

Implementating the Agreement on Trade-Related Aspects of Intellectual Property Rights in Vietnam

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Abstract

This is a mapping of WTO members' obligations under TRIPs against the national laws of Vietnam implementing those obligations. Vietnam has produced comprehensive substantive laws harmonizing its intellectual property laws with the intellectual property laws of the international community. These substantive laws are complemented by procedural laws also required by TRIPs for the enforcement of intellectual property rights. The analysis focuses on how flexibilities within the obligations under TRIPs have been exercised by Vietnam to adapt those obligations to meet its own circumstances as a developing country. It seeks to frame the flexibilities within the wider context of the problems of law, sometimes overlooked in transplant of law analysis, including the ambiguity of language, conflicting rules of interpretation, lack of comprehensiveness, unpredictable technological and social change, and the limitations on law and policy makers including lack of knowledge and experience and conflicts between them over policies which are not resolved in the legal text. These are exacerbated where law is transposed from other national legal systems, through international law, into ones with differences in traditions and culture such as Vietnam. Its agricultural, Confucian, Buddhist and socialist heritage neither valued nor saw the products of human creativity as individually owned property. Vietnam has not always chosen to use the flexibilities within TRIPs to make laws appropriate to its economic and social situation. The generality of its national law creates ambiguities and gaps making it difficult for administrators and judges to apply in the absence of further administrative regulation or guidance on its implementation. The failure to fill these gaps reflects the reality that although the law is comprehensive Vietnamese law and policy makers are not sufficiently familiar with policies relating such laws to levels of development or with their practical application.

Doctor of Philosophy Declaration

I, Thanh Thi Kieu, declare that the PhD thesis entitled *Implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights in Vietnam* is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature

Date 13 August 2009

Thanh Thi Kieu

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<<http://treaties.un.org>>

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Circular 16/2013/TT-BNNPTNT of 28 January 2013 of Ministry of Agriculture and Rural Development Giving Guidance to Protection of Rights to Plant Varieties [Thông tư số

16/2013/TT-BNNPTNT ngày 28/02/2013 của Bộ Nông nghiệp và Phát triển nông thôn hướng dẫn về bảo hộ quyền đối với giống cây trồng]

Circular 166/1998/TT-TC of 19 December 1998 of Finance Ministry on Copyright Registration Fees [Thông tư số 166/1998/TT-BTC ngày 19/12/1998 hướng dẫn chế độ thu lệ phí đăng ký quyền tác giả]

Circular 1769/VHTT-VP of 19 September 1981 of Ministry of Culture and Information on Providing an Extra Rate of 50 Percent to Literary, Artistic, Scientific and Technological Works with Royalties Paid under Decision 113/VH-QĐ of 20 December 1975 [Thông tư số 1679/VH-TT ngày 19/09/1981 của Bộ Văn hóa Thông tin về việc hưởng thêm 50% tỷ lệ nhuận bút trả cho tác phẩm văn học, nghệ thuật, khoa học và kỹ thuật theo quy định tại Quyết định 113/VH-QĐ ngày 20/12/1975]

Circular 19/2002/TT-BNN of 21 December 2001 of Ministry of Agriculture and Rural Development Guiding the Implementation of Decree 13/2001 on New Varieties of Plants [Thông tư số 119/2001/QĐ-BNN ngày 21/12/2002 của Bộ Nông nghiệp và Phát triển nông thôn hướng dẫn thực hiện Nghị định 13/2001/NĐ-CP về bảo hộ giống cây trồng mới]

Circular 22/2009/TT-BTC of 4 February 2009 of Finance Ministry on Industrial Property Fees and Charges [Thông tư số 22/2009/TT-BTC ngày 04/02/2009 của Bộ Tài chính quy định về mức thu, chế độ thu, nộp, quản lý và sử dụng phí, lệ phí sở hữu công nghiệp]

Circular 23-TC/TCT of 9 May 1997 of Finance Ministry on Industrial Property Fees and Charges [Thông tư số 23-TC-TCT ngày 09/05/1997 hướng dẫn chế độ thu, nộp và quản lý phí, lệ phí sở hữu công nghiệp]

Circular 27/2001/TT-BVHTT of 10 May 2001 of Ministry of Culture and Information Guiding the Implementation of Decree 76/CP of 29 November 1996 on Copyright and Decree 60/CP of 6 June 1997 on Civil Relations Involving Foreign Individuals or Organizations [Thông tư số 27/2001/TT-BVHTT ngày 10/05/2001 của Bộ Văn hóa Thông tin hướng dẫn thực hiện Nghị định số 76/CP ngày 29/11/1996 về quyền tác giả và Nghị định số 60/CP ngày 06/06/1997 về quan hệ dân sự có yếu tố nước ngoài theo quy định của Bộ luật Dân sự 1995]

Circular 3055/TT-SHCN of 31 December 1996 of Ministry of Science, Technology and Environment Guiding the Implementation of Decree 63/CP on Industrial Property [Thông tư số 3055/TT-SHCN ngày 31/12/1996 của Bộ Khoa học Công nghệ và Môi trường hướng dẫn thực hiện Nghị định số 63/CP ngày 24/10/1996]

Circular 44/2011/TT-BTC of 1 April 2011 of Finance Ministry Giving Guidance against Counterfeit Goods and Protection of Intellectual Property Rights in the Customs Sector [Thông tư số 44/2011/TT-BTC ngày 01/04/2011 của Bộ Tài chính hướng dẫn công tác chống hàng giả và bảo vệ quyền sở hữu trí tuệ trong lĩnh vực hải quan]

Circular 92/2002/TT-BTC of 18 October 2002 of Finance Ministry on Fees and Charges Relating to New Plant Varieties [Thông tư số 92/2002/TT-BTC ngày 18/10/2002 của Bộ Tài chính quy định chế độ thu, nộp và quản lý, sử dụng phí thẩm định, cung cấp thông tin, dịch vụ và lệ phí đăng ký, cấp, công bố, duy trì hiệu lực văn bằng bảo hộ giống cây trồng mới]

Decision 113-VH/QĐ of 20 December 1975 of Ministry of Culture and Information on the Royalty Regime to Literary, Artistic, Scientific and Technological Works [Quyết định số 113-VH/QĐ ngày 20/12/1975 của Bộ Văn hóa Thông tin về chế độ nhuận bút đối với tác phẩm văn học, nghệ thuật, khoa học kỹ thuật]

Decision 12/2002/QĐ-BNN of 19 February 2002 of Ministry of Agriculture and Rural Development on the Establishment of the Office of New Varieties of Plants [Quyết định số

12/2002/QĐ-BNN ngày 19/02/2002 của Bộ Nông nghiệp và Phát triển nông thôn về việc thành lập Văn phòng bảo hộ giống cây trồng mới]

Decision 16/2003/TCCB of 17 February 2003 of the Chief Judge of the Supreme People's Court on Supporting Organs of the Supreme People's Court [Quyết định số 16/2003/TCCB ngày 17/02/2003 của Chánh án Tòa án Nhân dân Tối cao về bộ máy giúp việc của Tòa án Nhân dân Tối cao]

Decision 175-CP of 29 April 1981 of the Government Council on the Entering into and Carrying out of Economic Contracts in Scientific Research and Technically-Deploying Activities [Quyết định số 175-CP ngày 29/04/1981 của Hội đồng Chính phủ về việc ký kết và thực hiện hợp đồng kinh tế trong hoạt động nghiên cứu khoa học và triển khai kỹ thuật]

Decision 30/2006/QĐ-BYT of 30 September 2006 of Health Ministry Issuing Regulations on Data Security of Drug Registration Records [Quyết định số 30/2006/QĐ-BYT ngày 30/09/2006 của Bộ Y tế hướng dẫn thi hành việc bảo mật của sản phẩm thuốc chữa bệnh nộp tại cơ quan y tế có thẩm quyền trước khi được lưu hành trên thị trường]

Decision 42/2007/QĐ-BTC of 4 June 2007 of Finance Ministry Regulating the Responsibility of Enforcing the Protection of Intellectual Property Rights and Prevention of Goods with Counterfeit Trademarks in the Customs Sector [Quyết định số 42/2007/QĐ-BTC ngày 30/09/2006 của Bộ Tài chính về việc phân công nhiệm vụ thực thi bảo vệ quyền sở hữu trí tuệ, chống hàng giả trong lĩnh vực hải quan]

Decision 54/2003/QĐ-BNN of 7 April 2003 of Ministry of Agriculture and Rural Development Issuing the List of Plant Varieties to Have to Announce Quality Standards [Quyết định số 54/2003/QĐ-BNN ngày 07/04/2003 của Bộ Nông nghiệp và Phát triển nông thôn ban hành Danh mục giống cây trồng phải công bố tiêu chuẩn chất lượng]

Decision 68/2006/QĐ-BNN of 13 September 2006 of Ministry of Agriculture and Rural Development Issuing the Additional List of Plant Varieties to Have to Satisfy Standards as Being Provided for [Quyết định số 68/2006/QĐ-BNN ngày 13/09/2006 của Bộ Nông nghiệp và Phát triển nông thôn ban hành Danh mục bổ sung giống cây trồng phải áp dụng tiêu chuẩn ngành]

