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Public Administration Reform and Anti-Corruption
A Series of Policy Discussion Papers

Criminalising Corruption: A Study of International Practices and Application for Viet Nam

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The series of *Policy Discussion Papers* on *Public Administration Reform and Anti-Corruption* is led and edited by Jairo Acuña-Alfaro, Policy Advisor on Public Administration Reform and Anti-Corruption at UNDP Viet Nam.

The series aims to analyze trends in Viet Nam regarding the implementation processes and options in specific public administration reform areas. In order to confront the social, economic, political and environmental challenges facing Viet Nam, policy makers need to be informed by evidence. These policy papers aim to contribute to current policy debate by providing discussion inputs on policy reforms – thereby helping to improve Viet Nam's development efforts.

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Table of Contents

Executive Summary and Policy Recommendations

The overall policy rationale for reform is explicit. First, levels and types of corruption are increasing. Not only will they adversely impact on Viet Nam's chosen path of economic development but the potential for them to become pervasive and entrenched will emphasise the increasingly visible disparities between the state, public officials and the citizens. Second, there are weaknesses in terms of the coherence of the Articles in the Penal Code and the need to review and amend the language of existing Articles to bring it in line with other countries. Third, in terms of an overview of the current legislation and in comparison to international good practice, the legislation does not address new areas of corruption, including bribe-giving, private sector corruption and the offence of bribing a foreign public official (PFO). Fourthly, the reform of Vietnam legislation, which should be grounded in the risks and threats of corruption faced by Viet Nam, is an essential platform on which to provide a more integrated legal framework with the Anti-Corruption Law (ACL). In turn this framework is necessary to address and revise the current institutional and procedural arrangements so that they are fit-for-purpose in achieving a more effective implementation of the revised legislation.

There are three policy options facing Viet Nam in terms of addressing corruption. First, there is the option of doing nothing. The second policy option is limited reform, primarily focused on compliance with the United Nations Convention on Anti-corruption (UNCAC). The third option is a substantive revision of the Penal Code and its use as a platform for reform to the institutional and procedural arrangements for effective implementation. The policy point is that Vietnam can opt for a minimalist approach of simply amending the Penal Code to comply with the formal-legal requirements of UNCAC with little or no reference to either the emergence of new types of corruption, new ways of sanctioning offences, and the institutional-implementation issues. It can also opt for the opportunity for, given the implications for progression along the Middle-income Country (MIC) trajectory, for state legitimacy and for external compliance with future Financial Action Task Force requirements, a comprehensive and timely reform process that addresses holistically the causes and consequences of corruption, the legislative framework and the necessary institutional and procedural arrangements to implement the law effectively. In view of the external and internal issues raised, the third policy option is essential.

In light of international experiences and the various internal and external reports on the law, this policy report makes specific recommendations within which to begin the reform process by a substantive revision to the Penal Code.

It argues for: a revised and expanded Section on Crimes of Corruption that encompasses public and private sectors; and a revised Section on Crimes of Public Office specifically for the public sector.

The revised *Crimes of Corruption* section will comprise:

Bribery:

- a revised Article on Receiving Bribes (Article 279; although divisible if there needs to be a distinction between public and private sectors).
- a new Article on Giving Bribes (Article 289; although divisible if there needs to be a distinction between public and private sectors. Legal entities will be included as offenders).
- a new Article on bribing a Foreign Public Official or Official of an International Organisation.

Abuse of Office:

- a revised Article on Misuse of Office to Appropriate Property (Article 280).
- a revised and merged Article on Abuse/ Misuse of Office (Articles 281, 282).
- a revised Article on Undue Influence/Trading in Influence (Articles 283 and 291).
- a revised and merged Article on Profit from Public Office (Articles 278, 284)

The new *Crimes of Public Office* section should comprise:

Prevention of Corruption:

- a new Article of failing to disclose a conflict of interest
- a new Article of failing to disclose illicit assets
- a new Article of failing to register assets

Conduct in Public Office:

- Article 285: Negligence of responsibility, causing serious consequences
- Article 286: Deliberately disclosing work secrets; appropriating, trading in or destroying documents containing work secrets
- Article 287. Unintentionally disclosing work secrets; losing documents containing work secrets
- Article 288. Deserting one's posts

The report makes it plain that reform of the Penal Code must be a platform for consequential and necessary legislative, institutional and procedural reforms to ensure effective implementation. These should include changes to the ACL and to the roles and responsibilities of agencies engaged in anti-corruption work, to the use of expertise and specialist techniques, and to the use of a portfolio approach to sanctions, and the interdependence of offences (such as the failure to declare assets as the basis for an offence of possessing illicit assets), and debarment.

Much of the approach to the revision of the Penal Code will benefit from international good practices which have a number of common themes; none present any insurmountable difficulties as the basis for realistic and feasible reform in the Viet Nam context. Most countries undertake substantive Penal Code reform, often with overarching objectives (including the impact of corruption on the social, political and economic development), so that the Penal Code provides an effective framework for implementation. The report concludes that few if any countries had a Criminal Code or Penal Code that, in its entirety, would be suitable for substantive transfer or adaptation. On the other hand, specific articles in many states may be suitable as a template or benchmark as the basis for revising Articles in the Viet Nam Penal Code.

On this basis the report recommends that it is essential Viet Nam clarifies, consolidates and updates the existing legislative framework – and in so doing provide the basis for institutional and procedural reforms - if Viet Nam is to address corruption effectively. It should be noted that all the issues identified in this report are recognised by the Vietnamese authorities and by both internal and external reviews. All recognize that corruption is systematic and structural, not only reflecting the dynamic nature of corruption and the time-lag in legislative and institutional capacity and effectiveness catching-up with changes in types and levels, but also the potential adverse consequences of tinkering with rather than substantially reforming the legislative and institutional response.

The Vietnamese 2009 National Anti-corruption Strategy (NACS) was explicit about the necessity of structural reform: 'eroding the confidence of the people in the leadership by the Party and the management by the State, giving rise to potential conflicts of interest, social resistance and protest, and widening the gap between the rich and the poor. Corruption has become a major obstacle for the success of *Doi Moi* process and the fighting force of the Party, threatening the survival of the regime'.

Externally, and of more significance for Viet Nam than a focus on compliance with UNCAC, are concerns expressed by foreign investors and their governments, and the changes to the increasing intervention of the Financial Action Task Force.

Thus structural reform at a number of levels is an essential process in both the economic development of Viet Nam but also the legitimacy of the state, with the first step involving revisions to the Penal Code as the platform for further legislative, institutional and procedural reform and where this step will benefit from consideration of how other countries have reviewed and revised their legislation.

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Why Addressing Corruption Is Important: Vietnam's Development Trajectory

Policy Context and Report Structure

This report makes specific policy recommendations for the reform of the Penal Code of Viet Nam. Viet Nam faces increasing levels of corruption that is becoming entrenched, creating the risk not only of alienating the citizens from the state but also of negating the effects of an emerging middle-income country (MIC[1]).

The policy recommendations are grounded in, firstly, understanding the relationship between economic development and corruption and, secondly, a review of internal and external assessments of the adverse consequences of the presence and pervasiveness of corruption and the generally agreed weaknesses of the current legislative framework, in Viet Nam. Thirdly the recommendations draw on a comparative legal/institutional analysis approach to examine what works, what does not and why for a selected number of Penal Codes regarding the criminalisation of corruption and thus what may be relevant to informing the reform process in Viet Nam.

The recommendations are made because, both in terms of comparisons with other countries and in in terms of providing an appropriate legislative framework to address contemporary levels and types of corruption and to facilitate institutional and procedural anti-corruption arrangements, the Penal Code of Viet Nam is no longer sufficiently comprehensive, coherent and up-to-date.

The report recommends that it is essential Viet Nam clarifies, consolidates and updates the existing legislative framework – and in so doing provide the basis for institutional and procedural reforms - if Viet Nam is to address effectively corruption that is, and will continue to be, an integral and worsening aspect of its development trajectory as an emerging MIC.

Corruption and Development Issues for Emerging MICs

The corruption facing Viet Nam is both a consequence of its specific developmental trajectory and, more generally, a negative consequence of economic development that faces most MICs. The Vietnamese 2009 National Anti-corruption Strategy (NACS) was explicit about its pervasive presence: 'corruption is still taking place in a rampant, serious and complicated fashion in multiple areas, especially in such areas as administration and use of land, construction investments, equitization of SOEs, management and use of funds, natural resources, mineral resources and State assets'.

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[1] The High-Level Conference of Middle Income Countries (www. http://micconference.org) notes that the term 'middle-income country' (MIC) has no single definition; a widely used definition is that of the World Bank, dividing the MICs in an upper and lower segment based on per capita gross national income. In the United Nations system the category of middle- income countries is often utilized to refer to developing and transition economies not categorized as least developed countries. Among the 90 or more countries so classified, a number of MICs have been identified by a number of organisations, such as Goldman Sachs and the *Economist,* as expected to continue progress economically. Often grouped (and badged by an acronym), these include: Brazil; Russia; India; China; Turkey; Indonesia; Mexico; Philippines; Bangladesh; Egypt; Iran; Nigeria; Pakistan; South Korea; Vietnam; South Africa; Colombia.

Such issues are not unique to Viet Nam. For MICs there is inevitably a greater time-lag between legislative and institutional reform, and the emergence of some of the more visible - and adverse - consequences of wider policy agendas. In terms of economic development this can be particularly true in terms of inequalities in the accumulation of material wealth, in the provision of public services, in the rise of extortive use of public office. Reform is hampered bythe issue of 'institutional capacity constraints in managing the reform agenda' (World Bank, 2001: 22) and by the development of an *ad hoc* and often conflicting business 'environment of excessive regulation and ineffective enforcement' leading to rules and regulations that 'are not binding and are therefore ineffective as tools of government policy' (Tenev et al, 2003: xiii). Both provide the context for tax avoidance, misallocation of resources, informal self-interested networks and corruption.

In such circumstances the failure to develop an appropriate governance framework means a failure'to impose normative constraints on predatory elite behavior that would result in an allocation of public resources based on ethical universalism' (Mungiu-Pippidi, 2013: 102), reinforcing disparities of income, diluting reform efforts and encouraging corruption as the currency of business, political and public administration relationships.

Unless addressed as a policy priority, corruption may become 'both a fundamental cause for, and inevitable consequence of, weak state authority.... Corruption distorts state behaviour by allowing bureaucrats to intervene in areas where they should not, while undermining their capacity to act efficiently in those areas where they are urgently needed. Most importantly, corruption weakens the state's ability to gain consent for, and enforce compliance with, rules and institutions by undermining the public's trust that these rules and institutions were designed to be fair and to be enforced without discretion or prejudice' (European Bank for Reconstruction and Development, 1998:23-24).

Certainly a review (see Table 1: Doig, 2013) of emerging MICs shows general similarities in terms of GDP growth since 2008 and in terms of incremental HDI trends over the same period.

Table 1: Middle-Income Countries

Grouped acronym[1] by investment analysis	Listed on other grouped acronym	Country	GDP growth 2008/10/12 (world bank)			TI CPI 2008/10/12			World Bank control of corruption 2008/10/12 % ranking lowest=worst			Global integrity Anti-corruption performance [90+ is strong]		HDI trends 2008/10/12 in terms of broad categories of a long and healthy life, knowledge and a decent standard of living.			
						180	178	174				2006/7/8	2009/10/11	08	10	12	Current rank (higher = worse)
						Total countries											
BRIC		**BRAZIL**	5.2	7.5	0.9	80	69	69	58	59	56	73	76	0.716	0.726	0.73	85
		RUSSIA	5.2	4.5	3.4	147	154	133	12	14	16	69	71	0.778	0.782	0.788	55
		INDIA	3.9	10.5	3.2	85	87	94	44	36	35	75	70	0.533	0.547	0.554	136
		CHINA	9.6	10.4	7.8	72	78	80	35	32	39	59	64	0.672	0.689	0.699	101
TIMP	N-11 CIVET MIST	**TURKEY**	0.7	9.2	2.2	58	56	54	61	59	63	69	68	0.704	0.715	0.722	90
	N-11 CIVET MIST	**INDONESIA**	6.0	6.2	6.2	126	110	118	34	25	29	69	81	0.601	0.620	0.629	121
	MIST	**MEXICO**	1.2	5.3	3.9	72	98	105	50	45	43	63	68	0/764	0.770	0.775	61
	N-11	**PHILIPPINES**	4.2	7.6	6.8	141	134	105	25	22	33	71	57	0.642	0.649	0.654	114
N-11		**BANGLADESH**	6.2	6.1	6.3	147	134	144	14	14	21	68	70				
	CIVET	**EGYPT**	7.2	5.1	2.2	115	98	118	27	34	14	54	54	0.647	0.661	0.662	112
		IRAN	2.3	-	-	141	146	133	28	16	24	-	-	-	-	-	-
		NIGERIA	6.0	8.0	6.6	121	134	139	21	15	11	64	60	0.453	0.462	0.471	153
		PAKISTAN	1.6	3.5	4.2	134	143	139	22	13	14	72	68	0.502	0.512	0.515	146
	MIST	**SOUTH KOREA**	2.3	6.3	2.0	40	39	45	68	69	70	-	88	0.895	0.905	0.909	12
	CIVET	**VIETNAM**	6.3	6.8	5.0	121	116	123	26	31	35	47	44	0.597	0.611	0.617	127
CIVET		**SOUTH AFRICA**	3.6	3.1	2.5	54	54	69	63	61	54	79	79	0.613	0.621	0.629	121
		COLOMBIA	3.5	4.0	4.0	70	78	94	50	43	42	71	80	0.704	0.714	0.719	91

[1] Acronyms are designed by investment and commentator sources in terms of favoured emerging markets and are based on countries' first character. Thus: BRIC [Brazil, Russia, India, China]; TIMP [Turkey, Indonesia, Mexico, Philippines]; N-11 [Next Eleven: Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, Philippines, Turkey, South Korea, Vietnam]; MIST [Mexico, Indonesia, South Korea, Turkey]; CIVET [Colombia, Indonesia, Vietnam, Egypt, Turkey, South Africa].

On the other hand, many of the emerging economies in Table 1 show static or worsening levels of corruption, according to the WBI Control of Corruption and TI Corruption Perception indicators, and increased levels of uneven economic development and potential political instability – see Table 2 for SE Asia countries.

Table 2: Unevenness in Developmental Trends; Selected SE Asia countries

GLOBAL 'FAILED STATES' RANKINGS		Total	Uneven Development	Poverty and Economic Decline	Legitimacy of the State	Public Services	Human Rights	Security Apparatus	Factionalized Elites
2008	Philippines	83.4	7.6	5.9	8.3	5.9	6.8	7.4	7.8
	Indonesia	83.3	8.0	6.3	6.8	6.7	6.8	7.1	7.0
	Vietnam	74.6	6.2	6.1	7.2	6.0	7.0	6.4	6.9
	Malaysia	67.2	6.9	4.2	5.9	5.1	6.5	6.3	5.7
	South Korea	40.6	2.4	1.6	3.9	2.0	2.7	1.0	3.3
2013	Philippines	82.8	6.5	5.6	7.6	6.4	6.7	8.7	8.0
	Indonesia	78.2	6.9	5.5	6.4	6.1	6.5	6.8	7.0
	Vietnam	73.1	5.8	6.2	7.8	5.8	7.5	5.4	6.9
	Malaysia	66.1	5.9	4.1	6.2	4.5	7.1	6.0	6.8
	South Korea	35.4	2.9	2.0	2.9	1.9	2.6	2.1	3.6

Source: Failed States Index (where max (and worst) Total score = 100 and individual category scores = 10 (with 10 the worst)

In tracking the developmental trajectories of former communist states in Eastern Europe, the Baltic and the Balkans the European Bank for Reconstruction and Development has identified three relevant factors that concern the presence and potentially adverse consequences of corruption on development trends. First, corruption at street level – involving those institutions with whom the citizen is likely to interact on a daily basis – is significantly linked to a lack of trust in the state. Second, there is a correlation between state intervention, access to state funding and corruption in terms of state enterprises that continue to have close links with the state (see Hellman and Schankerman, 2000; Nguyen and Dijk, 2012). Finally there is the failure of the state to develop its own coherent, citizen-focused national identity because of the countervailing influence of short-term alliances and elite profiting from the initial success of economic development – see Box 1 (see also Khan, 2009).

Box 1: Corruption and Transitional Progress

The greater the concentration of economic gains in the first years of transition – when the state itself is still in the process of transformation – the greater the ability of those winners to 'capture' the political process and prevent further reforms in the next phase... The combination of a weak state and an extreme concentration of market power in many transition countries has created a policymaking environment characterised by the capture of the state by powerful economic interests, discretionary intervention by state bureaucrats into the market and high levels of corruption. In this environment, the state has been unable to finance itself in a sustainable way, to enforce a proper regulatory framework for the rapidly expanding financial markets or to respond credibly to economic shocks. Nor has it been able to enforce hard budget constraints on enterprises, to promote good corporate governance or to maintain investor and popular confidence in the market.

