

# ASSET RECOVERY IN CORRUPTION CASES HANDLED BY THE PEOPLE'S PROCURACIES OF VIET NAM

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## I. INTRODUCTION

In recent years, the number of corruption cases that have been initiated, prosecuted, and brought to trial tends to increase, in which the illicitly acquired assets is mind boggling. In many cases, public funds and people's property as well were misappropriated resulting in damages up to thousands of billions of VN dong whereas success in asset recovery is limited.

The impediments to asset recovery may vary, but they, *inter alia*, can be identified as follows:

- Most of the money and property that are misappropriated by corrupters is spent or used for various purposes; therefore, these assets often cannot be recovered or returned;
- The corrupters used all methods and tricks to disperse or hide the money and/or property acquired by the crime before being discovered, seized or identified by criminal justice authorities;
- the process of tracing proceeds and conducting forensic work is time consuming and inadequate.

As a result, it is important to learn good practices and share information among ASEAN public prosecutors to enhance the success of asset recovery in prosecuting corrupt criminals.

## II. THE CONCEPT OF PROCEEDS OF CORRUPTION

Articles 2 (d) and (e) of UNCAC, which became effective in Viet Nam from 18 September 2009, contain the following definitions:

*“Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets; and*

*“Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;*

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Under Vietnamese law, the definition of property is set out in Article 105 of the Civil Code (2015):

*1. "Property" shall be things, money, valuable papers or property rights. 2. Property shall include immovable or movable property. Immovable or movable property can be existing or formed in the future.*

According to Article 1(2) of the Anti-Corruption Law 2005:

*"Proceeds of corruption" are property obtained or derived from corrupt acts.*

The definition of corrupt acts in Article 3 of the Anti-Corruption Law 2005 contains the 12 different acts specified below:

1. Embezzling property;
2. Taking bribes;
3. Abusing positions or powers to appropriate property;
4. Taking advantage of positions or powers while performing tasks or official duties for self-seeking interests;
5. Abusing powers while performing tasks or official duties for self-seeking interests;
6. Taking advantage of positions or powers to influence other persons for self-seeking interests;
7. Committing forgeries in work for self-seeking interests;
8. Offering bribes, bribe brokerage by persons with positions and/or powers to settle affairs of agencies, organizations, units or localities for self-seeking interests;
9. Taking advantage of positions or powers to illegally use state property for self-seeking interests;
10. Harassment for self-seeking interests;
11. Failure to perform tasks or official duties for self-seeking interests;
12. Taking advantage of positions or powers to cover up law violators for self-seeking interests; illegally hindering or intervening in the examination, inspection, audit, investigation, prosecution, adjudication or execution of judgements for self-seeking interests.

However, the corrupt acts under the current criminal code only consist of the 7 types specified below:

1. Embezzling property;
2. Taking bribes;
3. Abusing positions or powers to appropriate property;
4. Taking advantage of positions or powers while performing tasks or official duties;
5. Abusing powers while performing tasks or official duties;
6. Taking advantage of positions, powers to influence other persons for self-seeking interests; and
7. Committing forgeries in work.

The concept of "corrupt proceeds" in Viet Nam still has two different interpretations as mentioned above, so it may cause hindrance to the recovery of corrupt proceeds.

### **III. LEGAL FRAMEWORK FOR RECOVERY OF PROCEEDS OF CORRUPTION**

The recovery of corrupt proceeds is enforced during the process of detecting, handling, investigating, prosecuting, adjudicating and executing judgements in corruption cases. Thereby, the competent authorities may use measures in accordance with the law to recover proceeds of corruption, such as search, seizure, inventory search, freezing, confiscation of the proceeds obtained or deprived from corrupt acts.

