

**Vietnam's Membership of the WTO: An Analysis of the
Transformation of a Socialist Economy Into an Open Economy
with Special Reference to the TRIPS Regime and the Patent Law**

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Abstract

This study is designed to examine Vietnam's attempts to reform its economic and legal system in order to accelerate its economic development and the challenges it is facing as a result of its membership of the WTO. The thesis revolves around the following central research question: How has the Vietnamese legal system responded to the challenges brought about by modernisation driven by this country's membership of the WTO and what improvements are needed in its legal system to ensure that this agenda of modernisation is reconciled with the needs of its people as well as with the demands of the international trade and the intellectual property protection agenda.

After a long period of negotiations Vietnam became the 150th WTO member on 11th January 2007. Like China, Vietnam has also been pursuing a policy of economic liberalization since 1986 while maintaining a socialist political system. On the road to economic development and prosperity for the people, Vietnam accepted many new obligations resulting from its WTO membership. Consequently, the country is now going through a period of breathtaking changes not only in transforming the economy but also all aspects of its legal system.

By joining the WTO, Vietnam represents a unique case of an attempt to reform a centrally planned economy in order to transform itself into a system which was supposed to be compliant with the multi-lateral trading system led by the WTO, and based on the values of capitalism. The economic and legal transformation that Vietnam is going through as a result of membership to the WTO, and the nature and scope of obligations that Vietnam was required to undertake to become a member of this world trade body, makes a fascinating case for study. While still maintaining a single party political system, a huge transformation has been carried out in the legal framework of Vietnam in the past 20 to 25 years to bring the Vietnamese legal system up to the international legal standards expected by foreign trades and investors interested in doing business with and in Vietnam.

Vietnam has finished its first few years with the WTO “machine” in operation and this country is now trying to progress with the same speed as with other WTO members. In order to deal with the challenges and to gain from the opportunities arising from its WTO membership appropriately, Vietnam is launching plenty of new initiatives in socio-economic policies and in the national legal system as well. However, the country is still facing many challenges concerning the integration of the main principles of international trade and economic law into a socialist legal system. It is in this context that this thesis examines the process of reform, its weaknesses and strengths, the merits and demerits of Vietnam’s membership of the WTO with particular reference to the obligations arising from the international intellectual property regime, and proposes a set of recommendations designed to better equip Vietnam to deal with the challenges ahead. The focus is on the strengths and weaknesses of various reform programmes undertaken by the country and the lacunae that still exist in its legal system.

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Agreement on Textiles and Clothing

Agreement on the Application of Sanitary and Phytosanitary Measures

Agreement on Trade-Related Aspect of Intellectual Property Rights

General Agreement on Tariffs and Trade

General Agreement on Trade in Services

Marrakesh Agreement Establish the World Trade Organization

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes

Agreement on Trade-Related Investment Measures

Berne Convention for the Protection of Literary and Artistic Work

Brussels Convention Relating to the Distribution of Programme-Carrying Signals
Transmitted by Satellite

Madrid Agreement Concerning the International Registration of Marks

Relating to the Madrid Agreement Concerning the International Registration of
Marks (Madrid Protocol)

Paris Convention for the Protection of Industrial Property

Convention for the Protection of Producers of Phonograms Against Unauthorized
Duplication of Their Phonograms

Union for the Protection of New Varieties of Plants Convention

Brussels Convention Relating to the Distribution of Programme-Carrying Signals
Transmitted by Satellite

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes

World Intellectual Property Organization Convention

Abbreviations

Abbreviation	Description
AFTA	ASEAN Free Trade Area
APEC	Asia Pacific Economic Co-operation forum
ASEAN	Association of Southeast Asian Nations
Berne Convention	Berne Convention for the Protection of Literary and Artistic Work
BIRPI	United Bureau for the protection of intellectual property (French acronym)
Brussels Convention	Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
BTA	Bilateral Trade Agreement
CEPT	Common Effective Preference Tariff
CPV	Communist Party of Vietnam
DSB	Dispute Settlement Body
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
EMR	Exclusive Marketing Right
EU	European Union
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HDI	Human Development Index
IMF	International Monetary Fund
IP	Intellectual Property

IPR	Intellectual Property Right
ITO	International Trade Organization
LDC	Least Developed Country
LNA	Legal Needs Assessment
LND	Legal Normative Document
Madrid Agreement	Madrid Agreement Concerning the International Registration of Marks
Madrid Protocol	Relating to the Madrid Agreement Concerning the International Registration of Marks
MFN	Most-Favoured-Nation Treatment
MOH	Ministry of Health of Vietnam
MOJ	Ministry of Justice of Vietnam
NA	National Assembly of Vietnam
NOC	National office of Copyright of Vietnam
NOIP	National Office Intellectual Property of Vietnam
ODA	Official Development Aid
PAR	Public Administration Reform
Paris Convention	Paris Convention for the Protection of Industrial Property
Phonograms Convention	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
R&D	Research and Development
Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
SOE	State owned enterprise
SPS	Sanitary and Phyto-Sanitary
TBT	Technical Barriers to Trade
TRIMS	Trade related investment measures
TRIPS	Trade related intellectual property rights
UN	United Nations

UNAIDS	Joint United Nations Program on HIV/AIDS
UNDP	United Nation Development Program
UPOV Convention	Union for the Protection of New Varieties of Plants Convention
WB	World Bank
WHO	World Health Organization
WIPO Convention	World Intellectual Property Covention
WIPO	World Intellectual Property Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
WTO	World Trade Organization

Chapter One

Introduction

I.1 Background of Study and Current Research

I.1.1 The Socialist Republic of Vietnam and the WTO's membership

The establishment of the World Trade Organization (WTO) in 1994 has had a significant influence on the development of international trade. Although there are still many conflicting arguments about the role of the WTO on liberalizing trade, it has been generally agreed that the WTO and its legal regime is playing a key role in the dramatic growth of the global economy. There is considerable agreement that accession to the WTO and participation in the worldwide trading system is necessary for every nation's economic growth, especially by taking advantage of new technology and free trade. However, how much advantage the developing countries will gain from trade liberalization and how much they will lose from being part of the global economy are still big questions for every nation member, especially for new members.

China, a major socialist country, joined the WTO in 2001. Vietnam, another major socialist country, concluded its accession negotiations in 2006 and formally became the 150th WTO member on 11th January 2007. Like China, Vietnam had also been pursuing a policy of economic liberalization for many years, since 1986, while maintaining a socialist political system.¹ As part of the endeavour to integrate the Vietnamese economy into the world economy, membership of the WTO became a major objective for the country. The events leading up to Vietnam's accession to the

¹ Generally see Deborah Z. Cass, Brett G. Williams and George Barker (eds.), *China and the World Trading system: Entering the New Millennium* (Cambridge University Press, 2003); Gareth Porter, *Vietnam: The Politics of Bureaucratic Socialism* (Cornell University Press, 1993); Pietro P. Masina, *Vietnam's Development Strategies* (Routledge, 2006); Stephanie Balme & Mark Sidel (eds.), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007) Mark Sidel, *Law and Society in Vietnam: the Transition from Socialism in Comparative Respective* (Cambridge University Press, 2008).

WTO's Agreement, especially the accession negotiations and the content of the final deal reached between the WTO and Vietnam, have had a profound impact on Vietnam as a nation in general and specifically on its economy and legal system. Prior to achieving WTO membership, Vietnam accepted many new obligations heralding a fundamental shift in its economic policy and legal framework. Consequently, the country is going through a period of breathtaking changes not only in transforming the economy but also the legal landscape.²

Vietnam's membership to the WTO represents a rather unique case of an attempt to reform a centrally planned economy in order to transform itself into a system which was supposed to be compliant with the multilateral trading system led by the WTO and based mainly on the values of capitalism. After being reunified in 1975, the Vietnamese economy operated under a centrally planned strategy for a long period. Almost all of international trade activities were operated with the Soviet Union and a few Asian countries. Around three quarters of Vietnam's imports were from these trade partners and around 60% of the Vietnamese exports also were to these nations.³ Thus, the collapse of the Soviet Union and its community nations had crucially impacted on Vietnam's economy. Vietnam was to no longer receive the development funds, military assistance and trade exchanges from those nations. Vietnam had therefore to reform its own own capacity to cope with the real situations of backward socio-technical infrastructure and development strategy. In addition, due to the fact that Vietnam was one of the last ASEAN countries to conclude the WTO accession agreements, Vietnam had to present more favourable offers than other regional countries like China, Cambodia and Nepal in order to get the bilateral and multilateral agreements with other WTO members.

While still maintaining a single party political system, a huge transformation has recently occurred in the legal framework of Vietnam, to bring the Vietnamese legal system in line with the international legal standards expected by foreign trades and investors interested in doing business with and in Vietnam. In an attempt to

² Prime Minister of Vietnam, Nguyen Tan Dung, *The WTO's membership: Opportunities and challenges for Vietnam*, available at <<http://vietnamnet.vn/chinhtri/2006/11/631087/>>

harmonize the principles of international trade and open economy with the existing political system, based on the one party system of government, Vietnamese leaders sought to develop a legal framework whose aim was to support “a socialist oriented market economy”. The hope was that this new concept would allow the Vietnamese economy to integrate itself into the international trading system led by the WTO.

Having gone through a process of transition in its modern history from the Confucian thoughts to the French colonial system and finally to the Marxist philosophy, the country now finds itself once again managing the challenges brought about by the drive to transform not only the economy but also the legal system into a modern system based on an open economy. Strong influences flowing from the centrally planned economy meant that many legal documents had been issued without proper consideration for the tenets of the rule of law. In addition, with the limitation in legal knowledge and social preferences, the law makers have often, without awareness, undermined some crucial rules concerning human rights and constitutional law. For example, in October 2008, the Ministry of Health issued the Decision No 33/2008/QĐ-BYT (dated 30th September 2008) in which they stipulated about 83 conditions for obtaining a driving licence many of which were either unreasonable or against the dignity of the individuals concerned. It stated that those suffering from health problems such as diabetes, cancer, HIV or diseases related to digestive system, endocrine and similar ones would not qualify for a driving licence. In order to attain health certification to apply for the driving test, contestants need 20 signatures from doctors and relations, thus creating a complicated procedure.⁴

Of course, as a result of twenty years of reform, the country has transformed both its economic and legal system. Indeed, the economic and legal transformation that Vietnam is going through as a result of membership to the WTO, and the nature and scope of obligations that Vietnam was required to undertake to become a member of

³ Leslie Holmes, “Vietnam in a Comparative Communist and Postcommunist Perspective” in Stephanie Balme and Mark Sidel (eds.), *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007), 11.

⁴ Tuoi Tre Newspaper, available at <http://www.tuoi-tre.com.vn/Tianyon/Index.aspx?ArticleID=285044&ChannelID=3> visited 26 October 2008.

this world trade body, makes a fascinating case for study. To illustrate, by the time Vietnam had completed its first two years with the WTO “machine” in operation, the country witnessed a threefold increase in foreign direct investment (FDI) capital and in 2007 achieved the highest increase of gross domestic product (GDP) out of the last ten years. The task of setting up a comprehensive and well-functioning legal system and its associated institutions is however still challenging for the Vietnamese Government, especially as their existing legal system is not fully coherent or complete and is weak in status as an enforcement system.

I.1.2 The TRIPS Agreement and its Application in Vietnam

As most other developing countries are, Vietnam is facing the challenge of reforming the national judicial system to comply with the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement). In order to fulfil the WTO member’s responsibilities, the Vietnamese Government must improve the Intellectual Property rights (IP) protection in order to comply with the minimum requirements of TRIPS, in terms of statutory law and the effectiveness of the enforcement system. However, setting a comprehensive and effective IP protection regime is not an easy task to a developing country like Vietnam.

Protection of IP in Vietnam was first mentioned around 1949, this was based on the ratification of the Paris Convention for the Protection of Industrial Property and the Madrid Agreement on International Registration of Mark in March 1949. However, these participations played only a symbolic role rather than a real position in the Vietnamese legal regime and the IP law sector, this was because Vietnam was entwined in the Vietnamese War from 1945 until 1975. During this time, the mission of a reunified nation was the focus, with attention on the Government as well as the citizen.

When Vietnam applied for WTO membership, the protection of IP rights were to be enforced in the Vietnamese legal system as a compulsory condition for this membership. The TRIPS Agreement offers three necessary preparation periods, for all member states, before the undertaking of its obligations. Vietnam belonged to a second group of countries whose socialist economies were being changed to market economies. This meant that Vietnam must perform its obligations, under the TRIPS

minimum standards, in all aspects of IP rights protection by the year 2000.⁵ It was an urgent task in the Vietnamese Government's schedule to upgrade the IP legal system. A comprehensive plan to overview the IP rights protection system of the country was implemented in 2000. This action program highlighted the necessary amendments and additions needed to the current legislation on IP rights protection and for the improvement of IP management and enforcement. Much legislation in IP rights protection was promulgated. For example, regarding the criminal procedures and remedies that were required in the Vietnam – United State Bilateral Trade Agreement and TRIPS standards, the first Criminal Code was passed in 1999 and was later amended in 2005, which added more criminal penalties to IP infringements. From the 12th to 23rd May 2003 in Geneva, the sixth negotiation meeting regarding Vietnam's membership to the WTO was held. In this negotiation round, the enforcement of IP protection in Vietnam was the main problem for discussion.

In this “paper” law system, almost all IP rights were protected by Vietnam's IP legislation, however in practice the IP enforcement system takes much time to implement. There are many IP protection authorities but this does not mean that they are effective; in addition, Vietnam does not have a special court designated for IP rights disputes. The Civil Court, the Criminal Court, the Economic Court and the Administrative Court all fall under the control and jurisdiction authority of the Vietnamese People's Court system. In addition, IP law is a newcomer to the legal framework as well as the Court. To illustrate, in the law training courses in law colleges and legal training centres, IP as a subject was only mentioned within the industrial property sector. The copyright law remains silent and uncovered in most legal training courses; consequently to popularize the IP law in real practice in Vietnam is truly a difficult job for the Government.

I.1.3 Using Piracy IP products or Bankruptcy?

In all developing countries, including Vietnam, the state budget, enterprise capital and individual income for buying the copyright of IP works is limited. These

⁵ The TRIPS Agreement, Article 65.3.

countries are unable to pay a big portion of their income for books and other education equipments. It should be noted that the main IP exporters are developed nations with multinational companies that dominate by providing IP works worldwide with subsequent expensive prices. In concluding the WTO negotiation, countries must accept the WTO-Plus conditions in IP protection; Vietnam had already incorporated all of the TRIPS obligations into their domestic law prior to becoming a WTO member.

In fully applying the TRIPS standards into the domestic legal system all Vietnamese consumers must buy the IP products, most of these prices are far beyond their budget. For example, in terms of software, the rate of use of pirated software products accounted for 85% in 2007, Vietnam spent around 40 million USD mainly from the state budget to buy the legal software programs.⁶ This means, in order to reach the TRIPS standard in software protection, the Vietnamese enterprises and citizens must spend around 200 million USD. The lawful products are distributed under exclusive rights and at an expensive price to developing nations. This expenditure could perhaps lead to bankruptcy for many small-medium enterprises, schools, universities and citizens in Vietnam. If citizens use the affordable pirated products, they could face administrative remedies, monetary fines or criminal penalties in the case of serious infringements.

One of the main causes of the illegal use of IP works in Vietnam could be regarded as the expensive supply source from multinational company in industrial nations. Meanwhile, it seems paradoxical that the biggest losses accounting from software infringements are witnessed from the developed nations, who are also the main IP exporters.⁷

⁶ News on Laodong newspaper, 1 May 2009, available at <<http://www.laodong.com.vn/Home/Vi-pham-hay-lachet/20095/136432.laodong>>

⁷ *In 2007, the loss value for software piracy in eleven developed nations such as the USA, the UK, India, China, France, Germany ...etc was 31 billion USD among of total 48 billion worldwide, source: the 2007 Global Software piracy study of the International Data Corporation (IDC), available at <<http://global.bsa.org/idcglobalstudy2007/>>, visited 1 May 2009.*

I.1.4 Special Effect of the Cultural Norms and Social Attitudes of Asian History

Located in Southeast Asia, Vietnam followed for a thousand years the feudal system and the Confucian virtues which were borrowed from China. The traditional culture, values and psychology of the Vietnamese people has had a negative influences on the implementation of IP rights protection in the national legal system. From a Confucian point of view, “information should be shared without concern for compensation” and “to steal a book is an elegant offense”.⁸ Consequently, challenges have arisen in the IP enforcement in ASEAN nations. Similarly, consequences from the cultural influences have resulted in shortcomings of the IP protection in Vietnam. It is a fact that the intellectual property laws are not only new to the country’s legal system, but moreover conflict with the Vietnamese people’s psychology. In social attitude, Vietnam’s view towards the IP rights is different from a Westerner’s legal tradition in both the national legal system and the culture in general. Traditionally in Vietnam, intellectual works were not defined as private property, therefore IP rights protection were not promulgated within the national legal system. Copying and imitation were not condemned as plagiarism; furthermore this was preferred as an accepted learning process and distribution of original works.

The challenge of how to study, draft and issue legal normative documents that comply with international rule, meet the state management demands as well as traditional culture, is a big problem of the Vietnamese law makers.

I.1.5 The Interaction of Patent Law and Public Health in Vietnam

With concern to the availability and access to medicines, after two years of being a member of the WTO and with thanks to their commitment to the healthcare service sector and pharmaceutical products, most of the vital medicines are now available in Vietnam’s market. There are 10,339 types of medicine that are lawfully registered. The number of foreign pharmaceutical companies which have opened branches in Vietnam has increased quickly. In addition, resulting from the the WTO’s

⁸ William Alford (1992) cited from Doris Estelle Long, *The Protection of Information in a Culturally Diverse Marketplace* (1996), *The John Marshall Journal of Computer & Information Law*, 156.

commitment to open business areas in importing-exporting pharmaceutical products for foreign companies, opportunities have been created especially since 1 January 2009 for access to medicines in Vietnam at more competitive prices. However, it appears that imported drugs are dominating the national medicine market at present in terms of availability and affordable price at the expense of local producers.

Despite high speed economic growth in recently years, Vietnam is still regarded as an agricultural economic nation with a low level of industrial development. As many other developing nations, Vietnam is not currently successful in the production of vital materials for the development of the manufacturing industry, mainly due to the lack of funding for R&D activities as well as the limitation in human resource capacity. The production of pharmaceuticals in Vietnam, under urgent demands from the health sector, has been gradually improved in the past few years but still remains at the early stages of development. The pharmaco-chemical industry is not yet developed in order to provide the materials for drug production. As a result, according to the 2008 Report of the Drug Administration of Vietnam, until the end of 2008 the pharmaceuticals and healthcare industry in Vietnam can only provide 50.2% of domestic demands. Additionally, more than 90% of the raw materials for drug production must be imported from foreign providers. Furthermore, in 2008, the total value of domestically produced drugs represent only 715 million USD meanwhile the value of imported drugs is 757,752 million USD.⁹

Vietnam has a good record in health care system performance; however the cost for pharmaceutical products is still much higher than the affordable expenses. Similar to other poor nations with low levels of R&D, Vietnam is not yet successful in pharmaceutical manufacturing. Almost all of these products are imported from industrial nations at an expensive price that is beyond the capacity of the state budget and family income. In recent years, the price of pharmaceutical products in Vietnam is much higher than the best prices in international markets, perhaps due to some

⁹ *The Pharmaceutical market in Vietnam: A balance competition?* News on the Education-Healthcare of Vietnam newspaper, available in the Vietnamese version at <<http://www.giaoducsuckhoe.net/article.asp?articleID=1184&CategoryID=2&SubCategoryID=1&SpecialtyID=29>> visited 20 April 2008.

unfair arrangements between medicine distributors and imported companies. This is leading to significant difficulties for the health care access of poor people.

In Vietnam, the prevalence rate of HIV/AIDS among the adult population accounted for 0.29% in 2001,¹⁰ which was comparatively lower than regional countries like Thailand and Cambodia or African countries. According to the UNAIDS Vietnam figures (Joint United Nations Program on HIV/AIDS), until 31 August 2007 there were 132,628 cases of HIV and 26,828 cases of AIDS.¹¹ However in 2008, HIV patients were found in all 64 provinces of Vietnam, and according to the latest report from the Ministry of Health in Vietnam, until 31 March 2009, there were 193,624 cases of HIV and 30,643 cases of AIDS, most of these patients cannot afford to pay for their treatment by themselves.¹²

Most HIV/AIDS patients in Vietnam are poor people and lose their labour capacity. Due to the lack of health care education, in many cases, relatives and employers do not allow the HIV/AIDS patients to stay in the same house or working area. They not only face discrimination, but the patients are normally unable to pay the cost of the HIV/AIDS treatment by themselves. The cost of HIV treatment medicine with the pharmaceutical patent holder in the United States is four times higher than a similar product without patent royalties from India. As a consequence of the expensive price and low income, only a small number of the HIV patients are able to pay for the treatment cost. Even though the patient may have received some supports from international organizations and the state budget, those subsidies are still extremely limited in comparison to the requirements.

Vietnam, and many other nations, irrespective of their wealth have a human right to have access to the vital medicines. Vietnam is looking for a legal instrument that can not only comply with the TRIPS obligations but also provide more opportunities and

¹⁰ *Vietnam Development Indicators, November 2001 of Gvt-donor-NGO Poverty Task Force*, cited in "EC-Vietnam Country strategy paper, 2002 – 2006" p32 available at <http://europa.eu.int/comm/external_relations/vietnam/csp/02_06_en.pdf>

¹¹ Available on *UNAIDS Vietnam* website at <http://www.unaids.org.vn/sitee/index.php?option=com_content&task=blogsection&id=4&Itemid=26>, visited 20th November 2008.

¹² *The First Quarter of 2009 Report of Ministry of Health of Vietnam*, available in the Vietnamese version at

access to medicines, at the same time as reducing their prices. It is trying to incorporate the TRIPS Agreement and complex patent law, into the domestic law system so as to bring benefits to social welfare which is a big challenge for Vietnam.

I.1.6 Current Research

There is limited research into Vietnam's legal reforms resulting from her WTO membership. What is more, most of the existing literature focuses on one branch of the Vietnamese national legal system or consists of short legal articles.¹³ In addition, very few articles have been published by Vietnamese scholars, providing little in-depth understanding about the real stage of Vietnam's legal reforms and their interaction with political, socio-economic development and international factors. In Vietnam, the published works on the WTO provided simple and general introductions about the WTO system and names of agreements without analysis or argument. According to the National Library of Vietnam, until May 2009, there were only eleven related books/article collections that focused in general on the WTO system and three books/articles collection focusing on the Vietnamese national legal system, over half of these sources are translated versions and out of date work published prior to 2005.¹⁴ There is only one current book available and published since Vietnam concluded the WTO's negotiation in January 2007, this was published by Cambridge University Press in 2008 about the Law and Society in Vietnam. Any research focusing on the influences of cultural norms, social attitudes and legal traditions to Vietnam's contemporary legal regime, in particular with IP law enforcement regime, are still virtually nonexistent within Vietnamese legal research.

<<http://www.moh.gov.vn/homeby/vn/portal/InfoDetail.jsp?area=58&cat=1456&ID=6965>>, visited 8 April 2009.

¹³ The recent books about the Vietnam Reform and Vietnamese law can be named as Stephanie Balme and Mark Sidel (eds.), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007); Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Respective* (Cambridge University Press, 2008); John Gillespie & Penelope Pip Nicholson (eds.) *Asian Socialism and Legal change: The dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press at the Australian National University 2005); Penelope Pip Nicholson, *Borrowing Court System: the Experience of Socialist Vietnam* (Martinus Nijhoff Publishers, 2007).

¹⁴ Reference the website of the *National Library of Vietnam*, available at <<http://www.nlv.gov.vn/nlv/index.php/Table/Tra-cuu-CSDL/>>, visited 1 May 2009.

Within IP law, in particular focusing on patent law and public health in Vietnam, there is even less research. At the end of 2008, there was currently no independent book or comprehensive research into this area. The key aim of this study is to address this gap.

I.2 Research Questions

The research hypothesis

This research is designed to address the following hypothesis: The Vietnamese accession to the WTO is the catalyst of change towards an open market economy. In doing so, the thesis aims to prove this hypothesis by utilising the measures taken to implement the TRIPS Agreement and Patent Law into the domestic legal order of Vietnam. Accordingly, this study will analyse the developments leading up to Vietnam's membership and the subsequent developments that have taken place in the country since its membership of this organisation. This study aims to examine Vietnam's attempts to reform its economic and legal system in order to accelerate its economic development and the challenges it is facing as a result of its membership of the WTO. It will examine how has the Vietnamese legal system responded to the challenges brought about by modernisation driven by this country's membership of the WTO and what improvements are needed in its legal system to ensure that this agenda of modernisation is capable of delivering the change required or expected in the country.

Without a doubt, the membership of the WTO is regarded as the most important factor in the reform in all areas including socio-economic development and legal development in Vietnam. The aims of this study are to examine: the background to Vietnam's desire to join the WTO; the nature and scope of obligations that Vietnam undertook for this membership; and the impact this membership has had on the Vietnamese political, legal and economic landscapes. The application of the TRIPS standards on patent protection and public health in Vietnam has been selected for further examination, as this legal context is not only a newcomer to the legal system and social attitudes but is also a controversial issue in Vietnam, as well as for many other WTO's members.

This study aims to investigate the key issues and research questions as following:

First, the WTO and its legal regime are playing a crucial role in the growth of international trade and the global economy. Accession to the WTO and participation in the world trading system is an obvious step forward for developing nations and the expansion of their markets, attracting FDI and taking advantage of new technology transfers. However, how many advantages are the developing countries actually getting from trade liberalizing and how much could they lose from the global economy are still big questions for their governments as well as legal researchers.

Second, joining the TRIPS system and enhanced intellectual property protection is a compulsory task for all WTO members and it is necessary for WTO accession for States aspiring to join this organisation. How the developing nations can apply the IP protection and TRIPS standards into their domestic law system is an interesting question, especially when considering how to meet the WTO obligation without harming their social interests. Reconciling the TRIPS standards into the national legal system is difficult but achievable for developing countries, especially in the context of social welfare and public interest.

Third, as one of the most recent nations to conclude the WTO accession and being regarded as having a non-market economy, Vietnam represents a unique case attempting to reform a centrally planned economy in order to transform itself into a system, compliant with the multilateral trading system led by the WTO, based mainly on the values of capitalism. While still maintaining a single party political system, a huge transformation has occurred in Vietnam's legal framework. This recent transition has brought the Vietnamese legal system inline with the international legal standards expected by foreign traders and investors interested in doing business with and in Vietnam. How Vietnam's national legal regime has been reformed, in order to meet the WTO's membership requirement, and what Vietnam should do "beyond the WTO's membership" in order to gain benefits from the international trade system are questions to be addressed. These questions will be explored by analysing the main features of the accession negotiations, comparing and contrasting this with other similar negotiations, and finally focusing on the lessons that can be learnt from the accession of Vietnam's membership to the WTO.

Fourth, the IP law is not only considered as a new element of Vietnam's national legal regime but is also generally viewed as a controversial matter in social attitude. This is clearly evident as the systems of IP protection and IP law were only improved after Vietnam applied for membership to the WTO. However, is creating an IP protection regime inline with the TRIPS standards a feasible task for Vietnam and what would be a suitable way for Vietnam to reconcile TRIPS into the domestic system, in order to attain WTO accession commitments but also protect the citizen's and promote socio-economic development, are questions which will be addressed.

Fifth, TRIPS is the first WTO Agreement which has been amended due to the controversial interaction between patent protection and public health. Examination of the consequences of WTO membership; the TRIPS standards and patent law affecting the public health in Vietnam; and how the related provisions of the TRIPS Agreement on pharmaceutical products and the Doha Declaration on Public Health have been interpreted into Vietnamese IP laws, are all considered as some of the main aims of this study.

I.3 Research Approaches and Data Collection Methods

I.3.1 Research Approaches

This study is conducted as legal research into international law and international trade law. No results for this research could be predicted because conclusions will be achieved via deductive methods. The research is carried out based on: theoretical foundations; literature sources; fieldwork (including interviews with key stakeholders); and a case study. Combinations of multiple research methods will be considered during the investigation. This research is conducted by investigating historical developments of international IP law and its application to developing countries. The historical research method is used as one of the main approaches of this project.

It is envisaged that other research methods will be used in this project. The comparative legal research method, and both micro and macro-comparison approaches, will be applied to compare the differences between international law

and the national legal regime in various areas and levels of protection of IP. In addition, a comparative study between Vietnam and other transitional nations, regional nations and new WTO members will be used to explore and understand the real stage that Vietnam is at within the WTO system. This method is used mostly in Part 2, from Chapter Four to Chapter Six, of this thesis.

The reform-oriented research method is used together with the legal comparative method and historical research method in Chapter Four. The reform-oriented method examines the limitations of current international IP laws, and the challenges faced by developing countries in implementing TRIPS into their national legal systems. This helps in forecasting and recommending changes to controversial IP matters in international law and developing countries, and in particular in Vietnam.

A critical approach is used as a potential research strategy in all chapters, especially from Chapter Four onwards. With sole leadership from a single party political system, Vietnam, perhaps, has sometimes shown confusion when applying the radical transformations that conflict with their political positions. On the one hand, the Vietnamese leaders want to reach the high speed of economic development and trade exchanges, however on the other hand, the constraints resulting from the centrally commanded economic thoughts based on socialism have slowed down the reform progress.

The combination of multiple research methods will investigate the historical development of Vietnam's national legal system in relation to international law and the WTO legal system. The historical research method and reform-oriented research method are the most appropriate approaches for identifying the adequacy of some of the existing rules in Vietnamese law and for suggesting recommendations to change the legal system. The comparative legal research method will not only indicate the differences between Vietnam and other transitional nations but will also determine any international legal aspects from which Vietnam can benefit in reforming its legal system.

Purposes of Research method

Qualitative method has been used in this study to investigate Vietnamese citizens' views on: Vietnam's accession to the WTO; their knowledge about the WTO and international trade; the current status of the Vietnam's accession; the advantages and disadvantages of the global economy and opportunities and challenges for Vietnam; their ideas and knowledge on IP law in international standards and IP protection in Vietnam; and their ideas as to the best way to develop both Vietnam's economy and national legal system, in particular IP protection, when Vietnam integrates into the international trade system.

This method is selected because this is the most effecting way of addressing the main research question, identifying, explaining and evaluating the practices, exploring the opinions of people and finding out the conclusions. This study aims to explore the process of reform of Vietnam, its weaknesses and strengths, the merits and demerits of the Vietnam's membership of the WTO. The context of special effect of cultural norms and social attitudes of Asian history to legal development will be investigated. So, for the scale and aims of this thesis, the qualitative method has been selected as the most appropriate method¹⁵

In this study, qualitative method is used to carry out a face-to-face questionnaire-based survey in accordance with the following plan:

Questionnaire-based survey and its methodology

Questionnaire form

The questionnaire form was built in both Vietnamese and English versions with the same content in multi-choice answer form in 5 main sections: Sections A: Background Information; Section B: Overall attitudes toward the WTO; Section C: The TRIPS Agreement and Vietnam's IP law; Section D: Communication and law disseminations; and Section E: Recommendation. Each questionnaire included 31 questions with around 220 multi-choice answers that covered the issues of the

¹⁵ General references on the Qualitative research method, see David Silverman, *Doing Qualitative Research* (SAGE Publications, 2005); Catherine Marshall, Gretchen B. Rossaman, *Designing Qualitative Research*, (3rd ed. London, SAGE Publications, 1999).

awareness of Vietnamese citizens of the WTO, the Vietnam accession to the WTO, the challenges and opportunities of Vietnam, the definition of intellectual property law, the TRIPS, IP protection law in Vietnam and recommendation for the ongoing economic and legal reform in Vietnam. The questionnaire sample had been tested by three volunteers, one working for a NGO, one from Japanese International Cooperation Agency in Vietnam, and one a farmer in Nam Dinh Province.

Timing and survey area

From January to May 2006, 200 copies of the questionnaire-based survey were carried out in Vietnam nation wide. The Participants were living mainly in three provinces (Nam Dinh, Quang Ngai and Binh Phuoc) and two biggest cities (Hanoi and Ho Chi Minh), in urban, rural and mountainous areas, in Northern, Central and Southern. They are represented a cross-section of income, age, profession, geographical and socio-economic variety, gender and education.

Interview procedures

I conducted face to face surveys and provided some extra explanations about my research. The first 30 copies were done during the Workshop entitled “Vietnam and the Admission to the WTO: Opportunities and Challenges”, organized by the National Assembly, between 20 and 21 January 2006 in Hanoi. The Participants were the Vietnamese senior government officials from Ministries and Ministerial level department, representatives from 11 provinces of Vietnam, legal researchers and academics, and representatives from international organizations like UNDP, Work bank, IMF in Vietnam.

Around 50 copies were been distributed in the rural area of Vietnam, in Nam Dinh province (in the North), Quang Ngai province (in the Central) and Binh Phuoc Province (in the South). The Participants were mostly farmers and small businessmen and businesswomen.

A further 50 copies were completed in Ho Chi Minh City, the biggest city of Vietnam with the population of 5 millions. Half of them were made at the Conference on FDI Attraction to Vietnam, organized by the Management Board of Dzung Quat Economic Authority (my organization) and the American Chamber of

Commerce. The Participants were the foreign investors, Vietnamese investors, lawyers, academic researchers, government officials and reporters. The rest were done by participants from various backgrounds such as businessman, student, housework people, and worker.

All the remaining questionnaires have been done in Hanoi, the capital of Vietnam. The Participants mostly are from the Vietnam national administrative system and academy such as the University, Ministry, Government Office and Office of National Assembly.

Data input

The questionnaire copies were numbered from the 1st to the 200th. The result of the survey was input by computerized processing with four excel files; the Vietnamese version; the English version; combine two Versions without percentage; and combine two Versions with percentage. The final result with percentage was presented in the English questionnaire form.

The outcome of each questionnaire could be easily accessed following the data tables. All 200 hard copies were brought to Leeds and the result input is enclosed to this thesis. The questionnaire outcome has been analyzed in my thesis. The interview schedule are enclosed to this thesis in appendices.

I.3.2 Data Collection Methods

In this study, documentary analysis will be applied as the major method for data collection. The analysis of documents and visual data is the most meaningful and appropriate method for this study. Documentation and visual data will be the primary and secondary legislation of international law, international trade law and Vietnamese law, official statistics, preparatory legislations, textbooks, journal articles, official publications, as well as other types of documents and visual data. The major types of documents and visual data which will be analysed in this research project are enclosed in the initial bibliography of this study. This data is current as of May 2009.

Working as a senior government official, the author has had the opportunity to access macro reform strategies and the official master plans of Vietnam. Together with supportive formal documents from international research projects including international organizations such as the World Bank, the European Union and many different United Nations Development Programmes (UNDP); this study was carried out from a different point of view, incorporating not only international resources but also the real reform processes and proposals of Vietnam.

A questionnaire-based survey was carried out on a small scale in the year 2006, which focused on the important awareness of Vietnam's main organizations and stakeholders that are involved in activities relating to the topic of this research, including: Vietnamese steering organizations in the WTO's accession; the National Assembly; the executive agencies; judicial bodies; law firms; foreign investor setc. and the view from ordinary citizens such as workers, farmers and small businessmen. The main target of this survey was to investigate Vietnam's citizens views on: the Vietnamese accession to the WTO; their knowledge about the WTO and international trade; the current status of Vietnam's accession; the advantages and disadvantages of the global economy and opportunities and challenges for Vietnam; their ideas and knowledge on IP law in international standards and IP protection in Vietnam; and their recommendations on the best way to develop both Vietnam's economy and its national legal system, in particular IP protection once Vietnam integrates into international trade.

The survey was a face-to-face questionnaire, designed in both Vietnamese and English versions, in which an introduction and summary of the research was included. There were 200 nationwide participants involved from different socio-academic background, this was to ensure a true representation of national and background diversity. The field work provided information about the different concerns regarding the global economic integration and the WTO's capacity to achieve a level playing field. By analysing the answers of participants, from various education levels and in both rural and urban area, the research findings have formed a comprehensive evaluation. With professional advice and knowledge from legal researchers, international legal advisors and the WTO accession team, the author is hoping to open the idea of macro approaches to the role of law and a panorama of a

developing nation in global development. The opinions, from farmers and workers through to the professional arguments of leading law makers and international legal advisors, about the reform of Vietnam have established a strong foundation for conclusions and recommendations for this study.

I.4 Organization of Thesis

This thesis is divided into two separate parts consisting of eight chapters. The first part consists of three chapters which will provide the introduction to the research and discussions about the WTO and its IP protection system. The second part consists of the last four chapters and will seek to explore the transition of Vietnam in the movement towards economic globalization and will then summarize and focus on the research conclusions.

Chapter One details the background, aims and research methodologies of the study.

Chapter Two reviews, in brief, the roles, functions and influences of the WTO in international trade development. This chapter analyses the development of international trade law through the operation of the WTO and its legal regime. Based on these elements, the position and actual status of developing countries, , will then be discussed.

Chapter Three presents an analysis of the TRIPS Agreement including its international standards. Which level of IP protection should apply; the conflicting relationship between public interests and rights of IP holders; and the ineffective enforcement of IP protection in developing countries will be argued in this chapter. The chapter will progress to further discuss the evolution of the TRIPS Agreement and the influences of the Doha Declaration on the Agreement, and public health on the IP law in developing nations.

For the second part of research, the study analyses the impacts of international factors, the WTO system and the TRIPS Agreement on the socio-economic developments and the national legal reforms of the Socialist Republic of Vietnam.

Chapter Four analyses the overall picture of Vietnam, including the political regime, economic status, social situation and Vietnam's integration into international trade. From the crucial factors of a single political party system to the master plan and development strategy of Vietnam which encompasses the reform agenda of all state power held by the legislative, executive and adjudicative or judicial branches, will be analysed here. The long process of Vietnam's membership to the WTO will be reviewed in this chapter.

The national legal regime of Vietnam and its weaknesses and strengths will be analysed in Chapter Five. Vietnam's legal experience will be reviewed, in particular looking at the differences and comparisons to other transitional nations. The case of the establishment of a socialist legal system and its transition, under the impact of international economic law, will be introduced. This chapter will examine and review Vietnam's national legal regime including the historical development, the concept of law from the feudal era, the Confucian thoughts and its influences on contemporary law. The strengths and weaknesses of the fundamental branches of Vietnamese legal system such as the legislative, executive and judicial bodies will be analysed in this section, with particular emphasis on the development of legal systems under the pressure of international trade law and the WTO legal regime. The impacts of legal traditions, cultural norms and social attitudes to law making, law implementing and law enforcement will be explored. Critical assessments on the achievements as well the challenges and shortcomings of the law reforms will therefore be explored.

Following on, Chapter Six will address the historic development of the IP law sector of Vietnam within the national legal regime development. The current stage of IP law in both legal normative documents and enforcement systems, reconciled within the TRIPS standards, will be discussed. Developing on ideas presented in part one, problems and challenges identified in the IP law sector in meeting the TRIPS standards will be examined with detailed analysis. This chapter will provide a unique discussion on the role of law in the nation's movement, the impacts of international trade law and the WTO system on Vietnam's reforms, the reconciliation of TRIPS obligations and public interests, by using the data which was obtained from the author's survey. Furthermore, it will also try to explore the

influences of traditional thoughts, cultural norms and social attitudes to the IP law in Vietnam.

Chapter Seven will focus on Vietnam's existing legal framework and its impact on pharmaceutical products, with regards to the consequences flowing from the TRIPS Agreement, the Doha Declaration on Public Health and patent law to the access to, price, importation and production of drugs in Vietnam. This work will also analyse how the provisions of the TRIPS Agreement and its exceptions that apply to pharmaceutical products have been interpreted in Vietnam's IP law. Some suggestions on how to use the provisions of "the TRIPS exceptions", the Doha Declaration and the TRIPS Agreement amendments, in order to improve the opportunities and access to medicines in Vietnam, will be discussed in this chapter.

Building upon the previous discussions and arguments, the last chapter, Chapter Eight, will conclude the main findings of the study with regards to all aspects of Vietnam's socio-economic reform and the building of a socialist legal system in Vietnam. By reconnecting arguments from previous chapters, the conclusion will clearly address the lessons that Vietnam can learn from, having gone through more than twenty years of reform. Finally, in the latter part of this chapter, the recommendations of the present author will be summarized on how to incorporate the international standards into a transitional legal regime. Suggestions on how to build a comprehensive and effective legal system with regard to IP law and public health, particularly in Vietnam, will complete this study.

Chapter Two

The World Trade Organization and Developing Countries

Introduction

The establishment of the World Trade Organization (WTO) in 1994 has been effective in influencing the development of growing international trade. For a simple definition, the WTO is commonly referred to as a multilateral trading system which can provide a predictable and efficiently functioning system for the huge volume of “international trade and related economic activity”.¹ Although there are still many controversial arguments about the role of the WTO on liberalizing trade, the WTO and its legal regime are playing a key role in the dramatic growth of the global economy. Especially with the current economic and financial worldwide crisis, the role for economic growth with the WTO trading system has gradually increased. There is considerable agreement that accession to the WTO and participation in the worldwide trading system is necessary for every nation’s economic growth, especially by taking advantage of new technology and free trade. However, how much advantage the developing countries will gain from trade liberalization and how much they will lose from being part of the global economy are still big questions for every nation member, especially for new members.

The aim of this chapter is to look at the historical development of the WTO and study the role of the WTO and how its working regime could benefit international trade and in particular developing countries’ development. The first part of this chapter provides a general overview of the WTO’s history and identifies current issues and concerns for development and developing nations and then progresses to summarize the functions and structure of the WTO, as well as its role in international economic development.

¹ Speech of Deputy DG of WTO, Harsha Vardhana Singh, *Multilateralism and the Role of WTO in the Present context*, Centre for International Governance, University of Leeds, dated 27 April 2009.

The second part contains arguments on the definition of developing countries and their role in the WTO system. The gap between WTO obligations and the actual legal systems in developing countries will be examined in this part.

Part three then focuses on the effects of the global economic and international trade policies on the socio-economic development of developing countries, especially in poor countries. This addresses the conditions and challenges that some new WTO members are facing in concluding their WTO accession. The progress of transitional countries that are also newcomers in the international trade system including Vietnam and China will be examined here. Finally the findings of this chapter will be summarized.

II.1 History of the WTO and its Current Issues

The most important organization in international trade is the World Trade Organization (WTO). It is working towards providing a better environment for international trading.² At present, the WTO is regarded as the most powerful organization in international trade law; in July 2008 there were 153 different nation members and 29 observers.³ Since 2001, when Chinese trade became formally bound by the WTO's rules, more than 97% of world trade is now governed by the WTO system.⁴

Although the WTO was only officially founded in 1995, its origin began in the negotiation to establish the International Trade Organization (ITO) at Havana in 1948 under the pressure of trade liberalisation. During the World Wars, many Western nations and the United States of America (USA) were looking for a free international trade system which would promote and benefit each individual country, as well as the world's economy. The idea of an international organization that could regulate trade and economic issues worldwide had been developed by the USA and

² DG Pascal Lamy speech on the meeting of the *Trade Negotiation Committee* on 17 December 2008, available on <http://www.wto.org/english/news_e/news_e.htm> visited 27th December 2008.

³ The number of member states of the WTO stands at 153 in 2008, Vietnam, Tonga and Ukraine were the latest WTO members.

the United Kingdom (UK), with the help of the Economics and Social Council of the United Nations (UN). Proposal documents on the legal framework of the ITO requested “significant and meaningful commitments for signatories in such areas as dispute settlement, international commodity arrangements, foreign investment, labour standards and restrictive business practices”.⁵ However, due to the refusal by the US Congress to support the ITO Charter, the ITO was never formed, despite its ambitions.

At the same time, the negotiations for the General Agreement on Tariffs and Trade (GATT) were set up, with limited control in tariff matters and related issues only. As a result of the US Congress’s refusal to support the ITO Charter, GATT as a provisional agreement, became the first worldwide and international trade regime.

After the Second World War, international economic development and international trade were growing. As an inevitable consequence, nations in the world were seeking a new suitable legal framework for the development of their economies. A framework for free trade tariff in many nations was sought and as a result the nation members of the GATT increased. From 1947 to 1961, GATT Negotiation Rounds only addressed tariffs. Extra issues including anti-dumping measures were added in the Kennedy Rounds (1964-1967), non-tariff measures in the Tokyo Round (1973-1979). The Uruguay Round (1986-1994) created potential development stages for GATT, many potential issues of global trade and economy were discussed, including the tariffs and non-tariffs of: services; textiles; agriculture; intellectual property; and dispute settlement mechanisms (DSM). By the end of the Uruguay Round in 1994, there were 128 countries/nation members of the GATT. The Uruguay Round in 1994 was regarded as the largest GATT round.⁶ The WTO, established by the Uruguay Round, formally began to operate in international trade law on 1st January 1995, this

⁴ DG Supachai Panitchpakdi’s speech on 24 January 2003, available on <http://intranet.corpei.ec/carpetas/cic/OMC/WTOCD/WTO%20Website/SnapshotOfWTOWebsiteInEnglish/english/news_e/news03_e/news_cancun_beyond_24jan03_e.htm> visited 02 May 2009.

⁵ Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner, *World Trade Law: Text, Materials and Commentary* (Hart Publishing, 2008), 67.

⁶ *Understanding the WTO*, available on <www.wto.org> visited 15th December 2005.

can be determined as “a formal organization that would unify all of the various agreements within one institutional framework”.⁷

From its founding in 1995, until 2008, there have been six WTO Ministerial Conference Meetings, the first one was held in December 1996 in Singapore and the latest was in Hong Kong in 2005. No ministerial conference was held in 2007 and this seems to have slowed down the implementation of the Doha Round contents. The Seattle Meeting (1999) and the Cancun Meeting (2003) were evaluated as failures of the WTO multilateral trade system.⁸ The Doha Meeting specially looked at the key issues of developing nations and third world nations, such as the agriculture sector, services and intellectual property. The role of trade as a potential tool for fighting against poverty and reaching the Millennium Development Goals (MDGs) was pointed out as a main task and the commitment of the WTO system for the needs of poor nations. The Doha Development Agenda (DDA) was called the Development Round but, in fact, the benefit that the rich nations and the DDA has had on developing countries has had little resulting performance.⁹

Until the summer of 2009, there had been no ministerial conference in nearly four years, despite the Marrakesh Agreement which established the WTO which states the requirement of regular session to be held at least once every two years.¹⁰ In recent years, 2008 and 2009, the growth of trade and economic worldwide development has been placed in crisis. Perhaps, this deflation cannot be overcome in a short period; therefore macro-solutions must be conducted worldwide with particular recommendations for specific regions and groups of nations. These current issues require urgent review and a further negotiation round to improve the economic development, as well as the multilateral trade systems. “The WTO, the Multilateral Trading system and the current global Economic Environment” with their core guiding principles namely “Full participation, Inclusiveness, and

⁷ Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner (n5),70.

⁸ Carlos A. Primo Braga and Elwyn Grainger-Jones, “The Multilateral Trading System: Mid-Flight Turbulence or Systems Failure” in Richard Newfarmer (ed.) *Trade, Doha, and Development: A Window into the Issues*” (The World Bank, 2006), 27.

⁹ See *The Doha Ministerial Declaration*, available on <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> visited 10th March 2009 and Carlos A. Primo Braga and Elwyn Grainger-Jones, (n7), 27-42.

¹⁰ Article IV.

Transparency” are the “General Themes” for the awaiting 7th Ministerial Conference which is due to be held on 30 November to 2 December 2009.¹¹

In the WTO, developing countries are the majority of its members and they play a significant influence to the global economic and international trade law developments. Of the 153 nation members, around two-thirds are from developing countries, they appear to be its most active members focusing on setting up trade policy proposals, policy drafts and WTO Ministerial Meetings.¹² Developing countries did not play an important role at the beginning of the international trade era and few original GATT parties belonged to this classification.¹³ However, their performance in both economic and political positions has improved at a high speed during the progressive history of GATT. The GATT contracting parties, in order to create a more suitable environment for developing countries, decided to provide differential and more favourable treatment to developing countries, without offering such treatment to other contracting parties. These conditions were named as the Enabling Clause and can be detailed as the facilitation and promotion of trade and export of developing countries, with assistance from other developed countries.¹⁴ The Uruguay Round and the WTO agreements display continuous support for special policies for the least developed countries and developing countries in some areas such as textile and agriculture. However, developing countries have to face significant challenges from the Trade Related Aspects of Intellectual Property Rights (TRIPS) and Trade Related Investment Measures (TRIMS) Agreements.

In recent years, developing countries represent the highest economic growth in terms of speed, most of the recent WTO policies are concerning developing countries. Because of trade liberalisation under the WTO, all members of the WTO and developing countries, in particular, gain more benefits than detriments to their economic development. Integration into the global economy has benefits for

¹¹ *The WTO's new* on 26 May 2009, available on

<http://www.wto.org/english/news_e/news09_e/gc_chair_stat_26may09_e.htm> visited 27 May 2009.

¹² Hoekman & Martin, *Developing Countries and the WTO: A Pro-active Agenda* (Blackwell Publishing 2001) foreword.

¹³ Matsushita, Schoenbaum & Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2nd ed. Oxford University Press, 2006), 765.

¹⁴ GATT Contracting Parties, Decision of November 28, 1979 on *Differential and More Favorable Treatment, Reciprocity and Fuller Participation on Developing Countries*.

developing countries; however, reasonable integration steps must be taken by poor countries to develop their domestic economy and legal system.

In reviewing the history of the development of the WTO, conflicts between developed countries and developing countries have caused the failure of some Rounds of Negotiations for example the Seattle Round 1999; and a number of trade policy disputes especially in some sensitive areas like agriculture and IP protection. The WTO regime, undoubtedly benefits the growth of international trade and developing countries as well. However, trade policies must be balanced in the accession agenda and in those sectors that developing countries could have comparative advantages. In addition, the allocation of trade representatives at the WTO headquarters of the poor countries must be improved in order to have a balance voice from both rich and poor countries since the multilateral trade system is supposed to create the same level of opportunities and the level playing field for all poor countries as well as developed countries.

II.2 The WTO Legal Regime

II.2.1 The Negotiating Principles and the WTO Agreements

The WTO legal regime is not a system of law codes or any legislative documents that are all newly promulgated. It is built on a system of negotiated agreements from all member nations, the agreements cover goods, services, intellectual property, environmental protection and trade dispute mechanisms. The WTO legal regime would be named as a “rules-based” system, the system is based on rules and rules are built on members’ negotiations. This agreement system creates the fundamental rules for business regulations and trade policies between WTO members. The WTO legal system could be viewed as a pyramid picture with the Marrakesh Agreement establishing the WTO as the corner stone. The Marrakesh Agreement declared the establishment of comprehensive legislation and an effective enforcement system that have created a multilateral framework of disciplines for trade in services and the IP

protection at world wide level, including a more effective and reliable dispute settlement mechanism (DSM).¹⁵

Under the above “Umbrella” Agreement, three agreements including: the General Agreement on Tariffs and Trade (GATT), for goods; the General Agreement on Trade in Service (GATS), for service; and Trade Related Aspects of Intellectual Property Rights (TRIPS), for intellectual property, are the “basic principles” of the WTO. Of these, GATT is the corner stone of the WTO with a long developmental history.

Under GATT, agreements and additional regulations for “goods” cover the following areas: agriculture; health regulations for farm products (SPS); textiles and clothing; product standards (TBT); investment measures; customs valuation methods; reshipment inspection; rules of origin; import licensing; subsidies and counter-measures; and safeguards. The GATS regulation deals with “services”: air transport; financial services; shipping; and telecommunications.

Under the principles and rules of the United Nations Charter, any nation has the free right to participate in any bilateral agreement or multi-bilateral agreement system.¹⁶ The WTO legal system has also been built on the negotiations of the member states. The WTO agreements that were negotiated and ratified by member nations are the legal framework of the world trading system. Based on these crucial rules, the WTO member nations provide trade policies within their domestic legal system within the agreement limits. The WTO agreements also create rights and obligations for international trade and commercial activities between nations, people, enterprises and organizations in a proper system. Until 2008, the WTO agreements have been applied with the same minimum standards in all 153 member countries. Even though the detailed provisions are not the same in all the different nations, the common principles such as the Most Favoured Nation (MFN) rule, the National Treatment (NT) principle, reciprocity and fair competition, have meant that international trade activities have operated as a level playing system.

¹⁵ The Marrakesh Declaration of 15 April 1994.

¹⁶ Thomas Cottier and Marina Poltea, “Constitutional Functions of the WTO and Regional Trade Agreements” in Lorand Bartels and Federico Ortino (eds.) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006), 43.

Overall, the WTO laws have marked an important part of international law development in both legislation and its institutions. WTO law is based on the general international law system and it has many similar characteristics in theory, but it focuses on the specific area of rules on trade matters between countries. It therefore covers the law of trade and other economic related areas such as environmental protection, health care, and human rights in economic development. Generally, the WTO legal regime covers most of the areas except the law in the movement of people. As the main sources of international law are customary international law and conventions/treaties, the WTO system does not only provide “case law”, but also a comprehensive and complex agreement system. In addition, the WTO legal regime is not “a simple treaty arrangement”,¹⁷ because its obligations are enforced by a comprehensive and effective system. With the DSM regulations and its operations, WTO law seems to be the most capable international regulator within the general international legal regime.

II.2.2 Main Functions of the WTO

In a simple definition, the main function of the WTO is to create trade liberalization on a global level, and to introduce an effective enforcement system to ensure the international trade rules are conformed at the same levels by the correlative developed country members. Or in an imaginative definition, “the WTO is a table. People sit around the table and negotiate”.¹⁸ In the words of the WTO’s Deputy Director General, Mr Singh, the WTO system would be regarded as “a facilitator of trade, production and investment, provides a framework for predictable good governance in the international trade regime under which nations respect each other’s right, and reduces trade and related tensions among nations.”¹⁹ Economic promotion at a worldwide level, fighting with poverty, assistance to poor countries, keeping the peace in trade matters, and sustainable development for the environment are the WTO’s main targets. The operations of the Dispute Settlement Body (DSB) are trying to set a fair international trade market environment. Although, there are

¹⁷ Deborah Z. Cass, *the Constitution of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005), 53.

¹⁸ Ibid.

¹⁹ Singh (n1).

controversial arguments about its effectiveness and judgments, the WTO trade dispute settlement regime is considered to be a comprehensive and highly effective system.

The functions of the WTO are regulated by Article III of the Marrakesh Agreement establishing the WTO in 1994 with the following main provisions:

- To facilitate the implementation, administration and operation, and further the objective, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
- To provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreement. The WTO provides also a forum for further negotiation among its Members that concern to multilateral trade relations.
- To administer the Trade Policy Review Mechanism.
- To co-operate with the IMF and the IBRD for achieving greater coherence in global economic policy making.²⁰

Despite originating from the GATT, the WTO differs in many important functions and basic principles; it represents a different constitution of the international economic law. There is no flexibility in operation and country members cannot “take in” or “get out” of the signed agreements as they could with the GATT; the WTO’s legal system forces its rules on all its member nations and its members will be subjected to the WTO dispute trade punishments if they break the provisions of the signed agreements.

In reality and according to a number of sources, the WTO is viewed as a very complicated organization. In order to achieve the target of helping “trade flow smoothly, freely, fairly and predictably”, the WTO is in charge of: setting and

²⁰ Available on <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> visited 15th June 2006.

administering trade agreements; acting as the organizer for trade negotiations between current members and observers; settling trade disputes and applying the enforcement system; reviewing the trade policy of nation members and nation observers; implementing technical assistance, including favourable conditions in trade policy and training programmes for the least developed and developing countries; cooperating with other international organizations in a way to develop trade and economy worldwide.²¹

From the period of original GATT, promoting better living standards, steady growth of income for nations and their citizens and sustainable development, and ultimately developing the production capacity and good exchange were the main objectives of multilateral agreements and trade organizations. The WTO and its functions were set up with the ambitious design to be a crucial trading system across the world. With its legal personality, the WTO provides the forum for trade negotiations between countries, including the setting up of the legal framework on multilateral trade relations and the enforceable implementation system for these multilateral trade agreements. Its primary targets are to set up a business operation environment for trade matters on a worldwide level with a comprehensive legal framework and effective enforcement system. With that, the developing countries and poor countries can have opportunities to maximize their exports and receive favourable assistance from the developed countries and the international community. The WTO can be considered as an organization that is responsible for setting the order and control of international trade activities and trade disputes between nation members.²² With a huge number of agreements, systems of convention and legal normative documents, the WTO's rules have created an extremely different stage of legal development. Additionally, it administers the professional organs accountable for maintaining its operations such as the Trade Policy Review Mechanism, and the Understanding on Rules and Procedures Governing the Settlement of Disputes.²³

²¹ Ibid.

²² Deborah Z. Cass, *the Constitution of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005), 3.

²³ Article III, Marrakesh Agreement.

II.2.3 The WTO structure

The principle structure of the WTO has been built on the basic rules of four groups of Annexes namely: the group of multilateral trade Agreements (including Goods, Services and Intellectual Property); the second one provides the framework for the dispute settlement mechanism; the third annex covers the trade policy review mechanism and the last ground contains four plurilateral trade agreements.²⁴

In terms of governing structure, the original governance structure came from the GATT provisions, namely the provisions of of the Uruguay Round agreements which came into force on 1 January 1995. The WTO structure was completed as a complex international organization with a full legal personality and legal capacity. The Ministerial Conference is the top level decision making authority of the WTO, it organizes meetings at least once every two years.²⁵ The WTO makes decisions based on a consensus principle which had been used continuously since the GATT 1947. Each nation represents one vote, except the European Communities which will have a number of votes equal to each of their member states. Not all decision can be made by consensus, and in most cases WTO decisions will be made by voting.²⁶ Recently, the implementation of the consensus working principle has been faced with challenges, based on the number of state members of the WTO required to vote, as of May 2009 there are 153 members. The huge number of state members who will no longer “free-ride on negotiated agreements” is argued to be the crucial cause of these difficulties.²⁷

The General Council, which is represented by the ambassadors and the Chief of National Delegations in Geneva, will carry out the assignments that have been made

²⁴ *For more history and institution of the WTO*, see Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner (n5), 65-102.

²⁵ The latest meeting, the Sixth Ministerial Conference was held in Hong Kong, China, 13-18 December 2005. The five previous Ministerial Conferences were held in Singapore, 9-13 December 1996, Geneva 19-20 May 1998, Seattle 30 November -3 December 1999, Doha 9-14 November 2001, and Cancun 10-14 September 2003. The Ministerial decisions are made by the members under the consensus opinions. Then, the WTO's agreements have to be ratified in all member countries by their parliament or national assembly.

²⁶ Article IX, the Agreement Establishing the WTO.

²⁷ J Schott and J Watal, “Decision-Making in the WTO” (Institute for International Economics, Washington, DC, March 2000), cited Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner (n5), 87.

by the Ministerial Conference. The General Council is at the top of the WTO's structure of Councils and is responsible for the Trade Policy Review and the Trade Disputes Settlement. The General Council has three subordinate body Councils including: the Council for Goods; the Council for Services; and the TRIPS Council.

There are also a number of specialized committees within a particular Council, for example, there are ten Committees and one Working party that belong to the Council of Goods. There are also a number of working groups and working parties in charge of other areas including: the membership negotiation; environment; regional trade agreement; and technical assistance for developing countries.²⁸

Based in the headquarters in Geneva, the WTO Secretariat has over 600 staff under the direction of the Director General. Its main duties are to provide the technical and material support to the Councils, General Council and Ministerial Conference. They also research trade policy; provide the legal assistance in the disputes settlement process, and work with various working groups and State parties negotiating their entry into the WTO.

II.2.4 Basic Principles of the WTO

The target of the GATT and the WTO is to provide a foundation for unified global international trade rules that will benefit all members, fight poverty and improve international trade. The following are the five basic principles of the WTO regime:

Non-Discrimination

The non-discrimination treatment principle was built on the "Most Favoured Nation" rule (MFN) and the "National Treatment" policy (NT). The MFN is simply understood as:

Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be

²⁸ See the *WTO structure chart*, source

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf> visited 30th January 2009.

accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.²⁹

It means any product which is made by one WTO member country will be treated with no less favourable conditions than a similar product from any other nation. In other words, if a country offers a specific tariff to one of their partners, this favourable tariff will apply unconditionally to all the WTO members. The MFN rule is not only confirmed as the most important priority of the GATT agreement but also of the GATS Agreement (Article 2) and the TRIPS Agreement (Article 4).

The National Treatment (NT) principle requires for imported goods, when they satisfy the border measure barriers, to be treated with no less favourable tax, charges or other conditions than similar domestic products. Meaning that imported goods within a member country would have the same level of conditions as similar domestic products. Article III of the GATT regulated this principle as:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

Article 17 of GATS and Article 3 of TRIPS, once again, reaffirmed this rule.

The non-discriminatory requirement is the most important principle of the WTO legal system.³⁰ It has existed not only in the GATT but also in other agreements such as the TRIPS, the GATS and the SPS/TBT. The context of non-discriminatory treatment includes the MFN and NT as fundamental elements of the GATT/WTO jurisprudence. Its application has been the basis of the conduction of international trade from GATT³¹ and it has always remained as the core rule of the multi-bilateral trade system. However, in reality, there is a big difference between *de jure* (in law) and *de factor* (in practice) of the non-discrimination principles.³²

²⁹ Article I, the GATT Agreement

³⁰ Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner, (n5), 273.

³¹ Andreas F. Lowenfeld, *International Economic Law*, 2nd ed. (Oxford University Press, 2008), 30.

³² *Ibid*, 277.

Reciprocity

Even though the non-discriminatory rule is fundamental in the WTO system, the “exception–reciprocity” that influences the less-advantaged nations is also an important element. Reciprocity is considered, as a challenge of the WTO negotiation, for all nations especially for the developing and least developed countries. In a simple explanation, reciprocity is the mutual or interchange of privileges between two countries. This principle is one advantageous for the poorer countries when they integrate into international trade. Within the Marrakech Agreement that established the WTO, the development rights of poor countries are protected by “entering into reciprocal and mutually advantageous arrangement directed to the substantial reduction of tariffs and other barriers to trade”.³³ The WTO accession was carried out by negotiations on the basis of reciprocal and advantageous offers. The accessing country could gain their advantage from other partners by contributing some privileges to them. The “gain” and “offer” does not mean the “same” or “balance”. Reciprocity that each nation could gain will depend on their political position and economic development in the world. The developing and the least developed countries are given a longer period to fulfil their WTO commitment, and the developed countries are required to contribute with their technical assistance to the poor countries. However in reality, the poorer countries seem to lose their reciprocity more than richer ones.

