

MUTUAL LEGAL ASSISTANCE AND ISSUES OF ANTI-CORRUPTION AND ASSET RECOVERY THROUGH CORRUPTION CASES IN VIET NAM

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I. INTRODUCTION

Anti-corruption and asset recovery are emerging as global issues, and this requires countries to collaboratively work with each other and find out countermeasures for international cooperation in the field of criminal justice to deal with these plagues. This report discusses the issue of mutual legal assistance in criminal matters (MLA) and anti-corruption and asset recovery through corruption cases in the Vietnamese context.

II. MUTUAL LEGAL ASSISTANCE

A. Background of MLA

MLA may be generally defined as a mechanism in which one country, upon a formal request, provides another country with legal assistance for the purpose of investigation, prosecution, adjudication and execution of a criminal case. Legal grounds to conduct MLA are relevant international agreements and domestic laws. In addition, in the absence of such legislation, the principle of reciprocity can be used to seek legal assistance. The scope of assistance often includes obtaining evidence, service of legal documents, summoning of witnesses, victims etc., exchange of information, transfer of prosecution, extradition, execution of judgements and execution of search-and-seizure orders related to illegally acquired assets. There are certain requests for MLA that may be refused to be executed, such as when requests do not satisfy the principle of dual criminality or requests would prejudice the sovereignty, security, national interest or other essential interests of the Requested State. MLA, as a formal legal basis, has to be implemented via a central authority of each country. Requests for MLA made by competent authorities shall be submitted to the central authority of the Requesting State before being sent to the central authority of the Requested State for execution.

B. MLA Legislation

The Vietnamese legislation on MLA consists of the 2003 Criminal Procedural Code, the 2007 Law on Mutual Legal Assistance, MLA treaties between Viet Nam and foreign countries.

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1. The 2003 Criminal Procedural Code

Part VIII of the 2003 Criminal Procedural Code provides for basic principles on international cooperation in criminal justice of Viet Nam's judicial agencies. These principles are described as follows:

- International cooperation in criminal proceedings between procedure-conducting agencies of Viet Nam and foreign authorities with corresponding competence shall be implemented under the principles of respect for national independence, sovereignty and territorial integrity, non-intervention in internal affairs of each other, equality and mutual benefit, compliance with the Constitution of Viet Nam and fundamental principles of international law.

International cooperation in criminal proceedings shall be carried out in conformity with the international agreements to which Viet Nam has signed or acceded and the laws of Viet Nam.

- Where Viet Nam has not yet signed or acceded to relevant international agreements, international cooperation in criminal proceedings shall be effected on the principle of reciprocity but not in contravention of the laws of Viet Nam, international laws and international practices.

In relation to cooperation in MLA, provisions in the 2003 Criminal Procedural Code indicate that when granting MLA to foreign countries, the competent Vietnamese judicial authorities shall apply the provisions of relevant international agreements to which Viet Nam has signed or acceded and the provisions of the 2003 Criminal Procedural Code. The competent Vietnamese judicial authorities may refuse to execute foreign requests in one of the following circumstances: (1) Requests fail to comply with the international agreements to which Viet Nam has signed or acceded; (2) The execution of requests would impair the national sovereignty, security or other essential interests of Viet Nam.

2. The 2007 Law on Mutual Legal Assistance

The 2007 Law on Mutual Legal Assistance, which was introduced in 2007 and came into force in 2008, marked a breakthrough in the development of Viet Nam's MLA legal framework. As a separate law governing the MLA field, it provides for principles, competence and procedures of executing legal assistance in civil and criminal matters, extradition and transfer of prisoners between Viet Nam and foreign countries as well as responsibilities of Viet Nam's state agencies in MLA activities.

In terms of MLA in criminal matters, chapter III of the Law stipulates the scope of assistance including the following matters:

- Service of legal documents and other records concerning MLA in criminal matters;
- Summoning of witnesses and experts;
- Gathering and providing evidence;
- Transfer of criminal proceedings;
- Exchange of information; and

- Other assistance.

The Law also envisages kinds of requests which are likely to be refused or postponed, such as:

- Requests not in conformity with the obligation of Viet Nam under international agreements to which Viet Nam is a party and the Vietnamese laws;

- Requests would prejudice sovereignty, national security of Viet Nam;

- Requests relate to the prosecution of a person for an offence in respect of which the offender has been finally convicted, acquitted or pardoned in Viet Nam;

- Requests relate to an offence that could be no longer prosecuted by reason of lapse of time under the laws of Viet Nam;

- Requests relate to an act or omission that does not constitute an offence under the laws of Viet Nam.

