GROUP 2

IDENTIFYING AND PUNISHING CORRUPT OFFENDERS II (EFFECTIVE MEASURES TO ACQUIRE NECESSARY COOPERATION FROM RELEVANT PERSONS AND PUBLIC OR PRIVATE ENTITIES THROUGH DETECTION, INVESTIGATION AND TRIAL)

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I. INTRODUCTION

The group elected Mr. Jose Alexandre Pinto Nunes as Chairman and Mr. Shingo Aoyama as Co-Chairman. Rapporteurs are Lalaine Delmendo Benitez and Maria Graca De Vasconcelos. The group proceeded to discuss the current situation of corruption in their respective countries.

II. CURRENT SITUATION OF CORRUPTION

The group decided that each participant would report on the current situations of corruption in their countries. There were several specific cases of corruption cited by each participant. The consensus is to classify these different problems into major issues relating them to specific criminal action.

The current situations of corruption were then classified under these major headings: irregularities in the procurement process in the public sector; misappropriation; nepotism – appointment of unqualified persons; abuse of official position/power; bribery; embezzlement of public funds/property; fraud; money-laundering; illicit enrichment; interference by politicians; misconduct in office and trading in influence

The majority of the participants expressed that corruption in the public procurement process is considered as the most problematic. It was observed that this is prevalent in the areas of public works, local government, and bidding for services and supplies. These irregularities in the procurement process are related to the cases of bribery of government officials who accept bribes in order to award government contracts for public works, services and supplies. This results in the award of contracts to undeserving bidders or contractors who deliver substandard materials and services. This kind of corruption affects the delivery of public services and the quality of services and materials. There are times that the projects are not completed on time or are not completed at all. These irregularities in the procurement process also give rise to other crimes like misappropriation of funds, embezzlement, diversion of public funds, and the abuse of power.

Some cases of fraud that were cited are tax fraud and salary fraud. In salary fraud, employees receive double salaries from different agencies. Cases of fraud may also involve payment of ghost employees and ghost projects. There are also bank frauds where loans are given without sufficient collateral, false supporting documents and funding of inexistent projects. This case of bank fraud also involved misconduct of bank officials

It was observed by several participants that their specific cases of corruption will actually fall within the major headings above. There were several opinions regarding money-laundering. Some consider it a crime in itself while others consider it as a result of other corrupt acts like embezzlement, fraud, bribery and illicit enrichment.

The discussion about the impacts of corruption showed that the consequences, in general, are the same in every country.

The group listed the following impacts: implementation of law enforcement; people having difficulty getting an efficient public service and facing its poor quality; big gaps between poor people and rich people; negative effects on the quality of life; erosion of trust in the government; people are no longer concerned with the quality of their work because the contractors bribed the government officials; increased costs of companies because of the bribes they have to pay; losses to the public treasury when the price paid for public works includes the bribe money given to officials; failure to recover these losses; non-completion of the contracted work; projects by government agencies are hampered always, like those sponsored by the World Bank (sometimes they stop funding the projects); public works are not bid competitively; moral degradation — connection between the criminals and the law enforcers; inequality in the distribution of wealth, increased unemployment; politics is viewed as a major source of income instead of as a public service; negative effects on the market prices; collusion between private and public officials, creation of fictitious or infeasible companies because they only want to get money.

Analyzing the situations above, and based on the discussions by the group, the major consequences of corruption can be summarized as follows: losses to the economy, losses to the public treasury, lack of accessibility of public services by the population and loss of trust in public officers.

III. CRIMINALIZATION

Most of the participants stated that their countries have implemented a majority of the provisions of the UNCAC. Some countries expressed that the provisions on illegal enrichment and corruption in the private sector are not yet implemented. The discussion covered the following points:

In some countries, laws on illicit enrichment exist but have not yet been implemented or this practice is covered by the law on unlawful acquisition of wealth. There are countries where there is, as of yet, no law on illicit enrichment.

Embezzlement in the private sector can be punished by different provisions of law, which may be the general criminal code or through specific laws. On matters of bank secrecy, there is access if a warrant is issued by a judge.