Free Trade and Market Access

Free trade improvement, by lower bound tariffs and removing the non-tariff barriers, is one of the principles of the WTO trading system. With six ministerial conference negotiation rounds and a numbers of lower level negotiations, the accession of new markets has gradually been expanded. In addition, through the accession negotiation the observers must commit to reform their trade related legal regimes so as to remove trade barriers in both tariff measures and non-tariff measures, at the same time, this will provide open market schedules.

Fair Competition

³³ *Preamble of the Marrakesh Agreement.*

A global free trading system with fairer competition is described as a main target of the WTO. With the main rules of anti-dumping and non-discrimination, namely the MFN and the NT, the WTO system desires to provide a secure and fair trading regime worldwide. This principle has been confirmed in many WTO's agreements in areas of agriculture, goods, services, intellectual property and government procurement. However, the matter of whether the free trading system can actually promote fair competition worldwide, especially the trade between the developed nations and the developing nations, is considered as not really an accurate answer and is a complex issue.³⁴

Economic Promotion and Social Welfare Improvement

The ultimate objective of the WTO system is recognised as:

to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allow the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing in a manner consistent with their respective needs and concerns at different levels of economic development.³⁵

The main goal of the free trading system is therefore designed not only to promote the economic growth but also encourage the integration of the developing and least developed nations into the multilateral trading system. Importantly, these principles were asserted in following negotiation rounds, more specifically, the recent Doha negotiation round has been described as the Development Round.

II.2.5 The WTO and Economic Globalization

Economic globalization is mentioned firstly as the movement of capital at worldwide level. Then, with the free movement, agreement in goods, services,

³⁴ For general arguments, see Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How trade can promote development* (Oxford University Press, 2005).

³⁵ *Preamble of the Agreement Establishing the WTO.*

capital and labour in some regions were signed and the subsequent concept of economic globalization was developed. There were many economic areas such as the European Community, ASEAN, ACP, CARICOM, ECOWAS and NAFTA that had been established in order to improve the socio-economic development through free trade, technical assistance and setting an equal playing field for a group of nations.

To promote trade liberalization on a worldwide level was the main target for the discussion and conclusion of the GATT in 1947 and the main reason for the founding of the WTO. Under the impact of the GATT and the WTO, trade has been boosting worldwide and between 109 billion USD and 510 billion USD have been added to the global income.³⁶ The reduction of tariff rates and the removing of quota in agriculture, fishery products and textiles have increased much of the income for the poor and developing countries. Export promotions, economic growth, and the possibility for creating more jobs are the main advantages that members get from trade liberalization.

The WTO non-discrimination principle creates the same tariff for imports from all countries and the same conditions are applied to the imports and the local products. It means that the consumer will have more opportunities to choose good quality products at competitive prices. The costs could be reduced and economic systems should be more efficient due to the fair treatment and similar access to market opportunities. In the recent negotiations, from the Doha Round, international trade is considered as a major tool in promoting economic growth, especially in developing nations. The legal regime for international trade and its effective dispute settlement mechanisms have created a cross-national development flow of capital, foreign direct investment (FDI), technology transfer, and management methods. The full and free trade in textile and clothing and the Doha Declaration on public health are regarded as further advantages gained from the WTO system.³⁷ The effects of trade liberalisation on the global economy are considered in various areas, significant

³⁶ *Ten benefits of the WTO trading system*, available on <www.wto.org>.

³⁷ Surya P. Subedi, "What next for the WTO after the collapse of the Doha Round?" Conference Papers of the *Sixth International Conference on International in the Contemporary World*, 1-4 February 2009, New Delhi, India, 308.

achievements in improving the domestic reforms, economic development and welfare in developing nations.

Under the GATS Agreement, many kinds of trade services can be freed, allowing them to invest in all member nations. This is similar to the impact of the GATT, trade services including legal consultants, insurance firms, telecommunications, banking, tourist services and transportation all therefore have a potential opportunity to develop worldwide. Thanks to the WTO's trade policies, citizens of a member nation can access services of similar kinds and quality as those of other members.

Brought together ³⁸ by integrating the interests of the rich nations and poor countries in trade liberalisation is considered as the solution for not only economic growth but also improving human rights and social welfare. In providing a fair environment for free trade the aim is to improve the living standards of all nations in the world, assist the poor nations to benefit from the international trade system, and provide economic development in a sustainable environment.

II.3 The WTO Legal System And International Economic Law

II.3.1 A System Based on Rules for Global Economic Development

Creating a comprehensive legal system and an enforceable dispute settlement mechanism is one of the main achievements of the WTO. With 60 years in development of international institutions, the WTO is the biggest international organization in trade with its own unified legal system. With "a treaty comprising some 500 pages of text accompanied by more than 2,000 pages of schedules of commitments"³⁹, all of them were negotiated or ratified by its members. The WTO Agreements, in various related trade areas, have created the same framework for all countries to perform their trade and commercial activities. As defined by Salmon,

³⁸ Petros C. Mavroidis, "Come Together? Producer Welfare, Consumer Welfare, and WTO rules" in Ernest (eds) *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press, 2005), 277.

³⁹ Ibid.

the WTO is “a body of rules of law constituting a system and governing a particular society or grouping”.⁴⁰

From the ideas of the initial GATT agreement on tariffs and trade in 1947, the WTO has finally been created as a true international organization with systems of legal rules and effective dispute mechanisms. The “contracting parties” definition from the GATT 1947 has been changed to the “members” definition in the WTO entity. The WTO treaties became the main source of international trade law, with the Agreement establishing the WTO becoming its Constitution, and other multilateral agreements became its annex part. These treaties and agreements form compulsory obligations for all WTO member nations. Working as an international organization with unique legal orders, the WTO’s legal system would be identified as an “inter-legality” concept. The law on international trade has been developed, to an extreme level, within the WTO legal regime and its related conventions.

During the 60 years development of the GATT and more than a decade of the WTO, the global economy has observed significant growth in development speed under the trade liberalization of the WTO’s legal regime. Even though the WTO has, in fact, claimed that it could not give equal trade to all members, there is little doubt in agreeing that the system has applied to all members and that they can access their own chances by gaining benefits from the global economy as well as having the same rights in the WTO’s dispute settlement procedures.

II.3.2 An Effective Trade Dispute Mechanism

Settling trade disputes constructively and peacefully, is one of the main duties of the WTO, in order to maintain the stability of the global economy. Because of the significant increases in both trade and member nations, trade disputes could arise in all trade sectors between members and could therefore lead to serious conflicts not only in trade and the economy but also politically. With the founding of the WTO, an Agreement named “Understanding on Rules and Procedures Governing the Settlement of Disputes” allows the trade disputes to be handled by clearly identified

⁴⁰ Cited from DG Pascal Lamy speech at the *Second Biennial Conference of the European Society of International Law*, Sorbonne, Paris, May 2006

rules including, settling disputes procedures, judging guidelines, and actions that must to be taken by the violated member, all within a specific timetable.

The WTO trade dispute mechanism operates on the basis of four principles: equitable; fast; effective; and mutually acceptable.⁴¹ The Dispute Settlement Body (DSB) is the professional authority of the WTO, responsible for dealing with trade conflicts between members. The DSB was reviewed in 1997 and then continually during the Development Rounds, the dispute settlement mechanism of the WTO has been improved and is classified as one of the cornerstone of the WTO system. This mechanism provides a clear settlement phase process including consultation, conciliation, panel phase, Appellate Body review - the last phase and trade remedies. The trade dispute settlement system of the WTO was considered as a *sui generis* system, which was based on the rule of law. As the dispute parties are independent states, trade disputes have mostly been resolved by conciliation, arbitration and trade retaliation. Judgments and remedies are not carried out by the national courts, instead they are enforced by the disputing parties.

From its foundation in 1995 until December 2008, the DSB has received 384 disputes ⁴² so far and has issued over 200 panel and appellate reports.⁴³ The dispute settlement mechanism has been widely regarded as a successful story; it has been reformed from being the “ineffective and time-consuming”⁴⁴ dispute settlement procedure of the GATT. In the words of Peter Sutherland, the former Director General of GATT, “the dispute settlement mechanism is the greatest achievement of the international community since Bretton Woods”. The “crown jewel of the entire multilateral trading system” is the evaluation from former Director General Mike Moore about the DSB.⁴⁵ It has generally been agreed that the DSB has achieved significant success within the WTO system. In some counter-arguments, it has been

<www.wto.org/english/news_e/spp1_e/spp1126_e.htm> visited 25 June 2006.

⁴¹ *Understanding the WTO*, available on

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm>, visited 11 March 2009.

⁴² *Full list of the WTO dispute cases*, available on

<http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>, visited 30 December 2008.

⁴³ Cited in Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner, (n5), 153, this figure stayed in 2006.

⁴⁴ Intan Murnira Ramli, *Development and Rule of Law in the World Trade Organization – the case of developing countries and their Use of Dispute Settlement Procedures*, (DPhil Thesis, University of Kent, 2006).

suggested that the DSB's operations have been strongly influenced by the position of the state members.⁴⁶ National sovereignty could be threatened by this system, problems in the "usage rates", and matters regarding implementation were some of the other criticisms regarding the effectiveness of the DSB.⁴⁷

It would be too complex and difficult to evaluate exactly how much success the DSB has achieved within the WTO system, but there is considerable agreement that the DSB is playing the key role in the implementation of the WTO obligations. By having such an effective system to resolve the trade disputes has meant that the WTO Agreements are actually enforced to all WTO member states. Without this enforcement tool, it is unlikely that the WTO commitments in 153 nations, all with different cultures, economic development levels and unique political systems, could not be carried out within each member's domestic system as a national compulsory task. Any WTO member, in theory, irrespective of its size, is subjected to the DSB. Many advantages of the WTO's trade dispute mechanism compared with the previous GATT system such as clear dispute settlement procedures, fixed timetables for each stage of a dispute settlement procedure, and the free option of a nation to decide at any stage to settle their dispute, have created the basic factors in implementing the WTO's obligations to all its members. A large number of disputes submitted, to date, have demonstrated the effectiveness of the DSB. It is obvious that, as the WTO system develops, the DSB will need continual reforms to ensure their system remains operational and continues to provide various dispute settlement options and tradable remedies in the years to come.

⁴⁵ Cited in Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner, (n5), 153.

⁴⁶ Kyle Bagwell, Petros C. Mavroidis, Rober W. Staiger, "The case for tradable remedies in WTO dispute settlement" in Simon J. Evenett, Bernard M. Hoekman (eds.) *Economic Development & Multilateral Trade Cooperation* (the World Bank, 2006), 395-413.

⁴⁷ WJ Davey, "The WTO Looking Forwards" (2006) *Journal of International Economic Law*, 9-23.

II.4 Developing Countries in the WTO Legal Regime

II.4.1 The Definition of Developing Countries

In the GATT-WTO legal regime, there are no specific definitions for country classifications.⁴⁸ Developing countries are mentioned as the least developed countries in both economic development and in terms of its human resources. The poorest countries in the developing country classification are referred to as the least developed countries. Least developed countries are named under a list that follows the UN classification, while developed and developing country groups are determined under their trade policies.

The definition of a developing country can be deduced from the the World Bank (WB)'s classification of gross national income (GNI). Under the WB classification, the low and middle income economic countries are referred to as developing countries. This classification is changed each year; consequently the economic classification does not necessarily respect their development status. According to the 2007 WB classification, countries were categorized and divided into four levels named as low income, \$935 or less; middle income \$936-\$3,705; upper middle income, \$3,706-\$11,455 and high income, over \$11,456. The low and middle income nations are normally referred to as the developing countries.⁴⁹

Not all developing countries are at the same development level. A group of newly-industrialized countries (NICs) such as Korea, Taiwan, Hong Kong, and Singapore would stand at the top stage of economic development. For example, in 2002, GDP per capita of Korea was \$16,950 and they were ranked 30th worldwide. In the same year, Singapore was placed 21st with a per capita GDP of \$24,040.⁵⁰ There is still a

⁴⁸ Kevin Kennedy, "Special and differential treatment of developing countries" in Patrick F.J Macrory, Arthur E. Appleton and Michael G. Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. 1 (Springer, 2005), 1525.

⁴⁹ *The World Bank data*, available on <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> visited 30 December 2008.

⁵⁰ *Global Indicator*, available on <http://globalis.gvu.unu.edu/indicator.cfm?IndicatorID=19&country=KR#rowKR> visited 20 Aug 2007.

considerable gap between the NICs and the lower subset groups of developing countries. Most developing countries are the least advantaged countries in terms of both economic and human resources development. Consequently, accessing the multi trade system is often their national target for fighting poverty, expanding the export market, seeking assistance from developed countries and joining the same international environment.

At present, there are 50 countries on the UN least developed countries (LDCs) list, 32 of which are currently WTO members and 10 nations are WTO observers. They can receive the extra support and favourable conditions from the WTO. All of the WTO Agreements recognize benefits for the least developed countries including waiver time, participation to multilateral trading, WTO accession progress, system of technical assistance, lower import barriers, market access assistance and improved domestic capacity. They also receive financial support from developed countries in the accession to and beyond WTO accession.

There are no specific legal documents to definitely define the meaning of a developing country or to regulate which country would be classified as having a developing country status. In the accession, each country would self categorize their status by selecting whether they are at a developed or developing level. However, their selection is not automatically accepted by all WTO bodies. The “developing status” in the WTO provides developing countries many benefits including longer transition periods before they are required to fully reconcile the WTO obligations within their national legal regimes. They can benefit from the Generalized System of Preferences (GSP) from some developed countries. In addition, developing countries are also able to receive technical assistance, training courses and aid for trade.

Socio-economic development and business trade policies are significant in international trade and the WTO legal framework as well. The country classification plays an important role in the WTO accession and the WTO obligations, however, when fully pledged to become a WTO member, the developing and least developed countries seem to be similar in receiving assistance from the community and developed countries.

II.4.2 Special and Differential Treatment for Developing Countries

Early within the history of international trade development, developing countries played a smaller role in the multilateral trading system, representing 10 out of the original 23 GATT nation members. Developing countries accounted for a small proportion in both number and economic power until the late 1960. In 1970, the number of developing country members represented two-thirds of the GATT contracting parties and their influences to international trade development have increased rapidly.⁵¹

Beginning with the discussion of market access and conditions for agricultural products, from developing nations in the twelfth session of the GATT contracting parties in 1957, the first shift of special and differential issues was regarded the import barriers of developed nations. However in general consideration, the link between economic development in developing countries and international trade represent a cloudy picture. One of the main challenges was the disadvantages observed by the poor countries in terms of their following characteristics: limited human resources; weak government institutions; poor administrative reforms; poor socio-economic developments; and limited access to the international market. Moreover, the developed countries, namely, the United States, Japan, Canada and the EU would not have wanted to open their markets for the export products that the developing countries had advantages in producing such as textiles and clothing, agricultural and aquaculture products. The potential differences regarding benefits observed between the rich and the poor nations within a same ruled base system were the most important issues facing the multilateral negotiation rounds, and liberalizing trade seemed to be lacking in effectiveness to the success of the developing countries.

The starting of the United Nations Conference on Trade and Development (UNCTAD) in 1964 had a positive influence on developing countries and the multilateral trade rounds. The special and differential treatment (SDT) of developing

⁵¹ Bernard Hoekman, "Developing Countries and the WTO Doha Round: Market Access, Rules and Differential Treatment" in Basudeb Guha Khasnobi (ed.) *The WTO, Developing Countries and the*

countries was discussed. Under the different programmes of action, a new trade policy for development was set up aimed at expanding markets in developed countries for exporting products from developing countries by tariff reductions. A number of international agreements were concluded to this effect, including: the International Cocoa Agreement; the International Coffee Agreement; the Sugar International Agreement; the International Wheat Agreement; the International Tropical Timber Agreement; the International Jute Agreement; and the International Rubber Agreement.

Starting with Article XVIII of the GATT 1947 and with the formal foundation of the UNCTAD in 1964, the principal rule provisions outlined for the developing countries were a positive step forward. Further discussions regarding the interests of developing countries were mentioned in Part IV of the GATT 1965; however this article has never been considered as having created any legal obligations.

The 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation (commonly known as the Enabling Clause) of developing countries was adopted as a major legal system, and it became a founder for the Generalized System of Preferences. The Enabling Clause, which was developed on the basis of two favourable waivers for developing countries in the GATT 1971, prepared a potential achievement on creating differential and more favourable treatment, reciprocity and fuller participation of developing countries. GATT contracting parties would provide more differential and favourable conditions for developing country members without agreeing such treatment to other contracting parties.⁵²

International trade legal regimes for developing countries have been continuously developed since the Uruguay Round in 1994. Most WTO Multilateral Trade Agreements (MTAs) record the exceptions, a longer-phase period for obligation implementation and special treatments for developing countries, especially in the

Doha Development Agenda: Prospect and Challenges for Trade – Led Growth (Palgrave Macmillan, 2004), 10.

⁵² The GATT contracting parties, Decision of November 28, 1979 on differential and more favorable treatment, reciprocity and fuller participation of developing countries.

sensitive areas such as garment and textile, agricultural and aquaculture sectors and intellectual property protection.

With the amendments from the GATT 1947 and the Multilateral Trade Agreements (MTAs), developing countries receive special and differential treatment, from the GATT-WTO system, which provides more favourable conditions than developed country members receive. The most important treatment from these provisions is the exemption from immediately needing to implement the MTAs into their national economic rules. Developing countries have been allowed to decide whether or not to apply the WTO obligations within a fixed period from the date of accession. The Special and Defferential Treatment (SDT) also provides more trade opportunities to developing countries by expanding new market accessions. In this provision, protection tariff deduction from wealthy countries, industrial policy in product subsidies, higher bound tariffs or longer transition period are some of the potential advantages that developing countries can gain from the WTO system.

With the development of the GATT rules on SDT, between 1947 and 1994, and with the WTO's MTAs, developing countries are now able to access the multilateral trade system and free trade. As other sectors of the WTO's legal system have, the SDT provisions have been discussed in terms of how they can support the development of developing nations. Being named as a "political right",⁵³ the SDT would be promoted in providing more favourable conditions for developing nations. As a result of developing nations accessing more opportunities in the global economy and subsequently improving their citizens living standards, the multilateral system is progressing towards achieving its principle target. However, the appropriate level of SDT, which not only gives suitable preparation periods but also offers flexible conditions for developing nations, as well as promoting international trade liberation and domestic reform, is still a big challenge for the WTO discussions.

Developing Nations and International Aid Programmes

⁵³ Alexander Keck and Patrick Low, "Special and differential treatment in the WTO: Why, When, and How?" in Simon J. Evenett and Bernard M. Hoekman (eds.) *Economic development and Multilateral trade cooperation* (the World Bank, 2006), 154.

In least developed nations and developing countries aid programmes such as the Official Development Aid (ODA) have contributed significantly to the socio-economic development as well as the institutional and legal reform in such countries. This is because the developing nation's state budget is not able to reach the domestic expenditure demands and the ODA funds come in to play a source of significant resource in improving the vital infrastructure including clean water supply, electricity supply, transportation, training provisions in schools and universities and building of hospitals and medical centres. In general, ODA can be considered as an effective and positive factor for improving the vital socio-technical infrastructures. In addition, aid and donor agencies and government also provide a substantial level of support in poverty reduction especially in the least developed nations and in particular in remote and mountainous areas. For example, during the fifteen years of receiving ODA by Vietnam, i.e., from 1993 to 2008, international donors have signed the ODA agreements with a total value of US\$ 35,217 billion. Out of this total commitment 62.65% has been disbursed. The ODA money has been spent in the following main five areas: "Developing agriculture and rural areas; Building economic infrastructure towards modernization; Building social infrastructure (health, education and training, population and development and some other areas); Protection of environment and natural resources; Strengthening institutional capacity and human resource development, technology transfer, capacity building for research and development."⁵⁴

In the process of receiving the ODA fund, the host nation must carry out domestic reforms that are required by the donors in many important sectors such as national legal system, State owned company privatisation, and finance and banking sector liberalisation. Donor governments and aid agencies also play an active role in improving the human resource development by providing training and funding for studying and training abroad.

⁵⁴ The Ministry of Planning and Investment of Vietnam, "Overview of fifteen years of receiving ODA of Vietnam, 1993-2008" available at www.mpi.org.vn

The support of donor governments and aid agencies are also important in facilitating the internal reforms in socio-economic policies, political system and national legal regime in beneficiary nations. The ODA funds are provided under strictly regulated conditions of the donor community in which stable political system, transparency in decision making by the governments concerned and capacity building of human resource are considered as key factors.⁵⁵ Therefore, in order to get the funds from the donor and aid agencies, the beneficiary nations must carry out radical reforms in their domestic systems.

In conclusion, ODA can be considered as capital support with strong political influence from the donor governments and other aid agencies. Nevertheless, ODA is having a positive impact on the economic development of developing countries such as Vietnam. Furthermore, if the beneficiary nation can maintain its own programme of development and move away from the dependent status on donor and aid agencies on the implementation of its development programmes the ODA funds can work as effective means to enhancing their national development. Therefore, ODA can always work as a potentially positive factor to support the socio-economic development of the developing countries.

II.5 The WTO's Role in Global Economic Development and the Challenges Ahead

Since the GATT and then the WTO came into being, global trade has been boosted and is likely to continue developing. The WTO regime has been a powerful element for world economic development; however, despite the many reforms of the last 60 years, difficulties imposed by the WTO are still a big challenge for all members especially for the poor and developing countries.

⁵⁵ General references about the ODA regulations and system, see the websites the World Bank, available at www.worldbank.org; the International Monetary Fund, available at www.imf.org; the ASIA Development Bank available at www.adb.org.

I.5.1 The Rights to Develop for Developing Nations

On the principle of the United Nation's "one nation-one vote", representing more than 75% of all WTO nation members, developing countries appear to greatly influence the creation of WTO rules. However, with the main function being an international entity for international trade promotion, the development of the WTO's legal regime is influenced not only by the sovereign equality of state but also its economic power.⁵⁶ The main aim is developing trade on a worldwide level, as well as fighting poverty and increasing the welfare for all members, therefore it is truly a challenge for the WTO to create a rule based trading system which is able to satisfy and provide benefits to all its rich and poor members. The trade policies that promote trade opportunities in rich countries would not normally maximize the welfare in poor nations; consequently, in many cases the policies create controversial conflicts between WTO members.

The WTO legal regime is keen to provide particular policies for poor countries, providing opportunities for economic development and welfare harmonization with other members. SDT is essential as a potential cornerstone for poor countries to improve their own trade opportunities, fight poverty and develop their national welfare. However, in the words of Joseph E. Stiglitz, SDT is a controversial argument between the proponents and opponents about the special policy circumstances available for developing countries.⁵⁷ There is little doubt that poor countries must be given more favourable trade policies for their national economic development, even if these circumstances create fewer advantages for the rich countries. However, SDT has also been argued as having a negative effect on trade liberalization; under the SDT exemptions, developing countries can apply tariff protections and deny the opening of their domestic market.

In short, it seems to be impossible to issue a trade policy framework that can provide the same benefits and opportunities for all poor and rich countries, as each country has its own development strategy and each owns a particular national resource and

⁵⁶ Kevin Kennedy, "Special and differential treatment of developing countries" in Patrick F.J Macrory, Arthur E. Appleton and Michael G. Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis*, Volume 1, (Springer, 2005), 1530.

geographic location. Trade liberalisation and global economic growth, improved economic development and improved living standards in all nations are primary targets of the WTO, but how to regulate these tasks in detailed policies and action programmes are crucially difficult tasks witnessed by the trading system.⁵⁸ One trading system can not provide equal benefits to all members, although setting the strategy for all WTO members to improve their development and create a better, fairer trading market is the main target that the WTO is longing to achieve.

II.5.2 The Doha Development Agenda and the Meaning of a “Development Round”

From the Uruguay Round, many arguments between WTO members in sensitive trade sectors such as agriculture, textile and IP protection arose, due to their different interests. In Singapore in 1966, the issues represented a disappointment in agricultural policy; the policy was evaluated as an incursion on the national sovereignty in many developing countries. In 2003, most of the WTO's developing country members argued that new issues such as investment, environment, workers rights would not be included as part of subsequent Development Rounds.⁵⁹

The WTO's Seattle ministerial meeting in 1999 concluded in failure. In 2001, in Doha, Qatar, representatives from over 140 WTO members sought new “growth, development, and prosperity”,⁶⁰ a new direction for international trade. During previous ministerial meetings, the balance of benefits between the rich and poor was the biggest challenge for negotiations. Poor countries gained less trade opportunities than the corresponding benefit achieved by rich countries. This benefit gap created and posed the question of whether free trade would bring wealth and development for all nations. All these issues created numerous challenges for the multilateral trade negotiation.⁶¹

⁵⁷ Joseph E. Stiglitz and Andrew Charlton (n34), 88.

⁵⁸ Richard Newfamer, *Trade, Doha, and Development: A Window into the Issues* (the World Bank, 2006) the foreword.

⁵⁹ Joseph E. Stiglitz and Andrew Charlton, (n34), 60.

⁶⁰ Quoted in “Seeds Sown for Future Growth” *The Economist*, 15 Nov. 2001.

⁶¹ Carlos A. Primo Braga & Elwyn Grainger-Jones, “The Multilateral Trading System: Mid-Flight Turbulence or Systems Failure?” in Richard Newfamer (ed.) *Trade, Doha, and Development: A Window into the Issues* (the World Bank, 2006), 15.

The Doha Round opened by focusing on the goodwill of fairer trade opportunities, higher development speeds, a balance between trade development and social welfare, and the creation of more chances for poor countries. Public benefit in the health care sector, agriculture liberalization, reduction of tariffs and a free quota system from rich countries for the least developed countries were the main items to be discussed. The Doha Declaration on the TRIPS Agreement and Public Health was named as successful in supporting public health in poor countries, by creating opportunities and access to cheaper priced medicines and by spending appropriate investment amounts on research and development.⁶² Many efforts for increasing public health have achieved significant worldwide movements. Other international non-governmental organizations (NGOs) and influential people such as the former US President, Bill Clinton and the former Microsoft President, Bill Gates are running positive action programmes in poor countries, especially on the African continent. Cheap prices for medicines, proper investment in health care systems, research and development promotion, vaccine programmes for all infants and children in the least developed countries are some of the greatest achievements not only in terms of international economic development but also in terms of human rights and social welfare.

After the failure of the Seattle Ministerial Meeting in 1999, the international trade law was required to be designed “to integrating developing countries into the world trading system and to help them to benefit from their participation”.⁶³ The shortcomings of policies on textile and agriculture in previous negotiations created a compulsory task for the reform of trade law.⁶⁴ Policies in tariff reduction and trade facilitating were negotiated with a design to promote trade liberalisation. Free quota systems in textile and subsidies in agriculture were used as a positive force for a new period of development. The context of the United Nations Millennium Summit in 2000 and its Millennium Development Goals were addressed at the Doha conference

⁶² Pedro Roffe, Christoph Spennemann & Johanna Von Braun, “From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health” in Pedro Roffe, Geoff Tansey & David Vivas-Eugui (eds.) *Negotiating Health: Intellectual Property and Access to Medicines* (Earthscan, 2006), 9-26.

⁶³ Joseph E. Stiglitz and Andrew Charlton, (n34), 1.

to determine appropriate development issues which could promote participation and benefit the global economy of poor countries. The support to public health, free market access in agricultural products, further favourable conditions for market access of non-agricultural products for developing countries and special and differential treatments for the least developed countries (LDCs) were the principal achievements of the Doha Conference.

To help the poorest nations with debt relief and trade initiatives, from the year 2000 the EU Trade Commissioner, Pascal Lamy announced the EU proposal on the free quota and zero tariffs on all import products with the exception of arms from the LDCs. The US African Growth and Opportunities Act was a similar policy on the African continent. Many of the poorest nations have gained benefits in investment growth and citizens' living standard improvements from the welfare and free trade policies. The Cancun Conference in 2003 and the Hong Kong Conference in 2005 have continued focusing on these crucial issues. These meetings addressed a new design for sustainable global development and the definition of the Development Round was utilised to refer to the WTO Ministerial Meetings.⁶⁵

However, the agricultural sector showed little progress or development because of the different interests of different members. Developing countries were failing to meet their targets on most of the key issues such as market access, domestic support and exported subsidies. Even, in some aspects, the agriculture policy was a step backward. In addition, some of the OECD (Organization for Economic Co-operation and Development) countries issued a new agricultural legal framework which increased their level of domestic protection and the limits of the market access for imported product such as the US Farm Bill 2002 and the EU 2003 Luxembourg declaration.⁶⁶ Rich countries also provided favourable conditions for their domestic producers as well as applying the market restrictions in many sectors that developing countries own a significant advantage such as the textile industry and cotton production.

⁶⁴ Kym Anderson, Will Martin, and Dominique van der Mensbrughhe, "Doha Policies: where are the Pay-offs" in Richard Newfamer (ed.) *Trade, Doha, and Development: A Window into the Issues* (the World Bank, 2006), 43-57.

⁶⁵ Joseph E. Stiglitz and Andrew Charlton (n34), 3.

⁶⁶ Ibid 60.

Agricultural, textile and cotton issues created the main conflicts of interest between the rich and poor countries at the Cancun Development Round of 2003. A group of 20 countries led by China, India, Brazil and South African asked the EU and the US for more open domestic market access and the protection of tariffs. The EU's "Everything but Arms" and the US's African Growth and Opportunity Act are evaluated as significant efforts for enhancing the export of products from the poorest nations. However, their efforts gained very little achievement.⁶⁷

Oxfam viewed the ministerial meeting in Hong Kong in December 2005 as being held "on a knife edge",⁶⁸ due to the unbalanced benefit between the rich and poor countries in the international trade market. Oxfam summarized, at the time, in 2005, for every \$100 generated by international exports, \$97 goes to the rich and middle income countries and only \$3 goes to the third world countries. If the African countries could improve their export capacity by 1%, of the world exports, their income would be three times as large in comparison to what they currently receive in aid and debt relief.⁶⁹ The failure in improving trade for poor countries in the Doha Round placed pressure on the Hong Kong Meeting to find the best solution for better opportunities under fairer trade competition. All sensitive areas that developing countries have advantages in were reaffirmed at the Hong Kong Conference. The provisions for SDT were an integral part of the meeting's declaration in terms of being precise, effective and operational.⁷⁰ The commitments for the LDCs are recognized as being very serious issues. The interests of the LDCs have been addressed in all negotiated areas and full favourable conditions have been enforced to maximize the benefits that have resulted from the Doha Development Round.

Oxfam highlighted the gap between the rich and poor countries' benefits, within the same environment, in which the rich countries own the main advantage and they always fail to proceed with their commitments for the poor countries. With four times higher tariff barriers for poor countries than developed ones, increasing agricultural subsidies, applying unfair antidumping tariffs, restrictions on textile and

⁶⁷ Ibid 61.

⁶⁸ "Blood on the floor: How the rich countries have squeezed development out of the Doha negotiations" *Oxfam Briefing Paper*, December 2005.

⁶⁹ Ibid.

⁷⁰ *Hong Kong Ministerial Conference Declaration*, Article 25.

garment exports and WTO rules on IP protection and investment, developing countries are losing around 100 billion USD every year.⁷¹

In short, it is apparent that the WTO policy is playing a key role in the high speed development of the international economy. Since the Uruguay Round in 1994, the commitments for more favourable conditions for poor countries have been reaffirmed in all of the following Development Rounds. There have been many action plans for poverty reduction, technical assistance and SDT for developing countries; however, fairer trade treatment and improved market access for poor countries still provide truly huge challenges for WTO policy development.

II.5.3 Free Trade in Agriculture and Poverty Reduction

Agriculture plays a key role in poor countries in both national GDP and in employing large numbers of labour workers. In many developing countries such as Asian and African nations, small household income is mainly dependent on the success of agricultural products. In addition, agricultural products are special products because they offer food security and they are therefore the most essential and important products in poor countries.

The central argument for each nation's policy and international policy on agriculture is based on the benefits and conflicts between the producers and the consumers. If the price is too high, the poor consumers would not be able to buy enough food and if they are not high enough, the producers may become bankrupt and would not be able to produce enough food for national food security. Moreover, in developed countries, with huge state budgets and social welfare policies, the government can spend on their agricultural sectors such as tariff subsidies, comprehensive infrastructures, access to new markets and other supports. Meanwhile, farmers in poor countries lack the advantage of technology, international market information and are suffering from the high protection tariffs of the developed countries.

Boosting their exports to developed countries is the main target of developing countries when seeking WTO membership. Agricultural and fishery products offer

⁷¹ "Eight broken promises: Why the WTO isn't working for the world's poor" *Oxfam Briefing Paper*,

them a potential advantage, and it is also the key sector for poverty reduction. Vietnam, Thailand, India and China, as well as other developing countries, have become the top countries exporting these products. This contributes an important portion to their national income. The WTO legal regime, with the Agreement of Agriculture in particular, represents the binding commitments in agricultural areas; in some cases, this has caused many disadvantages for poor countries where agriculture is the main source of income.

The rules and commitments of the Agreement of Agriculture apply on the following three main areas: liberalization on access to imported markets with various trade restrictions on confronting imports; restrictions of direct subsidies from the government budget on export products; restrictions on the domestic support activities like subsidies or increasing domestic price.

Even though, as detailed in the new rules and commitments in the agricultural sector, the least developed countries are not obliged to apply these commitments and they are given a longer time to fulfil their commitments and they are not bound to lower their protected agricultural tariffs,⁷² however, in reality negotiations concerning agriculture achieved very little progress. The WTO-Plus conditions and the request of “reciprocity” from the developed countries are demanding the lowering of protected agricultural tariffs from the developing countries, new members and observer members. China and Vietnam are typical examples for this case. China deducted 16.7% and Vietnam deducted 10.6% of import tax in the agriculture sector.⁷³ The average offer of binding agricultural tariffs of Vietnam was 25% whereas Thailand, the Philippines and other Asian countries bound the agricultural tariffs at 36% and 34% respectively. Nepal, a member of the WTO in 2003, was able to take the binding tariff at an average of 42%.⁷⁴

2005.

⁷² *News on the WTO* website available on

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm>visited 28 June 2006.

⁷³ *The 12th Vietnam membership negotiation*, available on

<http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm>visited 23 August 2006.

⁷⁴ “Extortion at the gate”, *Oxfam Briefing Paper*, October 2004.

In the bilateral negotiation, observer members have to offer a lower import tariff and many non tariff measures. Referring to the Vietnam case for example, at the moment, the export product of the US in Vietnam is subjected to an average tax of 27%. However, when Vietnam became a WTO member, the tax applied was at the rate of 15% or less. There are also some specific regulations in the sanitary and phytosanitary measures concerning specific production as well.

Agricultural trade policy is always one of the most sensitive issues in the WTO Development Rounds. Reasonable prices for consumers and secured income for producers are the main targets that the trade policy must achieve. In recent Development Rounds, agricultural policy was committed to reforming the key instruments in substantial improvement in market access, reduction of all forms of export subsidies, and substantial reductions in trade distorting domestic support. The SDT for developing countries for agriculture are also an integral part of the negotiation.⁷⁵

II.5.4 Expanding of Imported Goods and Losing the Domestic Market in the Service Sector

Fully accessing the liberalized market when the domestic capacity has not yet been well-prepared will cause negative impacts on domestic enterprises. The MFN, the NT and the reduction of binding tariffs will create an explosion of imported goods from developed and developing countries with well-prepared manufacturing industries. On one hand, domestic consumers have more choices with more competitive prices; on the other hand, import liberalization could decrease the domestic enterprise income. Poverty and unemployment can be the other side of the global economic “golden coin”.

Liberalization in the service sector is a compulsory obligation of WTO members. Observers have to allow international companies to access their domestic service sector including insurance, finance, telecommunications, and legal services. The number of sub-sectors that have to become available for access will depend on the observer nation’s position and their WTO negotiations. For example, China provides

⁷⁵ The Doha Ministerial Declaration.

access to 85 sub-sectors; Thailand allows 74 sub-sectors; the Philippines opens 50 sub-sectors and Vietnam has offered 92 sub-sectors in service.⁷⁶

The service sector is a very sensitive industry, potentially impacting citizen's welfare as well as it being a profitable market. The service sectors of the developed countries have a significant advantage especially in terms of their banking and finance systems. This sub-sector market is new to the developing countries and their domestic companies are not able to compete with the foreign multi-national firms. Thus, expropriation by multi-national corporations and the lost potential benefit in the service sector are clear threats to the developing countries in trade liberalization.

Moreover, many kinds of sub-sectors including clean water supply, waste treatment systems, telecommunications, and electricity concern not only affect the trade in the area but also citizens' welfare. The poor people may not access the benefits of trade liberalization due to the fact that they are not representing a huge benefit resource. Opening the service sector without incorporating a degree of domestic enterprise protection could lead to the worsening status of poor people in the developing countries.

II.6 Global Economic Context, the WTO and Transition Economies

The integration into the international trade rules of the Economies in Transition was faced with crucial challenges as they were considered as non market based economies. In fact, many socialist nations were GATT founders such as China, Cuba and Czechoslovakia (Czech Republic and Slovakia). Some Eastern European countries became GATT members in the 1970s namely Poland in 1967, Romania in 1971 and Hungary in 1973. With their centrally planned economic policies, the participation of communist nations at that time seemed to be influenced by political consideration rather than their real trade positions.⁷⁷ When the former Soviet Union broke down in May 1990, Hungary and Bulgaria were the first Central and Eastern

⁷⁶ "Extortion at the gate", *Oxfam Briefing Paper*, October 2004.

⁷⁷ Richard Pomfret, "The economics in transition, the WTO and regionalism" in Patrick F.J Macrory, Arthur E. Appleton and Michael G. Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis*, Volume II, (Springer, 2005), 248.

European countries to reform their trade policies and become WTO members in 1995 and 1996. Some former USSR countries such as Kyrgyz Republic, Latvia and Georgia concluded their negotiation in the late 1990s. Many other USSR countries, including Russia, are still negotiating.

II.6.1 China and the WTO

The entering of the People's Republic of China into the WTO has created the reshaping of the WTO.⁷⁸ As one of biggest economies and populations in the world and with a unique political system, China is a key nation in all international areas. The participation of China in the multi-bilateral system has made the WTO a truly worldwide organization.⁷⁹

China was a founder of the ITO and became a contracting party of the GATT in 1948. However, after the 1949 Revolution and the Taiwanese issues, the Chinese Government announced that China was denouncing its GATT membership. As with many communist states, China had applied the centrally planned economic policies for a long period - from 1950s to the early 1980s. In the late 1980s, with the rapid speed in FDI flow and exports the opened market policies required more development. China was still dominated by a single communist party, but was achieving an excellent performance in economic development and legal reform. Under the pressure of economic globalization and domestic reforms, China applied to rejoin the GATT in 1986. After 11 years of negotiations and intensive domestic reforms, in all trade policies, economic and legal sectors, China concluded its WTO negotiation in December 2001 at the Doha Meeting. With a large economy, a huge population and a strong political position, the accession of China created enormous impacts on the international trade system in all areas such as economy, trade, diplomatic and human rights.⁸⁰ The Doha Meeting and the potential impacts of the Chinese integration forced changes within the WTO system.

⁷⁸ Deborah Z Cass, Brett G. Williams, George Barker (eds.) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 1.

⁷⁹ *Conclusions of the meeting of the Working Party of Chinese accession*, available on <http://www.wto.org/english/news_e/pres01_e/pr243_e.htm>, visited 30 December 2008.

⁸⁰ John H. Jackson, "The impacts of China's accession on the WTO" in Deborah Z Cass, Brett G. Williams, George Barker (eds.) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 19-30.

At the same time, membership to the WTO forced a chain of considerable reforms in the Chinese domestic system. As a transitional nation with a single party political system and Marxist theory, China had launched a numbers of domestic reforms; privatization of the state-owned enterprises, government transparency, administrative and legal reforms were all named as crucial changes in China.⁸¹ The rule of law and legal reform played a key role of the Chinese integration into the multi-bilateral trading system. As a socialist nation, China's legal system encountered problems regarding the overlap of state power with areas of law and a commanding economic policy.⁸² Building a state governed by law which was moving toward a market economy, from the planning system, were the initial reforms of China during the 1980s. After the conclusion of the WTO accession, all of China's existing trade policies were mainly in line with the WTO system.⁸³ However, in fact, the reform achievements of the legal system and state administrative management were limited due to the restricting contexts of the Chinese political system and the previous centrally planned economy.⁸⁴ After joining the WTO, China has achieved major successes and plays an influential role in international trade as the world's third largest trader.⁸⁵ The high speed economic growth, the expansion of international markets, the structure of internal economic sectors and more importantly issues including huge transformation in trade polices and legal reforms were regarded as China's principle achievements. Through WTO accession, China has performed many crucial reforms in all sectors in order to reach the WTO standards. For example, since April 2004, the Standard Administration of China had reviewed all existing 21,000 Chinese National Standards to examine their compliance with the WTO's obligations. From a centrally planned economy, China

⁸¹ Sylvia Ostry "WTO membership for China: to be and not to be – is that the answers?" in Deborah Z Cass, Brett G. Williams, George Barker (eds.) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 31-39.

⁸² Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge University Press, 2007), 8.

⁸³ Elena Ianchovichina and Will Martin "Trade policy reform and China's WTO accession" in Deborah Z Cass, Brett G. Williams, George Barker (eds.) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 93-114.

⁸⁴ Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge University Press, 2007), 224.

⁸⁵ Chinese Trade Review available on <http://www.wto.org/english/tratop_e/tpr_e/tp299_e.htm> visited 24 May 2008.

has intensively reformed to be an active and open developing economy.⁸⁶ As stated by Elena Ianchovichina and Will Martin, China is “the biggest beneficiary of accession to the WTO.”⁸⁷

II.6.2 Indochina Nations

Cambodia, Vietnam and Laos in Southeast Asia began pursuing WTO membership later than China. Cambodia finished its negotiations in a relatively short time as their trade has little impact or influence within the global trade market. Vietnam, with a population of more than 80 million and being a potential large agricultural exporter, encountered difficult negotiations and harder conditions. After only a few years of international trade integration, Vietnam has shown significant improvements in FDI, trade exports, reform on trade policies and its legal regime. The Lao People’s Democratic Republic applied for their WTO membership on 16 July 1997. Laos is currently reforming its systems by “bringing related laws and regulations in line with the WTO requirements.”⁸⁸

In general, after the collapse of the Soviet Union and socialist systems in the Eastern European states, the centrally planned economies were basically forced to reform their domestic development strategies. Under the drive of international trade rules, the transition economies applied the open market principles into their internal law system. Together with the WTO rules, the regional trade agreements also crucially impacted on the trade policy reforms in the socialist states. As most of them are late in becoming WTO members, these transition economies must accept harder accession conditions compared to the previous ones. In general, there is no doubt that these transition economies have achieved significant success in their trade policy reform and economic development; however, they are still encountering

⁸⁶ More figures and arguments of the Chinese reforms can be found at HongGang Shen, *The Power of States to Derogate from the Free Trade Principles to Safeguard their national interests under the GATT Regime of General Exceptions with Special Reference to China*, (PhD Thesis, University of Leeds, School of Law, 2008).

⁸⁷ In Deborah Z Cass, Brett G. Williams, George Barker (eds.) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 112.

⁸⁸ *Statement of statement by H.E. Dr Nam Viyaketh, Minister of Industry and Commerce, Laos at the 4th Session of the Working Party on the Accession of Laos to the WTO*, available on <http://www.wto.org/english/news_e/news08_e/acc_laos_4july08_e.htm#statement>, visited 18 March 2009.

major challenges in integrating into the global trade system. Considerable effects from non-market economies, single dominated parties, poverty, a lack of high technology and inadequate infrastructure systems still remain obstacles in the transition of the socialist economies. The large gap between non-market economies and international trade rules would not be reduced in a short period. A stronger commitment is needed in both trade policy reforms and political reform in these transition economies. The assistance and favourable conditions from the WTO and regional trade bodies will therefore play the crucial role in the reform of former centrally planned economies.

Conclusion

Trade liberalisation and economic globalization are the main subjects in multilateral negotiations at the WTO Development Rounds. They are also the debating points regarding the different benefits of the various WTO members. A fairer trade system for all nations in the world is not only the target of the WTO legal regime but also many international organizations, NGOs and the developing nations. The foundations set by the WTO and its operations have been successful in promoting international trade. All members are given the opportunity to push their economic development through the WTO trading system as well as receiving assistance from other members. However, trade liberalisation and economic globalization do not guarantee success or the same equal opportunities for all.

Poor countries face many disadvantages and difficulties, such as: inefficient technical and financial resources; difficult market access for sensitive products in both agricultural and non-agricultural sectors; further detailed and effective provisions concerning SDT; providing the IP protection at a high level; and a weak domestic market. Consequently, progression in trade development is not easy for developing countries in both theoretical and practical terms. However, this does not mean that economic non-globalization is better for economic development. Each country, developing or developed must play a suitable role in order to achieve a fairer trade system for all nations and a wealthier world. Rich countries are central in providing technical assistance, health care support and international rule implementation for the poor countries. Moreover, responsibility for creating more

favourable conditions for developing nations in the multilateral trade negotiations are a key duty of the WTO as it progresses. A wealthier global economy is important but fairer trade for all ⁸⁹ is not only the best way to develop but also supports the commitment to human rights.

The WTO is the most powerful organization in international trade, and its establishment was a significant development for international trade and international trade law. The GATT and WTO have achieved much success in the last 60 years. It is not only “a unique legal system within the international legal order” but is also “the link between the legal system of the WTO and the legal system of other international organizations.”⁹⁰ Covering all sectors of international trade and with a comprehensive legislative system and enforceable dispute mechanism, the WTO has become a truly universal organization leading global economic development. In theory, free trade that utilises the same legal system for the worldwide economy must provide equal opportunities for all state members. However, the WTO’s functions and principles are not designed to be an international justice system or simply an economic development agency.⁹¹ Its operation could not guarantee success for all of its members, neither could it create absolute fairness in trade development worldwide. Many campaigns against economic globalization have been organized in both developed and developing countries. The WTO was established neither as an international charity organization nor a social welfare system; however, in fact, the WTO and its regime have provided dramatic development within the international economy. The amount of success members can get from the WTO is not only due to its development regime but also depends on the adaptable capacity of each country. Negotiations and reforms have been continuous within the WTO’s operating system with a “win-win” strategy and fairer trade for all members.

⁸⁹ Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How trade can promote development*, (Oxford University Press, 2005).

⁹⁰ Speech of DG of the WTO, Pascal Lamy, “*The Place and the Role of the WTO (WTO Law) in the International Legal Order*” addressed before the European Society of International Law on 19 May 2006, Sorbonne, Paris, available on <www.wto.org/english/news_e/sppl_e/sppl126_e.htm> visited 25 June 2006.

⁹¹ S.P.Subedi, “The notion of free trade and the first ten years of the World Trade Organization: How level is the ‘level playing field’” *Netherlands International Law Review*, LIII 2006, 273-296.

Specifically, in respect of law making, reconciling a number of different international law sectors as well as incorporating international conventions into 153 national legal systems is truly a significant development in setting a comprehensive legal system for the operation of a “fully-fledged international organization”.⁹² Accompanied by the effective dispute settlement mechanism, the most favoured nation treatment and national treatment, and non discriminatory treatment, the multilateral trading system of the WTO can be evaluated as being the most complex and comprehensive international legal regime.

In short, gaining the benefits of free trade through the WTO is different for different state members. How much a nation could gain from the global economy and how much they might lose in terms of their sovereignty and social welfare are questions that still remain open and pose a challenge for each state member and for the WTO itself. The failure of the Seattle Round 1999, the deadlock in the Cancun Round 2003 and the debate in the Hong Kong Meeting 2005 has placed the WTO’s legal regime in need of urgent trade policy amendments. The success of the multilateral trading system, and of particular nations, is dependent on the future negotiations between state members in order to force the WTO’s policy towards a more beneficial regime that is able to strike a balance between the rich and the poor members and at the same time enhancing sustainable development. The Millennium Developmental Goals of the UN must be placed at the same level in terms of economic growth, in each particular nation, as well as in the WTO’s policy. There is no doubt that each of the WTO’s members can achieve trade opportunities and development success if they can improve their domestic systems through competition, well prepared market openness and a wise economic liberalization.

⁹² Ibid.

Chapter Three

The TRIPS agreement and Intellectual Property Protection in developing countries

Introduction

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) is the result of the Uruguay Round of trade negotiations (GATT 1994). All countries, which want to gain the benefit of being WTO members, have to comply with regulations laid down in the GATT agreements as an indispensable condition. Signed by over 153 WTO member states, the TRIPS Agreement is an important part of the international trade system, and, in the words of Reichman “is the most ambitious intellectual property agreement ever attempted at the international level”¹ and the cornerstone² of the international trade system.

This Chapter is designed to briefly introduce the background of the TRIPS agreement and the role of IP protection in the WTO legal regime. The second part of the chapter examines the important impacts of the TRIPS implementations to developing countries. The third part attempts to analyze the benefit conflicts between the IP exporters and the poor countries that are the main IP importers and the implementation of the Doha Declaration to the public health. How adequate the provisions in the TRIPS agreement are to protect the interests of developing countries and what difficulties these countries will encounter in implementing the TRIPS agreement into their domestic law system will be examined in part four of this chapter.

¹ In “Compliance with the TRIPs Agreement: Introduction to a Scholarly Debate” (1996) *Vand.J.Transnat’l L.* Cited in Rama John Ruppenthal, ‘TRIPs through the Far East: High tech product piracy and the need for alternative regional solutions’ (2001) *Wisconsin International Law Journal*, 143-177.

² Beseler in the Foreword of “TRIPs Agreement, Enforcement of Intellectual Property Rights” (2000) *The European Official Publication*, 1.

III.1 Intellectual property rights (IPRs) protection and the TRIPS Agreement

III.1.1 A historical review of IPRs and the TRIPS agreement

The idea of Intellectual Property Rights (IPRs) was mentioned very early in the 14th century regarding of the term of patent. The first patent was granted in Renaissance Italy in 1469 for construction methods in Venice. The first patent law, which provided ten year protection for invention was adopted by the Republic of Venice in 1474.³ With the development of science and technology, the idea to of protecting patents as private property was developed in industrial countries like the European nations. In the US, the IP law was developed from principles of the Constitution, on February 2nd 1848, to allocate power to Congress “to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴

In England, the Statutes of Monopolies of the year 1623 may be considered as the foundation of English IP law⁵ and then the Statute of Anne in 1710 in copyright law. However, the foundation of the Stationers’ Company in 1403 and the innovation of the printing press in 1476 were led to the principal ideas of the IP law system in England. The 1710 Statute of Anne has not only been evaluated as “the first modern copy-right law” but also as indicating “the progression of copyright history from one of trade regulation and marketplace economics to the liberal culture of possessive individualism.”⁶ The 1710 Statute of Anne also had an influence on the first copyright law of the USA in 1783.

The definition of patent was established later in some European nations. The first Patent Act in German was passed in 1877, while the Prussian Law on copyright

³ Graham Dutfield, *Intellectual Property Rights and the Life science Industries, A Twentieth Century History* (Ashgate, 2003), 197.

⁴ The United State Constitution, available at <<http://www.usconstitution.net/const.html#A1Sec8>> visited 20th January 2009.

⁵ Mohamed Omar Gad, *Representational Fairness in WTO Rule-Making: Negotiating, Implementing, and Disputing the TRIPS Pharmaceutical-Related Provisions* (British Institute of International Law and Comparative Law 2006), 44.

came into force in June 1837. In France, the first idea of authors' rights and book trade concerns were introduced before the French Revolution in 1777 and was formally regulated by the Decree levels in January 1791 and July 1793.

Many European nations issued patent laws in the late nineteenth century, but the length of protection term and detailed protection systems were different. For example, the US provided 17 years for patent protection while France and Germany gave 15 years, and Britain 14.⁷ Those differences showed the need for a general framework of patent law among the high technology nations.

Based on the idea of setting up a network for international IP protection, in 1883, the first potential international treaty in IPRs protection named the Paris Convention for the Protection of Industrial Property was established with 14 member states and came into force in 1884. This Convention applied protection to inventions (patent), trade-marks and industrial designs. It established two principles of patent protection: guarantees for the "right of national treatment" and the "right of priority".⁸ Copyright protection extended to become international IP protection 3 years later with the Berne Convention for the Protection of Literary and Artistic Works. There were two small International Bureau to carry out these administrative tasks. Under the pressure of demands for IPRs protection, the two Bureau were united to establish the United Bureau for the protection of IP, popularly known by its French acronym BIRPI) in 1893.

To meet pressing demands for patent protection, the Paris Convention was revised four times from 1883 to the last version in 1967. The Madrid Agreement for the international registration of Mark, established in 1891, and the Hague Agreement of 1925 concerning the international registration of industrial designs were further steps in the development of IPS protection at a worldwide level. The 1948 Havana Charter which established the ITO stated the request for Members "preventing by agreement the development or application of technology or invention whether patented or

⁶ Graham Dutfield & Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008), 67-68.

⁷ Graham Dutfield, (n3), 49.

⁸ M.O Gad (n5), 45.

unpatented.”⁹ Concerning IP protection in different nations, the ITO can request each Member to take appropriate remedies in accordance with their domestic law and enforcement systems.¹⁰

At the 1982 GATT Ministerial Meeting, the need for an international comprehensive legal system for IPRs was raised in response to many serious issues such as the anti-counterfeiting coalition and how to set up an agreement on IPRs within the GATT system. Further discussions of aspects that involved counterfeit trade-marked goods in GATT sessions pushed the determination to set up an appropriate forum for raising standards of IPRs in multilateral negotiations. From the original idea of fighting counterfeit trade-marked goods, the US proposed to expand the scopes and effects of IPRs protection. Both developed and developing countries had expressed the need to improve the WIPO legal system for IPRs at global level.¹¹

As a result of technology transfer, international trade development and economic growth worldwide had pushed the discussion about setting up proper protection of IPRs especially in patent protection during the period from the late 1960s to early 1980s. International awareness of the relationship between IPRs protection and technology transfer had been raised to a considerable level with the Resolution of the UN General Assembly in 1980 entitled “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, that included the related provisions of IPRs protection.¹²

In the meantime, the BIRPI, from its beginnings with seven staff, had been developed as a special agency of the UN in December 1974 and had then become the World Intellectual Property Organization (WIPO)¹³ under the entry into force of the Convention Establishing the World Trade Intellectual Property Organization. With the principle of providing the same level of protection of IPRs across nations and of

⁹ Article 46(3e) the 1948 Havana Charter.

¹⁰ Article 49(9) and Article 49(10) the 1948 Havana Charter.

¹¹ More details, see Duncan Matthews, *Globalizing Intellectual Property Rights* (Routledge, 2002)

¹² Cited from Frederick M. Abbott “Are the Competition Rules in TRIPS Agreement Adequate?” in Ernst-Ulrich Petersmann (ed.) *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press, 2005), 318.

¹³ Understanding the World Intellectual Property Organization (WIPO)
< <http://www.wipo.int/treaties/en/general#birp> > visited 15th March 2008.

harmonizing benefits between member states, the WIPO roles and functions have developed together with the constant growing of IP protection needs.

A broad legal regime for IPRS protection had been established by the WIPO foundation but perhaps the WIPO system was not strong enough “to address international enforcement issues in any effective manner”.¹⁴ Lack of an adequate enforcement system has been named as a historical limit of the WIPO system. The international treaties on IPRs protection so far applied to member states in separate areas and each country incorporated the convention context at different levels.

The establishment of the WTO in 1995 and the TRIPS Agreement has provided a significant protection level in both the legislative framework and the enforcement system of IPRs. Before the adoption of the TRIPS Agreement, international law in IP protection lacked comprehensiveness in important IP subject areas and effectiveness in enforcement procedures. During the negotiations to establish the WTO, the biggest intellectual exporters, the United States, Europe and Japan, argued that the IP protection system lacked many IPRs provisions as well as appropriate enforcement measures. The international treaties in IPRs protection so far applied to member states in separate areas and each country incorporated the convention context at different levels. Concerning the absence of some IPRs provisions before the TRIPS implementation, the protection of design, computer program were not mentioned in the IP conventions. In the scope and availability of IP rights, there were still many inadequacies in the “exception” cases which can exclude from the IP protection; insufficient duration of protection; or misuse of compulsory licensing.

The TRIPS Agreement has been designed to set up new rules and disciplines in order to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights. In addition, this legal regime ensured that measures and procedures to enforce intellectual property are not themselves barriers to legitimate trade.¹⁵ The

¹⁴ Christopher May, *A global political economy of Intellectual property rights: The new enclosures?* (Routledge 2001), 67.

¹⁵ Preamble of TRIPS Agreement.

TRIPS recognized the private ownership of IPRs and that IPRs protection is needed mainly for developmental and technological objectives.

The IP protection regime in TRIPS is not a totally new framework. It incorporates existing, related IP conventions. All provisions of the agreement must be deployed effectively and not be contradicted in the legal system of each member state. The protection level in a member state would be stricter than or at least equal to the Agreement's standards. However, member states are free to determine the appropriate method of implementing the Agreement's provisions within their own legal system and practice.¹⁶

The TRIPS Agreement requires member states to satisfy minimum standards not only in their legislative systems, but also in their enforcement systems, permitting "action against any act of infringement of intellectual property rights covered by this Agreement."¹⁷ Although member states are allowed to choose their own way of implementing TRIPS within their particular national jurisprudence and practice, they must conform to the TRIPS provisions including the enforcement rules. If a country breaks a TRIPS provision, it will be penalized as for any violation of the WTO membership's obligations. Many developing nations have reformed their IP law system in compliance with TRIPS standards. The change of the Indian Patent Act 1970 is a significant example of TRIPS application on "Universal Minimum Standards of Patent Protection".¹⁸

For a developing country, making an IP legislation regime in line with TRIPS standards is difficult but feasible. However, providing an effective domestic enforcement system is a bigger challenge, even though developing countries are allowed to have a transition period before having to fully meet TRIPS standards. In adopting the WTO membership obligations and the TRIPS requirements into its national legal system, a developing country must find its own suitable way so that IP

¹⁶ Article 1.1, the TRIPS Agreement.

¹⁷ Article 41.1 the TRIPS Agreement.

¹⁸ More detailed arguments, see Gail E. Van, "Strategic Patent Licensing for Public Research Organizations: Deploying Restriction and Reservation Clauses to Promote Medical R&D in Developing Countries" (2008) *American Journal of Law and Medicines* Vol.34, No 2&3 175-225.

rights protection will not jeopardize its citizen benefits and its objective of sustainable national economic development.

However, establishing an appropriate IP legal regime which not only reaches the international standards but also promotes domestic socio-economic development is a big challenge for developing nations. In principle, the TRIPS agreement requires the same standard framework for developed and developing countries except for the transitional period and technical assistances. With a huge gap in technology and scientific development, the interests of the industrial nations and poor countries with regard to IP protection are absolutely different. In the words of Correa, "this Agreement became one of the most controversial pieces of the multilateral trade system",¹⁹ especially as regards the influences of IPRs protection in TRIPS and vital public concerns, namely, public health and education. Recently, the conflicts between patent protection in the pharmaceutical industry and medicine satisfaction in developing nations have been raised as a significant concern by economic Nobel prize-winner Joseph E. Stiglitz:

I suspect that most of those who signed the agreement did not fully understand what they were doing. If they had, would they have willingly condemned thousands of AIDS sufferers to death because they might no longer be able to get affordable generic drugs? Had the question been posed in this way to parliaments around the world, I believe that TRIPS would have been soundly rejected ... intellectual property is important, but the appropriate intellectual property regime for a developing country is different from that for an advanced industrial country. The TRIPS scheme failed to recognize this. In fact, intellectual property should never have been included in a trade agreement in the first place, at least partly because its regulation is demonstrably beyond the competency of trade negotiators.²⁰

So, incorporation of the TRIPS standards into domestic law is not desirable for developing nations but on the other hand, WTO membership and extending their

¹⁹ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A commentary on the TRIPs Agreement* (Oxford University Press 2007) preface.

export market are potential benefits that forced TRIPS implementation in these nations. The meaning of “the stick” and “the carrot” in the global economy is perfectly illustrated in application of the TRIPS in developing countries.²¹

III.1.2 Scope of the TRIPS Agreement

The TRIPS Agreement defines minimum standards for international protection of IP rights. The duty of each WTO member is to enforce these protections in accordance with its own procedural and administrative requirements. The TRIPS Agreement aims to promote effective and adequate protection of IP rights in international trade. It covers all aspects of IP rights, such as copyright and related rights, trade-marks, geographical indications, industrial design, patents, layout-designs (topographies) of integrated circuits, protection of undisclosed information, and control of anti-competitive practices in contractual licenses.

The objects of the TRIPS are formulated as follows:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technology knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.²²

The principles of public interest protection are stated in Article 8.1 of the TRIPS agreement which requires WTO members:

in formulating or amending their laws and regulations, to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technology development, provided that such measures are consistent with the provisions of this Agreement.

²⁰ Cited from Graham Dutfield & Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008), 12.

²¹ Graham Dutfield, (n3), 49.

²² Article 7, the TRIPS Agreement.

The TRIPS Agreement defines minimum standards of international protection for IP rights and points out the rights and obligations of the WTO members to enforce these protections in accordance with procedural and administrative requirements in their nations. The TRIPS Agreement aims to promote the effective and adequate protection of IP rights in international trade. The TRIPS Agreement covers all aspects of IP rights, namely, copyright and related rights, trade-marks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, protection of undisclosed information, and control of anti-competitive practices in contractual licenses.

In accordance with the TRIPS Agreement, member states must comply with the rules and obligations of all related IP conventions, including the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Treaty on Intellectual Property in Respect of Integrated Circuits, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.²³

As regards the scope of obligations, all provisions of the agreement must be effective and not be differently implemented in each Member State. The protection level in the member state may need not be stricter than the Agreement's standards. Member states are free to determine the appropriate method of implementing the Agreement's provisions within their own legal system and practice.²⁴

The TRIPS Agreement requires Member State to supply not only minimum standards in legislation, but also an enforcement system, which permits "action against any act of infringement of intellectual property rights covered by this Agreement."²⁵ The civil and administrative procedures that concern the enforcement of IP rights protection in Member states must be fair, equitable, not complicated or costly, or entailing unreasonable time-limits or unwarranted delays.²⁶ The remedies that apply for IP infringement will be detailed in each member's domestic IP law. Member states must also provide criminal procedures and penalties to be applied in

²³ Article 2, the TRIPs Agreement.