Source: European Bank of Reconstruction and Development, 1998: 24

In reform terms, corrupt conduct is clearly a significant issue in terms of the waste of public resources, distortion of market activities and the linear trajectory of an emerging economy; 'corruption is found to be negative and significantly correlated with real per capita GDP, tertiary education and economic freedom' (Saha and Gounder, 2009:15).

Of more importance for the legitimacy and stability of the state, however, is misuse of public office as a breach of public trust between it and all its citizens, as the 2012 review noted in stating that the intrinsic nature of corruption is as 'a criminal breach of trust by a public official (Painter et al, 2012: 41; see also see Box 2). Addressing the consequences of the breach of trust, whether corruption, abuse of office, and so on, is an important response but it in itself will remain less than effective if it focuses primarily on the public officeholder rather than the nature, roles and perceptions of public office. Certainly, research elsewhere has already argued that there 'will be a greater payoff for performance improvement in terms of trust in individual institutions when the performance matters to citizens and that there is 'no widespread perception of a deterioration in accountability and honesty in public life' (World Bank, 2008: 211).

Box 2: Trust in Public Office

Breach-of-trust law reflects an 'ancient and important' principle — that public officials have a duty to use their offices for public good, not private benefit. This duty lies at the heart of good governance. It is essential to retain the confidence of the public in those who exercise power.	Public office is a public trust: public officers are but servants of the people, whom they must serve with utmost fidelity and integrity
Source: Canada Supreme Court, 2006	*Philippines: Presidential Decree No. 749*

More widely in terms of MIC progress, however, the European Bank of Reconstruction and Development has warned that 'one further obstacle to progress in meeting the challenges of the next phase of transition is rooted in the power structures inherited from the early years of transition. Incomplete or imbalanced economic reforms at the very start of transition tended to generate flawed markets that often yielded extremely high benefits for small groups while imposing costs on the rest of society...To the extent that reforms in the next phase of transition reduce or eliminate these market flaws, they should be expected to provoke fierce opposition from those groups that initially gained from the rent-seeking opportunities. Indeed, it is often the biggest "winners" of the first phase of reform that constitute the most difficult obstacles to the necessary reforms of the next phase' (1998: 24).

Corruption in Viet Nam: External and Internal Reviews of Corruption, Causes and Consequences in Viet Nam

External

External assessments of the corruption issues in Viet Nam reflect a consensus in both its pervasiveness and seriousness, and the threat it poses to state legitimacy and economic progress.

The 2009 World Bank report *Modern Institutions* identifies corruption at all levels in Viet Nam, from the pharmaceutical supply chain to land registration, and implementation weaknesses from evidential issues through to institutional independence. Corruption and its impact on continuing economic development is a key issue identified by a range of organizations (see, for example, the Business Anti-corruption Portal at *www.business-anti-corruption.com*; Canadian Trade Commissioner Service, 2011) but calls for reform also emphasise the lack of official response; the same concerns were identified a decade ago when businessmen believed 'that corruption is perhaps the single largest threat to social stability and economic development in Vietnam' but where 'a dramatic reduction in corruption will not occur without broader structural change' (Tenev, 2003: 87).

It is also clear that citizens are well aware of the negativity with which corruption influences perceptions of the state and public officials. In terms of the 2010 TI Global Corruption Barometer, 44% of the population reported paying a bribe in 2010; 63% felt that the level of corruption was increasing (the 2010 Joint Donor Report survey found that 65% thought corruption was a major problem). The Formin/CECODES survey (2008) reported widespread corruption, with it generally assumed that networks and connections determined position and status – and anyone in positions of power had the potential for corruption. The 2012 World Bank Report on perceptions confirmed earlier findings, with little variation between citizens, public officials and businesses about the extent of corruption and with causes identified as petty bribes, poor sanctions, absence of effective sanctions and transparency, unwillingness to take action on allegations, bureaucratic procedures, and so on.

The evidence also suggests that perceptions are well-founded; the Joint Donor Report survey found that over 70% of officials took bribes or misused public funds and assets for private benefit, especially in relation to land management and construction. Enforcement agencies were weak and ineffectual, particularly when dealing with party members, while the intended engagement of citizens in a supervisory role has not been implemented, again because of party influence.

Box 3: Making the Connections Between Development, Trust and Breach of Public Office in Vietnam

Farmers can legitimately claim that they bear a disproportionate burden of the costs of Vietnam's modernization. Meanwhile the profits derived from land transformation benefit land developers and their official associates. This has worsened the distribution of wealth in the country, slowed poverty reduction in rural areas, and fostered social disharmony. Specifically, compensation and clearing of land for investment projects has become increasingly contentious in the face of farmer resistance and demonstrations.

Source: Joint Policy Brief, 2013

Internal

When seen as a whole, the inter-dependence between disparities, corruption and trust in the state are apparent – see Box 3 – as well as the weaknesses of the legal and institutional frameworks to address such issues. Nevertheless, and in contrast to external assessments which identify systematic issues in terms of institutions and procedures as well as the existing laws, official internal assessments have, apart from the criticisms in the NACS, been both more limited and more focused on reforms to the Penal

Code consequential on signing the United Nations Convention Against Corruption (UNCAC). In order to take forward the issues raised in the NACS, and to assess how far such a response is sufficient, this report undertook fieldwork as part of the review to explore further official perceptions (for a thorough examination of the law as the basis of the further fieldwork, see Dao, 2010).

Through interviews and discussions with as well as seminars held by different Vietnamese authorities (the Internal Affairs Committee of the Vietnamese Central Committee of Communist Party, Inspectorate of the Party, Judicial Committee of National Assembly, GI, Ministry of Justice, Ministry of Public Security, Supreme Procuracy, Vietnam Lawyers Association, Vietnam Bar Association) and with practitioners (including lawyers, judges, investigators) as well as assessing media and official reports on results of detecting and punishing corrupt practices, the report concluded a number of findings:

- there is a consensus of opinion and perception on the seriousness and prevalence of corruption in Vietnam. The interviewees all confirm the significance of the situation of corruption in Vietnam and the need to strengthen tools to fight corruption, including the Penal Code;

- there is general agreement that anti-corruption efforts are not effective in spite of the fact that there are several party and government agencies in charged with anti-corruption. For instance in the September 2013 discussion of the Steering Committee of National Assembly on the Report on detecting and dealing with corruption by the GI the Deputy Chief of the Supreme Procuracy noted that there are many cases of corruption but most offenders are only punished by administrative sanctions. Very few cases were treated as crimes under the relevant section of the Penal Code which meant few criminal convictions (in one province, of 804 corruption-related cases only two were prosecuted). He also raised the possibility that anti-corruption bodies themselves could be corrupted;

- Vietnamese agencies[1] have reported on ineffectiveness of the anti-corruption activities; for example Report No. 4988 by the Ministry of Plan and Investment on July 16, 2013 on detecting and dealing with corrupt activities within responsibility of the Ministry of Plan and Investment, stated that from 1st January 2009 to 30 April 2013 Inspectorate and other authorities of the Ministry through inspection detected and requested for sanctioning corrupt activities with 115 cases through economic measures while 25 cases punished by administrative sanctions (no case was transferred for criminal investigation);

- according to interviewees from the Internal Affairs Committee of the Vietnamese Central Committee of Communist Party, bribery is the most prevalent form of corruption[2]. Interviewees from the Judicial Committee of National Assembly, GI and the Vietnam Bar Association also pointed to the existence of corruption in the private sector and the need to address illicit enrichment. They all acknowledged that, with economic development and changes in economic structure in Vietnam, there was a need to criminalize corrupt activities in the private sector. They saw the need to criminalize illicit enrichment to be effective tool for confiscation of corrupt assets but they were still unclear about the criminalization of such act in the context of Vietnam;

[1] For example, in interviews with the internal Affairs Committee of the Vietnamese Central Committee of Communist Party. The Judicial Committee of National Assembly noted similar concerns in the draft Report on Supervisory Results of 'Law Enforcement in Dealing with Corruption Crimes and Position-related Crimes', as did the GI in the Report No.1421 on Detecting and Punishing corrupt activities within Responsibility of Administrative Agencies on 28th June 2013.

[2] Other sources suggest that embezzlement and abuse of office comprise the majority of cases 2008-2010 (see Dao, 2010; Phuong, 2010).

- all interviewees were concerned that the Penal Code should be amended in terms of anti-corruption provisions. They already recognized weaknesses in the Penal Code from anti-corruption perspectives, both within the existing provisions and in the lack of legislation dealing with new areas of concern in relation to corruption. Interviewees from GI considered that the Penal Code met some standards of UNCAC in terms of criminalization but the elements of the offences were not clearly prescribed and caused difficulties in terms of interpretation and proof (for example, the element of 'abuse of position/power', what is 'material nature' in terms of a bribe, and so on). There was also concern about the overlap between offences and there allocation of offences in two separate sections in the Penal Code. Finally, the concept of position/power holders was limited and needed reviewing.

While the various official agencies are aware of the issues both of the weaknesses of the legislative framework and of new areas where corruption is an issue, they are in general very much focused on the Penal Code and on areas that UNCAC require to be addressed. Thus the Deputy Director of 1B (the Department in charged with prosecuting corruption crimes within the Supreme Procuracy) considered that there is a need to consolidate corruption-related Articles in the Penal Code. Interviewees from Judicial Committee of National Assembly, the Ministry of Justice, Bar Association noted the lack of provisions on bribery of foreign public officials (FPO) and corruption in the private sector while the Judicial Committee of National Assembly, the Ministry of Justice, GI, and the Bar Association support the criminalization of legal entities.

What is in Place: The Current Legal and Institutional Context for Addressing Corruption

Overview of the Legislative Framework

Certainly the legal framework is neither up-to-date, and nor implemented effectively. The Penal Code covers most types of corruption and prescribes elements of each offence to a certain extent. The penalties provided in the Penal Code reflect, however, a strict treatment of such offences, reflecting – in terms at least of criminal law policy – a formal-legal determination of Vietnam to sanction bribery. Vietnamese criminal law also covers notable types of corruption but not all; bribery of FPOs and officials of international organizations is neither expressly covered in bribery provisions nor separately provided for (although in principle these could be criminally punished under the same provisions as is domestic bribery along with the general provisions on the applicability of Vietnamese criminal law). Corruption in the private sector has not been criminalized while 'gift-giving for making future good relations' and 'gift-giving for showing gratitude' have been theoretically discussed but have not been covered by criminal law. Further, the lack of criminal liability of legal entities makes the law limited in dealing with corruption in the context of an economically developing society (see also Painter et al, 2012).

The key sources of anti-corruption law in Vietnam are the 2005 Law on Prevention and Combating Corruption (ACL; No 55/2005/QH11, as amended in 2012) and the 1999 Penal Code. The ACL is the primary anti-corruption statute which prescribes the various forms of corruption. The Penal Code (No15/1999/QH10 as amended by Law No 37/2009/QH12) deals with separate corrupt offences and set out specific penalties therefore. Other sources are several relevant ministerial Decrees and circulars. The relevant sections of the Penal Code are shown in Box 4.

Box 4: Relevant Penal Code Sections

Section A. Crimes of Corruption		**Section B. Other Crimes Relating To Position**	
Article 278.	Embezzling property	Article 285.	Negligence of responsibility, causing serious consequences
Article 279.	Receiving bribes		
Article 280.	Abusing positions and/or powers to appropriate property:	Article 286.	Deliberately disclosing work secrets; appropriating, trading in or destroying documents containing work secrets
Article 281.	Abusing positions and/or powers while performing official duties	Article 287.	Unintentionally disclosing work secrets; losing documents containing work secrets Deserting one's posts
Article 282.	Abusing powers while performing official duties	Article 288.	Offering bribes
		Article 289.	Acting as intermediaries for bribery
Article 283.	Abusing positions and/or powers to influence other persons for personal profit	Article 290. Article 291.	Taking advantage of one's influence over persons with positions and powers to seek personal benefits
Article 284.	Falsifications in the performance of public functions		

In relation to corruption-related offences Chapter 1 of the ACL extends the range of offences; its current iteration is provided in Box 2.

Box 5: Corrupt Acts under the ACL

Article 3 (1) – (7): 2005
(unchanged in the 2005 law and subsequent revisions, reflecting Articles in the Penal Code)
1. Embezzling properties.
2. Taking bribes.
3. Abusing positions, powers to appropriate properties.
4. Taking advantage of positions, 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, powers to influence other persons for self-seeking interests.
7. Committing forgeries in work for self-seeking interests.

(corresponding to and expanding Articles 8-12 in the 2005 law, as amended in 2012)
1. Giving bribes and brokering bribes committed by people in positions of powers to do self-seeking works of an organization, including:
2. Self-seeking abuse of power to illegally use state property for personal benefits
3. Self-seeking harassment is authoritative and imperious acts that cause difficulties and annoyance when performing duties in order to force other organizations and individuals to pay unprescribed fees, or other acts for the benefits of the harassing person.
4. Self-seeking failure to perform duties is deliberate failure to perform assigned tasks or duties or failure to comply with the authority, order, procedure, and time limit related to their tasks and duties to serve their personal affairs.
5. Self-seeking abuse of powers to protect violators of laws to serve their personal affairs; obstruction and illegally intervening the inspection, investigation, audit, prosecution, and judgment implementation for self-seeking purposes.

Analysis of Current Legislation

The Penal Code of 1999 (as amended 2009)

Corrupt offences are currently dealt with in the Vietnamese Penal Code, including recent amendments; these include the separation out of the offence of acting as an intermediary for bribery as an independent offence. The second change is the abolition of the death penalty from the range of punishments for giving a bribe and acting as an intermediary for bribery.

In comparison with acts that should be criminalized under the UNCAC, corruption offences under the Penal Code are not comprehensive. In addition, some corrupt acts prescribed in the ACL are not considered as corruption offences under the Penal Code, such as bribe giving by public officials, illegal use of public property by abuse of public position, and obstruction of justice.

Since the anti-corruption provisions in the Penal Code have been inspired by the concept of corruption under the 1998 Ordinance on Anti-Corruption, the key element of corruption offences is an act committed by public position/authority holders in the performance of public duties (and why corruption in the private sector and corruption acts by other people in order to influence the performance of public duty are not considered as corruption offences under criminal law).

The focus of the Crimes of Corruption section of the Penal Code is on public officials. Article 289 addresses ‘anyone’ giving a bribe and Article 290 includes anyone acting as an intermediary; there is no mention of legal entities in the former or mandating anyone to act corruptly on their behalf. There are no other entries in the Penal Code relating to corruption in the private sector or legal entities. The only offences relating to legal entities concern violations of the 2005 Law on Enterprises – Article 9 places an obligation on companies to pay taxes and prepare and submit truthful and accurate financial statements on time in accordance with the 2003 Law on Accounting. This law prohibits ‘forging, falsely declaring,

colluding with or forcing other persons to forge or falsely declare or erasing accounting records', failing to record assets, and destroying accounting records. Neither addresses private sector embezzlement.

Regarding to criminal sanctions for corrupt offences, the criminal law policy on corruption offences is for severe sanctions since they have such a major impact on society and the public authorities. The principal penalties are fixed-term imprisonment, life imprisonment and death penalty. The principle of proportionality is respected by the establishment of four different frames of penalties for bribery offences because they are made in consideration of the gravity of offences and the severity of the penalties provided.

The key factors for the establishment of different frames of penalties are the size or value of loss of property and the consequences caused by the offences. The most popular punishment provided for corruption offences is a lengthy period of imprisonment. In addition, some additional penalties are also provided for corruption offences. These include: a prohibition of holding a public position is applied as compulsory penalty on convicted officials; a fine of between one and five times the monetary equivalent of the bribe; or confiscation of property. Corruption offences are predicate offences; the confiscation of objects and money directly related to offences under Article 41 of the Penal Code, as a criminal measure, should be imposed in corruption cases.

The ACL 2005 (as amended in 2012)

Under the ACL (Article 1.2), corruption can be identified by following elements:

- Persons who commit corrupt acts can only be a public position holder and public authority holder;
- A corrupt act is conduct of misuse of public position or public authority for private gain.

The concept excludes corruption in the private sector, giving of bribes by citizens, trading in influence by people without public position or authority. While various types of corruption are dealt with through the ACL many of them are not clarified and not standardized in comparison with the requirements in the Penal Code or UNCAC. Further, some of the contents are identical (use of position, authority in the performance of duty for private gain and abuse of position, authority in the performance of duty for private gain) or vague (harassment for private gain, and omission of public duty for private gain). The lack of Articles on bribe giving, illicit enrichment, bribery of FPOs and officials of public international organizations, and corruption in the private sector also make the ACL non-compliant with relevant international standards.

The ACL also sets out principles of dealing with corruption in Article 4 with two kinds of responsibilities imposed on corrupt offenders that are disciplinary and criminal responsibilities (see Article 68). However, the Law cannot directly punish corrupt offences since it does not set forth specific sanctions in terms of disciplinary and criminal penalties.

Overall, the ACL is intended to deter and punish corrupt activities (Article 1.1) but it can only help to deter and to some extent to prevent corruption. The ACL prescribes systems that are designed to prevent, deter and combat bribery and other forms of corruption. However, the mechanisms for cooperation between responsible bodies (including sanctioning non-cooperation), ensuring judicial independence in dealing with corruption cases and protection of victims, witnesses, corrupt whistle-blowers are not addressed.

