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Review of implementation of the United Nations Convention against Corruption

Executive summary: Cambodia

Note by the Secretariat

The present conference room paper is made available to the Implementation Review Group in accordance with paragraph 36 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (Conference of the States Parties resolution 3/1, annex). The summary contained herein corresponds to a country review conducted in the fourth year of the first review cycle.

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II. Executive summary

Cambodia

1. Introduction: Overview of the legal and institutional framework of Cambodia in the context of implementation of the United Nations Convention against Corruption

Cambodia acceded to the United Nations Convention against Corruption (the Convention) following the deposit of its instrument of accession with the Secretary-General of the United Nations on 5 October 2007.

Cambodia is a kingdom whose monarch reigns but does not rule. Cambodia's constitution was enacted in 1993 but was amended seven times as of 2014. The Constitutional Council safeguards the respect for the Constitution.

The Cambodian legal system follows the civil law tradition. The legislative power is exercised by a bicameral Parliament made up of the National Assembly and the Senate. A member of the majority party or majority coalition is named Prime Minister by the Chairman of the National Assembly and is appointed by the King.

The judicial power is independent from the Government. The Constitution mandates that the King should guarantee the independence of the judiciary together with the support of the Supreme Council of Magistracy (SCM).

Cambodia is a full member of the Association of Southeast Asian Nations (ASEAN) and has acceded to a number of regional multilateral treaties and memorandums of understanding, including the Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries (AMLAT, 29 November 2004, Kuala Lumpur) and the Memorandum of Understanding of the South-East Asia Parties against Corruption (SEA-PAC MoU).

Cambodia is a dualist country. Nevertheless, it can directly apply self-executing provisions of international treaties once they have been approved by Parliament and ratified by the King. This is practiced in the case of bilateral extradition treaties (cf. Art. 567 CPC) but not yet for the Convention. In the absence of international treaties, Cambodia can still provide assistance on the basis of reciprocity.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

The criminalization of the bribery of national public officials is governed by articles 605 and 594 of the Cambodian Penal Code (PC). As to the active and passive corruption of judges, it is specifically dealt with under articles 518 and 517 of the PC. However, the reference to third party beneficiaries is missing.

The criminalization of the active and passive bribery of foreign public officials and officials of public international organizations is stipulated under articles 34 and 33 of the Law on Anti-Corruption (LAC). However, the reference to third party beneficiaries is missing.

The criminalization of active and passive trading in influence of public officials is stipulated under articles 606 and 595 of the PC. However, the reference to third party beneficiaries and to trading of influence when it involves any other person are missing.

The criminalization of active and passive bribery of employees and administrators is stipulated under articles 279, 278 and 280 of the PC. The reference to the direct or indirect character of the bribery as well as the reference to third party beneficiaries are missing. Besides, the bribery of employees is only criminalized in cases when this occurs without the knowledge of the employer.

Money-laundering, concealment (arts. 23 and 24)

The Law on Anti-Money Laundering and Combating the Financing of Terrorism dated 24 June 2007 (AML) as well as the Anti-Money Laundering and Combating the Financing of Terrorism Law dated 3 June 2013 and amending articles 3, 29 and 30 (AAML) deal with the preventive and repressive aspects of money-laundering and of the financing of terrorism in Cambodia. Article 3 of the AAML Law gives a definition of the elements constituting money-laundering including the conversion, transfer, concealment, acquisition, possession and use of property or proceeds of crime. These provisions also consider the participation by providing assistance in the commission of an offence.

The Cambodian legislation provides a list of predicate offences which covers all offences and crimes [article 404 of the PC and article 3, paragraph (e) of the AAML].

Cambodian legislation does criminalize self-laundering in articles 3, 29 and 30 of the AAML and 404, 405, 406, 136, 137 and 138 of the PC.

Cambodia delivered to the Secretariat a copy of its legislation on money-laundering in December 2014.