Decision 69/2006/QĐ-BNN of 13 September 2006 of Ministry of Agriculture and Rural Development Issuing Regulations on the Confidentiality of Test Data of Agricultural Chemical Products [Quyết định số 69/2006/QĐ-BNN ngày 13/09/2006 của Bộ Nông nghiệp và Phát triển nông thôn ban hành quy định bảo mật dữ liệu thử nghiệm nông hóa phẩm]

Decision 784/VH-QĐ of 30 December 1982 of Ministry of Culture and Information Providing a Rise of 100 Percent in Primary Royalty Rate to Literary, Artistic, Scientific and Technological Works under Circular 1769/VHTT-VP of 19 September 1981 [Quyết định số 784/VH-QĐ ngày 30/12/1982 của Bộ Văn hóa Thông tin về việc hưởng thêm 100% tỷ lệ nhuận bút cơ bản trả cho tác phẩm văn học, nghệ thuật, khoa học và kỹ thuật theo quy định tại Thông tư 1769/VHTT-VP ngày 19/09/1981]

Decree 10/CP of 23 January 1995 of the Government on Organization, Function, and Authority of Market Management, as amended and supplemented by Decree 27/2008/NĐ-CP of 13 March 2008 [Nghị định số 10/CP ngày 23/01/1995 về tổ chức, nhiệm vụ và quyền hạn của quản lý thị trường, sửa đổi bổ sung bởi Nghị định số 27/2008/NĐ-CP ngày 13/03/2008]

Decree 100/2006/NĐ-CP of 21 September 2006 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law on Copyright and Related Rights [Nghị định số 100/2006/NĐ-CP ngày 21/09/2006 quy định

chi tiết và hướng dẫn thi hành một số điều của Bộ luật Dân sự và Luật Sở hữu trí tuệ về quyền tác giả và quyền liên quan]

Decree 103/2006/NĐ-CP of 22 September 2006 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law on Industrial Property [Nghị định số 103/2006/NĐ-CP ngày 22/09/2006 quy định chi tiết và hướng dẫn thi hành một số điều của Luật Sở hữu trí tuệ về sở hữu công nghiệp]

Decree 104/2006/NĐ-CP of 22 September 2009 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law on Rights to Plant Varieties [Nghị định số 104/2006/NĐ-CP ngày 22/09/2006 quy định chi tiết và hướng dẫn thi hành một số điều của Luật Sở hữu trí tuệ về quyền đối với giống cây trồng]

Decree 105/2006/NĐ-CP of 22 September 2006 of the Government Guiding the Implementation of a Number of Articles of the Intellectual Property Law on the Protection of Intellectual Property Rights and the State Management of Intellectual Property [Nghị định số 105/2006/NĐ-CP ngày 22/09/2006 quy định chi tiết và hướng dẫn thi hành một số điều của Luật Sở hữu trí tuệ về bảo vệ quyền sở hữu trí tuệ và quản lý nhà nước về sở hữu trí tuệ]

Decree 106/2006/NĐ-CP of 22 September 2006 of the Government on Sanctioning Administrative Violations in the Field of Industrial Property [Nghị định số 106/2006/NĐ-CP ngày 22/09/2006 quy định xử phạt vi phạm hành chính về sở hữu công nghiệp]

Decree 109/2011/NĐ-CP of 2 December 2011 of the Government Amending and Supplementing Some Articles of Decree 47/2009 [Nghị định số 109/2011/NĐ-CP ngày 2/12/2011 của Chính phủ sửa đổi, bổ sung một số điều của Nghị định số 47/2009]

Decree 114/2013/NĐ-CP of 3 October 2013 of the Government on Sanctioning Administrative Violations in the Field of Plant Varieties and Plant Protection and Quarantine [Nghị định số 114/2013/NĐ-CP ngày 03/10/2013 về xử phạt vi phạm hành chính trong lĩnh vực giống cây trồng, bảo vệ và kiểm dịch thực vật]

Decree 119/2010/NĐ-CP of 30 December 2010 of the Government Amending and Supplementing Some Articles of Decree 105/2006 [Nghị định số 119/2010/NĐ-CP ngày 31/12/2010 của Chính phủ sửa đổi, bổ sung một số điều của Nghị định số 105/2006]

Decree 12/1999/NĐ-CP of 6 March 1999 of the Government on Sanctioning Administrative Violations of Industrial Property [Nghị định số 12/1999/NĐ-CP ngày 06/03/1999 về xử lý vi phạm hành chính trong lĩnh vực sở hữu công nghiệp]

Decree 122/2010/NĐ-CP of 31 December 2010 of the Government Amending and Supplementing Some Articles of Decree 103/2006 [Nghị định số 122/2010/NĐ-CP ngày 31/12/2010 sửa đổi, bổ sung một số điều của Nghị định số 103/2006]

Decree 125/HĐBT of 29 July 1982 of the Ministers Council on Re-organization of the State Committee of Science and Technology [Nghị định số 125-HĐBT ngày 29/07/1982 về việc sửa đổi tổ chức bộ máy của Ủy ban Khoa học và Kỹ thuật nhà nước]

Decree 13/2001/NĐ-CP of 20 April 2001 of the Government on Protection of New Varieties of Plants [Nghị định số 13/2001/NĐ-CP ngày 20/04/2002 về bảo hộ giống cây trồng mới]

Decree 142/HĐBT of 14 November 1986 of the Ministers Council on Copyright [Nghị định số 142-HĐBT ngày 14/11/1986 quy định quyền tác giả]

Decree 154/2005/NĐ-CP of 15 December 2005 of the Government Detailing a Number of Articles of the Customs Law on Customs Procedures, Customs Checking and Monitoring [Nghị định số 154/2005/NĐ-CP ngày 15/12/2005 của Chính phủ quy định chi tiết một số điều của Luật Hải quan về thủ tục hải quan, kiểm tra, giám sát hải quan]

Decree 168-CP of 7 December 1967 of the Government Council on Amending the Principles for Paying Royalties to Literary, Artistic, Scientific and Technological Works Set out in Resolution 25-CP of 24 February 1961 [Nghị định số 168-CP ngày 07/12/1967 về việc sửa đổi nguyên tắc trả tiền nhuận bút đối với tác phẩm văn học, nghệ thuật, khoa học kỹ thuật quy định tại Nghị quyết số 25/CP ngày 24/02/1961 của Hội đồng Chính phủ]

Decree 172/2007/NĐ-CP of 28 November 2007 of the Government Amending and Supplementing Some Articles of Decree 57/2005 [Nghị định số 172/2007/NĐ-CP ngày 28/11/2007 sửa đổi, bổ sung một số điều của Nghị định số 57/2005]

Decree 189/2007/NĐ-CP of 27 December 2007 of the Government on Establishing Ministry of Industry and Commerce [Nghị định số 189/2007/NĐ-CP ngày 27/12/2007 quy định chức năng, nhiệm vụ, quyền hạn và cơ cấu tổ chức của Bộ Công thương]

Decree 197-HĐBT of 14 December 1982 of the Ministers Council on Rules for Goods-Marks [Nghị định số 197-HĐBT ngày 14/12/1982 ban hành Điều lệ về nhãn hiệu hàng hóa]

Decree 200-HĐBT of 28 December 1988 of the Ministers Council on Rules for Utility Solutions [Nghị định số 200-HĐBT ngày 28/12/1988 ban hành Điều lệ về giải pháp hữu ích]

Decree 201/HĐBT of 28 December 1988 of the Ministers Council on Rules for Licensing Invention Patents, Utility Solutions, Industrial Designs, Goods-Marks, and Know-How [Nghị định số 201-HĐBT ngày 28/12/1988 ban hành Điều lệ về mua bán quyền sử dụng sáng chế, giải pháp hữu ích, kiểu dáng công nghiệp, nhãn hiệu hàng hóa và bí quyết kỹ thuật (Điều lệ về mua bán lixăng)]

Decree 31/2001/NĐ-CP of 26 June 2001 of the Government on Penalizing Administrative Violations in the Cultural and Information Sector [Nghị định số 31/2001/NĐ-CP ngày 26/06/2006 về xử lý vi phạm hành chính trong lĩnh vực văn hóa thông tin]

Decree 31-CP of 23 January 1981 of the Government Council on Rationalizations and Inventions [Nghị định số 31-CP ngày 23/01/1981 của Hội đồng Chính phủ ban hành Điều lệ về sáng kiến cải tiến kỹ thuật - hợp lý hóa sản xuất và sáng chế]

Decree 344-CP of 22 September 1979 of the Government Council on the Protection of Plants in Agricultural Production [Nghị định số 344-CP ngày 22/09/1979 của Hội đồng Chính phủ ban hành điều lệ bảo vệ cây trồng trong sản xuất nông nghiệp]

Decree 42/2003/NĐ-CP of 2 May 2003 of the Government on Protection of Layout Designs of Integrated Circuits [Nghị định số 42/2003/NĐ-CP ngày 02/05/2003 về bảo hộ thiết kế bố trí mạch tích hợp bán dẫn]

Decree 45/1998/NĐ-CP of 1 July 1998 of the Government Guiding the Implementation of the 1995 Civil Code's Provisions on Technology Transfer [Nghị định số 45/1998/NĐ-CP ngày 01/07/1998 hướng dẫn thực hiện quy định của Bộ luật Dân sự về chuyển giao công nghệ]

Decree 46/HĐBT of 10 May 1983 of the Ministers Council on Handling Administrative Violations of Speculating, Trafficking, Producing Fake Goods and Doing Business Illegally [Nghị định số 46-HĐBT ngày 10/05/1983 quy định việc xử lý bằng biện pháp hành chính các hành vi đầu cơ, buôn lậu, làm hàng giả kinh doanh trái phép]

