

GROUP 3

MEASURES OF DETECTION, PUNISHMENT AND INTERNATIONAL COOPERATION AGAINST CORRUPTION IN PUBLIC PROCUREMENT

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I. INTRODUCTION

The group workshop commenced on the 28th day of October 2016 under the guidance and advice of Professor Watanabe Ayuko and her assistant Mr. Fukuda Yuji. Mr. Uttam Vijay Naidu was unanimously appointed as the Chairperson, followed by the appointments of Mr. Edmond Emanuel Cooper as the Co-Chairperson, Ms. Chaing Sinath as Rapporteur and Mr. Nguyen Quoc Huy as Co-Rapporteur. Discussions were conducted under the theme of Measures of Detection, Punishment and International Cooperation against Corruption in Public Procurement. There was a total of 13 sessions.

Information compiled in the report was done in collaboration with views of participating members from the following countries: Bangladesh, Brazil, Cambodia, Fiji, Guyana, Japan, Kazakhstan, Kyrgyz Republic and Viet Nam. This report is prepared with consideration and understanding of the articles promulgated by UNCAC. The report is a combination of similar and diverse detection, investigation and legal practices in relation to corruption and tackling offences in public procurement with international cooperation.

II. CONTENTS

A. Intelligence Stage

1. Source of Information

As per group discussion, it was conclusively agreed that intelligence plays a very vital role when it comes to investigating cases of corruption in public procurement. Intelligence can be obtained in many forms; however, for countries like Kazakhstan, Kyrgyz Republic and Viet Nam, intelligence gathered or received through rumors is not considered for investigation. Kyrgyz Republic and Viet Nam do not consider anonymous letters as sources of information that may lead to investigation.

The group discussed the sources and avenues of how information, complaints or reports are lodged for investigation. Listed below are the actual versions of how information is received, documented and the initiation of the detection and investigation:

- Direct report — complainants come personally and lodge their complaint.
- Receipt of information or complaints via telephone, cell phone or text messages.
- Email or social media, as it is the present trend in technology.
- Written complaint with attached documents through mail, in the form of documents and

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sometimes anonymous, but taken into consideration in some countries.

- Documents pertaining to alleged offences are at times received through government entities, the judiciary or other government agencies during audits, inspections, internal investigation or prosecution.
- At times, such issues are highlighted through media and investigation is inevitably conducted, the reason being that there are demands by members of the public for administration of justice.
- Whistle-blowers also play a vital role in assisting investigators and prosecutors by disseminating critical information which leads to successful investigation and conviction of corruption in public procurement.
- At times information is also received through reciprocal relationships with other countries which provide information on offenders while doing investigations in their own countries.

(a) Conclusion

Basically, these are several sources of intelligence or information that we utilize. However, some of countries are deprived of such intelligence, which greatly contributes to offenders going free after commission of corruption-related offences.

(b) Recommendation

Since corruption is committed in secrecy, it is hard to establish initial leads so therefore all sources of information should be taken into consideration. Even though experiences from the past have revealed that some anonymous letters are not true, it is appropriate to have all information analysed prior to the commencement of investigation in public procurement. Therefore, it is also recommended that a committee or panel be formed to scrutinize the anonymous letters before or during the detection or investigation of corruption in public procurement cases.

Further, it is very essential to inform the public that corruption in public procurement is a high-risk crime which should not be condoned. Therefore, creating confidence, promoting better relationships between citizens and public officials and receiving more accurate information from citizens are all important.

Countries which do not utilize anonymous letters or rumors as a source of information can reconsider the above issue as a recommendation to have better investigation of corruption in public procurement.

