

**ASSESSMENT OF THE DRAFT
LAW AGAINST CORRUPTION FOR THE SOCIALIST
REPUBLIC OF VIET NAM**

**Compiled by the ABA-UNDP International Legal Resource Center (ILRC)
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MEMORANDUM

To: ABA/UNDP International Legal Resource Center
From: Timothy L. Dickinson
Joanne Darkey
Date: 8/8/05
Re: Comments on the Viet Nam Draft Law on Anti-Corruption

Introduction

We commend the efforts to eradicate corruption and to comply with the United Nations Convention Against Corruption (“UNCAC”). The draft law has many of the components of a comprehensive and multidisciplinary national law envisioned by the UNCAC. We provide the following comments on the 4th draft of the Law on Anti-Corruption dated May 25, 2005. We also understand that we reviewed an unofficial translation so that that some of the questions or concerns may be addressed upon a more formal and official translation. We would be pleased to respond to any questions or provide additional commentary on later drafts as they are produced.

General Comments & Considerations

1. Intent & Structure

An overarching question is whether the draft law is intended to be a law from which a myriad of implementing regulations will follow or whether the law is viewed as a stand alone law. If the latter, the law should be lengthened and expanded in order to detail all of the necessary components. If the former, the draft law may be condensed with the understanding that numerous laws and regulations will need to be developed in the months to come. As the draft law strikes us now, it is somewhere between the two, an amalgam of many laws that are applicable to anti-corruption efforts. Examples of laws that would be complimentary to this law work include public access to information, civil service and government ethics, and bank secrecy laws. Structurally, the draft law attempts to cover all areas under the UNCAC, while it may not fully succeed in its efforts because of a lack of specificity. Depending on what is decided as the final structure, a preamble may be helpful in explaining the adoption of UNCAC and setting forth a roadmap of the various laws and regulations that are either fully addressed in the law or will follow in time.

2. Scope

The draft law appears to broadly apply to both the public and private sector with not as much distinction between the two as might be appropriate. The government might consider dividing the scope more clearly and in that way may focus more succinctly on what it would like to achieve in each sector.

A preamble may be helpful in explaining the adoption of UNCAC and setting forth a roadmap of the various laws and regulations that will follow.

It may be helpful to explain the purpose of the law and the comprehensive approach, but also to emphasize promotion of accountability, management, and integrity of public affairs and public assets. We also believe it would be helpful for the government to consider an action plan for further regulations that would cover the specifics on the many areas covered under the law.

Finally, we note that the law does not address the different question as to who oversees, and is allowed to investigate corruption in the highest levels of the government or those entrusted with overseeing the government anti-corruption program.

3. Consider Expanding Definitions and Clarify Criminal and Civil Liability while Enunciating Sanctions

The Government should consider defining conduct that is prohibited and conduct that is criminalized. If the objective is to follow the structure and definitions of UNCAC regarding bribery, then the definition therein should be utilized. If the objective is to create a broader definition of proscribed conduct, than the definitions section should be expanded for clarity. Some of the key definitions provided are not clear. For example, “authorized people” is unclear. “Public officials” should be defined and used consistently throughout.

“Corrupt behaviors” should be clarified. The language does not appear broad enough in some instances to include corrupt behavior such as soliciting bribes or refraining from acting in an official capacity. Defining “abuse” of position may ameliorate this issue.

The government should consider delineating clearly criminal and civil prohibitions and the requisite sanctions of each standard.

In some provisions, it appears that organizations or agencies bear legal responsibility. It should be clarified as to which individuals are held accountable within government agencies, etc. and what the basis of liability is along with the possible sanctions.

Likewise, remedies and rewards should be clearly articulated. We note that there is reference to a law of rewards and wonder what this law is and whether civil actions by a person reporting corrupt behavior would be possible such as the *qui tam* actions in the United States.