In terms of sanctioning corrupt acts under the ACL, the two primary sources of administrative regulations are Decree on Disciplinary Sanctions for Public Officials (No 34/2011/ND-CP)

and Decree on Disciplinary Sanctions for Employees (No 27/2012/ND-CP) issued by the Government. Under these two Decrees, public officials and employees working in the public sectors may be punished by disciplinary sanctions such as a reprimand, a warning, reduction in classification of salary, reduction in classification of position, dismissal from position and termination of employment.[3] Article 3 of the Decree No.34 and Article 4 of the Decree No.27 provide the circumstances in which these penalties are applied, including cases of violating anti-corruption law, but where the act is not so serious as to require a criminal justice response.[4]

This means that disciplinary sanctions may apply in both circumstances: when a criminal charge is not laid and when a conviction is achieved. In addition, the Decrees also provide offences that result in each of these sanctions.[5] For example Article 9 of the Decree No.34 set out offences that may result in a reprimand, including violations of anti-corruption law; Article 10 of this Decree prescribes offences that a warning may be applied, including serious violations of the ACL; and other severer sanctions are provided to be applied to more serious violations of the ACL.

Further, the procedures and persons responsible for adjudicating the offence and deciding the sanctions are also covered in the Decrees.[6] Responsible persons for deciding the imposition of sanctions on disciplinary offences are leaders of the authorities that the offenders work for or used to work for (depending on when the violation occurs).[7] In terms of who is responsible for deciding the sanction, the case of Article 15 of the Decree No.34, for example, indicates that the responsible person will be the leader of the authority that appoints the public official if that official is in a management position and will be the leader of the authority that employs the official if the official is not in a management position. Under both Decrees, a temporary disciplinary committee for considering violations, adjudicating and proposing sanction will be set up, except in cases that the offence is convicted by the court, and which involves detailed procedures (including representation, a secret vote, a formal record and an appeals procedure).

In addition to above Decrees, the Decree No.107/2006/ND-CP on responsibility of the heads of authority, organizations and units when they let corruption occur in their authority, organization and unit should also be mentioned. Article 2 of the Decree defines who are such heads, including the leader of the authority, organization and unit using state's budget and/or state's assets and his/her vice leader who is directly responsible for area where corruption occurs. According to Article 3, the severity of the corruption case is the basis for applying proportionate sanctions to such heads.

Different kinds of sanctions are set out under Article 7, including a reprimand, a warning and a dismissal from position. A reprimand may be applied to serious case of corruption (Article 8) while a warning is applied to very serious case (Article 9) and a dismissal from position is for significant (special) serious case (Article 10). The head of the higher level authority (in the administrative hierarchy) is responsible for setting up a disciplinary committee dealing with the case and for deciding the sanction for the offending heads (Articles 13, 14). The procedure of adjudicating and imposing sanctions is similar to the procedure in the above two Decrees (Articles 16, 17).

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[3] Article 8 of the Decree No.34/2011/ND-CP and Article 9 of the Decree No.27/2012/ND-CP.

[4] In this situation the judgment must be entered into force before the application of the disciplinary sanction.

[5] Articles 9-14 of the Decree No.34 and articles 10-13 of the Decree No.27.

[6] Chapter IV (from Article 15 to Article 20) of the Decree No.34 and Part 4 (from Article 14 to Article 19) of the Decree No.27.

[7] Article 15 of the Decree No.34 and Article 14 of the Decree No.27.

The Institutional Framework

The main governmental bodies in charge of anti-corruption activities are the Central Steering Committee for Corruption Prevention, the Government Inspectorate, the State Audit and the Ministry of Public Security. Under the ACL, there are specialized agencies in charge of anti-corruption within these governmental bodies (Article 75). The Ministry of Public Security has its own investigative body responsible for corruption (C48) and the People's Supreme Procuracy has separate body in charge of corruption case (1B). On the other hand, the People's Supreme Court does not have a separate court dealing with corruption cases and there are no judges who are trained in or who specialise in corruption cases. **Annex 1** describes in details the roles and responsibilities of the agencies.

The 2013 workload of the GI is significant: 4,724 administrative inspections and 89,281 specialized inspections in 2013 that also involved detected violations valued at 12,225 billion Vietnamese Dong (VND)[8]. The GI applied administrative fines equal to 252 billion VD and requested administrative sanctions on 431 State organs and 819 persons from the responsible persons in the agencies where the offender worked. On the other hand, and although the GI cannot investigate or seek sanctions under the Penal Code, it considered that only sent 43 cases and 43 suspects were suitable for criminal investigation and thus passed on to other agencies (see Table 3 for previous years).

Table 3: GI Statistics

Year	Detected	Send to police/prosecutor	Police Investigations leading to proposed Prosecution	Number to court
2009	150 cases 431 persons	68 cases 84 persons	321 cases 819 defendants	308 cases 718 defendants
2010	133 cases 193 persons	21 cases 30 persons	262 cases 623 defendants	253 cases 562 defendants
2011	150 cases 320 persons	76 cases 159 persons	253 cases 503 defendants	208 cases 479 defendants
2012	89 cases 107 persons	24 cases 42 persons	244 cases 601 defendants	167 cases 338 defendants

Indeed, between 2000 and 2009, there were a total of 235 cases involving 760 defendants involved in receiving bribes that were dealt with through the criminal justice system. In terms of cases, the prosecutions and sentences for offences under the Penal Code for 2008 and 2009, the last years for which data is available, are provided in Table 4.

[8] About $560million.

Table 4: Cases in court and sanctions

		Warning	Fine (as principal penalty)	Probation	Suspended sentence	Sentenced to 3 years' jail	Sentenced from over 3 to 7 years' jail	Sentenced from over 7-15 years' jail	Sentenced from over 15 to 20 years' jail	Life imprisonment
278	2009	6		1	109	94	60	44	18	3
	2010		1	1	78	75	45	21	12	1
	2011	2	3		92	49	47	39	12	3
	2012			5	47	47	47	42	20	1
	2013			2	49	49	39	36	38	2
279	2009				13	14	15	9	1	
	2010				12	9	11	4		
	2011					18	10	5		1
	2012			1	12	25	15	11	4	1
	2013				5	15	15	12	5	
280	2009			1	33	30	21	12	1	
	2010			2	32	15	12	11	1	
	2011			2	21	14	9	7	2	
	2012				21	21	16	7		
	2013			3	21	26	18	11	1	2
281	2009	5		5	85	69	29	2	1	
	2010	5	4	13	63	30	24	22		
	2011			4	38	30	8			
	2012	1		9	64	48	35	3		
	2013			6	50	40	30	8		
282	2009			1	7	2	2			
	2010				16	11	8	1		
	2011	1		3	2	1	3			
	2012				4	1	1	1		
	2013			2	9	9	7			
283	2009						1			
	2012						2			
284	2009				2	7				
	2010			1	7	8	7			
	2011				27	11	7			
	2012				11	1				
	2013				20	16	5			
285	2009			2	11	14	2			
	2010			2	6	6				
	2911			2	4	5	3	2		
	2012		39		18	7	1	1		
	2013			4	29	22	5			
286	2009	1		1		2				
	2013				1					
288	2009				1					
289	2009				16	21	6	3		
	2010				9	5	4	2	4	

		Warning	Fine (as principal penalty)	Probation	Suspended sentence	Sentenced to 3 years' jail	Sentenced from over 3 to 7 years' jail	Sentenced from over 7-15 years' jail	Sentenced from over 15 to 20 years' jail	Life imprisonment
	2011				10	7	11	3		
	2012			5	18	26	18	3		
	2013				9	6	11	6		
290	2009					4	2			
	2010						1	1		
	2011					1				
	2012				3	1	1			
	2013				1	4	1			
291	2009				1	1				
	2010				4	2				
	2012				1					
	2013					4				

Source: Bureau of Summarised Statistics of Vietnamese People's Supreme Court

In addition, confiscation was imposed in 12 cases; fines and other sanctions were imposed in another 169 cases. The death penalty was imposed once for a case of embezzlement in 2012.

The Dynamics of Corruption for the Policy Agenda

Understanding the Dynamics of Corruption for the Policy Agenda

The Legal Framework

A number of external reviews have pointed out the weaknesses in the laws – see Box 6.

Box 6: Reviews of the Penal Code and ACL

Painter, M. et al. *International Comparative Analysis of Anti-Corruption Legislation: Lessons on Sanctioning and Enforcement Mechanisms for Viet Nam*. 2012	• The law did not strengthen sanctioning and enforcement mechanisms, nor weaknesses in powers and procedures for criminal investigation including asset recovery. • The 12 offences under the law only apply to public officials; some duplicate each other. • There is no read-across between the Penal Code and the Law. • The law does not fully encompass SOEs, the private sector, passive or the supply-side of bribery, illicit enrichment, and foreign public officials. • The law does not address small-value corruption, as identified in the Penal Code. • The law does not include sanctions, including disciplinary proceedings. • The law is not clear on the powers, independence, resourcing, roles and responsibilities of key anti-corruption organisations and allow for too much discretion through the widespread use of decrees and circulars and decisions on what may be a disciplinary inquiry or criminal investigations. • There is only a limited legal basis for coordination, cooperation and information-sharing.
ADB-OECD Anti-corruption Initiative for Asia and the Pacific. *The Criminalisation of Bribery in Asia and the Pacific*. 2010	• Lack of definition in Law, Penal Code and Criminal Procedures Code – e.g., taking bribes, abuse, jobs, coercion, serious consequences – and scope, e.g., promising, role of intermediaries in both active and passive bribery, authorised competence, payment through a third party, material interest. • Lack of scope for 'public officials', to include requirements of Law on Public Servants. • Law does not cover foreign public officials. • Law does not cover legal entities. • Confiscation restricted to serious cases and upwards, and does not clarify whether it is object or value based. The scope of restraint orders, and responsibility for managing such assets, is unclear while the point of application is subject to charging. • The Criminal Procedures Code does not provide for specialist techniques. • Access to information is subject to banking and tax secrecy. • There do not appear to be any blacklist or debarment sanctions.

The Penal Code covers a number of offences. However not all required offences are included. Corruption in the private sector has not been criminalized. Further, the lack of criminal liability of legal entities makes the law limited in dealing with corruption. The ACL was established as evidence of anti-corruption reform, but without any effort to synchronise the law with the Penal Code or in terms of consequential institutional and procedural change.

Thus there are important issues about the usefulness of the laws as a legal framework for anti-corruption work, the ACL exists less as a substantive piece of legislation than as a piece of legislative 'window dressing' (to use the phrase of an interviewee) because it sets out corruption offences but lacks both enforcement mechanisms and sanctions. It also provides within a legal framework general prevention emphasis on raising awareness of corruption and setting responsibilities for anti-corruption bodies which carries no means of ensuring compliance or sanctions for non-compliance.

The Institutions

In terms of the application of the law, it is generally recognized that the process of handling corrupt cases is still slow and prolonged, that the agencies involved in anti-corruption work lack expertise in specific areas where corruption occurs (such as land management) and in investigation/prosecution working (such as ensuring that defendants are charged with the right offences), as well as managing the political dimension of any investigation. Part of the problem lies with a continued emphasis on the confession as the primary source of evidential admissibility. Part also lies in the absence of technical expertise that keeps pace with the methods used to carry out and conceal corrupt practices, obtaining evidence and exchanging information between agencies.

While the current Criminal Procedures Code will require reform to allow the admissibility of evidence obtained by new techniques, the issue of the need to develop such competences has already been identified (in the Report No. 1421/BC-TTCP dated 28/6/2013 by GI on detection and handling of corruption by state administrative agencies and Summary Report No. 979/BC-KTNN dated 16/7/2013 by State Audit on detection and handling of corruption from 2009 to 2012).

Inter-agency cooperation and coordination has also been formally identified[9] but the guidance has not been implemented. In any case the current agency compartmentalization is not only reinforced by the lack of protocols and commonality in terms of the transfer of cases to be investigated under the ACL and the Penal Code but also by the lack of clarity of the role of the Central Steering Committee for Corruption Prevention. Whilethe Committee has moved from within the government to being a party body in 2012, it still raises questions as to its role in decisions on the initiation of investigations, on its technical competences, on its supervisory responsibilities over law enforcement authorities and over the arrangements with governmental authorities in anti-corruption work when it has no formal-legal status in the criminal justice or administrative-regulatory processes.

The courts lack sufficient awareness of judicial independence and judicial responsibility, not in the least because of judges' perceptions of themselves as public officials and because of the supervisory role of prosecutors in court proceedings. Courts have issues concerning the imposition of inappropriate sentences for the gravity of the offences, the issue of supplementary sanctions and the use of confiscation. They are also reluctant to impose more relevant sanctions.

[9] In December 2011, there was a Joint Circular (No. 12/2011/TTLT-TTCP-VKSNDTC-TANDTC-KTNN-BQP-BCA dated 15/12/2011) between the GI, Supreme Procuracy, Supreme Court, State Audit, Ministry of Defence and Ministry of Public Security on the exchange, management and use of information and data on anti-corruption. The Circular set out (1) the principles of exchange, management and use of information and data; (2) responsibility of each agency; (3) the content of information and data to be shared/provided; (4) the way of sharing/providing information; (5) the way of management and use of information.

The Need for Structural Reform

It should be noted that all of which are issues recognised by the Vietnamese authorities and what is clear from both internal and external reviews is that these issues are systematic and structural, not only reflecting the dynamic nature of corruption and the time-lag in legislative and institutional capacity and effectiveness catching-up with changes in types and levels, but also the potential adverse consequences of tinkering with rather than substantially reforming the legislative and institutional response to corruption.

The 2011 NORAD review reflects the views of a number of reports – see Box 7 - in stating that the weaknesses relate to the internal and external implementation dimensions as well as the state of the current legislation: 'the adequacy of the legal framework for AC is less the issue in Viet Nam today than is the implementation process where there are multiple continuing difficulties in: implementation capacity; weaknesses in accountability and transparency that make it difficult to expose corruption; the lack of political will to sanction corrupt behaviour; the lack of protection for whistleblowers; the administrative processes for lodging complaints; and taking effective investigative and enforcement action' (NORAD, 2011: 13).

Box 7: 2008 Report for Danish Ministry of Foreign Affairs

The mechanisms in place to tackle corruption either rudimentary or poorly enforced. There is wide gap between the formal rules governing the integrity systems and actual practices on the ground. The principal reasons why the integrity system is not operating well are:

- insufficient checks-and-balances between the executive and agencies such as the legislative, supreme audit, the judiciary, civil service, law enforcement, and anti-corruption agencies;
- an inadequate incentive structure for civil servants; a tendency for politicians and officials to operate outside the law;
- institutional rivalry; poorly enforced codes of conduct;
- widespread access to off-the-books funds;
- nepotism in appointments;
- a tendency toward secrecy in the public sector;
- narrowly based and formalistic public consultation and inadequate protection for whistleblowers.

Source: Davidsen et al, 2008

The 2012 World Bank report also emphasized the continuing inadequacy of the authorities' response. Anti-corruption measures were 'not working very well, including the system of assets and income declarations, the policy of holding the heads of agencies responsible for corruption within the agencies, the use of codes of conduct and professional ethics, and the payment of salaries via bank accounts. These measures, as currently implemented, are only very weakly associated with lower levels of corruption. Such measures should either be de-emphasized, or revisited to attempt to make them work better. Two other factors were not significant for explaining levels of corruption at either the province or the district level, regardless of the measure of corruption. Regulations on returning gifts appears to have little impact, and the levels of salaries also do not help explain levels of corruption' (2012: 80-81; see also Hayton, 2011).

What Substantive Reforms Have Been Proposed To Date?

Prior to the work of this review and the 2012 review of the ACL and institutional arrangements (Painter, 2012), the only published review by the Vietnamese authorities on specific reforms has been as part of the UNCAC self-assessment process which has commented on the current legal framework in comparison to UNCAC[10] - see Box 8.