In most countries, there are, as of yet, no laws to punish bribery in the private sector. As such, corruption in the private sector is not yet the subject of legislation or implementation.

Measures to freeze assets have not been sufficiently implemented. There is a need to elaborate more on the process of such freezing and the need for coordination when different countries are involved.

In some countries there are, as of yet, no whistle-blower laws. These laws are relatively new to some countries so that there has been no effective implementation. The same is true for the protection of witnesses.

Specifically in Bangladesh, most are covered. There are laws on bribery and money-laundering. There is no law punishing foreign public officials involved in bribery. There is a lack of practical implementation. Money-laundering laws exist but need more international cooperation to recover money and to collect evidence from foreign countries. There is a lack of implementation of Articles 16, 21, 41, 45, 47 and 49. There is weak implementation of Articles 27, 32, 38, 39, 40, 42, 43, 44, 48, 50, 51 and 53.

In Cambodia, a majority of the provisions of UNCAC exist. There is most probably a lack of implementation of Article 22 (embezzlement of property in the private sector). It was pointed out that money-laundering seems to be a new problem for Cambodia. As such there is a recognized need to do more in criminalizing and in improving implementation.

In Laos, bribery is not defined in a corruption law but is provided for in the general criminal law. There is a need to enact a corruption law. If foreign officials are bribed outside the territory of the country, the law

does not exercise jurisdiction over these foreign officials. The laws in Laos only punish bribery committed within its territory. Likewise, bribery in the private sector is not defined in the law. There is no law on extradition: only bilateral treaties with several countries.

In Mongolia, there is a lack of implementation of Article 16 (Bribery of foreign public officials and officials of public international organizations), Article 18 (Trading in influence), Article 26 (Liability of legal person) and there is partial implementation of Article 15 (Bribery of national public officials), Article 17 (Embezzlement), Article 21 (Bribery in the private sector). The Criminal Code of Mongolia does not punish offering bribes to public officials.

In Papua New Guinea there is no law yet on UNCAC Articles 16, 18, 20, 21, 24, 26, 32, 33, 35 and 50. There is no law on bribery by the private sector. They do have laws on stealing and embezzlement. No specific law on illicit enrichment exists, but if there is illicit enrichment by committing another offence, then that law will apply. There is legislation on money-laundering and forfeiture of unlawfully acquired wealth. Lack of resources and capacity for implementation is a problem. There is no law on the protection of witnesses and whistle-blowers.

Bribery of foreign public officials and international organizations is not criminalized in Brazil.

In Japan most of the UNCAC articles are covered. However, bills concerning some of the issues that are not covered are currently being deliberated: for example, the bill to punish Japanese who give bribes to Japanese officials in foreign countries and the bill for the return of the proceeds of crime obtained by a foreign national which are kept in Japan by following a fixed adjudication or judgment made in that foreign country.

In Timor Leste, bribery in the private sector has not been criminalized. The anti-corruption law is still under consideration by the parliament. The same is true in the case of illicit enrichment, which is still being debated in the parliament. The anti-corruption law also aims to address the provision on the liability of legal persons. Witness protection has been provided since 2008, but it has not yet been implemented due to the lack of resources. There is no law yet on whistle-blower protection. The filing of corruption complaints is not encouraged because the superior officers misinterpret such filings as being against them.

In the Philippines, there is no law on bribery in the private sector.

As a general observation, the group cited the lack of implementation of existing laws despite the fact that a majority of the UNCAC provisions exist in each country; however, there is also a lack of implementation of specific offences or in the practical application of the existing laws. In a majority of the countries, it is observed that bribery in the private sector has not yet been legislated.

IV. OBSTACLES IN THE DETECTION, INVESTIGATION AND PROSECUTION

With respect to detection, it was observed that there are factors that hinder effective detection, investigation and prosecution. There is a lack of human resources, equipment, expertise, technical knowledge of the staff and specialized skills to interrogate, interview and to analyze evidence. In some cases, investigators and prosecutors are not fully and expertly trained to do their jobs. As a consequence, it takes too long to finish the investigation, and it takes time to dispatch an investigating team and initiate prosecution. For lack of proper coordination, the prosecution and the investigation aspects remain pending. In some cases, there is a need to get authority from the prosecution authority in order to start an investigation.