As to the recovery of corrupt proceeds involving foreign elements, Article 71 of the Anti-Corruption Law 2005 stipulates that:

*On the basis of treaties to which the Socialist Republic of Vietnam is a party and under the basic principles of Vietnamese laws, the Vietnamese government shall cooperate with foreign governments in recovering Vietnamese or foreign corruption-related properties and returning such properties to their lawful owners.*

To date, Viet Nam has not adopted specific laws on confiscation and recovery of corrupt proceeds; however, under the current law, there are two main groups of measures to confiscate and recover proceeds of corruption as below:

- Group of criminal measures provided in the Criminal Code 1999, the current Criminal Procedure Code 2003 and the Criminal Procedure Code 2015 (effective in January 2018).
- Group of administrative and civil measures provided in the Civil Code 2015 and Civil Procedure Code 2015

#### **A. Group of Criminal Measures**

Under the provisions of Article 28 of the Criminal Code, the recovery of proceeds acquired by criminal offences shall first be enforced by the imposition of penalties, namely:

- Fine (principle penalty),
- Confiscation of property (as an additional penalty) and fine (as additional penalties when not applied as the principle penalty).

Pursuant to Article 30 of the Criminal Code, fines shall be applied as an additional penalty but not as a principle one.

Property confiscation is an additional penalty applied to a person convicted of corruption crimes for only two offences, including: Embezzling property (Article 278) and Receiving bribes (Article 279).

Article 42 of the 1999 Penal Code states: "The offender must return the property that has been appropriated to the owner or his lawful manager and must compensate for material damage which is determined to have been caused by the offense".

According to Article 41 of the Criminal Code, confiscation of objects and money that is directly related to crimes is enforced as below:

1. *The property confiscation for State funds shall apply to:*
  - a) *Tools and means used for the commission of crimes;*
  - b) *Objects or money acquired through the commission of crime or the trading or exchange of such things;*
  - c) *Objects banned from circulation by the State.*
2. *Things and/or money illegally seized or used by offenders shall not be confiscated but returned to their lawful owners or managers.*

Article 65 of the Criminal Procedure Code 2003 (corresponding to Art. 88 CPC 2015) stipulates that investigating bodies, procuracies and courts must proceed in accordance with the procedures by law to establish the offences and criminal proceeds in order to take measures to recover proceeds misappropriated by corrupt criminals.

However, the current provisions of law still have a number of shortcomings, such as: the difficulty in determining which of the defendant's assets are the corrupt assets due to lenient regulations on the asset declaration; the time-consuming process of identification of proceeds may allow the offender to disperse or hide the proceeds, making them very difficult to recover; lack of specific provisions creating powers, orders and procedures for the asset recovery.

Articles: 140, 142, 143, 144, 145 and 146 of the CPC 2003 (corresponding to Articles 128, 129, 192, 194, 195, 196, 197 and 198 of the CPC 2015) regulate the search, seizure, temporary seizure, distraint of property, documents and objects, and freezing bank accounts, which can be considered as the most powerful and effective measures in the asset recovery in general and for corrupt proceeds in particular.

Article 140 of the CPC 2003 (Article 192 of the CPC 2015) stipulates the grounds for search of persons, places of residence, workplaces, means, documents, articles, letters, telegrams, postal parcels and electronic data.

Difficulty: the process takes a long time, and great efforts are required to establish legal grounds that the corrupt proceeds could be hidden or spent by offenders through different means and tricks.

According to Article 146 (1) of the CPC 2003 and Article 128 (1) and Article 129 (1) of the CPC 2015, property distraint and bank account freezing shall only be enforced against the accused or defendant for the crimes for which the Criminal Code authorizes the imposition of fines or confiscation of property to secure compensation for damages.

Difficulties: In a number of cases, the corruption crime or other crimes do not provide for the immediate imposition of fines or compensation for damages. Instead, other crimes must be prosecuted, such as: negligence of responsibility, causing serious consequence (Article 285); deliberately disclosing work secrets; appropriating, trading in or destroying documents containing work secrets (Article 286); etc. These crimes do not permit distraint of assets until the corruption crime is initiated. Therefore, this is also one of the reasons for prolonging the time of tracking corrupt proceeds.

The property distrained or the freezing of a bank account shall be enforced in a value or an amount that is equivalent to the proceeds confiscated, the fine penalty, or in the amount of compensation for damages (Article 146 (2) of the CPC 2003, Articles 128 (3) and 129 (3) of the CPC 2015).

In numerous cases, while the entire suspicious property should be distrained as soon as possible, only a small portion of the property can be established as corrupt proceeds at an early stage. Such property distraint cannot guarantee the successful recovery of corrupt proceeds.

