

Distr.: General

14 October 2011

English only

**Conference of the States Parties to the United
Nations Convention against Corruption**
Fourth session
Marrakech, Morocco, 24-28 October 2011
Item 2 of the provisional agenda


**Document submitted by Transparency International*, a
non-governmental organization in consultative status
with the Economic and Social Council**

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V.11-86435 (E)



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VIETNAM SURVEY REPORT

EXECUTIVE SUMMARY

CONTEXT AND PURPOSE

The Vietnamese State signed the UNCAC on 10 December 2003, ratified it on 30 June 2009, and became an official party to the Convention on 18 September 2009. Vietnam belongs to the group of States to conduct self-assessment in 2011, the second year of the first cycle of the UNCAC review (2010-2015). To implement this resolution, the Vietnamese Government (with the Government Inspectorate assuming the prime responsibility and acting as the coordinator) has conducted the self-assessment and formulated a country report on the implementation of the Convention.

In close consultation with the Government Inspectorate and with the support and cooperation of UNDP, Towards Transparency (TT) - Transparency International's National Contact in Vietnam collected and analyzed inputs from selected experts to support the Government's UNCAC self-assessment.

PROCESS AND METHODOLOGY

The collection and analysis of experts' inputs were carried out from 10 May to 10 August 2011, by combining three research forms: questionnaire, in-depth interviews and consultation workshop. The report also involved several working sessions between the consultants with representatives of TT, UNDP and the Government Inspectorate. Many experts who currently work at universities, research institutes, state agencies and social organizations closely concerned with the issue of prevention and combat of corruption in Vietnam were consulted, with some participating in two or three survey forms.

LIMITATIONS OF THE SURVEY

The first limit is that the number of experts in corruption prevention and combat, particularly those specializing in criminalization and international cooperation remains limited. Meanwhile, not all identified experts were willing to participate in the survey, primarily due to time constraints and, in some cases, fear that corruption is a 'sensitive issue.'

The second difficulty relates to the limited time available for the consultation process. Just over two months were available for implementing and concluding the project.

With regards to the content, due to limited resources and the requirements of the resolution of the Conference of the State Parties to the UNCAC, this survey only touches upon the key articles in the two chapters of the Convention: Chapter III (Criminalization and Law Enforcement) and one article in Chapter IV (International Cooperation). In addition, the survey indirectly referred to two articles in Chapter II (Preventive measures).

SUMMARY OF CONCLUSIONS

Consultation of CSO's in the self-assessment process:

- (1) The Vietnamese government has paid attention to and held consultations with a number of civil society organizations through sending questionnaires and inviting them to workshops. However, in order to enhance the effectiveness of consultations, the Government should hold consultations from the beginning stage of preparation with all CSOs and employ other modes of consultation, eg via the Internet, sending questionnaires, in-depth interviews with experts, etc. In addition, to expand the number of groups consulted and increase the quality of consultations, the Government should recommend and allow both international and Vietnamese CSO's who are interested and possess expertise conduct or support surveys.
- (2) The Vietnamese government has endeavored to publicize the process of self-assessment by posting the name and address of the responsible agency and implementation plan on the Government's e-portal. To enhance the effectiveness of this activity, the Government should further publicize the process of self-assessment through the mass media and through other forms (e.g. press conferences, workshops, etc).

Incorporation into domestic law and implementation of a number of articles in the UNCAC:

