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# REPORTS OF THE PROGRAMME

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## GROUP 1

### TACKLING CORRUPTION IN PUBLIC PROCUREMENT

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### I. INTRODUCTION

The group started its discussion on 28th October 2016. The group elected by consensus, Mr. Ulugbek Abdurakhmanov as its Chairperson, Mr. Asitha Anthony as its Co-Chairperson, Ms. Lujaina Mohamed as its Rapporteur, and Mr. Alhousseiny Traore and Mr. Basilio Thomas Wani as its Co-Rapporteurs.

#### A. Preface and Justification

Why are legal instruments necessary to combat corruption in the area of public procurement? Why should the group discuss this matter? Simply because we see that there is a need to combat corruption to enable every country to effectively use its resources for development and welfare of its people, to ensure that the deterrent measures are used to fight corruption, punish the offenders and restore people's trust in their governments.

#### B. Methodology

The group decided to dedicate its sessions to discuss the topic: "Tackling Corruption in Public Procurement". Under the aforementioned topic, the group decided to focus on the following:

1. Effective methods of investigation
2. Prosecution and trial
3. Other measures for combating corruption, i.e. public awareness and international relations

## II. SUMMARY OF DISCUSSIONS

### A. Basic Principles

All members of the group agreed upon the following basic principles that should be observed in the fight against corruption:

- Principle of legality
- Protection of human rights
- Presumption of innocence
- Confidentiality
- Impartiality

### B. Effective Methods of Investigation

#### 1. Actions Taken Prior to Commencing an Investigation

The group members discussed the importance of starting investigations with an investigation plan. Sri Lanka and Uzbekistan have obligations to make an investigation plan which has to be approved by the head of the investigating body. In all other participating countries, making an investigation plan is optional. However, all members agreed about the importance of beginning an investigation with a plan in order to complete the investigation in the most effective and efficient manner.

##### *(a) Pre-investigation or preliminary investigation*

The members discussed the pre-investigation methods used in their respective countries. Japan, Ukraine, Mali and Myanmar do not have a pre-investigation stage before initiating a criminal case. However, if sufficient evidence is not obtained in the preliminary stage of the criminal investigation, these countries may drop the case.

All other member countries have a pre-investigation stage before initiating a criminal case, where an investigation is carried out to determine if sufficient evidence can be obtained. If sufficient evidence cannot be obtained during the pre-investigation stage, a criminal case will not be initiated.

The members acknowledged the following advantages and disadvantages of conducting a pre-investigation before initiating a criminal case against suspects:

<b>Advantages</b>	<b>Disadvantages</b>
- Sufficient evidence to warrant a conviction which ensures that the rights of the suspect are not infringed	- Difficulty in collecting sufficient evidence due to limited investigation powers
- Higher rate of conviction increases public confidence	- Possibility of abuse of power by investigators/prosecutors

##### *(b) Collecting evidence in the pre-investigation or preliminary stage*

The group acknowledged the following methods of collecting evidence in the pre-investigation or preliminary stage, to detect corruption in the area of public procurement:

- Gathering information such as tender documents from relevant institutions
- Surveillance: wire-tapping, GPS tracking, etc.
- Seeking expert opinions
- Obtaining testimony/statements from witnesses such as suppliers, competitors, etc.

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Japan, Sri Lanka, Uzbekistan, Ukraine, Maldives and South Sudan have the authority to obtain bank records of suspects without a warrant from the judge. Japan, Mali and Uzbekistan use surveillance techniques during this stage.

In some countries, there is a necessity to use surveillance techniques like wire-tapping without a warrant. In some countries judges as well as prosecutors have the power to issue warrants for surveillance. Most members agreed that wire-tapping is a violation of the right to privacy and that a warrant from a judge is necessary to protect the rights of the suspects. Some members agreed that it is not a violation if the warrant is issued by a judge.

South Sudan, Bhutan, Myanmar, Maldives and Japan currently do not use wire-tapping during investigation. During the first stage these countries employ confidential methods to gather information and evidence from relevant institutions and obtain expert opinions if necessary.

In addition to the above-mentioned methods of investigation, Sri Lanka, Indonesia, Mali, Ukraine and Uzbekistan use wire-tapping techniques during the first stage of investigation. Indonesia, Uzbekistan and Sri Lanka do not need a court order to start a wire-tapping operation. However, the power is monitored by strict internal regulations that determine the use of wire-tapping.

## 2. Investigation Stage

All group members agreed that basic investigative actions used to investigate corruption cases in the area of public procurement should include but not be limited to the following:

- Forming an investigation team
- Arresting suspects and travel banning
- Search and seizure
- Examining and interrogating witnesses (involved parties, members of tendering committee, etc.)
- Confronting and interrogating suspects
- Freezing and control of assets
- Obtaining information about the lifestyle and expenditures of suspects
- Ensuring witness and whistle-blower protection
- Seeking comprehensive expert opinions

The group discussed the merits of suspending the accused from his position of office if sufficient evidence is obtained. Most members agreed that this is an important administrative sanction to prevent further abuse of power, but not an investigative action. Some members believe that arrest of the suspect is sufficient to achieve the same objective.