Concerning information that must be contained in an MLA request, the 2007 Law on Mutual Legal Assistance provides that the MLA request must consist of the following:

- The name and address of the office by which the request is made;

- The name and address of the requested office or its head office to which the request is sent;

- The name of the person and his/her permanent residence or office address, the official name and address of an entity or organization or its head office to whom or which the request relates;

- A description of the assistance sought, the purpose of the request, the nature and relevant facts of the case, the provision and punishment of the applicable laws, the progress of the investigation, prosecution or court proceedings and the time limit within which the request should be executed.

In addition to the above information, the letter of request for assistance may include additional information:

- The identity, nationality and domicile of the person [the accused] to whom the case relates or the other who knows information sought that is related to the said case;

- Matters for which an interrogation is sought, a list of questions posed and, in cases of a request for the obtaining of evidence, a description of documents, records or items of evidence rendered and, if necessary, a description and identify of the person who is required to render such documents, records or items of evidence;

- The nature of tasks, a list of questions and requirements for the summoned witness or expert;

- In case of a request for search, seizure, tracing or confiscation of proceeds and/or instrumentalities of crime, a description of searched property and premises, the grounds to believe that the proceeds and/or instrumentalities of crime exist within the Requested Party and are possibly under the jurisdiction of the Requesting Party and the enforcement of orders or judgements of the court to which the request relates;

- Measures applicable to the request that would likely result in locating or seizing proceeds and/or instrumentalities of crime;

- Requirements or procedures that the Requesting Party wishes to be followed to facilitate the execution of the request, including forms or manners in which information, evidence, documents or items are provided;

- The degree of confidentiality required and the reasons thereof;

- The purpose, intended date and schedule of the trip if competent officers of the Requesting Party wish to travel to the territory of the Requested Party for the purpose of the execution of the request;

- The criminal judgement or order of a court and other documents, articles of evidence or information necessary for the execution of the request.

If the Requested Party considers that the information contained in the letter of request is not sufficient to enable the request to be dealt with under this Treaty, it shall request additional information in writing and set a specific date on which such additional information is received;

The request shall be made in writing. However, in urgent cases and permitted by the Requested Party, it may be made in another form but shall be promptly confirmed in writing thereafter.

The letter of request and its supporting document shall be in the language of the Requesting Party and accompanied by a translation into the language of the Requested Party or another language acceptable to the Requested Party.

It is worth mentioning that, according to the 2007 Law on Mutual Legal Assistance, the Supreme People's Procuracy of Viet Nam (SPP) is the Central Authority for mutual legal assistance. The Department for International Cooperation and Mutual Legal Assistance in Criminal Matters (ICD) of the SPP is directly in charge of handling MLA requests.

III. ANTI-CORRUPTION AND ASSET RECOVERY THROUGH CORRUPTION CASES IN VIET NAM

A. Relevant Legislation

The Vietnamese Penal Code stipulates corruption-related offences in its Chapter XXI – Part A, including 7 offences from Article 278 to Article 284, specifically:

- Offence of embezzlement (Article 278);
- Offence of bribery (Article 279);
- Offence of abusing power or position to appropriate property (Article 280);
- Offence of taking advantage of power or position while executing the State's duties (Article 281);
- Offence of abusing power while executing the State's duties (Article 282);
- Offence of taking advantage of power or position to put influence on another to seek benefits (Article 283);
- Offence of making false statements of forgeries in the State's business (Article 284);

Punishments applied to these offences range from definite terms of imprisonment to life imprisonment and the death penalty. The sentenced person can have additional punishments imposed such as pecuniary penalties, prohibition of holding positions for limited periods, and partly or wholly confiscating property.

B. Asset Recovery in the Fight against Corruption Crime

Corruption is conduct by those who have positions or power to intentionally appropriate property or benefit from illicit enrichment. It also causes extreme consequences and damages to the politics, economy and society. According to the definition in the Vietnamese Penal Code, "corruption is a conduct by those who use position or power to commit violations when executing the State's duties to gain benefits." Therefore, in order to effectively prevent and suppress corruption, apart from prosecuting the offender, there need to be measures to (1) recover property derived from corrupt acts, (2) remedy consequences caused by corrupt acts and (3) efficiently combat conduct of enrichment or money laundering. Of such measures, it is believed that asset recovery and confiscation are clearly strong and drastic means, heavily impacting the motivation and intentions of corrupt offenders. In addition to the prosecution of corrupt acts, tracing, restraining, seizing and confiscating proceeds of corruption can stop those who are intent on committing corrupt acts from thinking about doing such things. If one is aware that any proceeds of corrupt crime shall be recovered, he/she is much more likely to lose the intention or motivation to commit corrupt acts. If corruption is mainly imposed with punishment, the corrupt person can accept such punishment to, in return, enjoy the asset obtained from his/her corrupt acts, which should have been confiscated by the State. This argument is to emphasize that asset recovery is undoubtedly an effective measure to combat corruption.