- (3) The 1999 Penal Code of Vietnam (amended and supplemented in 2009), through Articles 279, 289 and 290, shows compatibility to a basic extent with Article 15 of the UNCAC (on bribery of public officials); however, Vietnam's Penal Code defines a bribe merely as 'material benefits' (Article 289), narrower than the definition provided in Article 15 of the UNCAC, under which a bribe is understood as 'any undue advantage.' In order to increase the effectiveness of the prevention and combat of this offense, the State should revise the Penal Code toward defining a bribe as "any undue benefit" in accordance with Article 15 of the UNCAC.
- (4) Vietnam's Penal Code is not compatible with Article 16 of the UNCAC (on bribery of foreign public officials and officials of public international organizations) because the criminal offenses of giving and receiving bribes (Articles 279 and 289 of the Penal Code) are applicable only to Vietnamese persons. In order to perform the international legal obligations under Article 16 of the UNCAC, the State should add to the Penal Code the offense of bribing foreign public officials or officials of public international organizations.
- (5) Vietnam's Penal Code, through Articles 278 and 280, show compatibility to a high extent with Article 17 of the UNCAC (on embezzlement, misappropriation or other diversion of property by a public official). Yet, the 2003 Criminal Procedure Law does not impose on suspects in corruption cases the burden of proof of the lawfulness of their properties, which has causes difficulties in the investigation and handling of corruption cases, especially when the Vietnamese legal framework on management and supervision of incomes and properties remains incomplete. Therefore, the State should study experiences of other countries to revise the Criminal Procedure Code toward laying the burden of proof on suspects to prove the transparency of their incomes and properties.
- (6) Through Articles 250 and 251, Vietnam's Penal Code shows compatibility to a certain extent with Article 23 of the UNCAC (on laundering of proceeds of crime). However, there are still legal constraints causing difficulties to the prevention and handling of money laundering. Therefore, the State should revise Article 251 of the Penal Code toward (i) replacing the provision that the suspect must clearly know that the property is acquired from the commission of crime with the provision that the suspect knows that the property comes from an unlawful source, which is sufficient for constituting an offense; (ii) clearly providing that legalized money and properties may be proceeds of crime acquired by the suspect himself/herself, and (iii) regarding involvement of a foreign element in money laundering as an aggravating circumstance. In addition, the State should also (i) promulgate documents guiding in detail the value of legalized money and properties sufficient for constituting a money laundering offense under Article 251 of the Penal Code; and (ii) study and formulate laws against money laundering, cash transactions in the economy, checks and promissory notes.
- (7) Although Vietnam announced its reservation not to abide by Article 26 of the UNCAC (on liability of legal persons), this Article has been in fact partially incorporated into the domestic law. Legal persons must bear administrative and civil liabilities (according to the 2002 Ordinance on Handling of Administrative Violations, the 2005 Civil Code and the 2009 Law on Compensation Liability of the State, etc.). However, the fact that the laws do not stipulate that legal persons shall bear administrative liability for all acts of corruption and does not regard them as subjects of penal liability (Article 72 of the 1992 Constitution and Article 2 of the Penal Code), is impeding the prevention and combat of corruption cases of abusing the names of legal persons, which are on the rise in Vietnam. Therefore, the State should study revision of relevant legal documents toward requiring legal persons to bear administrative liability for all acts

of corruption rather than only money laundering as currently provided. In addition, the State should also withdraw its reservation with regard to Article 26 of the UNCAC, and amend the Penal Code toward regarding legal persons as subjects of criminal offenses.

- (8) Vietnamese law, through Article 71 of the 1992 Constitution and Article 7 of the 2003 Criminal Procedure Code, is compatible to a certain extent with the provisions of Article 32 of the UNCAC (on protection of witnesses, experts and victims). Yet, the State should add specific provisions on mechanisms and measures to protect experts, witnesses or victims, including those on (i) signing agreements with other states to enable resettlement of experts, witnesses or victims facing high dangers; (ii) changing their personal information or identities; (iii) transferring them to other workplaces or working posts, etc.
- (9) Vietnamese law, through a series of regulations, including Article 74 of the 1992 Constitution, Article 132 of the 1999 Penal Code, Article 65 of the 2005 Anti-Corruption Law (amended and supplemented in 2007), the 1998 Law on Complaints and Denunciations (amended and supplemented in 2004 and 2005), is substantially compatible with Article 33 of the UNCAC (on the protection of reporting persons). However, these regulations are insufficient to effectively protect corruption-reporting persons and their relatives. Therefore, the State should accelerate the formulation and adoption of new relevant legal documents guiding the protection of witnesses, whistleblowers and victims.