²⁴ Ibid, Article 1.1.

²⁵ Ibid, Article 41.1.

cases of wilful trade-mark counterfeiting or copyright piracy on a commercial scale. The penalties should be imprisonment and/or monetary fines.²⁷ Other special requirements like the border measures and provisional measures must be carried out in members' domestic law.

Each Member State is also even given the option of finding appropriate means of implementing the TRIPS obligations within its particular national jurisprudence and practice, but it must respect its obligations under the TRIPS provisions including the enforcement rules. If a country breaks the TRIPS provisions, the penalties will be applied in the same way as any violation of WTO Member state obligations. The combination of implementation of TRIPS within domestic legal systems and the liability of WTO trade sanctions has created the most significant success of IP protection at a worldwide level.²⁸

The TRIPS Agreement allows developing and least developed countries to get plenty of exemptions from their IP obligations, for example, the Transitional Arrangements provisions:

Article 65 the TRIPS Agreement states:

1. Subject to the provisions of paragraph 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing

²⁶ Ibid, Article 41.2.

²⁷ Ibid. Article 61.

²⁸ Koning, "Why the coercion-based GATT approach is not the only answer to international piracy in the Asia-Pacific region" (1997) *European Intellectual Property Review*, 19(2), 59-77.

special problems in the preparation and implementation of intellectual property laws and regulations may also benefit from a period of delay, as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement to that Member, as defined in paragraph 2, it may delay the application of the provision on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraph 1, 2, 3 or 4 shall ensure that any changes in its law, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 66: For the Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints and their need for flexibility to create a viable technological base, such Member shall not be required to apply the provisions of this Agreement the Council of TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

III.2 Understanding the TRIPS Agreement

III.2.1 Brief Overview of the Agreement

The TRIPS agreement affects WTO members under the principal doctrine of international law “*pacta sunt servanda*”.²⁹ The Preamble to the TRIPS agreement states the nature and scope of agreement obligations as:

²⁹ Vienna Convention of the Law of Treaties, Article 26: “*pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

This basic principle can be understood to mean that no provisions of any TRIPS obligations and related conventions or the application of any such provisions to any persons or circumstance, would be inconsistent with any law of any nation's domestic legal system. The way in which the TRIPS obligation may be reconciled with WTO member legal systems must be consistent with country's interests and development strategies. The approach to any particular IP protection system in member nation can be freely determined within their "own legal system and practice".³⁰ In different countries, the TRIPS obligation may be interpreted at different levels but not below the minimum standards set by the related IP conventions.

In principle, the TRIPS Agreement covers five main issues:

- (i) how basic principles of the trading system and other international intellectual property agreements should be applied;
- (ii) how to give adequate protection to IPRs;
- (iii) how countries should enforce those rights adequately in their own territories;
- (iv) how to settle disputes on IP between members of the WTO;
- (v) special transitional arrangements during the period when the new system is being introduced.³¹

³⁰ Correa (n19), 23.

³¹ *Understanding the WTO*, available the WTO website at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf p42-43, visited 15th December 2008.

III.2.2 The coverage of the Agreement

In keeping with the TRIPS Agreement status as part of the WTO system non-discrimination features in the form of the treatment of nationals and most-favored treatment are among its most fundamental principles. The protection of balance between the IPRs holder's benefit and the promotion of technical innovation, technical transfer and accession to technical benefits are particularly important issues. Harmony of benefits between the IPRs owners, the producers, and users in order to enhance economic development and social welfare are additional principles of the TRIPS system.³²

The areas covered by the TRIPS agreement include: Copyright and related rights; trade-marks including services marks; geographical indications; industrial designs; patent; layout-designs (topographies) of integrated circuits; undisclosed information, including trade secrets and control of anti-competitive practices in contractual licenses. The patent, copyrights, trade-marks and other intellectual property are different titles of intellectual innovation and creation and have different types of protection under the TRIPS legal framework.

a. Patent

Patent is an important part of the TRIPS agreement and has recently become controversial in arguments about public health interests and patent holder rights in view of the many widespread diseases in developing nations where drugs are unaffordable.³³ In the Doha Round 2001, the issue of TRIPS and the availability and affordability of pharmaceutical products was mentioned as the second biggest concern after the heaviest threat from Bin Laden's Al-Qaeda terrorism.³⁴ The TRIPS agreement provides protection for "any inventions whether products or processes, in

³² Simon Lester, Bryan Mercurio, Arwel and Kara Leitner, *World Trade Law, Text, Material and Commentary* (Hart Publishing, 2008), 707.

³³ Some typical WTO disputes in patent protection can be named as *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (24 August 1998); *Brazil – Measures Affecting Patent Protection*, WT/DS199/4G/L/454 (and Notification of Mutually Agreed Solution, IP/D/23/Add.1 (30 May 2000) *Canada – Patent protection of pharmaceutical products*, WT/DS114/R (17 March 2001).

³⁴ Graham Dutfield, *Intellectual Property Rights and the Life Science Industries, A Twentieth Century History* (2nd ed. Ashgate, 2009), 281.

all field of technology, provided that they are new, involve an inventive step and are capable of industrial application.”³⁵ The term “products” of invention covers chemical compounds and new machines and devices. A process is a “course of action, proceeding, especially series of operations in manufacture, printing, photography etc.”³⁶ Processes are a vital step in a technology transfer for a country to obtain a new product. The “method of use” in many nations is a compulsory part encompassed in patent transfers and is transferred separately as an independent patent accession.³⁷ Patentees can enjoy their rights “whether products are imported or locally produced” without any discrimination.³⁸ It means the member must provide the same protection to same patented products whether these products are locally produced or are imported. The dispute known as *Brazil - Measures Affecting Patent Protection* is regarded as a typical example of discrimination between locally produced products and imported products.³⁹

The TRIPS standards provide 20 year protection for patents in both new renovation products and processes. Patent protection also includes diagnostic, therapeutic and surgical methods, plant and animal (other than microorganism) and biological processes for the productions of plants or animals (other than microbiological processes).⁴⁰ In respect of Parts II, III and IV of the TRIPS Agreement, the related provisions are applied by the Paris Convention, which is the first major international agreement which covers the protection of industrial property rights. With respect to 20 years protection, Canada was the first nation to reduce the minimum patent protection to 19 years and six months by “allowing manufacturing and stockpiling of pharmaceutical products without the consent of the patent holder during the six months immediately prior to the expiration of the 20-year patent term by virtue of

³⁵ Article 27, the TRIPS Agreement.

³⁶ Wegner, *Patent Law in Biotechnology, Chemicals & Pharmaceuticals* (Chipperham, Stokton 1994), 302.

³⁷ Correa (n19) 273.

³⁸ Article 27, the TRIPS Agreement.

³⁹ On 30 May 2000, the US argued that Brazil had breached of the TRIPS obligations in Article 27 by adopted the Brazil 1996 Industrial Property Law which created specific ‘local working’ provisions for compulsory licence and importation for pharmaceutical product. The US argued that provisions (article 68 and its related measures) were not compatible with the TRIPS obligation. More details see the *Dispute Brazil – Measures Affecting Patent Protection*, WT/DS199/4G/L/454 and *Notification of Mutually Agreed Solution*, IP/D/23/Add.1.

the provisions of Section 55.2(2) and 55.2(3) of the Patent Act together with the Manufacturing and Storage of Patented Medicines Regulations.”⁴¹ Plant varieties are also covered by the International Union for the Protection of New Varieties of Plants.

With regard to public welfare in the scopes of patent protection, Article 27, paragraph 2 and 3 of the TRIPS agreement give the exclusions for those inventions the commercial exploitation of which is necessary to protect public order or morality. Further exclusions are given to protect human, animal or plant life or health or to avoid serious prejudice to the environment. They include diagnostic, therapeutic and surgical methods for the treatment of humans or animals; plants and animals other than micro-organisms and essential biological processes for the production of plants or animals other than non-biological and microbiological processes which are considered as excluded from patentability.

For harmonizing benefit and to protect the rights of patentees, these exceptions can be made on the principle of avoiding harmful effects on the normal commercial exploitation of products. They must also not unreasonably prejudice the legitimate interests of the patent owner. These exceptions must have regard to the legitimate interests of third parties.⁴² How to interpret this issue in the context of domestic law is regarded as a significant challenge to all members. The disputes known as *Canada - Term of Patent Protection* and *Canada - Patent of Pharmaceutical Products* are examples that show how difficult it is to employ the purview of the TRIPS Agreement in terms of patent protection and public interest.⁴³

⁴⁰ Understanding the WTO – Intellectual Property: protection and enforcement, available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> visited 20th November 2007.

⁴¹ Generally see the Panel Report, *Canada – Patent protection of Pharmaceutical Products*, WT/DS114/R (17 March 2000).

⁴² Article 30 the TRIPS agreement.

⁴³ The Canadian Patent Law and the Canadian Manufacturing and Storage of Patented Medicines Regulation allowed their local manufactures produce and stockpile of pharmaceutical products without consent of the patent holder during six month prior to the expiration of the TRIPS patent protection term. The EU and their Members complained to the DSB that Canada had breached the TRIP obligations (Article 27(1)) but Canada replied that those regulations were not inconsistent with the TRIPS obligations as they were covered by the exceptions in the Article 30 of the TRIPS. More details see the *Canada – Patent protection of pharmaceutical products*, WT/DS114/R (17 March 2001).

Due to the public health crises such as the spread of HIV/AIDS in many poor countries, a cheap price for crucial medicines is not only urgent concern for governments but is also a human right. So, patent protection and its exceptions is a crucial matter to discuss at the WTO Development Rounds. The issues and applications of patents to WTO members raise many controversial questions, particularly in developing countries. The raising of patent protection level worldwide has negative impacts on medicine and access to high technology in poor countries, where only 4 percent of the world's R&D expenditure has been made.⁴⁴

b. Copyright and Related Rights

The protection of copyright and related rights in the TRIPS agreement is covered by Section 1, part II of the TRIPS Agreement, complying with Article 1 through Article 21 of the Berne Convention 1971. Computer programs and compilation of data are protected as literary works under the Berne convention. The protection of rental right, performers, producers of phonograms (sound recordings) and broadcasting organizations will be covered by the TRIPS agreement and the Berne convention. Copyright and related rights protection does not cover ideas, procedures, methods of operation or mathematical concepts.

The term of protection

The term of protection of copyright and related rights is much longer than patent protection. All literary works, except photographic works or works of applied art are protected for "no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making."⁴⁵ The principal term of protection under the Berne convention is a minimum term of copyright for the life of the author plus 50 years. Article 7(2,3,4) of the Berne convention detailed three situations in which the term of protection is not covered on the basis of the author's life as follow:

⁴⁴ Correa, (n19), 23. *This issue will be discussed in detail at the Part III.4 Global public health security and Pharmaceutical Patent Protection.*

⁴⁵ Article 12, the TRIPS Agreement.

- (1) In the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after making.
- (2) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public.
- (3) In the case of photographic works and works of applied art, it shall be a matter for legislation in the countries of the Union to determine the term of protection in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of 25 years from the making of such a work.

Limitations and exceptions

The TRIPS agreement allows the WTO members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁴⁶ The limitations and exceptions must comply with the related provisions at article 9(2) and specific exceptions of the Berne Convention.

The limitations and exceptions in both the TRIPS agreement and the Bern Convention are principal rules for WTO members to seek a balance between the right of the copyright owner and social welfare such as the proliferation of knowledge and art, freedom of expression, educational access to literature and the enhancement of culture.⁴⁷

c. Geographical Indication

With regard to Geographical Indication, the protection indicated for goods identified as originating in the territory of a member or a region or locality in that territory

⁴⁶ Article 3, the TRIPS Agreement.

⁴⁷ Correa, (n19) 135.

where the quality, reputation or other characteristic of the product is potentially attributable to its geographical origin.⁴⁸ Most of the detailed provisions in the TRIPS Agreement which concern geographical indication are in line with the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. Geographical Indication protection is strongly applied to the trade in wines, spirits and foodstuffs in EU nations such as French wines and cheeses. This protection was intended to prevent:

Any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention and against registration of a trade mark which contains or consist of a geographical indication with respect to goods not originating in the territory indicated provided this is such as to mislead the public as to the true place of origin.⁴⁹

In the EU, along with many well-known geographical indications such those applied to wines and cheeses, a further system of registered geographical indication has been introduced which requires not only proof of geographical origin but also compliance with product standards.⁵⁰ These systems extend the scope of geographical protection in the European continent.⁵¹

d. Industrial Designs

Protection for the Industrial Designs that are new or original is provided by a combination of provisions from the Paris Convention and the TRIPS agreement. The owner of a legal industrial design product has a right to prevent third parties from making, selling or importing article bearing or embodying a design when such acts are undertaken for commercial purposes. The minimum term of protection for industrial designs is ten years.

e. Layout design (topographies) of Integrated circuits

⁴⁸ Article 22, the TRIPS Agreement.

⁴⁹ Article 22.3 the TRIPS Agreement

⁵⁰ Council Regulation (EC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L208/1).

⁵¹ Jacques H. J. Bourgeois, 'Post Cancun WTO TRIPs – A Bumpy Road' in Stefan Griller (ed.), *At the Crossroads: The World Trading System and the Doha Round* (Springer WienNewYork, 2008), 394.

The Washington Treaty on Intellectual Property in respect of Integrated circuits (hereafter called the Washington Treaty) provides principal protection for integrated circuit designs. The TRIPS agreement requires members to reconcile the Treaty articles from article 2 to 7, except for article 6(3), together with articles 12, 16.3 and 37. The term of protection is at least 10 years but may lapse after fifteen years.⁵²

It is considered desirable by exporting nations that IP be at a high level, so that they can maximize their export benefit. Some members, such as the US are improving their protection through bilateral agreements with other nations.

f. Undisclosed information

Protection for undisclosed information is a new concept in international IP law.⁵³ It was introduced in Article 39 of the TRIPS agreement under the need to protect the commercial value of information in the course of ensuring an effective system against unfair competition according to Article 10 bis of the Paris Convention. The members must provide for the possibility of preventing unfair use of information of commercial value within their continent. In the case of approving the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities, the member must protect such data against unfair commercial use.

The power to protect secret information was requested by developed countries such as Japan, Australia and the US on the grounds that they are the nations which transfer high technology to developing countries. So that such nations might receive commercial value from such information and in order to preserve secrecy undisclosed information protection was incorporated into members' legal regimes as a WTO obligation. This seems to have received more attention in IP exporting nations than developing countries.

g. Trade-marks

Trade-marks are becoming a the subject of potential section of IPRs law, due to global economic development which requires a higher level of protection for images,

⁵² Article 38, the TRIPS Agreement.

styles, signs and association of products.⁵⁴ The TRIPS Agreements and related provision in the Paris Conventions apply substantive protection for trade-marks, named well-known marks, services marks and collective marks. The definition of trade-marks covers broadly any sign, or any combination of signs capable of distinguishing the goods and services of one undertaking from those of other undertakings, shall be capable of constituting a trade-mark and shall be able for registration. Members can register for other trade-marks based on different grounds provided that they do not derogate from the provisions of the Paris Convention.⁵⁵

The owner of a registered trade-mark has the right to prevent all third parties from its illegal use in the course of trade or of identical or similar signs for goods and services which are identical or similar to those in respect of which the trade-mark is registered where such use would result in a likelihood of confusion. The term of trade-mark protection is no less than seven years and can be renewed indefinitely.

In principle, most of the TRIPS context which applies to trade-mark protection had been interpreted from the Paris Convention, however, in some areas the TRIPS Agreement provides a different standard from IP related conventions. For example, the licensing and assignment provisions in Article 21 can be understood as stipulating that the trade-mark can be subject to compulsory licensing and a registered trade-mark can be assigned with or without the transfer of the business to which the trade-mark belongs, while Article 6^{quater} of the Paris Convention stated:

The assignment of a trade-mark is valid only if it takes places at the same time as the transfer of the business or goodwill to which the trade-marks belongs, it shall suffice for the recognition of such validity that the portions of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the good bearing the marks assigned.

⁵³ Arup, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property* (Cambridge University Press 2000), 198.

⁵⁴ Arup (n53), 195.

⁵⁵ Article 15(1) the TRIPS Agreement.

It is to be noted that Article 21 of the TRIPS agreement regards registered trade-marks only, other cases being covered by the detailed provision of the Paris Convention.

In short, trade-mark protection in the TRIPS agreement can be called the “Paris-plus” Solution⁵⁶ for preventing the misleading of the public as regards the origin, nature, or essential qualities of the goods which the trade-marks applied. The protection of trade-marks is a crucial part for strengthening the right of trade-mark owners as well as consumer benefit in the global economy.

III.2.3. The enforcement system of the TRIPS Agreement

Before the adoption of the TRIPS Agreement, enforcement obligations in IP protection were mentioned in few provisions of international conventions such as the Berne Convention and the Paris Convention. However, these were not specific and effective remedies. Demand for an effective enforcement system became more important during the Uruguay Round and the Tokyo Round when the IP exporting nations lost many billions of dollars per year due to the trading of counterfeit goods.⁵⁷ The illegal use of IP products without payment has caused the loss of huge benefits, especially for IP exporting nations. Thus, developed countries such as the US and the EU nations were keen to improve the IP protection level both through legislation and highly effective enforcement systems.

a. Main provisions of the TRIPS enforcement system

Considering the importance of a powerful means of enforcement, the TRIPS Agreement required all member nations to incorporate the TRIPS enforcement provisions into their administrative and judicial system. Part III of the TRIPS Agreement provides five detailed sections to ensure that enforcement procedures would be incorporated into member national legal systems and would be effective against any infringement to IPRs.

⁵⁶ Correa, (n19), 202.

⁵⁷ Arup, (n53), 180.

In terms of general obligations in Section 1, these procedures must be applied in such a manner as to avoid the creation of negative effects on legitimate trade and to provide safeguards against IP abuses. Member nations must establish particular IP enforcement procedures that must be fair and equitable as well as not too complicated or costly, nor must they entail unreasonable time-limits or unwarranted delays. All decisions have to be recorded in writing and in a proper manner, so that the proceedings can be accessible at least to the parties without undue delay. Paragraph 4 of section 1 provides the right for a party to request a preview by a judicial authority of any final administrative decision. However, there is no obligation to provide a preview of acquittals in criminal cases. Enforcement provisions must be included in national systems in such a way as not to create a negative effect on their enforcement capacity in general.

In order to implement the general obligations in practice, the second part introduces the civil and administrative procedures and remedies. The TRIPS enforcement system requires each nation member to set up civil judicial procedures which must be available in respect of any activities which infringe IPRs covered by the TRIPS agreement. The details of injunctions, damages and other remedies are covered in this section, such as refusing counterfeit goods or ordering a member to desist from infringements. Acting in good faith or bad faith and how to pay adequate damages to IPRs holders are covered in these provisions. Safeguards against abuse of enforcement procedures such as adequate compensation for both damage and expense, which includes the legal fee, are also detailed in this section.

Provisional measures and special requirements related to border measures are significant outcomes of the TRIPS agreement enforcement system. These measures have secured more effective way to protect IPRs in different party continents at the same level. Border measures have increased cooperation between WTO members in preventing the release of infringing products across national borders. With the compulsion to establish a "competent authority" to control border enforcement procedures, the TRIPS enforcement system has established measures empowering it to fight against the import of infringing goods.

Sections 3 and 4 of part III of the TRIPS agreement provide detailed instructions for a "competent authority" to deal with infringing products, giving them the power

power to order the destruction or disposal of these products in such a manner as to avoid potential damage to IPRs holders.

The last section of the TRIPS enforcement part covers criminal procedure provisions. These obligations apply to cases of well-known trade-mark counterfeiting or copyright piracy on a commercial scale. Members have the power to decide whether to apply for criminal procedures and particular sanctions which include imprisonment and/or monetary fines.

b. Preventing and settling disputes

The TRIPS agreement marked a crucial development in appropriate enforcement provisions as compare with the Berne and Paris Conventions. Articles 63, 64 require all members to detail the “availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights shall be published.” Publications that include the law, regulations, judicial decisions, administrative rulings of general application and bilateral intergovernmental or inter-agency agreements must be made in the national language. Transparency of laws and normative legal documents, regulations and administrative procedures and court accessions through publication are compulsory TRIPS obligations for members. WTO members must provide their own dispute prevention instruments to the TRIPS council. Most of the recent WTO observers must provide these contents during their accession at the request of negotiating nations. A formalized dispute settlement procedure which meets the TRIPS standards must be established in the domestic legal system. Each member has obligations to provide in response to a written request from other member information which relate to their IP protection legal regime.

Dispute settlements of TRIPS matters are governed by the Dispute Settlement Understanding of the WTO. This can be counted as a significant improvement to the dispute settlement mechanism.⁵⁸ The WTO Council for TRIPS (referred as the TRIPS Council) is the primary instrument for ensuring effective implementation of the TRIPS Agreement among WTO members as well as in international IP disputes.

⁵⁸ Correa, (n19), 479.

Up until 1 March 2009, there were 28 trade disputes that involve the TRIPS Agreement. Most of them were brought by the US and EU, the most industrialized countries and the big IP exporters.

c. Adequate enforcement system: Challenges ahead

Under WTO obligations, all WTO members have incorporated the TRIPS enforcement provisions into their national laws. However, setting an effective enforcement system for IP protection is a significant challenge in both developed and developing countries due to several reasons.

First of all, the global dissemination of information and easy access to media information, technology innovation and a number of websites enabling online uploading/downloading of music and video recordings, such as Youtube and Megaupload, could be named as causing crucial difficulties for adequate enforcement. Public acceptance of the use of pirated products, especially compact disks and DVDs is very prevalent in all countries, not only in poor areas but also in rich nations. For example, there was a report that it is possible to buy a pirated DVD of the "Kill Bill" film in both China and New York for \$1 in Chinese markets and for no more than \$5 in New York.⁵⁹ Buying the pirated products at cheap prices seems to be an accepted practice. In some Asian nations, such as Vietnam, the number of pirated products that were sold is much bigger than the number of legal versions of the same products. Copy-right violation is regarded as permissible by everyone, even the copyright owners. According to the latest conference on copyright in Vietnam on 16 March 2009, pirated products on software programs, CDs and DVDs account for at least 85% of the entire Vietnam market.⁶⁰

China, the "new kid on the block"⁶¹ in the WTO, and one of the biggest markets for pirated and counterfeit products in the world, has been the subject of complaints the United States and twelve third parties including the EU about its failure to

⁵⁹ Jacques Bourgeois "Post Cancun WTO TRIPS-A Bumpy Road" in Stefan Griller (ed) *At the Crossroads: The World Trade system and the Doha Round* (SpringerWien. NewYork, 2008), 394.

⁶⁰ News on the Copyright Conference, held on 16 March 2009, available at <<http://vietnamnet.vn/vanhoat/2009/03/836469/>>, visited 17 March 2009.

⁶¹ Peter K. Yu, "Access to Medicines, BRICS Alliances, and Collective Action" (2008) *American Journal of Law and Medicines* Vol.34, No 2&3, 352.

implement effective enforcement system for IP protection in China. The complainant requested the consultant to review in four major matters concerning trade-mark counterfeiting, copyright piracy and the lack of effective protection measures in the Chinese IP legal regime. In fact, notwithstanding the WTO membership obligations in the TRIPS agreement, IP infringements in China are considered to constitute a high percentage of sales.⁶²

Even in the UK, which is regarded as having a long history of IP protection, just a week after the “Mama Mia” and “Sex and the City” films were released in the cinemas, the author received an offer to buy the pirated DVDs at a price of £2.5, while the authenticated ones were released two months after that at a price of at least £10. In Rome, Italy, around the areas most frequented by tourists such as the Vatican city, the Vatican museum, and the city shopping centre, it is very easy to buy a fake Louis-Vuitton bag or similar well-known trade-marked product for 10 euros on the street. It seems a public business and nobody, including the Italian police or market control force pays any attention on this situation. Meanwhile TRIPS requires its members to implement effective action against any act of infringement including “expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”⁶³ Local government authorities must apply the necessary civil and administrative procedures. provisional measures and special requirement related to border measures or criminal procedures to stop those infringements.

The problem of “the international trade in counterfeit goods” was mentioned at length in the Tokyo Round. It was raised by the US and the EC who are the big IP exporters.⁶⁴ In the TRIPS regime, all obligations and enforcement procedures have been regulated in a comprehensive system. However, the effective enforcement of the IP protection in fact is still far from what is required. In addition, applying IPRs protection across borders is not an easy task for the TRIPS enforcement system. The

⁶² See the WTO dispute DS362, *China Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, (Request for consultants on 10 April 2007; Panel report on 26 January 2009).

⁶³ Article 41, the TRIPS Agreement.

⁶⁴ Correa, (n19), 410.

WTO member will incur “a fairly considerable cost”⁶⁵ for adequate standards, an effective administrative system and border control. The TRIPS Agreement, in Section 4, has regulated the special requirements relating to border measures. To establish an effective border control system needs time and investment; in developing countries, IPRs is a new concept in social attitudes and legal systems. Even though establishing a strong enforcement system for IP protection is a WTO obligation, many nations meet major problems when reconciling these standards with their legal regimes.

III.3 Intellectual property protection and public welfare

III.3.1 Intellectual protection and developmental and technological objectives

Comprehensive and effective IP protection worldwide will improve economic and technology development through R&D protection by variety of means, such as patenting, trade-marks, trade secrets, geographical indication, copyright and related rights. In principle, a strong IP protection system will create favourable conditions for inventions and creations as well as promoting investment and technology transfer. It also plays an important role in supporting dynamic competition in international trade, especially in developing countries.⁶⁶

However, IPRs protection has different effects on economic development and different welfare implications in different nations. The developed countries, which are the main IP exporters and own plenty of trans-national companies, insist on increasing the standard level of IP protection under the argument that it will promote R&D. For example, the US Government has argued that:

Apart from stimulating innovation, however, a strong intellectual property right regime - particularly a strong patent regime - can also produce other benefits for countries, regardless of whether the countries are developed or

⁶⁵ Ibid 395.

⁶⁶ Maskus and Lahouel, “Competition policy in developing countries” in *Developing Countries and the WTO: A Pro-active Agenda* (Blackwell Publishing, 2003), 239.

developing. For example, countries that have strong patent regimes are more effective in attracting investment and market entry by innovative companies. The reason for this are fairly simple-patents provide a greater capacity for the innovator to complete based on the innovation. If the innovator cannot use the innovation to provide a market advantage, there is disincentive to enter the market, particularly where others in the market can charge lower prices because they do not need to recover the cost of research and development, nor invest in new research and development.⁶⁷

The influences of IP protection are complex in relation to public interest. A stronger IPRs protection system creates positive effects for FDI development, technology transfer and trade flow. Economic globalization and international trade development require a tighter protection system for IPRs. Public welfare is affected in a variety of ways by the level of IPRs in each country because of the effect it has in expanding market accession, reducing barriers and tariffs to trade and attracting innovation. Which level of IPRs protection is appropriate, which will bring the best impact on economic development and social welfare, is one of the most complex matters of the WTO negotiation rounds.

III.3.2. The WTO system and Public Health

Human health security is at the highest priority level in the WTO legal regime. There are eight particular issues: namely, access to drugs, health services, food safety, food security and nutrition, infectious disease control, tobacco, environment and emergency issues such as biotechnology. Public health issues are mainly governed by four agreements. In the early stage of the GATT and the WTO, “public health” was not mentioned: it was absent from the original WTO agreements. With the development of high-speed technology and international trade flow since the 1990s, the issues of protection of human life and health and environment protection have been raised in both international policies as well and in trade disputes in GATT and WTO. Public health exceptions from the GATT are regulated by Article XX which provides flexible means for contracting member to apply necessary

⁶⁷ Cited in Correa, (n53), 420.

restrictions in order to protect public interest. Up until 2008, there have been 12 cases during history of the GATT and 10 cases within the WTO system that related to the concerns of “public health protection” and the “general exceptions” in the GATT.⁶⁸

The Agreement on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) provide considerations for trade limitation for legitimate objectives. Special rules on food safety, assessment of health risks, and prevention of risk from plant or animal-carried diseases are the main scopes of measures for protecting human health.

The GATS creates a legal framework for trade in health services across borders that include provision of diagnosis or treatment planning, services/investment in one country by a provider from another country/or patient movement/or technology transfer across borders. The GATS also allows members to take any necessary measure to protect human, animal or plant life or health, regardless of their obligations under the Agreement.⁶⁹

The TRIPs Agreement contains the main provisions in health issues in the context of patent, trade-marks, biotechnology, traditional knowledge and undisclosed information in which the relation between patent protection and the pharmaceutical industry is leading to some debates about the balance between the long-term of R&D and the right of poor people to access medicine.

III.3.3 Global public health security and Pharmaceutical Patent Protection

The AIDS pandemic in the African Continent and serious diseases in poor countries have raised concerns about the protection of patent holders, who are mostly multinational pharmaceutical companies, and the human rights of poor people who definitely cannot afford to pay for their vital medicines. Millions of people in poor

⁶⁸ Detailed arguments see HongGang Shen *“The Power of States to Derogate from the Free Trade Principles to Safeguard their National Interests under the GATT Regime of General Exceptions with Special Reference to China”* (PhD thesis, University of Leeds, School of Law, 2008).

⁶⁹ Art. XIV of the GATS Agreement.

nations are dying every year from diseases that could be prevented and treated by existing vaccines and medicines. More than 2.5 million of all age groups have died from diseases preventable by immunization, such as diphtheria, tetanus, pertussis, and measles. In general vaccination coverage, the EU and America, with their developed economies, have achieved more than 90% while elsewhere there is a totally different picture. Hepatitis B vaccine covers 89% of the American population but only 49% in Africa and 28% in Southeast Asian Region. In 2006, the Haemophilus influenzae type B (Hib) vaccine covered 92% in the US but reached only 24% in Africa.⁷⁰

Recently, more epidemic-prone diseases have been spreading rapidly in many regions but mostly in poor countries. According to the WHO figure of potential international public health concern from September 2003 to September 2006, epidemic-prone diseases such as cholera, yellow fever, SARS, Ebola, Marburg haemorrhagic fever and Nipah virus are more serious in the African continent and in poor countries. The number of cases was 288 in African countries and 108 in the Western Pacific while the number in EU was only 78 and 41 in America.⁷¹ Food-borne diseases, accidental and deliberate-caused outbreaks, toxic chemical accidents, radio-nuclear and environmental disaster diseases are potential threats to international public health security. In every recent year, around 17.6 million people in developing countries, including low and middle-income nations, have died from AIDS, infectious diseases and maternal and newborn conditions.⁷²

Most HIV/AIDS patients in developing countries are poor people who lose their labour capacity. Moreover, due to the lack of health care education, in many cases, the relatives and employers do not allow the HIV/AIDS patients to stay in the same house and working area. The HIV/AIDS patients are normally unable to pay the cost of HIV/AIDS treatment by themselves. This happens in spite of the fact that the

⁷⁰ The World Health Report January 2008, available at the WHO website on <http://www.who.int/immunization/newsroom/Global_Immunization_Data.pdf> visited 10th January 2009.

⁷¹ The World Health Report 2007, available at the WHO website on <http://www.who.int/whr/2007/whr07_en.pdf> visited 5th Oct 2007.

⁷² Dean T. Jamison, "Cost-Effective Strategies for the Excess Burden of Disease in Developing Countries, in Priorities of Health", cited in Graham Dutfield, "Delivering Drugs to the Poor: Will the TRIPS Amendment Help?" (2008) *American Journal of Law & Medicine*, 107.

healthcare system in some nations is assessed as good in a comprehensive public health structure reaching down to the local areas and the Government spends significantly on social welfare. However, in poor country, with a limited state budget, for spending on the health care system, the royalties for medicinal patent holders are still too costly.

At present, most developing countries have not yet successfully researched and developed HIV treatment medicines as well as most high technology R&D products. According to some recent WHO studies, developing countries presented for only 4% of the total worldwide R&D products.⁷³ As a result, all HIV drugs that are used in poor countries must be imported from developed countries or manufactured by trans-national pharmaceutical companies. If 150 mg of the HIV treatment medicine (AZT) from India, without patent's royalties, costs \$48 per month, then it costs \$239 in the United States with the pharmaceutical patent holder rights protection.⁷⁴ According to the Oxfam survey of 2005, patented pharmaceutical products cost 10 times more than non-patented products.⁷⁵

It can be confidently affirmed that the cost of Research and Development of any IP products in general and pharmaceutical products in particular, is impossible to estimate. However, protecting human health and social development must be given a higher priority than enterprise benefit. Moreover, there is no really strong evidence for the supposed impact of the TRIPS agreement on the improvement of R&D and technology transfer in developing countries. For example, when the new Industrial Act in Brazil came into force in 1996, the drug patent which was issued for Brazilian residents represented only 2.6% of the total while nearly 50% of applications were filed by the US residents. In addition, the quantity of imported drugs increased over 47 times during the period 1982-1998 while the total national import only doubled. The potential benefits of reconciling international law with the Brazilian national

⁷³ United Nation Development Program, *Human Development Report 67* (1999).

⁷⁴ Cited from Sykes, "TRIPs, pharmaceuticals, developing countries, and the Doha "Solution" (Spring 2002) *Chicago Journal of International Law*.

⁷⁵ "Eight broken promises: Why the WTO isn't working for the world's poor" Oxfam Briefing Paper 2005.

law system seemed to be for foreign companies not for domestic enterprises or Brazilian institutions.⁷⁶

III.3.4 The Doha Declaration on the TRIPS Agreement and Public Health⁷⁷

a. Background of the Doha Declaration

Soon after the Uruguay Round of 1994, WTO members started to seek harmonization policies for both IP nation exporters and poor countries. However, not until the Fourth WTO Ministerial Conference of 2001, were questions concerning the impacts of TRIPS Agreements on poor countries discussed in a manner supportive to public health. The Doha Declaration on the TRIPS Agreement and Public Health was the first potential success of this Conference, and it has become a component part of the IP legal system. The principal responsibility of this Declaration is regarded as “a manner supportive of public health, by promoting both access to existing medicines and research and develop into new medicines.”⁷⁸

The Doha Declaration on the TRIPS Agreement and Public Health stated:

We agree that the TRIPS agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect access to medicines for all

.... We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.”

⁷⁶ Bermudez, Epsztejn, Oliveira and Hasenclever, “The WTO TRIPs Agreement and Patent Protection in Brazil: Recent changes and Implication for local production and access to medicines 95” (MSF/DND Working Paper 2000), cited Correa, “The TRIPS Agreement and Developing countries”, *The World Trade Organization: Legal, Economic and Political Analysis*, Volume 2, ed. by Macrory, Appleton, Plummer (Spinger 2005), 420-440.

⁷⁷ WT/MIN (01)DEC/W/2, November 14, 2001, The Doha Declaration.

⁷⁸ Paragraph 17 of the General Ministerial Declaration 2001.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

Accordingly, and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

- a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
- b) Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- c) Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.⁷⁹

The right of developing countries to access essential medicines marked a new period with respect to the Declaration on the TRIPS Agreement and Public Health – the Doha Declaration. This Declaration laid down a legal solution for the harmonization between the property rights of patent holders and the Public interest.⁸⁰ The issue was raised by the developing countries affected by the HIV/AIDS, tuberculosis, malaria

⁷⁹ WTO, Doha Ministerial Declaration on the TRIPs Agreement and Public Health (WT/MIN(01)/DEC/2) para 4; 5 & 6.

and other epidemics: that is, the African countries, Brazil, Cuba, Barbados, Ecuador, Honduras, Bolivia, Dominican Republic, India, Thailand, Jamaica, Pakistan, Paraguay, Philippines, Peru, Venezuela, Jamaica and Sri Lanka.⁸¹ The importance of this issue consists in the right of poor people to access existing medicines even though they may not have enough money to cover the cost of their treatment.

Although this Declaration was just a beginning of an “aid-for-trade” effort⁸² in relation to public health concerns, however, with “compulsory licenses”, “parallel import” and related issues, the Doha Declaration can be evaluated as establishing the principle that “differentiation in intellectual property rules may be legitimate in the WTO system and is an issue needing special attention in TRIPS implementation.”⁸³

b. Public Health and the TRIPS Amendment

The conflict between IP protection and a wider opportunity to access medical products led to the Doha Declaration on Public Health. According to the Doha Declaration, these nations have the right to determine their national emergency needs. Each Member has the rights to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.⁸⁴ These regulations give poor countries an opportunity to improve their health care systems at minimum cost. Its vital issues made the amendment of the TRIPS Agreement on 6 December 2005 unique among all amendments to WTO Agreements from the Uruguay Round so far.

The TRIPS Agreement is amended “as set out in the Annex to this Protocol, by inserting Article 31bis after Article 31 and by inserting the Annex to the TRIPS

⁸⁰ See Art 27 of TRIPS Agreement and “*Declaration on the TRIPS Agreement and Public Health*” of the WTO website, visited at Aug. 14th available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

⁸¹ TRIPS and Public Health, WTO document IP/C/W/296 (June 2001).

⁸² Newfarmer, Trade, Doha, and Development: A Window into the Issues (the World Bank 2006), 23.

⁸³ Correa (n19), 446.

⁸⁴ Article 1 Article 5 (b,c) of the “*Declaration on the TRIPS Agreement and Public Health*” of the WTO website, visited at Aug. 14th available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

Agreement after Article 73.”⁸⁵ In order to create a permanent and proper framework for access to medicine in poor nations that do not have efficient or any manufacturing capacities in the pharmaceutical sector; or those nations which “have some manufacturing capacity in this sector, it has examined this capacity and found that, excluding any capacity the purposes of meeting its needs. When it is established that such capacity has become sufficient to meet the Member’s needs...”⁸⁶ the TRIPS amendment regulates the clear provisions on improving access opportunities of poor nation by the “compulsory license” solution and its detailed implementations.

The amendment provides the Definition of Pharmaceutical Product; Eligible Importing Member and Exporting Members; the “notification” of importing members to the TRIPS Council and the details of compulsory license implementation procedures. Avoiding double remuneration to the patent owner, the obligations of eligible importing nations and exporting nations are also regulated under the Annex to the Protocol Amending the TRIPS Agreement and Annex to the TRIPS Agreement.

Compulsory Licensing of pharmaceutical products

At what is regarded as an early stage of IP law history, compulsory license has been used as a government measure to improve national manufacturing ability by taking advantages of innovation with reasonable royalties.⁸⁷ The concept of compulsory licensing is not a new provision in the TRIPS Agreement, even though it has been met with significant interest recently. Article 31 B the use of patent without the authorization of the right holder in principal cases, namely “national emergencies”, “other circumstances of extreme urgency”, “public non-commercial use” for public, and “anti-competitive practices”. TRIPS has provided the particular conditions for granting compulsory licences such as where the proposed user has tried to negotiate with the right holder, offering a reasonable price within a suitable period of time, but

⁸⁵ The Protocol Amending the TRIPS Agreement.

⁸⁶ Appendix to the Annex to the TRIPS Agreement, WTO’s document WT/L/641 on 6 December 2005.

fails to get a voluntary licence. The patent owner still receives reasonable remuneration even when a compulsory licence has been granted. There are a number of additional conditions including the legal validity review, or the patent holder can continuously explore their patent use or a compulsory licence is issued predominantly for the domestic market.⁸⁸

In fact, not many nations, especially industrial nations, apply the compulsory licensing measure, Canada being an exception. In the term of pharmaceutical and food patent, during the period from 1969 to 1992, Canada issued 613 licences in medicine manufacturing or importation.⁸⁹ Canada was also the nation which employed the purview of Article 30 of the TRIPS Agreement in the limited exception to design the legal framework which created a six-month preparation period to exploit the exhaustion of patented innovation.⁹⁰ Both the compulsory licensing measure and the exploitation of patent exhaustion were applied by the Canadian Government as measures for improving public health.

However, only since the Doha negotiation round, with its Declaration on TRIPS and public health and further TRIPS amendments and guidelines, has the use of compulsory licensing of pharmaceutical products has been considered, as flexibility within TRIPS allows, to improve social welfare. Compulsory licences can be issued under a number of particular conditions in order to protect the reasonable rights of patent holder. The Doha Declaration includes provisions in its preamble, paragraph 4 affirming that:

⁸⁷ More historical analyses about compulsory Graham Dutfield, "Delivering Drugs to the Poor: Will the TRIPS Amendment Help?" (2008) *American Journal of Law and Medicines* Vol.34, No 2&3, 107-124.

⁸⁸ See Article 31, the TRIPS Agreement.

⁸⁹ Jerome Reichman & Catherine Hasenzahi, "Non-Voluntary licensing of patented inventions: Historical perspective, legal framework under TRIPS, and overview of the Practice in Canada and the United States of American" *UNCTAD-ICTSD project on IPRs and Sustainable Development, Issue Paper No.5* (2003) available at <<http://www.iprsonline.org/resources/docs/Reichman%20-%20Non-voluntary%20Licensing%20-%20Blue%205.pdf>> visited 20 June 2009.

⁹⁰ Canada, by the Patent Act and the Manufacturing and Storage of Patented Medicines Regulations, allowed local producers in pharmaceutical products can manufacture and stockpile without the patent owner permission during six months immediately prior to the expiration of the 20-year patent protection, see *the Canada-Patent protection of Pharmaceutical products*, WT/DS114/R, 17 March 2000.

The TRIPS agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, WTO members can flexibly use the full provisions in the TRIPS Agreement for this purpose. Compulsory licensing for medicine is regarded as one of TRIPS's flexibilities on patent protection. In the Doha Declaration, compulsory licensing of pharmaceuticals is normally used as a government tool whereby a third party or the government can use a patent without the consent of the patent owner either free for a reasonable remuneration in the case of national emergency or other circumstances of extreme urgency such as clearly arise from the threat to public health posed by HIV/AIDS, tuberculosis, malaria and other epidemics. In principle, those emergency cases can be freely determined by the Member's Government. The condition of reasonable negotiation with the patent holder has been removed, while the nations that are unable to produce the medicine can import cheaper copies from different nations.

For the least-developed nations, an extension until the year 2016 with respect to pharmaceutical patents and related information about pharmaceutical products has a potential impact on the special needs and requirement of LDCs to create a vital technological base for their health care systems. This goodwill provides more opportunities to access the pharmaceutical products for poor people.

However, all difficulties for developing nations and LDCs in access to medicine have not been yet removed entirely as each Member has to create its own legislation for compulsory licensing on the basis of TRIPS and the Doha Declaration. In addition, the manufacturing process of a number of vital drugs is protected by various patents. Developing nations, with their low level of R&D and human resources, even with compulsory licensing, may not be able to produce the drugs at affordable prices. So, in fact, compulsory licensing is neither an easy solution nor "necessarily a panacea". It can, however, "strengthen the bargaining position of

governments” when they negotiate with multinational drug firms to import affordable medicines.⁹¹

Parallel Imports and “exhaustion” of IPRs

Regulated according to the concept of “exhaustion” of IPRs, parallel imports may be understood as the importation and sale of pharmaceutical products which were manufactured and exported to another nation in a legal manner without patent permission. This means, when the inventor has gained proper payment for an invention in one country, their products may be sold in other countries without their consent. The main target of parallel import is that the benefit of the innovation patent holder and the public interest may be harmonized.

Each nation has the option of deciding whether or not to give permission for parallel imports depending on their demand for pharmaceutical products and their price in the international market. A company or person can import related health products from any nation, wherever such products are reasonably priced and cheaper than in the internal market. Under the principle of international exhaustion of IP rights, parallel import is truly a policy with potential for global health security, especially in poor counties.

c. How much advantage can the Doha Declaration and the TRIPS bring to the developing countries?

Many developing countries, especially the new members, have to implement not only the TRIPS Agreement standards but also the TRIPS-plus protections in order to finish their accession negotiation. The developed countries have asked WTO observers or new members to implement full TRIPS standards and TRIPS-plus obligations through their bilateral trade agreements. The trade disputes between the US and Argentina in 1997, the US and the South Africa 1999 on pharmaceutical

⁹¹ Graham Dutfield, *Intellectual Property Rights and the Life Science Industries, A Twentieth Century History* (2nd edn Ashgate 2009), 278.

patent are the “two most prominent cases” of this situation.⁹² In its bilateral trade agreement with the US, and in its WTO accession offers, the Socialist Republic of Vietnam, a WTO member since 2007, agreed to implement all of the TRIPS agreement standards before concluding its WTO accession.

Moreover, although the Doha Declaration required compulsory licences for pharmaceutical products, the patent holder company could access similar protection with the “Exclusive Marketing Rights – EMRs”. There is strong evidence that this policy could raise the cost of pharmaceutical products in poor countries. In some cases, even if they reduce the price, the pharmaceutical patent holder still retains the “exclusive distribution rights inherent in patents and EMRs.”⁹³ Furthermore, in practice, even with compulsory license; many developing nations cannot produce the necessary pharmaceutical products due to their lack of R&D capacity. Perhaps, the TRIPS system is still facing the considerable challenge of how to resolve the problem of access to medicines along with adequate IP protection.⁹⁴

The Doha Declaration and the TRIPS amendment were expected to be effective tools to effect a balance between patent protection and improving access to medicines. Regarding the law-making aspect, those provisions are the best solution to the debate on the issues of public health and TRIPS. In fact, there is a success story from the Decision of the General Council for TRIPS on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS and Public Health on 30th August 2003. According to the evaluation of the WTO General Director Pascal Lamy “this system was used for the first time in September 2008 to ship generic medicines from Canada to treat HIV/AIDS patient in Rwanda.” According to his optimistic conclusion about “the current state of play in the field of access to medicines, important steps have been taken in the WTO and elsewhere since the adoption of the

⁹² Correa, “The TRIPs Agreement and Developing countries”, in Macrory, Appleton, Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis, Volume 2* (Spinger 2005), 420-440.

⁹³ Mattias Ganslandt, Keith E Maskus and Eina V. Wong “Developing and distributing essential medicines to poor countries: the defend proposal” in Carsten Fink, Keith E. Maskus (eds) *Intellectual Property and development: Lessons from Recent Economic Research* (the World Bank and Oxford University Press 2005), 208.

⁹⁴ Jacques H. J. Bourgeois, “Post Cancun WTO TRIPS – A Bumpy Road” in Stefan Griller (ed.) *At the Crossroads: The World Trading System and the Doha Round* (SpringerWienNewYork 2008), 390.

Doha Declaration in 2001. Access to medicines has been improved through a major reduction of prices, enhanced international funding, a greater recognition of the need to find balance within the intellectual property system, as well as use of some of the TRIPS flexibilities by certain WTO members.”⁹⁵

However, the real picture of the solutions of the Doha Round and TRIPS amendment is not so good in practice. The number of nations, especially developing and least developed countries which have ratified the TRIPS amendment is very small. Up until January 2009, only 21 Members (European Community is accounted as one member) have ratified the amendment.⁹⁶ The deadline for ratification has now been extended to the 31 December 2009. In addition, the procedures and paper work for compulsory licensing are complicated and time-consuming for any country.⁹⁷

The level of IP protection beyond the TRIPS minimum standards in developing countries which lack efficient capacity in R&D has had a negative impact on access to medicine for poor people. With a huge number of HIV/AIDS, TB and Malaria patients, mostly living in the poorest nations, the request to access medicine at a cheap price without distribution barriers must be counted as a global priority. First and foremost, easy access at reasonable cost to pharmaceutical products for poorest nations is a human right. The matter of patent protection for medicine as well as IPRs and social welfare still is a complex issue for further WTO Rounds.

III.3.4 Copyright and the Public Interests

Health care improvement and education development are also named as first priorities among the eight millennium development goals. In all nations, economic development will promote public service quality, while a good education system is the key to high technology application and improvement of productivity capacity.

⁹⁵ The 11th Annual International Generic Pharmaceutical Alliance Conference – Geneva 9 December 2008, available at <www.wto.org/english/news_e/sppl_e/spppl1_e.htm> visited 10 March 2009.

⁹⁶ List of ratified members can be found at

<http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm>, visited 10 May 2009.

⁹⁷ Interview with a top level official of the Pharmaceutical Department of Ministry of Health of Vietnam on June 2006 in Hanoi. In his opinion, better to find other solutions such as donor/sponsor or assistance from international organizations; or from the Vietnamese state budget than to complete the procedures and paperwork to get advantages of the Doha Declaration on the Public Health.

The concept of a special policy for public services including education in developing countries has been addressed in many multilateral agreements. In the GATS, health and education are mentioned as essential human services, to be accorded special attention. In this agreement, around 30% of WTO members made commitments in the education section, among which developing countries represented only 17%.⁹⁸ The education commitments in the GATS focused mostly on primary and secondary education levels.

In the TRIPS agreement, education and social interests are linked with the protection of copyright and related rights. These areas, in the words of Fitzpatrick, are “at once the most domestic and cosmopolitan forms of property.”⁹⁹ The concept of protecting copyright and related rights is disputed from two points of view. On the one hand, according to the “utilitarian or incentive-based theory”, the consumer has the right to access intellectual works in the “public domain”. On the other hand, by the personality or author’s rights theory, the author has the right to regard the results of his intellectual efforts as property.¹⁰⁰ In different countries with different cultures the protection of copyright and related rights in national legal systems is affected by one of these theories.

In addition, in most poor countries, the state budget, enterprise capital and individual income for buying the copyright of intellectual works are limited. In many African and Asian countries, poor people are facing the status of unsecured food supplies and minimum life facilities such as clean water and health care clinics. Children in these countries must live and work in rough condition to survive. Having enough food and being able to go to school in minimum conditions are their emergency tasks. As a result, these countries are unable to spend a big portion of their income on books and other educational equipment. Thus, as in to the patent protection situation, a reasonable harmonization between public interests and author property

⁹⁸ Vanduzer, ‘Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations relating to Health and Education services’ in Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press, 2005), 187.

⁹⁹ In Fitzpatrick ‘Prospects of further copyright harmonization’ (2003) *European Intellectual Property Review*, 25(5), 215-223.

¹⁰⁰ Ibid.

rights is still the heterogeneity issue in domestic copyright protection law in particular and worldwide in general.

The TRIPS Agreement also allows each nation to have the right to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder”¹⁰¹ in copyright protection. The special cases which relate to public interest can be named as: Copying a work for private use; extracting a work without falsifying the intent of the author for the purposes of comment or illustration; extracting a work without falsifying the intent of the author, in order to write a paper or for use in a periodical, broadcast, television program or documentary film; extracting a work without falsifying the intent of the author, for teaching or examination; copying a work for archives and use in libraries; translating and disseminating a work from a widely-used language into an ethnic minority language and vice versa; performing a theatrical or another type of artistic work in cultural or propaganda activities in public places; making a direct audio, visual recording of a performance for reporting the news or teaching; taking photographs or televising a work of fine art, architecture, photograph, or a work of applied fine art for public display; and translating a work into Braille for the blind.¹⁰² Consumers may use a published copyright work for “non-commercial purposes” without the permission of the author and without paying royalties. However, their use must not affect normal exploitation of the work or cause any detriment to the author’s enjoyment of copyright in the work. The author’s name and the origin of the work must be mentioned whenever the work is used.

¹⁰¹ Article 13, the TRIPS Agreement.

¹⁰² The TRIPS Agreement and related IP conventions.

III.4 Integrating the TRIPS standards with developing country legal systems

III.4.1 Benefits for developing countries from the TRIPS participation

Ratification and participation in the TRIPS system are compulsory for WTO membership. Besides being necessary for the WTO accession, the developing countries can gain essential benefits from applying the TRIPS standards into their legal system as enhanced IP protection level is an encouraging FDI measure. Rapp and Rozek's research in the relation between a nation economic development and level of patent protection, noted the following outcomes:

First, that a well-developed patent regime encourages economic growth through increased innovation and investment; second, that, conversely, weak patent regimes impede economic development; and, third, that the significance of intellectual property rights increases as economic development occurs because of greater potential for exploitation.¹⁰³

Licensing agreements and the transfer of high technology are likely to encourage economic development in a nation which owns a high level of IPRs protection and a proper enforcement system. Applying the TRIPS standards to domestic legal regimes would also encourage the development of R&D activities in developing nations. There is a clear conception in international R&D that developing nations are "consumer countries rather than productive participants in the world trade".¹⁰⁴ The numbers of applications and granted patents from developed nation accounts for the major portion of the total worldwide number,¹⁰⁵ as in these nations the inventors have not only proper material and equipments for R&D but also their loyalty and personal rights are secured by a comprehensive law and adequate enforcement system. It is a fact that a very small number of innovations have been created in poor nations. At a low level of protection, the benefit of IP owners would crucially suffer

¹⁰³ Cited in Duncan Mathew (n11), 109.

¹⁰⁴ Ibid, 110.

¹⁰⁵ More details in numbers of applications and granted of IPRs, see the WIPO website at <www.wipo.org>

from illegal exploitation. Not only do foreign companies not want to provide a proper budget for R&D of products that will be distributed mainly in developing countries such as HIV/AIDS medicine but also domestic inventors would not develop their own research for fear their property rights would be easily infringed.

The Role of Development Assistance Programmes

The aid program in increasing access to essential medicines in the developing world has been addressed by the World Health Organization, European Community, G8 nations and other developed nations since it has been acknowledged that “one-third of the world’s population are without the access to medicines they need.”¹⁰⁶ Accordingly, many developed nations and international donors have developed a programme of aid to support developing countries to improve the access to pharmaceutical products by their population. Together with programmes to develop the infrastructure such as building hospitals and medical centres and improving the equipments for examination and treatment, developed nations have carried out many action plans in supporting the R&D activities in pharmaceutical sector in developing countries. In addition, in order to facilitate the provision of public interests in the TRIPS Agreement and Doha Declaration provisions such as “compulsory licence” and “parallel import” were introduced. They are designed to reduce the level of protection of IP products in health sector and extend the transition period to fully implement the TRIPS Agreement into domestic national legal system in least developed nations. These are part of the package of recommendations of the international aid programs to improve the accession opportunities to pharmaceutical products for the poor people.

International organizations such as the Global Fund to Fight AIDS, TB and Malaria (GFATM) and the Global Alliance on Vaccines and Immunisation (GAVI) are playing a key role in reducing the price of IP products. For example, the price of the Hepatitis B vaccine was expected to fall from US\$2 per dose in 1993 to less than 50cents by 2004/2005; or an affordable cost such as less than US\$10 for a 6-8 month

¹⁰⁶ Department for International Development, UK, “Increasing access to essential medicines in the developing world: UK Government policy and plans” (June, 2004)

course of treatment.¹⁰⁷ For example, Vietnamese aid program on health sector has been playing a crucial role in improving the national health care system. During the last 15 years, around US\$0.9 billion has been granted by various donor agencies and governments to enhance both the technical services and pharmaceutical products in Vietnam.¹⁰⁸

III.4.2 Can IP importers and IP exporters speak with the same voice?

There is a strong agreement that the TRIPS has increased the level of IP protection worldwide. However, how to set the balance between the advantages and disadvantage of implementing the TRIPS obligations in domestic IP protection still remains a big question for the developing and least-developed countries. Developing countries are the main IP importers and they are also condemned as the most IP infringing countries in the world. It is not an unusual thought that developing countries lack the capacity for both IP production and protection. There are plenty of reasons for this shortcoming. Poor countries lack extensive funds, methods, and skilled professionals to Research, Development, Apply, and Maintaining the IP products within their borders. In addition, IP products are exported from developed countries at high prices especially in the cases where the intellectual works are to be used for the promotion of health care protection and education. This situation may cause a conflict of interest. On the one hand, poor countries want to use the result of the Research and Development of IP works to promote their education, health care protection, scientific, and industrial development. On the other hand, they are unable to pay the cost of the royalties for those privileges. The dispute around the patent holder rights of pharmaceuticals and the Doha Solution is the fundamental example of this situation.¹⁰⁹ Moreover, if IP users are to cover the full royalties, they must spend a significant percentage of their income. This money will be paid to the IP exporters - developed countries - and the gap of wealth between the rich and the poor gets bigger.

¹⁰⁷ n4

¹⁰⁸ n2

¹⁰⁹ More detail see Sykes, "TRIPs, pharmaceuticals, developing countries, and the Doha Solution" in Bernard Hoekman and Will Martin (Spring 2002) *Chicago Journal of International Law*.

III.4.3 A same level playing field for developing countries?

There is no doubt about the beneficial effects of the TRIPS agreement on global IP protection and international trade development. However, it is clear that the playing field of TRIPS is too hard for developing nations. The concept of IPRs and IP law has a long history in developed countries, as the first patent was granted in Italy in 1421, the Case of Monopolies in England in 1602, and its details became a precedent for the Statutes of Monopolies in 1623. It was considered the foundation of English patent law.¹¹⁰ IPRs protection and IP law were also mentioned at a very early time in other western European nations and the US. On the other hand, IP was a new-comer in legal systems as well as in social attitudes in poor countries, as they lack the knowledge, high technology and proper R&D expenditures to invent IP products.

There were many different jurisdictions for IPRs protection over the world before the establishment of the WTO and the coming into force of the TRIPS agreement. There is no doubt that the TRIPS Agreement and its enforcement have marked a significant development for IP protection at world-wide level. It required all WTO members to provide similar international protection standards under their national law with a strong enforcement system.

However, there is also strong evidence that pirate industries and counterfeit goods exist “in most, if not all”¹¹¹ nations whether they are the WTO members or not. The trading of counterfeits and pirated versions of IP products, especially in copyright and related rights is a global problem even though the TRIPS obligations were applied in most nations possibly because these products sell at a much lower price than the IP protected items. Obtaining an effective enforcement system is not easy for all nations including both developed and developing countries. Lack of appropriate circumstances in law making, fines and penalties, judicial or administrative bodies, and police enforcement is very prevalent in developing

¹¹⁰ Holdsworth, A History of English Law, Vol IV 349-53 (1937) cited in M.O.Gad, *Representational Fairness in WTO Rule-Making: Negotiating, Implementing, and Disputing the TRIPS Pharmaceutical-Related Provisions* (British Institute of International and Comparative Law, 2006) 44.

¹¹¹ Ruppenthal, (n1) 144.

countries. The long duration, complex procedures and high cost of legal proceeding are also mentioned as potential difficulties in all IP disputes.

Because most developing nations are members or observers of the WTO, they must incorporate the TRIPS and related international IP conventions into their domestic law. In fact, the process of enacting these provisions in WTO members could be evaluated as a good result, as most nations must finish their shift before their WTO membership can be approved. This is a fundamental factor in securing the success of WTO negotiations. With the same standard obligations for every nation member and no specific and differential treatment for developing countries, reconciling the TRIPS provisions in both legal documents and enforcement measures is an unreasonable requirement for poor nation that own a low base in technology and scientific development and where the governments lack experience and knowledge in IPRs. Moreover, in order for some countries, such as Vietnam, to conclude the WTO negotiations, they must accept the WTO plus conditions in IP, as Vietnam had incorporated all of the TRIPS obligations into its domestic law before it became a WTO member.

At the same time, the incorporation of TRIPS into its particular national legal system is the indispensable duty of any WTO member state. If those IP rights are infringed in an ineffective legal system, these countries might easily incur economic sanctions.¹¹² This explains why the TRIPS Agreement has been applied in most countries in the world, even though providing a comprehensive and effective IP protection regime is a hard and costly task for every nation. Furthermore, in contrast to Western people, IP rights protection is a new concept in developing countries' citizens' ideology, even though these countries can provide a well-developed economy and national legal system. This kind of thought has been creating significant difficulty in IP protection enforcement.

In addition, IP law is a new concept in social attitudes, while using a pirated product is very common in all nations, not only the poor countries. It was no surprise when the Singapore Business Time Newspaper, dated 25th Sep 2000 announced that around 25% of the software programs used by Americans were illegal copies even

though the US is an IP exporting country with high income and well educated citizens. These numbers reach more than 90% in most developing countries such as Asian nations and Eastern Europe.¹¹³

So, whenever a poor nation agrees to implement the WTO obligation in IP protection in its jurisdiction, it is a strong fact that the TRIPS minimum standards are too hard to apply in developing countries.

II.4.4 Intellectual property, welfare and the right to develop of developing countries

In this time of high-speed global economic development, research and scientific development becomes a crucial power of industrial countries. Providing the best system for research is a priority of any government. IP protection could be counted as a sector of the Research and Development system. At worldwide level, the WTO legal regime and the WIPO forum are providing strong and comprehensive protection for IPRs.

For the new WTO members, the target of meeting the minimum standards of international law is not only an essential part of the process of becoming a member of WTO but also a way of keeping national development moving at a realistic speed. However, providing a reasonable balance between protection of human rights, national democracy, and public interests and the WTO obligations is still a big challenge for developing countries. Under the pressure of gaining benefit from international trade, poor nations have applied hard international standards to their domestic legislation. In the context of implementation of all multilateral and bilateral trade obligations, the TRIPS agreement standard would be one of the most controversial subjects of dispute in both the WTO system and particular national legal regimes. Or in other words of Perter K. Yu:

While a country wants stronger protection for its fast-growing industries, it prefers weaker protection in field related to pharmaceutical, chemicals, fertilizers, seeds, and foodstuffs, due to its huge population, continued

¹¹² Koning, (n28).

economic dependence on agriculture, the leader's worries about public issues, and their concerns about the people's overall well-being.¹¹⁴

Up until June 2002, there have been twenty-eight trade disputes which involved the TRIPS Agreement, most of them raised by the US, Canada, EU and their member nations.¹¹⁵ With respect to IP law, in most national legal regimes of poor nations, there are plenty of regulations in which citizens' interests are given preference over obligations under international rules in order to reduce the price of IP products. For example, in Vietnam, before the Law on Intellectual Property came into force (from 1st July 2006) under the WTO negotiation requirement, the "exceptions" provisions for protection in Vietnam IP law were numerous in view of what was required under the TRIPS agreement.

Under the WTO accession conditions, in newly promulgated legislation in new WTO members, the "exceptions" provisions from the IP rights protection must be amended in line with the TRIPS Agreement standards and bilateral agreement conditions. However, with a least-developed economy and new concept of IP rights protection, a poor country should provide the IP regime which brings the greatest benefit to everyone. A broader exception from IP protection in patent and copyright than the TRIPS protection will reduce the price of education literature and potential medicines. In order to promote the country's industry, education and health-care systems, some additional exceptions from IP rights should be granted for poor nations.

In some academic research theories and the WTO negotiation rounds, it is argued that a higher level of IP protection is a restriction of free trade. A well-known trademarked product might not be exported to a nation with weak IP protection for fear that advantage might be lost from imitation. In addition, the different levels of IP protection in other nations play an important part in a firm's decision to invest in foreign markets. A stronger IP protection level will attract more FDI than a weak

¹¹³ Ruppenthal, (n1) 144.