Further, there are disagreements on the evidence required between the investigators and the prosecutors.

There is also the problem of unwilling witnesses who are afraid to testify or are threatened not to testify. Parallel to that, there is the problem of a lack of complaints by citizens about corruption acts, many times due to the difficulties of making the complaint or an absence of knowledge on how they can do it.

In some cases complainants do not fully understand confidentiality in the investigation of cases. As a result, the investigation is exposed to media interference and political interference. Also, the important evidence may not be brought out or will be lost or hidden. This media interference will unnecessarily attract the attention of other agencies jeopardizing the investigation. Where powerful politicians are involved, they can afford to employ means to threaten witnesses or destroy the evidence or even bribe the investigators and prosecutors.

Likewise, there is also the problem of very slow judicial response. The bench or the judges are slow to act on cases, and the judicial processes are too cumbersome. Trials are delayed for months and years and cases keep piling up. Sometimes a court proceeding can also be very costly on the part of the complainants and the witnesses. The law can be an impediment itself in providing that an accused is to be presumed innocent until proven guilty. The delay in the disposition of cases also results in the loss of witnesses who may die or choose to hide or retract their statements.

On the aspect of transnational transactions or overseas dealings, the process of gathering evidence is too cumbersome and requires special skills and equipment. Add to it the financial cost of gathering overseas documents and summoning persons and entities overseas.

V. MEASURES TO OVERCOME SOME OF THE OBSTACLES

In the preceding topic, the group identified various obstacles to detection, investigation and prosecution of corruption offences. Considering the lack of time to discuss measures related to all of these obstacles, the group decided to focus the discussion on the following measures.

A. With respect to difficulty of people to file their complaints — reporter-friendly mechanisms to encourage reporting by citizens and raising public awareness of such measures

The discussion in the group was focused on the best system to be adopted to make it easy for citizens to file or express their complaints. There is a choice between a centralized or a decentralized system.

There were arguments defending the advantages of each system, and also showing their weaknesses.

Referring to a centralized system, many participants argued that this system allows the citizen to have trust in an agency, creating a kind of relationship between the citizen and the public officer that will make the person feel safe to report the facts that he/she knows. Also, having a centralized system, according to some participants, prevents the repetitious filing of complaints or many agencies receiving the same complaints and adopting investigation measures, all at the same time. It was also raised that centralization allows the secrecy of the information, considering that few people will know that a fact was revealed. Also, it would be better for the management of the information and be able to compare with other informations or complaints that already exist.

The weaknesses of this centralized system pointed out by some participants are the difficulties for complainants to reach the agency which may not be present in the entire country. Many times, people want to report personally but it would demand a great effort, time and resources for them to reach the agency. Participants considered that many countries have isolated cities, with difficult accessibility. These situations would make it harder for a person to report to the authorities. A possible remedy for this weakness is to have many sectoral offices in the countryside.

The decentralized system was considered good for many participants because it allows that a complaint can be sent to many agencies. It can be to the public prosecution service or to the police department. In this situation, in case the receiving office does not adopt measures, other offices can begin an investigation. So it prevents the absence of investigation of a complaint. Also, it was mentioned that by this system it is easier for the citizens to make their complaints. It occurs because, considering the presence of the agencies, police department and public prosecution service in many cities, the citizen will have a place near his home to access an agency that can receive his complaint.

The majority of the participants concluded that the decentralized system is better. However, both systems should provide different means of complaining such as hotlines, internet, letters, etc.

The discussion of this topic was restricted to the receiver of the complaints, not including the agencies or authorities with powers to investigate the facts.

As measures to raise public awareness of the means to complain, the group listed the following: advertisements in media (newspaper, radio, TV); handbooks; workshops in schools and associations; training to local officers to inform village populations; sports; teams to provide law in the provinces.