Article 399 of the PC generally criminalizes concealment as well as article 37 of the LAC, pursuant to the provisions of article 24 of the Convention.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Articles 592, 593, 597, 598 and 601 of the PC criminalize the embezzlement of public funds, the unlawful exploitation of a company or the wilful misappropriation of documents, securities, private or public funds. However, reference to third party beneficiaries is missing.

Article 35 of the LAC and article 586 of the PC criminalize the abuse of power; however, there is no reference to third party beneficiaries nor to the abstention of carrying out an act in the exercise of one's functions.

Article 36 of the LAC considers that illicit enrichment is an increase in the wealth of an individual for which the individual cannot provide a reasonable explanation regarding the increase in comparison to his or her legal income. Illicit enrichment is however only criminalized when it is done at the same time as a declaration of assets and debts.

Articles 391, 392 and 393 of the PC criminalize the breach of trust committed by any individual but also by company directors.

Obstruction of justice (art. 25)

Articles 546 and 548 of the PC criminalize any act of intimidation as well as the bribery of witnesses so that they do not make a statement or give a false statement.

Article 607 of the PC and article 40 of the LAC criminalize intimidation of public officials as well as obstruction in the work of the anti-corruption unit (ACU).

Liability of legal persons (art. 26)

Article 42 of the PC confirms the general principle of criminal responsibility of legal entities which does not preclude the criminal responsibility of physical persons who have committed such offences.

Article 46 of the LAC as well as articles 409, 283, 519, 559, 625 and 644 of the PC provide for such criminal responsibility for various corruption acts therefore including the offences contained in the Convention. These provisions enforce a wide range of sanctions including pecuniary sanctions.

Participation and attempt (art. 27)

Articles 26, 28 and 29 of the PC criminalize the participation to the commission of a crime or an offence as accomplice, instigator and assistant. Attempt is also included in those same articles and it is sanctioned in article 27 of the PC. Article 44 of the LAC also criminalizes attempt. Cambodia confirmed that the preparation of an offence is implicitly embedded in those articles.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

The PC as well as the LAC establish a sentence proportionately to the seriousness of the offence and it comprises a range of prison sentences and fines.

Articles 80 and 104 of the Cambodian Constitution grant immunity to the members of the National Assembly and of the Senate. Such immunity may only be lifted by the same bodies as well as in the case of flagrante delicto.

The Cambodian judicial system uses the principle of opportunity. However, Cambodia confirmed that the Code of Criminal Procedure (articles 40 and 41 of the CPC) provides that a closing order must always be justified by the Prosecutor. The closing order may also be reviewed by the Chief Prosecutor to the Court of Appeal on the plaintiff's request. Besides, the investigating judge is not obliged to conform with the final submission of the Prosecutor.

The CPC defines provisional detention as an exceptional measure and it governs the framework of provisional release for any charged individual while taking into account the necessity to guarantee their appearance in later procedures (articles 203, 204, 205, 216, 217 and 223 of the CPC).

Cambodia has confirmed that its legislation contains provisions for conditional or early release for corruption offences while taking into account the gravity of such offences (art. 512 up to art. 521 of the CPC).

The Common Statute of Civil Servants provides for disciplinary sanctions such as the temporary suspension of duties during the judicial procedure, the mutation or revocation (arts. 52 and 40).

Article 53 of the Common Statute of Civil Servants provides for the resignation of the civil servant in case of a final conviction. Cambodian legislation also provides for the deprivation of the right to be a public official in case of a criminal conviction (art. 55 of the PC). Such deprivation of rights may be temporary or final.

Cambodian legislation does not refer explicitly to the fact that a public official convicted of an offence contained in this Convention may be deprived of his/her right to exercise his/her public function in an enterprise owned in whole or in part by the State.

Article 35 of the Common Statute of Civil Servants provides for the application of disciplinary sanctions without prejudice to potential criminal procedures.

Chapter 7 of the Law on Prison provides for education, correction, provisional training and rehabilitation for prisoners.

Articles 93, 94 and 95 of the PC provide for provisions which grant the accused mitigating circumstances in the implementation of the sentence imposed on him/her. However, the Cambodian legislation has no specific measures promoting cooperation with law enforcement services.