4. Organization

The structure as currently presented is not entirely clear. The government should consider adding subtitles for additional organization and clarity for the reader. Reorganizing and changing the order of some of the chapters may provide enhanced clarity. For example, Chapter VI – the Roles and Responsibilities of Society in Preventing and Fighting Corruption – might be better placed earlier in the law as an introduction of the various components, roles and responsibilities of the various entities in society. The government may also consider

moving Chapter III, Sections 1-3 and Chapter V, which articles all pertain to the new agencies and powers, rights, and duties of the enforcement agencies such as the National Steering Committee, Provincial Steering, to immediately follow the General Provisions in order to clearly identify who will enforce the law and how it will be enforced.

The government may consider providing sections on the offences and penalties in the same chapter or successive chapters. Therefore Chapter IV may follow Chapter I. It appears that individual fines or criminal penalties are envisioned, but they are not clearly enunciated and could best be placed after the recitation of the offences.

5. Improve Transparency by Increasing Access & Dissemination of Information

The government should consider if all citizens should have access to information without regard to their place of employment or geographic location. In addition, media access may be better suited to be addressed in Chapter 2 rather than as a responsibility in Chapter VI. We query whether the current libel law has criminal penalties such that there may be amendments necessary of existing law in order to fulfill the intent of a publicity and transparency and to avoid a chilling effect on reporting of high level corruption that could be caused by the interplay of other existing legislation. We also note a reference to regulations on grass-root democracy and query what these regulations are.

6. Disclosures of Assets

If the judiciary is not included in the requirement of disclosure, it should be considered to be included. In addition, the government should consider publication of the disclosures and access to the disclosures by all citizens.

7. Freezing, Seizures, and Confiscation of Assets

We query what the procedures are for taking control of assets and question whether existing law allows for judicial oversight.

8. Campaign Financing and Money Laundering provisions

There appears to be no specific campaign finance limits and money laundering specific provisions.

9. Gift Provisions

The government may consider setting a monetary limit so as to provide clarity, but we recognize that this limit may appear in more specific regulation to follow.

10. Organization and Coordinating Mechanisms

Chapter V enunciates a very complicated structure for coordination and cooperation between the various relevant agencies. This complicated structure could result in redundancies and inefficient or ineffective enforcement. Therefore, the government may consider a less cumbersome system.

Specific/Technical Comments

We address more specific comments below according to the Article numbers in consecutive order:

Chapter 1 – General Provisions

Article 3 – Definitions

“Personal gain” includes “mental benefits” which are not defined. “Harassment” is vague as it is currently defined, and could be clarified.

The following terms are used within the law but are not defined:

- Fraud
- Public service
- Mental benefits
- Harbor people
- Illegally interfere
- Victimize, bully
- Heads of agencies, organizations and departments
- The Government
- People’s consultation – Article 23
- Close relative
- Illegal presents
- Mass organizations – Article 28
- National Steering Committee for corruption prevention and control
- State authorized agencies – Art. 33
- Officer and staffs – Art. 35
- Authorities –Art. 36
- Public employees in compliance with law – Art. 43
- Regulators

Article 4 – Corrupt Behaviors and Settlement

- This offense should be clearly defined, — perhaps using UNCAC language —and, the same consideration for punishment of this offense

Article 5 – This Article seems to address scope, jurisdiction, and penalties

- “People” – should it be “authorized people”? Is this only applicable to public officials?
- What are the disciplinary sanctions? According to each public entity’s rules and regulations?
- Reference to lower standard than criminal offence. Criminal standard is unclear.

Article 6 – Prohibited Behaviors

- How are these different from “Corrupt Behaviors”?

- Missing numbers 2 & 3
- Number 5 is unclear translation

Article 7

- Do public agencies and organizations bear legal responsibility? Who is held accountable?
- Declaration of assets is further discussed in Articles 42-52 – combine or reference later articles

Article 14

- Mass media shall be “liable” for ensuring accuracy and honesty of provided information. Is this a legal “liability”? While reporting must be honest, this could create a chilling effect.

