Towards Transparency Newsletter

June 2018

The draft revised Anti-corruption law: towards a tiger with more teeth

Towards Transparency (TT) provided an analysis and various recommendations to the Vietnamese drafting authorities on the draft Law on Prevention and Anti-Corruption (amended), with a view to ensuring its compatibility with the United Nations Convention on Anti-Corruption (UNCAC), international standards and local context. Inputs for these recommendations came to date from two sources: 1) TT's international consultant, Matthew Stephenson, Professor at Harvard Law School, analyzed the gaps, limitations and challenges of the current draft law ; 2/ A consultation workshop organized with Vietnamese social organizations. The full analysis has been discussed with relevant Vietnamese authorities, including the Government Inspectorate (GI) and members of the National Assembly's Judicial Committee. This newsletter focuses on few areas of concerns of the draft revised law: conflict of interest, assets declaration and verification, treatment of private sector corruption, and role and participation of social organizations in anti-corruption.

"The draft AC law remains unclear regarding the rules on conflict of interest applicable to public officials who do not have an administrative superior; moreover, the remedies for a conflict of interest seem too weal to be effective"

Conflict of interest rules

Corruption is often difficult to prove, and in some cases, officials might be unduly influenced by self-interested considerations without even consciously realizing it. It is commendable that the draft AC Law includes some provisions on conflict of interest. However, these provisions seem too narrow and too weak to be fully effective. A clarification of the language in Article 23(3) seems advisable. Article 23(3) states that an officer's superior should determine that a conflict of interest exists if the superior "determines that the continual performance of the tasks, public duties may not be accurate, [objective], honest." In other words, Article 23(3) seems to imply that an agency only needs to take action to deal with a potential conflict of interest when the responsible agency supervisor determines that the official's personal interests will actually distort her judgment in the performance of her duties. A better formulation should require the supervisor to take action in response to a subordinate's possible conflict of interest if the supervisor determines that there is a high likelihood that the official's private interests might influence the performance of her duties.

Moreover, the remedies for a conflict of interest seem too weak to be effective. First of all, the law only requires that a supervisor (not a superior) must consider taking remedial action, not that the superior must take remedial action, when a conflict of interest is present. Additionally, one of the possible remedies (Article 23(3)(c)) is merely "monitor [ing] the performance of the assigned tasks, public duties by the person having conflicts of interest," which seems inadequate, especially since the nature and extent of the monitoring is not specified. In cases where an official has a material conflict

of interest, it would be recommended that official must recuse herself from the matter that creates the conflict, unless a special exception is granted through some legally-specified review process.

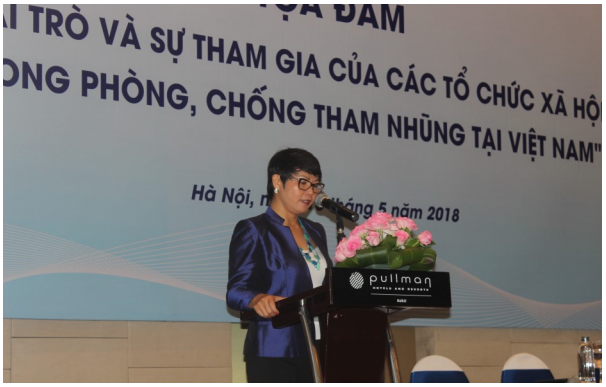
The remedies in Article 23(3) do not actually include recusal—rather, the more robust remedies, found in Article 23(3)(a-b), involve either transferring the conflicted official to another position, or suspending the performance of the task. Those remedies may be excessive in many cases: The conflicted official need not be reassigned to a different position; rather, the specific task can be reassigned to a different official. On the other hand, the penalties for officials who fail to report when they know they have a conflict of interest (Article 115(1)), says only that such individuals shall "be reprimanded or warned." Those sanctions (reprimand or warning) seem too weak for situations where an official knows she has a conflict of interest but fails to report it, or for cases where a responsible supervisor knows that a subordinate has a conflict of interest but takes no action. More significant penalties should be considered, including the reconsideration of any government decision tainted by a significant conflict of interest.