Protection of witnesses and reporting persons (arts. 32 and 33)

The PC, CPC and LAC as well as the Sub-Decree No. 5 dated 10 January 2011 on the organization and functioning of the Anti-Corruption Unit provide general measures in order to ensure the protection of witnesses, experts and victims without making any reference to their parents or other individuals close to them nor to agreements made for the relocation of witnesses, experts and victims. Article 13 of the LAC also provides, up to a certain extent, for the protection of reporting persons of such information.

Cambodia is in the process of preparing a new draft law implementing more specifically and more fully the protection of witnesses, experts, victims and reporting persons.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Article 404 of the PC gives a definition of money-laundering whereas article 408 provides for additional penalties such as confiscation. Article 48 of the LAC also provides for confiscation measures. Articles 30-2 and 30-3 of the AAML Law provide for the confiscation of assets which are the proceeds of the predicate offence including property intermingled with or exchanged for such proceeds. They also provide for the confiscation of assets constituting the income and other benefits obtained from the proceeds of the predicate offence, property of the perpetrator of the offence the value of which corresponds to that of the proceeds of the predicate offence as well as the instrumentalities and materials used in carrying out the criminal offence.

Article 30-1 of the AAML and the LAC (arts. 28, 30 and 48) provide measures for the freezing and seizure of assets which are the proceeds of the predicate offence.

Article 12 of the AML provides for measures reporting cash or suspicious transactions to the Financial Intelligence Unit (FIU).

Cambodia pointed out that the relevant competent authorities are usually required by the Tribunal in order to administer such assets (art. 48 of the LAC, arts. 119, 120, 161 and 354 of the CPC).

Article 12 of the AML provides for the obligation of reporting suspicious transactions to the FIU. As to Article 27 of the LAC, it provides for the ACU to check and order the delivery of banking, financial and commercial documents; it also confirms that the banking secret may not be invoked in the event of a corruption offence.

Article 30-4 of the AAML provides for a person opposing a confiscation order for an asset to have the onus to prove the legal origin of such asset. Article 36 of the LAC regarding illicit enrichment also provides for the same measure.

Articles 30-3 and 30-4 of the AAML also provide measures protecting the rights of third parties who are in good faith. Article 179 of the PC provides that confiscation might not be ordered if it affects the rights of third parties.

Statute of limitations; criminal record (arts. 29 and 41)

Article 10 of the CPC provides for a statute of limitations for bringing a criminal action of fifteen years for felonies, five years for misdemeanour and one year for petty offences. Article 11 of the CPC provides for the interruption of the statute of limitations if there is an act of prosecution or investigation. Cambodia confirmed that the interruption of the period of limitation by the initiation of legal proceedings applies and that such rules do not require the presence of the alleged offender who has evaded justice or fled the country.

As for the implementation of article 41 of the Convention, Cambodia explained that in practice, it is implemented even though Cambodia does not have specific legislation that requires the taking into account of foreign sentences in respect of offences pursuant to the Convention. Cambodia explained that this can be covered by articles 84 and 85 of the PC.

Jurisdiction (art. 42)

Jurisdiction for offences committed on Cambodian territory, also with regard to vessels and aircraft, arises from Art. 12-16 PC. Cambodia applies both the active (art. 19 PC) and passive (art. 20 PC) personality principle. Therefore, jurisdiction to prosecute in lieu of extradition is also established with regard to nationals. Cambodia has not established other optional bases for jurisdiction.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Article 66 of the Public Procurement Law provides for the rejection of an ongoing procurement or the termination of a contract and the registration onto the blacklist of any entrepreneur involved in corruption acts.

Article 5 of the CPC enables victims of a crime to file a complaint as plaintiffs of a civil action before the investigating judge. Article 355 of the CPC provides that in a criminal judgment, the court shall also decide upon civil remedies.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The LAC establishes the Anti-Corruption Institution which is composed of the national Council Against Corruption and the Anti-Corruption Unit (ACU). The ACU has a mandate for the prevention, regulation, detection, investigation and repression of corruption.