Decree 47/2009/NĐ-CP of 13 May 2009 of the Government on Penalizing Administrative Violations of Copyright and Related Rights [Nghị định số 47/2009/NĐ-CP ngày 13/05/2009 quy định xử phạt vi phạm hành chính về quyền tác giả, quyền liên quan]

Decree 49-HĐBT of 4 March 1991 of the Ministers Council on the Implementation of Ordinance on Foreign Technology Transfer 1988 [Nghị định số 49-HĐBT ngày 04/03/1991 quy định chi tiết việc thi hành Pháp lệnh chuyển giao công nghệ nước ngoài vào Việt Nam]

Decree 54/2000/NĐ-CP of 3 October 2000 of the Government on Protection of Business Secrets, Geographical Indications, Trade Names, and Rules against Unfair Competition in Respect of Industrial Property [Nghị định số 54/2000/NĐ-CP ngày 03/10/2000 về bảo hộ quyền sở hữu công nghiệp đối với bí mật kinh doanh, chỉ dẫn địa lý, tên thương mại và quyền chống cạnh tranh không lành mạnh liên quan đến sở hữu công nghiệp]

Decree 54/2003/NĐ-CP of 19 May 2003 of the Government on the Function, Authority, and Organization of the Ministry of Science and Technology, as amended and supplemented by Decree 28/2004/NĐ-CP of 16 January 2004 [Nghị định số 54/2003/NĐ-CP ngày 19/05/2003 quy định chức năng, nhiệm vụ, quyền hạn và cơ cấu tổ chức của Bộ Khoa học và Công nghệ, sửa đổi bổ sung bởi Nghị định số 28/2004/NĐ-CP ngày 16/01/2004]

Decree 56/2006/NĐ-CP of 6 June 2006 of the Government on Penalizing Administrative Violations in the Culture and Information Sector [Nghị định số 56/2006/NĐ-CP ngày 06/06/2006 về xử lý vi phạm hành chính trong lĩnh vực văn hóa thông tin]

Decree 57/2005/NĐ-CP of 27 April 2005 of the Government on Sanctioning Administrative Violations in the Field of Plant Varieties [Nghị định số 57/2005/NĐ-CP ngày 27/04/2005 của Chính phủ về xử phạt vi phạm hành chính trong lĩnh vực giống cây trồng]

Decree 59/HĐBT of 5 June 1989 of the Ministers Council on Royalty Regime to Political-Social, Cultural-Educational, Literary-Artistic, and Scientific-Technological Works [Nghị định số 59/HĐBT ngày 05/06/1989 về chế độ nhuận bút đối với tác phẩm chính trị-xã hội, văn hóa-giáo dục, văn học-nghệ thuật, khoa học-kỹ thuật]

Decree 61/NĐ-CP of 11 June 2002 of the Government on Royalties Regime [Nghị định số 61/NĐ-CP ngày 11/06/2002 về chế độ nhuận bút]

Decree 63/CP of 24 October 1996 of the Government Guiding the Implementation of the 1995 Civil Code's Provisions on Industrial Property [Nghị định số 63/CP ngày 24/10/1996 hướng dẫn thi hành quy định của Bộ luật Dân sự về sở hữu công nghiệp]

Decree 67/2005/NĐ-CP of 19 May 2005 of the Government on Guiding the Implementation of the 2004 Ordinance on Judicial Examination [Nghị định số 67/2005/NĐ-CP ngày 19/05/2005 hướng dẫn thực hiện Pháp lệnh giám định tư pháp]

Decree 76/CP of 29 November 1996 of the Government Guiding the Implementation of a Number of Articles of the 1995 Civil Code on Copyright [Nghị định số 76/CP ngày 29/11/1996 hướng dẫn thi hành một số quy định của Bộ luật Dân sự về quyền tác giả]

Decree 85/2011/NĐ-CP of 20 September 2011 of the Government Amending and Supplementing Some Articles of Decree 100/2006 [Nghị định số 85/2011/NĐ-CP ngày 20/09/2011 sửa đổi, bổ sung một số điều của Nghị định số 100/2006]

Decree 85-HĐBT of 13 May 1988 of the Ministers Council on Rules for Industrial Designs [Nghị định số 85-HĐBT ngày 13/05/1988 ban hành Điều lệ về kiểu dáng công nghiệp]

Decree 88/2010/NĐ-CP of 16 August 2010 of the Government Substituting Decree 104/2006 on Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law 2005, as Amended 2009, on Rights to Plant Varieties [Nghị định số 88/2010/NĐ-CP ngày 16/08/2010 quy định chi tiết và hướng dẫn thi hành một số điều của Luật Sở hữu trí tuệ và Luật Sửa đổi, bổ sung một số điều của Luật Sở hữu trí tuệ về quyền đối với giống cây trồng]

Decree 97/2010/NĐ-CP of 21 September 2010 of the Government Substituting Decree 106/2006 on Sanctioning Administrative Violations in the Field of Industrial Property [Nghị định số 97/2010/NĐ-CP ngày 21/09/2010 về xử phạt vi phạm hành chính trong lĩnh vực sở hữu công nghiệp]

Directive 166/CT of 1 January 1989 of Chairman of the Ministers Council on Reviewing Laws and Regulations System [Chỉ thị số 166/CT ngày 01/01/1989 của Chủ tịch Hội đồng Bộ trưởng về việc rà soát hệ thống văn bản pháp luật]

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Joint Circular 02/2008/TTLT-TANDTC-VKSNDTC-BVHTTDL-BKHCN-BTP of 3 April 2008 of the People's Supreme Court, the People's Supreme Procuracy, Ministry of Culture-Sports-Tourism, Ministry of Science-Technology, and Ministry of Justice Guiding the Application of Some Legislative Provisions in Settling Disputes over Intellectual Property Rights in the People's Courts [Thông tư liên tịch số 02/2008/TTLT-TANDTC-VKSNDTC-BVHTTDL-BKHCN-BTP ngày 03/04/2008 của Tòa án Nhân dân Tối cao, Viện Kiểm sát Nhân dân Tối cao, Bộ Văn hóa Thể thao Du lịch, Bộ Khoa học Công nghệ, Bộ Tư pháp hướng dẫn áp dụng một số quy định của pháp luật trong việc giải quyết các tranh chấp về quyền sở hữu trí tuệ ở tòa án nhân dân]

Joint Circular 28/TTLB of 16 April 1990 of Ministry of Culture and Information, Ministry of Finance, and Ministry of Labour, Invalids, and Social Affairs Guiding the Implementation of Royalty Regime to Cultural and Artistic Works under Decree 59/HĐBT of 5 June 1989 on Royalty Regime to Political-Social, Cultural-Educational, Literary-Artistic, and Scientific-Technological Works [Thông tư liên bộ số 28/TTLB ngày 16/04/1990 của Bộ Văn hóa Thông tin, Bộ Tài chính, Bộ Lao động Thương binh và Xã hội hướng dẫn thực hiện chế độ nhuận bút]

đối với tác phẩm văn hóa nghệ thuật theo Nghị định số 59/HĐBT ngày 05/06/1989 về chế độ nhuận bút đối với tác phẩm chính trị-xã hội, văn hóa-giáo dục, văn học-nghệ thuật, khoa học-kỹ thuật]

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ABBREVIATIONS AND ACRONYMS

WTO AND RELEVANT AGREEMENTS

Doha Declaration	Declaration on TRIPs and Public Health, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001) (Ministerial Declaration)
DSU	Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 2 ('Understanding on Rules and Procedures Governing the Settlement of Disputes')
GATS	Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B ('General Agreement on Trade in Services')
GATT	Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('General Agreement on Tariffs and Trade 1994')
TRIPs Agreement	Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1C ('Agreement on Trade-Related Aspects of Intellectual Property Rights')
TRIPs Council	WTO Council for Trade-Related Aspects of Intellectual Property Rights
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995)

RELEVANT TREATIES FROM AND ADMINISTERED BY WIPO OR OTHER INTERNATIONAL ORGANIZATIONS

Berne Convention	Convention for the Protection of Literary and Artistic Works, signed 9 September 1886, including any of its revisions (entered into force 4 December 1887)
Brussels Convention	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellites, opened for signature 21 May 1974 (entered into force 25 August 1979)
Paris Convention	Convention for the Protection of Industrial Property, signed 20 March 1883, including any of its revisions (entered into force 7 July 1884)
PCT	Patent Cooperation Treaty, signed on 19 June 1970, including

any of its revisions (entered into force 24 January 1978)

Phonograms Convention	Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, opened for signature 29 October 1971 (entered into force 18 April 1973)
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, opened for signature until 30 June 1962 (entered into force 18 May 1964)
UPOV Convention	International Convention for the Protection of New Varieties of Plants, signed 1 December 1961, including any of its revisions (entered into force 10 August 1968)
UPOV Council	Council of the Member States of UPOV Union for the Protection of New Varieties of Plants
UPOV Union	International Union for the Protection of New Varieties of Plants established by UPOV Convention
Vienna Convention on the Law of Treaties	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Washington Treaty or IPIC Treaty	Treaty on Intellectual Property in Respect of Integrated Circuits, opened for signature 26 May 1989 (not yet entered into force)
WCT	WIPO Copyright Treaty, opened for signature until 31 December 1997 (entered into force 6 March 2002)
WPPT	WIPO Performances and Phonograms Treaty, opened for signature until 31 December 1997 (entered into force 20 May 2002)