## **B. Group of Administrative, Civil Measures**

The Civil Code 2005 provides for the protection of property rights (Article 164), the right to reclaim property (Article 166), and the right to claim damages (Article 170).

Article 114 of the Civil Procedure Code 2015 stipulates 11 measures related to asset recovery as specified below:

1. Distraining disputed properties.
2. Prohibiting the transfer of property rights over disputed properties.
3. Prohibiting the change of the status quo of disputed properties.
4. Permitting to harvest and sell subsidiary food crops or other products or commodities
5. Freezing accounts at banks, other credit institutions, state treasury; freezing assets at depositories.
6. Freezing the obligors' properties.
7. Prohibiting or forcing the performance of certain acts.
8. Banning obligors from leaving the country.
9. Suspending tender closing and other activities related to tendering.
10. Arresting aircraft or ships to secure the settlement of the cases.
11. Applying other provisional emergency measures in accordance with the law.

Procedures for the application of measures to recover property are also set out timely in Article 133 (3) of the Civil Procedure Code 2015 as follows: *Within 48 hours after receiving the written request, the judge must consider and issue a decision to apply provisional emergency measures.* In contrast, the application of compelled measures such as distraining assets and/or freezing bank accounts in criminal proceedings is only enforced when the defendant has been officially charged for his crime.

#### **IV. ASSET RECOVERY ENFORCED BY THE VIETNAMESE PEOPLE'S PROCURACIES**

##### **A. Achievements**

In recent years, procurators have strictly supervised the investigation process that started right from the receipt of tips and reports of the crime to the conclusion of the investigation in every serious corruption case. In addition, procurators have requested the investigating body to take all necessary measures to recover proceeds obtained through or related to corrupt acts.

According to statistics on the results of detecting, investigating and dealing with corruption cases from 1 December 2012 to 31 May 2016 by the procuracies of all levels (except the procuracies of Lao Cai Province), the procuracies at all levels handled a total number of 1,091 cases with 2,296 accused persons; the number of cases to be resolved at the prosecution stage is: 1,037 cases with 1,843 accused persons; the number of cases prosecuted was 868 cases with 1,868 accused persons. The total damaged property in corruption cases is over 5,335 billion VN dong, of which, the total amount of assets misappropriated is more than 4,346 billion VN dong and only about 1.757 billion dong has been recovered.

In a number of corruption cases, a large portion of the proceeds has been detected, traced and successfully recovered. In particular, all the corrupt proceeds have been recovered in some cases as specified below:

- The case of Huynh Ngoc Si, 58, former director of the ODA-funded East-West Highway Project in Ho Chi Minh City, who was prosecuted for bribery, and his family has paid the full amount of 5,109,200,000 VN dong for his own criminal acts;
- The case of Nguyen Ngoc Thanh Tung, who was prosecuted for abusing positions and powers to misappropriate properties in Vietinbank, Bac Giang Province, the full misappropriated amount of 5.650 billion VN dong has been recovered;
- The case of Nguyen The Ngoc and his accomplices, who were prosecuted for embezzling properties, occurred at Petrovietnam Transportation Corporation, and the damages estimated at 3,774,302,109 VN dong have been retrieved; and
- Particularly, the recent case of Giang Kim Dat and his accomplices, who were prosecuted for embezzling property, occurred at the Vinashin Group, Ministry of Transport; the investigating agencies have investigated, traced and distrained his suspicious assets with the value greater than the alleged sum of money misappropriated by him (his distrained properties are worth 300 billion VN dong, exceeding the 260 billion VN dong that were allegedly misappropriated at the time the crime was committed).

##### **B. Shortcomings and Limitations**

According to the statistics mentioned above, the total damaged assets in corruption cases is more than 5,335 billion VN dong, the assets recovered were over 1,913 billion VN dong, accounting for only 35.9%. Although the percentage of assets recovered out of the misappropriated

assets was significantly higher than in the recovery of damaged assets, it still remained low at 40.4 % (1,757 billion VN dong recovered out of the total amount of 4,346 billion misappropriated).