The draft AC law remains unclear regarding the rules on conflict of interest applicable to public officials who do not have an administrative superior, for example agency heads, heads of state-owned enterprises, and members of the National Assembly. It should therefore provide for some specific rules about how to handle conflicts of interest for senior officials who do not have a direct supervisor within the meaning of Article 23.

Assets declaration and verification

Due to the difficulty in detecting and prosecuting corrupt acts directly, income and asset disclosures by public officials have become an increasingly popular mechanism to help detect and deter corruption. The logic is that when an official has assets that he or she cannot explain, this provides prima facie grounds for suspecting corruption. In addition, because corrupt officials may not submit truthful declarations (since they have an incentive to conceal their illicit assets), verification of the declarations can be a powerful tool to catch corrupt actors. It will often be much easier to detect and prove an inaccurate or incomplete declaration than it will be to prove the underlying illicit conduct.

The draft AC Law includes a promising (and lengthy) provision on asset declarations and verifications, but this section contains some important gaps and ambiguities that ought to be addressed. First, before settling on a final text for the asset declaration provisions in the AC Law, Vietnam ought to do a careful assessment of the projected resource costs of different proposed systems. In particular, 4 estimates are required to make sure that the system works: (1) the number of officials who will need to make annual declarations under the proposed system; (2) how many people will be available to review declarations for accuracy (in order to meet the requirement in Article 33(2)(b) that says the initial review for completeness must be done within 7 working days); (3) the number of verifications that are likely to be required; and (4) the personnel requirements to perform the verifica-



TT's Executive Director Nguyen Thi Kieu Vien at the CSO Consultation workshop, « Role and participation of CSOs in anti-corruption in Vietnam » (10 May 2018)

"Remedies for failure to comply with the asset disclosure requirements need to be strengthened. Article 117(2) indicates that only that those who are 30 or more days late in filing their declarations and explanations "shall be disciplined in the form of a warning"

tions in a timely fashion. Indeed, the system cannot function when the reviewers are so overwhelmed with declarations that only a small fraction of the reviews are completed, and an enormous backlog piles up. There are only two ways to solve that issue (outside of the scope of the AC law Article 37): either to substantially increase the resources and personnel devoted to asset declaration review and verification, or to apply the asset disclosure requirement to a more limited set of officials (those where the risks of corruption and illicit wealth are highest).

Remedies for failure to comply with the asset disclosure requirements need to be strengthened. Article 117(2) indicates that only that those who are 30 or more days late in filing their declarations and explanations "shall be disciplined in the form of a warning." A more serious sanction (like a daily fine) for those who are more than 30 days late should be set up. A more significant penalty for extreme lateness would similarly be in order for those who "shall be disciplined in the form of a reprimand" for taking more than 30 days to publicize assets declaration (Article 117 (1)).

Meeting between TT and Mr. Nguyen Manh Cuong, Vice Chief of National Assembly's Judicial Committee (7 May 2018)

Article 59(1) imposes a stiff penalty for untruthful declarations and provides for a substantial tax or on undeclared assets/incomes (45%). However, it is not clear whether or when these sanctions will actually be applied in practice, as Article 59(1) says only that the income controlling agency can make a written request to the Tax Department or competent agencies to impose the tax and other fines.

Likewise, Article 58, which deals with freezing improperly explained assets, only allows the control agency to "request or suggest" that assets be frozen or otherwise controlled. Rather than being limited to make a request to another department, control agencies should therefore be given the authority to issue an order to freeze/control assets, and to directly seek to impose penalties through the ordinary judicial/administrative process.

The draft AC Law seems inconsistent on the issue of knowing whether asset declarations will be public or confidential. Article 35, for example, makes it sound like the disclosures are not public, as this Article states that access to the declarations is limited to "competent persons," including managers/employers, inspectorates, State Audit agencies, Procuracies, courts; Article 35(3) further specifies that requests for information must be in writing, and "must state clearly the purpose of use and the information, data they request for provision." (Additionally, Article 42 (2)(b) instructs that the asset control units are responsible for "maintaining confidentiality of information and documents collected during the controlling of assets, incomes of persons who are obliged to make [a] declaration," which also seems to indicate that the declarations are confidential, except upon request by a competent person pursuant to Article 35.) However, Article 41 states explicitly that the asset declaration sheets "must be made public," with the time and form of publicity elaborated in more detail by the government. Likewise, Article 57 mandates that asset verification reports "shall be … made public."