Chapter 2 –Corruption Prevention

Article 19

- Will all of the information described in the provision be published or on websites?

Article 24

- Contracts and bids prohibited with enterprises “owned” by relatives of public officials – consider broadening to “any financial interest” – If no expansion, then disclosure may be required.
- SOE’s prohibited from using money as assets as “illegal presents” – employees, officials should be prohibited and “illegal presents” should be considered to be defined

Article 26

- State budget agencies and organizations, not individuals, usually bear legal responsibility for auditing results

Article 27

- Compensation for eminent domain use is not entirely clear (“at same location compensated at the same price regardless of locations”) – is this supposed to be fair market value?
- Describe process of public auctioning – notices, etc.
- No participation of government officials (or relatives) involved in the project, etc.

Article 28 – Personnel management

- Disclosure of promotion, awards, punishments, etc. to public employees and workers at their workplace – No other place of disclosure?
- No objective criteria for employment, promotion, standard pay scales that are publicized?

Section 2 (Articles 33 and 34) – Formulation and implementation of regimes, norms, and standards – it is unclear what the purpose is and how this section fits into the chapter

Article 33

- unclear what regimes, norms, and standards are and which “state authorized agencies” will be issuing them

Article 34 – Examination and violation treatment

- 2(b) is not clear regarding “repay differences”, fines

Article 35 – Ethical Codes for Public Employees

- Article 35.1 – needs clarification
- Article 35.4 – why only spouses and not children or parents or “close relatives”?
- Article 35.5 – Nepotism banned for only certain types of jobs?
- Article 35.7 – How long is “the certain period of time as stipulated by the Government”?
- Article 35.8(d) – why are officers in SOE’s exempted from the nepotism rules?

Article 36

- Report corruption to the “authorities” – which authorities?

Article 39

- Gift offering and taking by public employees in accordance with tradition, custom and practice – Consider setting low monetary limit

Article 40 & 41

- Ethical codes created by own entities – National Assembly for National Assembly, judiciary for judiciary, ministers for own sectors, but professions’ ethical rules are to be created by the government “in coordination with social and professional organizations.”

Article 43

- Are all public employees subject to disclosure? “Public employees in compliance with law”
- Candidates for office should be added since they are referenced in Article 47

Article 47 – Disclosure of assets

- Wider dissemination of the assets declaration statements than at the “workplace of the declarers upon their prosecution for corruption.”

Article 48 – Verification of assets

- How will this process be implemented?

Article 51

- Only disciplinary action or warning if dishonest declaration – Is there no investigation to follow?

Article 53 – Responsibility of heads of agencies, organizations, and units in cases of corruption

- Strict liability of head of agency?

- What is the difference in consequences of direct and indirect responsibility?
- Government to provide details of this Article – when is that anticipated?

Chapter 3 – Has no title

Article 61 –Power of the State Inspection agencies

- Seal documents, freeze, list and temporarily hold assets
- What are the “necessary measures” to revoke occupied assets?

Article 69 – Rewards for truthful denunciations

- What is the “law on rewards”? Are civil suits possible?

Chapter 4 –Dealing with Corruption

- As per general comments above, consider moving this section to follow the provisions on offenses
- Consider clarifying the standards and the sanctions

Chapter 5 –Organization and Coordinating Mechanisms...

- As per general comments above, consider simplifying the structure.

To: Alan Budde
Project Coordinator
ABA-UNDP International Legal Resource Center (ILRC)
American Bar Association

From: Kathleen Clark
Law Professor
Washington University in St. Louis
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Re: Assessment of May 2005 draft Anti-Corruption law for Vietnam

Date: August 1, 2005

I have reviewed the May 2005 draft of Vietnam's Anti-Corruption law, which contains many provisions that will prove helpful in preventing and detecting corruption. I am providing these comments and suggestions on ways that the law can be strengthened and improved. The first part of my comments are general in nature. The second part addresses specific provisions of the draft law. If there are any questions, I would be happy to provide more information.