C. Measures to Recover Proceeds of Corruption According to Vietnamese Legislation

Fully aware of the importance of asset recovery in the fight against corruption, Viet Nam has made relevant legislation to deal with proceeds of crime in general as well as corrupt property in particular. The Vietnamese criminal procedural legislation stipulates sufficient provisions to trace, seize, restrain and freeze proceeds of crime for the purpose of later confiscation. Among these provisions, Article 70-71 of the 2005 Law on Anti-Corruption set out general provisions to deal with proceeds of corrupt crime, particularly cross-border cases, including penal, administrative, civil and economic measures, particularly aiming at high-profile cases. Currently in Viet Nam, besides these provisions,

there is no separate law governing proceeds of crime.

D. The Penal Code

Generally, legal measures and schemes to deal with proceeds of crime are stipulated in the Penal Code, the Criminal Procedural Code, the Civil Code and other relevant legislation. The Penal Code is most relevant as setting out penal measures to deal with, recover and confiscate proceeds of crime, including corrupt property. Article 28 of this Code provides for (1) pecuniary penalty as either main or additional punishment and (2) confiscation of assets. More specifically, Article 30 of the Code states that pecuniary penalty as main punishment shall be applied to corrupt and drug offences or other ones. The offender shall be also subject to asset confiscation or pecuniary penalty as additional punishment. These penal measures are also set out as punishments for certain offences such as embezzlement or bribery; accordingly, those who commit these offences can be imposed with pecuniary penalty or confiscation of assets.

In addition to the above measures as punishment, Article 41 of the Penal Code stipulates judicial measures; accordingly, confiscation shall be applied to instrumentalities of crime, property or money having criminal origin. These measures have no punishable nature but are included in criminal judgements by the court and are ones which aim at proceeds of corrupt crime. The nature of these judicial measures is that in corruption cases, the offender shall not only be imposed with sentences such as definite terms or life of imprisonment but also any proceeds of crime shall be either confiscated or returned to the bona fide parties. What is more, Article 41 of the Penal Code provides that the offender can be forced to make compensation or restore the harm caused by criminal acts, including corrupt ones.

E. The Criminal Procedural Code

In order to enforce the above provisions in the Penal Code, the Criminal Procedural Code (Article 65) states that the investigation agency, the prosecutors' office and the court shall take procedural measures not only to prove criminal conduct but also to identify proceeds of crime for later asset recovery. Also, the Criminal Procedural Code set out specific schemes to seize objects/documents and restrain or freeze assets for the purpose of confiscation.

IV. ACHIEVEMENTS OF ASSET RECOVERY

The current status of the fight against corruption shows that corruption has massive economic and social consequences, driving a number of state-owned enterprises into bankruptcy. For high-profile cases only, the amount of proceeds of corrupt crime can be estimated at thousands of billions of VND, leading investing projects and business operations to decrease. Corrupt acts can often be breaching the State's economic regulations to obtain illegal assets or benefits and create economic consequences for state-owned enterprises. An example of this is the case of ALC II Company, a subsidiary of Agribank. The accused of this case embezzled 79 billion of VND and caused 390 billion of VND in damages to the State. However, the amount of asset recovery is inadequate when compared to these figures. Nevertheless, in recent years, the court prefers to apply more confiscating and compensating measures over corrupt cases. This implies that asset recovery will be a drastic means to combat corruption crime in the time to come.

V. CHALLENGES OF ASSET RECOVERY

- The number of corruption cases discovered and treated do not reflect the actual situation of corruption crime;
- The amount of proceeds of corruption crime traced and identified does not reflect actual size;
- There are few traces of proceeds of corruption crime as they can be laundered;
- Time consuming investigation, lack of resources and technical facilities;
- Difficulty in making information of property of officials accessible to the public and tracing property transactions;
- Rulings of the court unable to be fully enforced.