2. Methodology

The group discussed how intelligence is dealt with to provide successful detection, investigation and prosecution of offences of corrupt practices in public procurement. Due to the status quo of the participants being from various nations, there were different views of the methods for each country. The issues were discussed and noted as follows:

- According to Bangladesh and Kyrgyz Republic, there is a special unit/department in relation to corruption and the information received is verified to establish the credibility of the information with supporting detection evidence, the reason being that the above countries have a different view from other participants in relation to the stages of detection and investigation. In Cambodia, the Anti-corruption Unit is responsible for receiving information, verifying and initiating investigation.
- During the group discussion, it was also established that in Kyrgyz Republic upon receipt of information, there is a process of sorting out information into different categories. The anonymous complaints are put aside simply for the reason that it does not have a name. However, it is left to the initiative of the officer to follow up on the information if he/she is interested in the case. The remaining countries commence investigation after receipt of intelligence.
- The group noted that there is more than one independent/investigative agency in Brazil and Fiji

engaged in the investigation of corruption in public procurement cases. However, in Guyana, the police department is responsible for all investigations. In Japan, there are several agencies which are in charge of investigation of corruption cases in public procurement.

(a) Conclusion

There are differences and similarities in how investigations are conducted in relation to corruption in public procurement. Some are independent while others are interlinked through mutual arrangement or Memoranda of Understanding. The laws of various countries dictate the process in relation to investigation of procurement violations.

3. Response to Complaint

All participating members confirmed that they have a feedback policy whereby the complainant is informed of the progress of his or her complaint. After discussions on the issue, the group unanimously agreed that such practice will foster a healthy relationship between the complainant and the law enforcement agency, promote accountability and transparency which will enhance the trust and public support to combat corruption in public procurement.

B. Detection and Investigation Stage

1. Analyzing and Evaluating Information

This is a very important component of investigation concerning cases of corruption in relation to public procurement. Thorough understanding and appropriate evaluation will result in successful investigation and prosecution of corruption cases. It will also provide an indication of how credible and reliable the informant has been. This important aspect was supported by the group.

2. Types of Measures for Detection and Investigation

The group also discussed the special laws utilized for detection prior to investigation by Kazakhstan and Kyrgyz Republic. In total, they have 18 typologies for Kazakhstan and 21 for Kyrgyz Republic (Please refer to Index number I and II). A different approach is utilized for detection. The group also noted that in some countries, detection is the preliminary stage of confirming whether an offence has been committed or not and whether a full-scale investigation is warranted.

Also discussed were compulsory and non-compulsory measures such as search, seizure, arrest, checking bank account information for which the authorization from judge or prosecutor is required in some countries. Most participants confirmed that sting operations are important measures for corruption investigation and are allowed to be utilized in all participants' jurisdictions, except Japan. However, inducement to commit corruption offences is not permitted. In addition, the group raised the issue of tracker devices as one method of investigation, and it was noted that in Brazil, it is mandatory to obtain a court order to use such devices as a part of an investigation. The issue of using a tracker device and authority to use such devices in Japan is still pending decision of the Supreme Court.

3. Collating Evidence

During the process of detection and investigation, the investigator, in all countries, can obtain evidence from suspect's photographs, documents such as contract details, insurance, agreements, receipts, promissory notes, money transactions and even details of bank accounts from financial institutions. For such information, Brazil needs authorization from judges.

It was noted that for all countries in our group, the investigators have the power to obtain the bank account information of suspects regardless of any interruption or objection from the financial institutions, with the exception of Guyana where permission is sought from the bank.

All of the countries also can acquire reports pertaining to telephone and cell phone details of incoming and outgoing calls of suspected persons and material witnesses with addresses from service providers. This eases the task of locating the persons involved quickly and extracting important evidence to finalize the investigation successfully. All participants' countries, except Japan and Guyana, can conduct wiretapping as a method of investigation. In Brazil, investigators need to obtain the authorization of the court in advance, and, in Bangladesh, the result of the wiretapping can be used as intelligence but is not accepted at trial as evidence.

4. Recommendation

Considering the above characteristics of corruption crime, it is worthwhile considering the implementation of wiretapping as an investigation method in Guyana and Japan. On the other hand, wiretapping has a tendency to be misused and leads to a violation of privacy, and that is why Japan has not adopted wiretapping as an investigation method in corruption cases so far. Other countries need to implement preventive measures against the misuse of authority.

(a) Interviews

This is one of the major components of investigation which concerns the documentation of all information obtained from suspected persons involved in corruption cases. All notes taken must be within the guidelines provided by the relevant legislature of the said countries.