My first general comment concerns approach: including a positive as well as a negative approach. The draft law has many specific prohibitions, both in terms of particular prohibited actions and prohibited attitudes (Article 35 ¶ 1 prohibiting "the attitude of red tape, arrogance," etc.). Prohibitions will be an important part of any anti-corruption regime because it is necessary to provide notice of those activities that can result in criminal or other sanction. But it is also important to create a positive ethical culture within the organization. This cannot be accomplished through a series of prohibitions alone, no matter how detailed they are. Instead, an organization's leaders also need to set a positive tone, and set out affirmatively what goals its employees should strive to meet. Aspirational goals are not strictly enforceable in the way that specific prohibitions are. Nonetheless, they are quite useful as touchstones for regulators who have to write specific regulations and for public employees who want to understand the purpose of those regulations. Aspirational goals are also useful rhetorically and in training, so that compliance with specific rules is more than a technical exercise, and reflects the values that the organization wants to inculcate in its employees. See for example, "Principles of Ethical Conduct for Government Officers and Employees" in the Appendix.)

Second, I want to underline the importance of transparency in preventing corruption and abuse of governmental power more generally. I recommend that transparency be expanded in several ways. First, rather than setting out specific types of government information that must be revealed (Article 18), I recommend setting out a general rule of transparency with specified narrow exceptions to that rule, such as to protect individual privacy or to protect the confidentiality of on-going criminal investigations. (See Freedom of Information Act (FOIA) in Appendix.) Similarly, rather than specifying which individuals may request government information (Articles 29 and 30), I recommend allowing anyone to request such information. Also, rather than limiting the public disclosure of assets declarations

to specified audiences, such as the workplace or voter meetings (in Article 47), I recommend that any such public disclosure be general. This is important because it will be difficult to predict in advance which individuals will have the incentive to request or scrutinize such information. In addition, allowing anyone to request and use the information will encourage the creation of non-governmental organizations that can further effectuate openness of government. This will strengthen civil society, one of the goals identified in UNCAC. It is also important to set up an appeals procedure so that information requesters can seek review of decisions not to release information. Without an appeals procedure, the mandate of transparency could be thwarted by low-level officials who for one reason or another don't wish to release government information. The appeals process can help discipline the government apparatus.

The drafters of this law also need to give close attention to those types of information that should be held in confidence. Some of the items listed as mandatory disclosure in Article 18 may actually be appropriate for confidentiality. For example, Article 18, ¶ 2 indicates that public procurement information will be made public. Certainly final procurement decisions should be made public. But particular bids may include proprietary information that is appropriately held in confidence, and the disclosure requirement should allow for some information to be held in confidence. Similarly, ¶ 2 and Article 28 also require that "personnel management" information be disclosed. But particular information about individual employees may appropriately be considered private. (See FOIA in Appendix.)

Third, I recommend closer attention to the issue of reporting of misconduct: who is required to report; how reporters (or whistleblowers) will be protected from retaliation; what incentives will be given to encourage reporting; and who should receive the reports. Article 9 appears to require all citizens to report corruption. Article 65 appears to encourage all citizens to report corruption. It is unclear how such a reporting duty would be enforced, or whether such a generalized duty would be effective. Other states impose a reporting requirement only on government employees – a duty that can be emphasized through regular training and enforced through employment-related discipline. Article 69 indicates that whistleblowers will be rewarded. The drafters of the anti-corruption law may want to consider whether financial incentives are appropriate for government employees who come forward, since they already have an obligation to report corruption. In the United States, for example whistleblowers can earn substantial amounts, up to 30% of the amount recovered. But the government has opposed such awards for government employees who are already required by law to report criminal activity. (See 28 USC § 535b in Appendix.)