Box 8: UNCAC Self-Assessment

Topic	Stated Vietnamese Response
Receiving bribes	Vietnamese law only stipulates bribes in the form of material benefits and based on the worth of the bribes to determine frame for penalties and define criminal liability. Thus, if the bribes are intangible benefits or spiritual benefits, the definition and determination of criminal liability will encounter certain difficulties.
Bribery of foreign public officials	The self-assessment only answers the question in part, in relation to internal matters
Giving bribes	Vietnamese laws have met, to a certain extent, the requirements specified in subpara a, Article 18 of the Convention. Limitations of Vietnamese laws in comparison with the provision of the Convention is that: Article 289 does not describe what is the act of 'bribe giving' as subpara a of Article 15 of the Convention has done, it only provides general provisions on 'who gives the bribes'.
Illicit Enrichment	Requiring public servants to prove the origin and reasons of their income is completely infeasible and inappropriate with historical practices and material and technical conditions of Vietnam in this stage.
Private Sector bribery and other offences	Penal Code of Vietnam does not touch upon bribe offering and receiving in private sector. From the above discussions, the Government of Vietnam has instructed related authorities to conduct further studies and consolidations in order to propose renovations of policies and criminal and anti-corruption laws in Vietnam in the following regards: (1) Anti-corruption Laws expand the subjects of corrupt acts to cover the private sector; (2) Add the offences of receiving bribes and assets embezzlement in the private sector into the Penal Code.
Corruption as a predicate offence	The majority of offences stipulated in the Convention have been established as predicate offences in the Penal Code of Vietnam. Particularly, all offences of corruption stipulated in the existing PC of Vietnam have already been considered as predicate offences of money laundering. However, there are still several acts stipulated in the Convention have not been established as crimes in the Penal Code of Vietnam, such as: embezzlement, corruption in the private sector
Legal Entities	It's time to solve the issue of criminal liability of legal persons directly in the Penal Code of Vietnam. Therefore, we think that in the future, it's necessary to amend, supplement the existing PC in regard of providing stipulations on criminal liability of legal persons for offences of corruption in particular and other crimes in the PC in general.
Source: Self-Assessment report drafted by the inter-sectoral working group to implement the Convention (on 11th March, 2010 under Decision No. 434/QD-TTCP of the Government Inspector General) and Team of government experts to review the implementation of the Convention (on 02 June, 2010 under Decision No. 776/QD-TTg of the Prime Minister)	

In August 2012 the drafting team of the amendments of the Penal Code, chaired by the Ministry of Justice, prepared a draft report on *Principal Directions for the Amendments of the Penal Code*. This stated that the guiding principle of any review of the Penal Code should be coherent, practicable, transparent and in accordance with the developing trends of criminal

[10] Mandatory for State Parties are: Bribery of National Public Officials (Art.15); Active Bribery of Foreign Public Officials (Art.16); Embezzlement, Misappropriation and Other Diversion of Property (Art.17); Money Laundering (Art.23). Optional for State Parties are: Passive Bribery of Foreign Public Official (Art.16); Trading in Influence (Art.18); Abuse of Function (Art.19); Illicit Enrichment (Art.20); Bribery in Private Sector (Art.21); Embezzlement in Private Sector (Art.22).

law all over the world. It argued that amendments must be based on the review of the implementation of the Penal Code in the last twelve years as well as on consultation of selective experiences of criminal law from other countries all over the world, on compliance with relevant conventions in which Vietnam is a State Member, such as UNCAC, in order to build legal basis for international cooperation in preventing and combating crimes and more generally on progress of the revision of Constitution, the Criminal Procedures Code and relevant laws.

It drew attention for the need to review the definitions of a public official, to review the range of custodial and non-custodial sanctions including the introduction of mitigating circumstance such as reporting cases or voluntarily returning corrupt assets, to consider the criminalisation of illicit enrichment, to consider the criminalization of liability of legal entities, to ensure complementarity between the Penal Code and other laws, to address serious cases, and to criminalize such corrupt acts as bribery of FPOs, bribery in the private sector, and embezzlement in the private sector.

More recently the Government has proposed (in its *Report on Preventing & Combating Corruption for period from January to September 2013)* that not only should the law be reformed but that attention should be given to the Criminal Procedure Code 'to facilitate the criminal proceedings for corruption cases that contain complicated elements'.

Are the Proposed Reforms Enough? Understanding the Consequences of Not Addressing Corruption for the Policy Agenda

The Vietnamese 2009 National Anti-corruption Strategy (NACS) was explicit about the necessity of structural reform, arguing that 'the system of policies and laws has not been well synchronized or well aligned; the strengthening of agencies and organizations in the political system still fails to keep up with the development of the socio-economic life; the personnel of public officials and civil servants are still unprofessional, the ethics of a significant portion of public officials and civil servants is downgraded; the implementation of guidelines, policies and solutions for preventing and combating corruption that were put forward during the past few years still fail to meet the requirements and expectations, with poor effectiveness, especially there is the lack of a comprehensive long-term strategy or plan for preventing and combating corruption'. As a policy issue, the imperative for structural reform is necessary on a number of levels both internally and externally.

Failure to undertake reforms over the past decade have led to corruption that is both pervasive and becoming embedded at a time when it is not only important to 'create stronger positive incentives within the bureaucracy that reward success in promoting broadly based development' but it is also crucial to shift public sector culture away from 'the notion that public office should carry private benefits as a matter of right' (Tenev, 2003: 87). Not only does corruption facilitate the factionalization of elite groups in the Party, SOEs and other state agencies but its pervasiveness and persistence will underpin challenges to the legitimacy of the state and the Party (see Thayer, 2009; Fforde, 2013). The alternative is, as the NACS warned in 2008, 'adverse effects in many ways, eroding the confidence of the people in the leadership by the Party and the management by the State, giving rise to potential conflicts of interest, social resistance and protest, and widening the gap between the rich and the poor. Corruption has become a major obstacle for the success of *Doi Moi* process and the fighting force of the Party, threatening the survival of the regime'.

Comprehensive reform addresses external concerns about the investment environment in Viet Nam; the 2013 Investment Climate Statement for Vietnam prepared by the US Department of State noted that 'international investors have voiced concerns that the investment climate has deteriorated. Problems include corruption and a weak legal

infrastructure, financial instability, inadequate training and education systems, and conflicting and detrimental bureaucratic decision-making' (http://www.state.gov/e/eb/rls/othr/ics/2013). On the one hand, there is evidence that argues that levels of Forward Direct Investment (FDI) are not associated with higher or lower rates of corruption in Viet Nam (Gueorguiev and Malesky, 2012) or that economic growth promotes business corruption in Viet Nam (Bai et al, 2013). On the other, there is also evidence of general correlations between a weak institutional environment and decrease in FDI (Al-Sadig, 2009), of favouring the SOE sector at the expense of the development of the private sector (Nguyen and van Dijk, 2012) and of a shift in predatory behaviour of public officials: 'it seems that only with long-term time horizons of government will bureaucrats be content with the extraction of value-enhancing bribes that do not damage investment. With short-term time horizons, bureaucrats are more likely to be in fear of losing their positions and hence more likely to partake in extracting value-destroying bribes and corruption with theft' (Record, 2005: 12).

Externally, and of more significance for Viet Nam than a focus on compliance with UNCAC, are the changes to the increasing intervention of the Financial Action Task Force (FATF) and other international agencies (see FATF, 2011; van der Does de Willebois et al, 2011; OECD/World Bank, 2012) because they do have sanctions and intend to use them. The 2013 FATF methodology for the Fourth Round evaluations now requires assessors' reports on contextual factors that might significantly influence the effectiveness of a country's AML/CFT measures. These include 'the level of corruption and the impact of measures to combat corruption…including the risks, issues of materiality, structural elements, and other contextual factors, to reach a general understanding of the context in which the country's AML/CFT system operates' (FATF, 2013: 6; see also Asia/Pacific Group on Money Laundering (2009)).

Negative reports may have serious adverse implications for the stability and growth of MICs' financial and banking services. Given the likely timescale for application of the methodology from 2015 onwards, countries already subject to FATF concerns will not only need to introduce legislative reform in the near future but also actively support its effective implementation so that the benefits are identifiable for the onset of the evaluation process.

The focus on limited legislative reform, particularly on the three areas where the Penal Code is not UNCAC-compliant, is very much a limited formal-legal response to issues that are only partly relevant to the Viet Nam context and which largely ignores the dynamic context both to law but also to institutional implementation and external compliance reviews.

How, where and when corruption changes is dynamic; one of the issues with national legislation and institutional development is not only to keep up with the changes but also, in terms of the difficulties of regular revisions to Penal or Criminal Codes, to seek to anticipate new types or forms of corruption and to word legislation broadly so that offences remain pertinent and applicable over time. Both are essential to reforming the clearly-identified weaknesses in the current institutional and procedural arrangements to address corruption.

Thus structural reform at a number of levels is an essential process in both the economic development of Viet Nam but also the legitimacy of the state, with the first step involving revisions to the Penal Code as the platform for further legislative, institutional and procedural reform and where this step will benefit from consideration of how other countries have reviewed and revised their legislation.

Informing the Policy Agenda: Learning from International Experiences

Why and How: The Reform Process and Going beyond the Minimum

Many countries amend their Criminal Code according to need and circumstance, from aligning provisions more closely with international standards to reflecting operational requirements. Thus a number of countries have introduced the offence of bringing a FPO as a consequence of the OECD Convention, in turn complemented by UNCAC. In a limited number of cases, countries have reviewed and revised the Code in its entirety; for example, Poland redrafted its Criminal Code in 1997 following the end of Soviet control and the French Penal Code was comprehensively rewritten in 1994 with three principles in mind: an orderly and articulate summary of the basic rules of French criminal law (e.g. principle of legality, rule of personal responsibility, the division of offences into three groups and the rule of criminal intent); to clarify criminal law and emphasise human rights, which is the fundamental foundation of a democratic legal system; and to delineate a new scale of punishment and widen the scope of sentences left to the discretion of the courts (McKee, 2001).

In the case of Indonesia (see Box 9) the specific issues of economic growth, rising corruption and the weaknesses of existing agencies triggered a specific and comprehensive response. In the case of the Philippines the overall intention behind reviewing the Penal Code was to draft a new Code that was 'updated, modern, simplified, responsive and truly Filipino, in order to improve the administration of justice in the country and enhance access to justice of the poor and other marginalized sectors'[11].

Box 9: Indonesia's Drivers for Reform and Response

Issues

- economic change characterized as a 'miracle' however, Indonesia's problems with public corruption continue to be widespread;
- Although curbing public corruption is at the heart of the Reformasi agenda, many corrupt Indonesian officials have yet to be held accountable for their acts of misappropriation, demonstrating a lack of effective reform in the public corruption arena;
- curbing public corruption is imperative for Indonesia's overall growth and stability;
- there was distrust amongst the different agencies in combating corruption.

Legal Reform

Law Number 30's preamble states that corruption is an 'extraordinary problem that needs to be tackled by extraordinary means.' The explanatory memorandum to Law Number 30 makes clear that the KPK was designed as a corruption superbody with a far-reaching mandate.

Specific Oversight Responsibilities

166 Article 6 of Law Number 30 established the KPK's primary roles, which include: (1) coordination with other agencies responsible for eradicating corruption; (2) supervision of the administration. Law Number 30 gave the KPK significant law enforcement coordination powers.

Specific Powers

[11] Other stated aims were: changes to universal jurisdiction of crimes instead of the current jurisdiction based on territory, given the evolving nature of crime, specifically transnational organized crime; simplification of the approach to criminalization based on conduct and not mental state; simplification of the categorization of crimes; corporations are subject to criminal fines; no longer a splitting of criminal and civil actions – the civil remedy is always embedded in the criminal action (see http://www.doj.gov.ph/criminal-code-committee).

To fulfill these broad responsibilities, the legislation gave the KPK legal powers to investigate and prosecute; the authority to tap and record a suspect's communications; the power to investigate a suspect's bank accounts; the authority to prevent Indonesian suspects from traveling abroad; and the ability to inquire into the wealth and taxation affairs of suspects. Additionally, the KPK has surveillance equipment and other state-of-the-art technology to assist in investigations.
Source: Macmillan, 2011

The process in many countries recognizes the importance of number of issues: the need to review existing laws in terms of suitability, relevance and overlap; establishing the purpose of reform, including compliance with regional and international obligations; the value of holistic reform; the importance of undertaking the reform process through one authoritative and independent agency or body (such as a law commission); the need to establish realistic timetables; the relevance of reviewing other countries' reforms; the centrality of the widest possible consultation; the need to review proposed reforms in terms of implementation resourcing and ownership; the legacy requirement of a monitoring and review process (see USIP, 2001).

Other Countries' Penal Codes

In order to study how other countries have addressed corruption in their Penal or Criminal Codes, the report looks at 6 examples: Germany, Malaysia, Philippines, Indonesia, South Korea and Turkey. The rationale for the choices is to identify other economies in the region with similar levels of growth, albeit at different levels of political development, and compare their anti-corruption legislative and implementation frameworks, and to compare this with such frameworks in two outlier countries, Germany and Turkey. All but Germany are among those countries identified as MICs (see Table 1 above).

South Korea operates a Criminal Code has not been substantially revised since 1953. Malaysia and Indonesia have updated Penal Codes while the Philippines is currently revising its Penal Code. All three have subsidiary legislation which links the Code with the offences and powers of a dedicated agency. Two have specialist courts. Of the outliers, both again have been and are economically successful; Germany has not ratified UNCAC but has a modern criminal code and uses law enforcement for corruption investigations while Turkey is unusual in having both law enforcement and inspectorate institutions, as well as, despite having signed UNCAC, being reluctant to update its Criminal Code. Annex 2 lists the key Articles and sections of each country.

Structure

Table 5 provides an overview of the main components of the countries' anti-corruption legislation. All the countries have a specific section in the Code or Constitution on corruption. For all there are four main offences: receiving a bribe; giving a bribe; trading in influence; and misconduct in/abuse of office. Most focus on public officials, unless the offences are generic, and provide guidance on who are covered by the definition (although there may be a distinction in relation to the judiciary or judicial proceedings). The other most common offences within that specific section are: forgery and/or falsification; confidentiality; using public office for personal ends (e.g., running a private business). Taking in offences from elsewhere in their legislation, the majority of countries also address fraud, conflict-of-interest, and asset disclosure. Most have anti-money laundering and confiscation legislation but this appears elsewhere in the legal framework. Some countries have specific sections or articles on, for example, nepotism (see Law 28/1999, Indonesia) but these tend not be found across the six countries (although some deal with a number of such issues through administrative or regulatory or employment frameworks).

Table 5: Overview of Offences in Selected Countries

	Germany	Malaysia [Constitution and Subsidiary Law]	South Korea	Philippines [constitution, laws and decrees]	Indonesia	Turkey
Specific AC Section						
Receiving bribe (both sectors)	✓	✓	✓	✓	✓	✓
Giving bribe (both sectors)	✓	✓	✓	✓	✓	✓
Separate Sections in Private Sector Offences?	Y in Code	Y/N (use of agent in MACC Act)	N	N (in Graft Act)	N	N
Bribery -attempts		✓				
Bribery of FPOs (actual or proposed)		✓	✓			
misconduct	✓	✓	✓		✓	✓
Forgery/falsification	✓	✓			✓	
Confidentiality	✓		✓			✓
Trading in influence	✓	✓	✓		✓	✓
Acting in a personal capacity while in post		✓			✓	✓
Duty to report bribery		✓				
Confiscation			✓		✓	
Asset disclosure				✓	✓	
Illicit enrichment				✓	✓	
Embezzlement				✓	✓	✓
Use of intermediaries		(agent)	✓(caselaw)	✓		
Other Sections						
Fraud	✓	✓	✓	✓		
Forgery/falsification				✓		
Conflict of interest				✓		
confidentiality				✓		
Misuse of office				✓		
Definition of public official in related laws	✓	✓		✓	✓	
Bribery as a predicate offence	✓					

Contents

In terms of the main issues relevant to the Vietnamese context concerning identified weaknesses with existing Articles in the Penal Code and in terms of areas not addressed in the Penal Code, the experience from other countries provides information on components and frameworks within which to inform the policy agenda on reform.

What is a Public Official

The codes define what is a public official, in nearly all cases within a single source (although, for example, South Korea's definitions appear in the State Public Officials Act and Local Public Officials Act). In Philippines the definition is included in the Revised Penal Code (Act No. 3815) and the Anti-Graft and Corrupt Practices Act (RA 3019). The Malaysian Penal Code has ten categories while the General Part of the German Criminal Code provides for a legal definition of the term of public official which is intended to cover any persons who are

charged in any way with the execution of tasks of public administration to prevent the so-called 'escape into private law' – and thus includes any privately organized enterprise where the state has a controlling interest (OECD, 2010). Only Turkey has a variation between definitions in Law No. 657 on Public Officials and the Criminal Code.

What is Covered in a 'Corruption' Section?

Most countries have a section devoted to public officials. As noted in Table 5, most countries include bribery (giving and receiving), misconduct in and misuse of office, and undue influence; the majority also address embezzlement and forgery. In the case of bribery most also criminalise bribery in the private sector and a lesser number also have provisions for corporate liability.

Bribery

All countries use broad terms for all aspects of bribery. First, all criminalise giving and receiving and all use terms that cover *asks/demands*, is *promised/allowed to be promised, agrees to receive* and *accepts.* Additional terms include *persuading, inducing, influencing* or *attempts to obtain*. All use a term such as *benefit* or *gratification* or *advantage.* All terms are mirrored in terms of giving and receiving. A number, such as Malaysia, criminalise aiding and abetting a corruption offence. None distinguish between petty and other types of bribes, none specify a limit on value and none include a repetition of an offence at administrative level as grounds for criminalization. Malaysia uses specific language that clarifies a bribe as *a gratification other than legal remuneration* (it also, in order to reinforce the message and ensure the absence of misinterpretation, is the only country to append examples to certain Articles).

On the other hand, while most criminalise acceptance of a bribe for himself/herself or any other person not all are clear about the advantage going directly to a third party (for example, a corrupt offer of employment to a family member). South Korea has an explicit Article (130) that addresses this issue: 'a public official or an arbitrator who causes, demands or promises a bribe to be given to a third party on acceptance of an unjust solicitation in connection with his duties…'.

The question of a breach of trust in both public and private sector is clearly addressed in the Act relating to the MACC. This makes it plain that, in its generic bribery offence, receiving a bribe when the recipient has no authority or opportunity to favour the giver, no intention of acting or not acting, the bribe was not connected to his work and did not actually do anything to favour the giver is the offence rather than its intended or actual consequences.