¹¹⁴ Peter K. Yu, "Access to Medicines, BRICS Alliances, and Collective Action" (2008) *American Journal of Law and Medicines* Vol.34, No 2&3, 353.

protection. An unsecured environment for IP law in developing countries would create negative impacts on trade flows to their countries.¹¹⁶

Strengthened TRIPS standards may not only promote international trade development but can also have a negative effect on public interest in poor countries.¹¹⁷ The relationship between IPRs and social welfare is very complex in many areas such as the transfer of high technology, access to pharmaceutical products and literary works and the improvement of R&D in developing countries. Tighter protection, on the one hand, may reduce welfare in poor countries due to a higher price for all IP products. However, on the other hand, the royalty returns on R&D activities will create other innovation products. These implications have led debates in the WTO rounds as well as in many trade disputes as to how best to transfer technologies, and especially pharmaceutical products, to developing countries.

Conclusion

The TRIPS agreement and IP protection may be named as the most complex and contentious issues compared with other WTO agreements because of problems as to how to set and incorporate the TRIPS minimum standards into national legislation.¹¹⁸ The huge benefits of the TRIPS Agreement have been broadly recognized in every country in the world. It is a significant development in the IP protection system at the international level. The stringent protection in TRIPS Agreement is a useful thrust to advance Research and Development of the intellectual works of human beings. The cost of Research, Development, and Testing of any high-tech products like software programs and pharmaceuticals is very high,

¹¹⁵ As of June 20, 2002, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#trips, visited 20th October 2007.

¹¹⁶ Fink & Maskus (ed.) *Intellectual Property and Development: Lessons from Recent Economic Research* (the World Bank and Oxford University Press, 2005), 21.

¹¹⁷ Correa, (n19), 3.

¹¹⁸ Correa, "The TRIPS Agreement and Developing countries" in Macrory, Appleton, Plummer (eds.) *The World Trade Organization: Legal, Economic and Political Analysis*, Volume 2, (Spinger 2005), 420-440.

while the cost of reproduction and distribution of these IP products is always lower.¹¹⁹

The big gap between the ambitious protection level and the royalty cost in poor countries still remains in both the WTO system and in particular member nations due to the fundamental difference of benefit between the IP exporting countries and IP importing nations. Even though the Exceptions, Compulsory Licenses and Parallel Import have been indicated as significant efforts of the Doha Development Round for social welfare, reducing the gap between the requirements of the WTO standards and each state member benefit remains a likely cause of deadlock in future Development Rounds.

Even though the IP protection regime in the TRIPS agreement is not a totally new framework this is the first time that IP protection law has been attempted at an international level with comprehensive cover of all potential IP subjects and effective enforcement systems. It has become a compulsory obligation for WTO membership, that minimum standards of IP protection must be incorporated into the national law of all WTO members. Although valued as a crucial successful step in international IP law TRIPS is also regarded as the most controversial issue of the WTO system. The ideas of IP protection and IP law were developed in developed nations who are the main IP product exporters in order to get back their investment and derive benefit, while the poor nations, who are mostly IP consumers, want to access the IP products at affordable prices.

It is strongly confirmed that stringent protection of IP products at a worldwide level can promote Research and Development of the intellectual works of humankind. However, in developing nations, a big gap exists between the compulsory requirements of WTO's membership and how to reach the TRIPS standards. Not only is this a new sector in lawmaking, the law on intellectual property in developing countries is also a new concept in social attitude. As a result, lack of appropriate circumstances in law making and law enforcement are mentioned as potential difficulties in IP protection system.

¹¹⁹ Ibid.

Because most developing nations are new members or observers of the WTO, they must implement the TRIPS standards into their domestic law as a fundamental factor in guaranteeing their negotiation success. Except for a few nations with small economies that play little part in the international trade market, most observers have no transition period to incorporate the TRIPS standards into their legal system. Especially, when they negotiate bilateral agreements with developed nations such as the US and EU, minimum standards of TRIPS protection in the IP sector is a compulsory commitment. For example, some typical cases, such as China and Vietnam, must implement the TRIPS requirements before they can conclude their WTO accession through their bilateral agreements with the US. So, it may be argued that TRIPS standards can be regarded as WTO plus conditions for the new members and observers.

Establishing a worldwide level for IP protection is evaluated as a significant success of the WTO legal system; however, it must not conflict with essential human rights and basic development rights of poor nations. The fundamental goal of free trade is not only to improve global economic development but also to keep in view social welfare protection especially for poor people. So, the interpretation of WTO obligations and TRIPS agreement standards must be carried out in a way that promotes public interest rather than restricting access to the intellectual works, especially when they are products vital for human life.

Chapter Four

Vietnam and the Road to WTO Membership

Introduction

Vietnam concluded its accession agreements and formally became the 150th World Trade Organization (WTO) member on 11th January 2007. In becoming a member of the WTO, Vietnam represents the unique case of a socialist nation that has a less-developed economy but that ranks highly in terms of human resource indicators. Since it was treated as a developing country, Vietnam could not gain the most favourable conditions that the WTO's legal regime provides for the least developed countries. In addition, the WTO accession requirements and international trade law created considerable challenges to the socialist development orthodoxy and nation sovereignty. Despite being aware of these risks, Vietnam still continuously integrates itself into the international economic system under the "WTO-Plus" conditions.

Vietnam has finished its first years operating with the WTO "machine"; this country is trying to run at the same speed as the international trade development of other WTO members. Vietnam had a six times increase in foreign direct investment (FDI) capital in 2008, as compared with 2006, and had the highest increase of gross domestic product (GDP) in 2007, compared with the last ten years. The benefits from WTO membership could therefore be evaluated as a great success. In order to appropriately deal with the challenges and to benefit from the opportunities arising from membership, Vietnam has launched many new initiatives in both socio-economic policies and in the national legal system. In fact, as a result of 20 years of reform, the country has transformed both its economy and legal system. However, the task of setting up a comprehensive and well-functioning legal system and associate institutions is still truly challenging for the Vietnamese Government, especially as their existing legal system is neither fully coherent nor complete in status and has a weak enforcement system.

In 2007, the continuously rising inflation rates, consumer price index, reached the highest rate for the last ten years. The economic development in 2008, as appears similar to other nations, seems to be frozen. Meanwhile the Vietnamese Government provided an optimistic prediction regarding national economic growth in 2009 as 6.0%, whereas the International Monetary Fund's (IMF) expectation is 4.8%.¹ In contrast, the Economist Intelligence Unit of Southeast Asia has considered a very different number for the growth of Vietnam's GDP, suggesting it would stay at 0.3% due to several domestic and international factors.² At the same time, a greater gap between the richest and poorest people, the increase of bankruptcy in the domestic enterprise sector, and other negative factors from economic globalization are seriously threatening Vietnam's social welfare and national sustainable development.

How to reconcile the international economic rules into a socialist economic system? Has the Vietnamese Government included a "well-prepared Plan" for its reform? How does WTO membership influence Vietnam's economic development and its social changes? And finally, what are Vietnam's Government action plans for their new period? These are the questions that this chapter proposes to examine and will be structured as follows:

This first section provides an overview of the current situation with regards to the existing political framework and economic status of the Socialist Republic of Vietnam. A comprehensive review of the eleven-year accession to WTO membership and its commitments in comparison with other new WTO members, especially the Republic of China, which has a similar "transitional" system, will be studied in the second part. The new elements of Vietnam's transformation, from a centrally regulated system of control to a market economic regime under a socialist development strategy, will also be explored in the final part of this chapter.

¹ *Public Information Notice No 09/36, 17 March 2009*, available at <<http://www.imf.org/external/np/sec/pn/2009/pn0936.htm>> visited 18 March 2009.

² Justin Wood, Director of Corporate Network, *The Economist Intelligence Unit of Southeast Asia on the Dantri Newspaper, 16 March 2009*, available at <www.dantri.com.vn>

IV.1 Political Regime

IV.1.1 The Political Set Up of the Country

Based on the former Soviet Union model, Vietnam's political power was governed by a troika which was composed of the Communist Party of Vietnam's Secretary General, the President of the State, and the Prime Minister. The National Congress of the Communist Party of Vietnam (CPV) and the Politburo Meetings generally provided the national political framework. The political structure of the Socialist Republic of Vietnam was based on a single party system, where the Communist Party of Vietnam holds the monopoly of the country's development strategy. According to the 1992 Constitution of the Socialist Republic of Vietnam, the Communist Party remained the leading organization of the state. The President of the State, the Government Prime Minister and all leaders of the Government, the Supreme People's Court and the People's Office of Supervision and Control are also the Politburo members.

The CPV is "a party in power... the Party exercises leadership over the political system while being an integral part of it. The Party exercises leadership over the state, the Vietnam Fatherland Front and other socio-political organizations, respects and promotes their roles; and operates within the framework of the Constitution and the law."³ The resolutions from the Communist Party are the crucial development strategy, the National Assembly and the Government, on the grounds of this strategy, appropriate primary and secondary legislations and action programmes will be set.

The development strategy, towards a more market orientated economy has brought a significant change to Vietnam's politics. According to the new Constitution, adopted in 1992, Vietnam's Communist Party is described as "the vanguard of Vietnamese working class and loyal representative of interests of the working class, the working people and the whole nation, who adheres to the Marxism-Leninism and Ho Chi Minh's thought, is the force assuming leadership of the state and society."⁴ The CPV remains the leading organization of the state but like any state power agency, it is

³ Statutes of the Vietnam Communist Party, available at <www.cpv.org.vn>

⁴ Article 4, the 1992 Constitution.

obliged to operate within the legal framework of the law and the Constitution. Vietnamese citizens exercise their state power through the National Assembly and the People's Councils. The National Assembly, whose members are elected by the Vietnamese people, across the country, is the highest law making organization.

IV.1.2 The Exercising of State Power and Role of the Communist Party

According to the 1992 Constitution, the State of Socialist Vietnam is a state of the people, by the people and for the people. Vietnamese citizens exercise their state power by publicly electing members into the National Assembly and the People's Councils. The National Assembly, the People's Councils and other state bodies are organized and function according to the principle of democratic centralism. The power of state is unity with the delegation of power to, and co-ordination among the state divisions responsible for exercising the legislative, executive and judicial control. The Vietnam Fatherland Front and the Vietnam Confederation of Trade Union are the socio-political organizations of the political system which exercises state power under the Constitution and law.

Similar to China, Cuba and previous socialist nations, Vietnam's political regime is dominated by a single party. Even though Vietnam is integrated within international trade and it has become a WTO member, the Vietnamese Communist Party still remains a monopoly and controls the leading role within the political system. With the transitional shift from a centrally planned economy, Vietnam has been pursuing many large scale action plans in economic policy and legal reform. Most trading nations have admitted the market economic status for Vietnam. In general, Vietnam has basically reconciled the principles of international trade rules into its domestic system. The role of the Constitution and law have been strengthened by an independent legal regime with three separated governance powers: legislative system, executive branch and judicial regime. The definition of a "law governed state" has been introduced for the first time in decades, and the issues of constitutional enforcement have been placed in high priority within the national legal regime.

However, in fact, the Communist Party not only leads but also directly dominates all levels of state management activities through very close control from the top level,

down to the bottom. All of the economic policies, laws and regulation systems must be built on the Resolutions of the Party Congress (Nghị quyết Đại hội Đảng). Being a Communist party member is a compulsory condition for high ranking government employees; in addition, around two-thirds of the National Assembly (NA) are also party members. The state leaders such as the President, Chairman of the NA and Prime Minister must be selected and approved by the Central Committee and the Political Bureau.

Vietnam has been described as a stable political system as the Communist Party solely controls most of the state activities. On the one hand, this provides crucial factors for advancement in economic development and social security; however, on the other hand, the single party system creates potential weakness namely concerning the centrally planned economic policies, slackness in reform, monopoly of power and authoritative administration systems. Under the pressure of international trade rules and international factors, Vietnam's Communist Party has introduced many reforms in organization structure and development strategies, however these reforms seem to gain insignificant results.

IV.2 Vietnam's Economic Situation

IV.2.1 The Centrally Planned Economic Policies

Located on a small strip of land along the coast of the South China Sea, Vietnam is country that has a limited amount of land for a huge population.⁵ Around 75 percent of the population are farmers who live in the countryside. During the 30 years of war (1945-1975), almost all of the industrial and transportation infrastructures were destroyed. After being reunified in 1975, the Vietnamese economy operated under a centralized state which dominated for around 10 years. Private enterprises and land were nationalized; all business and food production operated under state orders. These policies had a strong and negative influence on the economic development. For a long time, food production was not enough to satisfy the population demand. The national industry was represented by only a small number of light industrial

⁵ L. Shelton Woods, *Vietnam, a global studies handbook* (ABC-CLLO, 2002), 85.

factories. During this period, Vietnam faced many internal and external crises such as the market block and embargo from the US; national economy dependency on aid from the Soviet Union and Eastern European socialist countries; the national emergency of galloping inflation and inadequate food supply; perplexing economic development strategies and international trade cooperation, the 1979 War with China and the resolution of crisis in Cambodian affairs. These matters forced the Vietnamese leaders to looking for crucial reforms for Vietnam. Different to the reform strategy of the Soviet Union which changed their political system before economic reform, and more similar to China, Vietnam decided to renovate their centrally planned economic policies first and the political system has step-by-step subsequently changed in order to support the economic development.⁶

The impacts of the international economy and international trade policy have played an advantageous role in Vietnam's economic strategy reforms. However, during the period of being a reunified nation and until the collapse of the Soviet system, almost all of Vietnam's international trade activities were operated within the Soviet community nations and a few Asian nations. Around three-quarters of Vietnam's imports were from these trade partners and around 60% of Vietnam's exports were also to these nations.⁷ Thus, the collapse of the Soviet Union and its community nations had a crucial impact on Vietnam's economy. Vietnam was to no longer receive development funds, military assistance or trade exchanges from those nations. Vietnam had to reform their nation using its own capacity; in reality to reform a backward socio-technical infrastructure and development strategy.

IV.2.2 The Reform Launching and the Open Door Policy

After the CPV's sixth congress in 1986, Vietnam's economic policy was definitely changed and emergency action to rescue the weak economic situation began. In the ten year period 1990-2000, even though Vietnam still had to deal with a lot of negative factors, namely with the collapse of the Soviet Union and Eastern Europe,

⁶ Barret L. McCormick "Political Change in China and Vietnam: Coping with the Consequences of Economic Reform" in Anita Chan, Benedict J. Tria Kerkvliet, and Johnathan Unger (eds.) *Transforming Asian Socialism: China and Vietnam Compared* (Allen & Unwin Australia, 1999), 161.

the Asian financial crisis, and natural calamities in many areas, under the socio-economic development strategy, the national economy had positively changed. Private businesses were encouraged to develop in the “open-market” system. Foreign trade and foreign direct investment (FDI) were attracted by a high quality but cheap labour force. The normalization of relations with the US and other countries helped in providing significant thrust in the Vietnamese economic development. Overall, Vietnam’s economy has constantly been improving since the start of the economic reforms in the 1990s.

From 1992 to 1997, the annual rates of growth were maintained at over 8%. In this period, the foreign investment sector including FDI and Official Development Aid (ODA) played key roles in Vietnam’s economic development. As many Asian countries were, Vietnam’s economic development was obstructed by the financial crisis in 1998; and growth had fallen to around 4% in 1998.⁸ The economic outlook for Vietnam, however, recovered slightly in 1999 and has continued to gain considerable progress. Generally, after 10 years of Renovation policies, Vietnam’s GDP has more than doubled (2.07 times);⁹ internal food supply has been secured and Vietnam has become a leading rice exporting country, with the average GDP per capita reaching 835 USD in 2007.¹⁰ As an important part of Vietnam’s economy, foreign investment plays a key role in its socio-economic development. In 2007, with the impressive achievement of WTO membership, Vietnam attracted around 20.2 billion USD of FDI. In 2008, the investment reached around 60 billion USD, this is the highest FDI capital achieved within 20 years of the launch of the Reform policy.¹¹

⁷ Leslie Holmes, “Vietnam in a Comparative Communist and Postcommunist Perspective” in Stephanie Balme and Mark Sidel (eds.) *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007), 11.

⁸ Source: Official Statistics cited in *Vietnam 2010 – Entering the 21st Century*, the World Bank documents available at <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/12/19/000094946_00121905570051/Rendered/PDF/multi0page.pdf> visited 25 November 2007.

⁹ Source: <www.asemconnectvietnam.gov.vn/longtermstrategy>

¹⁰ Source: the *UNDP Vietnam*, available at <http://www.undp.org.vn/undpLive/Content/UNDP/About-Viet-Nam/Viet-Nam-at-a-Glance>, visited 15 December 2008.

¹¹ Source, *Ministry of Planning and Investment*, available at <www.mpi.gov.vn> visited 15 December 2008.

In general, Vietnam's economic development has overcome many difficulties and challenges. National growth has increased rapidly and steadily over the last five years. Foreign investment has risen dramatically, especially in the years 2007 and 2008. Poverty reduction and hunger elimination were recorded as an excellent result. The material life and living standard of Vietnam's citizen have been markedly improved. Under the international trade integration requirements, the national economic institutions have been reformed.

To achieve these goals, Vietnam has applied a number of national solutions such as applying the international trade rules to their domestic market; upgrading the competition capability of state owned enterprises (SOEs); reforming the national legal system; boosting export and managing import; and controlling inflation.

IV.3 Vietnam and Global Economic Integration

As a transitional economic nation in global trade liberalization, Vietnam must find its own path for its economic reform which is based on Vietnam's circumstances and socio-technical infrastructures. The transitional nations in Asia such as Vietnam and China represented good performance in both economy and governance reform. China was the first socialist nation to reform its national development strategy and became a model for other transitional nations.¹² Influenced by China's experiences, Vietnam launched their reform eight years later with similar renovation strategies.

IV.3.1 Vietnam and the ASEAN

The decision to join an international organization means that the nation must take the potential policy reforms to incorporate the international rules within their domestic system. Membership of the Association of Southeast Asian Nations (ASEAN) does not demand as strict a standard as the WTO rules, it does however recommend necessary changes to political and economic policies. Vietnam began studying the organizational structures and legal frameworks of ASEAN early in the

¹² Will Martin, "Trade policy reform in the East Asian transition economies" *The World Bank policy research working paper 2535*, January 2001.

1990s.¹³ By formally becoming a member of the Treaty of Amity and Cooperation in Southeast Asia (the Bali Treaty) in July 1992, Vietnam expressed its will to join ASEAN and became its observer.

Becoming an observer in July 1992 and formally joining ASEAN in July 1995, Vietnam participated in the ASEAN Free Trade Area (AFTA) and applied the Common Effective Preferences Tariffs (CEPT) schemes that requested that ASEAN members apply tariffs from 0 to 5 percent for the good originating from other ASEAN nations to their domestic national tariffs. The CEPT schedule for Vietnam, as a new member, would be extended to 2006 meanwhile the original members applied full obligations from 2003. Even though Vietnam's leaders expressed their will to partly apply CEPT in the same year with the other members, the Government failed to present the new tax system in time. In principle, hasty preparations, lack of knowledge about the ASEAN system and poor quality from the Government officials became significant matters of Vietnam when it was an official member of ASEAN.¹⁴

In short, during the 1990s, despite 10 years of reform, Vietnam faced problems in all sectors, namely the legal institutions, economic policies and poor knowledge of international rules and practices, all of which had existing and significant problems. In fact, Vietnam was fully aware of the obstacles and produced many considerable reforms, but their achievements were still very limited.¹⁵

The strong influences from the centrally planned economy have had a significant effect on red tape in the administrative system. In addition, laws during the time of national reunification were neglected and social attitudes towards respecting the law remained at a low level. Meanwhile, the ASEAN legal framework is not as strong a system as other regional communities such as the EU or the WTO, and its compulsory obligations as well as the implementing deadline for Vietnam were not

¹³ See more details of Vietnam and ASEAN on Nguyen Vu Tung, 'Testing the Institutionalism Approach Cooperation between Vietnam and ASEAN' in Stephanie Balme and Mark Sidel (eds.) *Vietnam's New Order: International Perspectives on the State and Reforms on Vietnam* (Palgrave Macmillan, 2007), 51-70.

¹⁴ Ibid, 56.

¹⁵ Hien Do, *Economic Interdependence within ASEAN* in Stephanie Balme and Mark Sidel (eds.) (n7), 109.

strictly enforced. There were a number of objective reasons to explain the shortcomings of Vietnam at the beginning period of the reforms. However, the main causes came from the Vietnamese Government's lack of preparation on: personnel capacities; comprehensive strategies on economic policy reform; law reforms, bureaucratic adjustments; and knowledge and information in both domestic law systems and ASEAN regional standards, and were all classified as crucial issues not only at the time Vietnam applied for the ASEAN membership but also a few years later when Vietnam accessed the WTO. More importantly, the overlap of political policies, rules of law and implementing documents existed at the same time as a delay in developing a proper comprehensive strategy for international integration. The weaknesses of the law making capacity, legal institutions, legal information and access to enforcing the law created poor performance in regional economic integration. The comparatively low capacity of domestic enterprises, low awareness and lack of information about the ASEAN tax system were named as the challenges witnessed in that period.

However, by joining the ASEAN, Vietnam had begun practicing for its global rule reconciliation. Understanding the main steps required for international integration, including studying of the external rules and the existing domestic system, were the main lessons for Vietnam after the ASEAN accession. Vietnam had many ideas on how to improve their legal regime, economic policies and social awareness in order to meet with the regional standards. All of these experiences had been surmounted and challenged by the time Vietnam applied for WTO membership; and organization which requested much harder conditions.

IV.3.2 Vietnam and the WTO Accession

Vietnam applied for WTO membership and was named as an observer of the General Agreement on Tariff and Trade (GATT) from June 1994. Its application for WTO membership was accepted on 4th January 1995. After 11 years of negotiations and reforms to meet the requirements of the WTO's legal regime, Vietnam concluded the final stage of its WTO accession in November 2006. The Working Party for the accession of Vietnam, which was established on 31st January 1995, held 14 negotiation rounds with over 200 meetings in which there were 14 multilateral negotiation meetings and 28 nation partners with whom Vietnam was required to

negotiate bilateral agreements. Vietnam answered around 3,000 questions on legal reform, governmental transparency, and on many economic related policies in finance, foreign investment, banking, and trade.

Considered as a large market, with a population of 84 million, Vietnam ranks 13th among the world's largest country populations and has over 40 million people who are of a labour working age. Located in Indochina, Vietnam is favourably situated in term of land, sea and air links with other countries, this plays a key promoting role to the country's trading developments. Moreover, a more secure political system and high speed economic growth, in comparison with other regional nations, have created an attractive FDI environment in Vietnam. On the one hand, Vietnam's favourable natural conditions, a big internal market, a young labour force and success in economic development provided a strongly positioned country in the WTO accession negotiations; on the other hand, these factors also create more complications and difficult requirements than for other WTO members. For example, in the tenth session (Geneva, September, 2005), Vietnam committed to open its domestic market at a higher level than many other new WTO member countries and additionally agreed to deal with the WTO-Plus conditions in order to reach the bilateral agreements.¹⁶

All commitments on tax had to be carried out from the date of accession including, eliminating export subsidies in the form of direct payment from the state budget; tax and tariff provisions with regard to the free tax zones and open economic parks; expanding the trade areas for foreign enterprises; and import licensing regulation, even though these obligation are very difficult to implement in regards to the Vietnamese socio-economic infrastructure.¹⁷

The main content of potential multi-bilateral negotiations and key negotiations are briefly summarised below.

Negotiation Rounds of Vietnam with Crucial Trade Partners

¹⁶ All bilateral agreements between Vietnam and other nations are available at the *Vietnam Government website*, available at
<http://www.chinhphu.vn/portal/page?_pageid=33,166868&_dad=portal&_schema=PORTAL>

At the ninth session of the Working Party, May 2005, Vietnam committed to complying with and presented the Action Plans for the implementation of the WTO Agreements on Trade Related Intellectual Property Rights (TRIPS), Trade Related Investment Measures (TRIMS), Custom Valuation (CVA), Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT), Import Licensing, Pre-Shipment Inspection and Rule of Origin from the date of the WTO's accession.¹⁸

Vietnam also committed to full compliance of the tax on motor vehicles with Art. III of the GATT, 1994. In this session, the Working Party presented the commitments on tax, eliminating export subsidies in the form of direct payment from the state budget, tax and tariff provisions with regards to the free zones, special economic areas, expanding the trade rights of foreign enterprises, and import licensing regulations. All of these commitments were to be carried out from the date of accession.

To accelerate the accession, the National Assembly and the Government gave making laws and strengthening the national legal system, in order to meet the WTO's membership demands, a top priority. In the seventh session of the National Assembly (NA), May 2005, the NA discussed and promulgated 11 law codes and commented on another 12 law codes in preparation for the next session in November 2005.

The Tenth Session (Geneva, September, 2005)

In 2005, Vietnam concluded bilateral negotiations with partners such as the EU, China, Canada, Norway, Cuba, Brazil, Argentina and many others, and they had significant progress with all of these partners.

The NA circulated and further discussed all of the law codes that implement the WTO Agreements within the national legal system and identified Vietnam's accession commitments. These commitments were evaluated as "highlight, active,

¹⁷ More information, see *Vietnam and the WTO* available at
<http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm>

and different from all previously acceding members".¹⁹ In this session, Vietnam committed to open their domestic market at the higher level than many other new WTO member countries. The responses to questions were submitted to working parties. The implementation of the Action Plan for the Customs Valuation Agreement was also updated.

With reference to the bilateral negotiations, at the time of the 10th session meeting, Vietnam had finished negotiations with most partners and was at the final stage with the last members including Australia, Honduras, Dominican Republic, Mexico, New Zealand and the US. In this session, the Working Party of Vietnam had to deal with the WTO-Plus conditions, and asked the above named members not to require Vietnam to take obligations that they deemed would be too onerous for an undeveloped economy.

The Eleventh Session (Geneva, March 2006)

Since the previous meeting in September 2005, Vietnam progressed significantly towards WTO accession and the bilateral agreements with Australia and New Zealand, Honduras and the Dominica Republic were signed.

During 2005, 29 law codes and legislation items that covered the WTO commitments were revised and promulgated. The implementation of these legislative items emphasizes the full country's commitments to accessing the international trade system. With legislative respect, Vietnam's national legal system has been recognized, as one of few, which complies with the WTO's obligations, prior to formally becoming a WTO member. Vietnam was named as one of only twelve countries that has fully implemented all the WTO obligations into its national comprehensive legal system.²⁰ This was an extreme endeavour of the Government

¹⁸ On *WTO website* <www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm> visited at 11 July 2006.

¹⁹ The statement of the Chief Negotiator of Vietnam at the 10th section of the Working Party on the Accession of Vietnam to the WTO, Geneva, 15 September 2005, available on <www.wto.org> visited 6 December 2005.

²⁰ Statement of Mr. Luong Van Tu, Vice Minister of Trade and Chief Negotiator, available at <http://www.wto.org/english/news_e/news06_e/acc_vietnam_27march06_e.htm> visited 26 May 2006.

and the NA of Vietnam. It was also a big challenge for Vietnam with regards to its low level of economic development and citizen knowledge.

The Twelfth Session (Geneva, July, 2006)

After finishing the last bilateral agreement with Mexico and the US, Vietnam went to its last WTO membership negotiation session. At this meeting, Vietnam and delegates in the Working Party, including over 40 members, were focused on the implementation of all bilateral agreements into the Vietnamese trade schedule. The Working Party were also interested in Vietnam's multilateral commitments that were already implemented within the domestic legal system and their future impact when Vietnam would have full access to WTO membership.

With "bilateral done, multilateral nearly" ²¹ completed at this session, delegates of the Working Party supported Vietnam to join the WTO at the end of 2006. This would be at a similar time to when Hanoi would host the Asia-Pacific Economic Cooperation in November.

IV.4 Main Contents of the Vietnamese Commitments

IV.4.1 Agriculture and its Sensitive Obligations

The agricultural sector was one of the most challenging areas of negotiation for the Working Party of Vietnam. Vietnamese farmers own only a small amount of agricultural land in comparison with other countries. Each Vietnamese household has only 0.3ha on average available for agriculture while an Australian farmer can own up to 200ha. However, as a result of the naturally fertile soil and cheap labour, in many different kinds of agricultural products, Vietnam always reaches high productivity in its exports which represent a substantial portion of the international market total for products such as rice, crude coffee and pepper. For many years, the crude coffee price in the international market was affected by the quantity of exports from Vietnam; as a result the International Coffee Association had to recommend

²¹ The 12th Vietnam membership negotiation available at
<http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm> 23 August 2006.

that Vietnam limit their export quantity in order to keep the price stable for other exporters. In the international market and in terms of export quantities, Vietnam is the second biggest exporter of rice, the second in crude coffee, the first in pepper (its portion accounts for 60% of the international market total²²), the second biggest exporter of cashew nuts and the eighth in tea.

In some products like salt, sugar or the poultry sector Vietnam, however, is faced with a low competition capacity with around 100,000 poor households in coastal areas and with a similar situation in the mountainous areas.²³ Moreover, due to the underdeveloped food processing system, most of Vietnam's agricultural products are exported as raw materials at a cheap price, whereas the similar processed products are imported at much higher prices. Thus, in both bilateral and multilateral negotiations, the "bound" tax rates and subsidies in the agricultural sector were the most difficult to agree between Vietnam and the other partners. From the point of view of the freedom of trade as well as poor farmer protection, Vietnam accepts the "bound" tax ceiling between 0 and 35%, so that a tax of around 14%²⁴ will be levied on imported agricultural products.

In the Survey, conducted by the author, 60.5% of the participants were concerned that Vietnam's products, especially agricultural products, could not compete with the imported goods. Vietnam is an agricultural based country, with around 90% of its citizens living in rural areas, most of which are poor people. Moreover, in Vietnam, agriculture and livestock husbandry have been developed on a small scale and without a comprehensive master plan. As a result, low quality high cost products are the current situation for many kinds of Vietnamese agriculture and livestock husbandry, for example concerning the dairy industry, sugar, and pig rearing. The offer of tariff reductions of 10.6% for agricultural and 38.4% for fish and aquaculture products will pose a real difficulty for these sectors. The expansion of exported goods and services in Vietnam's domestic market, lower farmer income,

²² Available at <<http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=181968&ChannelID=11>>.

²³ News on Vietnam, available at <www.wto.org/english/news_e/pres06_e/pr455_e.htm> visited 21 October 2006.

²⁴ Ministry of Trade of Vietnam available at <www.mot.gov.vn> visited 22 October 2006.

unemployment and social inequality are real threats to Vietnam as it integrates into the world market.

IV.4.2 Intellectual Property Protection and the TRIPS obligations

IP law is a newcomer to the country's legal system and to the Vietnamese people's psychology. In the past, after the country's declaration of independence and during the war (from 1945 to 1975), a pre-modern ideology exerted considerable influence on the legal system and the state governance in Vietnam. Within the IP law sector, Vietnam's view towards IP rights are definitely different from the Western legal traditions in both the national legal system and culture in general. Vietnamese tradition would never have defined intellectual works as private property and IP rights protection were never promulgated within the national legal system. Copying and imitation were not condemned as plagiarism, moreover they were viewed as an accepted learning process and an appropriate distribution mechanism of original works.

IP protection was mentioned for the first time in the Vietnamese legal system by the ratification of the Paris Convention and the Madrid Convention in March 1949. In the early 1980s, industrial property protection started the foundation for a new legal sector within Vietnam's legal system; this became the Regulations on Technical Innovation and Inventions.²⁵ The Vietnamese Government, then, issued a number of IP laws such as Trademarks (1982), Utility Solutions (1988), Industrial Designs (1988), Licensing (1988), and Copyright (1986).²⁶ From 1986, Vietnam ran a "Doi Moi Reform" course in the economic sector. The Vietnamese economy was transferred from being a state-planned economy to a market economy. Much fundamental legislation was issued during this period, and IP law had significant impacts upon the promulgation of the Ordinance on Protection of Industrial Property Rights.²⁷

Under the pressure of WTO accession, the first IP law code was urgently drafted and then promulgated by the NA at the eighth session (October and November, 2005)

²⁵ *Decree 31 CP* dated 23 January 1981.

²⁶ Co so du lieu Luat Vietnam, *Vietnam Law data* on <www.vnn.vn>.

and then came into force on 1st July 2006. The Civil Code and the IP Law of 2005 have governed all aspects of IP rights protection and named the responsible governmental agencies for IP law formulation and implementation. Vietnam has also participated in most of the international IP agreements. To conclude the WTO negotiation, Vietnam had incorporated all principle areas of the TRIPS Agreement and related IP international convention provisions into their national legal system.²⁸

²⁷ *Ratified on 28 January 1989.*

²⁸ *See more details in Chapter Six and Chapter Seven of this Thesis.*

IV.4.3 The Commitments on Trade in Goods ²⁹

Table 1. The Commitments on Trade in Goods

	2006 MFN Rates (1)	WTO 2007 Bound Rates	WTO Final Bound Rates (2)	WTO Implementation
Simple average	17.3	17.2	13.4	up to 12 years
Agricultural products (3)	25.7	27.3	21.7	up to 5 years
Non-agricultural products (4)	16.3	15.8	12.2	up to 12 years
Steel	7.7	17.7	13.0	up to 7 years
Textiles and clothing	36.4	13.6	13.5	upon accession
Footwear	43.9	35.8	27.2	upon accession
Cars and other motor vehicles (4)	55.5	84.8	58.7	up to 12 years
Most new cars	90.0	100.0	70.0	up to 7 years
Motorbikes	90.0	100.0	74.3	up to 12 years
Machinery/electrical	8.2	10.8	8.1	up to 5 years
Minimum tariff				
Agricultural products (5)	100	100-150	85-135	
Non-agricultural products (4;6)	90-100	100	75-100	
Number of lines	11,088	10,444	10,444	

(1) Most favoured nation (MFN) rates applicable as of July 2006.

(2) To be applied by 2019.

(3) Includes fisheries.

²⁹ Cited from the *IMF Country Report on Vietnam No. 07/385* December 2007.

- (4) Excluding used motor vehicles, whose importation was prohibited until May 2006 (WTO bound rates on used motor vehicles can be as high as 200%).
- (5) Maximum tariffs applicable to sugar and tobacco products. Some of them were subject to import bans or quotas until 2006.
- (6) Maximum tariffs applicable to new motor vehicles and motorcycles, and used clothing; imports of some of these items were previously subject to bans, quotas or licensing requirements.

IV.4.4 Service Sector

At present, in banking and the security services, Vietnam limits foreign banks in their share stock holding to up to 49% ownership capital. From 1st April 2007, foreign banks will be able to establish banking in Vietnam with 100% foreign capital investment, but certain obligations and limitations will be enforced.³⁰ All of these restrictions must be removed by January 2011. From the date of Vietnam's formal membership, foreign security firms will be able to establish joint venture companies with up to 49% ownership capital. After five years, these foreign firms will be able to establish 100% ownership in this field. All foreign firms established within Vietnam will be treated as Vietnamese enterprises and will therefore receive non-discriminatory national treatment after 5 years of Vietnam's accession to the WTO. Vietnam also offers similar policies within other service sectors such as Telecommunications, Energy, Express Delivery, Transportation, Distribution, and Environmental services.³¹

Vietnamese enterprises, at the moment, display poor performance in the domestic market, especially in the legal and professional services, retail services, and environmental services, due to the lack of a highly qualified labour force and the underdeveloped education system. The loss of some portions of the domestic market to foreign enterprises is currently a concerning situation to Vietnam's service sector, and it will perhaps become more serious in the years to come.

³⁰ Such as capital investment or total assets of the parent bank; the deposit ratio.

³¹ All of detail *Vietnam's commitments to the WTO* are available at
<http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm>

IV.4.5 Vietnam's Commitments in Comparison with Regional Countries

Due to the fact that Vietnam was one of the last ASEAN countries to conclude WTO accession, Vietnam had to present more favourable terms than the other regional countries, like China, Cambodia and Nepal, in order to conclude the bilateral and multilateral agreements with other WTO members. For example, in the tax sector, Vietnam was required to reduce, on average, import tax by approximately 22% to 30% in its first 5 years from the time of formally becoming a member of the WTO. The kinds of import tax that were required to be reduced accounted for 36% within 10,600 kinds of Vietnamese import tax, with the deductions ranging from 2% to 63%. Among these, the import tax for industrial and agricultural sectors was to be reduced by 23.9% and 10.6% respectively. Import tax was required to be deducted at the highest level for the textile industry (63.2% as compared with MFN); 38.4% for fish and aquaculture products; 32.8% for the wood and paper industry; 23.6% for electrical equipment industry; and 21.5% for the leather and rubber industry. The mineral industry had the lowest tax deduction, with only 2% taken off what was the existing import tax.³²

The highest rate of reduction in tax was required for some industrial products and processed agricultural products including alcoholic drinks, tobacco products, instant coffee and related products, and motor vehicles and their components. These "bound" tax rates were the formal legal ceiling; in practice, though, the applied tax would be at a lower rate than the legal ceiling. In comparison with China, the deduction observed in the industrial sector was higher (China deducted 9.6%) and lighter on the agricultural sector (China deducted 16.7%). In general, Vietnam's access to the global economy was similar to the levels secured by China and most of their accession agreements were also at a similar level.³³

At the beginning of the negotiation period, in the late 1990s, Vietnam was ranked as one of the least developed countries in the world and was therefore able to ask for favourable conditions such as the bound tax, flexible agendas for enacting laws in

³² On Vietnam newspaper available at <[www.laodong.com.vn/pls/dislay\\$.htnoidung](http://www.laodong.com.vn/pls/dislay$.htnoidung)> visited 11 July 2006.

³³ More details on the *Working Party Reports of Vietnam and China* are available at <www.wto.org>

conformity with WTO obligations, and flexibility in meeting the deadlines of the WTO's commitments. However, as a result of steady economic growth, maintenance of good education and health care systems, the strengthening of the national legal system and rapid trade extensions, Vietnam was soon ranked as a developing country even though the GDP was under 800 USD per capita per annum until the year 2008; which would categorize it as a least developed country under the UN classification.

This UN classification creates greater challenges for Vietnam. For example, Vietnam had to complete the law-making agenda before their last negotiation session, whereas Cambodia's enactment of law codes in conformity with the WTO remained under draft status until the date of the conclusion and actual accession of Cambodia's membership to the WTO. In some sections, such as IP law, Cambodia was allowed to fully implement the TRIPS obligations three years after their date of accession while Vietnam was required to implement full IP protection from their date of accession. Furthermore, Vietnam was asked to offer lower bound taxes than Cambodia and most of these came into force from the date of accession.³⁴ The WTO's accession conditions for Cambodia and Nepal were named as the "best package in the history of the WTO",³⁵ based on the fact that they were classified as least developed countries. However, as with many poor countries, Vietnam, Cambodia and Nepal are facing similar challenges beyond the WTO accession on issues such as legislation and reform implementation, competitive capacity, agricultural issues and IP protection.³⁶

³⁴ Report of the Working party on the accession of Cambodia, available at <<http://docsonline.wto.org/DDFDocuments/t/WT/ACC/KHM21.doc>> visited 7 February 2007.

³⁵ Rudra P. Sharma, "Nepal's road to the World Trade Organization: A pragmatic overview" in *Asian Yearbook of International Law*, Volume 10 (B.S Chimini et al., eds) 2005 Koninklijke Brill NV, the Netherlands, 152.

³⁶ Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How trade can promote development* (Oxford University Press, 2005), 1.

IV.5 Potential Benefits from WTO Membership

IV.5.1 Export Promotion

Many argue that WTO members will benefit from trade liberalization and as a result this will support poverty reduction. The potential benefit that developing countries are looking for, from their WTO membership, is export promotion within the international trade market. Vietnam is a country whose national export income accounts for over 60% of its GDP, the expansion of the export market therefore plays a key role in national economic development. Vietnam strongly believes that the sale of their agriculture, aquaculture, textile and garment products, in the international market, will be boosted when Vietnam becomes a member of the WTO as a result of the quota freedom system. In 2005, Vietnam's export income was valued as low compared to other Asian regions; for example, at this time, the total Vietnamese export income reached only one-third as compared with Thailand and two-thirds in comparison with the Philippines.³⁷

As a leading agricultural product exporter utilizing the WTO's free market system, Vietnam hopes to gain a significantly improved portion of the international trade market, especially in some of important markets in the EU, the US and Japan. After two years of enjoying the expansion of their export market, the export income of Vietnam had significant improvement. For example, the total export income in 2007 had expanded 21% compared to the year 2006 and the total export income in 2008 achieved around 63 billion USD, expanding 29.5% as compared to the year 2007.³⁸ In fact, these figures did not represent what Vietnam had demanded and hoped to achieve from its membership to the WTO, but, based on the current global economic crisis, this growth is considered as a great achievement for Vietnam.

³⁷ Source: the *Ministry of Trade of Vietnam* <www.mot.gov.vn> visited 3 November 2006.

³⁸ The *2008 Annual Report of Ministry of Industry and Trade of Vietnam*, available at <<http://tttm.moit.gov.vn/Default.aspx?itemid=70>> visited 5 May 2009.

IV.5.2 Accessing the Trade Dispute Settlement System

WTO membership offers an advantage by providing access to the WTO's dispute settlement mechanism for trade disputes between Vietnam and other nations. Until recently, Vietnam had been involved in many trade disputes concerning the export of products to the US and the EU, for which Vietnam had an advantage in, such as agricultural products, catfish, shrimp, gas lighters, shoes and textile products. As a non WTO member nation, Vietnam could not access the WTO's dispute settlement procedure or its legal regime. Thus, the trade disputes between Vietnam and other nations were settled through their own courts or arbitration services and enforcement systems. Due to specific regulations in these nations, and in many cases, unfair anti-dumping taxes were then imposed on Vietnam and it was very difficult to appeal against such judgements.

According to the expectations of the Ministry of Trade, Vietnam will reach a total export income of around 100 billion USD per year, in the years to come. It is likely that a bigger international market portion will correlate with more trade disputes; accession to the WTO does not mean each member nation will avoid the trade disputes, but in principle, fairer treatment between nation partners and favourable conditions through the WTO dispute settlement mechanism should be obtained.

IV.5.3 Government Transparency Promotion and a Stronger Country Position

By following the common worldwide rules, improvements in the domestic economic sector and the national legal system in Vietnam will be forced. Accession to WTO membership requires transparency in government and strengthens the national legal system³⁹. Under the commitments to the WTO, Vietnam amended and promulgated 25 law codes and ordinances by the end of 2006. According to the national legislative programme, in the years to come, around 100 law codes and ordinances will be amended and promulgated in order to reform the Vietnamese economy and

³⁹ Bovis Christopher, "Financing services of General Interest, Public Procurement and State Aids: The Delineation between Market Forces and Protection in the European Common Market" (2005) *Journal of Business Law*, 24.

national legal system. It is a truly significant effort by the Vietnamese NA and Government, especially, in view of its status as a least developed country. Vietnam's legislative programme was positively evaluated by the WTO's Working Party and other partners during the negotiation period.⁴⁰ With plenty of bilateral and multilateral negotiations, and through the answering of around 3,800 questions that involved trade policies, national legal reforms, public administration reforms and other aspects of the political regime, the global economic system required Vietnam, as a fully-pledged member of the WTO, to upgrade its national legal system, economic policies and its political regime. Keeping in line with the international trade laws also increases the speed of FDI to Vietnam through the introduction of large scale projects. To mention an impressive achievement which resulted from the WTO membership, in 2008, FDI in Vietnam reached 64 billion USD, expanding around six times compared to the year 2006. Furthermore, this was the highest year for FDI since Vietnam had issued its Foreign Investment Law Code in 1987.⁴¹

Most citizens were expecting positive national development as a result of Vietnam integrating into the global economic system. The author's survey showed that 71.5% of 200 participants, who were living and working in Vietnam, agreed that WTO membership would be a good opportunity for the development and growth of the national economy; and 19.5% of the respondents believed that Vietnam needed to be part of the same international trade rules as other countries and that this could be achieved by joining the WTO. In addition, an immeasurable benefit of the integration of Vietnam into the international trade system was the enhancement of the nation's position in the world.

By becoming a member of the most powerful international organization with 153 members, Vietnam can now take part in setting the rules of the international game and playing on the "same course with the same level" as most other countries in the world. 10.5% of the respondents in the survey agreed that Vietnam's accession to the WTO would enhance the political position and sovereignty of Vietnam.

⁴⁰ Study of Mr. Luong Van Tu, Chief of Vietnam Negotiation Team, on the *Ministry of Trade of Vietnam* website <www.mot.gov.vn> visited 3 November 2006.

⁴¹ Source, *Ministry of Planning and Investment of Vietnam*, available at <[http://www.mpi.gov.vn/portal/page/portal/bkhdtdttnn\(fdi\)/sltk](http://www.mpi.gov.vn/portal/page/portal/bkhdtdttnn(fdi)/sltk)> visited 5 May 2009.

IV.5.4 Upgrading the Domestic Enterprise Competition Capacity

Competition with other multi-national firms will be difficult; however, this is an opportunity for the improvement of the competition capacity of Vietnam's domestic enterprises. Presently, there are more than 4,000 state owned enterprises (SOEs) which play a key role in the national economy, many of which receive favourable conditions from the Government subsidies. However, in terms of real performance, Vietnam's SOEs operate at a low competition capacity and are therefore unable to reach the international trade requirements; in addition they do not create new jobs.⁴² The weak performance of the SOEs is a direct result of the state regulated economy with the overlap of the supervision system, the capital control, and an unstable manner of operation. The WTO's obligations to remove the direct government subsidies will not only be a challenge but will provide the opportunity for those SOEs which can adapt to offer good products or services at a reasonable price. For competitively weak enterprises and in the case of bankruptcy, it may actually benefit the state budget. In a fair competitive environment, SOEs and the private sector can display their advantages and take progressive steps towards creating a stable development environment for the Vietnamese economy.⁴³

IV.6 Paradoxes and Challenges Ahead

Despite the fact that Vietnam has gained many significant achievements and has been named as a "new tiger" of national development in the Asian region, social inequality, poverty, weak competition capacity, unemployment and many other problems are also associated with this remarkable national development. Integration into the international trade market has accelerated the rapid development in both the socio-economic and national political sectors; however, Vietnam still has to deal with the potential threats arising from the challenges and obligations of the WTO's regime.

⁴² *Interview with Mr. Tomas J. Vallely, Director of the Vietnam Program at the John F. Kennedy School of Government, Harvard University*

www.english.vietnamnet.vn/interview/2006/11/633960/, visited 15 November 2006.

⁴³ In the Survey, 18% of the responses agreed that there is a good chance to improve the competition capacity of Vietnam's enterprises when Vietnam becomes a WTO's member.

IV.6.1 Lack of a Highly Qualified Workforce

Under Vietnam's WTO commitments in the service sector, the questions of how to improve the educational qualifications and human resources are a challenge for the Vietnamese Government. Vietnam owns a large pool of cheap workers but these are not a highly skilled workforce. They mostly work in occupations that do not generate large incomes but that do require a huge labour workforce such as the agricultural, textile and leather processing sectors. These sectors allow the Government to provide jobs for large numbers, but poorly skilled workers. However, WTO membership has removed the quota system and it limits the state subsidies and as a result creates a highly competitive environment both in the international and domestic markets.

Due to the lack of modern technology, international market information, and international trade law knowledge, and due to costly overseas transportation, Vietnam's enterprises may suffer from weakness in terms of competitive capacity in the international trade market in the future. Furthermore, from 2007, foreigners will be allowed to provide most of the professional services if they are newcomers to the domestic market and for which Vietnam has limited experience and human resources in, this will include legal consultants and in the environment, tourism and hospitality, insurance and banking sectors. These sectors require highly skilled workers with international experience; unfortunately, the Vietnamese universities and training schools can not currently meet the demands of these jobs.⁴⁴

In addition, due to the outdated salary system and inefficient budget, the state sector and domestic enterprises would not be able to offer the attractive salaries and bonus schemes to these highly skilled professionals, most of these individuals have studied abroad and have considerable experience working overseas or in multi-national corporations. In a recent interview, the chairman of a Vietnamese law firm noted that, it is currently very difficult to find Vietnamese lawyers who have expertise in international law, who speak English or have any other foreign language

⁴⁴ Summary of the Conference "Lessons from Vietnam", organized by University of Geneva, 14th-16th December 2006, news on the *Tuoi Tre Newspaper*, available at

qualifications, and who have the experience to deal with international disputes.⁴⁵ Meanwhile, this labour market requires at least one million jobs every year. This picture is reflected in all of the professional service sectors in Vietnam, since the WTO's commitments came in force. Thus, the loss of the domestic market portion, an increase in international trade disputes and costly trade dispute settlements will be the possible expectation for Vietnam in the professional service area.

IV.6.2 The State Budget Decreasing and Social Inequality Increasing

In compliance with WTO obligations and the regional free trade arena, Vietnam has to deal with a possibly decreasing state budget in the years to come. At present, the import-export tax represents 25% of the total state budget and it will be reduced further due to the reduction in import tariffs under the WTO's obligation schedule. Because of the WTO-Plus conditions, for a newcomer and the bilateral content, Vietnam has to reduce the binding tax more than other countries that have the same development level in the Asian region such as Thailand, the Philippines and China. According to the reports from the General Department of Taxation and the Ministry of Finance, the import tax value will be decreased by around 300 million USD over a five year period from the date of the WTO accession.⁴⁶ Consequently, the strong dependence of the national budget on export income and the international trade market is a possible challenge for Vietnam. Despite gaining some significant achievements, Vietnam still belongs to the group of poorest countries in the world with an inefficient socio-economic infrastructure.

The state budget plays a monopoly role in the national education and health care systems. Only one third of Vietnam's population are covered by national health care insurance and around 70% of the population cannot cover their health care expenditures with their family income.⁴⁷ Ethnic people and those living in the mountainous areas have limited access to these systems, and it is likely that they are

<<http://www.tuotre.com.vn/Tianyon/Index.aspx?ArticleID=179393&ChannelID=397>> visited 27 December 2006.

⁴⁵ Interview with Mr. Nguyen Tran Bat, Chairman of Invest Consult Group on Vietnam Net, available at <<http://www2.vietnamnet.vn/baylenvietnam/2006/12/645861/>> visited 27 December 2006.

⁴⁶ Documents of Ministry of Finance on the *Laodong Newspaper* <www.laodong.com.vn> visited 11 July 2006.

also suffering as a result of the global economy and free trade in Vietnam. Similarly to other poor countries, education, health care and living standards of the Vietnamese citizens are dependent mostly on the Government's welfare policies and the state budget. Thus, in the case of a decreasing state budget, poor people will suffer most from the freedom of trade and the reductions of tax.

Conclusion

After more than 20 years of reforms and renovations, Vietnam has gained remarkable successes in its economic and legal systems. The GDP of the nation and the FDI have increased rapidly in recently years, especially since 2007 when Vietnam concluded its WTO negotiations. These successes were results from the perspicacious development strategies of the Government and their deep international trade integration. Vietnam has gained a stronger political position in the world, as a result of Vietnam becoming a non-permanent member of the UN Security Council in 2007. Vietnam also achieved significant successes in poverty reduction, and in the promotion of citizen's living standards and their social welfare.

Presently, and like many other Asian countries, Vietnam's economy has been developing with high-speed growth; becoming a member of the WTO was the undoubted way to continue this development. Under not only the pressure of economic globalization and international trade development but also with the assistance from the international community, Vietnam has successfully carried out its extraordinary transformation in all sectors such as economic, international integration, and socio-technical infrastructure systems. It is clear that with over 20 years of reform, from being a poor nation with very poor systems in all areas, Vietnam has passed the ranking of being a least developed nation with the GDP per capita, in 2008, exceeding 1,000 USD. All of the social development factors including health care, education, poverty and human development have significantly improved. The reforms have also brought a rapid FDI inflow to Vietnam with the

⁴⁷ UNDP Vietnam, available at <http://www.undp.org.vn/undpLive/digitalAssets/6497_061210_IHRD.pdf> visited 27 December 2006.

crucial advantages of economic growth, high technology transfers, creating a large number of jobs and poverty deductions.

Joining the WTO system was a logical development strategy for Vietnam after joining the ASEAN in July 1995 and APEC in 1998. After 12 years of accession, Vietnam has been formally participating in the WTO's regime since January 2007. By gaining advantages using the WTO's principles, Vietnam has expanded their export market, at the same time as attracting more FDI and improving citizen's living standards. With more competitive providers in all sectors and with the tariff reduction system from the WTO obligations, Vietnamese consumers now have more opportunities to access better quality products with cheaper prices. The political-social system has also been reformed in a way to fulfil the domestic economic development demands and international trade commitments. The efficiency and transparency of the Government and its market orientated strategy development have been strengthened through the implementation of Vietnam's commitment to the WTO.

After two years of being a WTO member, it is assumed that Vietnam, and other nations, will gain more benefits than negatives from being integrated into the WTO's system. It was broadly agreed, by the leaders, investors, researchers and general citizens of Vietnam, that joining the international trade system would offer key elements for change in Vietnam and furthermore that their international integration would be focused in the right direction. In the survey, the average favourable rate of 7.75 was recorded regarding the impression of the WTO's effectiveness in international trade, this was measured on a scale of 1 to 10, 1 for very unfavourable, 10 for very favourable. A similar question on the effectiveness of the WTO in developing countries, specifically Vietnam, was recorded at 7.55, again this was favourable. 71.5% of interviewees agreed that WTO membership would provide opportunities for the development and growth of the national economy of Vietnam. The second biggest agreement was regarding the benefits that could be obtained, for Vietnam, from utilizing the WTO's trade dispute mechanism.

There is no doubt that Vietnam has gained many achievements with the development of their socio-infrastructure and its reforms and that it likely to progress and have promising future developments. Presently, however, there are still many crucial

weaknesses in Vietnam's development strategies in both economic theory and practice. The socialist orientated market economy ideology and the transition of state owned sectors and state subsidies to state owned enterprises have led to the delay of principle reforms such as the privatization of SOE's, human policies in the Government sectors and the development of different kinds of principle markets namely the stock market, real estate, insurance, banking and finance. The examination of on-going development policies and finding appropriate strategies based on the specific economic situations, political systems and historical culture are crucial challenges for the Vietnamese Government and political leaders.

Since the end of 2007, Vietnam's dramatic performance has represented a much more complex picture. Because of rapid growth in the stock market, real estate market and the unexpected successful results of their GDP, and because of the capital which was invested, in 2007 and 2008, by overseas Vietnamese people, international donors and the FDI, the Government, political leaders and Vietnamese enterprises have developed widespread optimistic but subjective views about the nation's development. The reforms in the legal system, economic policy, state owned enterprises, capital management, finance control entrustments and other state macro-management do not reach the changing speeds of the trade effects on the economy, neither regionally nor internationally.

From the end 2007 and especially in 2008, high inflation, crises in the stock and real estate markets, and the rise of the monopoly interests of SOEs were warnings for the inadequate development strategies of Vietnam. Similar to other developing nations and new WTO members, Vietnam was facing many significant threats from the global economy. More than 7,000 medium and small enterprises became bankrupt in 2008 due to their weak competitive capacity; unemployment increased and crisis in the stock market and real estate market were all clearly evidence of the shortcoming of the state management strategy in international trade integration. The frozen economic status and puzzling reform strategies will be challenging for the Vietnamese Government for at least a few years to come.

To reduce the gap between the international standards requirements and the economic and legal systems current status, Vietnam needs to advance a number of action plans for upgrading their domestic capacity in all sectors. Moreover,

Vietnam's fundamental goals are to improve the living standards for the citizens and to advance the sustainable development of the national economy. To maximize the achievements and reduce the disadvantages of global trade, a comprehensive approach for the integration into international trade must be built, on the grounds of the deep understanding of the international trade rules, national economy, political circumstances, legal traditions, social behaviours and the rich cultural history of Vietnam. The difficulties and challenges faced by Vietnam are similar to other developing nations such as China, and other Southeast Asian states. The implications of regional trade and a global economy require Vietnam to find an appropriate strategy, in order to move forward and overcome their challenges.

Chapter Five

The WTO Commitments and the Development of the Vietnamese Legal System

Introduction

The history of the development of Vietnam's legal system was that it was built on a mix of pre-modern rules, French colonial legalities, and the ideas based on the laws of the former socialist Soviet Union. In ancient times, under the domination of different Chinese dynasties and for more than a thousand years from the second century BC, Vietnam's legal traditions were strongly influenced by the Chinese legal concepts, political traditions and the Confucian thoughts. After the national independence declaration, on 2nd September 1945, Vietnam was named as a democratic republic. The concepts of European legal theory had been propagated into Vietnam through the Vietnamese nationalist and national revolutionary leader, President Ho Chi Minh. He was a member of the French Communist party and studied the colonial philosophy and history of the United States of America (USA) in the hope of finding a way to liberate the nation. The USA's statement of their Declaration of Independence in 1776 stated, "All men are created equal. They are endowed by their Creator with certain inalienable rights; among these are Life, Liberty, and the pursuit of Happiness", equally principle human rights were referred to in the French Revolution Declaration 1791, "All men are born free and with equal rights, and must always remain free and have equal rights" both of which were cited in Vietnam's Independence Declaration in 1945 as announcements of the democratic nation's birth.¹

In the days following the Independence Day, the Interim Government had been held and one of the Government's first tasks was named as the organization of the

¹ President Ho Chi Minh, *Declaration of Independence 1945 - Democratic Republic of Vietnam*, available on <<http://www.tamilnation.org/ideology/vietnam.htm>> visited 20 January 2009.

National General Election; This gave the right to general voting and self-nomination to all citizens reaching the age of eighteen with no discrimination with regards to sex, wealth, religion or minority.² By January 1946, the General Elections had been successfully held nationwide with participation from many political parties including anti-communist parties. The People's Parliament were established and they prepared for the first National Constitution. The first Constitution of Vietnam, adopted in 1946, marked the beginning of the democratic legal regime of Vietnam.

Vietnam had been applying the Soviet Union system in both legal ideology and institution since they had ended the French war in 1954. Their national legal system represented a combination of different foreign legality in which the socialist law doctrine and Marxist-Leninist theory were the ruling characters. Resolutions and political decisions of the Communist Party became the fundamental rules for Vietnamese law. A centrally planned economic shift was managed by subjective command legality. After the re-unification of the nation in 1975, the Communist Party of Vietnam (CPV) embarked on a process of aligning the Vietnamese system more closely with the socialist doctrines and ideas of a centrally-planned economy. Most of lawmakers and senior state officials of Vietnam, in that period, were trained in the Soviet Union and other Eastern European nations. The legal system was used in a flexible way in order to maintain the autonomous role of the Communist Party. The 1980 Constitution was adopted as the first constitution effective for both regions of the country – the North and the South. This Constitution was strongly influenced by the systems in other socialist countries such as the former Soviet Union and the People's Republic of China. Most of Vietnam's laws and legalities during that period were heavily influenced by the laws of these socialist countries.

Since the advent of the Doi Moi reforms in 1986, and under a huge pressure from the integration with the global economy, social infrastructure and law systems in Vietnam, there have been changes in both law making, judicial and enforcement systems. Governing a law based state and the concept of a socialist legality were introduced as driving tools for the economic reform. International trade laws and market economic rules have driven the comprehensive reforms of Vietnam's

² *Ho Chi Minh Entire Collection*, "The Urgent Tasks of the Democratic Republic of Vietnam", 4 (8).

legality. The membership to the World Trade Organization (WTO), which Vietnam pursued from 1995, has initiated many radical changes in the national legal system to ensure compliance with the international legal standards expected by other nations and the international trade laws. In an attempt to harmonize the principles of international trade and an open economy with the existing political system, based on a one party system of government, Vietnamese leaders sought to develop a legal framework aimed at supporting “a socialist oriented market economy”. The strategy was that this new concept would allow the Vietnamese economy to integrate itself into the international trading system led by the WTO.

This Chapter is designed to study the challenges encountered by a socialist country in reform, as it sets up a comprehensive legal framework in order to combine the principles of economic openness and the international trade rules, at the same time as maintaining the socialist political structure. By analyzing its historic development, firstly an historical overview of the current situation of Vietnam’s legal framework will be provided. Secondly, the existing legal system of Vietnam will be briefly presented. Thirdly, in light of studying the WTO’s free trade system, the incorporation of international trade law into a socialist national legal system will be analyzed. Finally, this will progress to highlight the development challenges that Vietnam’s legal regime should expect to face as a result of the WTO’s membership.

V.1 Historical Development of the Vietnamese Legal System

V.1.1 Concept of Law in Vietnam, the Feudal Legality and the French Colonial System

The first State of Vietnam was established in the seventh century BC. The Van Lang (the Au Lac), was one of the earliest states to come into existence in the Southeast Asian region. In ancient times, Vietnam’s legal concepts were perhaps built on the wet rice farming culture, social rules and religious traditions. But, when Vietnam came under the domination of different Chinese dynasties, for more than a thousand years from the 2nd BC, traditional Vietnamese legal concepts became heavily influenced by the Chinese legal and political traditions and thoughts. The traditional Vietnamese political-legal regime had been strongly influenced by the ancient

Chinese system, for example, in 113 BC, when King An Dương Vương failed to protect ancient Vietnam from the Han China Empire, all of the existing Vietnamese laws were replaced by the Chinese political-legal system.³

In China and in other feudal nations at this time, the King had the highest authority in all law making, executing and dispensing justice throughout the nation. The manner in which the King exercised their power, antecedent, and customs in villages were the main sources of ancient law in antiquity. Two of the legal nominative law codes named the National Criminal Legal Code (Quốc Triều Hình Luật) and the National Procedural Code (Quốc Triều Khâm Tụng Điều lệ), created during the time of the Le Dynasties (1428-1788), were the most significant achievements of the monarchical period.

The National Criminal Legal Code (Quốc Triều Hình Luật) is the most ancient law code recorded, to date, in Vietnam's legal history. With 722 articles in 13 chapters and 30 volumes, this code covered various law branches such as criminal law, civil law, family law, and administrative law. This law code was created during the feudal regime but it represents significant advances when compared to the Chinese feudal legal regime or even the European legal system at the same time. For example, women could have the same share of inherited property as men; there was a separate resource property between husband and wife; the wife could divorce if her husband didn't take care of her for five months (article 308), or if the son-in-law blamed the parent-in-law (article 333) after divorce, both the man and woman could remarry; if the husband died, the wife could manage all their property; and women could own land rights. The rights of the grassroots and poor people had also been protected; if royal family members or mandarins broke the law, they would receive penalties in the same way as the normal citizens would have. In addition, civil and criminal procedures were regulated by high quality law making.⁴

The National Procedural Law Code (Quốc Triều Khâm Tụng Điều lệ), in the 18th century, was the second most prominent law code and the first procedural law code

³ Ta Van Tai, *The Vietnamese Tradition of Human Rights* (Institute of East Asian Studies, University of California, Berkeley, 1988), 37.