Legal mutual assistance on the ground of absence of dual criminality:

- (10) Through the provisions of the 2007 Mutual Legal Assistance, the 2003 Criminal Procedure Code and bilateral agreements on mutual legal assistance signed between Vietnam and many other countries, it can be seen that Vietnamese law is compatible with

Article 46(9)(b)&(c) of the UNCAC (on refusal to render mutual legal assistance on the ground of absence of dual criminality). In coming time, the State should maintain and study further expansion of the scope and measures of mutual legal assistance with regard to corruption crimes in the spirit of Article 46(9)(b)&(c) of the UNCAC and in accordance with relevant principles of Vietnamese law.

The apparatus of anti-corruption agencies:

- (11) Through relevant provisions of the 2003 Criminal Procedure Code, the 2002 Law on Organization of the People's Courts, the 2002 Law on Organization of the People's Procuracies and the 2005 Anti-Corruption Law (amended and supplemented in 2007), it can be seen that Vietnamese law is compatible to a certain extent with Article 11 (measures relating to the judiciary and prosecution services) and Article 36 (specialized authorities) of the UNCAC. However, Vietnamese anti-corruption agencies (including judicial agencies) have not yet fulfilled their important role in the prevention and combat of corruption for a number of reasons, such as (i) they have not yet enjoyed true independence in operation; (ii) the force of officers is inadequate and their technical equipment is limited; (iii) the ethical qualities of a number of officers, particularly those in justice agencies, are not high; and (iv) the functions and tasks of some agencies remain unclear and overlapping. Therefore, the State should study and further improve relevant legal documents in order to increase operational independence and effectiveness for specialized anti-corruption agencies as well as coordination between different agencies. To increase the independence of this system, the State should study establishing an anti-corruption body directly under the National Assembly.

Access to information on cases of corruption:

- (12) To a certain extent, access to information has been enshrined in Vietnamese law (Article 69 of

the 1992 Constitution, the 2005 Anti-Corruption Law, the 2007 Ordinance on Exercise of Democracy in communes, wards and townships, the 1989 Press Law, etc.) and is now codified into a separate law (Law on Access to Information- already included in the national strategy for prevention and combat of corruption through 2020). In Vietnam, a number of major corruption cases occurring over the past five years were reported in the mass media. Nevertheless, publicized information remains general, while complete records on these cases are only circulated internally in competent state agencies, and information on confirmed or suspected corruption cases is still slow. The State should adopt the Law on Access to Information, ensuring that the content of this Law is compatible to the highest extent with international norms and practices, especially concerning the scope of information possibly not to be publicized and the obligation of state agencies and officials in publicizing and providing information to the people and the press.

- (v) Consolidating and improving mechanisms to ensure participation of the public and civil society organizations in fighting corruption;
- (vi) Increasing forms, measures and raising effectiveness of education in ethics and laws on the prevention and combat of corruption in combination with improving living and working conditions for state officials and civil servants;
- (vii) Further increasing publicity and transparency by stepping up administrative and judicial reforms;
- (viii) Increasing physical foundations and professional qualifications and skills for specialized anti-corruption personnel;
- (ix) Further expanding international cooperation in the prevention and combat of corruption.

SUMMARY OF RECOMMENDATIONS

- (14) In the coming time the State should prioritize other actions to step up the fight against corruption in Vietnam, specifically:
- (i) Withdrawing the reservation not to abide by Article 20 and concurrently studying amendments to the 1999 Penal Code to regard illicit enrichment as a criminal offense;
- (ii) Amending and supplementing relevant legal documents for the realization of declaration and publicity of properties and incomes of civil servants and public employees not only within agencies and organizations but also to the public;
- (iii) Quickly, promptly and strictly handling newly arising corruption cases, especially those with major damage or impact;
- (iv) Completing the mechanism to recover properties acquired from corruption, including carrying out international cooperation in the recovery of these properties;