Normally, there are two common types currently practiced in all countries. They are by way of audio/video recording and preparing a transcript, and the other is by writing. All participants unanimously agreed to the methods utilized for compiling evidence in investigation files such as interviewing the ex-partner of the suspected person. Normally, the originals are retained as exhibits and presented in court at the time of trial where they are accepted and marked as court exhibits, with an exception in Brazil, Cambodia and Viet Nam, where the original documents are presented to the court in the first instance.

There are certain guidelines that are to be carefully considered while taking statements from suspected persons. The investigator has to be mindful and cautious that all statements are obtained voluntarily, without threat, promises, force or any form of inducement and of the true/free will of the person who is providing that evidence. This process sometimes creates difficulty in ascertaining the elements of the offence of corruption.

At times when this evidence is not properly obtained, there are allegations of abuse of power and use of violence by the investigator conducting the investigation. If the court views this violation or negligence as a serious breach of procedures, then the prosecution most likely will be unsuccessful.

(b) Analyzing evidence obtained from investigation

Once all evidence is obtained, the investigator analyses it and takes into account all the circumstances of the case, and then decides whether the evidence collected is sufficient and will enable the prosecution to prove its case beyond a reasonable doubt. If the evidence is adequate and does not have any pending rectification, then the investigation file with all the evidence will be submitted to the prosecutor to proceed with the case. However, Bangladesh has a special unit, namely the Legal and Prosecution Unit of the Anti-corruption Commission, which is comprised of experienced judges. That unit is responsible for perusing the file and thoroughly going through the evidence of the file and providing a report that there is sufficient evidence to secure a conviction. The file is then dispatched to the investigator and lawyer who will be pursuing the case in court.

C. Prosecution

1. Legislation

All participants' countries have criminal procedure laws, criminal laws and anti-corruption laws as the basis of prosecution (Please refer to Index III).

2. Process and Procedure

Under normal proceedings, the procedures of all countries are the same, with the exception of Bangladesh, Japan and Brazil. Bangladesh has a specialized agency to prosecute corruption offences. Japan and Brazil have specialized prosecutors in corruption cases in some important jurisdictions.

In countries like Japan and Cambodia, prosecutors enjoy great discretion in exercising their duties whether to prosecute or not. For Brazil, the discussion is such that if the prosecutor finds that there is no evidence to establish a prima facie case, he may drop the case and send it to the judge. In this situation, if the judge disagrees, because in his view, there is sufficient evidence to proceed with the case, the judge submits the file to a group of senior prosecutors who will make the final decision. If this group finds that there is not sufficient evidence, the case will be closed. Otherwise, if the group finds that there is sufficient evidence, they will send the case to a new prosecutor who must commence prosecution.

In all participants' countries, the prosecutor can conduct supplementary investigation or direct investigators to conduct further investigation in relation to relevant facts.

In Kazakhstan, Kyrgyz Republic and Viet Nam, upon acquittal of the accused, the prosecuting officer and the investigator are subject to civil liability. If the ruling is against the State, including the prosecuting officer and the investigator, the designated department will initially pay the full amount. This amount will be recovered from the investigator and prosecutor's salary in installments.

D. Punishment

1. Court Proceedings

Most corruption proceedings are initiated in the regular courts. However, in Bangladesh, a specialized court has been established for the first instance proceedings. In practice, the defendant, in most cases, chooses to make an appeal to a higher court which is a general jurisdiction court where the caseload is high and leads to a lengthy process. This tactic is used by the person against whom the charge is filed to prolong the prosecution resulting in loss of vital witness evidence due to natural causes. The accused has all the rights to rebut the allegations or charges against him. The judge has the designated authority to dictate the proceedings giving reasons that there is sufficient evidence to prosecute the case. In some parts of Brazil, there are specialized prosecutors and judges appointed in corruption cases.

In all countries, appeals to higher-level courts can be done by the prosecutor or the accused. The time limitation for appeals is available.

=> Advantages and disadvantages of having special judges and prosecutors:

- Advantages:

- The specialized judges and prosecutors have specialized knowledge, which ensures speedy execution of justice in the trial.
- The State can demonstrate to the public its efforts to combat corruption.

- Disadvantages:

- There is still a lingering and prolonging of the corruption case.
- In Brazil, the specialized prosecutors and judges have excess work because of the complex nature of the case.