⁴ Le Minh Tam and Vu Thi Nga, *History of the State and Law of Vietnam* (the People Police Publishing House of Vietnam, 2003), 303-305.

of feudal times. This law code includes 31 sections with 133 articles that regulated the procedural details of both case and statute law.⁵ During the feudal regime, the Vietnamese legal system achieved great progress as compared with the socio-economic development of the nation.

During of the colonial rule, for just under one hundred years, the legal system in Vietnam was developed around the French legal concepts and notions. From 1858 to 1945, and as a French colony, the Vietnamese legal regime was built on the French model. To illustrate, the French Civil Procedure Code 1806 was implemented, more or less, in its entirety in Vietnam. The General Governor of Indochina promulgated three Vietnamese Civil Codes which applied to the three separated regions, in the North in 1931, Centrally in 1936 and in the South in 1937. During the French colonial time, Vietnam's legal system was regarded as "subservient to the French system".⁶ Even today, the French legal model is still influencing Vietnam's legal system in so many ways and the examples of such influences are the Civil Law Codes of 1995 and 2005.

V.1.2 Traditional Culture, Beliefs, and Religions

Located in Southeast Asia, with a rich cultural heritage and history, Vietnam is a multi-religious state with 54 ethnic groups. Different groups have different traditional cultures, beliefs and religions. All Vietnamese citizens can enjoy freedom of their beliefs and of their religion; each citizen can decide to follow any religion or no religion at all. All religions are equal in terms of legal regulations. The freedom of belief and religion are protected, by law and the state power, as fundamental human rights.⁷

In general, Buddhism is identified as the main religion in Vietnam. Arriving from India and China more than two thousand years earlier, Buddhism became the formal national religion during the Vietnamese feudal period. Vietnam is also the most

⁵ Ibid, 308-318.

⁶ M.B. Hooker, cited in Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff Publishers, 2007), 215.

⁷ Article 70, The 1992 Constitution.

Confucian-influenced country in Southeast Asia.⁸ From the 10th century, Confucianism and Taoism entered Vietnam from China and strongly impacted people's spirits, especially in the elite class and the mandarin officers. Buddhism, Confucianism and Taoism became "three religions from the same source" or "three religions deserving the same honour".⁹ These spiritual beliefs crucially influenced the social institutions and even the legal making and legal enforcement systems at present.

Catholicism came to Vietnam later than Buddhism, Confucianism and Taoism, and from the 16th century Catholicism expanded quickly in all areas in Vietnam. Other religions such as Muslim, and other internal Vietnamese belief and religious sects such as Cao Dai and Hoa Hao Buddhism were and are free to develop in Vietnam. The Vietnamese State allows all kinds of religions to develop and function, however, all religious activities must operate within the framework of the national legal system. Presently in Vietnam, in terms of religion, Buddhism plays the most important role in the morale life of citizens as well as in the national political system.

V.1.3 Legal Regime in National Liberation

The contemporary legal regime of the Socialist Republic of Vietnam was established after the National Independence Declaration on the 2nd September 1945. Through the Declaration of Independence, Vietnam announced that it would repeal the colonial legal framework in Vietnam and denounce its international commitments arising from the colonial rule. However, a month after the Declaration of Independence, the President, Ho Chi Minh, issued Order No. 47 on the 10th October 1945 which allowed the French colonial legal normative documents to be applied as long as they were not contrary to the principles and objectives of the newly independent nation. When the People's Parliament (now called the National Assembly) was elected in January 1946, the first constitution of the Democratic Republic of Vietnam was adopted. Order No. 47 lasted until the end of the 1950s; it assisted in the smooth

⁸ L. Shelton Woods, *Vietnam, A global studies handbook* (ABC-CLIO, 2002), 143.

⁹ White book of the National Committee for Religious Affairs of Vietnam, *Religion and Policies regarding religion in Vietnam* (Vietnam, 2006) 8.

transition for the development of law making for the young Republic Democratic state.

The first Constitution of the Democratic Republic of Vietnam was adopted, just one year after the Declaration of Independence, and became the first cornerstone for the national legal system of the new democratic nation. Including 70 articles in 7 chapters, the 1946 Constitution regulated the main sectors of a national legal regime including: the political system; the rights and duties of citizens; legislative power of the People's Parliament; the executive authority of the Government; the administrative system and the court system.¹⁰ Being drafted and adopted only a short time after the independence, the 1946 Constitution was a beginning of the democratic legality and it set the principles for the national legal framework of an independent nation. In fact, the 1946 Constitution seemed to play a symbolic role for the independent nation rather than simply being a main legal document of the national legal regime. It should be noted that the France war started again in Vietnam just after the independence declaration. However, as a result of wide discussions of political leaders and intellectual scholars, including the State President Ho Chi Minh who had previously lived, studied and researched overseas, the 1946 Constitution was evaluated as being the most pre-eminent constitution to have developed during the war time and for the future development of Vietnam's centrally planned economy. The 1946 Constitution was replaced later by the Constitutions adopted in 1959, 1980 and 1992, under the single party political system.

The Ministry of Justice of Vietnam's Democratic Republic was established on the 28th August 1945, just after the national independence, and it had three local departments in the North, the Central and the South of Vietnam. During the French resistance war, even though all the state management activities were engaged under clandestine status, law making and law enforcement were still carried out in most

¹⁰ *The 1946 Constitution*, available on
<<http://vnthuquan.net/truyen/truyen.aspx?tid=2qtqv3m3237n1nqnqnqn31n343tq83a3q3m3237nvn>>
visited 22 August 2008.

legal areas namely concerning human rights, freedom and democracy, civil law, criminal law, business law, and international treaty implementation.¹¹

The French resistance war, 1946 to 1954, created major obstacles to Vietnam's legal developments. During this period, the CPV, its leadership and regulations, played an autonomous role for the country's revolution. The role of law lagged behind the Party's domination and as a result only a few legal documents were adopted during this period and most of them applied to the nation's independent revolution.

V.1.4 The Concept of Socialist Law in Vietnam and the Soviet Union's Influence

The second Constitution was adopted in 1959, after the end of the French war, it was a significant adaptation of the former Soviet Union's legal system and Chinese Communist Party's policies. Being potentially influenced by the Chinese Land Reform, the judicial system in Vietnam met a crisis with the Land Reform (1953-1958). The Ministry of Justice was abolished in 1960 and Vietnam lacked a proper judicial regime. In the words of a well-known legal scholar – Vu Dinh Hoe, who was the first Minister of the Ministry of Justice of Vietnam, after the first parliamentary election of the Democratic Republic of Vietnam:

In the judicial reform of 1950, many worker-peasant cadres were sent into the courts in the capacity of People's Assessors; another aspect was the unification of the regular courts with the military courts, and these courts tried the political cases.¹²

After reunifying the nation in 1975, the CPV continuously carried out development of the socialist doctrines and the centrally planned economy. Most of lawmakers and senior state officials of Vietnam, in that period, were trained in the Soviet Union and Eastern European nations. The legal system and the role of law were used in a flexible way in order to maintain the autonomous role of the Communist Party. The

¹¹ *History of Ministry of Justice of Vietnam*, available on http://www.moj.gov.vn/p/tag.idempotent.render.userLayoutRootNode.target.n344.uP?uP_root=me&cw_xml=><http://www.moj.gov.vn/mojwebs/GioiThieu_BTP/kyyeu_tpvnam_1.htm#_Toc114545452 visited 22 August 2008.

1980 Constitution was adopted as the first Constitution in both the Northern and Southern regions of Vietnam. All of these Constitutions were direct products of a commanded administrative order system from a single party political regime; for example, state ownership and collective ownership were regulated by the 1980 Constitution as the main forms of economic ownership of Vietnam. Only the Government and the state owned enterprises (SOEs) could perform trade activities with foreign partners and other nations.¹³ Therefore, those constitutions had been strongly influenced by the socialist political notions especially the former Soviet Union and the People's Republic of China. Most main law documents and legal procedures during that period were the rigid copies from the former Soviet Union's legal models. Even though, during the war, the roles and solutions of the Communist Party were more powerful than the state law. Development of the national legal system of Vietnam is regarded as the socialist law which was built on the principles of three columns namely "socialist legality, democratic centralism and collective mastery".¹⁴

In evaluation, since Vietnam declared its independence with the launching of its reform period, the national legal system seems to have rigidly interpreted the Soviet regime in all aspects namely, legal procedures, legal proceedings, legal execution systems, court systems and prosecution systems. In terms of legal education, potential legal researchers, during this period, were educated in the Soviet Union and Eastern European nations. Legal text books in law schools in Vietnam mainly made reference to the Soviet Union's legal system. Even now the concept of "socialist legality", which was borrowed from the Soviet Union's legal regime and was introduced in the Third Party Congress in 1960, is still the main theory of the current legal system of Vietnam.

¹² "Vu Dinh Hoe 1995", cited in Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press, 2008), 10.

¹³ *The 1980 Constitution*, Article 18 and Article 21.

¹⁴ John Gillespie, "Changing concepts of socialist law in Vietnam" in John Gillespie & Pip Nicholson (eds.) *Asian Socialism and Legal change: The dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press at the Australian National University, 2005), 45.

V.1.5 The Legal Reform Era and a Law Based State

When Vietnam decided to embark on the road to economic openness under the banner of a “socialist oriented market economy” in 1986, the country began to reform its legal systems in order to make it more business friendly and the adoption of the 1992 Constitution was a step further in this direction. The 1992 Constitution was amended in 2001 with further provisions designed to progress the country towards economic openness and reforms. The 1992 Constitution had been adopted under the renovation pressures with the main duty of delivering a transformational shift from a centrally planned economy to market driven economy. The concept of a “state” governed by “law” was mentioned for the first time and the role of legislation was placed as a top level of priority, at an even higher level than the Party regulations. The rule of law, the role of the Communist Party, the detailed functions and responsibilities of the legislative, executive and juridical bodies of Vietnam were being clearly classified in the new situation with fundamental reforms as compared to previous versions.

It was in 1995 that crucial reforms were introduced in Vietnam’s national legal system with a view to eventually bring the national legal system up to the level required by WTO members. All legal sectors have been principally reformed in accordance with international trade rules. However, in fact, the legal reforms of Vietnam seem to have had a negative and long lasting influence from the centrally planned economy. The master-plan policies seem to lack a long-term objective, and are therefore puzzling. The history of the feudal state regime has had significant consequences on the current Vietnamese legal system. The application of the “law of the state” and the “village customary regulations” are in parallel existence. The lack of professional policy makers, lack of international knowledge, negative influences from a single party political system and excessive satisfaction and widespread optimism of the Government have all contributed to the restricted reform progress of Vietnam’s legal systems. Even though the Vietnamese Government has completed many matrix reform programmes and action plans under the international sponsor funds, the actual renovation of its macroeconomic development strategy and law regime does not represent its expected performance.

V.2 Vietnam's National Legal Organs

Being a driving factor for national economic reform, from 1986, Vietnam created various action programmes in its legal framework renovation. Under internal economic pressures and international commitments such as international conventions and treaties, regional trade agreements as well as accession to the WTO, a positive transformation of international trade rules, into three pillars, within Vietnam's national legal regime have been made.

V.2.1 The Legislative Power

Pursuant to Article 83 Chapter VI, of the 1992 Constitution:

The National Assembly is the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam. The National Assembly is the only body vested with constitutional and legislative powers.

The National Assembly (NA) is in charge of drawing up and amending the constitutions, laws and decrees as well as the programme of Vietnamese law making. The NA is the organ which decides domestic and foreign policies, the socio-economic tasks, the country's national defence and security systems, the essential principles on governing, organization and activity of the Government, the social relations and activities of Vietnam's citizens. Furthermore, the NA exercises supreme control over all activities of the state, making law and supervising the state management activities of the Government, the Supreme People's Court and the Supreme People's Prosecution.

According to the constitution, the NA should engage its highest role in the national legal regime and provide the proper functions and authority so as to perform its duties. However, in fact, the NA achieves poorly role when comparing its allocated power due to the lack of human resource capacity. NA members are voted nationwide by citizens in public elections. The procedure of election, compulsory qualifications of NA Candidates and other details regarding the National Assembly Election are regulated by the 1997 and 2001 Election Laws. There are 493 representatives in the XII Vietnamese National Assembly (the current tenure); in

which only 25% are full-time representatives which includes representatives from the central level (like Chairman of NA, Deputy Chairmen of NA, Chairman and Vice Chairmen of the NA Committees), other full-time representatives are from the local NA delegations. The part-time representatives normally work for the executive system, judicial system and business sector, with a small number from non-governmental organizations (NGOs), societies and the private sector. Of the 493 NA representatives, 473 have either an undergraduate or post-graduate degree, accounting for 95.94% of the delegates.

The Standing Committee is an elected body of the NA. The duties and powers of the Standing Committee include interpretation of the Constitution and the issuing of ordinances on matters assigned to it by the NA. The Committee also supervises the implementation of the Constitution, and other legislation and activities of the Government which includes the Supreme People's Court, the People's Inspectorate General and also guides the activities of the People's Councils. The Standing Committee conducts the routine tasks of the NA in-between sessions. The Office of the NA is responsible for all research and services for all activities of the NA.

The Constitution plays the highest power role in the national legal system. All Legal Normative Documents (LNDs) must be consistent with the Constitution and the LNDs issued by lower state organizations are not allowed to be inconsistent with documents issued by higher state organs. In the case when a LND contradicts the Constitution or higher LNDs, the higher state organs will appeal/and or suspend this LND.

System of Vietnam's Legal Regime¹⁵

The System of Vietnam's Legal Regime is illustrated in Table 2.

¹⁵ The 1996 Law on the Promulgation of Legal Normative Documents (as amended in 2002).

Table 2. System of Vietnam's Legal Regime

Legal Documents	Promulgated Organizations
Constitution, Laws and Resolutions	The National Assembly
Ordinances and Resolutions	The National Assembly Committee
Orders and Decisions	The State Presidents
Resolutions and Degrees	The Government
Decisions and Directives	The Prime Minister
Decisions, Directives and Circulars	The Ministers and the Head of the ministerial level agencies
Resolutions	The Justice's Council of the Supreme People's Court
Decisions, Directives and Circulars	The Chief Justice of the Supreme People's Court and the Chief of the Supreme People's Prosecution
Joint Resolutions and the Circulars	Between state agencies; between state agencies and socio-political organizations
Resolutions	The City/Province People's Councils
Decision and Directives	The City/Province People's Committees

The President of the State

The President is the Head of State and is the representative for Vietnam's internal and external affairs. The President is elected by the NA from amongst its members.¹⁶ The working term for each President follows the five year working term of the NA. When the term of a legislative of the NA expires, the President of the State shall

¹⁶ Article 101, The 1992 Constitution.

remain responsible until the new legislative of the NA has elected its new President.¹⁷

The Vice President of the State is also elected by the NA representatives. The Vice President helps the President in the conduction of his duties, and acts as President in the event that the President can not discharge his duties for a long period of time. In the case of vacancy of the position of President, the Vice President shall serve as acting President until the NA elect a new President.

V.2.2 The Executive System

The Government

According to the 1992 Constitution, the Government is the executive organ of the NA and the highest organ of the state administration. It carries out overall management of the political, economic, cultural, social, national defence, security

¹⁷ Article 103, The 1992 Constitution

The President has the following duties and powers:

To promulgate the Constitution, law and ordinances.

To assume command of the people's armed force and the position of Chairman of the Council for National Defense and Security.

To recommend to the National Assembly the election, removal or dismissal of the Vice president, the Prime Minister, Chief of the Supreme People's Court, and Chief of the Supreme People's Prosecution.

To appoint, remove and dismiss Deputy Prime Ministers, Ministers and other members of the Government on the basis of resolutions of the National Assembly.

To proclaim decision on declaration of the state of war, to sign decrees granting general amnesties on the basis of resolutions of the National Assembly.

Following resolutions of the National Assembly's Standing Committee, to proclaim decision on general or local mobilization; to declare a state of emergency; in the case where the National Assembly's Standing Committee fail to convene, to proclaim a state of emergency in the whole country or in localities.

To recommend to the Standing Committee of the National Assembly to review ordinances within 10 days of their approval; if these ordinances or resolutions are still approved by the National Assembly's Standing Committee but the President does not concur, they can be submitted by the President to the National Assembly for decision at the earliest session.

To appoint, remove and dismiss the Deputy Chief and Judges of the Supreme People's Court, the Deputy Chief of the Supreme People's Prosecution and member of the Supreme People's Prosecution.

To decide on granting of senior officer's ranks and titles in the armed forces, ambassadorial titles and ranks, and State titles and ranks in other fields, and to decide on conferral of State awards, orders, medals and other honorific State titles.

To appoint or recall extraordinary and plenipotentiary diplomatic representatives of Vietnam; to receive foreign extraordinary and plenipotentiary diplomatic representatives; to conduct on behalf of the State of Vietnam negotiations and sign international treaties, except where they must be submitted to the National Assembly for determination.

To decide on the granting, withdrawal or deprivation of Vietnamese citizenship.

To sign decree granting amnesties.

and external activities of the state. Furthermore, it ensures the effectiveness of the state apparatus from central down to grass-roots level; ensures the respect for and observance of the Constitution and the law; promotes the people's rights as masters in national construction and defence; ensures the stabilization and improvement of the material and cultural life of the people. The Government is therefore responsible and accountable to the NA, the Standing Committee of the NA and the President of State.¹⁸

The government is composed of the Prime Minister, the Vice Prime Minister, the Cabinet Ministers and other members. The Prime Minister is responsible and accountable to the NA, the Standing Committee of the NA and the President of State. The Prime Minister is required to be a member of the NA; however, other members of the Government are not required to be members of the NA.¹⁹

The Government is the main body in charge of ensuring the implementation of the Constitution and the law by the state offices, economy, social organizations, armed forces units and citizens. It is also responsible for submitting draft laws, statutes and others bills to the NA and the NA Standing Committee. Organizing and directing law dissemination and law education are undertaken by the government. In addition, on behalf of the Socialist Republic of Vietnam, the Government is given the right to negotiate and sign international treaties, except as provided in some cases; to negotiate, sign, accede to and approve international treaties; direct the implementation of international treaties which the Socialist Republic of Vietnam has signed or acceded to; and to protect the interests of the state and the legitimate interests of Vietnamese organizations and citizen abroad.

The People's Council and the People's Committee

Vietnam is divided into 64 provinces, municipalities directly under central authority, and corresponding units. The provinces are further divided into districts, provincial cities and municipalities. Cities directly under the central authority are divided into

¹⁸ Article 109, The 1992 Constitution.

¹⁹ Article 110, The 1992 Constitution.

precincts or districts and municipalities. Districts are then divided into communes and townships.

The People's Councils are organs of state authority and are elected by the local population. They, on the basis of the Constitution, implement laws and their transcripts for the higher state authorities and adopt resolutions to ensure the strict observance of the Constitutions and laws on a local level concerning: socio-economic development plans and budgets in their localities; national defence and local security; on measures to stabilize and improve the living conditions of the local population, and to fulfil all tasks assigned by the higher authorities including implementing their obligations to the state.

The People's Committees are elected by the People's Councils and act as the executive agency for their respective People's Council. They are the states local administrative bodies which are responsible for implementing the Constitution, law and the regulations that are adopted and resolved by the higher state authorities of the People's Councils.²⁰

V.2.3 The Judicial System

The judicial system of Vietnam consists of the court system, the prosecution division, the judgment enforcement agencies and the public security force. The Head of the Supreme People's Court and the Head of the Supreme People's Prosecution are appointed by the President of the State. The terms of office for both of these Head positions corresponds directly with the five year term of the NA; both positions are responsible to and report directly to the NA. When the NA is not in a formal session, they will be responsible to and report to the Standing Committee of the NA and the President of the State.²¹

The national judicial system is located on three levels: the district, the provinces/cities and the central. The provision of appointments, removals, dismissals

²⁰ Article 123, The 1992 Constitution.

²¹ Article 135 and Article 139, The 1992 Constitution.

and the term of office of the judge, and the election and term of office of the people's jurors of the court are all determined by the law.²²

According to the 2002 Law on the Organization of the People's Court, Vietnam has six types of courts namely the Administrative, Labour, Civil, Criminal, and Economic Courts; and the Military Tribunal which is a special court for military crimes. At the eleventh NA session, in April 2007, the establishing of Marriage and Family Courts were discussed and resolved. The establishing of an IP Court was also considered due to the pressure of WTO obligations; however, this recommendation is still being considered and will not be resolved earlier than the next NA session scheduled in 2009.

In the Vietnamese Court System, the Supreme People's Court is the highest power authority; it supervises and directs the judicial work of the local Courts and the Military Tribunals.²³ The Supreme People's Court has the right to re-adjudicate appealed cases that have been sent from the Provincial Courts, and they have the power to send cases back to the Provincial Courts with a guide decision from the Supreme People's Court regarding the matter. The judge and the people's jurors²⁴ are in charge of case adjudication, and the final decision will be debated collectively and decided by a majority vote.²⁵

The District People's Court is the court that deals initially with civil, economic, labour, administrative and criminal cases. Appeals for District cases will be sent to the Provincial Court; a Provincial Court is allocated for each province/city. The Provincial Court settles the appeal for District cases, and other cases as the law determines, however they may be escalated to the Supreme People's Court, which is the highest appellate court in Vietnam's judicial system.

The People's Prosecution Authority is in charge of exercising the right to initiate public prosecution and to ensure rigorous and consistent implementation of the law. The system of the People's Prosecution is similar to the Court system. The

²² Article 128, The 1992 Constitution.

²³ Article 127, Article 134, The 1992 Constitution.

²⁴ *Who have the same power as the judges.*

²⁵ Article 131, The 1992 Constitution.

prosecution system is also divided into three levels: district level, provincial/city level and national level (named the Supreme People's Prosecution). A People's Prosecution Authority is led by its chief prosecutor. The district's prosecutor is subordinate to the province's prosecutor and the chief of local prosecution authorities and military prosecution authorities will be under the unified and direct authority of the chief procurator of the Supreme People's Prosecution.

The main duty of the prosecution organ is to ensure that cases are prosecuted objectively and accurately and under the supervision of law implementation.²⁶ The prosecution system supervises the lawfulness of the activities of the law enforcement agency such as the criminal investigations and enforcement of judgments. It is also responsible for the protection of citizens' right.

The Judgment Enforcement Agency is a department that belongs directly to the Ministry of Justice and it is responsible for the effective enforcement of judgments, especially in civil cases. The Judgment Enforcement Agency is divided into 3 levels, similar to that of the Court System, namely the district level, the provincial level and the Department of Civil Judgment Enforcement.

The Public Security Forces are responsible for the security and order in society, from the commune level upwards. The Public Security Forces are divided into two categories, the criminal investigation police and the public order police.

There are some supporting legal institutions that become involved in the national judicial system, such as lawyer association, legal aid centres and grassroots mediation groups.

V.3 The Agenda of Legal Reform and the Record of Achievements

V.3.1 The Role of Law in State Management

From the time of launching the reforms, Vietnam has obtained significant achievements in renovating and developing its national legal system. The most

²⁶ Article 137, The 1992 Constitution.

fundamental achievement is that a basic, but comprehensive, law system has been set up. The role of law has been placed as the main instrument for state administrative activities. From the initial command administrative system, Vietnam has been moving towards a market economy under the improvement of the principle legal frameworks. The rule of law in state management has been confirmed by the Constitution, and the state continues to administer socio-economic development through its law and socialist legality. All of the state's authorities, socio-economic organizations, military forces and all citizens must strictly obey the Constitution and law. The CPV is the directive leader of the state and society; however, all organizations and activities of the Party must operate under the framework of the national law system.

The state apparatus has been reformed and reorganized; the state is now clearly divided into having legislative, executive and judicial power. There has been a gradual improvement in classifying and distinguishing between the state and non-state management functions. The Government's transparency and social democracy have been strengthened and the legal basis for future social development, religions and beliefs, traditional cultures and natural preservation have now been established.

International law has become an important part of the national domestic system through regional and international commitments. Since Vietnam started its WTO accession, Vietnam has signed a numbers of international treaties and is gradually reconciling the regulations into law codes and implementation guidelines. The promulgation of the 1998 Ordinance on Conclusion and Implementation of International Treaties created a new period for legal development in Vietnam. Through the concluding of a number of bilateral treaties and being party to more than 180 multilateral treaties, international commitments and obligations have been facilitating the improvement in the laws. The efficiency and effectiveness of the law and its implementation have gradually strengthened, at the same time, with the dissemination and education of the law.

V.3.2 The WTO Accession and the Reform of Key Sectors of the Law System Development

Since applying for WTO membership in 1995, Vietnam has sought a comprehensive approach to its legal system development. Basic components of the national legal system have been reviewed and established including law making, law implementation and enforcement, legal frameworks, legal education and professional legal training, legal information and dissemination systems. The “law on law-making” has been circulated which instructs a unified process for preparing, making, examining and promulgating laws.

To set a “Comprehensive Approach to Legal Development”, a national programme aimed at setting up a long-term strategy for the development of Vietnam’s legal system was started in 2002 and will last until 2010 with the name of “Assistance for the Implementation of Vietnam’s legal system development strategy to 2010”. This is the Legal Needs Assessment (LNA) Programme.²⁷ This action plan is being chaired by the Minister of the Ministry of Justice and focuses on the legal framework reforms in: the law making process, law enforcement and implementation institutions such as Courts, legal aid agencies, prosecutors, bar associations etc, legal education and training of lawyers, judges and other legal professionals and improving the public education of law awareness. The LNA is responsible for reviewing many areas, including: public comments on draft laws and regulations before promulgation; the impacts of legislations and official instruments after they come into force; legislative draft improvements; codification and indexing of all legislation systems and official instruments; improvements of the wide access of citizens to the national justice system; and publication of the court’s judgments. This programme is an oriented development strategy for The Strategy on Socio-Economic Development 2001-2010 of the Communist Party of Vietnam.²⁸

Together with the LNA Action Plan, the “Public Administration Reform” (PAR) has been established to promote the reform of Government operations and the national

²⁷ “UNDP project of the Government of Vietnam” available on *UNDP* website, <www.undp.org.vn>.

²⁸ Details of the Program can be found at <<http://www.jus.umu.se/Vietnam/frame.htm>> visited 10 January 2009.

legal system. The PAR is in charge of reviewing: public comments on draft laws and regulations before promulgation; the impacts of legislations and official instruments after they come into force; legislative draft improvements; codification and indexing of all the legislation systems and official instruments; improvements concerning the wide access of citizens' to the national justice system; and the publication of the court's judgments.

In order to reconcile the WTO obligations into the country's legal framework, the NA has promulgated and taken further discussions on all law codes that implement the WTO agreements and accession commitments into the Vietnam's legal system. These commitments were the "highlight, active, and different from all previously acceding members".²⁹ During the negotiations, the 29 law codes and legislative acts that covered the WTO commitments were revised and promulgated. These legislative acts implemented the country's commitments to access the international trade system. In terms of legislation, Vietnam's national legal system has been recognized as being one, of only a small number, that has fully complied with the WTO obligations before formally becoming a WTO member. Vietnam was named as one of the twelve countries that have successfully implemented the full WTO obligations into their national comprehensive legal system.³⁰ This was a significant endeavour of the Government and the NA of Vietnam; it was, however, also a big challenge for Vietnam with regards to Vietnam's low levels of economic development and citizen knowledge.

V.4 Development Challenges Ahead

The WTO commitments and signed international treaties have greatly contributed to Vietnam's legal transformation in terms of complying with the compulsory international legal standards. The legislative system and enforcement sphere have been upgraded under the driving factors of the global economy and the internal

²⁹ The statement of the Chief Negotiator of Vietnam at the 10th session of the Working Party on the Accession of Vietnam to the WTO, Geneva, 15 September 2005, visited 6 December 2005.

³⁰ Statement of Mr. Luong Van Tu, Vice Minister of Trade and Chief Negotiator, available on <www.wto.org> <http://www.wto.org/english/news_e/news06_e/acc_vietnam_27march06_e.htm> visited 26 May 2006.

efforts of the Vietnamese Government. The “roles of law” have gradually replaced the rigid administrative orders of the previous centrally planned economy. Although there is broad agreement that Vietnam has achieved great successes in reforming and developing its legal system since the launching of the reform policy, Vietnam’s law system is still inadequate in both its legislative capacity and enforcement systems. Complexity and inconsistency are named as the main shortcomings of the national legal framework. Shortages in highly qualified human resources, capable in law making, law implementation and in the judicial system, are proving to be problematic for the Vietnamese national legal regime. A lack of lawmaking qualifications and a weak judicial system are challenging the success of the legal transformation.

V.4.1 The Role of Legislative Power, the National Assembly Capacity and the Quality of Law Making

The shortcomings concerning the real role and authority of the NA have been indicated as “a key continuing problem”,³¹ during Vietnam’s twenty years of reform. In Vietnam’s law making regime, the NA is in charge of legislative power; however, the separation between legislative, executive and judicial body is not clear. For example, the law codes promulgated by the NA provide only a general legal framework. The details of law is drafted, guided and implemented by the Government and Ministerial level organizations. The Government has spent large amounts of time drafting the laws as well as issuing and then implementing the legal documents. Moreover, in circulating the law codes, the implementing organizations were identified however no deadlines for issuing the implementation of the legal documents were ever introduced. As a result, many law codes are in legal force, but they cannot be enforced because the legal documents for implementing them have not yet been issued by the relevant executive organizations. For example: the Criminal Law Code came into effect on 1st July 2000, however only 14 out of the 24 secondary legislative orders were implemented; and the Civil Law Code came into

³¹ Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press, 2008), 25.

force on 1st July 1996, but, until 2005, 20 secondary legislations had still not been promulgated.³²

According to the Constitution, the role and authority in supervising the Government's activities was set as a top priority of the NA; however, in fact, this power remained at a symbolic stage throughout the reform period and until Vietnam concluded its WTO negotiation. The responsibility for the state audit activities can be highlighted as a significant example of the overlap of state management functions in Vietnam. The State Audit of Vietnam was an executive institution of the Government between 7th November 1994 and 1st January 2006. Their function was to audit the government's budget expenses of all government administrative levels, government project programmes and SOEs. The audit results were then reported to the Government and the NA.³³ This meant that an executive branch played the role in supervising the Government; their results were then submitted to the Government itself. As a result, the real roles, functions, responsibilities and detailed audit activities from the State Audit were all dependent on the Government's direction. Those allocated with state power represented a potentially absurd case of the Vietnamese state management regime. With thanks to the drive of global economic integration, a new Law on State Audit was adopted and took effect from 1st January 2006. The State Audit is a government auditing agency which submits auditing reports to the NA. The State Audit was established by the NA; however, it is an independent organization that is subjected only by the law.

In addition, the cooperation between the state organs that are responsible for law drafting, law promulgation and implementing legal documents are not clear. Even though, a bill was advised and reviewed by all related state organs; in fact it can still overlap with other bills that were drafted by different state organs. Furthermore, in some cases, the secondary legislation sometimes contradicts the primary legislation. Many items of legislation did not reach the international standards, due to the lack of

³² The NA's Representative, Mrs Duong Thi Loi, Representative for Bac Giang province, spoken on the 8th NA meeting 23rd November 2005, available on <www.vietnamnet.vn.chinhtri/2005/11/515012/>.

³³ History of the State Audit of Vietnam, available on <<http://www.sav-gtz.org/index.htm>> visited 1 September 2008.

international information and professional legal knowledge, especially in: Law on Enterprise; Law on Land; and Law on Investment; and Law on Intellectual Property.

The law-making process is still not codified as a result of the fact that the NA are not only responsible for legislation, but most of the NA representatives are concurrently leaders in the state organs; consequently some of them lack time and professional knowledge for law making activities. Only 121 of the 494 NA representatives work full-time in that role. Their main responsibilities are for the discussion, evaluation, and modification of the final bills before they are formal submitted to the plenary NA session. The small group of full-time representatives encounter many difficulties in fulfilling their duties. In an informal meeting in August 2005, Mr. Nguyen Van An, the Chairman of the NA said that around 90% of NA members had not, as yet, worked with their full capacity.

In fact, the formal meeting sessions of the NA are too short and do not provide enough time to complete the law making requirements. In the NA's legal framework, plenary meeting sessions are held twice a year; each session last around 30 days, and approximately two-thirds of the time is spent on law making. Normally, around 15 bills would be commented, discussed and promulgated at each of the plenary meeting sessions.

Large amounts of legislation do not reach the international standards, due to the lack of international information and professional knowledge of the people drafting them. The lack of a highly qualified workforce, in law drafting, is considering as a fairly serious problem for the development of Vietnam's legal regime. In a recent interview, a chairman of a Vietnamese law firm said that, nowadays, it is very difficult to find Vietnamese lawyers nationwide who have adequate expertise in international law, English or with any foreign language qualifications, and that are experienced enough to deal with international disputes.³⁴ With an ambitious target in law making under the WTO accession, the NA representatives could not afford to spend an appropriate amount of time on the international laws. Regarding the working environment and the technical assistance facilities required by the NA, such

³⁴ *Interview with Mr. Nguyen Tran Bat, Chairman of Invest Consult Group on Vietnam Net*, available on <<http://www2.vietnamnet.vn/baylenvietnam/2006/12/645861/>> visited 27 December 2006.

as computers, internet access, reference documents, and information systems; Vietnam's NA representatives are lacking these necessary supports and resources.³⁵

V.4.3 An Inconsistent Law Making Regime

It is broadly considered that "Vietnam had made enormous progress in terms of developing its legal framework"³⁶ under the pressure of the WTO membership, but the law making techniques remain in a confusing state. Strongly influenced by the state management policies, "Asking – Permitting", Vietnamese lawmakers have applied rigid command approaches to the law. Many of the problems impacting lawmaking progress have not been resolved during the 20 years of reform. In reality, law codes seem to provide a guide law system rather than a detailed implementing legal framework. Some particular law codes were considered as political resolutions or moral declarations. The Youth Law Code, passed on 29th November 2005, presents a typical example. Concerning the responsibilities of the state, social organization and family to the youth, article 4 states:

Youth is the future of nation, a great social force, significant potentiality, and leading role in the construction and protection of the country. Training, cultivating and promoting for the youth development are the duties of the Communist Party and the state...

A similar situation is concerning the rights and obligations provisions, article 9, chapter II states: "Young people have a same right in study... Must have a positive attitude in study..."

There are many similar articles that not only regulate a general moral norm, but are also impossible to implement, such as: the parent must provide a good environment in both social and economic standards for young people to develop (article 29); the parent must prevent their children, aged 16-18, from homeless, dropping out of school, breaking the law and other similar actions.

³⁵ Interview with a NA Representative, Prof. Nguyen Lan Dung, available on <<http://lanhdao.net/leadership/home.aspx?vnnid=923386>> visited 14 April 2007.

³⁶ The World Bank, "Vietnam Aiming High: Vietnam Development Report 2007", Report No 38064-VN, 154.

It is fair to say that these articles could not be in reality legal, in terms of their enforcement power; even many NA delegates broadly agreed that it was not truly necessary to draft, adopt and implement the Youth Law Code 2005.³⁷ However, under the political pressures, this code was passed and it is now playing a small role in the social life of Vietnamese people. In this respect, many unrealistic legal documents are in existence in the national legal system and are consequently creating significant obstacles to the conduct of law strengthening in Vietnam.

V.4.4 Socialist Legality Theory and Status Quo “One Law Code and Plenty of Guiding Documents”

With an enormous ambition to transform the legal system from administrative orders to a national law system with market driven international rules, Vietnam introduced the concept of Socialist Legality in which law plays the highest role in the conduct of socio-economic activities. However, the national legal reforms are still in a challenging situation. The limits from the lawmaking approach have led to the issuing of a huge number of unnecessary guiding documents from ministerial agencies and local authorities. The large numbers of implementation documents indicate the continuing challenge to Vietnam’s legal regime. A passed law code provides only the general framework, and it then needs to be guided by plenty of secondary normative regulations. According to Dr. Nguyen Dinh Cung,³⁸ there are more than eight pages of an implementing document for an average page of law code, the rates are varied, but, in the land law area the rate is 19.5/1, whereas it is 12.5/1 in construction law and 8/1 in investment law. At present, there are around 200 law codes, 100 ordinances and more than 10,000 implementing documents in Vietnam’s legal system. Throughout the laws, from the highest law code level to the guiding documents, coexistence and overlap are popular problems.³⁹ With 26 different types of normative legal documents being issued by various state

³⁷ *National Assembly delegate’s opinions during the law drafting*, available on <<http://vietnamnet.vn/chinhtri/doinoi/2005/03/403757/>> visited 3 September 2008.

³⁸ A prominent lawmaker and legal researcher, Head of Research Department on Macro Economic Policies of the Central Institute for Economic Management of Vietnam.

³⁹ Viet Newspapers, available on <<http://vietbao.vn/Chinh-Tri/Viet-Nam-dang-hon-nhien-lam-luat/20777935/96/>> visited 6 September 2008.

authorities and governmental agencies, coherence and unification between all of these documents is not realistic.⁴⁰

This situation is as a result of an inadequate process of law making strategy. On the one hand, Vietnam is pushing for global economic integration and a free market economy; on the other hand, Vietnam is retaining their single party political system with its rigid command application. Political resolution and government policies came into effect prior to the adoption of law; thus reducing the objective existence of law. It leads to the fact that a law code seems to be a political resolution and can work only with a number of guide regulations. Therefore, the observed overlap and coexistence is a consequence of the current law making system.

V.4.5 Conflict between Central and Local State Legal Normative

Documents

With the targets for improving the socio-economic infrastructure and growth development of cities and provinces, the local government authorities promulgate many LNDs that are not always uniform with: the national law codes, the central LNDs, or with other local governments' LNDs. The most disputed areas, with many LND conflicts, are the investment attraction policies and tax policies. Each province circulates some particularly favourable conditions for their investment attractions. For example, exported taxes and exported bonuses for enterprise are a sensitive element in LND issuing. Several years ago, many local governments (Hai Phong city, Quang Nam province, Quang Ngai province, and Binh Dinh province, to name a few) promulgated export bonus policies (from 3% to 5% of total exported tax) for those enterprises that made export procedures through their custom authority and paid the exported tax for their local budget. This type of LND contradicts with the legal framework of the Law of the State Budget.

Conflicts between local state policies are common and are even expected within Vietnam's national legal system. The monopoly of the Ministries and local Governments remain strong in the law making of Vietnam; and it therefore creates

⁴⁰ The World Bank, "Vietnam Aiming High: Vietnam Development Report 2007", Report No 38064-VN, 155.

an unfair competitive environment for attracting nationwide investment and breaks the uniformity of the national legal system.

V.4.6 A Complex and Inconsistent Legal Framework

Different interests from governmental levels, provinces and SOEs, in a system not properly supervised by the NA, have created many controversial problems in the enforceability and consistency of LNDs. The overlap of local LNDs and Ministerial LNDs is one of the main reasons for the complexity and inconsistency of Vietnamese law. According to the 2002 law on the Issuance of Legal Documents, Ministries and Ministerial Agencies that are linked with particular fields of law are responsible for the drafting of these respective bills. In order to utilise the state management power, the draft law committees of each agency insert more favourable conditions in the drafting of the LNDs that they are responsible for. Thus, in many related law codes, the state power management regularly overlaps between the different Ministries and Government Agencies. To illustrate, in the drafting of the Real Estate Property Bill, the department in charge of property registration is the Ministry of Justice. However, in the current Law on Land, the registration for Land Using is a responsibility of the department of the Ministry of Resource and Environment. Therefore, if the Real Estate Property Bill is promulgated as the drafting, there will be two state management organizations that are in charge of the registration of real estate property.

The WTO obligations, regional trade agreements and bilateral agreements have placed considerable pressure on the law making schedule. LNDs are drafted and issued at many different stages, in recent years a large number of LNDs have been created.

To meet the WTO accession schedule, many primary law codes and secondary LNDs have been issued, in a short period of time. Without adequate time for researching and drafting, and without participation and reference from citizens and international legal experts, the real picture of Vietnam's legal development is that it is incomprehensive and inconsistent.

V.4.7 Judicial Power and a Weak Enforcement System

With a goal to build a “law-based state”, many radical reforms have been applied to the judicial system during the 20 years of open door policy reforms. The Communist Party, through its resolutions, issued the leading policy on Reforming Judiciary Tasks. Resolution 49 was made in June 2005 by the Politburo of the CPV and the following guiding Resolution 17, in August 2007, on legal and judicial reform, expressed the positive changes in the contemporary court system. Transparency, capacity strengthening, easy access to court proceedings, the role of law and the court system are all urgent and principal transformations.

The court system, like all other state management areas, needed to be renovated. However, the judiciary was evaluated as being the weakest state power of Vietnam⁴¹ in all aspects namely the structure of the courts, their human resource capacity, the role of the barrister and prosecutor in court, and the enforcement system. The court system of Vietnam is conducted by six different courts named the: criminal court; civil court; economic court; labour court; administrative court; and the military tribunals (the military court belongs to the Ministry of Military), all of which fall under the supervision of the Supreme People’s Court. The administrative court, with its functions of judicial review and supervising of government administrative activities, was evaluated as “particularly weak and not able to make judicial review and correction of administrative action.”⁴² A series of blue prints for legal reform, in fact, were performed with poor results.

Quantity and Quality of Judges

A main challenge identified within the Vietnamese court is concerning the quantity and quality of judges, in all court levels. According to article 37 of the 2002 law on the Organization of the People’s Court, judges must be qualified and have as a minimum: a first degree in law; legal experience; and to have successful attended compulsory adjudication training. However, human resources of judicial power are facing serious problems.

⁴¹ *World Bank* “Vietnam Aiming High: Vietnam Development Report 2007”, Report No 38064-VN, p156.

At the tenth plenary session of the NA, the Head of the Supreme People's Court, Mr. Pham Van Hien, confirmed that the Vietnamese court, on all levels, was lacking 1,116 judges. Even though judges were been "collected (employed) without satisfied qualification – Vỡ vét" for the appointment, the number of judges in appointment still remains far from the numbers demanded.⁴³ In many cases, the appointed judges have not qualified the necessary legal knowledge. The concept of a "legal knowledge debt" was introduced in the Communist Party Resolutions and represents the poor performance in terms of the quantity and quality of the Vietnamese judge force. Evidently, the judges are limited in number and in qualification; the target to develop the judicial works efficiently in Vietnam, so far, have not reached a satisfactory achievement level.

A further challenge concerns the professional knowledge and experience of the lawyers, judges and prosecutors. In new fields, such as IP law, and in cases relating to international trade, the judges often lack legal knowledge and experience. There is sometimes confusion in the distribution of their judgments in IP cases,⁴⁴ such as the estimation of the damage caused by IP infringements or general international rule breaking. In addition, the status of the defence lawyer is not yet equal with that of the prosecutor in the court's proceedings. The arguments made by the defence lawyers do not, currently, create a significant effect on the court's judgments.

The Role of the Defence Counsel, Barrister and Prosecution

Inequalities between the judge, the prosecutor and the role of barrister, in court trials, are considered as crucial challenges to the legal reform. The concept of a defence lawyer/barrister is a newcomer to the traditional legal mechanism, even though it was introduced for the time in the French colonial court system. During that period, defence lawyers/barristers played only a small role in court trials because of the

⁴² Ibid.

⁴³ *The Laodong Newspaper*, No 238 dated 28 November 1996, available on <<http://www.laodong.com.vn/Home/Chanh-an-TANDTC-Nguyen-Van-Hien-Vo-vet-de-bo-nhiem-tham-phan-cho-du/200611/12824.laodong>> visited 01 October 2008.

⁴⁴ Dr. Pham Dinh Chuong, Chairman of the National Office of Industrial Property, "Intellectual Property Rights, a fundamental condition to develop a knowledge-based economy in Vietnam". This article was presented in *Building a knowledge-based economy to Vietnam development Conference*, dated 21st & 22nd June 2000.

social attitude of “the King is the son of God” and “the Mandarin is the parent”.⁴⁵ In 1945, only a month after the Independence Declaration, Order 46 was agreed which assigned the role and position of the organization of lawyers in Vietnam’s judicial system. The first lawyers office was established in 1963, in Hanoi, and it belonged to the Supreme People’ Court. The Lawyers Society was operating without a proper legal framework, this changed with the promulgation of the 1987 Ordinance on the Organization of Lawyers (amended later in 2001). Between 31st December 2008 and February 2009, nationwide there were 1,479 organizations that provided the legal services for the country; there were 5,334 qualified lawyers and 2,000 trainees with a lawyer-citizen ratio of 1/20,700, this represents a weak advocate regime.⁴⁶

According to the legal proceeding of the, 1988, Criminal Procedure Code and the Law on the Organization of the People’s Prosecution, 2002, the prosecutor conducts the prosecutions and supervises the judicial works. In principle, during the court proceeding, judges mostly agreed with the sentence which is proposed by the prosecutor. Rather than there being a real debate to determine the status of guilt and an appropriate corresponding sentence, a court trial in Vietnam seems to represent the conclusion of the prosecutor, with a poor performance from the lawyer. Theoretically, at trial, judges, prosecutor, people’s assessors and defence lawyer are all deemed to be equal, independent and subject only to the law; however, the Criminal Code, 1988, also regulates that the judgments must be based only on the dossier.⁴⁷ As a result, the final sentence is generally made based on the prosecutors conclusions. The similar situation occurs in civil cases, the Civil Procedure Code was promulgated more recently (2004) to help progress Vietnam’s legal reforms, in order to pursue their WTO membership. However, it is quite easy to understand why the role of the lawyer was considered as “rubbish” and “wasting time” because of the performance acting in court trials or simply being a legal broker.⁴⁸

⁴⁵ Nguyen Hung Quang “Lawyers and Prosecutors in Vietnam” in Stephanie Balme & Mark Sidel (eds.) *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007), 164.

⁴⁶ News on the *Vietnam Net*, dated 11 May 2009, available on <<http://vietnamnet.vn/chinhtri/2009/05/846958/>> visited 11 May 2009.

⁴⁷ Article 196.

⁴⁸ Nguyen Hung Quang, (n45), 170-172.

Recently, under the pressure of the WTO commitments and economic development, the role of the lawyer has been slowly but positively changing. The number of lawyers has increased and many international law firms have opened their branches in Vietnam.

With the unexpected rapid speed of FDI and international trade when Vietnam concluded its WTO accession in 2007, the legal services in Vietnam were given the opportunity to start over with the founding of the National Lawyers Association on 12th May 2009. However, their works does not yet reach the practice demands; especially, in criminal law, the role of the defence lawyer in court trials has not been improved much. These inequalities in court trials are leading to many problems and challenges, consequently Vietnam must strengthen its legal systems, in particular the criminal formality of the civil cases, unfair legality and ineffective judicial regimes. It is likely that the role of lawyer and procedural progress will remain problematic in many years to come.

Is the Enforcement System still Implemented?

Vietnam's law enforcement system is viewed as being too complex and ineffective. There are many related state ministerial agencies but none of which are effective enough in enforcing the law. The Judgment Enforcement Department, part of the Ministry of Justice, takes the main duty for law enforcement. It is not only a newly established nationwide system, but it has too few officials who have not been granted the specific powers and duties required. The overloaded and powerless status of the enforcement system has been identified as an emergency problem. According to the Summary Conference Report of civil enforcement during ten years under the Ministry of Justice, from 1993 to 2003 and dated April 3rd 2003, one-third of civil cases were not enforced, and staggeringly 40,000 cases had lasted for more than five years. Presently, law making has achieved great progress, however in order to integrate to the required international trade laws the law enforcement system needs to overcome many difficulties which are likely to be very challenging. Until July 2008 only 42.5% of all cases, and 24.72% of pecuniary penalties in civil

sentences, had been enforced. There are 340,000 cases currently waiting to be enforced and these numbers are likely to continue increasing.⁴⁹

These matters are more of an emergency when referring to criminal law as offenders are rarely arrested due to the poor performance of the enforcement forces. Until June 2006, in Ho Chi Minh city, the biggest city of Vietnam with a population of around 5 million, only 1,016 offenders had been sentenced with imprisonment verdicts; however, these sentences have not been enforced.

The ineffective execution of both civil and criminal cases, are having a negative influence on citizens' perceptions of the law and its enforcement. The backlog of judgment implementation in Vietnam has existed for many years, as a consequence of: an incomprehensive legal regime; work overload due to the number of cases – old and new; unclear and unrealistic judgments; and an overlapping of functions and power between different authorities. Passing the implementation responsibility, and lacking the real power and clear responsibilities to implement the legislation are popular situations observed between the related state enforcement agencies.

Similar to the judges' situation, the human resources of the enforcement system are presently lacking, not only in their high standards but also in the number of enforcement officers across most levels of the judicial system, from the central to local departments. Until April 2008, the enforcement force required more than 600 enforcement officers, this recruitment was an impossible task to complete; low salary scales and hard working conditions were identified as the main reasons for this.

The structure, role and reality of the current Vietnamese enforcement system therefore require an emergency review, in order to design appropriate changes in policy. In the words of Mr Nguyen Van Luyen, Head of the Civil Judgment Enforcement Department of the Ministry of Justice, "this stagnation will not be ameliorated without comprehensive reform strategy and breakthrough measures."⁵⁰

⁴⁹ Regular Meeting about of Law Enforcement of Ministry of Justice, dated 21 July 2008.

⁵⁰ The *UNDP* website (n27).

V.5 Further Reforms beyond the WTO Accession

As with many Asian countries, the Vietnamese economy has been developing rapidly. Concurrently, a comprehensive legal framework has been developed as part of the national long-term vision. The implementation of international trade rules and the WTO's legal regime into the national legal framework and the domestic economic system are tremendous achievements for the Vietnamese Government. In exploring, the impacts of international trade law and the influences of WTO membership on the development of Vietnam's economic development and its national legal system, the following changes might be predicted in the years to come.

V.5.1 The Rule of Law in the Socialist-Oriented Market Economy

In concluding the WTO negotiation, Vietnam has completed the main stage of law making and reconciling of international law into their national legal system. However, with similar problems to other transitional nations, dilemmas and obstacles in the rule of law in Vietnam are not likely to be resolved easily, as they are the consequence of the previous command economy, political system and legal traditions. To create an appropriate legal regime for the nation's development and to meet the required international standards, the rule of law and principle targets for legal system development must be clearly determined. The theory of "the socialist-oriented market economy" should be carefully reviewed to identify which concept is most suitable, with the current socio-economic development and international factors, to identify which elements need to be removed from the national development strategy. In practice, law must be the supreme fundamental measure for operating and supervising all areas of state management, political activities, culture, international relations, and socio-economic works. The legal measure is fundamental to the transition of Vietnam from a commanded economy to a market economy. The market economic status will help Vietnam avoid the anti-dumping sanctions from other WTO members and will help expand the international market for Vietnam's products.

V.5.2 Well-Functioning and Strengthening Capacity of the Legal Institutions

Vietnam needs further comprehensive and radical reforms in all area including law reform, beyond the WTO period. 64.5% of the survey participants agreed that reforming the national administrative management system and national legal regime were crucial measures to maximize the opportunities and minimize the challenges facing Vietnam when they became a WTO member. In order to renovate the national legal regime, the NA and the Government would carry out an examination of the legal framework, the lawmaking process, the legal institutions and the legislature implementation. The supporting aspects for the legal regime would all also be reviewed, such as law dissemination, legal professional training, and legal education.

The effect of a socialist legal regime still strongly influences Vietnamese jurisdiction; with an observed overlap of power among the three principle organs of the national legal system of Vietnam, namely the legislature, the executive and the judiciary. A clearer separation, between these state organs, is an urgently required task, in order to strengthen and empower their respective roles in national development. In the legislative branch, the NA must enhance their representatives by changing their working regime. The number of full-time NA members must account for, at least, 50% of the total number of NA members, and they should be paid with a special salary regime as well as having access to other technical and personal assistance.

The process of law drafting and law adoption should be renovated with the foundation of an independent administration section responsible for drafting the law, workers should be highly professionally skilled and earn well-paid salaries. There should also be the establishment of an independent committee of the NA for law review (including bills and law codes). These organizations will be responsible for strengthening the legislative functions and effectiveness of the NA and their operations. The professional law making would ensure the constitutionality, legitimacy and uniformity of LNDs and would improve the quality and effectiveness of the LNDs.

Enhancing the judicial system is presently an urgent task for Vietnam as it was evaluated as being the weakest branch of the national legal regime.⁵¹ Courts are considered as expensive, time consuming and incompetent, especially in economic and trade disputes. Most of the survey interviewees believe that if the court judgments were accurate and fair, then the social attitudes towards obeying the law would be improved.

The number and qualification level of judges, prosecutors and lawyers are critical matters in Vietnam's current jurisdiction. The loss of confidence from citizens concerning effectiveness, transparency and comprehensiveness are crucial issues that need resolving, in order, to strengthen the judicial capacity.⁵² Further training programmes in areas such as international law, international trade law, intellectual property, investment law and international environment law are urgently required for judges, lawyers, prosecutors and state officials, in order, to prepare them for the challenges they will encounter when Vietnam implements the international commitments into their economic development policies⁵³.

V.5.3 Will the National Legal Regime Meet the International Standards?

Although there have been a number of efforts made by the legislative, administrative and judicial authorities, the achievements of the Vietnamese law reform are only the first steps in their integration into the economic world. Building a comprehensive legal system and a strong law implementation strategy were not easy tasks, especially under the weak economy, and facing the complex bureaucracy influenced by the country's feudal past. An awareness of the importance of furthering national economic development, reviewing the current legislation and understanding the real situation of the legal system, researching and legislating all law sectors, in order, to

⁵¹ The working paper 3, April 2000 of the Australia Government Overseas Aid Program: Vietnam legal and judicial development, 15.

⁵² Debates on the Vietnam National Assembly, November 2006, available on <<http://www.vnexpress.net/Vietnam/Phap-luat/2006/11/3B9EFF7B/>> visited 10 February 2008.

⁵³ Experiences from the UK legal system would be applied to improve the human resources for judges and legal officers, more deeply analyses see Clive Walker & John Raine, "The impact on the Courts and the Administration of Justice of the Human Rights Act 1998" Research Programme of Lord Chancellor's Department, October 2002.

Clive Walker & Keir Starmer, *Miscrriages of Justice: A review of Justice in Error* (Blackstone, 1999).

bring them in line with international standards are indispensable tasks of the Vietnamese Government.⁵⁴ In the context of Vietnam's international integration, it is imperative that international trade and investment rules are incorporated into the national legislation. The targets for meeting the minimum standards of international law were not only essentially part of the process of becoming a member of the WTO, but were also part of keeping national development progressing at a realistic speed.

Together with upgrading legislation, the current law enforcement system will be improved by the establishment of a specialized court for newcomers, such as the IP infringements, this will have an increased capacity in the judicial system. A number of judges will be trained nationwide and overseas so that they can adequately handle these foreign involved cases. The border control element of the enforcement system might be separated from the inland control system, and the international co-operation in law enforcement at borders will be set in the national legal system.⁵⁵ These programmes may increase the capacity of administrative agencies in dealing with infringement prevention, especially in trade disputes and IP. Moreover, educational campaigns to: improve public awareness of the WTO trade system will be organized to improve public understanding of the international trade laws; and to provide understanding in terms of what Vietnam has to do and will do in accordance with the WTO accession procedures.

V.5.4 Effective Law Dissemination and the Law Information System

Vietnam's current legal system provides inadequate access to legal information, particularly for the general public; as a result, there is likely to be a limited awareness of the law among the public. People generally lack understanding about the content of the law and how the law could benefit the ordinary citizens; consequently, citizens may be ignorant of their duties to respect and obey the law. Moreover, with more than 30,000 pages of documentation, the WTO's legal regime is a highly complex system even for professional legal researchers. It is not

⁵⁴ Nguyen Dinh Loc, Minister of Ministry of Justice "The Role of legal system development in building a knowledge-based economy", This article was presented in *Building a knowledge-based economy to Vietnam development Conference*, dated 21st & 22nd June 2000 in Hanoi, Vietnam.

⁵⁵ The news of the *Ministry of Trade about the WTO accession action plans of Vietnam*, available on <www.mot.gov.vn> visited 5 August 2005.

surprising then, that over 80% of the Vietnamese population – who are working as farmers, are strangers to law documents in general. It strongly agreed that, a highly effective nationwide law dissemination information system would improve the level of legal understanding of citizens; as its result, law obedience and awareness could be improved and law violations would then be reduced. More than 70% of the surveyed participants recommended, establishing a good law information system and strengthening law dissemination, as the key roles for improving the effective legal enforcement system of Vietnam.

All WTO documentation and special regulations, such as: categorization of trade disputes; trade dispute settlement mechanisms; agricultural tax; and the possible government supports, were introduced through a WTO handbook. This handbook has been distributed via online versions and hard copies to all enterprises, state organization levels, and government agencies. The media (radio, television and most of the newspapers), have recently established a new programme named “Vietnam and the WTO”. This programme introduces the WTO and Vietnam’s commitments by answering questions and giving support.

In principle, Vietnam should gradually apply technology to create a national legal database for all LNDs, executive works, legal procedures and court dossiers, the treaties and conventions that Vietnam are member to, and Vietnam’s regional and international trade commitments. Studying and promulgating the law on law dissemination and law information, at the same time as establishing the national legal information assistance agency, will provide adequate and efficient access to the legal information. Cooperation with regional and international database centres, and legal research institutes, together with enhancing the publication of legal works should significantly improve the information network. Creating internet access to governmental and other state management activities would allow citizens electronic access and would help improve the transparency of state management activities. However, internet access for economically and technically poor citizens’ is not a popular or easy task. Therefore, an appropriately timed and daily dissemination of law information via the mass media, such as the radio and television, is not only cheap but also a more effective method. The Department of Legal Information and Legal Dissemination under the Ministry of Justice should be allocated more state

power, human resource capacity and proper funding. The legal dissemination must be organized on all levels from the grassroots to the central.

V.5.5 Harmonizing National Interests with the WTO Obligations

Within the current Vietnamese national legal regime, there are numerous regulations in which citizen's interests are given preference over the obligations of international rules, for example, in the IP sector. Before the Law on IP came into force (1st July 2006), the Exception provisions in Vietnam's IP law were numerous, in view of what was required under the TRIPS agreement. In the newly promulgated IP legislation, the Exception provisions from the IP rights protection will be amended inline with the TRIPS Agreement and the ASEAN general framework of IP rights protection.⁵⁶ However, with a least-developed economy and the new concept of IP rights protection, Vietnam should provide an IP regime which encourages the greatest benefits for all. In order to promote the country's industry, education and health care systems, some additional Exceptions from IP rights should be granted, such as parallel imports and compulsory licences. Strict, rigid enforcement of the TRIPS Agreement could cause great harm to Vietnam's economic development, as well as to Vietnam's citizens' interests.

Protection and registration of traditional knowledge, folklore and plant varieties are new concepts in both LNDs and social attitudes in Vietnam. Adequate protection has to be achieved to ensure that foreign companies cannot exploit the opportunities of these IP products, especially focusing on the various unique plants which potentially allow Vietnam to be the dominant agricultural nation that it is.

A similar task of balancing the protection of domestic economic development with the foreign investor benefits must be considered very careful, in both law making and law implementation. The investors and their commercial targets are likely to infringe on the host country's laws, if the violations could achieve greater benefits. These disputes occur regularly in some sensitive law sectors, such as labour law, environmental law and tax law. In order to prevent exploitation from foreign

⁵⁶ "Action Plans of the Vietnam Government for the implementation of the TRIPS Agreement to prepare for the WTO accession" unpublished documents of the *Ministry of Trade of Vietnam*.

investors, Vietnam must concretize these provisions to safeguard their public interests in the Vietnamese law codes, legal documents, and bilateral, regional or international trade and investment treaties.

Conclusion

From the enactment of the 1992 Constitution, Vietnam has nearly completed its comprehensive law system, covering most of the main legal aspects of public and private law. Vietnam has included most law subjects that have created the foundation for the national legal system. More importantly, law has become a main state management instrument and “the state administers society by the rule of law and constantly strengthens the socialist legislation”.⁵⁷ A crucial change has occurred and the rule of law is now placed as the highest priority of state management. Vietnam’s political system is still a single party system, with the CPV playing the sole leadership role; however all organization of the CPV must now operate within the national legal framework.

The numbers of laws and legal documents promulgated during the WTO accession are much larger in volume than throughout the war time and centrally planned economic periods. After the WTO accession, in principle and in law making respects, Vietnam achieved the basic standards of a comprehensive legal framework and complied with the international demands. With financial and technical assistance from international organizations and domestic efforts, the legal basis for building a socialist legality have gradually been created at the same time as the establishment of a market economy. The principal state powers named as the law making powers, executive systems and judicial branches have been separately determined; the law making capacity has therefore been strengthened. In general, the integration into international law has created the crucial force for the development of Vietnam’s legal framework.

As a result, Vietnam is now facing a number of significant challenges in their national legal reforms. The challenges for Vietnam are to reconcile the WTO

⁵⁷ Article 12, The 1992 Constitution.

regulations into their domestic legislation, and to maintain that the existing national legal system is not totally driven by a market economy. The socialist economic shift from the former Soviet Union created a command legal mechanism in Vietnamese jurisdiction. For a long period, the national legal system of Vietnam reflected the red-tape manner and subjective management strategies much more strongly than it did the principles of the market economic law. Until the launching of the national reforms at the Sixth National Congress of the Communist Party of Vietnam, the norm of a “law based state” and a “socialist legality” were introduced as a management by law strategy for the country to replace the “moral concepts” system.

Despite the concepts of a “law based state” and a “socialist legality”, which have been mentioned for more than 10 years in the reforms, the completion of Vietnam’s legal framework for the economic development and international trade integration, is still a big challenge. Under the WTO accession obligations, the promulgation of laws and the LNDs of Vietnam have been completed in most sectors with its target being to promote a multi component commodity economy, functioning in accordance with market mechanisms under the management of the state and following a socialist orientation theory.⁵⁸ The function, scope and shape of current legal systems have been changing under the international trade rules and the drive of the domestic market. The fundamental elements of the socialist market oriented legal framework were built on the WTO regulations with various domestic adaptations. During the 20 years of reform, Vietnam has undertaken a legislative and social conception transformation to a “law based state”; however, Vietnam’s legal framework has only just completed the revisions of the existing laws and promulgating new ones. There have been many problems from the centrally planned economic ideologies which still remain in the enforcement system, judicial system, and functions of the legal institutions, as well as the social attitudes of the Vietnamese people.