B. Witnesses and/or Whistle-blower Protection

Regarding witnesses and whistle-blowers, to make it difficult or impossible for offenders to retaliate against them, the group understood that the main measure is the establishment of a protection programme by an act. This programme must include, at least, relocation of the witness in the city or to another city and change of the witness's identity. Also related to the whistle-blower, the group considered that it is essential to maintain the secrecy of the identities and information provided.

As a measure to reduce fear through avoidance of face-to-face confrontation with the defendant, the group agreed that the video-conference seems to be a good instrument. Considering that this system demands a great investment that many countries cannot afford, it was suggested that the defendant can be removed from the courtroom during the testimony of the witness.

On the topic of criminalization and punishment of obstruction of justice, the group concluded that there is a need to establish a specific offence related to this fact. This offence cannot displace another specific offence committed with the objective to prevent the witness's testimony, such as physical violence or menace.

C. Creating incentives for people who provide substantial cooperation in an investigation or prosecution

On this topic, the group discussed whether it is best to provide immunity from prosecution or the mitigation of punishment. Some participants defended the idea that immunity is a good measure because it allows the person to disclose many facts and evidence with the guarantee that he/she will not be prosecuted. Other participants considered that offering immunity is a disproportionate measure because a person that committed a crime must be punished. People must fear that committing a crime entails punishment. They should collaborate with the investigation and prosecution of the offenders. The mitigation of punishment, for these participants, is enough of a benefit to them. The offender knows that his/her collaboration will be rewarded receiving less punishment, and society will also have an advantage by making the offender suffer punishment, even with a reduced penalty.

Another measure that was listed is the offering of a financial reward to people who collaborate with investigators. But the group decided that this measure is applicable only for people who have not participated in the crime. If the collaborating person is an offender, then he/she cannot be rewarded with money.

D. Effective structure/team of investigators and ensuring the secrecy of investigation

On this topic, the group centered the discussions on the aspect of advantages and disadvantages of a system with a structure or team of investigators that are specialized in corruption cases.

The discussions showed that many countries have a specialized structure or team to investigate corruption cases, not necessarily as a centralized agency of investigation. Some other countries have special agencies with powers to investigate corruption.

The countries without a special agency have in their structure more than one agency that can treat the cases of corruption, like police and public prosecution services. In this configuration, there is not necessarily a special team of investigators that are dedicated to investigate corruption. In general, this existence depends on the size of the local office of the agency.

In the biggest offices, in general, there is this division of power, making some investigators work only with corruption cases.

On the other side, there are those countries with one agency that has powers to investigate cases of

corruption. These agencies only handle the subject of corruption, leaving other kinds of crime to the police force. In this system, the discussions showed that depending on the country, this central agency can be the exclusive one with powers over these kinds of infractions. In other countries, the agency has powers to investigate only corruption, but other agencies, like police, can also conduct investigations about this subject.

According to the discussions, the group observed that every country works, when possible, based on the model of specialization of investigators for corruption offences. The variation consists on the centralization, or not, of the investigation in only one agency.

The specialization was seen by the group as a system with many advantages. Each kind of crime has its specific techniques of investigation, its means of formation of evidence. The specialization enables the officers to better handle investigations by mastering the techniques and the lines of investigations that these offences demand. This is based on the fact that they work, in a general way, with the same kind of evidence, allowing the investigators to analyze the evidence with more detailed eyes. Likewise, specialization provides the use of the same working routines, that are different from those of other crimes and this condition enables more agility to the investigation.

The group analyzed the structure of these special teams, seeking the types of investigators and professionals that compose them. This was based on the situation that many investigations about corruption need technical analysis on documents or facts, such as engineering, architecture or accounting.

The conclusion is that the special structures do not have professionals with specialized knowledge, but these professionals can be requested from other agencies to make the specific analysis demanded on that investigation.

As means of investigation, considering this need of specialized professionals, the group discussed the formation of task forces. Some countries related that these task forces are formed to investigate specific offences, without a characteristic of permanence. They are temporary because the purpose is not general investigation, but the sensitive ones that demand specialized work that the investigators cannot supply.