- Recommendation:

- The group agrees that the fundamental rights of the accused are infringed by delay of the trial process, especially in corruption cases. The whole society will endure prolonged suffering when justice is delayed. Therefore, the justice system needs to have a speedy trial in relation to the completion of the proceedings, such as a time limitation or strict timetable.

2. Types of Punishment

Punishment is in form of fines and imprisonment that can be suspended. The range of punishment differs in respect of each country. Viet Nam is the only country that has the death penalty for corruption in public procurement and other corruption-related crimes. In addition to the punishment described above, confiscation of proceeds of crime and the suspension of civil and political rights can also be imposed by the court as additional penalties.

E. International Cooperation

The discussion in the group pointed out that except Japan, all other participants' countries are members of UNCAC.

1. Mutual Legal Assistance

The group discussion showed that mutual legal assistance is an important tool to investigate corruption offences when an international element is involved such as collecting evidence, taking statements, monitoring, restraining and confiscating the proceeds of the crime. Absence or insufficiency of a foreign

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country's assistance in this matter could lead to unsuccessful prosecution or losing track of the crime proceeds.

Some countries such as Kyrgyz Republic and Kazakhstan cannot provide legal assistance in the absence of bilateral or multilateral treaties. However, in Cambodia, Guyana and Japan, legal assistance can be provided to another country based on domestic law. Similarly, on the basis of reciprocity, mutual legal assistance is possible in Brazil and Bangladesh in the absence of a bilateral or multilateral treaty.

The possibility of creating an international joint investigation team was also explored by the group. This would be a good concept since the issue of procurement violation is broad-based and for this reason, collection of evidence would be done more efficiently and timely. Sometimes it is necessary to conduct investigations simultaneously in different countries in order to achieve the best results, which MLA alone cannot accomplish.

2. Extradition

It was discussed by the group that extradition could be sought before and after the conviction of the wanted person. This measure facilitates the return of an alleged criminal to another country for the purpose of trial or enforcement of judgement.

Most participants' countries do not allow the extradition of their nationals, except Guyana and Fiji, where possibilities to extradite their nationals exist. For Japan and Viet Nam, bilateral or multilateral treaties could permit the extradition of their own nationals.

With regard to the possibility of extradition without bilateral or multilateral treaties, only Cambodia will extradite based on its own domestic law. Brazil needs the promise of reciprocity from the country requesting the extradition.

3. Recommendation

International joint investigation teams are a good method to conduct investigations simultaneously to bring about the best results, which would be beneficial for the participating countries if the legal framework to do so is enacted in legislation or if reciprocity creates such a position.

III. CONCLUSION

It can be reasonably concluded from our extensive discussion that dealing with corruption crime is very important. In some countries, the issue of corruption crime is dealt with systematically and expeditiously while others are works in progress. It must be noted that for justice to be effective, it must be executed swiftly. Based on the diversity of various countries, it is evident that a best practice across the divide would be difficult to arrive at presently. A special institution to deal with corruption-related matters may be an option based on the strength of the economy of the participating countries; therefore, it is important for participating countries to promote the concept of international cooperation across the board with special attention to reciprocity and networking when investigating and prosecuting cases of corruption in public procurement.

INDEX I
LIST OF 18 TYPOLOGIES IN KAZAKHSTAN

Under Article 11 (Operative-search measures) of the Law of the Republic of Kazakhstan dated September 15, 1994 No 154-XIII about operative-search activities, the operational search actions are:

- 1) A survey of persons;
- 2) The establishment of open and secret relations with the citizens, their use in operational and investigative activities;
- 3) Introduction;
- 4) The use of behavioural models to simulate criminal activity;
- 5) The establishment of secret enterprises and organizations;
- 6) Controlled delivery;
- 7) The application of technical means to obtain information does not affect the legally protected privacy, home, personal and family secrets, as well as the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications;
- 8) Inquiries;
- 9) Receiving samples;
- 10) Operational procurement;
- 11) The use of search dogs;
- 12) Search and identification of the person on the signs;
- 13) Search illegal removal of information devices;
- 14) Detection, covert fixation and removal of traces of illegal acts, their preliminary study;
- 15) Chasing a person who is committing or has committed a crime;
- 16) Implementation of the presence of witnesses of personal examination of detainees, withdrawal of their belongings and documents which may be relevant to the criminal activity, as well as the inspection of premises, workers, and other places, inspection of vehicles;
In the course of the anti-terrorist operation personal examination and inspection of the luggage of the physical person, inspection of vehicles, including the use of technical means, can be made without the participation of witnesses;
- 17) Operations to capture armed criminals;
- 18) Observation.