⁵⁸ Article 15, the 1992 Constitution.

Chapter Six

The TRIPS Agreement and Vietnam's Intellectual Property Law

Introduction

Although, protection of IP was mentioned in Vietnam from 1949, following the ratification of the Paris Convention for the Protection of Industrial Property and the Madrid Agreement on International Registration of Mark on March 1949, intellectual property law is regarded a new phenomenon in the country's legal system and the Vietnamese people's psychology. In the terms of social attitudes, Vietnam's view of IP rights is definitely different from the Western legal tradition in terms of both national legal system and culture in general. Traditionally in Vietnam, intellectual works were not defined as private properties nor was IPRs protection was promulgated in the national legal system. Copying and imitation were not condemned as plagiarism. It was preferred as an accepted learning process and distribution of original works.

When Vietnam applied for the WTO accession, the protection of IP rights had to be enforced in the Vietnamese legal system as a compulsory condition of the WTO membership. The TRIPS Agreement offers three necessary preparation periods to a member state before undertaking its obligations. Vietnam belonged to the second group of countries whose socialist economies are being changed to market economies. This meant that Vietnam had to perform its obligations under TRIPS minimum standards in all aspects of IP rights protection by the year 2000.¹ It was an urgent task for the Vietnamese Government to upgrade the IP legal system. A comprehensive plan to overview the IP rights protection system of country was implemented in 2000. This action program had pointed out the necessary amendments and additions to the current legislation on IP rights protection and improvement of IP management and enforcement. Much legislation in IP rights protection was promulgated. For example, regarding the criminal procedures and remedies that are required in Vietnam under the United State Bilateral Trade

¹ The TRIPS Agreement, Article 65.3.

Agreement and TRIPS standards, the first Criminal Code was passed in 1999 with amendments in 2005 adding more criminal penalties for IP infringements. From 12th to 23rd of May 2003, the 6th negotiation meeting for Vietnam's membership of WTO was held in Geneva. In this negotiation round, the enforcement of IP protection in Vietnam was the main problem under discussion.

With the first Law Code on Intellectual Property protection,² almost all of the TRIPS regime aspects have been governed in the Vietnam IP jurisdiction. Following WTO accession, Vietnam mainly finished incorporating the principles of the TRIPS obligations into domestic IP protection system. However, as with most developing countries, Vietnam is facing the challenge of implementing the compliance aspects of the TRIPS provisions into the national legal system in terms of both statutory law and an effective of enforcement system.

This chapter is designed to examine the historical development of a new organ of the national legal regime, the intellectual property law, in relation to the social attitude as well as the background and current stage of Vietnam IP law. The incorporation of the TRIPS Agreement standards and regulations of related IP conventions into the domestic legal system will be analyzed in the second part. The next part will discuss the shortcoming and challenges ahead in normative legislative documents and enforcement system. Arguments relating to the effects of traditional legal theory and culture on the implementation and enforcement of the Vietnam IP law will conclude this chapter.

VI.1 Historical review of the IP law system in Vietnam

VI.1.1 The concept of IP protection before national unification

The first Constitution of Vietnam, the 1946 Constitution was also the first fundamental law which acknowledged substantive rights in intellectual property. The copy rights and related rights were expressed in Article 10 as follows:

The Vietnamese citizens have the rights to enjoy:

- Freedom of expression
- Freedom of publication

The state was responsible for protecting the lawful rights of citizens. These fundamental rights were further confirmed in Article 25 of the 1959 Constitution: “Citizens of the Democratic Republic of Vietnam have the rights to undertake freedom of expression; freedom of publication ... the State must provide properly conditions for citizen to benefit their rights.” Article 67 of the 1980 Constitution confirmed the same content about the rights of freedom to expression, freedom of publication, and the responsibilities of the State to protect those lawful rights. However, the concept of IP work protection such as copyrights was not mentioned here.

In the current 1992 Constitution, the rights of citizens relating to intellectual works have been expanded by an independent Article 60, which states that

the Vietnam’s citizens have the rights to undertake scientific and technical research and discovery, invention, innovations, technical improvements, rationalization of production, and to engage in literary, artistic creation and criticism and other cultural activities; Copy right and the right to industrial ownership protected by the State.

Related provisions in Article 30 on cultural development, Article 32 on the State investment in the development of culture; Article 34 on State responsibilities on social reserve and the development of the national cultural heritage. Article 38 on State funding for scientific development have been providing the principles for the IP protection system in Vietnam.

The Instruction No 105 on “the organization and management of the movement on innovative and inventive activities of the public” on March 11th 1959 was the first detailed normative legal document on IP law of Vietnam. With the simple idea of promoting innovation activities through research and making proposals and recommendations on development strategies, the Instruction 105 played more of a

² Law No. 50/2005/QH11, 14th June 2005, which came into force 1 January 2006, here after referred

the symbolic role in the history of IP law rather than being a real power in practice. The further Instruction No 07, on January 22nd 1963 established the State Committee of Science who was responsible for master plan policy and general management on innovation and discovery. Degree No 20-CP on February 8th 1965, which promulgated awards for “technical innovations, production rationalization and improvement of the working manners”, was the highest level of IP law during the American war in Vietnam.

VI.1.2 Vietnam’s IP law before the WTO membership

a. The legal normative documents system

After reunification of the nation in 1975, Vietnam introduced the shift to centrally planned economic policy and began to build its legal regime including the IP law sector. In the early 1980s, the industrial property protection started the foundation for a new legal sector in the Vietnamese legal system by Degree No 31-CP, January 23rd 1981 (which replaced Degree No 20-CP), the Regulation on Technical Innovations, production rationalization and invention.³ Apart from regulations on the provision of awards and management of innovative works, the concept of invention protection was formally mentioned for the first time in law. In these provisions, utility solution certificate and patent were the main forms of not only industrial property protection but of all of general IP protection of Vietnam. The National Office of Invention was established one year later and became first state agency covering in IP protection in Vietnam. Degree No 31-CP and the National Office of Invention were the cornerstones for the late system of industrial property protection later and the current national IP regime.

Subsequently, the Vietnamese Government started to build a legislation system for IP legislations in both main areas: industrial property and copyright and related rights. Many normative legal documents in industrial property sector had been promulgated in short period such as Decree No 197/HDBT on Regulations on Trademarks (14/12/1982), Decree No 85/HDBT on Regulations on Industrial Designs (13/05/1988), Decree No 20/HDBT on Regulations on Utility Solutions

as the 2005 IP Law. All law and implementing documents have been updated until 1st May 2009.

(28/12/1988), Decree No 21/HDBT on Regulations on Licensing (28/12/1988), Ordinance on the protection of Industrial Property Rights (11/02/1989).

The protection of copyright and related rights was regulated in law by the Degree No 142/HDBT on the Protection of Copyright (1986), which was replaced by the Ordinance on Protection of Copyrights 1994. This was the time when Vietnam ran a “Doi Moi – Reform” course in economic reform. The Vietnamese economy was moving transferred from the state-planned to a market economy. Much fundamental legislation was issued in this period. IP law developed significantly upon the promulgation of the Ordinance on Protection of Industrial Property Rights.⁴ This Ordinance created the foundation for protection of inventions, utility solutions, designs, trademarks and patent rights. In 1994, a new Ordinance on Copyright was promulgated marking a considerable level of protection in Vietnamese IP law.

Both the 1989 Ordinance on Industrial property protection and the 1994 Ordinance on Copyright protection were amended by one of the most fundamental legislation in IP law,⁵ Part VI of the 1995 Civil Code.⁶ The 1995 Civil Code aims to “ensure the legal rights and interest of individuals and organizations, the interest of the State and the interests of the public, to ensure legal safety and equality in civil relations ... and to promote socio-economic development.”⁷ The major IP law in the 1995 Civil Code focuses on two main areas: Industrial property rights and copyright and related rights. Following the enforcement of the 1995 Civil Code and other implementing legislations, Vietnam’s IP law had developed significantly. In some areas of the current legal system, such as the term of protection for copyright and the inheritance copyright of works in the 1995 Civil Code, Vietnam’s IP law has attained the TRIPS standards. The most fundamental sectors of IP rights were named in the law as copyright, trademarks, inventions, utility solutions, industrial designs, and appellations of origin.

³ Decree 31-CP dated 23rd, January 1981.

⁴ Ratified on 28th, January 1989.

⁵ Stephen Hayward, “Copyright in Vietnam: The new law under the Civil Code” (1996) *International Company and Commercial Law Review* 7(10), 377-379.

⁶ Adopted by the Vietnam National Assembly on 28, October 1995 and came into force on 1, July 1997, then amended by the 2005 Civil Code. All of related IP sectors were affirmed and expanded by the 2005 IP law that mainly reached inline with the TRIPS standards.

⁷ The 1995 Civil Code.

The Main Sections of the 1995 Civil Code⁸

Industrial property rights protection was regulated in Chapter II of the Part Sixth of the 1995 Civil Code from Article 780 to Article 805, and in various secondary legislations. The most important legislation on detailed regulations concerning industrial property was the Decree 63/CP dated 24/10/1996 (amended by Decree 06/2001/ND-CP dated 1/2/2001). The industrial property rights named in the 1995 Civil Code and some provisions of the Decree 63/CP are inventions, utility solutions (including utility models), industrial designs, trademarks (including service marks) and appellations of origin. The geographical indications (except appellations of origin), trade names and the rights against unfair competition are regulated by the Decree 54/2001/ND-CP (dated 3/3/2001) on the protection of industrial property rights to trade secrets, geography indications, trade names and the protection of rights against industrial property – related competition. New plant varieties are also protected by the regulation of the Decree 13/2001/ND (dated 20/3/2001).⁹

Trademarks

The definition of trademarks in the article 785 of the 1995 Civil Code did not cover all general conditions for trademarks eligible for protection under the current IP law system. The 1995 Civil Code simply defined the conditions of trademarks that were being protected as:

Trademark, which consists of the symbols that are used to distinguish goods or services of the same kind made by different producers, is protected under the Vietnam IP law. Trademark can be a word, image, or combination thereof, represented in one or more colors.

Acts that were to be considered as trademark infringements were: using protected trademark as their product's sign, including identical or similar sign on packing/products when importing, selling or distributing goods in the Vietnamese

⁸ Then it is amended by the 2005 Civil Code.

⁹ Vietnam law data on <http://vnlaw.vdcmedia.com/csdl_luatvn.cfm> dated 30/7/2003.

domestic market whose trademark have been protected.¹⁰ The use of trademarks for non-commercial purposes was not considered as trademark infringements.¹¹

Geographical Indications

The Geographical Indication, in the Article 786, the 1995 Civil Code, was defined as a geographical name of a country or locality which identifies a product as originating from that specific country or locality. The geographical indication was protected only when this product originates from a country or locality corresponding to such a geographical indication and this product must have a quality and characteristics mainly attributable to geographical conditions including natural conditions or humane recourse or a combination thereof. The geographical indication must being expressed in words, phrases, sign, symbol or device, is the information on the geographical origins of goods.¹² Any commercial indications that are identical with or similar to protected geographical indications shall be considered as an infringement.¹³

Industrial designs

An industrial design is the shape of a product, expressed by special forms, colors and lines. The textile design shall be protected in the same manner as many other industrial designs.¹⁴ The protection term for the industrial design is 5 years renewable for two terms of 5 years.¹⁵

Invention

Invention is regarded as any technical concept, which is distinguished by having worldwide novelty in terms of the present state of technical development, is non-obvious, and is applicable to various social and economic fields.¹⁶ The protection of

¹⁰ Article 805.3(a,b), the 1995 Civil Code.

¹¹ Article 53.3(a) the Decree No 63/CP.

¹² Article 10, the Decree No. 54/2000/ND-CP.

¹³ Article 19.3 Ibid.

¹⁴ Article 784, the 1995 Civil Code.

¹⁵ Article 9.2.c, the Decree No. 63/CP.

¹⁶ Article 782, the 1995 Civil Code.

invention may be excluded in many special cases, most of them concern to the public interests.¹⁷

Undisclosed Information

The information, which applies to business activities and give its holder advantages over those who do not hold or use such information, shall be protected as undisclosed information. Any act that access this information to obtain approval for doing business or marketing product, especially in pharmaceutical products and agrico-chemical products will be considered as an infringement.¹⁸

Copyright and related rights

Most copyright provisions in the 1995 Civil Code were covered in four sections: General provision; Author's work rights and Owner's work rights; Contract of using works; and rights and obligations of performers, related IP producer organizations.

Section 1 (from Article 745 to Article 749) focuses on general provisions. This section mentions the protection of copyrights for the Author and the Owner of literacy, artistic and scientific works. The types of works that are contrary to Vietnamese politics, encourage violence or depravity, disclose State and Party secrets or misinterpret Vietnamese history are given limited protection under this legislation. These regulations also deny copyright protection to works that propagate violence or wars of aggression, induce hatred, disseminate reactionary, prurient lifestyles, inhuman acts, social vices, superstition or undermine traditions and customs. Any works that repudiate the achievements of the communist revolution, offend the honour of the national heroes or injure the reputation of an organization will be not protected in Vietnam's copyright protection law either.¹⁹

Section 2 (from Article 750 to Article 766) identifies the author's rights and the owner's rights; and the duration of copyright protection. This is the most important section of copyright legislation. This section defines the personal rights and the property rights of the author's works and the owner's works. When the copyright

¹⁷ The protection for invention will be deeply analyzed in the Chapter Seven.

¹⁸ Article 18.4, the Decree 54/2000/ND-CP.

¹⁹ Article 749, the 1995 Civil Code.

and related-rights are infringed, the author and/or the owner can request the relevant state authorities to protect their rights. The copyright and related rights of the author and the owner of the work might be limited in some cases of “fair – use” where the user copies the work for personal use or quotes without diversion from the author’s idea for teaching and other distributed actions.²⁰

Section 3 (from Article 767 to Article 772) provides the details of contracts for the use of a work. The rights and obligations between the author and/or the owner and the work’s user must be detailed in a written contract. The contract should contain reference to the manner of use of the work, the amount of remuneration for the work’s use, the scope and duration of the use and the liabilities of each party in the event of the breach of contract and such other contents as agreed by the contracting parties.²¹

The last section (from Article 773 to Article 779) in the copyright and related rights part stipulates the rights and obligations of performers, producers of cassettes, compact discs, videos, radio, and television broadcasters.

b. The enforcement system

During that period, similarly as the current system, the Vietnam’s IP protection system was enforced by both civil law and criminal law. Apart from plenty of general legal provisions on custom control, civil, criminal and administrative proceedings, the Government had promulgated the particular provisions on criminal and administrative procedures and remedies applying to infringements of IP rights such as the Decree No.12/1999/ND-CP (dated 06/3/1999) on administrative measures which protect against IP violations in the field of industrial property and the Decree No.31/2001/ND-CP (dated 26/6/2001) on administrative procedures in the culture and information sector. In the civil law, when the copyright is infringed, the inspector of the local authority of the Culture and Information Department can compel the infringer to stop the infringement and compensate for the damage suffered. However, this action will only be applied at the infringed rights holder’s request.

²⁰ Article 760 the 1995 Civil Code.

In the 1999 Criminal Code, the crime of copyright infringement producing and trading counterfeiting goods deceiving consumers and untruthfully advertising are regulated in the Articles 131 156 and 168. The crime of infringements upon industrial property rights will be subject to a fine of between twenty millions VND (approximately £800) and two hundred millions VND (approximately £8,000) or to non-custodial reform for up to two years. The infringers will be sentenced to between six months and three years of imprisonment if he/she 'in an organized manner; Committing the crimes more than once; Causing very serious or particularly serious consequences.' The infringements might also be subjects to a fine of between ten million VND and one hundred million VND, bearing a ban from holding certain posts, practicing certain occupations or doing certain jobs for one to five years.²² The State enforcement authorities for these crimes were the local economic police stations, local prosecution authorities and the local criminal courts.

c. The “below the TRIPS standards” in both aspect of the legislation and the enforcement system²³

Even since Vietnam applied for WTO membership in 1995, the development of IP law still stayed below the TRIPS standards until the adoption of the first intellectual property law code in 2005. In terms of legislation, some of the subject matters that require protection under the TRIPS agreement and related IP convention which were still not available in the Vietnam IP legal system included: trade secret; trade names; rights against unfair competition; geographical indications; new variety plants; and layout designs of integrated circuits. Some of the provisions in the copyrights and related rights such as the protection of computer programs and compilations of data; rental rights of phonograms or the right to communication of the dramatic, musical or dramatico-musical, musical works to the public, continued to be omitted from the Vietnam IP law system.

²¹ Article 767&768 the 1995 Civil Code.

²² Article 171, the Criminal Code of the Socialist Republic of Vietnam 1999 (thereafter referred to as the 1999 Criminal Code).

²³ References from the WTO documents on the Vietnam's accession to the WTO including the document <WT/ACC/VNM/21 dated 15 December 2001; Document WT/ACC/VNM/21/rev.2> dated 23 April 2004.

In most other sectors of IP law, there were many exiting shortcomings, for example, the scope of protection of trademarks was more limited than the TRIPS agreement and the legislative regime on the protection of undisclosed information was inadequate. In addition, there was discriminative treatment between the Vietnamese IP owners and foreigners, for example, in the Circular 23TC/TCT dated 9 May 1997 of the Ministry of Finance on “Guiding the collection, payment and management of industrial property charges and fees” the charges and fees for the industrial property protection for foreigners were higher than for Vietnamese owners.²⁴ Moreover, before the enormous legal reform that was passed in order to conclude accession to the WTO. Vietnam was not party to many important IP treaties such as the Berne Convention, the Brussels Convention, the Madrid Protocol, the Phonograms Convention, the Rome convention, the UPOV Convention and the WIPO convention. The lack of interpretation of international law in the domestic legal system had led to crucial repercussions for the improvement of level of IP protection in Vietnam.

In term of enforcement, although Vietnam expressed as their targets an effective enforcement system through civil remedies, criminal punishments and administrative procedures including customs regulations and border control measures, the lack of comprehensive provisions relating to the handling of infringements as well as an ineffective enforcement regime were considered as significant shortcomings of legal provisions relating to enforcement. The capacity of the State enforcement agencies in all human resources and material equipments were also evaluated as being weak. Overlapping function and a poorly organized system were also mentioned as shortcomings of the enforcement regime. Silence in legal training courses and law school programs as well as limits of the public awareness of IP protection perhaps created the poor effective performance of the enforcement system.

Basically, Vietnam’s IP law during this period not only fell below the minimum line of the TRIPS standards but also lacked sufficient effectiveness as Michael W. Smith’s describes, “Vietnam’s intellectual property laws have been called paper tiger

²⁴ The Vietnamese version can access at

<http://203.162.163.40/noip/cms_vn.nsf/vwPrintContent/29B7CE575B43BF2B47256F77000A9615?

law.”²⁵ The main causes of this status were created not only from the incomprehensible legislative sector but also from the weak enforcement system and social awareness in obeying the law. A free-riding attitude in IP work use was a popular point of view among Vietnamese consumers. In addition, the low income of citizens coupled with high demand for IP works had created a paradise for copyrights piracy and counterfeit products in Vietnam.²⁶ As a result, IP work infringement was considered as popular phenomenon.

In terms of legislation, the legal documentation system in IP protection was lacking not only in quantity but also stayed at a low quality level. In the main legal code, the IP protection was regulated by a part of the Civil Code with several guideline documents. The law had provided a general framework about IP works protection including the definitions, terms of protection, the rights and obligations of the IPRs holders as well as the consumers. Unclear enforcement systems included the related State authorities and effective sanctions such as administrative procedures, civil remedies and criminal penalties and were as regarded significant shortcomings of the IP protection regime.

In addition, the professional knowledge of IP law among not only citizens but also in organizations and State authorities also stayed also at a low level. So, it was quite popular situation, in the case of IP dispute, each party can bring the law as understood in their own view even in one dispute case. This happened even with the State authorities of IP protection such as Ministry of Trade, Ministry of Industry, the National Office of Industrial Property and the National Office of Copyright.²⁷ There were a number of IP rights debates in many areas such as Honda, Lavie, Nippon and Foremost in industrial property protection, Nguyen Thi Thu Hue, Nguyen Thi Tuyet

OpenDocument> visited 3 April 2009. The limitations of industrial property protection with patent protection particular will be deeply focused in the Chapter Seven of this research.

²⁵ Michael W. Smith “Bringing developing countries intellectual property laws to TRIPS standards: Hurdles and pitfalls facing Vietnam’s efforts to normalize an intellectual property regime” (1999) *The Western Case Reserve Journal of International Law*, 211-251.

²⁶ Rachel L Nass, “Trading Systems: Vietnam’s Creation of a New intellectual property regime at the inception of the Vietnam – United State Bilateral Trade Agreement” (2001) *Brooklyn Journal of International Law* Vol.27(1) 285-313.

²⁷ Chi Tin “Before into the international economic integration: The Intellectual Property disputes in Vietnam” *Laodong - Labour newspaper* dated 26/4/2003 on <[www.laodong.com.vn/pls/bld/display\\$.htnoidung](http://www.laodong.com.vn/pls/bld/display$.htnoidung)>

in literature and Le Vinh, Tran Tien in music copyright.²⁸ The registered trademark owners were facing the imitations in layout design, label or even exactly registered trademark. For example, Honda manufacturers had faced a number of similar trademarks in the Vietnam market for automobile. Authors also got into similar situations for example the copyright infringement case of Nguyen Thi Thu Hue and the Literature Publication House.²⁹ The Literature Publication House, a well-known publication house in Vietnam, published 10 short-stories of Mrs. Nguyen without her approval. They also did not pay her any author's emoluments and only asked her approval after she had appealed to the Court. Illegal imitation happened in almost all IP sectors in illegal market. With VND 10,000 (approximate 40 pence), a buyer could get an illegal CD or DVD in music, films, game programs. The State authorities in the IP protection enforcement had carried out some campaigns but they had little effect on this situation in short term.

While the normative legal documentation system of Vietnam in IP law achieved a considerable advance, its enforcement provisions were in difficult situation as, in fact, Vietnam did not have a good general law enforcement system at that time. Meanwhile the TRIPS agreement requires a very high standard in a comprehensive enforcement system. For the implementation of the 1995 Civil Code, many guiding documents had been issued and relevant administrative agencies that were responsible for the enforcement had been established such as the Department for Copyright of Literature and Art (established in 1987, now called as the Copyright Office of Vietnam) which belongs to the Ministry of Information and Culture; and the Department of Invention (established in 1982), a precursor of the current National Office of Intellectual Property of Vietnam, which belongs to the National Committee of Science and Technology in 1982. These were the main government agencies in charge of the basic responsibilities for the IP enforcement system in Vietnam.³⁰

²⁸ Ibid.

²⁹ Started from the end of 2002 available at <www.vnexpress.vn>

³⁰ More information and historical development of the National Office of Intellectual Property of Vietnam and the Copyright Office of Vietnam available on <<http://www.noip.gov.vn/>> and <<http://www.cov.gov.vn/English/home.asp>>

Thus, it is a broad conclusion that as a transition nation with a very low level of economic development and social education, applying reasonable levels of protection of IP in Vietnam during this period seemed to be an impossible task as “the public does not obey and the government does not enforce.”³¹ The concept of intellectual property and its protection by law was a stranger in social attitudes. So, even though Vietnam had applied both administrative remedies and criminal penalties to the IP infringements, in fact, using illegal IP products were popular in Vietnam.

VI.1.3 The TRIPS standards and the requirements under the BTA with the US

a. Law and regulation standards

The Bilateral Trade Agreement with the United States (signed in July 2000, here after referred as the Vietnam – United States BTA) was the most important reason for developing Vietnam’s IP law both in law making and effectiveness of enforcement system. In the Agreement, as a fundamental rule, the Parties pledged to provide an adequate and effective protection and enforcement of IP rights by bringing the IP international standards to national law. Vietnam must adopt the international conventions in IP rights protection in an atmosphere of free trade and competition with the most powerful economy in the world. Thus, soon after the Vietnam – United States BTA was ratified by the Congress of the United States and the National Assembly of Vietnam, Vietnam undertook to ensure full compliance with TRIPS in all areas of IPRs protection within 12 months to 30 months, depending on specific area. In copyright and related rights protection, the time in which Vietnam had to implement fully its obligations was 18 months after the date of this agreement came into force.³² As a principle, Vietnam and the United States must provide in their territory the national treatment for citizens of the other country. It means that Vietnam treats the US citizens no less favorably than it treats Vietnamese citizens with regard to the acquisition, protection, enjoyment and enforcement of all IP rights and any benefits derived there from. Vietnam can not, as

³¹ Michael W. Smith (n25) 241.

³² Article 18 (1) The Vietnam – United States BTA.

a condition of according national treatment, require IP rights holders to comply with any formalities or conditions (including fixation, publication or exploitation in the territory of Vietnam) in order to acquire, enjoy, enforce and exercise rights or benefits in respect of copyright and related rights. Vietnam must protect all works that embody original expression within the meaning of the Berne Convention. In particular, Vietnam must provide protection on: all types of computer programs that are literary works within the meaning of the Berne Convention and compilations of data or other material (excluding the data or material itself) whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations.³³

Under the Vietnam – United States BTA requirements, Vietnam’s copyright protection law should be improved to the standards of IP international law. Those copyright and related rights as enumerated in the Berne Convention must be provided to IP rights holders in Vietnam legal system. The terms of protection of a work is also based on the terms of protection in the Berne Convention. For example, Vietnam has regulated that where the term of protection of a work is to be calculated on a basis other than the life of a natural person,³⁴ the term shall not be less than 75 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 25 years of from the creation of the work, but not less than 100 years from the end of the calendar year of the creation of the work.³⁵ Similarly to the protection requirements in copyright and related rights, the obligations of industrial property rights protection and other areas of IP protection in the Vietnam – United States BTA are regulated in line with the standards of the TRIPS requirements.

b. The Enforcement System

According to the Vietnam–United States BTA, the Vietnamese IP legal system is required not only to promulgate much inline with the TRIPS standards but also to improve the enforcement system of IP rights. Vietnam has to provide effective

³³ Article 4(1) The Vietnam – United States BTA.

³⁴ In term of protection on the basic of the life of a natural person, the 1995 Civil Code, the IP rights are protected for 50 years after the death of the author.

³⁵ Article 4(4) The Vietnam – United States BTA.

actions against the infringement of IP rights. These procedures have to include expeditious remedies to prevent infringement and remedies substantial enough to deter future infringement. This enforcement system has to be applied in a manner that does not create barriers to legitimate trade, but contains effective safeguards against abuse. The enforcement procedures must be fair and equitable, not unnecessarily complicated or costly, nor entailing unreasonable time limits or unwarranted delays.³⁶ All sectors of specific procedural and remedial aspects of civil and administrative procedures, criminal procedures and remedies and enforcement procedures at the border must be applied in details in Vietnam's enforcement system.³⁷

VI.2 The TRIPS agreement and a new IP protection regime in Vietnam

Without the reform demand from the WTO membership, the IP protection regime of Vietnam would have continued to stay in a weak and incomprehensive status for a long period. Vietnam started to set up the main legal instruments and enforcement system for the protection of intellectual property from the time Vietnam applied for WTO membership in 1994. It began with a review of all existed IP legal documents and amendments by a potential part of the Civil Code 1995 and further guides such as Degree No 63-CP (October 1996) on Detailed Regulations on Industrial Property, Degree No 76-CP (November 1996) on Guiding the Implementation of the Provisions on Copyright in the Civil Code 1995, Circular No 3055-TT-SHCN (December 1996) on Guiding the Implementation of the Provision on the Procedures for Establishing Industrial Property Rights and others in IP registration procedures and fee, and the Circular No.166/1998/TT-TC (December 1998) of the Ministry of Finance on Copyright Registration Fees. During the WTO accession, the Vietnamese Government had submitted a detailed action plan for the incorporation and implementation of the TRIPS Agreement.

³⁶ Article 11 (1,2) The Vietnam – United States BTA.

³⁷ Article 15, The Vietnam – United States BTA.

In the 2001 negotiation round, Vietnam had provided a detailed summary on all related law and regulations in the IP legal sector that Vietnam has issued so far in reference with the international IP conventions that Vietnam had ratified. Following the requirement of TRIPS provisions and related international IP conventions in both law making aspect and enforcement system, Vietnam reaffirmed the basic principles of IP protection in Vietnam at the same time by setting up a crucial law making plan. Even though, at the time of applying for WTO membership, there was no independent law code in IP law in Vietnam, the Government had issued a significant number of regulations for example the Decree 54 (March 2001) on the protection of industrial property rights to trade secrets, geographical indication (except appellations of origin), trade names and the protection of rights against industrial property-related unfair competition. The protection on new plant varieties was regulated by the Decree 13/2001. Until the April 2004 negotiation round, no more legal normative document at the decree level were adopted. A few implementation documents had been issued such as the Circular 30/23/TT-BKHCHN (November 2003 guiding the implementation of procedures for invention/utility solutions.³⁸

The pressure to conclude the WTO accession had forced Vietnam into upgrading its national legal system and the IP law sector in particular. In order to answer concerns of other nations relating to IP protection, the first IP law code of Vietnam was urgently drafted and submitted to the NA at the 8th Session (October and November 2005). During the discussion, many arguments on how to reconcile the international IP provisions into domestic law had been reviewed and examined in depth. The Vietnamese lawmakers had wondered whether they reconciled all the TRIPS standards into the first IP law code even though it had not been concluded whether Vietnam would become a WTO member or not. For example, the protection of new varieties of plants was regarded as a compulsory matter of the TRIPS agreement. At that period, Vietnam had not yet signed the International Convention for the Protection of New Varieties of Plants. Before the first IP law code took effect, there were no any legislative documents on the protection of new varieties of plants in the Vietnam IP legal regime. When the first IP law code was being drafted, it was not a compulsory obligation for Vietnam to interpret those provisions into domestic law.

³⁸ The WTO document No.WT/ACCC/VNM/21/Rev.2.

During the discussion, in order to promulgate the 2005 IP law, many NA representatives hesitated at the part relating to the protection of new varieties of plants. The Law Drafting Committee had incorporated the TRIPS requirements on protection of new varieties of plants into the IP law drafting. However, some NA Representatives did not agree with this increased level of IP protection in Vietnam in order to give more favorable conditions for Vietnamese farmers. However, after a long discussion, the first IP law code of Vietnam was promulgated by the National Assembly on November 2005³⁹ with the required TRIPS level of protection of new varieties of plants in Part 4, Chapter XII, XIII, XIV, XV, from article 157 to article 197 (thereafter referred to as the 2005 IP Law). This law code contains 222 articles and is divided into six Parts and eighteen Chapters. In short, the first IP law code of Vietnam was inline with the main international law provisions as well as covering all IP protection sectors as demanded by TRIPS.⁴⁰

Being a member of international IP conventions was recognized as a potential force for Vietnam to improve the level of IP protection in Vietnam. 74.5% of the Survey's interviewers agreed that the TRIPS agreement had played crucial role in strengthening the IP protection worldwide compared with the evaluation of the "Level of Comprehensive of legal system of IP protection in Vietnamese legislative aspect" as being "Fairly incomprehensive" at the time before Vietnam concluded the WTO negotiation.⁴¹ The causes of IP infringement in Vietnam were indicated as including the consumer wanting to save money and the price of lawful IP product being too expensive while the IP law system in Vietnam, including remedies, penalties and enforcement system were weak as well as not being comprehensive nor effective. In addition, there were many objective causes such as the fact that the consumer did not know using the IP infringing product was an unlawful act, or in

³⁹ Law No. 50/2005/QH11 of November 2005 came into force on 1 July 2006, thereafter referred to as the 2005 IP Law.

⁴⁰ Article 3, the 2005 IP law determines the subject matters of intellectual property rights that Vietnam protect as:

‘1. Subject matters of copyright include literary, artistic and scientific and scientific works; subject matters of copyright-related rights include performances, phonograms, video recordings, broadcasts and encrypted program-carrying satellite signals.

2. Subject matters of industrial property rights include inventions, industrial designs, layout-designs of semiconductor integrated circuits, trade secrets, marks, trade names and geographical indications.

3. Subject matters of rights to plant varieties include plant varieties and reproductive materials.’

⁴¹ See the Survey Result in the Appendices.

some cases, they did not know the IP owner or how to ask for permission and pay the royalty.⁴²

In 2006, the Government had issued three implementing decrees for the 2005 IP law named as the Decree No.106/2006/ND-CP dated 22 September 2006 on Administrative measures against violations in the fields of industrial property (hereinafter referred to as Decree No.106/2006/ND-CP); Decree No.103/2006/ND-CP dated 22 September 2006 guiding the implementation of the 2005 IP law on industrial property (hereinafter referred to as Decree No.103/2006/ND-CP); Decree No. 105/2006/ND-CP dated 22 September 2006 (hereinafter referred to as Decree No.105/2006/ND-CP) on detailed regulations implementing the 2005 IP law; and the Decree No.100/2006/ND-CP dated 21 September 2009 (hereinafter referred to as Decree No.105/2006/ND-CP) guiding the implementation of the 2005 IP law on copyright and related right. All of these implementing decrees had been drafted and adopted on the principle standards of the TRIPS agreement and the related IP conventions.

After three years since the first Law code on Intellectual Property came into force and two years since joining the WTO legal system, the protection of IP in Vietnam seems to have developed on the right track. The IP infringement rate, while staying at a high level in comparison with developed nation, is slowly reducing, for example the rate of computer software infringement which stayed at in December 2008 had reduced 10% in comparison with the year 2007.⁴³ The total collection of royalties that arose from the copyrights pertaining to musical works had increased 62% in 2008 in comparison with 2007, which reveal a significant and promising improvement of the protection of copyright and related rights in Vietnam.⁴⁴

In the industrial property sector, the number of filing applications and granted applications also present an encouraging picture since Vietnam concluded the WTO

⁴² See Question 22, page 13 of the Survey Result in the Appendices.

⁴³ Interview of Mr. Emilio Umeoka, President of ASIA-PACIFIC Microsoft on <<http://www.vtc.vn/congnghe/tinhoc/viet-nam-giam-10-ty-le-vi-pham-ban-quyen-/200760/index.htm>> visited 8 April 2009.

⁴⁴ The 2008 report of the Vietnam Centre of Protection Music Copyright on the Vietnam National Copyright Department, available at <<http://www.cov.gov.vn/Vietnam/viewNew.asp?newId=429&rd=20090409vu511>> visited 8 April 2009.

negotiation. The number of filing applications and granted application at present is much larger than at any time from 1981 when the National Intellectual Property Office of Vietnam was established to the early 2000s.⁴⁵ The following are the statistics for the years 2007 and 2008.

⁴⁵ Vietnam Industrial statistic can reference in the Vietnamese version at the NOIP Website, at <http://203.162.163.40/noip/cms_vn.nsf/vwDisplayContent/769D72CC9AF2F54B47257430002FDE5D?OpenDocument> visited 20 March 2009.

Vietnam Industrial Property Statistics⁴⁶

(2007-2008)

Table 3: Industrial Property Filings

Types of Registration	2006	2007	2008	Comparison 2006/2007	Comparison 2007/2008
Patents/Utility Solutions	2,411	3,080	3,484	+28%	+13%
Industrial Designs	1,604	1,908	1,753	+19%	-8.1%
National registration trademarks	23,086	27,074	27,724	+17%	+2.4%
International registration trademarks	4,171	4,920	7,386	+21%	+50%
Geographical Indications	5	4	8	-25%	+100%
Layout designs of integrated circuits	1	1	1	-	-

Table 4: Industrial Property Grant

Types of Grant	2006	2007	2008	Comparison 2006/2007	Comparison 2007/2008
Patent/Utility Solution	739	792	741	+9.6%	-6.4%
Industrial Designs	1,175	1,360	1,337	+17%	-1.7%
National registration trademarks	8,840	15,622	23,290	+79%	+49%
International registration trademarks	3,417	4,422	3,631	+29%	-18%
Geographical Indications	2	7	2	+350%	-71%
Layout designs of integrated circuits	-	-	-		

⁴⁶ Annual report 2008 of the National Intellectual Property Office of Vietnam, the Vietnamese version can access at <www.noip.gov.vn> visited 5 April 2009.

VI.3 Integration into international intellectual property agreements/conventions and the IP protection for foreign nationals in Vietnam

In theory, Vietnam participated in the world IP law system at an early stage by the ratification of the Paris Convention for the Protection of Industrial Property and the Madrid Agreement on International Registration of Marks in 1949. In fact, that participation played only a symbolic role in the Vietnamese law regime in general and the IP law sector particularly as Vietnam was at war from 1945 until 1975, the mission of reunified nation has taken all the time and attention of the Government as well as the citizens.

However, this participation proved the awareness of Vietnam about the concept of IP protection and joining the international system in IP law. Developing from the basic idea of IP protection as the right to “freedom to expression and freedom to publication”, after the nation reunified in 1975, the Vietnam’s IP law was gradually established under the main provisions of the international IP conventions. For instance, in the Paris Convention, industrial property objects are regarded as “patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source/or appellations of origin, and the repression of unfair competition.”⁴⁷ Most of those rights were protected under the IP law of Vietnam even though this system was not comprehensive and adequate at the time. The Decree 63/CP confirmed “the foreign natural and legal persons that are beneficiaries of the Paris Convention have the right to request protection for their industrial property rights in Vietnam and shall enjoy all such rights and be subject to all such obligation as Vietnamese entities.”⁴⁸ The objects that were protected under Vietnamese IP law were also gradually added in order to reach the Paris Convention standards. The protection of invention, utility solutions (including utility model), industrial design, trade mark/service marks and appellations of origin were regulated by the 1995 Civil Code. Then, the protection of industrial property rights to trade

⁴⁷ Article 1(2) the Paris Convention.

⁴⁸ Article 67.1a.

secrets, trade name, related unfair competition, and geographical indications were regulated by the Decree 54/2001/ND-CP dated 3 March 2001.⁴⁹

Vietnam up until April 2009, is a formal party to the following IP treaties:⁵⁰

- | | | |
|----------------------------|------------------|------------------|
| - Berne Convention | entry into force | 26 October 2006 |
| - Brussels Convention | | 12 January 2006 |
| - Madrid Agreement (Marks) | | 8 March 1949 |
| - Madrid Protocol | | 11 July 2006 |
| - Paris Convention | | 8, March 1949 |
| - Patent Law Treaty | | 10, March 1993 |
| - Phonograms Convention | | 6 July 2005 |
| - Rome Convention | | 1 March 2007 |
| - UPOV Convention | | 24 December 2006 |
| - WIPO Convention | | 2 July 1976 |

Since applying for WTO membership, Vietnam's participation in international IP law of Vietnam has been placed at a proper level with the commitment to incorporate all of the TRIPS obligations into the national IP law regime at the date of WTO accession. With the promulgation of first IP law Code in 2005, amendment of the IP related provisions in civil law and being a member of many IP related international agreements, Vietnam was considered as attaining a fully legislated IP law system according to the TRIPS standards without a transitional period for developing nation. From the enforcement of the first IP law code, plenty of implementing decrees, guiding circulars and other LNDs in this sector have been drafted and promulgated in a short period in most of IP areas as well as enforcement regime. The 2007 Publication law code was promulgated to provide a potential supplementary to the relevant legal system.

⁴⁹ Details of the compliance of Vietnam IP law with international IP convention can find on the WTO documents of Vietnam accession on the WTO website.

⁵⁰ Source: WIPO website available on

<http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=185C&start_year=ANY&end_year=ANY&search_what=C&treaty_all=ALL> visited 14 March 2009.

In general, Vietnam has so far participated in principal international IP treaties and conventions and incorporated basically main provisions into domestic protection system by the 2005 IP law code, related IP law codes such as the 2000 Science and Technology Law Code, the 2005 Civil Code, the 2001 Custom Law Code, and its guideline regulations. In case of differences between domestic law and international provisions, Vietnam will apply the treaty legal regulations.⁵¹

The Principles of National Treatment and Most Favored National Treatment

In order to unify and enhance the economic and trade activities between Vietnam and other nations, the Standing Committee of the NA had adopted the Ordinance No. 41-2002-PLUBTVQH10 on “Most Favored National Treatment and National Treatment in international commercial” (which came into force from 1 September 2002 and hereafter refer as the Ordinance No 41-2002), in which the holders of IP rights including foreign individuals or legal person can enjoy the MFN and the NT treatment of Vietnam.⁵² The principle of the MFN and NT treatment of Vietnam is applied on the basis of equality, reciprocity and mutual benefit. In the IP protection sector, the MFN rule allows foreign individuals or legal persons of any one country can get the benefits and conditions of protection which are no less favorable than the treatment Vietnam accords to foreign individual and legal person from a third nation. In relation to the creation, protection and enforcement of IP rights, the NT rule ensured that foreign individual or legal person can get the same benefits and protection condition which are no less favorable than the treatment Vietnam accords to domestic organizations and individuals.⁵³

The scope of applicability of MFN treatment to intellectual property rights are regarded as including the following:

MFN treatment to intellectual property rights shall apply to all types of intellectual property rights which the State of Vietnam protects pursuant to the law of Vietnam and international treaties which Vietnam has signed or to which Vietnam has acceded, comprising:

⁵¹ Article 5.3, the 2005 IP Law.

⁵² Article 2(4) the Ordinance 41-2002.

⁵³ Article 4 and Article 3 (4;8) of the Ordinance 41-2002.

1. Rights of copyrights and related rights.
2. Industrial property rights with respect to patents, utility solutions, industrial designs, trademarks, geographical instructions including appellations of origin of goods, trade names, trade secrets, layout topographic of integrated circuits, plant varieties.
3. Rights to oppose competition deemed unfair by the law on industrial property rights, and other intellectual property rights.

The MFN treatment to intellectual property rights shall not apply to the following:

1. Exceptions to MFN treatment provided for in international treaties which Vietnam has signed or to which Vietnam has acceded.
2. Provisions of law or practical measures which are essential to ensure law enforcement and protection of intellectual property, including requirements for representation and transaction addresses in Vietnam of foreign owners relevant to administrative procedures and trial procedures.⁵⁴

Foreign individuals or legal persons who permanently having business in Vietnam may freely apply for registration of establishment of industrial property rights either by themselves or their lawful representatives in Vietnam. In the case where foreign individual or legal person do not reside or have permanent business in Vietnam, they may apply their application through their lawful representatives in Vietnam.⁵⁵ So, in principle, the contents and procedures of the IP registration in Vietnam have qualified the international standards and conformity in practice for foreign individual and foreign legal person in Vietnam. However, in fact, in the existing IP legal system, Vietnam is providing a considerably different MFN treatment between the American citizens and citizens of other nations. For example, in the Vietnam-United State BTA, Vietnam provided the term of protection for copyright and related rights is not less than 75 years from the end of the calendar year of the first authorized

⁵⁴ Article 13 and Article 14 of the Ordinance 41-2002, with reference to the English translate version of Phillip Fox Vietnam.

⁵⁵ Article 89 the 2005 IP Law.

publication of the work⁵⁶ meanwhile in the IP 2005 Law, the term of protection is not less than 50 years.⁵⁷

VI.4 The substantive provisions of IPRs in the Vietnam legal regime

VI.4.1 Patent law

Patent for invention was the first concept of intellectual property protection in domestic law as well as international treaty ratification in Vietnam. During the war time until the nation's independence in 1975, the idea of IP protection was not mentioned much in the Vietnam's national legal regime. After reunification, patent protection was the first IP subject to be regulated by law in national law system. The Ordinance on Innovation and Invention 1981 was first introduced with most principal provisions on the personal rights. Limitations on the property rights and the using rights belonging to the State were the main rules of the IP law. Instead of both personal rights and property rights belong to the IP owner/inventor, the rights to use inventions were issued by the State Committee for Science and Technology. As he was protected only by personal rights, the inventor met many difficulties in asking for monetary remuneration.

To build on the command economic strategy, those kinds of the nation's leading figures had created crucial obstacles for the research and development as well as for IP law development. As a direct consequence, few Vietnamese citizens invested in the research and development activities. Or, in the cases where they owned the IP subjects; they did not register their ownership rights on the State system. Thus, during this early stage, most of invention registers were from foreigners.

The 1989 Ordinance on the Industrial Protection Rights marked a substantial improvement, as the matter of IP protection was formally regulated in both personal rights and property rights. The protected subjects in that legal instrument were limited as compared with the TRIPS standards. The matters of well-known trade

⁵⁶ Article 4(4) the Vietnam- United State BTA

⁵⁷ Article 27(a), Article 34 the 2005 IP law.

mark, unfair competition, trade secret, geographical indication, and layout design of integrated circuits, that have been covered by the TRIPS Agreement, were not mentioned in this legal document. In addition, the protection time was 15 years instead of the 20 year term in the TRIPS Agreement.

The Civil Code in 1995 and its implementations shaped the legal principles for the intellectual property and replaced all previous IP legal instruments. The IP rights were classified as civil rights and were protected at an appropriate level. The detailed guidelines of industrial property protection in general and patent protection specifically were regulated with the aim of complying with the TRIPS obligations under pressure for WTO accession. The coverage of industrial property subjects was wider and there was compliance with international standards. For example, the term of protection of invention and utility solutions changed to be the same as the term of protection in the TRIPS agreement. The procedures of IP registration were simplified and improved. Proper attention and Action Plans were designed to further IP law making and enforcement system not only in the area of patent protection but in all areas of IP law. Various kinds of penalties, for examples, fines, compensation for the damage of IPRs holders, seizure or destruction of the infringing goods have been applied to infringing acts.

In the year 2005, to advance the WTO accession and complete the IP protection system, Vietnam amended the 1995 Civil Code and promulgated the first law on intellectual property. In accordance with the Civil Code and the 2005 Intellectual Property law, patent protection shall be provided to any technical concept, which is distinguished by having worldwide novelty in terms of the present state of technical development, is non-obvious, and is applicable to various social and economic fields. Vietnam also provides protection for the utility solutions which do not require protection under the TRIPS and international IP conventions. The development and detailed provisions of the Vietnam's patent law will be analyzed in the Chapter Seven of this research.

VI.4.2 Industrial Designs

The meaning of industrial design as defined in the Vietnamese law is “a specific appearance of a product embodied by three-dimensional configurations, lines, colors,

or a combination of these elements.”⁵⁸ Textile designs are also classified as types of industrial designs and were protected under the same regime. The owner of lawful industrial designs as with other industrial property objects, has the right to request the competent State agency to stop the infringements and the right to claim compensation for the damages which were caused by such infringements.⁵⁹ Even though the detailed provisions of industrial design in articles from 750 to 753 of the 2005 Civil Code and Part III of the 2005 IP law are not exactly the same statement as the TRIPS agreement, the content of the Vietnamese industrial design protection was substantially a copy of international IP law.⁶⁰

VI.4.3 Copyright and related rights protection

Vietnam applied the same standards for the protection of copyright and related rights as the Berne Convention and the TRIPS provisions. Copyright protection was provided for literary, artistic and scientific works and that were not contrary to the social morality, public interest or harmful to national defense and security. All original works irrespective of form or language, used for expression and quality of the works are the objects to be protected. The copyright protection starts from the moment of the work was created in a proper material form irrespective of whether or not it is a registered works.⁶¹

When copyright works are infringed in Vietnam, the authors or owners can request the Vietnamese competent State agencies to stop the infringement acts. Fines and/or criminal remedies which depend upon the level of damage will be applied to the infringed legal persons or individual. Until Vietnam concluded accession to the WTO in 2006, copyright protection provisions that included procedures for the acquisition and maintenance of IP rights in Vietnam’s legal system was inline with the TRIPS agreement and the Berne Convention regulation except some following inadequate provisions:

⁵⁸ Article 1.12, the 2005 IP law.

⁵⁹ Article 225; 751 of the 2005 Civil Code and Article 198 of the 2005 IP law.

⁶⁰ The WTO accession report, document WT/ACC/VNM/48, column 419, available at <www.wto.org>

⁶¹ Article 739, the 2005 Civil Code and Article 6.1 the 2005 IP law.

Architecture is not mentioned as a protected work as in the Article 2 of the Berne Convention. In addition, the Article 26, the 2005 IP law provides cases for use of public works that do not required the IPR owner's permission, although royalties must be paid under the guidelines of the Vietnamese Government. Meanwhile the matter of royalties/remunerations under the Berne Conventions and international customs will be set up on the basic of negotiation between the IPR owners and the IPR users. More over, those cases are applied for the "...commercial purposes in making their broadcasts which are sponsored, advertised or charged in whatever form" meanwhile the Berne Convention applies the protection of moral rights and equitable remuneration in any circumstances.⁶² Furthermore, the regulations on the production, exportation and importation of blank CDs are not available yet in the existing IP legal regime in Vietnam.

VI.4.4 Trademarks and services marks

Under the 2005 IP law's definition a trademark, including services marks would be words, letters, pictures, or a combination of such elements represented in one or many colours.⁶³ There are some exceptions which are confusingly similar to national flag; national emblems, flags, emblems, armorial bearings, abbreviations, full names of state agencies and names of various organizations in the socio-political system, names and images of leaders or famous people, whether Vietnamese or foreigner or those marks likely to mislead, confuse or deceive consumers.

During the WTO accession process, Vietnam has consulted the provision of the Joint Recommendation concerning the provisions on the Protection of Well-Known Marks adopted by the Assembly of the Paris Union and the General Assembly of the WIPO. On this basis, the protection of well-known marks in Vietnam is fully consistent with the TRIPS agreement and related provisions of the Paris Convention.

VI.4.5 Geographical indications

Vietnam provides the same protection model for all kinds of geographical indications, including appellation of origin. Protection for geographical indication

⁶² Article 11 bis the Berne Convention.

⁶³ Article 72.

can apply for products that originate and have a reputation, quality or characteristics essentially attributable to the geographical conditions of the area, locality, territory, or country corresponding to such geographical indications. There are some additional protections for spirits and wine designed to increase the level of protection and prevent confusing similarities or the consumer being misled. Under Article 80.2 of the 2005 IP law, Vietnam provides protection only to foreign geographical indications that are protected in their country of origin at the same time guaranteed to apply international treaties provisions in case of a conflict between the TRIPS regulations and domestic law.

VI.4.6 Plant variety protections

Protection for new plant varieties is a new concept in Vietnam IP law as these ideas were mentioned only when Vietnam sought the WTO membership. Until the time when the NA discussed the promulgation of the first Vietnamese IP law code in 2005, many NA delegates had considered whether to regulate the provisions which apply for the protection of plant varieties or delay this protection until Vietnam would conclude the WTO accession. However, aware of the demands for compliance with the IP protection demanding, the Government considered designing a new regime for a level of protection of new plant varieties which are regulated by the International Union for the Protection of New Varieties Convention (UPOV Convention). The main UPOV standards were transferred into the Vietnamese IP law system through article 4.5 and article 6.4 and part IV from Article 157 to Article 197 of the 2005 IP law and Degree No 104-CP in 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 IP law regarding the rights of plant varieties. In principle, having reviewed the present IP regulations, Vietnam has issued a compliance protection with the UPOV system. Even though the enforcement system still is an open problem, the principle requirements from the UPOV on “the filling of applications, the right of priority, the examination of application, the validity and duration of breeder’s rights” were satisfied in the 2005 Civil Code, the 2005 IP law and other further guide documents.⁶⁴

⁶⁴ The WTO accession report, document WT/ACC/VNM/48, column 435 available on <www.wto.org> visited 3rd October 2008.

However, plant variety protection is a new concept in the Vietnam's IP law system, so, in terms of specific provisions, the existing IP legal regime presents a number of shortcomings and adequate provisions as compared with the requirements of the UPOV Convention. For example, in the National Treatment principle of the UPOV Convention, the variety plant protection shall apply:

Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party. For the purposes of the preceding paragraph, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

Article 157 of the 2005 IP law provides for plant variety protection for organizations and individuals including "...Vietnamese organizations and individuals, organization; organizations and individuals of foreign countries which have concluded with the Socialist Republic of Vietnam agreements on the protection of plant varieties...". In compliance with the UPOV regulations, Vietnam should add the organizations and individuals of foreign countries which do not conclude the protection of plant varieties with Vietnam but have permanent residence addresses or have establishments producing or trading in plant varieties in the nation which conclude the agreements on the protection of plant varieties with Vietnam. Similar amendments should be carried out on the regulations in the denominations of plant varieties and the establishment of rights to plant varieties and contents of and limitations on rights to plant varieties.

VI.4.7 Requirement on undisclosed information, including trade secrets and test data

The protection for undisclosed information, including trade secrets and test data are applied by not only the IP law but also by a new Law on Competition (Law No.27/2004/QH11) which deals with unfair competition and infringement of business secrets, including assessing and acquiring information on business secrets of other in procedures for marketing approval of products, using such information for business purposes or for obtaining business related licenses or marketing approval of products, or acting against secret-keeping measures of state agencies.⁶⁵

In the IP law, the requirement on undisclosed information, including trade secrets and test data has been mentioned since 2003 within the industrial property rights protection. Pharmaceutical products and agricultural chemical products are the main areas of undisclosed information protection.

VI.4.8 Layout designs of integrated circuits

Similarly to the various new plant protections, layout designs of integrated circuits is a new sector of the Vietnamese IP law. There are few legal documents concerning the protection of layout designs of integrated circuits except article 4.4, article 4.6 and part III of the 2005 IP law and some related provisions in Decree No103-CP in 1996 which provides detailed provisions and guides for implementing certain articles of the 2005 IP law in the industrial property sector in including the layout designs of semiconductor integrated circuits.

VI.5 The enforcement system

VI.5.1 Civil procedures and civil remedies

In Vietnam, infringement disputes relating to IP rights are adjudicated by administrative, civil remedies and criminal penalties. In fact, as in other nations, most of IP disputes in Vietnam are handled by administrative procedures and civil

⁶⁵ Article 41.4.

remedies which are detailed by the 2005 Civil Code, the 2004 Civil Procedure Code, the 2005 IP law and their guidelines. The civil court at all level, from the district court, is in charge of cases in IP disputes that relate to personal right or remuneration, registration rights, ownership rights or licensing contract transfer rights for the right to use of IP objects. The legitimate rights of legal owner were recognized and protected under the power of the court to stop the infringing acts. Under a court order, other competent government agencies must undertake an appropriate action to ensure the lawful personal rights and property rights for the IP owners. Detailed provisions on compensation and how to calculate the “actual material damages” or illegal profit and “mental damages” that were consequences of infringing acts were determined in both civil law and IP law. Mediation procedures are also provided to the lawful right owner and infringers to handle their disputes by negotiation.

Apart from many general legal provisions on customs control, civil, criminal and administrative proceedings, the Government has promulgated particular provisions on criminal and administrative procedures and remedies applying to infringements of IP rights before the enforceability of the 2005 IP law such as the Decree No.12/1999/ND-CP (dated 06/3/1999) on administrative measures against IP violations in the field of industrial property and the Decree No.31/2001/ND-CP (dated 26/6/2001) on the administrative procedures in culture and information sector. Referring to the demands from the TRIPS standards, a number of implementing regulations have been issued in custom procedures, provisional measures, and special border measures.

VI.5.2 Criminal provisions

In the 1999 Criminal Code,⁶⁶ the crime of copyright infringement producing and trading counterfeiting goods deceiving consumers and untruthfully advertising are regulated in the Articles 131 156 157 158 and 168. The crime of copyright infringement will be subject to a fine of between twenty millions VND (approximately £800) and two hundred millions VND (approximately £8,000) or to

⁶⁶ Available in Vietnamese version at

<<http://www.wicolaw.com.vn/vn/resources/legaldocs/boluat.htm>> visited 20 March 2009.

a non-custodial sentence of up to two years. The infringers will be sentenced to between six months and three years of imprisonment if he/she acts “in an organized manner; committing the crimes more than once causing very serious or particularly serious consequences.” The infringements might also be subject to a fine of between ten million VND and one hundred million VND, and a ban from holding certain posts, practicing certain occupations or doing certain jobs from one to five years.⁶⁷

The crime of producing and trading counterfeiting goods will be subject to a fine of between thirty millions VND (approximately £1,400) and one hundred and fifty millions VND (approximately £6,000) or to a non-custodial sentence of up to two years. The infringers will be sentenced to between six months and three years of imprisonment if he/she acts “in an organized manner, committing the crimes more than once, causing very serious or particularly serious consequences.” The infringements might also be subject to a fine of between ten million VND and one hundred million VND, and a ban from holding certain posts, practicing certain occupations or doing certain jobs from one to five years.⁶⁸ The highest penalty of from 7 to 15 years imprisonment with a fine of from 5 to 10 million VND applies in the case where illegal profit exceeding 500 million VND (approximately £20,000) (Article 156).

The criminal penalty applies for the willful acts of trademark counterfeiting and copyright piracy on a huge commercial scale. Much more seriously, the application of the death penalty for counterfeiting trademarks has raised a big question in the WTO process as the death penalty does not exist in many nations. In the Vietnamese Criminal Law system, the death penalty applies for production and trade in counterfeited products which is of an “organized character” and “causing very serious consequences” to human health such as foods and medicine.⁶⁹ This penalty is harsher than the TRIPS standards but considered necessary to protect public health. The enforcement State authorities for these crimes are the local economic police stations, local prosecution authorities and the local criminal courts.

⁶⁷ Article 131, the 1999 Criminal Code.

⁶⁸ Article 157, the 1999 Criminal Code.

⁶⁹ Articles 156, 157, 158, the 1999 Criminal Code.

The crime of infringing upon industrial property rights is subject to a fine of between twenty millions VND (approximately £800) and two hundred millions VND (approximately £8,000) or to non-custodial sentence of up to two years. The infringers will be sentenced to between six months and three years of imprisonment if he/she acts “in an organized manner, committing the crimes more than once, causing very serious or particularly serious consequences.” The infringers might also be subjects to a fine of between ten million VND and one hundred million VND, and a ban from holding certain posts, practicing certain occupations or doing certain jobs from one to five years.⁷⁰ An infringement will be subject to either administrative remedies or criminal penalties. Administrative measures should apply for the first infringement which is not of a serious gravity. In the case of repeated infringements or with those with more serious consequences, the infringers will be subject to criminal prosecution.

VI.5.3 Noticeable efforts for a better enforcement system

It is a clear that before Vietnam reconciled the TRIPS standards in both legislative sector and enforcement system, the regime of IP rights protection in Vietnam was assessed as a “paper-tiger” mechanism in comparison with the international standards.⁷¹ The public did not obey the IP legislation and the enforcement system lacked effectiveness. The concept of paid royalty IP works was perhaps an unpractical idea in terms of social attitude. Since the early 2000s, to conclude the WTO accession, Vietnam has been aware of the importance of strengthening its IP protection and carried out a number of action plans in improving the capacity of IP enforcement agencies such as advance training courses in the professional knowledge in IPRs for the judges and related staffs in IP enforcement system, an online IP data library which allow IP works statistics to be checked, and a high technology information system in order to provide technical assistance to the State authorities in investigating, controlling and handling the IP infringement have been set up under the international supports. The effective co-operation between

⁷⁰ Article 171, the 1999 Criminal Code.

⁷¹ Michael W. Smith, (n25), 242.

competent State agencies has been enhanced.⁷² The provisional urgent measures include: seizure, distraintment, sealing, a ban from altering the original state, and a ban from movement and a ban from ownership transfer will be able to applied by the court to prevent the consequences of the IP infringements.

The duty of controlling IP works in import-export has been located with the Customs agencies national wide. The Customs office in co-operation with two main State authorities in IP management named as the National Office of Intellectual Property and the Copyright Office implements the special border measures. The Custom agencies can suspend customs procedures to detect goods which have the appearance of IPRs infringements. The detailed guidelines on special border measures such as procedures and obligations for application of the measure of suspension of customs procedures have been provided not only by the 2005 IP law code but also in secondary legal documents such as the Joint Circular No 129/2004/TTLT-BTC-BKHCN of the Ministry of Finance and Ministry of Science and Technology dated 29 December 2004 on special border control measures in respect of IPRs for imports or exports or Decree No.105/2006/ND-CP.

The handling of the IPRs infringement system has also been improved with higher levels of monetary fines, clearer instructions relating to sanctioning competence and more simple procedures with Decree No.106/2006/ND-CP.⁷³ Besides the fixed amount of fine system under previous legal regime,⁷⁴ a new one was introduced and the total fine amount that can be imposed is five times the value of the infringement goods. In the new handling system, a fast track procedure can be applied for the producing or trading in goods bearing counterfeit marks of geographical indication.⁷⁵ A new provision in monetary fines for illegal actions which properly cause

⁷² Annual report 2008 of the National Intellectual Property Office of Vietnam, the Vietnamese version can access at <www.noip.gov.vn> visited 5 April 2009.

⁷³ Can reference at the WIPO website

<http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5012> visited 3 May 2009.

⁷⁴ The Decree 12/1999/ND-CP dated 6 March 1999 in Providing sanctioning of administrative violations in the domain of Industrial property, can reference in the Vietnamese version at <<http://www.dost-dongnai.gov.vn/Portals/0/vanban/nghidinh12cp.htm>> visited 4 May 2009.

⁷⁵ Article 24, the Decree No.106/2006/ND-CP.

obstruction to the State management, inspection, supervision on IP protection has been introduced in this Decree.⁷⁶

Improving the capacity of relevant State agencies in both material equipments and human resource has attracted more international support and attention from the Vietnam's Government. With technical assistance and financial supports from Switzerland and Japan, an IP library system has been set up and came into operation in 2008. The online IP work registration system is being completed and is supposed to come into force in 2009. A monthly official gazette in industrial property right information is published in hard-copy form and on compact disc since January 2008. Legal education and training in Vietnam and abroad for officers and staff who work in related State authorities has been urgently carried out in recently years. In 2008, the European Patent Organization had helped the NOIP in organizing two short training courses in Vietnam. The WIPO, in 2009, in co-operation with Vietnamese related IP management agency and Universities provided some distance training courses in IP protection in Vietnamese. There were 18 domestic conferences in IP law and IP protection held in 2008 with 1,981 participants. In addition, joining international IP protection conferences abroad were also considered as a solution for humane capacity improvement.⁷⁷

Since Vietnam concluded the WTO's accession in 2006, the dissemination in IP protection and IP law has been remarkably promoted nationally. Celebrating the International IP Day 26 April, programs in IPRs concerns on television, newspapers and other mass media are regular activities in order to make the concept of IPRs and IP law can become familiar with the social attitudes. Research on how to set up an independent IP law sector in law schools has been carried out in 2007-2008 and will be implemented properly in the near future.