## 3. Important Aspects of the Investigation

The group discussed important aspects in investigating corruption cases related to public procurement. The consensus of these aspects are as follows:

### *(a) Power to arrest a suspect*

All members discussed the power to arrest in their respective countries. The group agreed that although the power to arrest infringes the right to freedom, arresting a suspect in a corruption case is justified in order to achieve the objectives of the investigation. In some countries, the prosecutor has the authority to issue warrants. The group agreed that the best practice would be to give powers only to the judges to issue a warrant in regard to the rights of the suspect.

*(b) Right to legal counsel (lawyer)*

In all member countries, the state provides legal aid to defendants during the trial stage, when needed. Although suspects have the right to counsel in the investigation stage in all member countries, in most countries the state does not provide legal aid to defendants in this stage. In Uzbekistan, Ukraine and, depending on the nature of the offence, in Japan, legal aid is granted to the suspect, when necessary, in the investigation stage.

Uzbekistan, Ukraine and Indonesia (depending on the nature of the offence) are obligated to arrange a meeting with the defendant and the defence counsel to ensure that the defendant is given proper representation. The defendant has the option to refuse counsel afterwards.

The group has different opinions on whether the state should provide legal aid before trial in the investigation stage. Some members feel that state funded legal aid is not necessary during the investigation stage because the court will consider the validity of all evidence presented and the defendant is provided proper legal representation during trial. Other members feel that this places the suspects who cannot afford legal counsel in a vulnerable position and that not all suspects will have an equal opportunity to defend their positions.

*(c) Plea bargaining*

The group discussed the plea-bargaining practices of the participating countries. In Sri Lanka, Maldives and Ukraine, depending on the weight of the evidence presented and importance of the case, the prosecutors have the discretion to offer a complete dismissal of all charges against a defendant. In Sri Lanka, such defendants are given the same protection as witnesses, and the defendant will not face any form of administrative sanctions.

Currently, South Sudan and Japan do not have a plea-bargaining practice. Mali and Indonesia do not have the legislative power for plea bargaining. However, the prosecutor may negotiate with the judge to offer a plea bargain depending on the evidence presented by the defendant.

All other participating countries in the group have the legislative authority to plea bargain. All participants agree that plea bargaining is a useful tool for investigation in cases where there is insufficient evidence and depending on the significance of the case.

*(d) Video recording*

The group discussed the merits of having statutory provisions which make video recording compulsory. Members had different opinions about the subject. Some believe that video recording should be made compulsory to protect the position of the prosecutor and to ensure evidence had been obtained without coercion; other participants believe that the matter should be left to the discretion of the prosecutor.

*(e) Remedial measures*

The participants discussed the remedial measures employed in their countries. In South Sudan, Mali, Uzbekistan and Maldives, after the investigation is completed the investigation body makes a review of preventive measures and irregularities observed during the investigation and sends recommendations to relevant institutions. In Indonesia, Mali and Myanmar, investigators periodically makes analytic reports about governmental institutions to identify and resolve actions that may lead to corruption.

Currently, Ukraine, Japan and Sri Lanka do not have legislative remedial measures. Some members believe that remedial measures do not need to be legislative, as they are not part of the investigation. Other members believe that deterrence from corruption is one of the most important aspects to combat corruption and should be given statutory force.

**C. Prosecution and Trial**

1. Power to Dismiss Criminal Charges

In South Sudan, Mali, and Myanmar, after a criminal case is initiated, if new evidence confirms the innocence of the defendant, prosecutors do not have the authority to dismiss the charges against the defendant during the trial. However, in this case the judge has the power to dismiss the charges. Members of these countries believe that prosecutors should not have the authority to dismiss charges after initiat-

ing a criminal case, as this will be an intrusion into the roles of the judge.

In other member countries, the prosecutor has the authority to drop a case in light of new evidence, even after a criminal case is initiated. Although the prosecutors in some countries have this authority, it is not used in practice. Members from these countries believe that prosecutors should be able to drop charges in such cases as the prosecutor is the party pressing charges.

## 2. Time Limitations in the Trial Process

In all countries except Uzbekistan, there is no time limitation system for the trial process. In Indonesia, there is a time limitation when the accused is detained.

Members have different views about fixing a time limit for trial. Some members believe that time limitation should be in the legislation provided with some conditions because time limitation can expedite the trial process and protect the rights of the parties involved.

Other members disagreed with the idea of a statutory time limitation because, a trial that takes place too quickly may lead to wrongful convictions, and may not be practical given the current judiciary system of most countries and the workload of judges in their countries.