Bribes and Gifts

International standards 'require that the giving of an undue advantage is an offence irrespective of the value of the advantage, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder' (ADB/OECD, 2010: 28). Many countries do not distinguish between a gift and a bribe - The Philippines Penal Code specifically includes 'gift' in its definition of a bribe in the Anti-Graft and Corrupt Practices Act and, while excluding gifts from family members, criminalises gifts 'even on the occasion of a family celebration or national festivity like Christmas, if the value of the gift is under the circumstances manifestly excessive'.

Use of intermediaries

No country[12] appears to have a specific category of intermediary. Most use *directly* or *indirectly (*only Malaysia uses the agent/principal terminology) or *a third party*.

Seriousness

A number address aggravated circumstances or the seriousness of the offence, but as a single article that covers a ranger of offences within the same section. On the other hand, as with a number national law systems, the German law distinguishes between bribery (section 334 of the Criminal Code) and corruptibility (section 332 of the Criminal Code) on the one hand, and the less serious giving and accepting a benefit (sections 333 and 331 of the Criminal Code) on the other. In both cases, a criminal conviction is only possible when the pact – to act or not act in return for a bribe - is proven.

Nevertheless for some countries the components of a corruption offence are less based on a payment, or promise of a payment, and an agreement to act than on the breach of trust. Here the offence requires an at least tacit understanding between two persons which links the giving of a benefit to a specific behaviour of the public official within his professional exercise without the act or decision being performed. In terms of breaches of trust as a basis for addressing corruption, it is the agreement or pact to breach that trust that triggers an offence. Whether or not the act is performed, or whether the person receiving the bribe is in a position to deliver that act, is less important than the breach.

Abuse of Office/Misconduct in Office

All six countries have appropriate legislation, although Germany links the violation of official duties to the payment of a bribe while Malaysia lists a number of offences that it considers unacceptable, including using his or her office for the benefit of himself or herself or a relative or associate, causing injury, engaging in trade, unlawfully buying or bidding for property, and impersonating a public official. Malaysia also transfers the burden of proof in the case of misuse of office for a benefit where conflict-of-interest is involved in that he or she is presumed guilty where such decision or action involves any matter in which a relative or associate has an interest. Apart from Malaysia most have a single Article addressing abuse of or misconduct in office which are usually short but inclusive; thus the Indonesia Penal Code covers abuse and extortion and states: *A civil servant or state apparatus who intentionally benefits himself/herself or other people in violation of law, or by abusing his/her power, forces a person to give something, pay, or receive discounted payment, or to do something for himself/herself.*

Trading in Influence/Undue Influence

All countries have Articles criminalizing undue influence although the approach varies. Germany makes it an offence to incite or agree to incite a subordinate public official to commit a corrupt act, but does not require payment of a benefit to do so. Malaysia covers all aspects by making it an offence 'as a motive of reward' to induce any official to do or not to do an official act, exercise public functions, show favour or disfavor, or to render or attempt to render any service or disservice.

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[12] In the region only Thailand's Penal Code appears to identify the use of intermediaries: 'whoever, demanding, accepting or agreeing to accept a property or any other benefit for himself or the other person as a return for inducting or having induced, by dishonest or unlawful means, or by using his influence, any official,...'(Article 143).

South Korea is more restrictive in that abuse of office must cause a loss to state finance or the state economy. Turkey both criminalises the exercise of undue influence (malversation) to secure a benefit; the offence also includes 'convincing' another, and taking advantage of another's negligence while any public official who allows embezzlement and undue influence to occur by their own failure to exercise control or supervision may also be subject to a criminal offence.

Embezzlement

All have provisions on embezzlement, which is linked to breach of trust. In some countries it is a generic issue applicable to both sectors; in others there is a distinction depending on the sector. Some, such as Indonesia, include wide provisions (which includes falsification, damage or destruction of records or letting others do so). Of interest is the Philippines Penal Code which does not include embezzlement of state property and funds within its corruption section but provides for a broader offence. This involves *any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially or shall other be guilty of the misappropriation or malversation of such funds or property…* . In some circumstances the same Code reverses the burden of proof: *the failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer shall be prima facie evidence that he has put such missing funds of property to personal uses.*

Some countries have also taken the opportunity to upgrade the terms used to reflect modern circumstances. Thus Indonesia identifies documents as *any recorded data or information that can be seen, read and/or heard, and issued with or without the help of equipment, either those printed on paper and physical material other than paper, or those recorded electronically in the form of writing, voice, picture, map, draft, photograph, letters, signs, figures or perforations that have meaning.*

Private Sector

Germany has specific provisions for giving and receiving bribes in the private sector; the Philippines and Turkey do not. Indonesia criminalises individuals or corporations who illegally enrich themselves by causing losses to state finance or the state economy (the 1999 law states that any act of corruption committed by or on behalf of a corporation will lead to both the prosecution and the sentence will be instituted against and imposed on the corporation or its board of directors). Malaysia has specific private sector offences within its generic offence that states:

> *Any person who by himself, or by or in conjunction with any other person – (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to or a reward for, or otherwise on account of* …

South Korea addresses corporate corruption in a specific section on embezzlement and breach of trust whereby it is an offence to make an 'illegal solicitation'. On the other hand, while it criminalises directors or officers of companies using their positions for securing a benefit, Malaysia does not criminalise corporations for initiating corruption.

FPOs and Extra-territorial Jurisdiction

Indonesia legislates for extra-territorial application of the anti-corruption law and is legislating for FPOs. Malaysia addresses both in its legislation. Indonesia does not criminalise the bribery of FPOs, although its public officials are subject to the criminal law if they accept a bribe outside the jurisdiction. South Korea has a specific Act (which also criminalises corporate responsibility for payments made on its behalf to an FPO). In the case of South Korea and Malaysia the wording reflects that used for domestic bribery:

South Korea: "a foreign public official is any person who: is engaged in a legislative, administrative, or judicial work for a foreign government (including local government); conducts official business on authority delegated by a foreign government; conducts the business of a public organization or agency established by a foreign government to engage in a specific business; is an executive or employee of an enterprise into which a foreign government has contributed more than 50% of the paid-in-capital or a foreign government exercises substantial control over the management (not including enterprises that operate on a competitive basis in the private economy without preferential treatment); or conducts the business of a public international organization."

Malaysia: "Any person who by himself, or by or in conjunction with any other person gives, promises or offers, or agrees to give or offer, to any foreign public official, or being a foreign public official, solicits, accepts or obtains, or agrees to accept or attempts to obtain, whether for the benefit of that foreign public official or of another person, any gratification as an inducement or reward for, or otherwise on account of:

- the foreign public official using his position to influence any act or decision of the foreign state or public international organization for which the official performs any official duties;
- the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any of his official duties; or
- the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person,
- commits an offence, notwithstanding that the foreign public official did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties."

Of the two, only South Korea follows the US Foreign Corrupt Practices Act in allowing facilitation payments: "facilitation or grease payments used to speed up the process of obtaining something from a foreign official that a person is already entitled to receive, such as (depending on the circumstances) getting a utility turned on".

Other Issues Relevant to Vietnam law

Coercion and Voluntary Reporting

Whether or not a bribe-giver is coerced into making a payment or the public official is extorting a bribe is not generally explicitly addressed in legislation although such circumstances may be used as a defence in court proceedings or in mitigation in general sentencing guidelines.

Only one jurisdiction legislates for both bribe givers and bribe recipients to exempt from punishment if they inform the authorities before the commencement of the investigation. One

jurisdiction legislates for bribe recipients alone. A public official has 30 days to report the advantage to the KPK in the Philippines who then report the offence to the KPK in the Philippines (law No. 20/2001; Article 12c).

Presumption of Guilt/Gifts and Bribes

Indonesia has a legal means of addressing the issue, and also including a presumption of guilt, in terms of the value of a bribe or gift: "any gratification for a civil servant or state apparatus shall be considered as a bribe when it has something to do with his/her position and is against his/ her obligation or task, with the provision that: a. when the gratification amounts to Rp10,000,000 (ten million rupiahs) or more, it is the recipient of the gratification who shall prove that the gratification is not a bribe; b. when the gratification amounts to less than Rp10,000,000 (ten million rupiahs), it is the public prosecutor who shall prove that the gratification is a bribe".

Sanctions and Confiscation

All countries have a wide range of sanctions but most now include confiscation (Indonesia requires compensation to the state agency that suffers financial loss; its 2010 Anti Money laundering law – Law No 8 – also gives the KPK powers for investigating money laundering offences).

The development of a comprehensive confiscation regime is, however, still ongoing in SE Asia, with only two countries legislating for full direct and indirect value-based confiscation. In terms of the presumption of guilt Indonesia's law requires that anyone convicted of corruption has to prove that their wealth did not derived from the activities that were the basis of the conviction. It is for the judge to decide whether that amount is partially or entirely confiscated by the state.

Implementation

Implementation I: Updating the Law

The main issue with the legislation is the process of change and the difficulties of maintaining the relevance and focus – see Box 10 relating to Singapore's CPIB for its recent amendments. Secondly, there are issues linking aspects such as money laundering and confiscation of the proceeds of corruption which are not necessarily linked to or included in those sections of the Penal Codes dedicated to corruption. On the other hand, a number of countries in SE Asia are, or are in the process of reviewing and revising their Penal Codes in relation to corruption. In the case of Malaysia, Indonesia and the Philippines, however, the reforms are both legislative and institutional. In other words, there is a clear link between reform of the law, improvements to the institutional implementation and those procedural and other powers deemed necessary to make the application of the law by specific institutions more effective.

Implementation II: Enforcement

Of the six countries, only Germany relies on a decentralized law enforcement approach with the responsibility for high level and complex economic crime, including corruption, resting with specialized prosecutors' offices and investigators at local and regional levels - the German Federal Bureau of Investigation (Bundeskriminalamt) only has a lesser (coordinating) role to play when it comes to fighting high level corruption.. Main responsibility for anti-corruption work takes place at local level where joint investigations teams, and use of

specialist techniques, under the control of the prosecutors' office, which is essentially mandated by the Code of Criminal Procedure.

Turkey is one of the few countries to operate an Inspector-General (IG) system of government, providing an independent framework within ministries. The leading Inspector-General – the Prime Ministry Inspection Board – takes responsibility for cross-ministry and complex cases of fraud and corruption. Its staff are trained and work to the criminal burden of proof and evidential admissibility. Cases involving criminality go to the police and prosecutors. Turkey also has a dedicated agency - the Council of Ethics for the Public Service - to promote a code of ethics, which includes requirements on conflict-of-interest and asset disclosure. Breaches of the code by senior public officials are investigated by the Council (it will inform the relevant authorities of lower categories of public official, or the prosecutor if the violation involves a possible criminal offence). Its only sanction – until the Constitutional Court banned its use in 2010 - was to publish in the Official Gazette the name of any public official guilty of any proven violation. There is a functional detective police unit (KOM) which investigates corruption under the Public Prosecutor's Office but whose main areas of responsibility are terrorism, smuggling and organised crime. There are major areas of concern relating to a reluctance to investigate elected national politicians (who in any case have immunity), over addressing the proceeds of corruption, over inter-agency working and information-sharing, and over the effectiveness of the judicial process.

Box 10: Singapore's CPIB recent Anti-corruption Law Reform Proposals

- empowering the court to order offenders to pay a penalty equal to the amount of bribe received apart from punishment in the form of fines and/or imprisonment term
- empowering investigators with wider powers rendering it unnecessary to prove that a person who accepted a bribe was in the position to carry out the required favour
- empowering investigators to order public officers under investigation to furnish sworn statements specifying properties belonging to them, their spouses and children
- empowering the public prosecutor to obtain information from the comptroller of income tax
- empowering the court to admit wealth disproportionate to income as corroborative evidence
- empowering the removal of the accomplice rule which views evidence of accomplice as unworthy of credit, unless corroborated
- rendering it a legal obligation to provide information required by investigators of the bureau
- rendering Singapore citizens to be liable for punishment for corrupt offences committed outside Singapore and to be dealt with as if the offences had been committed in Singapore
- creating a new seizable offence of knowingly giving false or misleading information

Source: http://app.cpib.gov.sg/cpib_new

The South Korean Anti-corruption Commission is a preventative agency which also develops and exports corruption assessment methodologies; the current tool is a quantitative Integrity Assessment tool. It is one agency under the Anti-corruption and Civil Rights Commission (the others are the Bureau of the Ombudsman, the Bureau of Administrative Appeals, and the Office of Planning and Coordination) which essentially acts as an UNCAC Article 6 body, with additional functions. Corruption is addressed through a law enforcement context with the Supreme Prosecutor's Office establishing the Anti-Corruption Investigation headquarters as well as other anti-corruption investigation departments within prosecutors' offices nationwide.

Specific Institutions

Malaysia, Philippines and Indonesia have expressed concern about the levels of corruption and in each case have responded with subsidiary legislation and institutional reform. In the case of Malaysia the 2009 MACC Act not only included all offences under the criminal law

but included new offences, such as that relating to FPOs, but also addressed MACC powers, such obtaining information and confiscation. The establishment of the KPK in Indonesia was more detailed, addressing specialist investigative techniques, powers of restraint of financial transactions, whistleblower protection, coordination and information-sharing. Part of the legislation establishing the KPK also legislated for a specialist Anti-corruption Court.

In the Philippines the Ombudsman not only has the power to investigate but also prosecute cases of corruption, without needing to wait for a complaint from a member of the public. It also has an inspection role, mandated to 'determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency'. It has primary jurisdiction over cases that fall within the jurisdiction of the Sandiganbayan, a special appellate court responsible for adjudicating on cases involving the Anti-Graft and Corrupt Practices Act and the Unexplained Wealth Act, including defendants from government-owned or controlled corporations.

Conclusions: Policy Guidance for Viet Nam and Proposals for the Reform Of The Penal Code

Policy Guidance

This policy report concludes that a comprehensive revision of the Penal Code should be initiated, and used as a platform for the revision of the ACL and for changes to the institutional and procedural arrangements for the effective implementation of the law. In so doing this policy report identifies four guiding principles from its work. It then provides a framework for the revisions and then discusses the detail of the revised sections of the Penal Code that are intended to address corruption. It concludes with an overview of what the revisions will mean for the ACL and for the institutions and procedures involved in anti-corruption work.

First Policy Guidance For Viet Nam: Lessons From International Experiences

Most countries undertake substantive Penal Code reform, often with overarching objectives (including the impact of corruption on the social, political and economic development), so that the Penal Code provides an effective framework for implementation. Of those who have substantially reviewed their Penal Code, including designating roles and responsibilities to specific institutions, reviews of those institutions have not identified the law as an inhibitor of effective implementation but have identified issues relating to inter-agency relations, and wider cultural and preventative issues (see on the KPK, for example, Dick and Butt, 2013; Schutte, 2012).

Most countries have specific sections of their Codes devoted to public officials but with a limited number of offences specifically relating to public office, with an emphasis on breach of trust, and the use of generic offences for common crimes, such as embezzlement and forgery. Most law reform has focused on the simplification of the language of offences, including the absence of distinction of categories of offenders, the level of offence, what comprises a bribe, value of bribe, loss to the state or repeat offenders. Similarly there is a separation of issues of severity and value in terms of sanctions, rather than incorporated into offences. One general theme to note is that most countries have not sought to address the emergence of new types of corruption by expanding categories of offences (although the Philippines Anti-Graft and Corrupt Practices Act attempts this in Section 3) but used appropriate terminology to ensure flexibility and adaptability.

UNCAC has not been a core driver for reform although the provisions in the Legislative and Technical Guides have been used to revise aspects of legislation, the most common of which has been the inclusion of bribery to FPOs and officials of international organisations. Most countries already have legislative provision for giving bribes and for the liability of legal entities. Where there is subsidiary legislation (for example, Malaysia and Philippines), that legislation has a specific purpose – for example, the establishment of a responsible agency – and is coordinated with the Penal Code in terms of offences. The subsidiary legislation also includes sanctions and, for the designated agency, specific powers.

The survey noted that few if any countries had a Criminal Code or Penal Code that, in its entirety, would be suitable for substantive transfer or adaptation. On the other hand, in terms of more recent reforms, specific Articles in many states may be suitable as a template or benchmark as the basis for revising Articles in the Vietnam Penal Code. Further, for Vietnam, it is clear, as the 2012 review has already identified (Painter et al, 2012:40-42), in terms of the international experience, Vietnam's legal framework is out-of-step with good practice. On the other hand, a reform process that seeks to develop a coherent legal framework in the Penal Code, to revise existing Articles and to introduce a limited number of new Articles is both feasible and necessary. Such a process would also provide the platform for reviews and revisions to the ACL and to implementing agencies.

Second Policy Guidance for Viet Nam: Options for Reform

There are three policy options facing Viet Nam in terms of addressing corruption. First, there is the option of doing nothing. Given the internal and external assessments, this will perpetuate and institutionalize corruption 'less as an aberration of the system but more as the normal workings of the system, which has its own distinct logic, which is self-perpetuating. The strong connections in people's minds between public office, making money, and other forms of personal advancement, lie at the heart of this' (Gainsborough 2009: 2). In terms of the adverse consequences this option will increase corruption as a visible indicator of the inequalities of the developmental process and, as the NACS noted in 2008, a core component in potentially delegitimizing the state.