INDEX II
LIST OF 21 TYPOLOGIES IN KYRGYZ REPUBLIC

Under Article 7 (About operative-search activity) of the Law of the Kyrgyz Republic dated October 16, 1998 No 131 about operative-search activities, the operational search actions are:

- 1) A survey of citizens;
- 2) Inquiries;
- 3) Collecting samples for comparative analysis;
- 4) Test purchases;
- 5) The study of objects and documents;
- 6) Controlled delivery (delivery verification);
- 7) Identification of the person;
- 8) Inspection of premises, buildings, terrain and vehicles;
- 9) Control of postal, telegraph and other messages;
- 10) Tapping and recording, producing telephone and other communication devices;
- 11) Collection of information from technical communication channels;
- 12) The establishment of secret enterprises and organizations;
- 13) Operational implementation;
- 14) Operational monitoring;
- 15) Operational experiment;
- 16) Operational setting;

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- 17) The application of technical means to obtain information does not affect the legally protected privacy, home, personal and family secrets, as well as the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications;
- 18) Search of means of unlawful removal of information;
- 19) Operative search in networks and communication channels;
- 20) Silent Monitor and record conversations (with the use of video and audio equipment and (or) special technical equipment);
- 21) Obtaining information about connections between subscribers and (or) the subscriber units.

INDEX III
LEGISLATION OF ANTI-CORRUPTION IN PUBLIC PROCUREMENT

	Country's name	Name of the laws
1	Bangladesh	<ul style="list-style-type: none"> - Anti-corruption Act 2004 - Anti-corruption Rules 2007 - Penal Code 1860 - Code of Criminal Procedure 1898 - Prevention of Corruption Act 1947 - Money Laundering Prevention Act 2012 - Public Procurement Act 2006 - Criminal Law (amendment Act) 1957 - Whistleblowers Act 2011 - Mutual Legal Assistance Act 2012
2	Brazil	<ul style="list-style-type: none"> - Anti-corruption Law of 2013 (Law 12.826) - Penal Code 1941 - Crimes against the National Financial System (Law 7492/86) - Anti-money Laundering (Law 9613/98)
3	Cambodia	<ul style="list-style-type: none"> - Criminal Code 2009 - Code of Criminal Procedure 2007 - Anti-corruption Law 2010 - Law on Public Procurement 2012
4	Fiji	<ul style="list-style-type: none"> - Crime Decree No 44/2009 - Criminal Procedure Decree No 45/2009 - Anti-corruption Promulgation 2007 - Public Procurement Promulgation 2010
5	Guyana	<ul style="list-style-type: none"> - Criminal Law Procedure Act (Chapter 10:02) - Criminal Law Offence Act (Chapter 10:01)
6	Kazakhstan	<ul style="list-style-type: none"> - The Criminal Code 2014 (CC) - The Criminal Procedure Code 2014 (CPC) - The Administrative Offences Code 2014 (CoAO) - The Law on Civil Service 2015
7	Kyrgyz	<ul style="list-style-type: none"> - The Constitution of the Kyrgyz Republic - The Criminal Code of the Kyrgyz Republic - Code of the Kyrgyz Republic on administrative responsibility - The UN Convention against Corruption - Law "On Combating Corruption" dated 08.08.2012, No 153 - Law "On public procurement" dated 03.04.2015, No 72
8	Viet nam	<ul style="list-style-type: none"> - Penal Code 1999 (amended in 2009) - Criminal Procedure Law 2003

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9	Japan	<ul style="list-style-type: none">- Penal Code- Code of Criminal Procedure- Act Concerning Elimination and Prevention of Involvement in Bid Rigging- Unfair Competition Act- Act on Prevention of Transfer of Criminal Proceeds, Political Funds Control Act
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