VI. POSSIBLE CAUSES

- It is often difficult to detect and investigate corrupt acts, particularly acts of embezzlement and bribery. The offenders can be state officials who hold certain positions and power and are capable of engaging in criminal acts and concealing proceeds of crime. Furthermore, in Viet Nam, there is a gap in the legislation to control cash flows, economic transactions and incomes.
- Proceeds of corruption crime can be turned into lawful assets through money laundering forms, including investing in business, stock markets and even gambling, etc. This leads to vast amounts of assets not being recovered.
- The offender accepts punishment and is not willing to cooperate with judicial authorities to return the assets.
- Mutual legal assistance channels do not work (no results of assistance aboard); difficulty in determining true values of assets, particularly shares, real estate, etc.
- Late actions taken to restrain and freeze proceeds of crime, which results in disposition.
- Lack of capacity of law enforcement officers, who are not experienced in financial and banking areas, economic investment and construction, which are needed to trace proceeds of crime.
- Asset recovery-related judgements by the court are sometimes not clear, consequently causing difficulty to be enforced.
- Weak legal framework as relevant provisions in the Penal Code and the Criminal Procedural Code are insufficient and obscure, which makes it difficult for law enforcement agencies to deal with proceeds of corruption crime.

VII. SOME SOLUTIONS TO ENHANCE EFFECTIVENESS OF THE FIGHT AGAINST CORRUPTION CRIME AND ASSET RECOVERY

In order to facilitate the fight against corruption as well as asset recovery, the following solutions can be taken into consideration:

- Economic policies and anti-corruption strategies must be improved to deal with current challenges of asset recovery and relevant provisions of the 2013 Constitution are required to be enacted;

- Assets of state officials must be properly listed in accordance with the 2005 Law on anti-corruption, aiming at the adequate control of the state officials' lawful incomes. This can be an effective measure to trace proceeds of corrupt crime;

- Strengthening power and competence of law enforcement agencies by amending relevant legislation; improving relevant legislation such as the law on anti-money laundering, the law on auditing, the law on inspection, etc.;

- Enhancing the function of supervision of the National Assembly and facilitating the ability of the people to supervise the operation of the state agencies;

- The Penal Code should be reviewed in the way that asset recovery measures play an effective role to confiscate corrupt assets, together with punishable measures;

- The Criminal Procedural Code should be reviewed; accordingly, some new provisions are recommended such as the role of the prosecutors' office in dealing with early crime reports, freezing measures applied to bank accounts, etc.;

- Improving provisions on evaluating the true values of proceeds of crime. The financial experts will play more important roles in criminal procedure to extract the amount of proceeds of crime from mixed assets.

- Improving capacity of law enforcement officers. They need to be trained with specialized knowledge in financial, banking, stock market areas, etc. to deal with proceeds of crime.

- Enhancing international judicial cooperation including mutual legal assistance activities, expecting this channel to be more and more effective in asset recovery.

VIII. PRIVATE AND PUBLIC COOPERATION IN ANTI-CORRUPTION

It is obvious that private enterprises are increasingly taking part in the prevention and suppression of corruption. They make a huge contribution to economic development and use public services the most; therefore, they are the most vulnerable to corrupt acts. Private enterprises play the role of "supplier" while state officials play the role of "demander" in a certain corruption affairs. Thus, one of way to prevent a corrupt act from occurring is minimizing "the supplier". In fact, private enterprises have in recent years been victims of

corrupt acts. However, they themselves have problems that tend to make bribery the way to win the business and breach the law to gain benefit, which may negatively impact on fair competition.

The link between private enterprises and corrupt acts and its consequences is clear; thus, the fight against corruption worldwide must take the role of the private sector into account. This is also indicated in relevant international legal instruments, including UNCAC. Nevertheless, public-private partnership in the fight against corruption has just been addressed in recent years in Viet Nam. This is because both the Vietnamese conception and legislation tend to consider corruption as a matter only occurring in the public sector. Aware that ignoring the private sector may fail in the fight against corruption, Viet Nam has changed its way of thinking, and new progress has made as the National Assembly is now discussing a draft amendment of the 1999 Penal Code; accordingly, corrupt acts can be understood to occur in both the public and private sectors and be committed by both those who are state officials and those who work in the private sector. Additionally, Viet Nam has made great efforts to improve the transparency of state agencies which often deal with applications and issue permissions to private enterprises. This is clearly an efficient approach to prevent corrupt acts from occurring in public-private relationships.