Article 29 of the LAC provides for cooperation between the ACU and public authorities. Article 26 of the AML also provides for cooperation between the FIU and governmental authorities.

Article 12 of the AML provides for the obligation of several private sector entities such as financial institutions to report suspicious transactions to the FIU.

Moreover, the role of the ACU is to receive and examine all complaints relating to corruption (Art. 13 of the LAC]. A hotline is also available to citizens.

2.2. Successes and good practices

Overall, the following successes and good practices in implementing chapter III of the Convention are highlighted:

- The open and inclusive manner in which the Cambodian self-assessment checklist was prepared, seeking input from all stakeholders and taking into account the opinions of all components of the Cambodian society;
- The signature of memorandum of understanding for the cooperation between the Anti-Corruption Unit and private entities (Art. 39, para.1 of the Convention).

2.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- On Art. 15:
To amend its legislation to include third party beneficiaries as possible recipients of the undue advantage;
- On Art 16
(Para. 1): To amend its legislation to include third party beneficiaries as possible recipients of the undue advantage;
(Para. 2): To consider amending its legislation to include third party beneficiaries as possible recipients of the undue advantage;
- On Art 17:
To amend its legislation to include third party beneficiaries as possible recipients of the undue advantage;
- On Art 18:
To consider amending its legislation to include third party beneficiaries as possible recipients of the undue advantage;
- On Art 19:

To consider amending its legislation to include third party beneficiaries as possible recipients of the undue advantage and to include the abstention of carrying out an act in the exercise of one's functions.

- On Art 21:

To consider amending its legislation in order to be fully compliant with the Convention;

- On Art 31:

(Para. 3): to take additional measures in order to regulate the administration of the frozen, seized or confiscated assets by the competent authorities;

- On Art 32:

To adopt the draft law regarding the protection of witnesses, experts, and victims;

- On Art 33:

To consider adopting the draft law regarding the protection of reporting persons;

- On Art 37:

(Para. 1): To adopt appropriate measures in order to encourage the cooperation of individuals who take part or have taken part in the commission of an offence.

2.4 Technical assistance needs identified to improve implementation of the Convention

- (Articles 23, 24, 31, 32, 33, 36, 37, 39 and 40): Capacity-building;
- (Art.23): Build a mechanism to share and analyse information and design a mechanism to strengthen cooperation between local and regional authorities;
- (Articles 23, 32, 37, 39, 40 and 41): Legal advice;
- (Articles 25, 26 and 27): Data collecting system for statistical purposes;
- (Article 25): Human Resources;
- (Articles 32, 33, 37, 40 and 41): Summary of good practices;
- (Articles 32, 37 and 41): Model legislations;
- (Articles 32 and 37): Model agreements;
- (Articles 39 and 40): On-site assistance by a relevant expert.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition, transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45, 47)

Cambodia has extradition treaties with four countries (China, Korea, Laos and Thailand). Domestically, extradition is regulated in a chapter of the CPC (Arts. 566-595).

In extradition matters, Cambodia generally requires dual criminality. However, in line with Art. 43(2) of the Convention, the principle of dual criminality is applied flexibly, i.e. the underlying conduct is decisive for the assessment of dual criminality.

The extradition procedure is a mixed judicial-executive procedure. The extradition decision is made by the Investigation Chamber of the Phnom Penh Court of Appeal (Art. 586 CPC). If the Investigation Chamber grants the extradition request, the Minister of Justice shall propose that the Royal Government issues a sub-decree ordering the extradition of the wanted person (Art. 589 CPC).

Cambodia does not allow “accessory” extradition, i.e. extradition for connected offences as laid down in Art. 44(3) of the Convention. Convention offences are not considered political offences.

Cambodia makes extradition conditional on the existence of a treaty. However, Cambodia could in theory use the Convention as the legal basis of extradition for corruption offences. Finally, reciprocity is also observed in practice in extradition proceedings.