VIETNAM RELEVANT LEGAL TEXTS

Vietnam Constitution	Constitutions of the Democratic Republic of Vietnam (1946, 1959) and of the Socialist Republic of Vietnam (1980, 1992 as revised 2001, 2013)
United States-Vietnam Bilateral Trade Agreement	Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations 2000, entered into force 10 December 2001
Vietnam-Switzerland Intellectual Property Cooperation Agreement	Agreement between the Government of the Socialist Republic of Vietnam and the Swiss Federal Council on the Protection of Intellectual Property and on Cooperation in

	the Field of Intellectual Property 1999, entered into force 8 June 2000
Civil Code	Civil Code of Vietnam (1995, 2005)
Civil Procedure Code 2004	Civil Procedure Code of Vietnam 2004, as revised 2011
Criminal Code 1999	Criminal Code of Vietnam (1986, 1999 as revised 2009)
Criminal Procedure Code 2003	Criminal Procedure Code of Vietnam 2003
Customs Law 2001	Customs Law of Vietnam 2001, as revised 2005
Customs Law 2014	Customs Law of Vietnam 2014
Intellectual Property Law 2005	Intellectual Property Law of Vietnam 2005, as revised 2009
Law on Handling Violations against Administrative Rules 2012	Law on Handling Violations against Administrative Rules of Vietnam 2012
Circular 01/2007	Circular 01/2007/TT-BKHCN of 14 February 2007 of Ministry of Science and Technology Guiding the Implementation of Decree 103/2006, as Amended and Supplemented by Circulars 13/2010/TT-BKHCN of 30 July 2010, 18/2011/TT-BKHCN of 22 July 2011, and 05/2013/TT-BKHCN of 20 February 2013
Circular 16/2013	Circular 16/2013/TT-BNNPTNT of 28 January 2013 of Ministry of Agriculture and Rural Development Giving Guidance to Protection of Rights to Plant Varieties
Circular 44/2011	Circular 44/2011/TT-BTC of 1 April 2011 of Ministry of Finance Giving Guidance against Counterfeit Goods and Protection of Intellectual Property Rights in the Customs Sector
Decision 30/2006	Decision 30/2006/QĐ-BYT of 30 September 2006 of Health Ministry Issuing Regulations on Data Security of Drug Registration Records
Decision 42/2007	Decision 42/2007/QĐ-BTC of 4 June 2007 of Ministry of Finance Regulating the Responsibility of Enforcing the Protection of Intellectual Property Rights and Prevention of Goods with Counterfeit Trademarks in the Customs Sector

Decision 69/2006	Decision 69/2006/QĐ-BNN of 13 September 2006 of Ministry of Agriculture and Rural Development Issuing Regulations on the Confidentiality of Test Data of Agricultural Chemical Products
Decree 100/2006	Decree 100/2006/NĐ-CP of 21 September 2006 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law on Copyright and Related Rights
Decree 103/2006	Decree 103/2006/NĐ-CP of 22 September 2006 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law on Industrial Property
Decree 104/2006	Decree 104/2006/NĐ-CP of 22 September 2009 of the Government Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law on Rights to Plant Varieties
Decree 105/2006	Decree 105/2006/NĐ-CP of 22 September 2006 of the Government Guiding the Implementation of a Number of Articles of the Intellectual Property Law on the Protection of Intellectual Property Rights and the State Management of Intellectual Property
Decree 106/2006	Decree 106/2006/NĐ-CP of 22 September 2006 of the Government on Sanctioning Administrative Violations in the Field of Industrial Property
Decree 109/2011	Decree 109/2011/NĐ-CP of 2 December 2011 of the Government Amending and Supplementing Some Articles of Decree 47/2009
Decree 114/2013	Decree 114/2013/NĐ-CP of 3 October 2013 of the Government on Sanctioning Administrative Violations in the Field of Plant Varieties and Plant Protection and Quarantine
Decree 119/2010	Decree 119/2010/NĐ-CP of 30 December 2010 of the Government Amending and Supplementing Some Articles of Decree 105/2006
Decree 122/2010	Decree 122/2010/NĐ-CP of 31 December 2010 of the Government Amending and Supplementing Some Articles of Decree 103/2006
Decree 154/2005	Decree 154/2005/NĐ-CP of 15 December 2005 of the Government Detailing a Number of Articles of the Customs Law on Customs Procedures, Customs Checking and

Monitoring

Decree 172/2007	Decree 172/2007/NĐ-CP of 28 November 2007 of the Government Amending and Supplementing Some Articles of Decree 57/2005
Decree 47/2009	Decree 47/2009/NĐ-CP of 13 May 2009 of the Government on Penalizing Administrative Violations of Copyright and Related Rights
Decree 57/2005	Decree 57/2005/NĐ-CP of 27 April 2005 of the Government on Sanctioning Administrative Violations in the Field of Plant Varieties
Decree 85/2011	Decree 85/2011/NĐ-CP of 20 September 2011 of the Government Amending and Supplementing Some Articles of Decree 100/2006
Decree 88/2010	Decree 88/2010/NĐ-CP of 16 August 2010 of the Government Substituting Decree 104/2006 on Detailing and Guiding the Implementation of a Number of Articles of the Intellectual Property Law 2005, as Amended 2009, on Rights to Plant Varieties
Decree 97/2010	Decree 97/2010/NĐ-CP of 21 September 2010 of the Government to Substitute Decree 106/2006 on Sanctioning Administrative Violations in the Field of Industrial Property
Joint Circular 01/2008	Joint Circular 01/2008/TTLT-TANDTC-VKSNDTC-BCA-BTP of 29 February 2008 of the People's Supreme Court, the People's Supreme Procuracy, Ministry of Police, and Ministry of Justice Guiding the Criminal Liability for Acts of Infringing upon Intellectual Property Rights
Joint Circular 02/2008	Joint Circular 02/2008/TTLT-TANDTC-VKSNDTC-BVHTTDL-BKHCH-BTP of 3 April 2008 of the People's Supreme Court, the People's Supreme Procuracy, Ministry of Culture-Sports-Tourism, Ministry of Science-Technology, and Ministry of Justice Guiding the Application of Some Legislative Provisions in Settling Disputes over Intellectual Property Rights in the People's Courts

CHAPTER 1: INTRODUCTION – IMPLEMENTATING THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM

Synopsis

Between 1995 and 2007 Vietnam made its accession to the WTO. It became one of the members of the global trading system as a result. To become a member the country had to meet, among other things, the obligation to protect intellectual property rights under the minimum standards set out in the TRIPs Agreement.

The TRIPs Agreement was created on legal models from the most industrialized and technologically developed countries. The major issue for Vietnam, a developing and non-industrialized country with a low per capita income, a low level of technological development, and limited experience with intellectual property law, was, and is, how to meet its obligation of implementing TRIPs standards while simultaneously taking advantage of their flexibilities to suit its own needs?

Answering this question requires an understanding of how Vietnam responded to the flexibilities within TRIPs. On the one hand, TRIPs obliges members to legislate its standards for intellectual property protection in their national legal systems. On the other hand, the Agreement contains potential flexibilities, recognized by its introductory statement to be important to the least-developed country members. These flexibilities can be read from its text or otherwise implied from its ambiguous language. They may facilitate the drafting of the corresponding laws of a specific member of the WTO.

This chapter outlines the thesis. It draws on themes in Vietnam's intellectual property law prior to its decision to seek membership of the WTO. There is limited literature published in English on the development of its laws on intellectual property protection in the implementation of the TRIPs Agreement, particularly compared with the similar experience of China in acceding to the WTO. To the extent that China's political, economic, and cultural features are similar to those of Vietnam that literature is useful and helpful in understanding the Vietnamese experience. The chapter states the research questions for the thesis, and discusses its methodology and the structure of the thesis. Consistent with the analysis throughout the thesis its conclusion is that although the TRIPs Agreement requirements have been incorporated into Vietnamese laws, using a considerable number of flexibilities embodied in TRIPs, the country still has far to go in its use of those flexibilities in its implementation of the Agreement to promote the welfare of its own people.

CHAPTER 1: INTRODUCTION – IMPLEMENTATING THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM

1. Flexibilities in Vietnam's Intellectual Property Protection under TRIPs

Between the commencement of Vietnam's application to integrate into the WTO, starting with its formal request for accession on 4 January 1995, and its membership on 11 January 2007, Vietnam implemented in its domestic law the TRIPs Agreement on the minimum standards for the protection of intellectual property rights.

The TRIPs Agreement contains a complex and high level body of intellectual property protection. Its provisions were modeled from the laws of the most industrialized and technologically developed countries.¹ As a developing and non-industrialized country with a low per capita income, a low level of technological development, and a limited experience with intellectual property law, the biggest question for Vietnam was, and is, how to meet its obligation of implementing TRIPs' standards while concurrently exploiting their flexibilities to suit its own needs?²

Answering this question requires an understanding of how Vietnam responded to the flexibilities within TRIPs. On the one hand, TRIPs obliges members to legislate its intellectual property protection standards in their national legal systems. On the other hand, the Agreement contains potential flexibilities, recognized to be important to the least-

¹ See, eg, Vandana Shiva, 'Protecting our Biological and Intellectual Heritage: The Transnational Corporation Bias in TRIPs' in Peter Drahos (ed), *Intellectual Property* (Ashgate, 1999) 141-161; Christopher Arup, *The New World Trade Organization Agreements: Globalizing Law through Services and Intellectual Property* (Cambridge University Press, 2000); D Matthews, *Globalizing Intellectual Property Rights: The TRIPs Agreement* (Routledge, 2002); Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, 2002); Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003); Christophe Bellmann, Graham Dutfield and Recardor Melendez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPs, Trade, and Sustainability* (Earthscan Publications, 2003); Meir P Pugatch, *The International Political Economy of Intellectual Property Rights* (Edward Elgar, 2004); Donald G Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPs Agreement* (M E Sharpe, 2004).