With a huge number of action plans in strengthening the protection of IPRs under the pressure of the WTO's commitments Vietnam has achieved an encouraging result in improving the effectiveness of its enforcement system. Although slowly, the IP infringement rate has been reducing, for example, the software infringement rate

⁷⁶ Article 11, the Decree No.106/2006/ND-CP.

reduced from 92% in 2004 to 85% in 2008 and is forecast to drop to 83% in 2009.⁷⁸ The IP management State agencies have strengthened their working capacity in all aspects such as the number of staff, material equipments and further education. Knowledge and awareness among citizens, enterprises and organizations of IPRs and IP law are being upgraded. It is a fair assessment that, the enforcement system of IPRs protection in Vietnam is fully established under the compulsory requirements of the TRIPS agreement and the WTO's accession commitments.

VI.6 Challenges ahead

Intellectual property law and its enforcement mechanism in Vietnam are still at an early and weak stage of development. It is clear that, in a very short period, the National Assembly and the Government of Vietnam have issued and implemented enormous legal normative documents in all sectors of the national legal regime. Upon the request of other trade partners during the WTO accession, Vietnam had reconciled all TRIPS related provisions into the domestic system without a transitional period. Vietnam was successful in making a fairly comprehensive law and guided documents, however, in contrast to the achievement of law making, weak and inadequate enforcement mechanism is indicated as a crucial challenge of IP law sector.⁷⁹ 62.5% of the Survey interviewers agreed that "the IP infringement in Vietnam is very popular and everybody uses the infringed IP products."⁸⁰ A main cause of this situation is the placement of State authorities as IP management. Article 11 of the 2005 IP law states:

The Science and Technology Ministry shall be answerable to the Government for assuming the prime responsibility for, and coordinating with the Culture and Information Ministry and the Agriculture and Rural

⁷⁷ Annual report 2008 of the National Intellectual Property Office of Vietnam, the Vietnamese version can access at <www.noip.gov.vn> visited 5 April 2009.

⁷⁸ Pham Anh, Quang Hung, "Soft ware infringements: Pressure from the Black-list", *Laodong Newspaper* online date 1 May 2009, available at <<http://www.laodong.com.vn/Home/Suc-ep-lon-tu-danh-sach-den/20095/136427.laodong>>, visited 5 May 2009.

⁷⁹ Interview with Mr Le Van Vien, President of the IP law society, Director of the IP Institute in Ho Chi Minh city, *The Lao Dong newspaper*, available on <<http://www.laodong.com.vn/Home/Thuc-thi-quyen-so-huu-tri-tue-van-la-thach-thuc/200810/109624.laodong>> visited 12th October 2008.

⁸⁰ See Question 20, page 13 of the Survey result in the Appendices.

Development Ministry in, performing the state management of intellectual property and the state management of industrial property rights. The Culture and Information Ministry.... perform the state management of copyright and related rights. The Agriculture and Rural Development Ministry... perform the state management of rights to plant varieties. People Committees at all levels shall perform the state management over intellectual property in their localities.

In fact, there is not any particular State organization which is solely responsible for the enforcement of IP protection. Infringements are handled by courts, inspectorates, market management offices, custom offices, police officers and peoples committees of all levels. The application of administrative remedies or criminal remedies is carried out by the competence of courts. In case of necessity, courts may apply provisional urgent measures provided for by law. The application of administrative remedies will be carried out by the state inspectorates, police offices, market control offices and People's committees. In the case of request, those agencies can apply measures to prevent and secure administrative sanctions. Customs offices are a competent State agency in IP imported/exported products.⁸¹

Thus, the National Office of Intellectual Property, which belongs to Ministry of Science and Technology (NOIP), and the National Office of Copyright (NOC), which belongs to Ministry of Culture and Information (now named the Ministry of Culture, Sport and Tourism) and is in charges of copyright registration, are not the enforcement agencies that have the real power to apply administrative remedies to stop IP infringements. Their main duties are IP rights registration. They have little power in IP protection enforcement. However, they play an essential role in settlement of IP rights infringements. The NOIP is officially authorized to make an appraisal of industrial property infringements. The provincial Departments of Science and Technology have also been empowered to make appraisal of industrial infringements for those infringements happening or concerning those persons in their province or city.⁸² Upon a complaint or a request by an industrial property

⁸¹ Article 200, the 2005 IP law.

⁸² Nevertheless, for complicated cases, these authorities must request the NOIP to conduct appraisal and issue official confirmation.

owner, a related party or an enforcement agency, NOIP will issue an official confirmation and clarification of the infringement. In practice, the official confirmation by NOIP of whether an infringement exists will give more confidence and serve as a legal basis for the enforcement agencies mentioned below to take enforcement actions, just because those agencies lack a throughout understanding and experience in industrial property. The same role as the NOIP is being played by NOC with respect to copyright enforcement.

The current IP protection enforcement agencies in Vietnam are the Economic police Department, the Market Management Bureau, some related Ministries and Ministerial agencies such as Ministry of Culture and Information, Ministry of Science and Technology, General Custom Office and the People's Committees at all levels. There are many related state ministerial agencies but they are not effective enough in the IP enforcement system. This has created overlapping functions and power struggles between those authorities. As a result, the enforcement system lacks the real power and the specific duty to implement the IP legislation.

On paper, all IP rights are protected by Vietnam IP legislations but in practice the enforcement system takes much time to implement. There are many enforcement authorities but this does not mean effectiveness. At present, Vietnam does not have special court for IP disputes. The Civil Court, the Criminal Court, the Economic Court and the Administrative Court under the Vietnamese People's Court system are jurisdictional authorities for these cases. In addition, IP law is a newcomer in the legal framework as well as in the Court. In the law training courses in law colleges and legal training centers, the subject of IP was mentioned only in the industrial property sector. The copyright law still remains overlooked in most of legal training courses. As a result, the judges lack legal knowledge and experiences in IP rights law. They have some confusion in deciding their judgments in IP cases such as the estimate of the damage caused by IP infringements or the general international rules.⁸³

⁸³ Dr. Pham Dinh Chuong, Chairman of the National Office of Industrial Property, 'Intellectual Property Rights, a fundamental condition to develop a knowledge-based economy in Vietnam' This article was presented in "Building a knowledge-based economy to Vietnam development" Conference in Hanoi, dated 21/22/June 2000.

VI.7 The negative influences of culture norms, social attitudes and traditional legal

VI.7.1 Cultural influence and the concept of IP law in the ASEAN nations

IP rights protection law, in many legal researchers view, is most affected by culture norms and social attitudes. The IP law was emitted originally from the Western legal tradition. In the view of Doris Long, the protection of IP in international trade is “taken by various nations in these debates reflect their differing (and often irreconcilable) philosophical, cultural, historical, economic, and political points of view regarding the need for strong protection of technology and other products of the mind.”⁸⁴ In Western IP tradition, IP law protection “values individual creative effort, singles out the creative individual for reward, values original expression, and believes that products are capable of disassociation from the artist to be sent through commerce.”⁸⁵ On the contrary, the Asian view about the IP protection is absolutely different from the Western legal thought. Located across a wide area, defined as the oldest civilization, with a mixture of various of particular legal traditions like Talmudic, Islamic, Chthonic, and Hindu in their history and having been influenced by the civil and common law from the Western tradition, the Asian legal tradition is one of the most diverse legal tradition in the world.⁸⁶ The development of IP law, as with many Asian legal sectors, is significantly effected by the tradition of religion, law and culture.

There is a broad agreement that the East Asian legal view has been focusing more on the personal rights than the property rights in protection of intellectual works. The result of human intellectual work should be shared among the human community without the concern of compensation.⁸⁷ Intellectual works belong not only to the creators but also to the human society at a whole. The authors create the intellectual

⁸⁴ Doris Estelle Long, ‘The protection of Information in a Culturally Diverse Marketplace’ (1996) *Marshall J. Computer & Info. L.* 129, Cited from Michael W. Smith (n25), 224.

⁸⁵ Michael W. Smith, (n25), 226.

⁸⁶ H. Patrick Glenn, *Legal Tradition of the World, Sustainable diversity in law* (Oxford University Press, 2000), 279.

⁸⁷ Michael W. Smith, (n25) 228.

works for the “edification and moral renewal” rather than material gain.⁸⁸ The imitation of an intellectual work is not exactly as an act of plagiarism. It is like a further study process. In the Asian traditional view, if an intellectual work would be copied by many people, it might be valued as an excellent work. In addition, the original creators will be respected by the learners and their works will exist over a long period. Asian countries were also built under the feudal mandarin’s system for a longtime. Under the ruling of feudal system, the intellectual works also are the general property of the ruling class. Sometimes, the real work’s owner has no rights including the personal rights with their works.

VI.7.2 Confucian thoughts and the effectiveness of IP law in Vietnam

Vietnamese cultural and social principles were affected by Confucian ideology from China.⁸⁹ Like China, Vietnam has a long history in the feudal system. In traditional legal system, law was made and enforced by the emperor and his enforcement system. The law was built on the ground of moral thoughts and the Confucian ideology. These social attitudes still remain in the Vietnam current law system. In other words, “Confucian ideals are latent within Vietnam culture”.⁹⁰ The term of “kinship relationship” is not only popular at family level but also more broadly to the social and national legal level.⁹¹ The way to share the information and some forms of intellectual works is like making a spontaneous contribution to the community. Moreover, as with many Asian countries, the protection of IP rights is a new concept in both national legal system and people’s attitudes. Both the IP owner and the IP users are still not familiar with the work’s permit and the royalties. Thus, at the present, the view of property rights of IP works in Western countries in IP law still seems to conflict with the Vietnamese culture.⁹² Due to Vietnamese attitudes, the board and long lasting use assess the value of any IP works. If any IP work would

⁸⁸ Rama John Ruppenthal “TRIPs through the Far East: High tech product piracy and the need for alternative regional solutions” (2001) *Wisconsin International Law Journal*.

⁸⁹ For more analysis on the Confucian’s influences on the development of Vietnamese law see Pham Duy Nghia “Confucianism and the conception of the law in Vietnam” in John Gillespie and Pip Nicholson (eds) *Asian Socialism and Legal Change: the Dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press at the Australia National University 2005), 77-90.

⁹⁰ Lynelly; Le N.H; Truitt, A.; Le TPM; Dang. NA in *Changing Gender Relation in Vietnam’s post Doi moi (Renovation) Era*, World Bank Publication 2002, 29.

⁹¹ Michael W. Smith, (n25), 246.

⁹² Michael W. Smith, (n25), 243.

not be used, the value of this work is nothing. Thus, the authors of Vietnamese literature prefer to protect their personal rights rather than to protect their property rights.⁹³ This character clarifies the regulation on the free-use of works in Vietnamese IP law.⁹⁴ There are many restrictions on author's exclusive rights in cases of free-use, especially in education promotion. Basically, the cases of free-use provisions in Vietnam IP law before Vietnam committed to reconcile the TRIPS standards to domestic system were greater than that in the TRIPS Agreement.

Cultural norms and social attitudes play an important role in the national development in Vietnam in both law making and law implementation. At present, the IP law implementation is the weakest sector of the Vietnam IP regime. The limitations of Vietnamese IP law implementation are not only caused by the lack of an effective enforcement system but also the psychological habit of Vietnamese people. The "Village civilization" is a fundamental cultural norm of the Vietnam society. It distributes a considerable impact not only on IP enforcement but also on the development and enforcement of the national legal system. In Western countries and developed countries, the citizens are willing to solve their disputes through the Court. They do not mind becoming the defendant or plaintiff in a debate case. On the contrary, the Vietnamese people avoid going to the court as much as possible. They are not familiar with the law enforcement system. They have not yet understood that the Court is protecting tool for their rights. They suppose that the Court is the place for serious crimes. Thus, in their view, those who had become a defendant or plaintiff are not good people. Some employers do not want to employ these people even if they are only involved in administrative or economic disputes. So, if any person meets any problem, they do not want to bring their disputes to the Court. They prefer dealing with each other through personal agreement or arbitration than having their disputes solved by the Court. These kinds of thoughts have been creating a bad impact on the application of IP rights protection because the official enforcement of IP infringement will be applied only on the request of IP holder

⁹³ Dr. Pham Dinh Chuong (n83).

⁹⁴ Article 761, the 1995 Civil Code.

according to the Civil Code. Thus, at the present, the numbers of IP infringements are increasing because of the silence of IP owners.⁹⁵

VI.7.3 The socialist law of former Soviet Union model

Vietnam is a socialist country, which originally followed the former Soviet Union model. The Vietnamese legal system is currently a communist-governed jurisdiction. The current Vietnamese legal system is still partially influenced by the former Soviet communism for example, in the structure of the national legal framework. The legislative power, the executive power and the judicative power are not totally separated as in Western law. Some historical fields of private law such as contract, commercial law, civil responsibilities or tort are mixed with public law. Some kinds of property cannot be privatized like the property of land. In the socialist tradition law, any work that is produced under the State orders or the State budget, including intellectual works might be the property of the state and the whole society. The IP law is also affected by the State collectivization thoughts. In the state-dominated economy, the authors create the intellectual works under the State order and they were paid by the state budget. In other cases, the creators worked as government officers. They received salary from the State budget. In some points of view, the property rights of their works might belong to the State and whole society as well. Under the current effective Vietnam IP law, the owners (who could be the State or any organization or individual) will have the property rights to the work which is created under a contract; the authors will only have the personal rights to their works. The combination of the Confucian thoughts, feudal ideals and the communist theory has created a current complex national legal system of Vietnam.

Thus, in Vietnam, when the intellectual works like books, music, paintings and software programs are published and distributed, the customers strongly suppose that they can freely access these works without the permission of the authors. The users also do not think that they have to pay royalties to the IP holders. Under these points of view, sometimes, the illegal IP users took intellectual works and remuneration without permission but they have not recognized that they have broken the law.

⁹⁵ Le The Bao "*Why the intellectual property protection is not effectiveness in the Vietnam legal system*" Laodong Newspaper online dated 5th July 2002 available at

VI.7.4 The French colony's law

The Vietnamese socialist law is also affected by the Western law since Vietnam was a colony of France in the 19th and early 20th century. After over 100 years, the legacy of French legal tradition still influences the development of Vietnam national legal system. In the IP law, the Vietnamese Civil Code 1996 is a typical example of the French legal type. For example, the formalism of this Civil Code which included a total of 838 articles, divided into 7 parts, affected more by continental tradition (French type) than by socialist tradition.⁹⁶ Moreover, the law of IP rights protection in this Code focuses more on the personal rights than the property rights of the IP owners. The French IP law also emphasizes more on the “moral rights” than “property rights” when grants the artist's rights even after their paintings were sold.⁹⁷

Conclusion

Reconciling the TRIPS Agreement into domestic legal system without a transitional period was the expressed desire of Vietnam in order to become a WTO member and able to established a comprehensive laws and effectiveness enforcement mechanisms. The development of intellectual property law in Vietnam since the early the years 2000s, despite existence challenges, has been marked many significant improvements in a very short period. At the time of pursuing the WTO's membership in 1996, the area of IP law in Vietnam was evaluated as mostly an inadequate legislative regime and weak enforcement mechanisms. In the law and regulation sector, the IP legal instruments had a few scattered regulations in one law code, a few degrees and several circulars. The enforcement mechanism presented a even poorer performance with many negative assessments such as “a tiger-paper law”, “a nation in the black list”, and “a stranger in national legal regime”.

The international economic integration and the WTO's membership have forced Vietnam to upgrade their domestic law regime including the branch of IP law. During the ten years of the WTO accession, Vietnam has carried out many crucial

<www.laodong.com.vn/bld/display\$.htnoidung>

⁹⁶ Glenn H. Partrick, *Legal Traditions of the World* (Oxford University Press, 2000), 306.

⁹⁷ Michael W. Smith, (n25), 244..

Action Plans for the incorporation of the TRIPS standards and provisions of international IP conventions into domestic system. The first law code on IP protection was adopted in 2005. In following years, its implementing documents have been promulgated. The IP law became a separated legal branch from the Civil law in the Vietnamese legal regime only from the law reform carried out on order to obtain access to WTO membership. Since the coming into force of the 2005 IP law code and the implementation of the WTO commitments, in fact, intellectual property protection in Vietnam has achieved many crucial improvements. In the law making aspect, with the subjective efforts and assistance from international resource, Vietnam has presented a comprehensive legal system in IP law from the signing of international treaties and conventions to interpreting those provisions into domestic regulations. The IP law regime has been fully organized from the law code to different levels such as ordinances, implementing decrees and other kinds of guidelines. The IP legislation system has been continuously compliant with international standards. The capacity for the State agency in enforcing IP law has also been upgraded. Even though the IP infringements in Vietnam still stay at one of the highest rates within the regional nations the effectiveness of the system has been strengthening at the same time as an increasing of public awareness of the concept of IP law.

After two years, the amendment of the 2005 IP law has been reviewing all provisions of international IP conventions and the Vietnam's commitments in the IP protection area. Defining the obligations which must be incorporated into national law system and setting up the law making program at the same time with reviewing the existing enforcement system in order to abolish the overlap of the State agency functions are the priority tasks of the State agencies. On the Resolution of the Government on Promulgating the Action Program on the major guidelines and policies for rapid and sustainable economic development when Vietnam becomes a member of the WTO, improving the IP legal system, including amending the 2005 IP law code must be completed in the years 2009 and 2010. The online system in IP statistics, references and IP registration have been established and will soon come into operation. Legal education and training in IPRs protection has attracted more assistance and investment from the Government and international resources. With crucial dissemination campaigns through mass media about the importance of IPRs

protection and IP infringement sanctions, the concept of IPRs and IP law is becoming more familiar to the citizen, enterprises and organizations. A stronger monetary fine system, administrative sanctions, civil remedies and criminal penalties have been established at the same time as providing adequate civil procedures, provisional measures and special border measures in fully compliance with the TRIPS requests.

In short, full compliance with the TRIPS standards in legislation, being a party to the international intellectual property agreements and setting up a broadly responsible agency system for law formulation and implementation before concluding the WTO's negotiation in 2007 has been considered as a radical endeavour of the Vietnam Government in the commitment of providing a adequate system in the IP protection. Of course, in the legislative sector, there are still a number of inadequate provisions that are not inline with the TRIPS agreements, international conventions and international customs in IP protection but Vietnam is carrying out the law amendment programs in the IP protection sector to meet the international requirements. The "Action Plan Beyond the WTO's Conclusion for Preventing and Fighting Infringements of IPRs" had been adopted in 2006 for full implementation of the TRIPS's standards into the Vietnam legal system. It was found that there have been significant numbers of improvements in the IP law in Vietnam during recent years.

More or less, at present, Vietnam has basically completed its law making program in the IP legal regime and is starting to set up a highly adequate implementing mechanism. The stronger level protection with a effective enforcement system has created a better environment for R&D activities, foreign investment and advance technology transfer in Vietnam. However, on other hand, strictly enforced IPRs whereby the price of IP works is an unaffordable cost for most of citizen, small enterprises, schools and social organizations would be considered as negative impacts for social welfare. With TRIPS standards in the WTO's obligations, the IP exporters that are mostly developed nations can achieve a bigger benefit meanwhile Vietnam, as with other developing nations, must accept the harder negotiation conditions in order to get a ticket to join the international trade game with their great desire of pushing economic growth and improving their citizen's living standards.

Without a doubt, Vietnam had to carry out their WTO's negotiation commitments in IP protection. Ultimately, IP protection and TRIPS standards are positive influences for sustainable development in Vietnam as the TRIPS's mission was regarded as the factor stimulating economic growth, technological and social welfare. However, to design a suitable law and regulation system that is not only protecting the IPRs but can also facilitate the accession opportunities to IP works is a potential promise which the Government must bring to their citizens when the nation integrates into the global economy. Taking full advantage of technical assistance from international supports, using legal measures to employ the "exceptions" of the TRIPS Agreement, and strong and timely interventions from the Government to reduce the prices of IP works would be some options and recommendations for Vietnam in the years to come to balance the relationship between the rights of IP work holder and the social benefits.

Chapter Seven

Invention and Public Health in Vietnam under the TRIPS standards

Introduction

In recent years, the intellectual property protection and the application of the TRIPS Agreement is also an important topic which concerns how the IP protection can create the best environment for research and development activities as well as provide the maximum opportunities to access the R&D products for society. The application of the TRIPS Agreement and related intellectual conventions at worldwide level, on the one hand, has significantly improved the IP protection to a significant development stage but on the other hand, those regulations have been considered to create the challenges to the social welfare of many millions poor people. The TRIPS was built, as evaluated by Peter Drahos and Ruth Mayne, on the basis of being “pushed through by a handful of rich countries under the influences of a heavy corporate lobby without the informed participation of many developing countries.”¹

Despite a high speed of economic growth in recent years, Vietnam is still regarded as an agricultural economic nation with a low level of industrial development. As with many other developing nations, Vietnam is not yet successful in production of vital materials for the development of the manufacturing industry due to the lack of proper funding for R&D activities as well as the limitation in human resource capacity. The production of pharmaceuticals in Vietnam, under urgent demands from the health sector, has been gradually improved in the past few years but still remains in the early stages of development. The pharmaco-chemical industry has not yet developed to the point where it is able to supply the materials needs for drug

¹ Peter Drahos & Ruth Mayne, *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave MacMillan, 2002) preface.

production. As a result, according to the 2008 Report of the Drug Administration of Vietnam, up to the end of 2008, the pharmaceuticals and healthcare industries in Vietnam were only able to meet 50.2% of domestic demands with more than 90% of raw materials for drug production imported from foreign providers. In addition, in the year 2008, the total value of domestically produced drugs represents only USD 715 million whereas the value of imported drugs is USD 757,752 million.²

Under the WTO's commitments, Vietnam started to gradually open its pharmaceutical market from 1 January 2007 with drug tariff reduction and to allow the foreign pharmaceutical companies to open their branches in Vietnam. From 1 January 2008, joint venture companies which have less than 51% of FDI capital investment can directly import-export pharmaceutical products. Foreign companies are allowed to import-export the pharmaceutical products in the Vietnam's market from 1 January 2009. So, with the weak production of drugs, the price of pharmaceutical products in Vietnam's market depends strongly on the international market and foreign pharmaceutical companies. Meanwhile, the Government budget for healthcare does not reach the basic demands and the incomes of a large portion of the population are insufficient to cover their health expenditures. Those challenges just described required Vietnam to find solutions in which legal instruments can be identified as one of the most effective tool. A strong and comprehensive legal framework in the healthcare system, particularly in the pharmaceutical sector will create a sustainable development for public health and social welfare in Vietnam.

This chapter will focus on the Vietnam's existing legal framework in pharmaceutical products with regard to the consequences of the TRIPS agreement and patent law to the accession, price, importation and production of drugs in Vietnam and explore to what extent the TRIPS provision on patents have been implemented.

The first part provides an overview of the health care system including the drug production and medicine accession opportunities when Vietnam formally became a

² *"The Pharmaceutical market in Vietnam: A balance competition?"* News on the Education-Healthcare of Vietnam newspaper, available in the Vietnamese version at <<http://www.giaoducsuckhoe.net/article.asp?articleID=1184&CategoryID=2&SubCategoryID=1&SpecialtyID=29>>

WTO member. The second introduces the related provisions of the TRIPS agreement in pharmaceutical products and the Doha Declaration on Public Health that have been interpreted in the intellectual property law of Vietnam. The third part briefly reviews the historical development of patent law in Vietnam since the declaration of national independence in 1945 and also reviews the current patent protection legal regime in Vietnamese IP law. The influences of the TRIPS Agreement implementation and its amendments to the production and importation of drugs in Vietnam will be analyzed in part four of this chapter. Some suggestions on how to use the provisions of “the TRIPS exceptions”, the Doha Declaration and the TRIPS agreement amendments in order to improve the drugs accession opportunities in Vietnam will conclude this chapter.

VII.1 Overview of the Healthcare System in Vietnam

According to the 1992 Constitution, all Vietnamese citizens are entitled to the public healthcare system and the State has responsibility to provide the best conditions including exemption from or reduction of healthcare fees.³ During the period of change from a centrally planned to a market economy, the development of the healthcare system has been significantly improved according to the principles of equity, efficiency and affordable cost.

In general, Vietnam has performed well in providing a comprehensive national health care system. All children up to 3 years old can get free inoculation against epidemics for 7 popular diseases. All children under 6 years old can get free health care treatment. Implementing programs on preventive drugs and vaccines have been promoted with a strong uptake, for example, 92.6% of pregnant women accessed the vaccine against tetanus. According to the report of the Ministry of Health of Vietnam in November 2008, 100% of communes and wards in Vietnam have been covered by health workers, 65.1% of which has a doctor; obstetric doctor and midwives are

³ Article 61, the 1992 Constitution.

available in 93.3% of communes.⁴ The Government delivers free health care insurance to poor people. Health care insurance at a cheap rate has been provided from urban to rural areas. Around 42% of population had health care insurance by the end of 2007 and the government's target is to reach 65% percent of all population if possible. Subsidies and significant investment from the Government budget have been provided for the healthcare system. At the same time, public health care education has been promoted in all administrative levels. Despite the fact that Vietnam is still considered a poor nation, the health care system and its main health indicators are comparable with the performance of middle-income country standards.

Although the reform process and economic development have been advancing a comprehensive health care system nation-wide, the limited state funds for improving sanitation, water supplies, and environmental protection has restricted the control of the spread of infectious diseases like malaria, dengue fever, typhoid and cholera. The total investment from the state budget and international financial aid can not satisfy the social demand. For an individual household, healthcare expenses account for a large portion of total income for a household. In fact, the total expenditures of all the population on healthcare account for around 5.9% GDP in 2005⁵ which was of a similar level with other nations; however, it is quite common in Vietnam that the normal men and women cannot afford the cost of medicine for fatal diseases. By the end of 2008, even though the Government has created many favorable policies for reducing insurance cost, poor people still face a financial challenge in accessing the voluntary health insurance policy.⁶ The high cost of healthcare expenditure has been considered as a main cause of the poverty status, especially in rural and mountainous areas with the average medicine expenditures per person, USD16.25 in 2008.⁷ Apart from in financial aspect, there are considerable difficulties in human resources, the administrative mechanisms, the availability of hospitals and medical centres from central level to local services, that are open to challenges of the Vietnamese health care system.

⁴ *Joint Annual health Review 2008, Report of Ministry of Health of Vietnam and Health partnership group*, available on the WHO website at <<http://www.wpro.who.int/vietnam/publications.htm>> visited 2 April 2009.

⁵ Ibid.26.

⁶ Ibid.13.

To upgrade the national health care system, in the 10 year development strategy, the Government is enhancing the comprehensive health care services for special groups such as poor people, war affected people, pregnant women and children, ethnic minority groups, former soldiers, and remote and hinterland areas.⁸ Based on the national development strategy, the Ministry Of Health of Vietnam has been setting a variety of national policy action plans for medicine manufacture; amendment of health care insurance policy; modernization of the medical and hospital equipment; dissemination campaigns on public awareness; and improvement of the qualifications of human resource in the health care service. For example, in 2008, a new health care insurance program has been researched in order to provide a better service. A new maternity system will be considered in which women can get 6 months maternity with full payment for instead of 4 months as in the previous system.

To improve the quality of the national healthcare service, the Party Politburo had issued the Resolution No.46-NQ/TW, dated 23 February 2005 on the guidelines for improvement of the citizen health protection and strengthening the national healthcare services.⁹ For further implementation, on 3 June 2008, the National Assembly adopted the Resolution No.18/2008/QH12 which provided a comprehensive framework to development the healthcare system.¹⁰ The main tasks of the Vietnamese healthcare system are defined as:

- Reforming and completing the healthcare system with an orientation towards equity, efficiency and development, aiming to create advantageous opportunities for the protection, care and promotion of the people's health with ever improving quality, appropriate with the socio-economic development of the country.

⁷ "The Pharmaceutical market in Vietnam: A balance competition?" (n2)

⁸ *Strategy for socio-economic development 2001-2010 of Vietnam* on <www.asemconnectvietnam.gov.vn> visited 25 May 2006.

⁹ Details of document are available on Vietnamese version at the Vietnam Administration of HIV/AIDS Control

<http://www.vaac.gov.vn/index.php?option=com_docman&task=cat_view&gid=52&Itemid=34> visited 2 April 2009.

¹⁰ *Vietnamese version on the Health Strategy and Policy Institute of Vietnam*, available at <<http://www.hsipi.org.vn/vcl/vn/home/InfoDetail.jsp?area=1&cat=57&ID=1079>> visited at 2 April 2009.

- Increasing state budget investment along with social mobilization for health care and effective implementation of assistance to state policy beneficiaries and the poor in caring for and promoting their health.
- Reforming and refining health financing policies with an orientation toward rapidly increasing the share of public health finance (including state budget and health insurance), gradually reducing direct out-of-pocket payments from patients.
- Capacity building and increasing the number of health staff at the grassroots level.
- Strengthening effectiveness of state administrative system in order to improve efficiency in health sector activities with an orientation towards equity, efficiency and development.¹¹

So, as a general assessment, in comparison with its economic development level, Vietnam has been presenting a really good performance in its health care system and human development index. The health sector has overcome many constraints from the previous planned policies as well as has achieved a number of remarkable improvements during recent reforming years. However, Vietnam's development in general and in the healthcare sector in particular is facing many shortcomings that are not easily resolved. Master plans as well as implementation action programs must be defined and built in order to set up a proper national health system in line with the universal standards and social demands.

VII.2 Pharmaceutical manufacture and access in Vietnam

The price of drugs and available accession are regarded as the other important problem as at the present, the existing pharmaceutical sector does not have the capacity to produce vital drugs for domestic demand. Even though, Vietnam has a good in its health care system, the cost of pharmaceutical product is still much higher than what is the affordable. Similar to other poor nations with an inadequate

scientific and technical research system, Vietnam is not yet successful in pharmaceutical manufacture. In fact, the domestic manufacturers are able to produce certain kinds of medicines but due to the low level development of the pharmaceutical industry, almost all raw materials are imported from foreign suppliers. Vietnam's pharmaceutical industry is not only depending on the international market in the raw materials but also their domestically made drugs can only meet a small portion of the national demand. In addition, the Vietnamese pharmaceutical producers are still not qualified under the WHO requirements¹². They are unable to produce the vital medicines and as a consequence, those products must be imported from industrial nations with at a high price far beyond the capacity of both state budget and family income.

The WTO's accession commitments have had a remarkable impact on Vietnam's pharmaceutical industry and pharmaceutical product market in Vietnam. Concerning the availability medicine accession, after two years of being a WTO member, thanks to the WTO's commitments in the healthcare service sector and pharmaceutical products, most of the vital medicines are available in Vietnam's market with 10,339 kinds of medicines that are lawfully registered. The first and most important consequence was considered to be the reduction of bound tariffs in pharmaceutical products. The bound tariff was reduced from the range of 0% to 10% to the range of 0% to 5% with most tariffs deducted around 6.5%. Many tariffs come into force in 2009 and the deadline for all bound tariff commitments on pharmaceutical products is 2012.¹³ In the BTA with the USA in 2000, the imported pharmaceutical tariff was bound at 5% instead of the 10% tariff. The current average tariff which applies for imported pharmaceutical products is 2.5%.¹⁴

¹¹ Cited from the Joint Annual Health Review 2008, p17-18.

¹² Jakkirt Kuanpoth "Patents and Access to Antiretroviral Medicines in Vietnam after World Trade Organization Accession" (2007) *The Journal of World Intellectual Property*, 203.

¹³ *Details of pharmaceutical tariffs can be found at Chapter 30, Vietnam's bound non-agricultural tariffs*, available at <http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm> or website of *Ministry of Finance of Vietnam*, available at <www.mof.gov.vn>

¹⁴ *Stayed at January 2009, news on the Ministry of Health of Vietnam*, available at <<http://moh.gov.vn/homebyt/vn/portal/InfoDetail.jsp?area=58&cat=1458&ID=6679>> visited 1 May 2009

An open market in the pharmaceutical manufacture industry and pharmaceutical distribution is considered as a second positive consequence of the WTO's membership to the availability of medicine in Vietnam. Under the open market procedures, the numbers of foreign pharmaceutical companies which opened their branches in Vietnam have increased quickly. From 250 firms in 2005 and 370 firms in 2007,¹⁵ up to 31 December 2008, Vietnam had more than 800 drugs firms in which 438 were foreign pharmaceutical enterprises. At the same time, nation wide, 37 projects have been established in the pharmaceutical industry in which there are 22 FDI's manufacturers.¹⁶

The application of the TRIPS Agreement to the IP law system also brings significant improvement in the pharmaceutical industry in Vietnam. A high protection level of IP works has been providing a better environment for R&D and manufacturing industry as the investors are sure that their inventions can be protected at the same level as international standards. Even though the pharmaco-chemical industry and pharmaceutical industry are still at the early stage, those areas are attracting more investment from both FDI and domestic capital.

It is generally agreed that when the WTO's commitment came into effect, there has been an increase in the volume of imported pharmaceutical products for foreign company into Vietnam from 1 January 2009. This has created more opportunities for access to medicine by the general population in Vietnam because they are now available in more affordable or competitive prices. However, it is noticeable that the imported drugs are dominating the national medicine market at present, in both availability and affordable price. In recent years, the price of pharmaceutical products in Vietnam has been continuously increasing. For example, the price of most imported vital medicines in Vietnam increased at least by at least, 10% in 2008.¹⁷ In some cases, the price of imported drugs is much more expensive than the best prices in the international market perhaps due to some unfair arrangements

¹⁵ Le Van Truyen "Price reduction for pharmaceutical products in Vietnam after two years being of a WTO's member: Desire and Practice" The Vietnam pharmaceutical net, can access by the Vietnam's version at <<http://www.thuocbietduoc.com.vn/home/newdt3579tt2ev2.aspx>> visited 15 April 2009.

¹⁶ *Summary of Meeting between Ministry of Health and Pharmaceutical enterprises in Vietnam*, dated 13 January 2009, available at <<http://ddd.com.vn/20090113040353362cat81/nganh-duoc-vietnam-chu-dong-hoi-nhap.htm>> visited at 10 April 2009.

between medicine distribution and importation companies.¹⁸ At the beginning of the year 2009, when the price of many products in the international market and domestic market have reduced due to the international economic crisis, pharmaceutical prices in Vietnam are increasing.¹⁹ Furthermore, in 2009 and perhaps in following years, there are likely to be many big challenges in worldwide economic developments such as unexpected changes in international markets, fluctuation of prices, high inflation in all nations and various foreign currency rates, that are lead to significant difficulties for the health care accession of poor people.

VII.3 HIV/AIDS and drug accession for the poor patients in Vietnam

In Vietnam, the rate of HIV/AIDS prevalence among adult population accounted for only 0.29% in 2001,²⁰ which was not very high compared with some regional countries like Thailand, Cambodia or African countries. In 2005, the prevalence of HIV among adults aged ≥ 15 years, per 100 000 population was 421.²¹ According to the figures of the UNAIDS Vietnam (Joint United Nation Program on HIV/AIDS), until 31 August 2007, there were 132,628 cases of HIV and 26,828 cases of AIDS.²² However now, in 2008, HIV patients are found in all provinces of Vietnam, and according to the latest report of the Ministry of Health, in Vietnam, up to 31 March 2009, there are 193,624 cases of HIV in which there are 30,643 cases of AIDS and

¹⁷ Le Van Truyen, n15.

¹⁸ *New on Laodong Newspaper* dated 12 July 2008, available at <<http://www.laodong.com.vn/Home/Lung-doan-gia-thuoc-tai-hon-1000-nha-thuoc-benh-vien/20087/97241.laodong>> visited 12 July 2008.

¹⁹ *Interview of former Vice Minister of MOH* on Tuoitre Newspaper dated 23 March 2009, available at <<http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=307528&ChannelID=3>> visited 16 April 2009.

²⁰ *Vietnam Development Indicators, November 2001 of Gvt-donor-NGO Poverty Task Force*, cited in "EC-Vietnam Country strategy paper, 2002 – 2006" p32 available at <http://europa.eu.int/comm/external_relations/vietnam/csp/02_06_en.pdf>

²¹ *Vietnam indicators in HIV*, available at <http://www.who.int/whosis/database/core/core_select_process.cfm?countries=vnm&indicators=HIVPrevAdults> There are other diseases that urgent need the medicine support from the Government and health aid such as the Incidence of tuberculosis (per 100 000 population per year) 173.0 (2006), Prevalence of tuberculosis (per 100 000 population) 225.0 (2006), can reference at the above website, visited at 8 April 2009.

most of the patient can not pay for their treatment.²³ Meanwhile, in local manufacture, until February 2008, the MOH had granted the license for producing ARV drugs for seven pharmaceutical manufacturers²⁴ but only two companies named as STADA Vietnam JV Ltd and ICA Biotechnological & Pharmaceutical Vietnam JV Ltd are actually producing the anti-HIV drugs. STADA Vietnam, named as the M.S.T Pharmaceutical (from 1 January 2000 to 4 September 2002) introduced the first two ARV drugs, as Lamivudine and Lamzidivir on January 2002.

In October 2004, Inhivinir (Indinavir 200mg) was introduced as the first local production ARV drug in Vietnam which had a price 65% lower than similar imported products by ICA Biotechnological & Pharmaceutical Vietnam JV Ltd.²⁵ STADA Vietnam was regarded as the first local producer who can manufacture three ARV drugs when they introduced the Indinavir Stada 400mg in November 2006. On August 2007, the MOH of Vietnam issued three registration licenses to STADA Vietnam to introduce the anti-HIV drugs named as Stavidine Stada, Lamzindivir Stada and Nevirapine Stada that increased the number of domestically produced ARV drugs to seven different anti-HIV drugs in Vietnam.²⁶ On November 2007, STADA Vietnam was the first local manufacturer which was granted the Ministry of Health of Vietnam's certificate on standards of WHO-GMP. This company is also the first and only Vietnamese local pharmaceutical producer qualified with the EU-GMP standards which were granted by the Ministry of Health, Germany.²⁷

²² Available on UNAIDS Vietnam website at
<http://www.unaids.org.vn/sitee/index.php?option=com_content&task=blogsection&id=4&Itemid=26> visited 20th November 2008.

²³ *The First Quarter of 2009 Report of Ministry of Health of Vietnam*, available in the Vietnamese version, can access at
<<http://www.moh.gov.vn/homebyt/vn/portal/InfoDetail.jsp?area=58&cat=1456&ID=6965>> visited 8 April 2009.

²⁴ "Patent Rights of Anti-HIV/AIDS Medicine Forced to Transfer to Secure Supply" News on Vietnam UNAIDS Program available on
<http://www.unaids.org.vn/sitee/index.php?option=com_content&task=view&id=351&Itemid=67> visited 16 April 2009.

²⁵ *New on Vietnam's Medical Net*, available on the Vietnamese version at
<<http://www.ykhoanet.com/xahoi/tienboykhoa/015.htm>> visited 14 April 2009.

²⁶ *News on the Ministry of Health of Vietnam* website, available at
<<http://www.moh.gov.vn/homebyt/vn/portal/InfoDetail.jsp?area=0&cat=1458&ID=5601>> visited 14 April 2009.

²⁷ General history of STADA Vietnam see
<<http://www.thuonghieuviet.com/News/Detail/?gID=4&tID=1&cID=9655>> visited 15 April 2009.

Like in some other countries, most HIV/AIDS patients in Vietnam are poor people and lose the ability to work. Moreover, due to the lack of health care education, in many cases, the relatives and employers do not allow the HIV/AIDS patients to stay in the same house and working area. Not only HIV/AIDS patients face discrimination, but also they are normally unable to pay the cost of HIV/AIDS treatment. As mentioned in Chapter Three, Part III.3: “Intellectual property protection and Public welfare”, the cost of a HIV treatment medicine with the pharmaceutical patent holder right protection in the United State is four times higher than a similar product without patent royalties from India. So, as a consequence of expensive prices and low income, only a small number of the HIV patients are able to pay the treatment costs. Even though, HIV patients have been received supports from international organizations and the state budget, those subsidies are still limited as compared with the requirements.

At present, the affordable health care for the HIV/AIDS patient is considered as a potential and long-term task of the Government. By the year 2010, Vietnam aims to provide the appropriate treatment, care and counseling for 90% of HIV/AIDS-infected adults, 100% of HIV/AIDS-infected children, 100% of HIV/AIDS-infected pregnant mothers; and 70% of all HIV/AIDS patients would be provided with specific drugs.²⁸ This target is not easy to reach as the annual average cost for the Antiretroviral (ARV) drug which is used for HIV/AIDS treatment was around \$5,000 per person (in 2003) while the annual average income was \$650 only.²⁹ This price is much higher than the best international prices while the state budget for drug subsidies is very limited, and so not many patients are able to access to ARV drugs with a proper treatment program.

Applying the interpretation of the international IP law in public health into the domestic IP legal system, the Government has issued a Regulation on the application of necessary measures to meet needs for anti-HIV medicines in emergency cases that provided guidelines in how to use the necessary measures to provide the vital drugs

²⁸ *The Decision of the Prime Minister No 36/2004/QĐ-TTg*, dated 17 March 2004, on approving “The National Strategy on HIV/AIDS prevention and Control in Vietnam till 2010 with a vision to 2020”

for HIV patients. Those measures included: Manufacture order; Import Appointment; Fast track registration license; and Compulsory license to produce anti-HIV drug in Vietnam.³⁰

Vietnam has also promulgated another measure that is permitted by the TRIPS agreement and the Doha Declaration in order to promote the medicine accession namely parallel imports. On 28 May 2005, the Minister of Ministry of Health issued the Decision 1906/2004/QD-BYT on the Regulation of parallel importation of preventive and curative medicines for humane purposes which is playing a the potential role in expanding the drug availability at the same time with reducing the drug price in the Vietnamese domestic market.

As a general review, with all of the above legal measures, Vietnam has made the best conditions of the TRIPS agreement and Doha Declaration to create more options for local pharmaceutical manufacturers to produce the ARV drug. In fact, until 2006, even though many appropriate measures in improving the availability and affordability of ARV drugs had been applied in Vietnam such as local production, national programs and donor supports only 30% of HIV/AIDS patients in Vietnam could access the ARV drugs.³¹ Since 2008, the drug accession for HIV/AIDS patients has been significant improved as 47.2% patients have accessed freely the essential drugs through 207 free drug distribution places (in 2008). More significantly, in principle, the HIV/AIDS patients in Vietnam can freely access the ARV drugs until the year 2012.³²

However, it may be noted that the improvement of the ARV drug accession in Vietnam is not the consequence of the upgrading of local drug production capacity or a comprehensive IP law and patent law regime that Vietnam has established during the accession to WTO. Those favorable conditions come from the supports

²⁹ Jakkrit Kuanpoth "Patent and Access to Antiretroviral Medicines in Vietnam after World Trade Organization Accession" (2007) *The Journal of World Intellectual Property*, Vol.10, 202.

³⁰ Decision of the Prime Minister No 173/2008/QD-TTg in promulgating the Regulation on the Application of necessary measures to meet needs for anti-HIV medicines in Emergency cases, dated 25 December 2008.

³¹ *Interview of Vice Minister of MOH Trinh Quan Huan on Dantri Newspaper*, available at <<http://dantri.com.vn/c0/s0-182375/chi-30-benh-nhan-co-hiv-duoc-tiep-can-thuoc-arv.htm>> visited 2 February 2009.

³² Interview of Vice Minister of MOH Trinh Quan Huan, n31.

and sponsors of international organizations such as the Global Fund, UNDP, WB, the Bill and Melinda Gates Fund, the Clinton Fund and Vietnam's national program against HIV/AIDS. Until 2009, apart from the State budget for ARV drug subsidies, no further international donor commitments have been made and Vietnam must find a number of appropriate options to maintain vital healthcare supports for the HIV/AIDS patients.

Concerning types of ARV drugs, Vietnam seems to be able to produce a full range of ARV drugs, however, in fact all domestically produced ARV drugs can be used only for the first-line regimen; meanwhile the practice treatment at present requires more drugs for the second-line regimen. In addition, all local pharmaceutical producers have not been awarded with the WHO's prequalification and in addition, those drugs have not been recognized by the FDA. Due to the low production level, in some cases, the price of domestic drugs is not much cheaper than imported drugs. As a result, local manufacture suppliers in ARV drugs can not meet the treatment demands in Vietnam.³³

VII.2 The development of Patent law in Vietnam

VII.2.1 Before the compulsory incorporation of the TRIPS standards

The concept of patent protection was first introduced in Vietnam by the ratification of the Paris Convention for Protection of Industrial Property on 8 March 1949. From the war, until 1975, patent as other IP sectors were not regulated in the national legal regime. With the shift to the National Reform in 1986, the concept of IP law became more familiar in society and was gradually developed but not be as in an independent legal branch. From 1986 to 2005, there was not any independent law code in the IP protection sector. The legal document system of Vietnam for the industrial property rights, including patents were regulated in the different law codes such as Chapter II of Part VI, from Article 780 to Article 805 of the 1995 Civil Code and the Decree 63/CP on the Implemented provisions that concerns industrial

property protection. This Decree was then replaced by the Decree 06/2001/ND-CP dated 1 February 2001.

The invention definition was regarded in the 1995 Civil Code as “a technical concept which is distinguished by having worldwide novelty in terms of the present state of technological development, high level of creativeness and be able to apply to various social and economic sectors.”³⁴ The patent owners had the rights to be named as authors in invention patents, utility solution patents and other patent certificates; having the economic right to receive remuneration. The protection period for patent protection was 20 years from the official filing date. In terms of the TRIPS agreement, this provision is similar with the TRIPS standards and still keeps the same regulations in the current patent law system.³⁵

Before the application of the TRIPS agreement and the WTO obligations into the national legal system, Vietnam had clearly determined the industrial property subject matters that were not able to be protected. In the beginning of the IP law establishment, the exceptions of patent protection provided for the industrial property objects that are contrary to social interest, public order and the principles of humanity.³⁶ According to Article 787 of the 1995 Civil Code, the industrial property “subject-matters” which are contrary to social interest, public order, and the principles of social humanity shall not be protected under the Vietnam IP law. Art. 4.4 of the Decree No.63 detailed the “subject-matters” which concerned the Public interest as:

Scientific concepts, principles and discoveries; Methods and systems for economic organization and management; Methods and systems for education, teaching and training; Methods for the training of animals;

³³ Interview with Mr Bui Dung Duong, Vice Director of the Prevention and Anti-HIV Department, MOH of Vietnam, available at <<http://www.kcb.vn/PrintPreview.aspx?aid=365>>, visited 14 April 2009.

³⁴ Article 782, the 1995 Civil Code, can access the Vietnamese version at http://vbqppl.moj.gov.vn/law/vi/1991_to_2000/1995/199510/199511090005/#774

³⁵ The patentable subject matter is defined in Article 27 of the TRIPS agreement as “any invention, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application”. The term of protection is twenty years from the official filing date.

³⁶ Article 787, the 1995 Civil Code.

Systems with regard to linguistics, information, classifications and compiling of documentation; Designs and planning schemes for construction works, projects for regional development and planning; Solutions concerning only the shape of articles and being of an aesthetic nature only; Conventional signs, timetables, rules and regulations and symbols; Computer software, layout designs of integrated circuits, mathematical models, graphs and the like; Plant or animal varieties; Methods for the prevention, diagnosis or treatment of diseases for human being, animals; Essential biological processes for the production of plants or animals other than microbiological processes

The following acts are not considered as patent infringements either

The use for non-commercial purpose; The use of products having been put into the market place including foreign markets by the owner of the patent, licensee, non-voluntary licensee or the person entitled to the prior use rights; The use for maintaining operations of foreign transport means temporarily entering or being in the territory of Vietnam.³⁷

In comparison with the TRIPS Agreement and the Doha Declaration, the “Exceptions” regulations on patent holder rights protection of Vietnam is greater than the “Exceptions” from the patent holder rights of the international IP law. Under the accession schedule of Vietnam to the WTO, Vietnam had taken a “quantum jump” in amendment and promulgation of the national legal system including the patent rights protection in order to meet the TRIPS obligations and other national requests during the WTO negotiation.³⁸

VII.2.2 The development of patent law under the WTO accession

The patent law sector as well as the whole picture of the Vietnam’s IP law has been remarkably improved from the time Vietnam applied for the WTO membership and the signature of the BTA with the United State in 2000. Due to very strict request

³⁷ Article 803 the 1995 Civil Code; the Decree No. 63, Article 52.1

³⁸ Vietnam accession to the WTO on the World Trade Organization website available at <http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm>

from the USA, most of TRIPS standards, including patent protection, had been incorporated into the Vietnam-USA BTA provisions.³⁹ Many legal documents for IP protection have been urgently promulgated since 2000 under the WTO accession schedules.

With the enactment of the 2005 IP law, the replacement of the 2005 Civil Code for the 1995 Civil Code and their implementing guidelines, a comprehensive legal regime for protection of patent has been established in line with the international regulations and standards. An invention can be protected under the kind of invention patent if it satisfies these following conditions:

- a) Being novel;
- b) Involving an inventive step;
- c) Being susceptible of industrial application

Unless it is a common knowledge, an invention shall be protected by mode of grant of utility solution patent when it satisfies the following conditions:

- a) Being novel
- b) Being susceptible of industrial application.⁴⁰

The definition, condition and guidelines of “Novelty of inventions; Inventive step of invention and Susceptibility of industrial application of invention” are instructed in the article 60, article 61 and article 62 of the 2005 IP law. The IP protection in Vietnam is also regulated at the Part Six – Intellectual Property Rights and Technology Transfer of the 2005 Civil Code from article 736 to article 757. Basically, the terms and conditions as well as rights and obligations of patent protection in Vietnam law have been set up at the same level with the TRIPS regulations as a compulsory condition of the WTO membership.

The moral rights of patent owner are dedicated “to be named as authors in invention patents and utility solution patents as well as ‘to be acknowledged as authors in

³⁹ See Chapter Six.

document in which inventions ... are published or introduced.”⁴¹ The invention owners can ask their IP remunerations in accordance with following provisions unless other agreement exists between parties: “10% of the profit amount gained by the owner from use of an invention; 15% of total amount received by the owner in each payment for licensing of an invention.”⁴²

The patent owner can protect their lawful rights by self-protection as well as asking the protection from the State agencies to handle acts of infringement upon intellectual property rights according to the regulations of the 2005 IP law and its implementation guidelines. The owner can also request the state agencies to apply provisional urgent measures to the infringement acts as well as claim for the damages that result from IP infringement acts.⁴³

According to Article 59, the 2005 Vietnam IP law, the protection of patent shall be excluded in many special cases which divide into three main categories:

- a) Those are not considered as inventions such as “scientific discoveries or theories, mathematical method; schemes, plans, rules and methods for performing mental acts, training domestic animals, playing games, doing business; computer programs; presentation of information; solutions of aesthetical characteristics only.”
- b) Those are not be protected as a patent form named “Plants varieties, animal breeds; Processes of plant or animal production which are principally of biological nature other than microbiological ones.”
- c) Those are not considered as a industrial products like the method for prevention, diagnostic, treatment of human or animal diseases, bio/or non-biological processes.

Other related provisions such as rights and term of protections; conditions and procedures for granting compulsory licenses; judicial procedures; the right to assign

⁴⁰ Article 58, the 2005 IP law.

⁴¹ Article 122, the 2005 IP law.

⁴² Article 135, the 2005 IP law.

⁴³ Article 198, Article 199 and Article 200 the 2005 IP law.

and inherit for patent and other concerning matters of patent in the TRIPS provisions and related international IP conventions are been incorporated into the Vietnam IP law system under the WTO accession.

VII.3 Public Health and the Vietnamese Patent Law

VII.3.2 The best benefits within the legal framework exceptions

The intellectual property law plays an important role in industrial development including the drug manufacturing industry. A highly legal IP protection provides an efficient environment for scientific and technology development due to the rewards in moral rights, royalty and commercial benefit that can be used for R&D activity expenditures. Vietnam, as is the case for many poor nations, does not have a high level of scientific and technology development. One of the causes would be regarded as a weak protection system in intellectual property which limits the technology transfer and R&D activities. So, the objectives of the TRIPS agreement are considered as

Recognizing that intellectual property rights are private rights; Recognizing the underlying public objectives of national system for the protection of intellectual property, including developmental and technological objectives; Recognizing also the special needs of the least-developed country members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.⁴⁴

In connection with the protection of human health and public interest, each nation can establish their IP protection regulations with the measures that promote their co-economic and technological development. In the pharmaceutical sector, there are more problems in the prices of drugs and the availability accession especially for the poor nations. Those nations are facing the dilemma of how to implement the

⁴⁴ Preamble of the TRIPS Agreement.

Declaration on the TRIPS Agreement on Public Health flexibly enough to provide an available and affordable healthcare service including drugs for their citizens.

As discussed in detail in Chapter Three, under the spirit of recognizing the special needs of developing nations in accessing technology and medicine in particular, the TRIPS agreement confirms that the protection and enforcement of IPRs must promote the technological innovation and transfer in a manner conducive to social and economic welfare. Nation members are also allowed to reconcile flexibly the TRIPS Agreement into their law in balance of protecting public health and public interest. The excludable patentability has been detailed as:

- a) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals,
- b) Plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

The Doha Declaration, concerning public health and medicines access promotion has confirmed “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health”; its provisions “can and should be interpreted and implemented in a manner supportive of WTO member’s right to protect public health and; in particular, to promote accesses to medicines for all.”⁴⁵

The flexibilities that WTO’ member can use to activate those provisions are explained as:

... the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted;... the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those related to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.⁴⁶

⁴⁵ Paragraph 4 The Doha Declaration.

⁴⁶ Paragraph 5, the Doha Declaration.

Vietnam, as with other developing nations, is looking for a legal instrument that can not only reaching inline with the TRIPS obligations but also extend the drugs accession opportunities and reduce the prices. According to the Vietnam IP law which has incorporated the TRIPS Agreement and related international rules in IP protection, the pharmaceutical products in any kind of “product” or/and “process” has been protected under patent protection. Following the TRIPS standards, Vietnam applies the term of 20 years protection for any inventions including pharmaceutical products.

In order to provide reasonable and affordable drugs, Vietnam is looking for some options within the TRIPS and the Doha Declaration framework that are referred as Compulsory Licenses and Parallel Imports.

VII.3.3 Compulsory licenses

All compulsory licensing of Invention without permission of the patent owner from the TRIPS Agreement has been incorporated in Chapter IX, Section 2 from Article 132 to Article 137 of the 2005 IP law. In the Vietnam’s IP law, the rights of industrial property owner would be limited in the case of licensing of inventions under the decisions of the state agency. The competent state agencies, on behalf of the State, can “use or permit other organizations or individuals to use inventions in domains under their respective management for public and non-commercial purposes, national defense, security, disease prevention and treatment and nutrition for the people, and to meet other urgent social needs without having to obtain permission of invention owners or their licensees under exclusive contracts.”⁴⁷

The compulsory licensing of invention can be granted in the following cases:⁴⁸

a. Compulsory licenses for national emergency cases, public and non-commercial purposes

To protect the social welfare, the TRIPS Agreement provides room to use the subject of a patent without the authorization of the right holder “in the case of a national

⁴⁷ Article 133, the 2005 IP law.

⁴⁸ Article 145, the 2005 IP law.

emergency or other circumstance”.⁴⁹ In those situations, the government or the third parties who are authorized by the government can use the subject matter of a patent without authorization of the right holder under specific conditions. Vietnam has interpreted those provisions into domestic law system by allowing the use in the cases of ‘public and non-commercial purposes/ or in service of national defense, security, disease prevention and treatment and nutrition for people/ or other urgent needs of the society’. The Government may issue the compulsory license in the using of invention under specific conditions.⁵⁰ So, in compare with the provisions of Article 31(b) of the TRIPS Agreement, the compulsory licenses of Vietnam in the case of national emergency situation, public and non-commercial uses are compliance with the international rules.

b. Non-working invention

The compulsory license shall be applied when the holder of exclusive right to use such invention fails to fulfill the obligations to use such invention provided in Clause 1, Article 136 and Clause 5, Article 142 of this Law upon the expiration of a 4-year duration as from the date of filing the invention registration application and the expiration of a 3-year duration as from the date of granting the invention patent.⁵¹ It means, in drug related concerns, Vietnam can issue compulsory licenses in the case where the IPRs owners refuse to use patented inventions in Vietnam or the manufacture of the products do not fulfill the domestic demands by meeting the needs of disease prevention, treatment and nutrition for people. Or in the case of unaffordable price of medicinal product or the drug availability does not meet the domestic demands the MOST can issue the compulsory license to protect the public interest.

⁴⁹ Article 31(b), the TRIPS Agreement.

⁵⁰ Article 145(1.a), the 2005 IP law.

⁵¹ Article 136, clause 1, states ‘Obligation to use inventions and marks: Owners of inventions are obligated to manufacture protected products or apply protected processes to satisfy the requirements of national defense, security, disease prevention and treatment and nutrition for the people or to meet other social urgent needs. When arise the needs mentioned in this Clause but invention owners fail to perform such obligation, the competent state agency may license such inventions to others without permission of invention owners.’ The Article 142, clause 5 states: Invention licensees under exclusive contracts shall be obligated to use such inventions in the same manner as the invention owners according to the above provisions.

c. Refuse to grant a contract license

Compulsory license can be applied where a patent owner refuses to grant the volunteer license to persons who wish to use the invention fails to reach an agreement with the holder of exclusive right to use such invention on the entry of an invention license contract in spite of his/her efforts made within a reasonable time for negotiation on satisfactory commercial price and conditions.

d. Anti-competition practices

A monopoly of patented products would create the anti-competition practices and this situation can lead to unreasonable prices or price fixing in the market. Especially in the pharmaceutical sector in Vietnam, the drug prices under normal conditions are too expensive for a large population. So, in the case, where the holder of exclusive right to use such invention is considered as having performed anti-competition practices banned by competition law, a compulsory license can be granted to other users.

Conditions for granting the compulsory licenses

Compulsory patent licensing must be used under strict conditions that do not create conflicts with the patent normal exploitation. In addition, the compulsory patent licensing must apply on the principle of reasonable property interests for the patent owner. The rights to use the compulsory licensing of invention mentioned above will be limited under conditions that states:

- a) Such licensed use right is non-exclusive;
- b) Such licensed use right is only limited to a scope and period sufficient to achieve the licensing objectives, and largely for the domestic market, except in the case of where the holder of exclusive right to use such invention is considered to have performed anti-competition practices banned by competition law. For an invention in semi-conductor technology, the licensing thereof shall be only for public and non-commercial purposes or for handling anti-competition practices according to the provisions of the competition law;

- c) The licensee must neither assign nor sub-license such right to others, except the assignment is effected together with the transfer of his/her business establishment;
- d) The licensee shall have to pay the holder of exclusion.⁵²

In certain situations, the Ministry of Science and Technology of Vietnam can grant the compulsory license without consultation with the patent owners on condition of 'a satisfactory compensation depending on the economic value of such use right in each specific case and compliant with the compensation bracket set by the Government.' Other ministries and ministerial authorities can issue the compulsory licenses after consultation with of the Ministry of Science and Technology.⁵³

Even though, a compulsory license can be issued without the consent of a patent owner, there is an obligation to pay a reasonable remuneration which is be determined under strict conditions such as: the price of invention transfer by a normal contract; the total investment to invent that innovation including the considerations on funding from the State budget (if any); the benefits from the use of invention; the remaining validity of term of protection; the necessary of the invention using transfer; and other factors that would influence the invention benefits; the remuneration will be less than 5% of the net sale price of product which manufactured under the compulsory license according to above principles.⁵⁴

So, in the light of related provisions in public interest and compulsory license that are regulated in Article 31 of the TRIPS Agreement, the TRIPS agreement amendment in 2005 and the Doha Declaration, the regulation of compulsory licensing in Vietnam are applying the same standards as the TRIPS Agreement and the Doha Declaration including the cases, the rights and conditions of the right to use invention under compulsory decisions. These regulations have been made in a way that reconciles all possible conditions of the international IP law in order to provide the best legal framework for public health and social welfare. The legislation system of compulsory licensing has been completed mainly from the law code level (the

⁵² Article 146, the 2005 IP law.

⁵³ Article 145(a) and Article 147, the 2005 IP law.

2005 IP law) to the decree implementation (the Decree No 103/2006/ND-CP) and the circular level (Circular No 01/2007/TT-KHCN).

In order to facilitate the development of the pharmaceutical industry and increase the availability and affordability of drugs for HIV/AIDS patients, on 25 December 2008, the Vietnam Government issued the Decision 173/2008/QD-TTg promulgating the Regulation on the Application of necessary measures to meet needs for anti-HIV medicines in Emergency cases (hereafter referred as the Decision 173/2008/QD-TTg) in which a compulsory license is regarded as a main measure to provide the anti-HIV drugs in national emergency cases. In the event that the HIV disease would occur and possible spread widely at one or many areas in Vietnam, the Prime Minister can announce the “national emergency case” and allow the application of “necessary measures” to meet the demand for drugs.⁵⁵ The conditions and obligations of compulsory license in anti-HIV drug must obey the regulations of the 2005 IP law, its implementing documents and related legal codes.

There is no doubt that a comprehensive legislation system has been established in line with the TRIPS agreements and the Doha Declaration in Vietnam. The current IP law system in general and the concern of “compulsory licenses” not only satisfied the WTO accession demands but also can facilitate the pharmaceutical industry as well as improvement the medicine accession opportunities. The existing IP law provides the detailed guidelines which involve the cases, conditions, procedures and obligations of the compulsory license. This is a significant achievement in Vietnamese law making work especially when the IP law and concept of compulsory licenses are new ideas in Vietnam.

However, until the end of 2008, Vietnam did not issue any compulsory license due to the lack of international market information, experience and knowledge experts in pharmaceutical law which are crucial limitations in applying the compulsory licenses in Vietnam. How to employ the term of “national emergency or other circumstances

⁵⁴ Article 24, Decree 103/2006/ND-CP.

⁵⁵ Article 7(d) the Decision 173/2008/QD-TTg, available on the Vietnamese Version at <http://vbqpp12.moj.gov.vn/law/vi/2001_to_2010/2008/200812/200812250001> visited 10 April 2009.

of extreme urgency” into the granting compulsory license is a big challenge for IP law implementation in Vietnam.

VII.3.4 Parallel Imports

Parallel import is defined as patented drugs that have been sold in foreign markets which can be imported to other markets without the permission of the IPR holder. For example, a drug was patented both in nation A and nation B; if the drug can be sold in the nation A with at a cheaper price than the same patent product in nation B; a company/drug distributor can import this drug from nation A and sell it in nation B market at a cheaper price than the drug which is patented in nation B. The action of parallel imports is implemented differently in each nation, some countries allow parallel import, some countries do not implement into their law system.