Article 55(6) states that there is an appeals process for disputes over asset declarations/ verification reports, but does not explain how the appeal process will work. This section of the AC Law needs to be clarified to explain which entity or entities have jurisdiction to hear appeals on asset verification reports, and what

"The draft AC Law seems inconsistent on the issue of knowing whether asset declarations will be public or confidential"

"UNCAC Articles 21 and 22 indicate that States Parties should consider extending the criminal prohibitions on bribery and embezzlement to private sector entities"

remedies those appeal bodies can order if it determines there has been an error of some kind.

Treatment of private sector corruption

There has been much discussion recently about whether anticorruption laws ought to extend to private sector corruption. In considering this issue, it is important to distinguish two different ways in which anticorruption laws might cover private sector actors: First, private to public corruption, when a private individual or firm bribes a government official. Second, private to private, or corruption within private companies.

There is no controversy that anticorruption laws ought to apply to the private actors in illicit transactions, and virtually all anticorruption laws impose liability of private actors who engage in, or otherwise facilitate, corrupt transactions with public officials (UNCAC Article 12, for example, specifically requires States Parties to take appropriate measures to prevent and combat this form of private sector corruption).

The more controversial question is whether anticorruption laws ought to extend to exclusively private corruption, as when an employee of one private firm pays a bribe to an employee at another private firm in order to win a contract, or when an executive at a private firm embezzles funds from his or her employer. Some countries extend anticorruption prohibitions to purely private conduct, while in other countries, the principal anticorruption laws apply only cases in which a public authority is somehow involved, and address "private corruption" through other legal instruments, such as laws against commercial fraud and theft.

The draft AC Law clearly applies to the first sort of "private sector corruption"; it is not clear, however, whether or to what extent it applies to the second form of "private sector corruption," or whether private sector fraud, embezzlement, and other forms of white collar crime are addressed elsewhere in the Vietnamese Criminal Code.

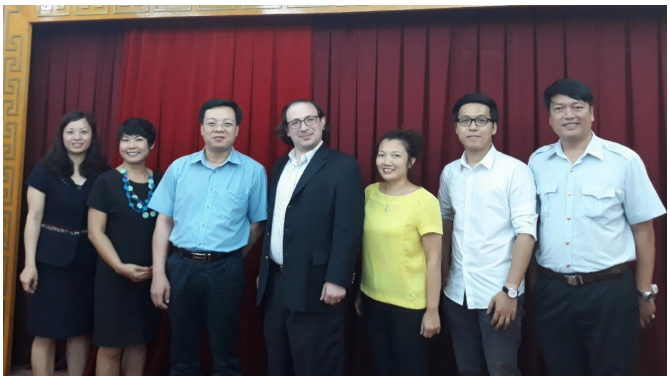
Role and participation of CSOs in anti-corruption

Vietnam, as a signatory of the United Nations Convention against Corruption (UNCAC) since 2009, did to some extent incorporate UNCAC's Article 13 into the Vietnamese anti-corruption legislation. The Article 13 of the UNCAC requires its State Parties to promote and ensure the engagement of non-state actors in anti-corruption. However, few articles of the draft revised law could be improved.

A clear definition of "social organization" should be supplemented: "social organizations" are not defined in the Draft. This raises the important question of knowing which types of social organizations this law will govern.

The draft revised AC Law should broaden the roles of CSOs in AC (for example in monitoring the government implementation of AC legislation). The draft revised law places social organizations in a "passive" position by limiting their role to preventing and handling corruption within their own internal operation. It therefore fails to reflect the spirit of the UNCAC which engages the "active participation" of social organizations.

For their part, social organizations, especially those which act for community benefit or of small size, should be "encouraged" but not "forced" to apply measures to prevent corruption within their own internal operations and to publicize funds or other measures regarding persons in power of charity organizations. During the workshop co-hosted with People's Participation Working Group (PPWG), CSO participants raised serious concerns on the limited role and burdensome regulations, imposed on social organizations if this law comes into effect.



Matthew Stephenson, Harvard Law Professor and TT's representatives meeting law drafters from the Government Inspectorate of Vietnam (1st June 2018)

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