The second policy option is limited reform, primarily focused on compliance with UNCAC. In terms of external review and compliance, however, the UNCAC process is persuasive rather than compliance-driven, with only limited expertise available through the review mechanisms, itself based on a self-assessment process, to ascertain whether the changes comply with UNCAC and no means to determine whether or not the reforms are applied effectively in practice. Further, of the three areas where Viet Nam indicates an intention to reform, one is not a significant issue for Viet Nam while the other two – offering or giving bribes and bringing legal entities within the remit of the criminal law – not only requires a well-drafted law but have major implications in terms of implementation of the law, investigations (which will need to develop specific expertise and techniques) and sanctions.

This pushes the policy agenda toward the third option – a substantive review and revision of the Penal Code and its use as a platform for reform to the institutional and procedural arrangements for effective implementation. This has a number of advantages. It addresses corruption across sectors in Viet Nam. It sets the context to re-engage with citizens and thus promote the legitimacy of the state. It facilitates economic development and reassures external investors. It reviews agencies and it provides effective means not only to sanction offenders and remove the proceeds of corruption but also to begin to focus on prevention and the promotion of public office and public service.

The policy point is that Vietnam can opt for a minimalist approach of simply amending the Penal Code to comply with the formal-legal requirements of UNCAC with little or no reference to either the emergence of new types of corruption, new ways of sanctioning offences, and the institutional-implementation issues. It can also opt for the opportunity for, given the implications for progession along the MIC trajectory, for state legitimacy and for external compliance with future FATF requirements, a comprehensive and timely reform process that addresses holistically the causes and consequences of corruption, the legislative framework and the necessary institutional and procedural arrangements to implement the law effectively. In view of the issues raised in 5.3, this policy option is essential.

Third Policy Guidance for Viet Nam: Initiating A Holistic Reform Process

Engaging All Stakeholders

If Viet Nam intends a thorough review and revision to its Penal Code then this will have implications for the resourcing and operationalization of the revisions, including institutional responsibilities and powers, and sanctions, as well as for the consequential requirement to review the need for, contents of, and the effective operationalization of the ACL. This will require a structured and iterative approach involving two aspects, one relating to the review of the law and the other to the review of the effectiveness of the law in terms of implementation.

For the first aspect, currently requiring a ministry to lead – and draft – revisions to legislation addresses only part of the reform process. The key lies with the collective ownership of a process that will also include a criminal assessment to identify the major risks and threats the revisions to the Penal Code are intended to address and a criminal law revision impact assessment on the likely institutional, procedural and resource implications for implementation.

Secondly, in the absence of a dedicated expert standing law commission, there should be an ad hoc commission with an legally-qualified chair and secretariat, with representatives from ministries, the legislature, law enforcement, the GI, entities such as the Vietnam Bar Association, Law Schools, NGOs, and Ministries among others to produce and revise a series of drafts for full consultation, debate and revision (following the Indonesian example of reform to its election law through the use of a team of academics, a national research institute and a NGO consortium, the Ministry of Justice, relevant agencies/interested parties, and international experts – see Handeland, 2007).

Basing Reforms on the Evidence

Reform to the Penal Code should be grounded in a Corruption Assessment (CA), a structured process that assesses ‘exactly how corruption manifests itself in a particular country, where the vulnerabilities lie, and the effectiveness of existing institutions and control mechanisms meant to deal with the problem. Based on this assessment, a strategic analysis of the corruption problem can be formulated and a range of programs can be identified and prioritized to deal with the problem in a customized and effective way’ (USAID, 2006:4).

The methodology begins by building up a fact-based strategic analysis of the corruption environment through 2 strands - a corruption pattern analysis and a general corruption profile analysis. These assess what types of corruption have occurred, are occurring and may occur, and their impact, to provide the evidenced-based policy framework upon which a realisable, prioritised and sequenced assessment of legislative, procedural and operational

contexts to identify gaps, overlaps and weaknesses in terms of the legal framework and the institutional and procedural arrangements to implement the revised legislation.

This provides the platform for proposals to amend the law, which in turn would be subject to a Corruption Impact Assessment (CIA). First introduced to assess, for example, the impact of roads or buildings on the environment the CIA has been extensively used for anti-fraud measures in testing the potential vulnerability of, for example, new activities or products. South Korea's Anti-corruption and Civil Rights Commission (ACRC) uses a CIA framework to 'analyse and eliminate factors that are highly likely to contribute to corruption from the very stage of drafting laws and regulations' on the basis that, unless drafted appropriately, laws will not only *not* achieve their purpose but may also lead to more or different opportunities for corruption as consequence.

An adaptation of such an approach would not only address the effectiveness of the legislation but also of those institutions designated to implement it. Thus reform to the Penal Code will provide the context for reforms to the ACL and anti-corruption institutions in a coherent and coordinated approach that facilitates the effective implementation of the revised Penal Code.

Reforming the Legislative Framework: Issues and Proposals for Inclusion in the Policy Agenda

General: Rationale for Reforming the Penal Code and the ACL

The overall rationale for reform is explicit. First, levels and types of corruption are increasing. Not only will they adversely impact on Viet Nam's chosen path of economic development but the potential for them to become pervasive and entrenched will emphasise the increasingly visible disparities between the state, public officials and the citizens. Second, there are weaknesses in terms of the coherence of the Articles in the Penal Code and the need to review and amend the language of existing Articles to bring it in line with other countries. Third, in terms of an overview of the current legislation and in comparison to international good practice, the legislation does not address new areas of corruption, including bribe-giving, private sector corruption and the offence of bribing a FPO. Fourthly, the reform of Vietnam legislation, which should be grounded in the risks and threats of corruption faced by Viet Nam, is an essential platform on which to provide a more integrated legal framework with the ACL. In turn this framework is necessary to address and revise the current institutional and procedural arrangements so that they are fit-for-purpose in achieving a more effective implementation of the revised legislation.

In so doing this report reiterates and confirms the findings of the *Report on International Comparative Analysis of Anti-Corruption Legislation: Lessons in Sanctioning and Enforcement Mechanisms for Viet Nam* (Painter et al, 2012) whose comments on the law, as a statement of intent, can only be repeated and confirmed for the overall legislative framework.

Viet Nam's ACL deals in large measure with preventive measures and administrative matters. It is limited in scope and purpose and as a result does not cover fundamental issues that need addressing in order to resolve problems in the AC sanctioning and enforcement processes. In addressing these reforms, it is necessary to undertake a review of other laws, including the Criminal Code.

Gaps and omissions in Viet Nam's AC laws, the Penal Code and the ACL, which have been widely recognized in other commentaries and reviews, need attention in a comprehensive

reform process in order to provide an effective set of sanctions and enforcement procedures. A particularly significant omission is the absence of criminalization of 'illicit assets'. The threat of loss of such assets, even in the absence of conviction for a specific corrupt act, has proven an effective mechanism in many other jurisdictions for combating corruption. It has enabled prosecution of the most egregious cases where inexplicably extravagant lifestyles of people holding positions of public trust are visible to all. This is challenging in the context of Viet Nam, where property and other assets have only in recent times come into private hands, but it should not in the long run be a fundamental obstacle.

The categorization of corruption as a 'position offence' in the Penal Code is neither necessary nor helpful. For example, it excludes from a definition of corruption any act by a non-state actor (including bribery of a public official). It also excludes a large segment of state activity from investigation, namely enterprises in which the government has a significant stake, but less that 50%. In addition, the manner in which corruption offences are defined through connecting them with different degrees of 'losses' to the state or different levels of 'seriousness' is not helpful. It would be simpler to refer only to 'benefits' or 'advantages' to the corrupt individual arising from abuse of office. Viewing corruption through the lens of 'losses to the state' draws attention away from its intrinsic nature as fundamentally a criminal breach of trust by a public official. Similarly, leaving some corruption cases to be dealt with through administrative discipline obfuscates the same fundamental point. All corruption, regardless of the material damages that follow from it, should be criminalized.

General: Developing Themes for Legislative Reform form International Experiences

In addition to the many examples of the approach to the criminalization of corruption in Section 5 above, international good practice has a number of common themes that should form the basis of a review of the Penal Code; none present any insurmountable difficulties as the basis for realistic and feasible reform in the Viet Nam context.

Terminology. As noted above, international good practice is not only about the simplification and comprehensive use of terms to widen the scope of, and interpretation of, the legislation but also about ensuring that terms are relevant. For example, there is no distinction between petty and other types of bribe, no list of corrupt acts, and often no distinction between public and private sectors. Malaysia's 2009 MACC Act is typical of the generic approach by defining bribery simply as: any person who by himself, or by or in conjunction with any other person (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement or a reward.

When 'corruptly' may be applied to anything other than lawful remuneration and when gratification is defined as not restricted to money or even 'estimable in money' (and where the law specifically excludes arguing that the gratification was 'customary'), then the wording of the law provides a flexible and comprehensive platform for implementation.

Similarly, all terminology may be revised for contemporary circumstances. For example, the Penal Code uses the word 'document' in relation to forgery. The rapid development of information technology and the increasing use of computer-based administration raises two issues. The first relates to 'document' and whether a pro-forma template on a computer is a document in traditional terms and the second concerns identification of amendments and falsification of computer-based material and whether that would be considered as forgery within the existing Article. Responses in some countries has been to move to a term with wider application - thus 'information' is used to replace document – and to introduce an offence of misuse of computers to address any action to alter information held therein.

Corruption as a Transactional Offence. Corruption involves two sides; offering and accepting. It is central to addressing corruption that both are encompassed by the criminal law within the same section. Further, in relation to the private sector, an increasing number of countries are introducing legislative changes to integrate corporate responsibility with individual liability to address not only the capacity of the private sector to suborn the public sector but also, in the Viet Nam context, require policymakers to 'focus on developing an even more transparent and consistent framework for private sector development based on the rule of law' (Tenev et al, 2003:79). Such an offence should have applicability between public and private sectors, and within each sector.

Criminalising Legal Entities. As the interviews and analysis for this report note, the role of the private sector, and SOEs, is significant in terms of corruption. Corruption is a transactional offence where addressing only one side does not necessarily result in mitigating conduct by the other side. While this report will recommend the criminalisation of the offering or giving of a bribe by individuals, it also considers that it is important to ensure corporate responsibility for the conduct of staff or third parties acting on its behalf.

The criminal liability of legal entities has been a goal of the EU for some time; the EU has proposed that:

> *EU-Member States provide for corporate liability for private corruption when committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person or when lack of supervision or control by a person with a leading position within the legal entity has made possible the commission of private corruption for the benefit of that legal person by a person under its authority.*(see Asser, 2012; Council Framework Decision 2003/568/JHA).

This ensures that companies cannot avoid responsibility for the actions of natural persons who have a relationship with the legal entity – whether director, employee, consultant or intermediary – and appropriate legislation can also provide means to encourage legal entities to promote prevention or be held responsible for the actions of their staff.

Thus, while legal entities can be held criminally responsible for offences committed on their account, they cannot be imprisoned, but rather subject to other sanctions, including fines and debarment. Nevertheless, owners, directors and senior managers can be held responsible for initiating, conniving in or condoning corruption-related offences by managers, employees, intermediaries and agents, as the example of the 2010 UK Bribery Act demonstrates. This law places responsibility on the legal entity's owners, directors and senior managers. Here, and while the company may also be held criminally liable and subject to financial sanctions, those responsible for managing the company may also be held criminally liable unless they can demonstrate policies and procedures to deter managers, employees, intermediaries and agents engaging in corruption-related offences for the benefit of the legal entity (see Box 11).

Box 11: UK Ministry of Justice Guidance

Your organisation could be liable if a very senior person in the organisation (for example, a managing director) commits a bribery offence. This person's activities would then be attributed to the organisation. Your organisation could also be liable where someone who performs services for it – like an employee or agent – pays a bribe specifically to get business, keep business, or gain a business advantage for your organisation. But you will have a full defence for this particular offence, and can avoid prosecution, if you can show you had adequate procedures in place to prevent bribery...
Source: Ministry of Justice, 2010

Sanctions. UNCAC makes the recovery of assets is a 'fundamental principle' of UNCAC, and involves a recognition that 'the fight against corruption is inextricably intertwined with that against money laundering' (FATF, 2011: 6). In particular, public officials are remunerated by and trusted to exercise official power and responsibilities on behalf of the state; breaching that public trust and privately profiting directly or indirectly from public office is doubly damaging. In such circumstances identifying and defining the monetary value of proceeds derived from corruption is crucial to ensuring that sanctions are sufficiently proportionate, dissuasive and effective in terms of their recovery (see OECD/StAR, 2012).

To ensure that public officials are in part dissuaded from involvement in corrupt activity and in part to ensure that the removal of any proceeds of corruption is as important as a criminal sanction then there should be a portfolio of offences and of sanctions, from money laundering offences, through illicit enrichment to confiscation, and debarment, which should be available to investigators and prosecutors as an effective framework through which to address corruption and its consequences. At the same time, a move toward value-based confiscation would be an essential component of such a portfolio.

Techniques. The dynamics of corruption not only require an appropriate and relevant legislative framework but also agencies with the powers and technical expertise for implementing such anti-corruption legislation. New ways of investigating corruption, in part because of the use of new means of committing corruption, such as technology or the use of legal entities, and in part in securing admissible evidence for a crime whose components and execution thrive on secrecy, collusion and misuse of existing procedures, may require new skills and approaches to ensure effective implementation of the law;

> 'determining which investigative tools to use depends on a variety of factors, including the nature of the alleged violations, the type of investigation conducted, and the resources available. It is a normal progression to go from simple to complex, with information from initial steps, such as standard investigative techniques including interviews with witnesses, and interrogation of suspects, searches and collection of documents and information, leading to more advanced steps, such as special investigative techniques, financial investigations and mutual legal assistance' (OECD, 2012: 21).

Of equal relevance are the UNCAC's statements on specialist investigative techniques, on joint work, and on the recovery and return of the assets or proceeds of corruption. This latter statement not only requires appropriate legislative reform but also its use as a core sanction whose goal is that no official should profit from public office. This in turn requires a comprehensive policy agenda that seeks not only to reform the law but also improves the effectiveness of implementation, including the range of offences and sanctions, including illicit enrichment and conflict-of-interest and asset disclosure, so that there is as much a focus on the proceeds of corruption as on the corruption itself.

First Step In The Reform Process: Reforming The Penal Code

The first step in the policy agenda to reform the legislative framework and use it as a platform to ensure a more effective institutional and procedural implementation of the law is to begin with the Penal Code. In light of international experiences and the various internal and external reports on the law, this policy report makes a specific recommendation within which to begin the reform process. It argues for:

- a revised and expanded Crimes of Corruption Section that encompasses public and private sectors;
- a revised Crimes of Position Section specifically for the public sector.

In the next sub-sections it outlines how this may be achieved, and why.

Penal Code Reform: Crimes of Corruption Framework

All corruption and corruption-related offences – offences involving any advantage offered to sought from public office and by public officeholders - should be brought together in a Corruption Crimes section. This sectionshould also include trading in influence and abuse of office which may or may not involve an 'advantage'. This has the benefit of the use of simplified and generic terms and seeks to criminalise and penalize both side of a corrupt relationship. All offences under the Crimes of Corruption section will be predicate offences.

The reforms would include addressing to whom the revised Penal Code will apply. This report has identified lack of clarity regarding who is governed by the legislation. Certainly the Penal Code's definition is less comprehensive than those of the ACL and the Law on Cadre and Public Servants. Thus the various laws are not entirely clear about the totality of those encompassed by the law. The opportunity should be taken to revise and consolidate definitions.

Bribe-giving would include legal entities as well as natural persons as potential offenders. A new Article should be introduced that criminalises bribery in the private sector for natural persons and legal entities but which would also include further offences for businesses that offer/pay bribes to public officials. If necessary the inclusion of a legal entity as a potential offender in its own right would allow the opportunity to retain 'intermediary' or 'agent' by defining them as performing services for or working on behalf of another person or legal entity, business, trade or profession, or a subsidiary, in any capacity, performing a function or activity connected with a, performed in the course of a person's employment, performed by or on behalf of a body of persons (whether corporate or unincorporate). Establishing a legal entity as a potential offender also allows another sanction – debarment – to be introduced.

The offences would be as follows:

Existing Core Offences

Receiving Bribes, Undue Influence/Trading in Influence, Abuse/Misuse of Office to Appropriate Property, and Abuse/Misuse of Office, should be synchronised and harmonised in the Penal Code (and in due course be reflected in the ACL). Receiving a bribe will include anyone working in the public or private sectors, although consideration should be given to sub-clauses that distinguish between sectors[13].

[13] Here the distinction would be less about different levels of proof or sanctions than, for legal purposes, identifying the agent-principal relationship in that it would be an offence for any agent to give or to receive and benefit in relation to his principal's affairs or business. The 2009 MACC Act uses such a clause in addition to its generic offence of giving or receiving a bribe.