It is not clear in the text of the anti-corruption law who is the appropriate recipient of these mandatory reports, or whether reporters will be given any kind of protection from retaliation. These issues need to be fleshed-out. I recommend the creation of a specific office to receive and investigate reports of corruption and other wrongdoing, and to recommend reforms that could prevent corruption, and requiring that official to make periodic public report on the types of corruption uncovered. I also recommend putting in place protections for whistleblowers, such as prohibiting employers from firing them. Many whistleblowers experience job loss and other formal and informal sanctions when they come forward. The

prospect of such losses can be quite a disincentive for people with information about corruption to come forward.

Fourth, I would also recommend more attention to training of employees about these standards. Training is not mentioned until Article 83. The success of the anti-corruption law will depend in large part on the training of government employees and others subject to this law.

The remainder of this memo comments on specific articles of the May 2005 draft anti-corruption law.

Article 4 sets out specific prohibited acts, including embezzlement, fraud and bribery. But many of its provisions prohibit “abuse of position and authority” and “abuse of power.” These vague terms need to be defined: what constitutes an abuse of position? On a related note, I recommend prohibiting government officials from accepting gifts and compensation from anyone who can be affected by the official’s exercise of discretion or decision-making, and prohibiting them from soliciting gifts from anyone. While a bribe is clearly corrupt and thus already prohibited, it is also important to prohibit conduct that may represent corrupt purposes, such as a gift that might influence a government official.

Article 7 indicates that agencies must issue anti-corruption regulations. But as much as possible, it is preferable to have uniform anti-corruption regulations across all agencies in government. Such uniformity makes it easier for employees to understand the rules that apply to them, and simplifies the training process as well. Of course, individual agencies may need to issue supplemental anti-corruption regulations to deal with situations unique to their circumstances. But general government-wide regulations can go a long way in addressing necessary issues.

Article 24 ¶ 2 sets out a conflict of interest rule prohibiting the relatives of certain high-level employees of state-owned enterprises (SOEs) from signing contracts or attending biddings of the SOEs. It also prohibits the SOE from employing relatives of its General Directors, Manager and Chairman in certain positions. This type of anti-nepotism rule is important, but I recommend expanding these anti-nepotism and conflict of interest rules to include a broader range of employees.

Article 25 addresses the privatization of state-owned enterprises (SOEs). I recommend placing restrictions on the ability of SOE insiders to purchase stock in their companies to ensure that their purchases are accomplished on the same terms that are available to the general public.

Article 35 sets out many specific prohibitions, some of which seem to be overly restrictive. ¶ 2 prohibits all public employees from starting up or managing any private enterprise, including schools and hospitals. It is appropriate to restrict a government employee from setting up or managing a private enterprise that is related to their government work (such as prohibiting a government hospital inspector from setting up a private hospital). Similarly, it is appropriate to insist that government employees do only government work while on

government time. But preventing all government employees from involvement in any private enterprise while on their own time appears to be excessive, unnecessary, and will interfere with the development of civil society. ¶ 3, by contrast, sets out an appropriately focused restriction, prohibiting government employees from acting as consultants for private or international organizations on projects related to their government work or involving state secrets.

¶ 4 of Article 35, which prohibits the “heads and deputy heads of agencies” and their spouses from investing in companies “operating in areas under their state management” should be broader, and apply to a wider set of government employees. Similarly ¶ 5, an anti-nepotism rule, needs to be broader in its application and prohibit all government employees from hiring their relatives for any position, not just the few specified positions.

Article 38 states that individuals who fail to report corruption shall be disciplined. As stated above, there are a couple of problems with this formulation. First, there needs to be clarification regarding which individuals have an obligation to report: all citizens or just all government employees? Second, I recommend re-writing this using a positive tone by saying simply that government employees are required to report corruption.

Article 39 on gifts should be expanded to restrict gifts from subordinate employees to their supervisors. In addition, I recommend prohibiting government employees from accepting gifts from anyone who could be affected by their exercise of discretion. This is a much broader category than that already prohibited by ¶ 3 (prohibiting government employees from accepting gifts from “enterprises operating under their direct management”).