² See below n 23.

developed country members.³ They can be read from its text⁴ or otherwise implied from its vague or ambiguous language.⁵ These flexibilities may facilitate the drafting of the corresponding laws of a specific member of the WTO.

There have been non-governmental organizations and scholars who have advised and argued that developing countries should take advantage of the flexibilities within TRIPs as much as possible.⁶ From its own economic, cultural, social, and technological development background, it is important for Vietnam to do so.

Vietnam, at the date of its application for accession to the WTO in 1995, had developed a limited intellectual property law based on the requirements of its centrally-planned economy and state and collective ownership of property.

After the Declaration of Independence of 2 September 1945 Vietnam was divided until its reunification on 30 April 1975. During this period of 1945-1975, the government of South Vietnam along with Law No. 14/59 of 11 June 1959 on Repression of Counterfeiting had developed some laws for the protection of industrial property particularly for inventions

³ For example, the sixth paragraph of the preamble to TRIPs reads: '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.'

⁴ The second sentence of TRIPs Article 1(1), eg, states 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'

⁵ The content and the position of TRIPs Article 13, within Section 1: Copyright and Related Rights, of Part II: Standards Concerning the Availability, Scope and Use of Intellectual Property Rights, eg, poses a question whether it is applied to related rights exceptions. The conceptualization of law's flexibility in general and of the WTO TRIPs Agreement in particular is discussed in Chapter 2 on conceptualizing law's flexibility.

⁶ See, eg, South Centre, *The Implementation Game: Developing Countries, the TRIPs Agreements, and the Global Politics of Intellectual Property* (5 December 2007) <www.southcentre.org> (visited 17 April 2008); Consumers International Asia Pacific Office, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* (20 February 2006) <<http://www.consumersinternational.org/news-and-media/resource-zone/copyright-and-access-to-knowledge/>>; Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books, 2000); Brook K Baker, *Processes and Issues for Improving Access to Medicines: Willingness and Ability to Utilize TRIPs Flexibilities in Non-Producing Countries* (August 2004), DFID Health Systems Resource Centre <http://www.iprsonline.org/resources/docs/Baker_TRIPS_Flex.pdf>; Deere Carolyn, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009).

and trademarks in Law No. 12/57 and Law No. 13/57, of 1 August 1957.⁷ However, there was no similar development of the law in the North and little more was to occur until several years after reunification.⁸

Five years after the end of the French occupation in 1954, the State Committee of Science of the Democratic Republic of Vietnam was established in 1959 with a Division for Technical-Improvement Initiatives located within it.⁹ This paralleled decisions to vest the ownership of productive capital in the people, through the State and in workers, through collectives. In 1975 the State Committee of Science and Technology, the successor to the State Committee of Science, was founded with Division of Inventions and Discoveries as one of its subordinates.¹⁰ Seven years later, in 1982, the National Office of Inventions was created within the Committee.¹¹ In 1993, as legal changes associated with the economic reform of Doi Moi began to grow, the National Office of Inventions became the National Office of Industrial Property under the Ministry of Science, Technology and Environment.¹² In 2003, in the process of acceding to the WTO and implementing the TRIPs Agreement, the Office was re-organized into the National Office of Intellectual Property located within the Ministry of Science and Technology.¹³

⁷ National Office of Industrial Property of Vietnam, *Hoạt động sở hữu công nghiệp 1997* [Booklet on Industrial Property Activities 1997].

⁸ Phạm Duy Nghĩa, 'Transplanted Law: An Ideological and Cultural Analysis of Industrial Property Law in Vietnam' in Christoph Antons, Michael Blakeney and Christopher Heath (eds), *Intellectual Property Harmonization within ASEAN & APEC* (Kluwer Law International, 2004) 125, 128-9.

⁹ National Office of Intellectual Property of Vietnam, *Giới thiệu lịch sử phát triển - Quá trình hình thành và phát triển của Cục Sở hữu trí tuệ qua các năm: Giai đoạn trước 1982* [About NOIP: Prior to 1982] <www.noip.gov.vn> (visited 13 February 2008); Đồng Nai People's Committee, *Tin Khoa học và Công nghệ 16/12/2004: Bộ Khoa học và Công nghệ kỷ niệm 45 năm ngày thành lập Ủy ban Khoa học Nhà nước và đón nhận Giải thưởng Hồ Chí Minh* [News on Science and Technology 16/12/2004: The Ministry of Science and Technology Celebrated 45 years of the Establishment of the State Committee of Science and Took the Ho Chi Minh State-Award] <www.dongnai.gov.vn> (visited 3 August 2009).

¹⁰ National Office of Intellectual Property of Vietnam, *ibid.*

¹¹ This organization was created by Decree 125/HĐBT of 29 July 1982 of the Ministers Council on the Re-organization of the State Committee of Science and Technology: National Office of Inventions of Vietnam, *Giới thiệu Cục Sáng chế* [Booklet on the National Office of Inventions] (1991).

¹² National Office of Intellectual Property of Vietnam, *Giới thiệu lịch sử phát triển - Quá trình hình thành và phát triển của Cục Sở hữu trí tuệ qua các năm: Giai đoạn 1990-1995* [About NOIP: 1990-1995], above n 9.

¹³ The re-organization was under Decree 54/2003/NĐ-CP of 19 May 2003, as amended and supplemented by Decree 28/2004/NĐ-CP of 16 January 2004: National Office of Intellectual Property of Vietnam, *ibid.*

The protection of intellectual property, including copyright, inventions, utility solutions, industrial designs, and trademarks, with some very limited prior exceptions began to be introduced in Vietnam by government regulations during the 1980s in the context of the development of a centrally-planned socialist economy.¹⁴

The policies on which the protection was based suited that economy. The grant of patents for inventions and utility solutions, for example, was divided into two forms. The creators of inventions or utility solutions were granted authors' certificates and patents or monopolies were conferred on the authors' employers, almost state-owned enterprises.¹⁵ The first invention protection title was granted on 28 June 1984, two years after the establishment of the National Office of Inventions, and the first utility solution patent was issued five years later, on 18 August 1989.¹⁶ Similarly, the first trademark registration certificate was granted on 29 June 1984 and the first industrial design certificate was issued

¹⁴ They include:

- Decree 31-CP of 23 January 1981 of the Government Council on Rationalizations and Inventions;
- Decision 175-CP of 29 April 1981 of the Government Council on Regulating the Entering into and Carrying out of Economic Contracts in Scientific Research and Technically-Deploying Activities;
- Decree 197-HĐBT of 14 December 1982 of the Ministers Council on Rules for Goods-Marks;
- Decree 46-HĐBT of 10 May 1983 of the Ministers Council on Handling Administrative Violations of Speculating, Trafficking, Producing Fake Goods and Doing Business Illegally;
- Decree 142-HĐBT of 14 November 1986 on Copyright;
- Decree 85-HĐBT of 13 May 1988 on Rules for Industrial Designs; and
- Decree 200-HĐBT on Rules for Utility Solutions and Decree 201/HĐBT on Rules for Licensing Invention Patents, Utility Solutions, Industrial Designs, Goods-Marks, and Know-how, both dated 28 December 1988.

¹⁵ According to Article 14(1)-(2) Decree 31-CP of 23 January 1981 on Rationalizations and Inventions, inventions were protected in two forms, either authors' certificates or monopolies/patents. A certificate of the authorship of an invention determines a technical solution to be an invention, a priority right, an author's right, and for the state ownership of the invention. The person holding an author's certificate was to enjoy the rights and privileges set out in Articles 39-48 of the Decree, including the right to monetary awards paid by the state-owned enterprise which applied the invention to a maximum of VND 50 000. Until Decree 200-HĐBT of 28 December 1988 utility solutions were provided for. Invention was defined by Article 10 Decree 31-CP as a technical solution which is new, involving a creative level, and capable of economic, medical, cultural, educational or national-defence application, and bringing about economic and social effects. It carried 15-year protection [Article 16(3)]. Utility solution was defined by Article 2(1) Decree 200-HĐBT as a technical solution which is new in Vietnam, is capable of being applied in contemporary economic-technological conditions, and results in new or better economic and social effects compared with the state of technology at the time of filing the application. It was rewarded with a term of 6-years. These reflect the general landscape of former socialist legal systems, further discussed in the context of Chapter 2 on conceptualizing law's flexibility: Subsection 2.4 (b) *Socialist Legislation Opposing Private Ownership*. For the statistics on the numbers of applications and patent grants for inventions and utility solutions in Vietnam from 1981 to 2008 see Appendices 2-3 to this thesis.