Asset recovery that is enforced by the procuracies at all levels has also indicated shortcomings and limitations. In particular, in the following grand corruption cases, almost nothing has been recovered because the offenders have dispersed all property or cannot afford to pay damages:

The case of Pham Thanh Binh, former Chairman of VinaShin Group, and his 8 accomplices, who were prosecuted for intentionally violating state regulations on economic management, causing serious consequences; the compensation for damages must be over 1,100 billion VN dong, but by early 2016, the recovered amount was only 2.4 billion VN dong;

The case of Vu Quoc Hao and his accomplices, who were prosecuted for embezzling properties and intentionally violating state regulations on economic management, causing serious consequences. The embezzlement occurred at the Financial Leasing Company II, Agribank of Vietnam; damages to the state were more than 531.8 billion VN dong, but the recovered assets included only 5.8 billion dong, 4 houses and 1 land plot; and

The case of Huynh Thi Huyen Nhu, who was prosecuted for embezzling property and deliberately violating regulations on lending in the operation of credit institutions, with the compensation amount of nearly 14,000 billion VN dong; however, the distrained properties were estimated at about 500 billion VN dong.

### **C. Reasons for the Shortcomings**

(i) In the course of conducting criminal proceedings, the criminal justice authorities failed to promptly detect and take necessary measures to distrain and block the property, so the offenders and their relatives had enough time to conceal or seek to legitimize the illegal income and property by tricks, such as:

- Hiding their ownership by using their relatives' names for the illegal properties, or transferring money continuously many times through many persons to create a closed process to transfer those proceeds overseas to buy assets there; this is one of the main tactics that corrupters have implemented to date to disseminate corrupt property;
- Using shell companies that had been legally established for the purpose of laundering illicit money. These companies may be legally established in one country, but their main activity is carried out in another country or territory;
- Through casinos or recreational entertainment centers to launder corrupt money;
- Transferring money out to foreign bank accounts or bringing corrupt proceeds to flee abroad.

(ii) A number of investigators and procurators still lack professional capacity to recover corrupt proceeds, especially the general knowledge of budget management, finance, banking,

investment and construction. It is also one of the major impediments to the proper tracing and tracking of corrupt assets.

(iii) Some investigators and procurators, while investigating and prosecuting, have not been fully aware of their responsibilities and roles, lack of expertise and have inadequate qualifications to take all necessary measures to ensure the recovery of the damaged or appropriated property in corruption cases.

(iv) Limitations of the current legal system: Although Viet Nam has been a member of UNCAC since 2003 and enacted the Anti-Corruption Law 2005, which recognized and set out the principles and legal basis for taking necessary measures to recover corrupt proceeds, these provisions are too general, showing the objectives and principles of asset recovery, and not regulating the authority, order and procedures for recovery of corrupt assets as well as forcible measures to recover corrupt proceeds. In addition, the Criminal Procedure Codes 2003 and 2015 have not specifically provided for the order, procedures and competence to recover criminal assets in general and corrupt assets in particular. As a result, the responsibilities and roles of competent authorities in asset recovery and detecting proceeds have not been enhanced adequately.

The Law on Judicial Examinations 2012 stipulates issues related to financial, banking, construction and land evaluation too broadly and vaguely and provides no sanctions imposed on agencies, organizations or individuals that have declined or evaded their responsibilities for examinations or deliberately prolonged the process of examinations.

In addition, the current legislation has not set out the mechanism of coordination in the recovery of corrupt assets involving foreign elements. In particular, the Law on Mutual Legal Assistance 2007 lacks provisions on asset recovery and has not clearly defined the recovery of criminal proceeds as an issue that falls under the scope of criminal legal assistance.

(v) Obstacles in economic management, administration and judgement enforcement include:

- The mechanism controlling individuals' assets and income, the use of cash and the supervision over large transactions is still inadequate and loose;
- The identification of property damaged by corrupt acts in many cases is complex and time-consuming because corrupt assets often take many forms, are hidden separately in many different locations, and data in legal documents and records are incorrect;
- The offender, who is usually a person holding a high position with professional and legal knowledge, has set planning and uses sophisticated tricks to commit offences and hide corrupt proceeds;
- The handling of assets related to grand corruption cases is very difficult due to the fact that the value of the distrained property is often much less than the total amount of the illicit proceeds misappropriated by the corrupt offender;

- The offenders misappropriate properties with the intention of accepting imprisonment penalties to keep the property obtained through corruption for their offspring.