Article 41 indicates that there will be ethical codes for professionals, including lawyers, auditors and journalists. While it is appropriate for some professionals to have a duty of confidentiality, it is important that there be exceptions to that duty for on-going or future crimes or frauds. Otherwise, lawyers and accountants can become unwitting participants in their clients’ crimes. I would be happy to provide more information on lawyers ethical codes and the problem of fraud.

Article 43 discusses asset and income transparency. Here again it important to recognize the need for a balance between the need for transparency on the one hand and the legitimate need for personal privacy on the other. The US government attempts to accommodate these needs by setting up two different types of financial disclosure. The highest level officials, including elected officials, must make their financial disclosures available to the public. Most other government employees who are required to disclose financial information are allowed to make “confidential” disclosures: They reveal their financial information to ethics bureaucrats, but not to the general public. As long as these ethics bureaucrats are in a position to ensure compliance with the conflict of interest laws, this kind of transparency compromise seems to work well and protect the privacy of most government employees.

Article 51, entitled “Dealing with Dishonest Declarers,” seems to assume that any inaccurate financial disclosures are deliberately false. It is important to distinguish intentional false declarations from merely inaccurate declarations, and sanction the intentional wrongdoers more harshly than those who made honest mistakes on their declarations.

Articles 53, 54 and 70 seem to suggest that the heads of agencies are responsible for corruption occurring inside their agencies, whether or not they knew about the corruption. It is unclear whether the intention is to hold the heads of agencies criminally responsible for any wrongdoing in their agencies. I would recommend asserting that agency heads are responsible for preventing corruption, but discipline them only if they failed to take reasonable measures to prevent and detect corruption.

Article 71 indicates that private employers will have to discipline their employees who are involved in corruption. Enlisting the private sector in the anti-corruption fight is important, and can serve as a kind of “force-multiplier.” In addition, I suggest requiring private employers to cooperate with anti-corruption investigations.

Article 73 sets out mitigating circumstances. ¶ 2a states that “Taking initiative in reporting the behaviors of corruption not prior being detected;” is a mitigating circumstance, but I believe that the “not” in that statement should be deleted. In addition, I recommend adding “cooperation in the investigation of prosecution of others” as a mitigating factor.

Article 78 indicates that someone who is prosecuted for corruption has the burden of showing the legal origin of their assets. Otherwise, those assets can be deemed to be illegal and are subject to seizure. Placing the burden of proof for the legality of assets on the individual rather than the prosecution could be appropriate once the prosecution has proven that this individual is guilty of a crime. But the burden should remain on the prosecution until individual guilt is proven. Otherwise, this kind of asset seizure provision can be abused, as a similar provision of US law allowing the seizure of assets allegedly related to drugs has been abused.

Article 80 states that if a person offers a bribe to help an entity, the entity is subject to fines and loss of license. I would recommend expanding this provision to apply not just to the offer of illegal bribes, but also to the offer of illegal gifts that are intended to help an entity.

Article 82 indicates that the National Steering Committee for Anti-Corruption can “guide the resolution of specific corruption incidents and cases.” This Steering Committee seemed to be aimed at directing policy rather than prosecuting specific cases. I recommend keeping clear the lines of prosecution authority, and dividing the responsibility of policy-making and regulation-writing from that of enforcement.

Article 95 asserts that the “mass media shall report honestly and objectively.” Such a standard could form the basis for government censorship and control of the media, which would run counter to the principle of transparency and to the development of civil society. I recommend clarifying that this statement is an aspirational goal rather than a basis for government intervention with or control of the press.

Article 96 discusses the responsibilities of the business community in preventing and detecting corruption. I would add a provision indicating that businesses have a legally enforceable obligation to cooperate with government investigations of corruption. A similar

approach (found in the Sentencing Guidelines for Organizations and in the Justice Department's Prosecution Guidelines) has been very effective in the United States.

Appendices:

- A "Principles of Ethical Conduct for Government Officers and Employees"
- B Freedom of Information Act (FOIA), 5 USC § 552
- C 28 USC § 535

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