¹⁶ National Office of Inventions of Vietnam, above n 11.

on 26 June 1989.¹⁷ The number of these protection titles or certificates was always to be low in the centrally-planned economy with its fundamental privileging of the public and collective ownership of productive capital.¹⁸

Changes to public or collective ownership commenced when Doi Moi was launched in 1986. It led to the Foreign Investment Ordinance in 1987 and the Ordinance on Protection of Industrial Property Rights of 1989. Vietnam started to gradually integrate into the global economy. The promotion of a socialist-oriented market economy was further confirmed under the 1992 Constitution. The effect of the centrally-planned economy on the laws and the judicial system in the period from Doi Moi to 1995 was to continue to be significant.¹⁹

The laws protecting intellectual property in Vietnam were very different from those in the non-socialist countries which provided the property models underlying the TRIPs Agreement. There were other significant differences in knowledge and skills in the application of those laws. In the United States, for example, the patent office has over 200 years of experience and a developed profession reflecting the prominent role of patents in the country's economic development.²⁰ Many other patent offices have more than 150 years of experience.²¹ Copyright protection is similar. For example, when Vietnam adopted its initial regulations on copyright in 1986 and established the Copyright Office in 1987 with only four officials,²² the Berne Convention of 1886 was 100 years old, leaving Vietnam almost a century behind other members of the international community in its

¹⁷ Ibid.

¹⁸ See the statistics on applications and grants of protection titles or certificates of industrial property rights between 1981 and 2007 of the National Office of Intellectual Property of Vietnam, *Số liệu thống kê* [Statistics], above n 9. Some of this data is presented in Appendices 2-4 to this thesis.

¹⁹ This is confirmed, eg, from the resolution of some appeals relating to industrial property rights by the National Office of Intellectual Property and the Ministry of Science and Technology in an internal document by Lê Hồng Vân, 'Trích yếu tóm tắt các vụ việc và quyết định giải quyết khiếu nại, tố cáo của Bộ Khoa học và Công nghệ thuộc lĩnh vực sở hữu công nghiệp' [Brief Summaries and Excerpts of Industrial Property Appeals and Decisions of Resolving These Appeals from the Ministry of Science and Technology] (2004) 7.

²⁰ See generally Stephen A Merrill, *Patent System for the 21st Century* (National Academy Press, 2004).

²¹ See Josh Lerner, '150 Years of Patent Office Practice' (2000) 7(1) *American Law and Economics Review* 112 (Oxford University Press, 2005).

²² Copyright Office of Vietnam, *Giới thiệu hoạt động của Cục Bản quyền tác giả* [Introductory Statement]; *Tổ chức bộ máy của Cục Bản quyền tác giả* [Organization of the Copyright Office of Vietnam] <www.cov.gov.vn> (visited 3 August 2009).

implementation. Consequently, the changes to Vietnamese intellectual property law between 1995 and 2007 were extensive and dramatic.

2. Research Questions, Methodology, and Thesis Organization

2.1 Research Questions

Answering the question of how Vietnam has taken advantage of the flexibilities within TRIPs when implementing the Agreement²³ raises another question: What have other researchers or commentators who have studied the implementation of the TRIPs Agreement in Vietnam concluded about Vietnam's use of the flexibilities within TRIPs?

Compared with China, discussed below, there is limited literature on Vietnam's intellectual property protection published in English.²⁴ Both Vietnamese and non-Vietnamese scholars have generally tended to find shortcomings, gaps, inconsistencies, or deficiencies in the Vietnamese legal processes for protecting intellectual property when compared with TRIPs' requirements. There has been little consideration of the specific question of how the flexibilities within TRIPs may have been exploited or tailored in the local law.

When Vietnam, in 2004, joined the Berne Convention, one of the four other intellectual property treaties incorporated into TRIPs, copyright protection was recognized as still being a 'new' area of law in Vietnam. Many problems were discovered with the first copyright laws and many recommendations, especially for the improvement of weak and ineffective enforcement, were made without considering the opportunities to take advantage of any

²³ This certainly realistically includes TRIPs-plus provisions. Vietnam would only join the WTO by agreeing TRIPs-plus so that TRIPs-plus forms part of the Vietnamese reality and limits the flexibilities open to Vietnam in implementing TRIPs in its own legal system. This is discussed in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam.

²⁴ Amanda J McBratney, 'More Legislative Traffic on the 'Doi Moi' Superhighway: Technology Transfer, IP and Competition Laws in Vietnam' (2003) 11(2) *Asia Pacific Law Review* 189, 189.

flexibilities, permitted under either TRIPs or the Berne Convention.²⁵ Before the adoption of the 2005 Intellectual Property Law, there were official consultations and seminars on drafts of the Law. One of these was held by the Vietnam Chamber for Commerce and Industry (VCCI) in March 2005. The drive for the protection of intellectual property was affirmed as coming not only from impetus inside Vietnam (*nhu cầu tự thân*) of industrialization and modernization, for example, but also from pressure outside (*sức ép bên ngoài*), including the implementation of the TRIPs Agreement.²⁶ Speakers from law firms and legal institutions specializing in intellectual property laws evaluated the drafting provisions for patents, utility solutions, and some other subject matters of industrial property but not from the perspective of TRIPs' flexibilities.²⁷ This is also seen from other local and foreign studies and commentaries on these laws.²⁸

In the process of Vietnam's accession to the WTO, an examination of the entire system for the legal protection of intellectual property was conducted by the government. The system was again found to have many shortcomings, including the absence of protection for trade secrets, geographical indications, layout designs, and the lack of provisions for the protection of well-known trademarks and computer software. It was emphatically concluded to be '*inadequate and ineffective*' and '*far from compliance with the TRIPs Agreement*'.²⁹ Strategies for strengthening the laws were prescribed, including participating

²⁵ Đặng Thế Đức & Hồ Tường Vy, 'Vietnam Adopts International Treaty on Copyright Protection' *Vietnam Law & Legal Forum* (28 October 2004) 5-8 <<http://news.vnanet.vn>> (visited 5 March 2008).

²⁶ VCCI Seminar Document, 'Giới thiệu về dự án soạn thảo Luật Sở hữu trí tuệ' [Introduction Statements on the Project of Drafting the Intellectual Property Law] (10 March 2005).

²⁷ See VCCI Seminar Documents presented by, eg, Law Firms Phạm & Associates and Invenco, the Trade Ministry's Department of Market Management, and Dr. Lê Nết - Ho Chi Minh City Law University.

²⁸ See, eg, Martin W Chow, 'Vietnam' in Alan Gutterman and Robert Brown (eds), *Intellectual Property Laws of East Asia* (Sweet & Maxwell Asia, 1997) 507; Đặng T H Thủy, 'The Protection of Well-Known Marks in Vietnam' in Christopher Heath and Kung-Chung Liu (eds), *The Protection of Well-Known Marks in Asia* (Kluwer Law International, 2000) 135; Phạm Duy Nghĩa, 'Technology Transfer in Vietnam' in Christopher Heath and Kung-Chung Liu (eds), *Legal Rules of Technology Transfer in Asia* (Kluwer Law International, 2002) 157; Christopher Heath, 'Vietnam' in Christopher Heath (ed), *Intellectual Property Law in Asia* (Kluwer Law International, 2003) 267; McBratney, above n 24; Phạm Duy Nghĩa, 'Exhaustion and Parallel Imports in Vietnam' in Christopher Heath (ed), *Parallel Imports in Asia* (Kluwer Law International, 2004) 85.

²⁹ Ministry of Science and Technology of Vietnam, *Accession to the WTO and the Intellectual Property System in Vietnam* (2003) 13 (the emphasis is original) <http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/vietIPR_hai.pdf>.

in intellectual property treaties to increase the effectiveness of the system. There was no emphasis on using TRIPs' flexibilities, although potentially adverse effects from the high standards of the Agreement were foreseen.³⁰ Another review concluded that in order to carry out its WTO commitments Vietnam needed to continue to improve procedures for the enforcement of intellectual property rights, again without taking into account any particular TRIPs' flexibilities which could possibly be incorporated into national laws.³¹

There were some general scholarly concerns about this issue in Vietnam but they were not substantial. One scholar observed that Vietnam should avoid merely adopting a system of intellectual property protection 'dictated by the West', and that it should consider the flexibilities within TRIPs for WTO members with a similar status to it.³² However, no further consideration was given to how this might be done. Another commentator made a similar point on the development of Vietnamese copyright law with some very limited suggestions for copyright exceptions.³³

A survey of this literature reveals at least three limitations on the existing research of intellectual property protection in Vietnam and its exploitation of the flexibilities within TRIPs in implementing the Agreement. First, the research has been non-complete and largely biased in favour of incorporating international intellectual property standards into the national law without much consideration of how the flexibilities in the Agreement could be used to adapt the law to Vietnam's own circumstances. Second, it tended to be focused on the substantial rights recognized in the law, not on the procedural processes to enforce those rights. This means there is almost no literature on the enforcement of intellectual property in Vietnam, whether it was before or after its accession to the WTO. Third, it has

³⁰ Ibid, 24-7.

³¹ Hoàng Phước Hiệp, 'Reforming the Legal System to Meet the Nation's WTO Commitments' *Vietnam Law & Legal Forum* (December 2006) 7, 7-10.

³² 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' (2009) 31 *Case Western Reserve Journal of International Trade Law* 211, 240-1.

³³ Đỗ Thị Kim Zung, 'Copyright Law at the Cross-Roads: Vietnam Developments' (2001) 6 *International Trade and Business Law Annual* 247, 258-9, 274-83.

been non-systematic, not considering the most important contents of TRIPs in their entirety and the relevant Vietnamese laws and sub-laws, regulations and sub-regulations.