Merged and Expanded Offence

The main framework of the merged offence would encompass a public official[14], directly or indirectly, using his or her office to seek to obtain, or to obtain, an advantage for his or herself, or any other person by undertaking a number of specified offences. These would include existing offences - *embezzlement, forgery* – and new offences - *misuse of confidential information for advantage, misrepresentation of the authority of office for advantage and conflict of interest for advantage* – into a new Article – Profit from Public Office - within the Crimes of Corruption section of the Penal Code for public officials that relates to all activities relating to crimes committed by public position/power holders for private benefit. These would be based on revised existing Articles 278 and 284.

Re-allocated Offences

Relevant Articles from the Crimes Relating to Position section will be re-allocated to the Crimes of Corruption section, including Article 289, which will mirror a redrafted Article 279 (and into which Article 290 will be absorbed), and Article 291 which will be incorporated into a new Article 283. Thus Offering or Giving Bribes would become a parallel offence to Article 279 and will include issues relating to intermediaries and legal entities. Article 291 and Article 283 would become a revised Undue Influence/Trading in Influence offence.

New Core offences

There would one new offence - Bribing FPOs or Officials of an International Organisation - included under the Crimes of Corruption section in the Penal Code. It would be for the reform process whether private sector bribery and public sector were distinguished or merged in terms of wording of offences or two separate Articles. The Article should be modeled on revised Article 279. The definition of an FPO may be modeled on either the OECD definition or those from other jurisdictions or the German 'equivalence' model (whereby those defined as FPOs are those defined as such in the application of domestic German law). Unless Vietnam accepts that facilitation payments paid by overseas companies in Vietnam are acceptable there should be no clause allowing payments on that basis.

Language and Content

The existing Articles have been analysed in detail in terms of terminology and content - see Annex 3. When compared against international experiences, the following issues should be addressed across all existing, new and re-allocated Articles in relation to standardization and simplification of terminology and contents:

- value: all references to the value of an offence whether in terms of, for example, the amount of the bribe or the loss to the state should be left out on the grounds that such qualifications should affect sanctions rather than whether or not they should form the basis of a charge.

- **circumstances**: all references to the circumstances of an offence should be left out on the grounds that such qualifications should be a prosecutor's decision as to whether or not to proceed with an investigation, or part of a defendant's case in court, rather than being a formal legislative qualification.

[14] As noted above, there should be a single and comprehensive definition of a public official, drawing on international experiences.

- **abusing positions and/or power**: most countries leave out the qualifier on the grounds that it is the use of their post that is the basis of the offence.

- **have accepted or will accept**: many countries have terms that involve requests or rewards, including: soliciting, demanding, asking, agreeing to receive, receive, received, as a reward for, allows, and so on.

- **directly or through intermediaries**: too limited in that the terms raise evidential issues of what is an 'intermediary'. Most countries use the terms 'directly' or 'indirectly'. If the term is to be retained, the proposed Article on Offering Bribes will include a clearer definition along the lines of the UK Bribery Act which specifies the relationship of any agent or third party with, for example, a legal entity.

- **money, property or other material interests in any form**: the terms are too restrictive and should include intangible and negative benefits (such as cancellation of a gambling debt). A useful term is advantage/benefit other than legal remuneration, which distinguishes clearly that anything beyond legal remuneration could be a bribe. Most reviewed countries use the terms benefit, advantage, or gratification.

- **to perform or not to perform certain jobs** for the benefits or at the request of the bribe offerers to use their influence and incite persons with positions and powers to do or not to do something within the sphere of their responsibility or directly related to their work or to do something they are not allowed to do: most countries do not use specific terms which may raise evidential and other issues. Many simply use the terms 'to perform or fail to perform an official act' or to request or persuade others 'to perform or fail to perform an official act'.

In summary, the revised Crimes of Corruption section will comprise:

Bribery

- a revised Article on Receiving Bribes (Article 279; although divisible if there needs to be a distinction between public and private sectors).
- a new Article on Giving Bribes (Article 289; although divisible if there needs to be a distinction between public and private sectors. Legal entities will be included as offenders).
- a new Article on bribing a Foreign Public Official or Official of an International Organisation.

Abuse of Office

- a revised Article on Misuse of Office to Appropriate Property (Article 280).
- a revised and merged Article on Abuse/Misuse of Office (Articles 281, 282).
- a revised Article on Undue Influence/Trading in Influence (Articles 283 and 291).
- a revised and merged Article on Profit from Public Office (Articles 278, 284).

Penal Code Reform: Crimes Relating to Position Framework

By collating and coordinating all offences relating to financial and other advantage by public officeholders the opportunity may be taken to revise the Crimes Relating to Position section to address corruption prevention and work performance matters for public officials. This section would be re-named the Crimes of Public Office section. This brings the section in line with the spirit of Article 277 of the Penal Code which states that 'position-related crimes are acts of infringing upon the legitimate activities of agencies and/or organizations, which are carried out by persons holding positions whilst they are on official duties'.

As the 2013 report on Illicit Enrichment states, in 2007 the Government promulgated the first Decree on transparency and income of civil servants (Decree No 37/2007). In 2011, Government issued a further Decree on amending and supplementing a number of articles of the above Decree No.37/2007/ND-CP on property and income transparency with Decree 68/2011. In 2013, Government promulgated a Decree on transparency of assets and income (Decree 78/2013). This Decree took effect from September 5, 2013, and replaced Decree No. 37/2007/ND-CP and Decree No. 68/2011/ND-CP. Article 8 of Decree 78/2013 defines the extent of the assets that should be subject to the asset declaration system in Vietnam while Article 29 provides for the disciplining of persons who are dishonest in their asset and income declaration and the origins of their asset increases.

It would make sense to incorporate into the Penal Code related offences that criminalises failure to declare assets and to conceal illicit gains so that the criminal justice system addresses the proceeds of corruption and thus a simple conviction would allow confiscation and other sanctions to apply. There should therefore be two sub-sections in the Crimes of Position section: Prevention of Corruption and Conduct in Public Office offences. These will be intended to address the need to distinguish and make transparent issues relating to asset disclosure, conflict of interest and job performance. The former would focus on preventing corruption in terms of asset declaration, conflict-of-interest disclosure and illicit enrichment while the latter includes revised current Articles where no financial or other advantage was involved but which relate to conduct of official duties. All offences under the Prevention of Corruption sub-section will be predicate offences.

In summary, the revised Crimes of Public Office section will comprise:

Prevention of Corruption

- A new Article of failing to disclose a conflict of interest;
- A new Article of failing to disclose illicit assets;
- A new Article of failing to register assets.

Conduct in Public Office

- Article 285: Negligence of responsibility, causing serious consequences
- Article 286: Deliberately disclosing work secrets; appropriating, trading in or destroying documents containing work secrets
- Article 287. Unintentionally disclosing work secrets; losing documents containing work secrets
- Article 288. Deserting one's posts

Penal Code Reform: A New and Separate Section – Business Crimes - for Private Sector Corruption?

While the proposed reforms to the Crimes of Corruption Framework reflect international experiences in proposing a generic, cross-sector, criminalisation of corruption it is also recognised that the Viet Nam context may still require some distinction between public and private sectors. Indeed, not only do some countries have such a section in relation to formal corporate officeholders and to breaches of trust, but the opportunity may be taken to bring some of the existing business offences, such as false accounting, into a wider range of corporate offences. However, it is understood that a generic approach may be too much to assimilate and implement in the short-term and that a parallel but separate approach may better identify and educate those to be subject to the criminal law.

That corruption in the private sector can have as much negative consequences for economic development as the public sector, and that there should be offences that parallel the public sector, should not be in question. This is because it is important in strengthening public awareness about the ethical issues and the impact on competition and productivity, on consumer interests and on employer-employee relations. There is also the possibility of more public functions or services being provided by the private sector[15] and it also addresses those bodies whose relationship with the state continues to be close but which operate as commercial entities. A separate section allows time to develop the concept of the liability of legal entities, and business activity, and to introduce means to control the conduct of agents and intermediaries as well as to control the conduct of managers and directors in their relations with the public sector (see Dao, 2010).

Whether a separate section also allows different sanctions, and different levels of sanctions, should be for discussion during the reform process but such a section – entitled Business Crimes - would include: the giving and receiving of bribes that parallels the structure and contents of those to be applied in the Crimes of Corruption section, embezzlement and breach of trust[16], forgery and false accounting, disclosing work secrets or copyright or confidential intellectual property rights, definitions and legal liabilities of legal entities, agents and intermediaries, and bribing FPOs and officials of international organisations.

Penal Code Reform: Status and Seriousness

One issue noted from the international experience is that the status of the public official is not an issue for the legislation. As with the issue of the value or size of the bribe, the focus of the reform of the law is breach of trust, irrespective of rank and value of bribe. In a number of countries, there is a use of small gifts or payments to test a public official's integrity (or their acceptance on the grounds that they are too insignificant to influence a public official) as well as the incremental establishment of reciprocity and obligation with such amounts or at such a level (the 'slippery slope' argument in the literature; see Osse, 1997) with a view to initiating corruption some time in the future. It is important that all public officials are, in terms of legislation, viewed the same; the issues of proportionality and seriousness should lie with the prosecutors and the courts.

Sanctions

While the Penal Code carries an extensive range of periods of imprisonment, disqualification, and other sanctions, for Crimes of Corruption and Crimes of Public Office (Prevention of Corruption sub-section) offences, not only do investigators and prosecutors require a portfolio of sanctions to determine the most effective response to removing the proceeds of corruption but also to be able to link sanctions to achieve this.

Confiscation as a significant sanction to divert corrupted officials of illicit assets is not widely used. At the same time the current legislation addresses object-based rather than value-based confiscation. Both require substantial attention in terms of legislative reform and changes to the investigative intentions of investigators and prosecutors, as well as judges.

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[15] Germany has a special category of official described as 'any person who, without being a public official, is employed by, or is acting for (a) a public authority or other agency, which performs public administrative services; or (b) an association or other union, business or enterprise, which carries out public administrative services for a public authority or other agency'.

[16] See for example South Korea's Penal Code, Chapter XL.

Thus an important intention of introducing offences relating to the failure to declare assets, and the failure to disclose conflicts-of-interest, may allow prosecutors to then determine whether or not the failure to do so conceals illicit assets. This in turn would allow prosecutors to invoke illicit enrichment provisions[17]. Overall, prosecutors do not necessarily have to initiate investigations or prosecutions under Crimes of Corruption section when they could use the revised Crimes of Public Office (Prevention of Corruption sub-section) offences in order to pursue the proceeds of corruption.

The criminalization of legal entities would allow the imposition of debarment as a consequence of the actions of their owners, employees, agents or intermediaries (see Moran, Pope and Doig, 2004).

The use of a portfolio approach to sanctions, and the interdependence of offences (such as the failure to declare assets as the basis for an offence of possessing illicit assets), and debarment, is lacking, thus allowing even convicted public officials to retain corruptly-acquired assets, and requires attention.

Implications from the First Step for the ACL, and Institutional and Procedural Reform

While not within the remit of this policy report, the report has made it plain that reform of the Penal Code must be a platform in terms of the consequential and necessary legislative, institutional and procedural reforms which should be part of the CIA to ensure effective implementation.

The ACL

In redrafting the Penal Code in a comprehensive manner, consideration should be given to a consolidated ACL that includes a clear statement that the nature of corruption is criminal; a comprehensive list of types of offences defined as corruption; a system of administrative and criminal sanctions that apply to these offences; and a set of mechanisms that require accountability of agencies and institutions concerned. The opportunity should be taken to consolidate the two aspects of the ACL – repressive and preventative – and develop the roles and responsibilities of designated agencies.

The Criminal Procedures Code

Investigative bodies in Viet Nam lack many of the necessary powers and capacities to conduct effective anti-corruption investigations. Comprehensive reform to the Penal Code and to the ACL would provide the platform to address a number of operational issues, such as special powers - for example, access to financial accounts, electronic surveillance and undercover operations; provisions to guard against obstruction of justice in dealing with corruption offences; use of and protection for covert information sources; and provisions concerning recovery of assets. The Code should also be amended to address joint working and information-sharing.

[17] While not all countries have legislated for illicit enrichment, many have enacted alternative means for tackling it, such as measures making it easier either to prosecute or to confiscate illicit proceeds (see World Bank/StAR and UNODC, 2012).

Institutions

In reforming the fragmented system of investigation and prosecution, and in emphasising to all that corruption in all forms and in all parts of society is a criminal offence that requires the concerted efforts of designated agencies involved in anti-corruption work, it will be necessary to concentrate the role of some agencies, with a focus on the inspection and preventative aspects, and to consider strengthening the core criminal investigation and prosecution agencies within a law enforcement context. The roles of State Audit and Government Inspectorate should be concentrated on being one part of a wider inspection and prevention system that encompasses the whole of society, not just the state.

Responsibility for the criminal investigation and prosecution of corruption should remain with the Police Investigation Department on Corruption-related Crimes in the Ministry of Public Security and the Special anti-corruption unit of the Supreme People's Procuracy. For more serious, sensitive and complex cases of corruption. However, there is a need to strengthen the investigation and prosecution capacity, and to provide specialist techniques, competences and powers, by developing a specialised law enforcement investigation unit for high profile and sensitive cases under the revised Penal Code that combines existing expertise between the Police Investigation Department on Corruption-related Crimes in the Ministry of Public Security and the Special Anti-Corruption Unit of the Supreme People's Procuracy. Lesser corruption cases would remain both the Police Investigation Department on Corruption-related Crimes in the Ministry of Public Security, Police Investigation Department on Position-related Crimes and Economic Crimes and the Special Anti-Corruption Unit of the Supreme People's Procuracy.

Reorganising agency responsibility within a law enforcement environment will provide the basis for joint and joined up working, shared staff and competences, shared training and shared information.

There is a good case, drawing on some of the experience of Indonesia, to explore the appointment or training of judges specialised in corruption cases within the framework of the existing court system.

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Annexes

Annex 1: Vietnamese Criminal Law On Corruption Crimes: Institutional Roles And Responsibilities

Under the Penal Code and the Criminal Procedural Code, the law enforcement authorities in dealing with corruption cases are as follows:

Corruption type crimes	Who is involved in initiating the case?		Who is involved in investigation?	Who is involved in prosecution?	Who is involved in judgment?
	Who is responsible for initiating the case?	Who is involved?			
Corruption crimes These are provided in Chapter XXI articles: 278, 279, 280, 281, 282, 283, 284.	• Police Investigation Department on Corruption-related Crimes (belongs to the Ministry of Public Security) • Special anti-corruption unit belongs to Supreme People's Procuracy (Department 1B) [under specific circumstances]	• Anti-corruption bodies in Government Inspectorate (GI) and inspectorates within an administrative unit (the Government) • State Audit (SA) (the Government) •	Police Investigation Department on Corruption-related Crimes (C48 - belongs to the Ministry of Public Security)	Special anti-corruption unit belongs to Supreme People's Procuracy (Department 1B)	Courts (without specialized anti-corruption division/judges)
Crimes are not considered as corruption in the Penal Code but are corruption acts under ACL (the Law on Preventing and Combating Corruption) These are provided in Chapter XVI, articles 165, 169, 174, 176, etc.	• Police Investigation Department on Position-related Crimes and Economic Crimes • Special anti-corruption unit belong to Supreme People's Procuracy (Department 1B) [under specific circumstances]	• Government Inspectorate and inspectorates within an administrative unit • State Audit	Police Investigation Department on Position-related Crimes and Economic Crimes	Special anti-corruption unit belong to Supreme People's Procuracy	Courts (without specialized anti-corruption division/judges)
Crimes are not considered as corruption in the Penal Code	• Police Investigation	• Government	Police Investigation Department on	(Common) Prosecution	Courts (without specialized anti-

but are corruption acts under UNCAC such as crime of giving bribe (Article 289), acting as an intermediary for bribery (Article 280)	Department on Position-related Crimes and Economic Crimes • (Common) Prosecution Divisions	Inspectorate and inspectorates within an administrative unit • State Audit • - Others	Position-related Crimes and Economic Crimes	Divisions	corruption division/judges)

Agencies involved in corruption crimes in practice are as follows:

•

Corruption type crimes	Who is involved in initiating the case?		Who is involved in investigation?	Who is involved in prosecution?	Who is involved in judgment?
	Who is responsible for initiating the case?	Who is involved?			
Corruption crimes These are provided in Chapter XXI articles: 278, 279, 280, 281, 282, 283, 284.	• Police Investigation Department on Corruption-related Crimes (belongs to the Ministry of Public Security) • Special anti-corruption unit belongs to Supreme People's Procuracy (Department 1B) [under specific circumstances]	• Anti-corruption bodies in Government Inspectorate (GI) and inspectorates within an administrative unit (the Government) • State Audit (SA) (the Government) • Party Inspectorate • Central Steering Committee of the Communist Party	Police Investigation Department on Corruption-related Crimes (C48)	Special anti-corruption unit belongs to Supreme People's Procuracy	Courts (without specialized anti-corruption judges)
Crimes are not considered as corruption in the Penal Code but are corruption acts under ACL (the Law on Preventing and Combating Corruption) These are provided in Chapter XVI, articles 165, 169, 174, 176, etc.	• Police Investigation Department on Position-related Crimes and Economic Crimes • Special anti-corruption unit belongs to Supreme People's Procuracy (Department 1B) [under specific circumstances]	• Government Inspectorate and inspectorates within an administrative unit • State Audit	Police Investigation Department on Position-related Crimes and Economic Crimes	Special anti-corruption unit belongs to Supreme People's Procuracy	Courts (without specialized anti-corruption division/judges)
Crimes are not considered as corruption in the Penal Code but are corruption acts under UNCAC Such as crime of giving bribe	• Police Investigation Department on Position-related Crimes and Economic Crimes	• Government Inspectorate and inspectorates within an administrative unit	Police Investigation Department on Position-related Crimes and Economic Crimes	(Common) Prosecution Divisions	Courts (without specialized anti-corruption division/judges)