Parallel imports are also regarded as a solution for meeting the demands for cheap drugs with cheaper price of the exhaustion of IPRs. This is stated as “the effect of provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime to such exhaustion without challenge, subject to MFN and national treatment provision.”⁵⁶ Those regulations can be considered as a significant benefit for poor nations to improve their medicine accession opportunities and this solution has been applied more commonly in developing nation.

Vietnam actually has to import almost all pharmaceutical products, not only the ARV drugs, which have high prices, in most cases, higher than the best international market prices.⁵⁷ So, in fact, although there was not an independent IP law code in Vietnamese IP law system until 2005 the regulations in parallel import had been issued just few years after the Declaration on the TRIPS Agreement on Public Health in order to find a solution for domestic market drugs. In order to ensure the availability and affordability of the drug market, on 28 May 2004, Ministry of Health of Vietnam issued the Decision No 1906/2004/QĐ-BYT dated 28 May 2004 on the Regulation on Parallel Importation of preventive and curative medicines for Human

⁵⁶ Article 5(d), the Doha Declaration.

being, that provided the detailed guidelines for parallel import of pharmaceutical products into Vietnam (hereafter referred as the Decision No 1906/2004/QD-BYT). All related provisions from the TRIPS Agreement, the Doha Declaration and its decision on Implementation of Paragraph 6 of the Doha Declaration have been interpreted into this Regulation including the definition of term and main provisions of imported drug quality. The general regulations, subjective application, interpreter of term; forms and contents of parallel imports application are detailed by promulgation of this Decision.

In the Decision No 1906/2004/QD-BYT, parallel import can be interpreted as the import of the medicines that have been patently-owned in Vietnam from foreign markets where the prices are cheaper than the domestic market, in particular:

- Import the same medicine that patently-owned in Vietnam but produced by different producers in the same company. Those medicines are sole/provided by the same producers or other providers.
- Import the same medicine that is patently-owned in Vietnam, produced by a same producer from different nations.⁵⁸

The Drugs Administration of Vietnam which belongs to the Ministry of Health is in charge of issuing the license for parallel imports. Three months after the regulation came into force, some first parallel imported licenses had been issued as a state management instrument to control the medicine price in the domestic market. Prices of parallel imported drugs were cheaper than the normal price; however, there were some limitations such as the drug quality, the availability of medicine in international market and the exclusive policies of pharmaceutical companies.

Conclusion

Vietnam, like other poor nations, by applying the TRIPS standards into their domestic legal system, has faced crucial challenges in improving the level of IP

⁵⁷ Jakkrit Kuanpoth "Patent and Access to Antiretroviral Medicines in Vietnam after World Trade Organization Accession" (2007) *The Journal of World Intellectual Property* Vol.10, 203.

protection at the same time as protecting their social interests. On the one hand, Vietnam wants to upgrade their IP protection level not only for its WTO conclusion but also for the establishment of a better environment for R&D activities. On the other hand, more “exceptions” of IPR protection will create more opportunities for citizens to enjoy the IP products especially in the education and healthcare sectors. After two years joining the WTO’s system, the pharmaceutical product market and medicine availability in Vietnam have considerably changed with more options in kinds of drugs and pharmaceutical suppliers but the prices are far from affordable for a poor nation. One of the main reasons for current expensive prices in Vietnam could be regarded as the TRIPS Agreement application.

As discussed in Chapter Three, Intellectual property law and patent law, particularly, have close links with price and availability of pharmaceutical product. In developing nations which import IP, the higher level of patent protection will lead to the higher price of patent pharmaceutical products. At the moment, all pharmaceutical products are the subject matters of patent protection and all available medicines in Vietnam’s markets are under patent protection. Nevertheless, whether the drug are imported or locally manufactured, the prices are still unaffordable for most Vietnamese citizens.

To reduce the price of medicine, Vietnam is employing the advantages of the TRIPS Agreement on public health provision. During the first few years of WTO accession, due to the lack of a comprehensive legal system including the IP law, lack of practical experience and knowledge in patent law. There were no specific guidelines for implementing those “exceptions” in the case of public interest protection even though Vietnam had named many non-patentable subject matters in the IP law regime. In other words, the legal tools were available in the national law system but they could not be employed to improve the social benefits due to the shortcomings of the State organs and legal regime.

There are some core codes such as the 2005 Pharmaceutical Law the 2005 IP Law and a guideline legal documents named the Decision No 1906/2004/QĐ-BYT about Regulation on Parallel Importation of preventive and curative medicines for Human in 2004 had marked an important improvement of the situation of patent law and

⁵⁸ Article 3 the Regulation on Parallel Import of Medicines for Treatment of Human.

pharmaceutical industry in Vietnam. These legal documents have established an entire sector in concerning of social interest protections and public health. However, in fact, Vietnam still could not use the applications of the TRIPS regulations in public health to improve the medicine accession opportunities in Vietnam due to the lack of full implementation guideline documents.

In order to conclude the WTO accession in 2006 and to implement the WTO commitments and obligations, patent law and the legal regime for the pharmaceutical industry in Vietnam has been mainly established from the law code level to implementing guidelines. Not only in general regulations of parallel import and compulsory licensing, the Government had also issued appropriate instructions in how to apply the necessary measures to meet the needs for anti-HIV medicines in emergency cases in Vietnam.

It is clear that the Vietnamese Government is aware of improving the public health protection and has been using legal tools to expand the accession opportunities in medical treatment methods and pharmaceutical products. Under the legal framework of the TRIPS agreement and Doha Declaration, Vietnam has issued fully all legal measures concerned of compulsory licensing and parallel imports from law code level to implementing documents. It is a broad agreement that, an appropriate implementing legal mechanism with fairly comprehensive guidelines is also available to create not only a better environment for the R&D activities and technology transfer but also improve the public interest.

However, how to active those law and regulations into practice with a poor performance of R&D activities are significant challenges for the Vietnam's Government. In theory, a proper protection system of IP will create a better R&D environment, technology transfer and economic development, but in practice, in many poor nations including Vietnam, the TRIPS standards and strict patent protection regime perhaps have created more disadvantages for medicine accession opportunity.

Chapter Eight

Conclusion and Recommendations

In the light of the examination the impact of international trade law in general and the WTO membership on the development of Vietnam's economic development, its national legal system with intellectual property law particularly in preceding chapters, the main findings and recommendations of this study would be indicated as follows:

1 Findings of Study

WTO membership and the transition in Vietnam

As seen in the previous chapters, this study has demonstrated how the membership of the WTO has transformed the landscape of the Vietnamese legal system and how this membership has been the catalyst of change in the Vietnamese society as a whole. The international commitments in regional trade agreements and the WTO accession were the main driving force of reform in Vietnam. To complete the WTO negotiation, Vietnam had to promise to reform so many areas of its legal system especially the intellectual property law to reconcile its WTO commitments with its domestic law. What is more, Vietnam was asked not only to comply with the international intellectual property regime but also the so-called WTO-Plus commitments for new members. In order to achieve this objective Vietnam had to carry out so much administrative reform and introduce ambitious law making program. So much so that Vietnam had to promulgate and amend around 100 law codes excluding their guiding documents. Therefore, it is clear that without the WTO accession commitments Vietnam would not have reformed so much at such a high speed.

Even though the WTO is founded neither as charity organization nor a social welfare one, the developing nation can gain trade advantages and socio-economic benefits if they can strengthen their competitive capacity, comprehensive legal system and well-prepared economic liberalisation progress. Smooth transformation from the centrally commanded economy to more market oriented economy without any major change of political system, becoming the 150th member of the WTO in 2006 and non-permanent member of the Security Council of the UN in 2007, Vietnam reflects a successful picture of a transition nation. More specifically, regardless of the breaking down of the Soviet Union which was named as the “elder of the socialist system” in Vietnam, the collapse of the Communism in Eastern Europe in 1990, the cut down of main financial donor and international trade activities from those nations, Vietnam has been able to make progress in all aspects of the state power from the highest level to the grassroots. Having gone through a process of transition in its modern history from the Confucian thoughts to French colonial system and finally to the central planned economy, the country has been faced with considerable challenges from the drive to transform not only the economy but also the political system into a modern system based on market economic development theory.

Since the engagement with the global economic contexts from the WTO start of negotiations for accession in 1995, Vietnam has gained constantly many impressive achievements in economic development and national legal reform. All social sectors such as healthcare system and education have gained a better performance than before; enterprise system reforms with rapid development of the private economic sector has occurred. Under the WTO commitments and domestic open market procedures, Vietnamese citizens have more options to access the socio-economic services in Vietnam and overseas. By getting the advantages from the WTO’s principles, Vietnam has expanded her export market while at the same time witnessed an improvement in the domestic competitive capacity. The transparency and efficiency of the State organ system and economic market elements has been strengthened through the implementation of the WTO’s accession commitments and obligations.

It has generally been agreed that international commitments in regional trade agreements and the WTO accession were the main driving forces of the recent

radical reform in Vietnam. More than 70% of interviewers interviewed by the present author during the first field trip conducted in Vietnam in 2006 thought that the WTO membership has created the opportunities for Vietnam to improve its economic growth and social development. To complete the WTO negotiation, Vietnam had made “tremendous efforts and progress”¹ and did its utmost to reconcile the WTO commitments into domestic law. In order to be fully compliant with most of the WTO agreements and the WTO’s plus conditions required by her trading partners, Vietnam would have to promulgate and amend around 100 law codes excluding other subsidiary legislative instruments in the area of economic-administrative reform. Huge progress has been made in establishing the rule of law in order to implement and supervise the state management activities and daily life. In other words, Vietnam has transformed from the rule of central administrative policies of the Government and command decisions by the Party Resolutions to the rule of law. Legal systems have been established in fairly comprehensive manner with three branches of the government, legislative power, executive organ and judicial system, working at a reasonable pace. Despite the fact that the Vietnamese legal system still presents plenty of shortcomings in all areas, Vietnam has been steadily on the right track to build a comprehensive and effective legal system.

In principle, without the compulsory obligations flowing from the international commitments as well as the international assistances in both financial sector and human recourses, the reform in Vietnam would not have obtained the performance that it has.

The TRIPS Agreement and Vietnam’s commitments in IP protection

Without the WTO membership and obligations of the TRIPS agreement, the concept of intellectual property and IP law would be a “stranger” in national legal regime for a long period. During the WTO accession, the IP protection in Vietnam was gradually improved at proper level with the obligation to incorporate all TRIPS standards into domestic legal systems. Principles of the WTO system such as National Treatment and Most Favored National Treatment have been included in the

¹ The WTO report on “Working Party examines first revision of membership report” September 20th

IP law as the IPR holders including foreign individuals or legal persons can enjoy the MFN and the NT treatment in Vietnam.² To conclude the WTO negotiation, Vietnam had promulgated a number of new law codes and amended other existing ones on IP protection. Many international treaties and conventions in related areas have been signed and reconciled into a domestic legal regime. The enforcement mechanism has been strengthened, even though, in fact, its effectiveness still stays at a very low level. Under the demands from other nations during the WTO's negotiation, Vietnam was able to reconcile all of TRIPS standards into domestic IP law without being given a transitional time. During the first fifteen years of reform, the enforcement system including the state management functions of related agencies had performed very poorly. The compulsory requirement of providing a stronger level of IP protection under the the BTA with the USA in the year 2000 had forced Vietnam to upgrade its enforcement system. Under the BTA provisions, the IP protection in Vietnam was required to reach the TRIPS standards in both legislative and enforcement regimes.

The TRIPS agreements and related conventions have recognized "the need to maintain a balance between the rights of authors, performers, producers and the larger public interest, particularly education, research and access to information."³ The special needs for the poor nations "in respect of maximum flexibility in the domestic implement of laws and regulations in order to enable them to create a sound and viable technological base" is reconfirmed in the Preamble of the TRIPS agreement. The protection and enforcement of IP rights must be carried out in such a manner which balances rights and obligations of IP rights holders and users of IP products.⁴

The WTO's impact on access to medicine in Vietnam

Presently, the availability of pharmaceutical product in the Vietnamese market depends strongly on the foreign supplier. With an inadequate scientific and technical research system, Vietnam is not yet successful in manufacturing medicine to meet

2005.

² Article 2(4) the Ordinance 41-2002.

³ The Preamble of WIPO Copyright Treaty; Preamble of WIPO Performers and Phonograms Treaty.

the demands of the country. Though the local factories can produce some kind of medicines, most of the raw materials are imported through foreign suppliers. However, the implementation of the WTO commitments in the imported-exported pharmaceutical products for foreign company have increased access to medicine in Vietnam in terms of both the availability and affordability by ordinary citizens. After two years of open market for healthcare service sector and pharmaceutical products, most vital medicines with the WHO's qualified standards are available in Vietnam. The number of foreign and international pharmaceutical companies that open their branches in Vietnam has significantly increased within the two years.

In addition, due to a higher level of patent protection in Vietnam, there are more international pharmaceutical companies wanting to invest in the pharmaceutical industry. Even at an early stage, the pharmaco-chemical industrial has been established with more potential investment for the R&D activities. In 2008, a promising number of total projects in which most of them are foreign manufactures had invested in these areas.

As other developing WTO members, Vietnam has applied the TRIPS standards on patent protection for all pharmaceutical products. As discussed in Chapter Seven, Vietnam has adopted all provisions of the Doha Declaration to improve public health.

Shortcomings of the Vietnamese legal system

The WTO's commitments have made a great contribution to the legal transformation in Vietnam in order to meet the international legal standards expected by the WTO and its member states. The legislative system and enforcement mechanism has been upgraded under the pressures of global economy. A more genuine rule of law has gradually replaced the rigid administrative orders of previous centrally planned economy. However, the perception is that the reforms have not gone far enough and the Vietnamese legal system is still inadequate in terms of both legislative capacity and enforcement system.

⁴ Article 7, the TRIPS Agreement.

After more than twenty years of reform, Vietnam has made a remarkable progress to develop its economy and modernise its legal system. Vietnam has also achieved significant success in poverty reduction, and promotion of citizen's living standards and social welfare.

One of the shortcomings relate to the capacity of the National Assembly (the NA) in spite of twenty years of reform. The distinction between legislative power, executive system and judicial body is still not clear. For example, the law code, which is promulgated by the NA, only provides a general legal framework. The laws provided for detailed provisions are drafted, guided and implemented by the Government and Ministerial level organizations. In the laws enacted by the NA, there is offer a mention of implementing organizations but there is no deadline prescribed for issuing the implementing legal documents. As a result, many of the law codes that have already entered into force have not been implemented because the implementing legal documents have not yet been issued by the relevant executive organizations.

In addition, cooperation between the State organs that are in charge of law drafting, law promulgation and implementing legal documents is lacking. Even when a bill has been written by a government department and reviewed by all related State organs, it still can overlap with other bills that are drafted by different State organs. Furthermore, in some cases, the secondary legislation might contradict the primary legislation. Much of the legislative process has not reached the international standards due to the lack of ability to access adequate international information and professional legal knowledge especially in areas such as the law relating to business enterprises, land ownership and use, investment, and intellectual property.

There is a broad agreement that Vietnam has made enormous progress in terms of developing its legal framework under pressure of the WTO membership, but the law making technique still is in a state of confusion. Law codes seem to provide a general legal framework rather than a set of rules that can be implemented. Some law codes were considered as political resolutions or moral declarations rather than binding legal instruments.

Comprehensive normative legal documents with a “paper-tiger” enforcement system in the IP law sector

In spite of a huge body of law coming into existence to strengthen the IP sector, the current regime of IP enforcement in Vietnam can be considered as a weak mechanism in comparison with the requirements of the TRIPS standards. Availability and easy use of the infringed IP products is the current picture of the Vietnam's IP market especially in copyrights and related rights. The IP consumers do not comply with the existing legislative provisions and the enforcement system lacks effectiveness. There are many state enforcement agencies but no particular state agency is solely responsible for the enforcement of IP protection. Two agencies that exist for industrial property registration and copyrights and related rights registration do not have the real power to apply the administrative remedies to stop the IP infringements. Due to the overlapping functions and powers between the state agencies, the enforcement system takes much time to implement. These bodies lack the real power and the specific duty to implement the IP legislation.

In a survey conducted by the present author in Vietnam in 2006, nearly 62.5% of interviewees agreed that infringed products are very popular and everybody uses infringed IP products to save money and for convenience.

2 Recommendations

Comprehensive Action Plans for Beyond the WTO

Soon after a month from the formal accession to the WTO, on the 27th of February 2007, the Vietnam Government had adopted the Resolution No 16/2007/NQ-CP which outlined major guidelines and policies to develop the economy when Vietnam become a WTO member. The Action Program had defined the specific tasks for all central and local state organizations as well as enterprises to be aware of the challenges and take advantages flowing from the WTO's membership. The document defined the following 12 tasks for the government:

Promotion and dissemination of information on the WTO; Legislation and institution building; Renewal of investment and raising of investment effectiveness; Raising of competitiveness; Administrative reform; Raising of effectiveness of foreign relation activities and international economic integration; Education and training and human resource development; Agricultural modernization and rural development; Implementation of social welfare policies; Protection and promotion of national cultural values; and Assurance of security and defense together with detail action plan on Organization of Implementation those targets.⁵

In order to implement these objectives and overcome the difficulties encountered since Vietnam's entry into the WTO period, the country should embark on a process of economic reform. This reform programme could include the following measures:

Economic and Legal

No more incentives should be granted to businesses engaged in exports of raw material and FDI in high risk areas of environmental pollution.

- (a) Urgent reform of the SOEs should be carried out along with cut backs on the subsidies from the state budget. The exclusive business rights of the SOEs should be abolished. Heavy fines and strong penalties should be imposed for those engaged in unfair competition.
- (b) Review of the legal framework for corporate business should be undertaken. The Government should set up a new list of investment projects that are in the processing industry, high technology and environmentally friendly sectors.
- (c) The government should establish a national research institution to carry out a comprehensive study of the legal system of that exist in the EU nations, the US, Japan and Canada in order to find out the ways to improve the Vietnamese system of implementing the TRIPS provisions

⁵ Source: the Ministry of Justice website, available on http://vbqpp11.moj.gov.vn/law/en/2001_to_2010/2007/200702/200702270002_en/lawdocument_view, visited 26 March 2009.

and benefiting from the comparative advantage that the country has in terms of export of its products.

Strengthening the rule of law in the socialist-oriented market economy

By concluding the WTO negotiation, Vietnam completed a main stage of law reform and reconciling international law into the national legal system. However, In order to to create an appropriate legal regime for national development and meet the international standards, the rule of law should be strengthened.. The theory of “the socialist-oriented market economy” should be carefully reviewed to find out which concepts are most suitable with the needs of the socio-economic development.

The National Assembly and law making process

Professional law making agencies must replace the current law drafting bodies. The capacity of the NA should be strengthened and the members of the NA should be required to devote their full time to law-making and the terms and conditions of their service should be improved. They should be paid a much higher slary than what they do at the moment. There should be a system of providing assistants to the NA members. The Government agencies should only be in charge of implementing the laws but not making them.

A proper investment in providing technical facilities and humane resources would be necessary to strengthen the capacity of the Department on Supervision of Legal Normative Documents of the Ministry of Justice.⁶ This organization should receive a higher level of power to discharge its responsibilities effectively and to improve its working conditions.

Strengthening institutions within the judicial system

Not only the NA and its members' competence need to be strengthened but also all of the state agencies within the judicial sector should be equipped with the resources necessary. Public servants working in the judicial sector need to have proper legal knowledge and experience. The people working in the judicial sector are poorly

⁶ Source: the Ministry of Justice of Vietnam, available at <http://www.moj.gov.vn/p/render.userLayoutRootNode.uP>, visited 25 March 2009.

paid, not properly trained and are lacking in motivation. The qualifications required to work in high judicial positions must be high and their status and qualifications should be reflected in the salary that they receive. The role of a barrister at trial court must be placed at equal level with the prosecutor to make the legal procedure fairer and more transparent.

Organization, Management and Action Plans for legal reform

Most law-making and law reform programs finished by 2005 in time for the conclusion of the WTO accession agreements. The country should now embark on a programme to effectively implement the commitments undertaken under the WTO agreements and benefit more from the world trading system. For this, the country needs a plan of action for a new period "beyond the WTO".

Strengthening the effectiveness of IP enforcement system

Under the current system, the IP infringements can be handled by three approaches named as civil remedies, administrative remedies and criminal penalties. Depending on the type, the level and consequence, the infringement can be tried by the court or other state agencies. In the court system in particular, the infringements can be tried at the Civil Court, Economic Court or Criminal Court. Involvement of various kinds of state agencies would delay the handling procedures as well as the possibility of missing some serious IP violations altogether. Most of the interviewees in the Survey carried out by the present author agreed that Vietnam can improve the effective enforcement system by strengthening the capacity of professional state authorities involved in IP protection. A specialized court for IP matters would be considered as a potential recommendation. Alternatively, reforming the Economic Court into a Commercial Court and entrusting with IP matters too would also be a possibility. This would strengthen and improve the current enforcement regime.

Education, training and research on the WTO system and the IP law

Recently, the subjects such as the WTO law, international trade law, and the IP law have been introduced in Vietnam's education system but the quality of teaching and research in these areas remains very poor due to the lack of experienced lecturers, books and research resources. An advanced level of training and education

education in these areas as well as in foreign languages, both at home and at overseas institutions should be a top priority of government of Vietnam.. This would enhance Vietnam's competitiveness by preparing a highly skilled human resource ready to face the challenges brought about by a new phase in globalisation and enable the country to integrate better into the world trading system.

Effective incorporation of international law into domestic legal system

Although there have been a number of efforts made by the legislative, administrative and judicial authorities to implement and incorporate the provisions of international trade law into the municipal legal system of Vietnam, the process is still at its preliminary stage. Of course, building a comprehensive legal system and strong law implementation and enforcement mechanism is not an easy task, especially under a weak economy and bureaucracy still influenced by the feudal past. However, the time has come for the government to embark upon a programme of action designed to strengthen the rule of law and to incorporate the main tenets of international law in general and international trade law in particular into the municipal system in order to bring the laws of Vietnam in line with international standards. This is a crucial challenge for Vietnam in the years to come. The target of meeting the minimum standards of international law is not only an essential part of the process of becoming a member of the WTO but also a way of keeping the national development strategy moving forward at a realistic speed.

For this, Vietnam should also set up a separate research institution and perhaps an independent consultative committee in the National Assembly, which would be responsible for the study and research in international law in general and international trade law in particular. Such agencies should have the responsibility of carrying out the examination and evaluation of international treaty provisions and suggesting ways and means of implementing them in a way which would benefit Vietnam. They should also review international treaties to be ratified by Vietnam to ensure that they can be implemented properly in Vietnam and enhance close integration of the Vietnamese economy into the world economy.

Effective system for dissemination of international law

The current Vietnamese legal system provides inadequate access to legal information, particularly for the general public. As a result, there is inadequate awareness of the law among the general public. People lack understanding about the content of the law and how the law can benefit ordinary citizens. In the absence of adequate programme of disseminating new laws ordinary citizens can also be ignorant of their duties to respect and obey the law. With over 30,000 pages of documents, the WTO legal regime is a highly complex system even for professional legal researchers.

Of course, all major WTO documents and special regulations such as categorization of trade disputes, trade dispute settlement mechanisms, agricultural tax and the possible government supports were introduced through a WTO handbook. This book has been distributed through online versions and hard copy to all enterprises, the state organizational levels, and the government agencies. However, in the survey carried out by the present author in Vietnam in 2006, various stakeholders in the society stated that they also would prefer to have such information disseminated through the radio and television programmes and the newspapers. The general public regarded these mass media as “the most trusted information resources”.⁷ Therefore, a number of programmes, namely, “Vietnam and its WTO commitments” that provide the information of the WTO system and its particular trade topics, which also includes answering questions and giving advice can be recommended.

The Department of Legal Promotional Literature and Legal Dissemination of the Ministry of Justice should be allocated more resources to enhance its tasks.

TRIPS standards and national interests on public health and education

Vietnam should complete the process of establishing a modern IP protection regime dealing with public health taking into account new and emerging principles such as the right to access the health services. It should also provide for equal opportunities for both the public and private sector to develop and offer medicare services to the people. The Government should abolish the exclusive rights to print textbooks of the Education Publishing House, a government agency, and allow private sector

⁷ See the Survey, Section D: Communication and Law Dissemination; Section E: Recommendation.

companies to operate in this area. This would allow for competition and the prices for books may go down to an affordable level for ordinary citizens.

In the current Vietnamese national legal regime, there are plenty of regulations in which citizen's interests are given preference to other competing interests. For example, before the Law on Intellectual Property came into force, the "exceptions" provisions in the Vietnamese IP law were numerous. However, in the newly promulgated IP legislation the "exceptions" provisions for the IP rights protection have been amended in line with the TRIPS Agreement and the general framework of IP rights protection in the ASEAN region.⁸ However, as a least-developed economy, Vietnam should assert its rights under various exception clauses in the TRIPS agreements in order to bring the greatest benefits to the Vietnamese ordinary citizens.

Drugs for the poor people

In order to improve the healthcare system and increase access to pharmaceutical products in line with the TRIPS agreement and the Doha Declaration on the Public Health, the Government of Vietnam should consider the following possibilities:

- (a) All legal provisions concerning the pharmaceutical industry such as intellectual property law, pharmaceutical law, investment law and enterprise law must be revisited to create an environment to develop local pharmaceutical manufacturing capacity and accord them an adequate level of protection.
- (b) The options of exercising compulsory patent transfer and parallel imports must be paid more attention and exercised when the situation warrants it timely intervention by granting compulsory licenses should be regarded as a tool of the Government to address major public health crises.
- (c) Vietnam should make more effective use of the concessions under the TRIPs agreement to negotiate with IPR holders a lower price for

⁸ "Action Plans of the Vietnam Government for the implementation of the TRIPS Agreement to prepare for the WTO accession" Unpublished documents of the Ministry of Trade of Vietnam.

mediansure that the country must import from abroad. The Global Fund, the Bill and Melinda Gates Foundation and the Clinton Foundation can be requested for assistance by the Government in such negotiations with IPR holders.

- (d) The State budget should provide for subsidies for local pharmaceutical industry to develop domestic capacity to manufacture medicine. For this, Vietnam must upgrade its R&D activities. A proper investment in the humane resource and upgrading national R&D activities must be considered as essential steps towards establishing an affordable healthcare system.

Conclusion

The contemporary state system and national development in Vietnam has significantly changed over the last 2,000 years. Vietnam's legal regime was built on a mixture of "Neo-Confucian Virtue-Rule", French colonial legality, former Soviet socialist legality, and more recently Western law theory and international law.⁹ As a socialist country, which followed for a long period the Soviet Union model, the current Vietnamese legal system is still partially influenced by its former Soviet communism especially in areas such as the structure of the national legal framework. The legislative power, the executive power and the judicative power are not totally separated as they are in Western law. Furthermore, some historical fields of private law such as contract, commercial law, civil responsibilities or tort remain mixed with public law; and some types of property cannot be privatized, like the property of land.

International law, the WTO's legal regime and international trade rules have all played key roles in the reform of Vietnam, in all sectors including socio-economic development and the national legal framework. International law has steadily been reconciled into the national legal system. During the WTO negotiation, Vietnam

⁹ John Gillespie, "Understanding legality in Vietnam" in Stephanie Balme & Mark Sidel (eds.) *Vietnam's New Order: International perspectives on the State and Reform in Vietnam* (Palgrave Macmillan, 2007), 137.

signed a number of bilateral treaties and became party to more than 180 multilateral treaties.¹⁰ The regional and international commitments and obligations have been detailed into specific law areas. At the same time, systemizing, reviewing, repealing and amending the existing laws were conducted nationwide. From a command economic policy and a former Soviet Union legal system, Vietnam has presented a number of significant developments and reforms in their national legal regime, from the time they applied for WTO membership.

The crucial target for Vietnam's national legal system is to create comprehensive legislation for the country, which not only liberalizes the economy and investment but also protects national sovereignty and the vital interest of citizens. The Vietnamese Government is still trying to find a reasonable balance between the protection of human rights, national democracy, and public interests and the consideration for the WTO obligations.

To improve the development process of incorporating international law into the national legal system, a comprehensive legal strategy should be applied to synchronize and coordinate the law making, law implementation, legal education, legal information and legal dissemination activities; this should be planned and then put into action. Many related projects, focusing on improving public awareness and knowledge about the WTO's operation and international trade law and the consequences of infringements, might help to improve the implementation of Vietnam's IP law.

In short, to reduce the gap between the requirements of international standards and the current status of Vietnam's economic and legal systems, the government needs to advance a number of action plans to upgrade their domestic capacity in all sectors. The fundamental goal of Vietnam is to improve the living standards for their citizens and to develop their national economy in a sustainable way. To maximize the achievements and reduce the disadvantages of global trade, a comprehensive approach to the integration of international trade must be built on the foundation of a

¹⁰ Report of the *Inter-Agency Steering Committee for Vietnam's Legal System Development Needs Assessment* on "Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the year 2010", available on <<http://www.jus.umu.se/Vietnam/frame.htm>> visited 20 August 2008.

deeper understanding of international trade rules, the national economy, legal traditions, and a rich cultural history.

It can be submitted that within two years of becoming a WTO member, Vietnam has implemented its accession commitments in a satisfactory manner. Vietnam's accession to the WTO has been the principle driving force not only for the legislative sector but also for the law implementation and law enforcement sectors. It has been generally agreed that due to the changes brought about to fulfill obligations arising out of Vietnam's membership of the WTO, the country has witnessed a smooth transfer of its centrally planned economy to a market-economy.

However, there still are, as outlined above, many shortcomings in the legal system of Vietnam, especially, with regard to the powers enjoyed by the executive branch to the detriment of the legislative and judicial branches. Therefore, in order to reduce the gap between the requirements of international standards and the current status of Vietnam's economic and legal system, the government has to advance a number of action plans to upgrade the capacity in all sectors. The fundamental goal of Vietnam is to improve the living standards of all of its citizens and to develop the national economy in a sustainable manner. To maximize the achievements and reduce the disadvantages of global trade, a comprehensive approach to the integration into international trade must be built on the foundation of a deep understanding of international trade rules, the national economy, the principles of the rule of law, and rich traditional values of the Vietnamese society.

Trade liberalization through the WTO's system does not provide the same advantages to every state member. How much benefit a nation can gain from the global economy depends on its capacity to adapt, change and reform. The WTO itself is going through a challenging time. The Doha Development round is not going anywhere at present. The two previous Ministerial conferences, one in Hong Kong in 2005 and another in Cancun in 2003, did not achieve much. There was no Ministerial Conference in 2007. Therefore, people are awaiting to see whether the 7th WTO Ministerial Conference to be held between the 30th of November to 2nd of December 2009, will inject vitality into the international trading system. The theme of the 7th Ministerial Conference is "The WTO, the Multilateral Trading system and

the Current Global of Economic Environment” and the core guiding principles seems to be “Full participation, Inclusiveness, and Transparency.” It remains to be seen whether the forthcoming conference will achieve any breakthrough in pushing ahead with the development agenda of the Doha Round. The success of the current round of trade talks is vital not for the future of international trade and the WTO itself but also to achieving the Millennium Development Goals of the international community.

It is the successes or failures of the international endeavours to make the international trading system fairer for all that would also have a tremendous impact on developing countries such as Vietnam which have done so much to join the WTO and to reform their economy to integrate themselves into the global economy. If the global economy does not move forward it would have more detrimental impact on countries like Vietnam which have more at stake than other older members of the WTO.

The desire to join the WTO and the subsequent efforts made by the government of Vietnam to fulfill its obligations under the accession agreements have transformed hugely not only the Vietnamese economy but also the legal, administrative and legislative system of the country. Directly or indirectly the WTO has been a significant agent for change in Vietnam. It remains to be seen whether the political system of Vietnam is able to institutionalize these achievements in order to bring about prosperity to people in all sections of the society. As stated by a former Director General of the WTO, Mike Moore “The future is not to be feared, it’s to be faced.”¹

¹ Speech of DG of the WTO, Mike Moore, “The WTO: The Challenge Ahead”, address to the New Zealand Institute of International Affairs, 01, July 1999, on <www.wto.org/english/news_e/spmm_e/spmm01_e.htm>, visited 20 August 2006.

Appendices

"Vietnam & WTO and IP law" Survey, 2006

Acknowledgement

Dear Participants

I am Ms Tran Thi Lan Anh, a PhD' candidate at the Department of Law, University of Leeds, United Kingdom. I have worked as a Vietnamese official for the Management Board of Dung Quat Economic Zone.

This survey is part of a research in international trade law which focuses on "Vietnam's membership of the WTO: An analysis of the transformation of a socialist economy into an open economy with special reference to the TRIPS regime and patent law". This research is being carried out for a doctorate (PhD) in law at the University of Leeds, United Kingdom and aims to investigate the opportunities and challenges for Vietnam when incorporating international trade law and TRIPS into national legal system. The advantages and disadvantages of WTO's membership and conforming to TRIPS by Vietnam will be discussed, as well as examining the potential conflicts between international IP law and national interest. After the completion of my research, I hope to come up with a set of recommendations for Vietnam's IP law. All responses are anonymous, so, please be candid in your response. To complete the survey, please use a pen, and tick the choices that most accurately reflect your view.

Thank you very much for your co-operation and if you need to ask any further questions, please feel free to contact me at one of the following email addresses T.L.A.Tran@leeds.ac.uk; Dzungquathn@fpt.vn

Yours faithfully,

Ms. Tran Thi Lan Anh

QUESTIONNAIRE FORM

Section A. Background Information

1. Which of the following best describes your current occupation?

(Please choose 1 response)

- 6 % a Office of the President, Prime Minister, National Assembly, and National Assembly Member
- 24 % b Ministerial levels and Local Government authorities
- 2 % c Societies, NGOs
- 2.5 % d Foreign investor
- 2 % e Vietnamese investor
- 3.5 % f Law firm
- 6.5 % g Media
- 11.5 % h Legal researcher and Academics
- 37 % i Worker, farmer, and small businessmen/women
- 5 % j Other (please specify)

2. Gender

- 48.5 % a Male
- 47.5 % b Female
- 4 % c No answer

3. Please identify the primary specialization of your work

(Please choose 1 response)

- 9.5 % a Law and legal research
- 17 % b Economic management
- 1 % c Environment
- 10.5 % d Finance, Banking, Insurance
- 9.5 % e Agriculture
- 6 % f Commerce, Trade
- 22 % g Social Services (e.g. Education, Health)
- 2.5 % h Communication, Information Services
- 0 % i Human rights
- 24 % j Other (please specify)
- 2 % No answer

4. Which best represents your geographic location?

(Please choose 1 response)

- 68 % a Urban
- 23 % b Rural

- 7 % c Mountainous
- 2 % No answer

5. Which best represents your age?

(Please choose 1 response)

- 23.5 % a 18-25 years old
- 47 % b 26-40 years old
- 25 % c 40-60 years old
- 4 % d More than 60 years old
- 0.5 % No answer

6. Which best represents your education level?

(Please choose 1 response)

- 0 % a Primary School
- 9.5 % b Secondary School
- 13.5 % c High School
- 54 % d Bachelor Degree
- 23 % e Master, PhD
- 0.5 % No answer

7. Which best represents your income

(Please choose 1 response)

- 56.5 % a Low-income group (household income less than 15 million VND/year)
- 33.5 % b Medium - income group (household income from 15 - 45 million VND/year)
- 8.5 % c High - income group (household income more than 45 million VND/year)
- 1.5 % No answer

Section B. Overall attitudes toward the WTO

8. Which best represents your knowledge about the WTO

(Please choose 1 response)

- 2.5 % a An organization of United Nation
- 93.5 % b An international organization on trade
- 1 % c A NGO
- 0.5 % d A Vietnamese Government Office
- 1.5 % e Don't Know
- 1 % No answer

9. Which best represents your knowledge about the WTO's functions

(Please choose 1 response)

- 1 % a Dealing with the global conflicts of human rights between nations
- 0.5 % b Dealing with the wars between nations
- 97.5 % c Dealing with the global rules of trade between nations
- 1 % d Don't Know

10. Overall, please rate how favourable your impression of the WTO's effectiveness is in International Trade on a scale of 1-10; 1 for very unfavourable, 10 for very favourable

(Please choose 1 response)

1 0.5% 2 0% 3 1% 4 1% 5 5% 6 7% 7 21.5% 8
29.5% 9 12% 10 14%

Don't Know/Not sure 5.5% No answer 3%

Average rate 7.75

11. Overall, please rate how favourable your impression of the WTO's effectiveness is in the Developing Country and Vietnam specific on a scale of 1-10; 1 for very unfavourable, 10 for very favourable

(Please choose 1 response)

1 0.5% 2 0% 3 0% 4 3% 5 7% 6 11.5% 7 20% 8
23% 9 12.5% 10 12.5%

Don't Know/Not sure 7% No answer 3%

Average rate 7.55

12. Which best represents your knowledge about the current status of Vietnam's accession to WTO

(Please choose 1 response)

- 1 % a Vietnam has become the WTO's member already
80.5 % b Vietnam will be the WTO's member in the year 2006
12.5 % c Vietnam will be the WTO's member after the year 2010
5 % d Don't Know
1 % No answer

13. Which best represents your understanding about the necessity of Vietnam accession to WTO

(Please choose 2 responses as your most important ideas)

- 10.5 % a To enhance the political position and sovereignty of Vietnam
71.5 % b Opportunities for the development and growth of national economy
19.5 % c To be part of the same international trade rules as other country
1 % d To rise up to a state which is ruled by law
3.5 % e To attract more Foreign Investment and ODA fund
6.5 % f To maximise exports of Vietnamese goods
19.5 % g To help Vietnam in transition to a market economy
4.5 % h To reduce the poverty in Vietnam
7.5 % i To promote a transparency government and strengthen national legal system
18 % j To improve the competition capacity of Vietnamese enterprises
23 % k To reduce the trade disputes between Vietnam and other

nations (like anti-dumping on catfish, shrimp, gas lighter ...etc)

- 13 % **l** To reduce the gap between Vietnam and developed countries
- 4.5 % **m** Vietnam have no choice
- 0 % **n** Other (please specify)
- 0 % No answer

14. Which best represents your understanding about the challenges when Vietnam becomes the WTO's member

(Please choose 3 responses as your most important ideas)

- 35.5 % **a** Possible increase of the domestic enterprise bankruptcy
- 25.5 % **b** Possible increase of the gap between the rich and the poor
- 25.5 % **c** Possible increase of the expropriation of multi-national corporations
- 57 % **d** Possible increase of the dependence of national economy on export and international trade market
- 12.5 % **e** Lower farmer's income
- 34 % **f** More disputes under the WTO's dispute settlement mechanism
- 12.5 % **g** Possible weakening of the national sovereignty
- 60.5 % **h** Possible expansion of exported goods in Vietnam's domestic market
- 5.5 % **i** Unemployment
- 1.5 % **j** Other (please specify)
- 1 % No answer

Section C. The TRIPS Agreement and Vietnam's IP law

15. Which best represents your understanding about the TRIPS Agreement

(Please choose 1 response)

- 11.5 % **a** An International Convention on IP
- 16 % **b** An IP International Convention to IP which Vietnam is a party
- 47 % **c** An international agreement on the IP protection worldwide
- 7 % **d** A bilateral agreement which is signed by Vietnam with foreign partners
- 16 % **e** A Vietnamese law code
- 1 % **f** Don't Know

16. Which best represents your point of view about the significance of TRIPS in IP Protection

(Please choose 1 response)

- 0 % **a** Not important at all
- 1 % **b** Fairly unimportant
- 4.5 % **c** Average
- 6.5 % **d** Fairly important
- 74.5 % **e** Very important
- 13 % **f** Don't Know
- 1 % No answer

17. Which best represents your point of view about the Level of IP protection in Vietnam

(Please choose 1 response)

- 46 % a Vietnam must protect IP in line with the full requirements of TRIPS Agreement and related IP Conventions as soon as possible
- 15 % b Vietnam must protect IP in line with the full requirements of TRIPS Agreement and related IP Conventions when Vietnam becomes WTO member
- 28.5 % c Increase the level of IP protection according to the requirements of the WTO's regime
- 0 % d Keep the same standard as Vietnamese IP protection has at present
- 0.5 % e Reduce the current level of Vietnamese IP protection
- 7 % f Don't Know
- 0 % g Other (please specify)
- 3.5 % No answer

18. Which best represents your point of view about the Level of Comprehensiveness of the Legal System of IP protection in Vietnamese Legislative Law

(Please choose 1 response)

- 9.5 % a Not comprehensive at all
- 35 % b Fairly not comprehensive
- 24.5 % c Average
- 19.5 % d Fairly comprehensive
- 1 % e Very comprehensive
- 10 % f Don't Know
- 0.5 % No answer

19. Which best represents your point of view about the Level of Effectiveness of Enforcement System of IP protection in Vietnam

(Please choose 1 response)

- 10.5 % a Not effective at all
- 26 % b Fairly not effective
- 35 % c Average
- 18 % d Fairly Effective
- 1 % e Very Effective
- 7 % f Don't Know
- 2.5 % No answer

20. Which best represents your point of view about the IP Infringement in Vietnam

(Please choose 1 response)

- 62.5 % a Very popular and everybody use easily the infringed IP products
- 12 % b People strictly obey the IP law
- 1 % c IP is social property and people have the right to access free of

- charge and without permission
- 11 % **d** Will infringe if the right-holders don't know
 - 1 % **e** Will ask the right-holder permission but don't pay the royalty
 - 6 % **f** Will ask the right-holder permission and pay the royalty
 - 2.5 % **g** Other (please specify)
 - 4 % No answer

21. Which best represents your attitude towards IP products

(Please choose 1 response)

- 17 % **a** Always use infringement products
- 42 % **b** Sometimes uses infringement products
- 19 % **c** Rarely use infringement products
- 19.5 % **d** Never use infringement products
- 2.5 % No answer

22. Which best represent your point of view about the reasons of IP infringement in Vietnam

(Please choose as many responses as you find necessary)

- 53 % **a** To save money, the price of paid IP product is too expensive
- 20 % **b** For convenience
- 8.5 % **c** Everybody use infringement products
- 2.5 % **d** The society has the right to "free-use"; this is human right
- 8 % **e** To popularize the IP production
- 13 % **f** To improve social welfare
- 25 % **g** Don't known the right-holder and how to ask permission and pay royalty
- 28 % **h** Don't known this is an unlawful act
- 13 % **i** The right-holder does not complain
- 36.5 % **j** The IP law is not comprehensive and effective
- 23.5 % **k** The penalty is too weak
- 29 % **l** The enforcement system is weak
- 2.5 % **m** Don't Know
- 0 % **n** Other (please specify)
- 1.5 % No answer

Section D. Communication and law dissemination

23. From where do you get most of your information about the WTO, international trade, and economic and social development issues in Vietnam

(Please choose 3 responses)

- 13 % **a** Your job
- 13.5 % **b** Your relatives/friends/colleagues
- 76 % **c** Newspapers
- 70.5 % **d** Television
- 21.5 % **e** Radio
- 43 % **f** Internet
- 10.5 % **g** Campaigns of national or local government
- 9 % **h** Through Vietnam's law and official Government documents

- 5 % i Law dissemination mechanism
- 1.5 % j NGOs
- 13.5 % k All of the above
- 1.5 % l Other (please specify).....
- 1.5 % No answer

24. Which two of the following do you identify as the most trusted information sources?

(Please choose 2 responses)

- 63 % a Vietnam's law and official Government documents
- 77 % b Media (Newspapers; Television; Radio)
- 12.5 % c Internet
- 4 % d NGOs; Societies
- 11.5 % e Professional consultants
- 22 % f Information from the international sources
- 0 % g Other (please specify).....
- 1 % No answer

25. Which best represents your point of view about the Importance of Level of law dissemination in Vietnam

(Please choose 1 response)

- 1 % a Not important at all
- 0.5 % b Fairly unimportant
- 9 % c Average
- 19.5 % d Fairly important
- 66 % e Very important
- 2.5 % f Don't Know
- 1.5 % No answer

26. Which best represents your point of view about the Level of Effectiveness of Law Dissemination System in Vietnam

(Please choose only one response)

- 4 % a Not comprehensive at all
- 13.5 % b Fairly not comprehensive
- 36 % c Average
- 27 % d Fairly comprehensive
- 16.5 % e Very comprehensive
- 1.5 % f Don't Know
- 1.5 % No answer

Section E. Recommendation

27. Which best represents your point of view about the best way to maximise the opportunities and minimize the challenges when Vietnam accesses WTO

(Please choose 2 responses)

- 17.5 % a Government expenditure transparency
- 64.5 % b Reform national administrative system and national legal system

- 8 % c Cut down the state subsidy for SOEs
- 35 % d Fighting with corruption
- 15 % e Finishing the WTO negotiations as soon as possible
- 32 % f Improve the quality of human resource especially in public sector
- 4 % g Request the assistance from foreign factors
- 18.5 % h Spend much budget portion to socio-technical infrastructure
- 0 % i Other (please specify).....
- 1.5 % No answer

28. Which best represents your point of view about the reason of delay of Vietnam's accession to WTO (in the Government target, Vietnam could become the WTO's member by 2005)

(Please choose 1 response)

- 17.5 % a The obligations for WTO's membership are too hard
- 26.5 % b Vietnam lacks of comprehensive negotiate strategy
- 3 % c The qualification of negotiate teams are not high as demands
- 45 % d Domestic factors (like weak economy, not complex of national legal system)
- 8.5 % e Foreign factors
- 3 % f Other (please specify).....
- 2 % No answer

29. Which best represents your point of view about the best way to develop IP Law in Vietnam

(Please choose 2 responses)

- 5.5 % a Rigid copying from developed countries
- 78.5 % b Learn the experiences from other countries who succeed in IP protection and incorporate into Vietnam's situation
- 20 % c Incorporate fully the requirements of the TRIPS Agreement and related IP Conventions into Vietnam national legal system
- 17.5 % d Meet the minimum standards of TRIPS as a condition of the membership of the WTO
- 52 % e Harmonizing the social welfare and IP holder-rights
- 0.5 % f Keep the same standard
- 5 % g Don't Know
- 0 % h Other (please specify).....
- 2.5 % No answer

30. Which best represents your point of view about the best way to develop IP Enforcement System in Vietnam

(Please choose 2 responses)

- 13.5 % a Impose heavy penalty by criminal law
- 20 % b Impose heavy penalty by administrative law such as a fine
- 73.5 % c Improve the level of understanding of citizens by highly effective information system in law dissemination
- 14.5 % d Found a specific IP court in the Vietnamese People Court System
- 64 % e Upgrade the enforcement power for professional state

- 3 % f organization in IP Protection
- 0.5 % g Don't Know
- 1 % Other (please specify).....
- 1 % No answer

31. Which best represents your point of view about the best way to develop of social attitudes to obey the law in Vietnam

(Please choose 2 responses)

- 54.5 % a The procuracy and judgments are just and fair
- 22 % b The judgments must be respect in highly effectiveness enforcement system
- 16 % c Not costly of taking a lawsuit in the Court
- 28 % d Don't lost personal reputation because of public rumours
- 28.5 % e Highly qualification of legal aid and defence lawyer
- 25.5 % f Significant pressure from public or mass media
- 23.5 % g Highly effectiveness of the Grass Roots Reconciliation Group and Local People's Committee to deal with settlement.
- 1 % h Other (please specify).....

Thank you very much for your corporation!

Annex

Status of Vietnam's accession working party ²

Application Received	4 January 1995
Working Party Established	31 January 1995
Chairperson: H.E. Mr. Eirik Glenne (Norway)	
Memorandum	24 September 1996
Questions and Replies	4 March 1998
	12 March 1998
	20 August 1998
Meetings of the Working Party	30-31 July 1998
	3 December 1998
	22-23 July 1999
	30 November 2000
	10 April 2002
	12 May 2003
	10 December 2003
	15 June 2004
	15 December 2004
	15 September 2005
Other Documentation	
(a) Additional Questions & Replies	20 April 1999
	16 July 1999
	26 June 2000
	6 August 2001
	6 March 2003
	30 October 2003
	28 April 2004
	13 October 2004
	7 April 2005
	7 April 2005
	26 July 2005
	2 September 2005

² On *WTO website*, available at <www.wto.org>, visited 11 July 2006.

(b) Agriculture (<u>WT/ACC/4</u>)	5 November 2002
	28 April 2004
	28 April 2004
	13 October 2004
	20 May 2005
	14 September 2005
	21 July 2005
(c) Services (<u>WT/ACC/5</u>)	24 August 1998
(d) SPS/TBT (<u>WT/ACC/8</u>)	26 June 2000
	11 October 2004
	31 October 2002
	23 April 2004
(e) TRIPS (<u>WT/ACC/9</u>)	26 June 2000
	5 November 2001
	23 April 2004
(g) Legislative Action Plan	26 June 2000
	23 April 2004
	05 November 2001
	23 December 2002
	15 May 2003
	26 June 2001
	31 October 2003
	5 December 2001
	26 April 2004
	24 October 2002
	04 November 2003
	04 November 2003
	13 April 2005
Market Access Negotiations	
Goods Offer	7 January 2002
	27 April 2004
	26 July 2005
Services Offer	7 January 2002
	27 April 2004
Factual Summary	19 September 2001
Draft Working Party Report	22 November 2004

5 September 2005

ACCESSION OF VIET NAM

Report of the Working Party on the Accession of Viet Nam

WT/ACC/VNM/48

27 October 2006

TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)

1. General

(a) Intellectual property protection

1. The representative of Viet Nam said that since the early stages of Viet Nam's accession process the main legal instruments for the protection of intellectual property in Viet Nam had been the Civil Code of 1995 (Part Six); Government Decree No. 63/CP of 24 October 1996 on Detailed Regulations on Industrial Property; Circular No. 3055/TT-SHCN of 31 December 1996 of the Ministry of Science, Technology and Environment on Guiding the Implementation of the Provisions on the Procedures for Establishing Industrial Property Rights, and a number of other procedures in Decree No. 63/CP; Government Decree No. 76/CP of 29 November 1996 on Guiding the Implementation of the Provisions on Copyright in the Civil Code; Circular No. 23-TC/TCT of 9 May 1997 of the Ministry of Finance on Industrial Property Fees; and Circular No. 166/1998/TT-TC of 19 December 1998 of the Ministry of Finance on Copyright Registration Fees.

2. The representative of Viet Nam explained that in 2005, Viet Nam had promulgated amendments to the Civil Code, which reaffirmed the basic civil principles of intellectual property rights (Part VI of the Code), as well as an Intellectual Property Law governing all aspects of intellectual property rights. The Civil Code (Law No. 33/2005/QH11 of 14 June 2005 replacing the 1995 Civil Code - thereafter referred to as the 2005 Civil Code) had entered into force on 1 January 2006. As for the Intellectual Property Law (Law No. 50/2005/QH11 of 29

November 2005 - thereafter referred to as the 2005 Intellectual Property Law), it became effective on 1 July 2006. These two texts formed a complete and uniform system of regulations on intellectual property, which would replace previous legislation. He noted that the new system was, to a large extent, based on the previous one. In case of conflict between the 2005 Intellectual Property Law and the provisions on intellectual property of the 2005 Civil Code, the former would apply (Article 5.2 of the 2005 Intellectual Property Law). Various decisions and decrees on copyright, industrial property, plant varieties and enforcement of intellectual property rights guiding the implementation of the 2005 Intellectual Property Law had been adopted in September 2006: Decree No. 100/2006/ND-CP of 21 September 2006 guiding the implementation of a number of articles of the Civil Law and Intellectual Property Law concerning copyright and related rights; Decree No. 103/2006/ND-CP of 22 September 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 Intellectual Property Law concerning industrial property; Decree No. 104/2006/ND-CP of 22 September 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 Intellectual Property Law concerning rights to plant varieties; Decree No. 105/2006/ND-CP of 22 September 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 Intellectual Property Law regarding the protection of intellectual property rights and State management of intellectual property; Decree No. 106/2006/ND-CP of 22 September 2006 on handling administrative violations in the industrial property field; Decision No. 69/2006/QD-BNN of 13 September 2006 of the Minister of Agriculture and Rural Development on data confidentiality of testing data of agro-chemical products; and Decision No. 30/2006/QD-BYT of 30 September 2006 of the Minister of Health on promulgation of regulations on data protection applied to Drug Registration Dossiers. In addition, the Ministry of Culture and Information, the Ministry of Science and Technology and the Ministry of Agriculture and Rural Development would promulgate circulars guiding the implementation of procedures on registration of copyright and related rights, industrial property rights, and plant varieties; on industrial property representatives; and on transfer of industrial property.

2. Substantive standards of protection, including procedures for the acquisition and maintenance of intellectual property rights

(e) Patents

3. The representative of Viet Nam said that any invention involving worldwide novelty, an inventive step and industrial applicability was protected in accordance with Articles 750 to 753 of the 2005 Civil Code and Part III of the 2005 Intellectual Property Law. Patent applications were subject to examination as to form and substance. The time-limit for formality examination was one month and 12 months for substantive examination as stipulated in Article 119 of the 2005 Intellectual Property Law. He added that utility solutions, which did not require protection under the TRIPS Agreement, were protected in Viet Nam. Any invention possessing worldwide novelty with industrial applicability – even if it did not involve an inventive step but was not of common knowledge – could be protected by a Utility Solution Patent (Article 58.2 of the 2005 Intellectual Property Law). By 31 December 2005, 5,342 invention patents had been granted, and the National Office of Intellectual Property had a staff of approximately 200.

4. Subject matter excluded from protection fell within three main categories, i.e., (i) those not considered as inventions, including scientific ideas, principles and discoveries, theories and mathematical methods; aesthetic creations; economic management methods and systems; educational, teaching, training methods and systems; computer programmes; designs and planning schemes for construction works; and projects for regional development and planning; (ii) subject matters which should be protected under other forms of protection than patents, i.e., plant and animal varieties; and (iii) those not industrially applicable such as methods for the prevention, diagnosis, and treatment of human or animal diseases, essentially biological processes for the production of plants or animals other than non-biological and microbiological processes (Article 59 of the 2005 Intellectual Property Law). Pharmaceutical products and processes to manufacture pharmaceutical products were protectable under Vietnamese law as they did not fall under the list of the objects excluded from protection under Article 59 of the 2005 Intellectual Property Law. Responding to a Member, who considered that Viet Nam's exclusions from protection

far exceeded the exceptions permitted under Article 27.3 of the TRIPS Agreement, the representative of Viet Nam said that the exclusions provided for in Viet Nam's legislation were essentially equivalent to those of the European Patent Convention and did not, in his view, go well beyond the provisions of Article 27.3 of the TRIPS Agreement. Inventions could also be excluded from patentability for reasons of public order and morality in accordance with Article 8 of the 2005 Intellectual Property Law. This provision applied irrespective of whether the commercial exploitation of such inventions was prohibited by law.

5. Owners of Invention Patents or Utility Solution Patents had the exclusive right to use, licence and assign the right to use the invention to other persons. They had the right to demand that other persons stop infringements, and could seek compensation for damages caused by acts of infringement (Article 255 of the 2005 Civil Code and Articles 123, 125, and 198 of the 2005 Intellectual Property Law). In response to a question, he added that the rights conferred to the patent owner by Article 28.1 of the TRIPS Agreement were set out in Articles 123.1(b), 124.1, and 125 of the 2005 Intellectual Property Law. As for the provisions of Article 28.2 of the TRIPS Agreement, these had been included in Articles 123.1(a) and 123.1(c) of the Law. He noted, in this regard, that the use of an invention was defined in Article 124.1 of the Law as the production, application, exploitation, circulation, advertisement, offering for sale, stocking for circulation, and importation of a protected product or process. In his view, these Articles fully complied with the provisions of Article 28 of the TRIPS Agreement.

6. A Member noted that Article 124 did not include "selling" and so asked how this Article was consistent with Article 28 of the TRIPS Agreement. The representative of Viet Nam stated that "circulation" in Article 124.1(c) included "selling" and that the term "circulation" had been clarified in Decree No. 103/2006/ND-CP of 22 September 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 Intellectual Property Law concerning industrial property.

7. The terms of Invention Patents and Utility Solution Patents were 20 and ten years respectively counting from the official filing date – taking effect on the grant

date (Article 93.2 of the 2005 Intellectual Property Law) – and were, in his view, in compliance with Article 33 of the TRIPS Agreement.

8. The owner of an invention or his exclusive licensee were obliged to use the invention (or transfer the right of use) in conformity with the requirements of socio-economic development of Viet Nam (Articles 136.1 and 142.5 of the 2005 Intellectual Property Law), and the owner was required to pay a remuneration to the author of the invention (Article 135 of the 2005 Intellectual Property Law). He confirmed that importation would satisfy the "use" requirement stipulated in Viet Nam's legislation (Article 136.1 of the 2005 Intellectual Property Law). The representative of Viet Nam stated that this issue would be resolved through the implementing decree. The rights to a patent (invention) were restricted by provisions on prior use right and compulsory licensing (Articles 134 and 145 to 147 of the 2005 Intellectual Property Law).

9. Conditions and procedures for granting compulsory licenses were laid down in Section 3, Chapter X of the 2005 Intellectual Property Law (Articles 145 to 147). Compulsory licensing could only be applied (i) for reasons of national defence and security, the prevention and treatment of diseases, or other urgent needs of the society; (ii) for reasons of non-use or improper use; (iii) if the proposed user had failed to reach an agreement with the owner on reasonable commercial terms and conditions within a reasonable period of time; or (iv) in case of anti-competitive practices. Provisions on conditions for granting compulsory licenses in compliance with Articles 31(f), 31(k) and 31(l) of the TRIPS Agreement had been introduced in Article 146 of the Law. Pursuant to Section 3 of Chapter X, compulsory licenses could not be granted before the expiration of a four-year period after the filing of an application for a Protection Title and three years after a Protection Title had been granted. The licensee of an invention by compulsory licensing was required to pay adequate remuneration to the owner, taking into account the economic value of the authorization, as required by Article 31(h) of the TRIPS Agreement (Article 146.1). The patent owner was entitled to request the termination of the use of a compulsory licence if the circumstances which led to it had ceased and were unlikely to recur, provided such termination would not prejudice the grantee of the compulsory licence (Article 145.2). Ministries and other ministerial-level authorities were responsible for granting and terminating compulsory licenses with regard to inventions in their field of action, when such

licenses had been granted for reasons of national defence and security, the prevention and treatment of diseases or other urgent needs of the society; the Ministry of Science and Technology was responsible for granting and terminating compulsory licenses in the other cases (Article 147.1). He noted that no compulsory licence had been granted in Viet Nam thus far.

10. In response to a question concerning the "remuneration frame provided for by the Government" stipulated in Article 146.1(d), the representative of Viet Nam said that the term "remuneration frame" referred to the ceiling level of remuneration and principles for determining the adequate level of remuneration under compulsory licensing. The "remuneration frame" would be used as a basis for establishing the remuneration. The frame had been set out in detail in Government Decree No. 103/2006/ND-CP of 22 September 2006 providing detailed provisions and guidelines for implementing certain articles of the 2005 Intellectual Property Law concerning industrial property. According to Decree No. 103/2006/ND-CP, the remuneration should take into account the economic value of the right transferred, including the contractual licensing price of the invention, the funds invested for the creation of the invention, the profits gained by using the invention, the remaining duration of validity of the patent, and the need for licensing the invention.

11. He added that judicial review of decisions on compulsory licensing and of the use of inventions under compulsory licenses was guaranteed by the Law on Complaints and Denunciations, the Ordinance on Procedures for Settlement of Administrative Cases, and Article 147.4 of the 2005 Intellectual Property Law. Pursuant to Article 147.4, decisions on compulsory licensing were subject to both administrative appeal and judicial litigation. Asked specifically about judicial review of decisions related to remuneration, he noted that decisions on compulsory licensing - which could be appealed under Article 147.4 - were required, pursuant to Article 147.2, to provide for appropriate scope and conditions in accordance with Article 146, including the right to an adequate remuneration (Article 146.1). Thus, decisions on remuneration could be appealed. In his view, the provisions of Articles 146.1, 147.2 and 147.4 of the 2005 Intellectual Property Law complied fully with the provisions of Article 31(j) of the TRIPS Agreement.

12. The patentee's right to assign or inherit his patent and to conclude a licence contract (Article 28.2 of the TRIPS Agreement) was ensured by Article 751 of the 2005 Civil Code and Article 123.1 of the 2005 Intellectual Property Law. The assignment or licensing of a patented invention was subject to certain restrictions permitted by Articles 30 and 40 of the TRIPS Agreement (Articles 139 and 142 of the 2005 Intellectual Property Law). In response to concerns expressed by a Member about limitations on royalty payments applied by Viet Nam, the representative of Viet Nam said that ceilings on royalty payments for intellectual property rights had been abolished by Decree No. 11/2005/ND-CP of 2 February 2005 on Technology Transfer, replacing Decree No. 45/1998/ND-CP of 1 July 1998.

13. In exceptional cases, the use of a protected invention would not be considered infringement, i.e., use for non-commercial purposes; distribution, circulation and use of products having been marketed by the owners, prior users or persons to whom the right of use had been transferred; or when use of the invention took place on foreign means of transportation in transit or temporarily staying in the territory of Viet Nam and such use was aimed solely at maintaining the operation of such means (Article 125.2 of the 2005 Intellectual Property Law).

14. Procedures for the termination and invalidation of invention patents were regulated by Articles 95 and 96 of the 2005 Intellectual Property Law. There were two routes to appeal against decisions of the National Office of Intellectual Property, and as which route to choose was up to the interested parties, "an opportunity for judicial review", i.e., by the Administrative Court, was fully ensured. Minister's decisions could be reviewed by the Administrative Court under the Law on Complaints and Denunciations of 1998, as amended in 2005 (Article 39), and the Ordinance on Procedures for Settlement of Administrative Cases of 1996, as amended in 2006 (Article 2). He considered Viet Nam to be in full compliance with Article 32 of the TRIPS Agreement.

15. Asked about procedures for patent applications in respect of micro-organisms, he said that the Ministry of Science and Technology had promulgated Circular

No. 30/2003/TT-BKHCHN of 5 November 2003 containing provisions on patent applications for micro-organisms and the examination thereof.

16. The representative of Viet Nam confirmed that his Government would take all actions necessary to fully comply with all of the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of accession to the WTO, without recourse to any transitional period. The Working Party took note of this commitment.

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