Consequently, the objective of this study is to map the implementation of TRIPs from the provisions of the Agreement itself in the Vietnamese legal system and to make clear how the flexibilities within TRIPs have been exploited simultaneously with Vietnam's implementation of the Agreement's standards.³⁴ In seeking to do this, it has focused on the main provisions of TRIPs' minimum standards concerning the availability, scope and use of seven categories of intellectual property rights, comprising copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits, and undisclosed information, as well as the Agreement's minimum standards for the enforcement of these intellectual property rights. It is, for these reasons, an original contribution to an understanding of how the flexibilities found in TRIPs may be exploited in a particular locality.

Such research has required a critical approach. Both the positive and negative consequences of the process of acceding to the WTO and implementing TRIPs need to be considered. TRIPs' standards for intellectual property rights need be examined together with its flexibilities to determine the question of how Vietnam has fulfilled its obligation to internalize the Agreement while concurrently exploiting its flexibilities to suit the country's own needs and the interests of its people. In determining the answer for this question, it is important to consider relevant international and national laws and secondary commentaries and to synthesize and analyze the economic, cultural, social, and legal perspectives contained in them. Where it is appropriate, a comparison has been made to see how similar or the same subject matters have been dealt with by other WTO members, especially those whose economic, political, cultural, and social features are similar or in common with Vietnam's, such as China. There can never be a direct comparison as the size of the Chinese economy, compared with that of Vietnam, gives the Chinese government significant bargaining power.

³⁴ See above nn 2 & 23.

The First Point of China's Experience of Implementing the TRIPs Agreement as How to Protect Intellectual Property

As indicated the implementation of the TRIPs Agreement in Vietnam has been much less studied than in the People's Republic of China. Like Vietnam, when China applied for WTO membership it incurred considerable foreign pressure on obligations to protect intellectual property rights under TRIPs. In the case of China pressure that came from the United States was particularly intense and had been applied for some time. Because of the desire of transnational corporations to sell goods and services in China because of the size of its economy and markets it may have been better able to deflect some of these forces than Vietnam.³⁵ For the same reasons it attracted considerable pressure from the United States government on trade in intellectual property and a large part of the literature concentrates on this. Very little has been written about the significance of intellectual property protection in China-EU relations, indicating that the relationship between international pressures and intellectual property protection in a developing country is as not clear as others have claimed in the US-China context.³⁶ The Chinese literature, however, represents a more mature body of work on similar phenomena that offer models and ideas that are relevant to understanding the Vietnamese experience. However the Vietnamese literature differs from China's as can be seen from the literature discussed below. Its markets are smaller and its comparative political weakness has meant that it has not been perceived to be a threat to United States national security as China has been.

³⁵ See below nn 37-40.

³⁶ As a Chinese law professor and a British lawyer, Wei Shi and Robert Weatherley ('Harmony or Coercion? China-EU Trade Dispute Involving Intellectual Property Enforcement' (2007) 25 *Wisconsin International Law Journal* 439) argue that the relationship between international pressures and intellectual property protection in China is not as clear as others have claimed. The article claims that though conventional wisdom asserts a positive correlation between greater international pressure and better domestic compliance with international rules of intellectual property, a growing body of empirical evidence shows that 'a coercive policy towards IPR protection is misconceived and ineffective in obtaining the desired result' (439). In the authors' view, much of the literature on international protection of intellectual property rights in China concentrates primarily on China-United States issues, but very little has been written about the significance of intellectual property in China-European Union relations. 'By examining areas of compatibility between European and Chinese culture and the mistakes made during the China-U.S. negotiations over IPR, this article uses prism of China-EU trade relations to suggest ways to reconcile the minimum standards imposed by the international standards and the specific conditions of particular states; and provide insight into the unresolved issues as to how and when China's WTO commitments will be implemented' (440).

Until the mid-1990s China had resisted pressure from the United States, as an interference with its sovereignty, to modify its law and legal processes relating to intellectual property. This led to the United States government retaliating with threats of trade sanctions.³⁷ The 1995 Memorandum of Agreement between the United States and China, as well as China's desire to join the WTO, only partly reduced the conflict.³⁸ That year also saw an agreement concerning intellectual property between the two countries.³⁹ A former Commissioner of the Chinese Patent Office, with views close to those of the Chinese government, argued that at the end of the 1990s China had made great progress in protecting patents, trademarks, and cultural and artistic works through the implementation of its intellectual property system.⁴⁰ A decade later it was argued by others that China's intellectual property laws in the books were nearly, if not completely, in conformity with its WIPO treaty obligations.⁴¹ The consistency in respect of the legislation may have been attributable to the increasingly high priority the Chinese central leadership placed on technological development.⁴² In attempting to answer the question of whether China has complied with the TRIPs Agreement by examining its intellectual property law in detail, leading European and Chinese academics and practitioners have come to the conclusion that the changes made in China have been far reaching and that China is largely in compliant with its TRIPs obligations.⁴³ The literature from the US is less certain of this.

Some of the claims made against China were exaggerated accounts of intellectual property piracy. With the exception relating to the piracy of the United States films, which may not

³⁷ Robert B Frost, 'Intellectual Property Rights Disputes in the 1990s between the People's Republic of China and the United States' [1995] (Winter) 4(1) *Tulane Journal of International and Comparative Law* 119, 132-3.

³⁸ Frost, *ibid.*

³⁹ See generally Frank V Prohaska, 'The 1995 Agreement regarding Intellectual Property Rights between China and the United States: Promises for International Law or Continuing Problems with Chinese Piracy' [1996] (Fall) 4(1) *Tulsa Journal of Comparative and International Law* 169.

⁴⁰ Lulin Gao, 'China's Intellectual Property Protection System in Progress' in Frederick M Abbott (ed), *China in the World Trading System: Defining the Principles of Engagement* (Kluwer Law International, 1998) 127.

⁴¹ William O Hennessey, 'Protection of Intellectual Property in China (30 Years and More): A Personal Reflection' (2009) 46(4) *Houston Law Review* 1257, 1288.

⁴² Hennessey, *ibid.*

⁴³ Paul Torremans, 'Introduction: Setting the Scene' in Paul Torremans, Hailing Shan and Johan Erauw (eds), *Intellectual Property and TRIPs Compliance in China: Chinese and European Perspectives* (Edward Elgar, 2007) 1, 4-5.

be as frequently subtitled in Vietnamese as they are in Chinese, similar opinions could be held in respect of claims made against Vietnam, except the economic consequences of the breaches of intellectual property rights may not be so great in its case because of its smaller markets.⁴⁴

The Second Point of China's Experience of Implementing the TRIPs Agreement as How to Enforce Intellectual Property

The most serious claim was that the Chinese violation of United States intellectual property endangered United States national security. Nastase argued that not only the executive branch of the United States government failed in addressing and monitoring national security threats caused by the counterfeit industry but that also United States legislation and processes were too weak to address this problem.⁴⁵ Alexander, in discussing the development of global intellectual property rights with international standards of protection and enforcement, notes that these can lead to complex issues. The development of such a regime represents each country's willingness to become a WTO signatory. This may conflict with significant interest groups that dominate a country's domestic affairs. Economic competition with the added burden of adhering to international standards leads to conflicts over the law and its enforcement. Alexander argues that these struggles provide the potential to confuse the boundaries of what is intellectual property protection and to create a fog around marginal infringements. In the context of China, and significant to

⁴⁴ In Part I of his article, 'The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint' (2008) 32 *Fordham International Law Journal* 96, Daniel P Harris lays down the background for the Sino-U.S. intellectual property dispute and traces the negotiations and agreements between the two countries and the failed efforts to induce China to protect intellectual property rights (100-13). Also, Li deals with the uncertainty over whether stricter enforcement of intellectual property laws in China leads to greater foreign direct investment: Yahong Li, 'Pushing for Greater Protection: The Trend toward Greater Protection of Intellectual Property in the Chinese Software Industry and the Implications for Rule of Law in China' '[2002] (Winter)' 23(4) *University of Pennsylvania Journal of International Economic Law* 637, 638-43.

⁴⁵ In light of 'national security' definition and interpretation the author explores the four areas left vulnerable by a failure to address 'the trade in counterfeits stemming from China: consumer safety, economic safety, the financing of criminal organizations and terror groups and the proliferation of sensitive technologies': Laura C Nastase, 'Made in China: How Chinese Counterfeits are Creating a National Security Nightmare for the United States' (2008) 19 *Fordham Intellectual Property, Media and Entertainment Law Journal* 143, 146-7.

Vietnam, is the presence of local protectionism and judicial disincentives to enforce intellectual property laws.⁴⁶

United States complaints about China led to it being named ‘the worst country in the world for copyright infringement and trademark violations’ which cost ‘... just anyone with a product for sale – billions of dollars a year.’⁴⁷ These complaints were in particular leveled by United States motion picture companies. The literature indicates that of equal importance with intellectual property law is its enforcement. In respect of this further work on China remains to be done.⁴⁸ One complaint was that initially China declined to provide copies of judgments on the basis that it does not have a common law system.⁴⁹ Its law is not based on judicial decisions but is the legislation passed by the People’s National Congress. It finally relented under pressure from the United States. The literature indicates that China has had difficulties in creating an enforcement regime meeting the requirements of Article 41 of TRIPs and while its compliance has been inadequate there has been convergence in Chinese intellectual property law towards compliance with the requirements of TRIPs.⁵⁰ This pattern of convergence over time could be expected where there is significant change in the law. It is a relevant factor to consider in the context of Vietnam.