(Article 289), acting as an intermediary for bribery (Article 280)	• (Common) Prosecution Divisions	• State Audit • Others			

Annex 2: Penal Codes Studied

COUNTRY	CIVIL CODE [CC] or COMMON LAW [CL]	SPECIFIC CORRUPTION SECTION	RELEVANT ARTICLE BY TITLE
GERMANY	CC	Yes	**CHAPTER TWENTY-SIX.RESTRICTIVE PRACTICES OFFENCES** Section 299: Taking and giving bribes in commercial practice Section 300: Aggravated cases of taking and giving bribes in commercial practice **CHAPTER THIRTY. OFFENCES COMMITTED IN PUBLIC OFFICE** Section 331: Taking bribes Section 332: Taking bribes meant as an incentive to violating one's official duties Section 333: Giving bribes Section 334: Giving bribes as an incentive to the recipient's violating his official duties Section 335: Aggravated cases Section 336: Omission of an official act Section 338: Confiscatory expropriation order and extended confiscation Section 340: Causing bodily harm while exercising a public office Section 348: Making false entries in public records Section 352: Demanding excessive fees Section 353b: Breach of official secrets and special duties of confidentiality Section 357: Incitement of a subordinate to the commission of offences
MALAYSIA	CL	Yes	**CHAPTER IX. OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS** 161. Public servant taking a gratification, other than legal remuneration, in respect of an official act 162. Taking a gratification in order, by corrupt or illegal means, to influence a public servant 163. Taking a gratification, for the exercise of personal influence with a public servant 164. Punishment for abetment by public servant of the offences above defined

			165. Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant 166. Public servant disobeying a direction of the law, with intent to cause injury to any person 167. Public servant framing an incorrect document with intent to cause injury 168. Public servant unlawfully engaging in trade 169. Public servant unlawfully buying or bidding for property 170. Personating a public servant 171. Wearing garb or carrying token used by public servant with fraudulent intent **MACC ACT 2009. Part IV** S16. Offence of accepting gratification S17. Offence of giving or accepting gratification by agent S18. Offence of intending to deceive principal by agent S19. Acceptor or giver of gratification to be guilty notwithstanding that purpose was not carried out or matter not in relation to principal's affair or business S20. Corruptly procuring withdrawal of tender S21. Bribery of officer of public body S22. Bribery of foreign public officials S23. Offence of using office or position for gratification S24. Penalty for offences under sections 16, 17, 18, 20, 21, 22 and 23 S25. Duty to report bribery transactions S26. Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence S27. Making of statement which is false or intended to mislead, etc., to an officer of the Commission or the Public Prosecutor S28. Attempts, preparations, abetments and criminal conspiracies punishable as offence
SOUTH KOREA	CC	Yes	**CHAPTER VII CRIMES CONCERNING THE DUTIES OF PUBLIC OFFICIALS** Article 122 (Abandonment of Duties) Article 123 (Abuse of Authority) Article 124 (Unlawful Arrest and Unlawful Confinement) Article 125 (Violence and Cruel Act)

			Article 126 (Publication of Facts of Suspected Crime) Article 127 (Divulgence of Official Secrets) Article 128 (Obstruction of Election) Article 129 (Acceptance of Bribe and Advance Acceptance) Article 130 (Bribe to Third Person) Article 131 (Improper Action after Acceptance of Bribe and Subsequent Bribery) Article 132 (Acceptance of Bribe through Good Offices) Article 133 (Offer, etc. of Bribe) Article 134 (Confiscation and Subsequent Collection) Article 135 (Aggravation of Punishment for Crimes in Course of Official Duty)
PHILLIPINES	CC	yes	***REPUBLIC ACT No. 1379: AN ACT DECLARING FORFEITURE IN FAVOR OF THE STATE ANY PROPERTY FOUND TO HAVE BEEN UNLAWFULLY ACQUIRED BY ANY PUBLIC OFFICER OR EMPLOYEE AND PROVIDING FOR THE PROCEEDINGS THEREFOR.*** **PRESIDENTIAL DECREE NO. 46: MAKING IT PUNISHABLE FOR PUBLIC OFFICIALS AND EMPLOYEES TO RECEIVE, AND FOR PRIVATE PERSONS TO GIVE, GIFTS ON ANY OCCASION, INCLUDING CHRISTMAS** **REPUBLIC ACT NO. 7080. AN ACT DEFINING AND PENALIZING THE CRIME OF PLUNDER** **PRESIDENTIAL DECREE NO. 749. GRANTING IMMUNITY FROM PROSECUTION TO GIVERS OF BRIBES AND OTHER GIFTS AND TO THEIR ACCOMPLICES IN BRIBERY AND OTHER GRAFT CASES AGAINST PUBLIC OFFICERS** **REVISED PENAL CODE (TITLE VII): CRIMES COMMITTED BY PUBLIC OFFICERS** **CHAPTER ONE** PRELIMINARY PROVISIONS Art 203. Who Are Public Officers. **CHAPTER TWO** MALFEASANCE AND MISFEASANCE IN OFFICE Section Two – Bribery Art. 210. Direct bribery.

			Art. 211. Indirect bribery. Art. 211–A. Qualified Bribery. Art. 212. Corruption of Public officials. **CHAPTER THREE** FRAUDS AND ILLEGAL EXACTIONS AND TRANSACTIONS Art. 213. Frauds against the public treasury and similar offenses. Art. 214. Other frauds. Art. 215. Prohibited transactions. Art. 216. Possession of prohibited interest by a public officer. **CHAPTER FOUR** MALVERSATION OF PUBLIC FUNDS OR PROPERTY Art. 217. Malversation of public funds or property – Presumption of malversation. Art. 218. Failure of accountable officer to render accounts. Art. 219. Failure of a responsible public officer to render accounts before leaving the country. Art. 220. Illegal use of public funds or property. Art. 221. Failure to make delivery of public funds or property. **CHAPTER FIVE** INFIDELITY OF PUBLIC OFFICERS Section Two – Infidelity in the custody of documents Art. 226. Removal, concealment or destruction of documents. Art. 227. Officer breaking seal. Art. 228. Opening of closed documents. Section Three – Revelation of Secrets Art. 229. Revelation of secrets by an officer. Art. 230. Public officer revealing secrets of private individual. **CHAPTER SIX** OTHER OFFENSES OR IRREGULARITIES BY PUBLIC OFFICERS Section One – Disobedience, refusal of assistance and maltreatment of prisoners Art. 231. Open disobedience Art. 232. Disobedience to order of superior officer, when said order was suspended by inferior officer. Section Two. – Anticipation, prolongation, and abandonment of the duties and powers

			of public office Art. 236. Anticipation of duties of a public office. Art. 237. Prolonging performance of duties and powers. Art. 238. Abandonment of office or position. Section Three. – Usurpation of powers and unlawful appointments Art. 240. Usurpation of executive functions. Art. 244. Unlawful appointments. [**REPUBLIC ACT NO. 3019]: ANTI-GRAFT AND CORRUPT PRACTICES ACT** Section 2. Definition of terms. Section 3. Corrupt practices of public officers. Section 7. Statement of assets and liabilities. Section 8. Prima facie evidence of and dismissal due to unexplained wealth.
INDONESIA	CC	YES	**1999 LAW ON CRIMINAL ACT OF CORRUPTION** Article 1: public Officials – definition Article 2: bribery Article 3: abuse of Office Article 13: gifts or offers Article 15: attempts Article 18: confiscation and compensation Article 19: third party confiscation Article 20: corporate liability **AMENDMENT TO LAW NO. 31/1999 ON CORRUPTION ERADICATION (Law No. 20/2001 dated November 21, 2001)** Article 5: giving and receiving bribe Article 7: embezzlement by a builder Article 8: embezzlement by a public official Article 9: forgery/falsification by a public official Article 10: embezzlement – damage, loss and assisting others Article 11: public official receiving prize or promise by virtue of office Article 12: public official receiving prize or promise by virtue of office to act/not act; misconduct in office Article 12B: reversal of burden of proof Article 37A: asset disclosure Article 38B: illicit enrichment Article 38C: confiscation

TURKEY	CC	YES	**ELEVENTH SECTION: Offenses Against Nation and State and Final Provisions** Article 247. Embezzlement Article 248. Embezzlement (sincere repentance) Article 249. Embezzlement (matters of mitigation) Article 250. Malversation or undue influence Article 251. Failure to perform control duty in bribery Article 252. Bribery (offering and accepting) Article 253. Imposition of security precautions on legal entities Article 254. Bribery (sincere repentance Article 255. Securing benefit in a work of which the performance is beyond authorization Article 256. Exceeding the limits of authorization for use of force Article 257. Misconduct in office Article 258. Disclosure of office secrets Article 259. Trading during public service Article 260. Abandonment or non-performance of public office Article 261. Improper disposition on other's property Article 262. Improperly undertaken public service Article 263. Improper use of special signs and uniforms Article 264. Prevention of performance Article 265. Use of vehicles in public service during commission of offense

Annex 3: International Experiences - Article Analysis

BRIBERY

Art. 279: Receiving bribes	**Comparative Legal Analysis**	**Commentary and suggestions on current Art. 279**
abuse their positions and/or power	-	Most countries leave out the qualifier on the grounds that it is the *use* of their post that is the basis of the offence.
have accepted or will accept	Many have terms that involve requests or rewards, including: soliciting, demanding, asking, agreeing to receive, receive, received, as a reward for, allows	Too limited; needs expanding according to the general comparative approach.
directly or through intermediaries	Most use the terms 'directly' or 'indirectly'.	Too limited; raises evidential issues of what is an 'intermediary'. The proposed Article on Offering Bribes will include a clearer definition.
money, property or other material interests in any form	Most use the terms benefit, advantage, or gratification.	Terms too restrictive, needs to include intangible and negative benefits (such as cancellation of a gambling debt). A useful term is advantage/benefit *other than legal remuneration*, which distinguishes clearly that anything beyond legal remuneration could be a bribe.
valued between two million dong and under ten million dong	Most do not specify amount.	While this may distinguish between a gift and 'bribe' many bribes are small but frequent; others are tests. Such a distinction also allows deniability. Better left out.
to perform or not to perform certain jobs for the benefits or at the request of the bribe offerers	Most do not specify 'certain' jobs and nor do they require it to be 'at the request' of or 'for the benefit' of the briber-giver. May simply use the term 'to perform or fail to perform an official act'.	Such qualifications are restrictive. The bribe could be for any decision or action, it could be for the benefit of a third party and the relationship between the official and giver may be such that a 'request' is not necessary.
in one of the following circumstances (a) – (c); [more stated under 2-5]	As above. Nearly all do not qualify the circumstances.	Propose that this should either be omitted or included as aggravating circumstances in terms of sanctions.

ABUSE OF OFFICE

Arts. 280-282: Abuse	**Comparative Legal Analysis**	**Commentary on current Arts. 280-282**
280: *abuse their positions and/or powers* ***281:*** *for self-seeking or other personal motivation, abuse their positions and/or powers to act contrarily to their official duties* ***282:*** *for self-seeking or other personal motivation, act beyond their powers contrarily*	Most of the Codes use the term 'abuse' but a number include terms that address 'benefit' for themselves, and others. Some include terms that define abuse as any official decision or action that results in (i) an advantage to himself or	The Vietnam Articles are overlapping. A more effective approach would be a single offence. If the provisions on asset disclosure and illicit enrichment are addressed then use of office for financial gain, including appropriation of land and assets, would be further addressed. The Finnish offence also covers oppressive conduct to other officials and would complement a

Arts. 280-282: Abuse	**Comparative Legal Analysis**	**Commentary on current Arts. 280-282**
to their official duties ***280:*** *to appropriate other persons property* ***281:*** *causing damage to the interests of the State and the society and/or the legitimate rights and interests of citizens* ***282:*** *causing damage to the interests of the State and the society, and/or to the legitimate rights and interests of citizens*	another (ii) a detriment or loss to another. None have the range of abuse offences but rely on a generic offence. One – Finland – also includes as an offence misuse of office in relation to a person under their command or immediate supervision.	revised Trading on Influence/Undue influence Article.
280: *valued between two million dong and under fifty million dong or two million dong* ***281****: -* ***282****: -*	Most do not specify amount.	Such a distinction also allows deniability; better not to specify amount.
280*: but causing serious consequences, have been disciplined for such act or sentenced for one of the offenses defined in Section A* ***281****: -* ***282****: -*	Most do not specify 'consequences' and nor previous potential criminality.	Such qualifications are restrictive.

TRADING IN INFLUENCE

Art. 283: Trading In Influence	**Comparative Legal Analysis**	**Commentary on Art. 283**
abuse their positions and/or power	-	Most countries leave out the qualifier on the grounds that it is the *use* of their post that is the basis of the offence.
have accepted or will accept	Many have terms that involve requests or rewards, including: soliciting, demanding, asking, agreeing to receive, receive, received, as a reward for.	Too limited; needs expanding according to the general comparative approach. Again, the focus is on the act or proposed transaction.
directly or through intermediaries	Most use the terms 'directly' or 'indirectly'.	Too limited; raises evidential issues of what is an 'intermediary'. The proposed Article on Offering Bribes will include a clearer definition.
money, property or other material interests in any form	Most use the terms benefit, advantage, or gratification.	Terms too restrictive, needs to include intangible and negative benefits (such as cancellation of a gambling debt). A useful terms is advantage/benefit *other than legal remuneration*, which distinguishes clearly that anything beyond legal remuneration could be a bribe.
valued between two million dong and under ten million dong, *or under five hundred thousand dong but causing*	Most do not specify amount.	While this may distinguish between a gift and 'bribe' many bribes are small but frequent; others are tests. Such a distinction also allows deniability. Better left out.

Art. 283: Trading In Influence	Comparative Legal Analysis	Commentary on Art. 283
serious consequences, have already been disciplined for such act but continue to commit it		
to use their influence and incite persons with positions and powers to do or not to do something within the sphere of their responsibility or directly related to their work or to do something they are not allowed to do		Too restrictive. The key here should be intent, meaning that neither the giver, intermediary or the public official necessarily has the means or would be able to deliver the advantage in order that the public official or the person abuse his or her real or supposed influence.
in one of the following circumstances (a) – (c); [more stated under 2-5]		

GIVING A BRIBE

New Article on Giving a Bribe	
Comparative Legal Analysis	**Commentary**
Most offences provide coverage from promise to giving, for past and future. What is offered, agreed to be offered or given is invariably a benefit or advantage. It may be given directly or indirectly ('intermediaries' are rarely mentioned as a specific term). There is no requirement that 'intention' or 'knowledge' is required, nor that performing or not performing is delivered. The amounts are not specified, other than in aggravating circumstance for sanctions.	The Offence should mirror a revised Article 279 so that accepting, offering to accept, etc., is paralleled with equivalent offences of giving, offering to give, and so on.

LEGAL ENTITIES

Comparative Legal Analysis	Commentary
what is offered/given – advantage, etc.; why it is offered/given; how it is offered/ give and by whom; when it is offered/given; issues of attempt or actual performance/non-performance; size of bribe; buying for the future/obligation/promise of a future reward; acceptance irrespective of outcome; intent, knowingly, dishonest, the act itself; consequence aggravation.	To maintain parity with public sector bribery, the Article should address giving and receiving in the same terms; What is offered/received should use the same term – 'advantage'; In terms of who offers, the term is 'anyone directly or indirectly'; Intermediary is the same terms as the proposed Article on giving a bribe; Whether anything is or is not performed is the same terms as the revised Article 279; The size of the payment is irrelevant; Intent or knowledge is not relevant.
Agent/principal or anyone	In terms of receiving or accepting, one of the differences in comparative legislation is whether the Article should adopt an agent/principal relationship,

Comparative Legal Analysis	Commentary
Legal entity	but that assumes the principal will also not be involved or is being deceived by his or her agent (employee, staff member, etc.). To cover all, many countries simply use 'anyone, directly or indirectly' for giving and the following for receiving: position of trust, employee, staff, etc. The definition of a natural person working for a legal entity should cover 'any person who directs or works, in any capacity, for a private sector entity' as well as the definitions here for an intermediary or agent. A legal entity should be defined around a definition of having a legal personality and which may, acting under its own name, exercise rights and be subject to obligations, including payment of taxes. It should also include sole traders, non-profit-making organisations and beneficial ownership.
Additional Offences	<u>False Accounting</u> Some countries use a clause that addresses internal procedures that disguise bribes as follows: <u>Corporate Responsibility</u> Some countries criminalise companies for the conduct of senior management and others.