Articles 571-594 CPC lay down the requirements for extradition, including a two-year minimum penalty requirement and reasons to refuse extradition. The fact that the offence involves fiscal matters is not a ground for refusal.

Cambodia can take a person whose extradition is sought and who is present in its territory into provisional custody or detention.

Cambodia largely complies with the principle *aut dedere aut judicare*. While Cambodian nationals cannot be extradited (Art. 33 of the Constitution), Cambodia has jurisdiction over its nationals on the basis of the active personality principle. However, since prosecution follows the principle of opportunity (Art. 40 CPC), the prosecutor enjoys a large margin of discretion. Moreover, for prosecution on the basis of Art. 19 PC, a complaint by the victim or formal information of the country where the offence was committed is required (Art. 21 PC).

Cambodia could not enforce the sentence imposed by a foreign court as this is incompatible with the Constitution and Cambodian law.

Articles 31 and 38 of the Constitution contain guarantees that are directly applicable in all law enforcement procedures. The decision to extradite can be appealed in a court of law (Art. 590 CPC). The extradition treaties of Cambodia stipulate as mandatory grounds for refusal of extradition the institution of criminal proceedings against the person sought on account of sex, race, religion, nationality or political opinion of that person.

While there is nothing in the legislation, the obligation to consult with the requesting State before refusing an extradition is observed in practice.

Cambodia has signed three bilateral treaties on transfer of sentenced persons. Transfer of criminal proceedings has not been considered yet.

Mutual legal assistance (art. 46)

Cambodia does not yet have a Mutual Legal Assistance Act but the Ministry of Justice is currently drafting such a law.

Apart from the Anti-Corruption Law, there is no domestic legislation that governs mutual legal assistance (MLA) in Cambodia. Therefore, UNTOC and the Convention are the only written legal bases for mutual legal cooperation. However, Cambodia does not require a treaty to render MLA, and the principle of reciprocity

is also applied. Cambodia applies the principle of dual criminality when fulfilling judicial assistance requests.

MLA can be afforded in relation to offences committed by legal persons. Cambodia can, in principle, afford all the forms of legal assistance listed in Art. 46(3) of the Convention (Art. 51 AC Law). The ACU has access to bank records without the need for a court order.

Cambodian domestic law does not clearly provide for the transmission of information relating to criminal matters without prior request. However, in Financial Intelligence Unit (FIU) to FIU and police to police relations, it is practiced frequently.

Cambodia can provide for the confidentiality of information. The confidentiality of the information provided will not prevent Cambodia from disclosing it when such information is exculpatory for an accused person. MLA will not be refused solely on the ground of bank secrecy or that the offence is also considered to involve fiscal matters. This is explicitly stipulated in the AMLAT.

In the absence of internal MLA legislation, the transfer of a person being detained or serving a sentence for the purpose of testimony is possible on the basis of bilateral treaties and the Convention. Safe conduct is granted on the same basis. The CPC does not exclude hearings to take place by video conference.

The Ministry of Justice has been designated as the central authority for receiving MLA requests. However, in practice requests are still transmitted through diplomatic channels. Requests and the related documents have to be submitted in writing in Khmer or English. For outgoing MLA requests, Cambodia follows the procedure specified by the receiving country. Cambodia fulfils requests in accordance with the procedure specified in the request unless such procedure conflicts with national law. The rule of specialty is observed in practice. Requests can be treated confidentially.

In the absence of national MLA legislation, Cambodia would only refuse MLA requests on the basis of Art. 3 AMLAT or Art. 46(21) of the Convention. No MLA request has been refused so far. However, Cambodia would provide reasons for doing so, if it ever were to refuse a request, and prior to that, consultations would be held, although there is no direct legal basis for this. Assistance may be postponed by Cambodia on the ground that it interferes with an ongoing investigation. Safe conduct can be granted on the basis of Art. 16 AMLAT.

Ordinary costs related to rendering MLA are borne by Cambodia. Documents in the public domain can be provided upon request.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49, 50)

Cambodia does not consider the Convention as a basis for mutual law enforcement cooperation.