## 3. Combined Civil and Criminal Trials

In most member countries, the civil and criminal charges are brought together in one trial. In Japan, Maldives and Bhutan, civil charges are brought after the criminal procedures, while Sri Lanka is currently making amendments to enable combined civil and criminal trials. All members acknowledged that a combined civil and criminal trial will expedite the trial process and secure the rights of the parties involved.

## 4. Adjudication and Right to Appeal

In Uzbekistan, judges have the power to withhold adjudication and send a case back for further investigation. In all other member countries, judges can either convict or acquit the defendant and do not have the option to send a case back for further investigation. All parties agreed that judges should only have the authority to either convict or acquit the defendant. Uzbekistan is currently making amendments in their legislation to remove the power of judges to send a case back during trial.

In most participating countries, the victim in a corruption case cannot appeal criminal charges because corruption is viewed as a crime against the state. Most members believe that the victim does not need this right because the prosecutor represents the victim, and if there is a chance of a successful appeal, the prosecutor will appeal on behalf of the victim. In Uzbekistan and Ukraine all parties, including the victim, have this right to appeal.

## **D. Other Measures for Combating Corruption**

### 1. Public Awareness

The group discussed the following methods of raising public awareness to combat corruption in the area of public procurement.

- To establish one website to unify the effort against corruption within the country. This website shall include information about bills and legislation related to corruption, an action plan to fight corruption, information about corruption cases, information about public procurement, a 24-hour hotline, online consultation, etc.
- To educate children and young adults in schools and universities about corruption, i.e., morality, values and integrity. Indonesia and Bhutan already enforce this form of education. All participants believe that education related to corruption from an early stage of child development is necessary to find a long-term solution to corruption
- Develop a practical action plan to fight corruption based on research and analysis
- To establish an independent non-governmental organization dedicated to fighting corruption and

represent the citizens of the country on issues related to corruption. Currently two member countries, Indonesia and Ukraine, have an independent and non-governmental organization that work against corruption. Some members believe that such an organization may become an obstacle to the government.

- Mass media: general information should be given to the media about cases being investigated to deter corruption. Most members believe that the media should focus on both prevention and deterrence of corruption. Some members believe that the focus should be on prevention of corruption because if corruption is prevented deterrence will not be a prevalent issue.

## 2. International Cooperation

### *(a) Problems encountered*

The group discussed the common problems encountered in providing international cooperation in corruption cases related to public procurement. The main issues highlighted during the discussion were as follows:

- The use of slow methods of transmitting information, e.g., through formal diplomatic channels.
- Different legal systems or criminal justice standards, such as dual criminality or due process requirements.
- Burdensome legal procedures, such as difficult processes for obtaining bank records.
- Poor communication or weak law enforcement ties and networks between the countries involved.
- Insufficient resources, expertise or capacity for countries to respond to requests for Mutual Legal Assistance.

### *(b) Solutions*

The group agreed on the following solutions for the aforementioned problems:

- Increasing direct bilateral communications and personal contact between law enforcement officials or central authorities in both requesting and responding countries.
- Using informal consultations and exchange of preliminary information between countries before seeking Mutual Legal Assistance.
- Creating a shared international electronic system that allows (a) secure exchange of information and documents, including submitting, managing and responding to Mutual Legal Assistance requests and (b) full information on Mutual Legal Assistance procedures, rules, forms and contact points, and to sign international treaties to enable this system to function efficiently.
- Utilizing international networks to exchange experiences and good practices, as well as to foster relationships between practitioners.
- Providing clear and accessible information on procedural requirements and rules for providing Mutual Legal Assistance in all countries.
- Regional organizations that enable direct formal contact between officials/heads of institutions in different countries to expedite the process.
- Amend legislation to enable the use of video conferencing and other IT technology to obtain testimony or statements directly from witnesses.

## **III. CONCLUSION AND RECOMMENDATIONS**

The group discussed the legal instruments of combating corruption in the area of public procurement

based on investigation, prosecution, the trial stage, international cooperation and public awareness. The group agreed that the basic principles in all countries are the same, despite the differences in legislation and practices of each country.

**A. Recommendations**

Upon constructive discussions, the group came up with the following recommendations:

1. Enact a special law on public procurement.
2. Exert joint efforts in combating corruption both in the public and private sectors.
3. Establishment of a website in each country which focuses on all issues related to corruption.
4. Establishment of an e-procurement system that ensures transparency.
5. Enact a special legislation to protect and reward whistle-blowers.
6. Establishment of a special global information system.
7. Encouraging collaboration between banking systems and states for asset recovery.

The group, in conclusion, unanimously agreed that the goal of tackling corruption in public procurement can be achieved only if all parties (state and society) are involved. Moreover, a strong political will of each country is crucial to trigger internal reforms and international cooperation.