There was discussion about who will lead the task force and problems that can occur. These problems can be the differences on the view of its components about the investigation's diligence or lines of investigation.

Regarding this problem, it was observed that the investigation is conducted by the investigation officer, the one with power to do it. The other actors that compose the task force, in general, execute diligence in their legal duties — as always — but with the request or orientation of the investigator. This is the one that shows the objectives that are being looked for in that investigation and what is important as evidence.

It was also observed that a task force, considering that different members/people do not come from the same investigation agency, cannot guarantee the secrecy of the investigation. This problem is a risk that exists even if a task force is not used, because the agencies, in general, do not have the necessary structure to provide all the investigation needs, like the technical analysis, discussed above. The violation of secrecy can occur, in fact, but it is prohibited as a crime in many countries.

VI. ADJUDICATION OF CORRUPTION OFFENCES

Related to speedy trial, the discussion demonstrated that the problems of non-speedy-trials are not only limited to corruption cases, but to all crimes. The problems are in the penal process, and also in the jurisprudence, that give too much protection for the defendant. One example is the possibility of using many appeals that make the trial too slow. The defendant can question many acts in the process and appeal to the various courts, which results in the paralyzation of the trial in many cases.

Based on this observation, the group tried to focus the discussion on measures that can be directed only to corruption trials. It was observed that the specialization of judges and courts to try only corruption cases is a measure that can improve the speed of the trial.

Some countries already have some specialized judges and courts on this subject — or for other kinds of crimes — and it was observed that it allows a speedier trial. It was discussed by a member of the group that the specialization cannot solve the problem because in this case the judge will have many processes and will not be able to conduct the trial in a reasonable time. The group understood that despite many processes be with one judge, if he analyzes only one subject he can work speedier than if he needs to judge processes on other subjects. This observation of the group is grounded on the fact that the work in only one subject, or in limited subjects, allows for better productivity because the person does not have to handle different kinds of evaluations of evidences, or conduct several procedures.

Otherwise, the specialization must be followed by the improvement of the structure of the judicial service, with the designation of a number of judges enough to handle these cases, and increasing the number of the justice officers and their equipment. Without this improvement, the specialization by itself, as an isolated measure, and may not be able to produce the desired result. This is because separating the trial of corruption from the other crimes, but keeping the same structure that exists to process all kind of crimes, can provoke the effect that was mentioned by one of the members — the repression of the processes with few judges.

These measures are related to the organization of the judiciary system, and seem to be able to be adopted by countries.

Beyond that, a member talked about the establishment of a time limit for the conclusion of the trial, to make it speedier, considering that the judge must give his decision in that time. But it was not understood as a useful measure because if there are many cases and many processes, the judge may not be able to conduct trial within that time. So the time will not be, in practice, observed. Also, considering the situation related above that the defendants have many appeals to address decisions during the trial, it also can result in exceeding the time limit.

As a consequence, the group concluded that it is necessary to adopt measures that prevent the defendant from making the trial slow, because it is too common that the defendant uses all of the mechanisms that the law allows to prevent the normal course of the trial.

It was discussed that in the Japanese system, there is a pre-trial conference. In this phase, judges, prosecutors and the private attorney of the defendant discuss the facts that need to be proved and the evidence that will be produced at trial. In such cases, the parties bring to the court only the witnesses, or other kinds of evidence, that are related to the facts and aspects of the accusation or the defence. This procedure, to the group, seemed to be a good measure, because it prevents the defendant from asking for hearing many witnesses or for the production of evidence that will not be relevant for the trial.

VII. CONCLUSION

At the end of the discussions, the group realized that the collaboration of both the citizens and the people who participated in the crimes is important for the investigation of corruption. For having this collaboration it is necessary to develop measures that encourage the reporting of corruption, investigation and the production of evidence. The measures to be adopted should ensure the security of the people collaborating. At the same time, it is agreed that each government represented in the group should put more efforts into realizing and ratifying applicable laws and practices in the fight against corruption as specified under the UNCAC.