Cambodia is a member of INTERPOL. It shares information via Interpol and uses the I-24/7 secure network. Cambodia is also a member of ASEANAPOL (the annual meeting of the Chiefs of ASEAN Police) and the South East Asia Parties Against

Corruption (SEA-PAC). However, the SEA-PAC MoU is not a binding international treaty and does not provide a legal basis for operational measures.

The Cambodian Financial Intelligence Unit (CAFIU) became a member of the Asia Pacific Group (APG) of FIUs in 2004. In 2015 it became a full member of the Egmont Group. It has MoUs with its counterparts in Malaysia, Bangladesh, Lao, Thailand, Japan, Indonesia etc. The exchange of confidential information is stipulated in the various MoUs. The FIU also uses the Egmont Secure Web.

The MoUs signed so far do not contain any provisions on joint investigations. Neither does the AMLAT.

Art. 27 of the AC Law allows for the use of special investigative techniques. Evidence obtained through the use of such techniques is admissible in court.

3.2. Successes and good practices

Overall, the following successes and good practices in implementing chapter IV of the Convention are highlighted:

- The flexible approach to dual criminality (underlying conduct is decisive);
- The comprehensive legal framework for extradition in the CPC;
- The explicit referral to international treaties (Article 567 CPC for extradition; Article 53 AC Law for MLA).

3.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- On Art. 44:
 - (para. 3) Consider granting extradition if the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention;
 - (para. 6(a)) Cambodia is encouraged to actually use UNCAC in practice for extraditions; and to notify the UN SG about this possibility;
 - (para. 8) Consider drafting guidelines and templates for the handling of extradition requests;
 - (para. 11) Ensure that nationals who are not extradited are actually prosecuted in Cambodia; consider adopting guidelines for the prosecution to ensure compliance with this obligation;
 - (paras. 14, 15) Include in the Criminal Procedure Code (CPC) a reference to the constitutional guarantees on due process and non-discrimination;
 - (para. 17) Include in CPC the obligation to hold consultations before refusing an extradition request;
- On Art. 46:
 - Cambodia is encouraged to continue working on the draft MLA Law and prioritize its swift adoption; ensure its full compliance with Art. 46

UNCAC, including also for asset recovery; in particular, include the following points in the draft:

- (para. 3) Ensure that all investigation and law enforcement measures that could be taken in a purely domestic context can also be used in fulfilling MLA requests;
- (para. 3(h)) Make provisions for facilitating the voluntary appearance of persons in the requesting State party;
- (para. 4) Allow for the spontaneous sharing of information without prior request;
- (paras. 5 and 20) Make provisions for guaranteeing the confidentiality of information;
- (para. 9) Clarify that dual criminality is not required for rendering MLA; clarify that MLA will not be declined due to the de minimis nature of the matter;
- (para. 13) Allow and use direct communication between central authorities; use central authority as entry point for MLA requests;
- (para. 14) Notify the UN SG about the central authority, acceptable languages and the use of UNCAC as legal basis for rendering MLA; specify that English can be used in MLA requests;
- (para. 17) Clarify that requests can be executed in accordance with the procedures specified in the request unless such procedures conflict with domestic law;
- (para. 26) Include the obligation to hold consultations before refusing a request;
- (Art. 47): Consider the possibility of transferring to another State Party proceedings for the prosecution of an offence established in accordance with this Convention;
- (Art. 48): The ACU is encouraged to continue its close cooperation with counterparts in the region and to conclude more MoUs with them; provide for ways to exchange case-related information;
- (Art. 49): Consider concluding agreements whereby the competent authorities concerned may establish joint investigative bodies; or undertake joint investigations on a case-by-case basis.

3.4 Technical assistance needs identified to improve implementation of the Convention

- (Article 44): Cambodia requested the Secretariat to provide guidelines in the application of discretionary prosecution in case of an extradition request which is denied (in particular with regard to Cambodian citizens that cannot be extradited);
- (Article 46): Assistance was requested for drafting a law on Mutual Legal Assistance.