Also relevant to Vietnam is that the disputes before the WTO Dispute Settlement Body between China and the United States have demonstrated that what is effective intellectual property enforcement is not clearly defined. In this context Article 41.5 of TRIPs has been significant. It stipulates that a member is not required to devote more resources to

⁴⁶ Randal S Alexander, ‘China’s Struggle to Maintain Economic Viability While Enforcing International and Domestic Intellectual Property Rights’ [2005] (Summer) 4(4) *John Marshall Review of Intellectual Property Law* 607, 616-9.

⁴⁷ Yahong Li, ‘The Wolf Has Come: Are China’s Intellectual Property Industries Prepared for the WTO’ (2002) 20 *UCLA Pacific Basin Law Journal* 77- 81, citing in Alexander, *ibid*, 615 nn 50 & 53.

⁴⁸ Torremans, *above n* 43.

⁴⁹ Natalie P Stoianoff, ‘Convergence, Coercion and Counterfeiting: Intellectual Property Rights Enforcement in the People’s Republic of China’ (2007) 4 *Macquarie Journal of Business Law* 245, 256.

⁵⁰ Stoianoff, *ibid*, 252, 256, 264-5.

intellectual property enforcement than to other areas of law enforcement.⁵¹ In two complaints lodged in 2007 by the United States against China under TRIPs, it was argued that the cases raised more issues for the multilateral trading system than it could resolve and that the appropriate solution proposed was that the United States and other developed nations should continue helping China improve its intellectual property regime while continuing to pressure it to enhance its enforcement.⁵² Other writers have claimed that the United States has not appreciated the efforts made by governments in developing countries, including China, to stop piracy.⁵³ As a developing economy the issues around the allocation of resources to particular areas of law enforcement are also significant for Vietnam. Also important for understanding the Vietnamese experience is the suggestion that China would not become a respected economic power if its system of enforcing copyright law continued to be ineffective.⁵⁴ Supporting this, it is argued that China must continue to improve its enforcement of international intellectual property agreements and that Chinese intellectual property protection can be deemed acceptable only when it can show its commitment to enforce international law without the threat of pressure from foreign governments.⁵⁵

⁵¹ Peter K Yu, 'Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility' (2005) 34(1) *Georgia Journal of International and Comparative Law* 143, 145-6.

⁵² Konstantina K Athanasakou, 'China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Questions to the WTO under TRIPs' (2007) 39 *Georgetown Journal of International Law* 217, 219-20, 245.

⁵³ Aaron Schwabach, 'Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere' (2008) 2(1) *Journal of International Media and Entertainment Law* 65, 82-3.

⁵⁴ Brent T Yonehara, 'Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws' (2002) 12 *DePaul University Journal of Art and Entertainment Law* 63, 67-8. See also Gerardo Lara (with a similar view relating to piracy of American films in China in the late 1990s), 'The Piracy of American Films in China: Why the U.S. Art Form Is Not Protected by Copyright Laws in the People's Republic of China' (1997) 2 *UCLA Journal of International Law and Foreign Affairs* 343.

⁵⁵ Gregory S Feder, 'Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can't Make It Drink' '[1996] (Fall)' 37 *Virginia Journal of International Law* 223, 252-4.

The United States film industry's products in Greater China (including the mainland, Hong Kong, Macau and Taiwan) raise issues about the functional and regulatory roles of the state in an age of transnational trade and intellectual property regimes particularly in the context of the protection of national cultures.⁵⁶ This is seen above in the role of the state in enforcing the law. As indicated TRIPs does not require greater enforcement of intellectual property than other area of law. It has been claimed that the size of the piracy problem of the United States motion pictures in China indicates that the TRIPs Agreement is flawed and that it should be revised to better protect motion pictures.⁵⁷ This is unlikely without intervention by the WTO itself. Ting indicates that there may be some common ground between the United States and China by pointing the severe damage that piracy was doing to China's own movie industry.⁵⁸ In light of the history of conflict over cultural exemptions to free trade, China's intellectual property enforcement raises issues of whether cultural exemptions to promote local and national cultures are justifiable. The United States has been urged to negotiate a formal agreement for international trade in cultural products to ensure appropriate market access for its products.⁵⁹

Different understandings of intellectual property cross cultures are also revealed by the literature on the Chinese experience. Yu points out the cultural and other differences between China and the West and how they may have contributed to the repeated failures of the United States in addressing the Chinese intellectual property regime.⁶⁰ Subsequently he has pointed out how the debate tends to oversimplify the complex nature of the problem

⁵⁶ Shujen Wang, *Framing Piracy: Globalization and Film Distribution in Greater China* (Rowman and Littlefield, 2003) 33-4, 48, 93-4, 153-60. Relating to that in the case of software piracy rated following a survey in China, Taiwan and the United States see Chun-Hsien Chen, 'Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China' (2007) 10 *Tulane Journal of Technology and Intellectual Property* 211.

⁵⁷ Jessica Haber, 'Motion Picture Piracy in China: Rated ARRRGH' (2006) 32 *Brooklyn Journal of International Law* 205, 208, 224, 226, 229.

⁵⁸ Oliver Ting, 'Pirates of the Orient: China, Film Piracy, and Hollywood' (2007) 14 *Villanova Sports and Entertainment Law Journal* 399, 428-34, 440-4.

⁵⁹ Carl E Heibreg, 'American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy' (2006) 15 *Minnesota Journal of International Law* 219, 221, 262.

⁶⁰ Peter K Yu, 'Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the US-China Intellectual Property Debate' (2001) 19 *Boston University International Law Journal* 1, 2-20.

resulting in public misconceptions and misleading policymakers into adopting policies that fail to address the real issue.⁶¹ In response, Yu seeks to re-direct the debate by challenging four common misconceptions which are also relevant to perceptions of Vietnam's intellectual property law. These are seeing copyright piracy as: merely a cultural problem; primarily a development issue; a past phenomenon for technological advanced nations; and, a necessary by-product of authoritarian rule.⁶² He argues that the United States may be unable to eradicate piracy abroad unless its legislators and policymakers are willing to consider the multiple interests of both stakeholders and non-stakeholders in this debate.⁶³ Other writers have pointed out the further complexities caused by other factors in bilateral relations between states. This includes the negative effect of United States copyright policy towards China and its potential threat to human rights, free speech, and public access.⁶⁴ For researchers on other developing nations one suggestion about methodology is also significant in this context that it should be a two-pronged analysis. One should be historical and the other functional, for determining whether, and to what extent, Chinese culture is the driving force behind its present policies of enforcing intellectual property rights.⁶⁵

⁶¹ Peter K Yu, 'Four Common Misconceptions about Copyright Piracy' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 127, 128-30.

⁶² Yu, *ibid*, 130.

⁶³ Yu, *ibid*. Recently, however, to examine the decade-long debate about the United States-China relations in intellectual property protection Yu takes a new approach by arguing that the lack of political will on the part of the United States policymakers and American public to put intellectual property protection at the very top of the United States-China agenda can be partially attributed to the failure to resolve the problems of piracy and counterfeiting in China: Peter K Yu, 'Three Questions That Will Make You Rethink The U.S.-China Intellectual Property Debate' (2008) 7 *The John Marshall Review of Intellectual Property Law* 412, 413.

⁶⁴ Jing Zhang, 'Pushing Copyright Law in China: A Double-Edged Sword' (2007) 18 *DePaul University Journal of Art, Technology and Intellectual Property Law* 27, 29.

⁶⁵ Apart from economic or political considerations to take part in understanding that, it is believed that traditional understanding of intellectual property as more communal in nature than available for individual ownership was embodied in Chinese culture rather than Communism, that this continues to have a strong influence on China's intellectual property laws and conception, and that 'it will delay, if not prohibit, effective intellectual property enforcement' (Justin McCabe, 'Enforcing Intellectual Property Rights: A Methodology for Understanding the Enforcement Problem in China' (2009) 8(1) *Pierce Law Review* 1, 3-5, 27-8). Close to this opinion Wei Shi ('Incurable or Remediable? Clues to Undoing the Gordian Knot Tied by Intellectual Property Rights Enforcement in China' (2008) 30 *University of Pennsylvania Journal of International Law* 542) discusses China's cultural uniqueness, institutional impediments and economic insufficiency to have formed knotty points of its intellectual property enforcement deficiency. Meanwhile, Yu, again, views the causes of the Chinese piracy and counterfeiting problem in terms of significant political, social, economic, cultural, and ideological differences between China and the West: Peter K Yu, 'The Second Coming of Intellectual Property Rights in China' (2002) 11 *Yeshiva University Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property* 3, 3-4 <<http://www.peteryu.com/2dcoming.pdf>>.

While Vietnam and China may have similar experiences in the protection of intellectual property under TRIPs as a result of their WTO membership their treatment in the literature has been very different with much less research and publication on the Vietnamese experience. This includes more specific issues returned later in the thesis such as: contemporary issues in copyright over copies;⁶⁶ the Digital Rights Management and the Right of Communication through the Information Network;⁶⁷ Person-to-Person (P2P);⁶⁸ open source software as a remedy for piracy;⁶⁹ secondary liability;⁷⁰ a tax-funded Internet-

⁶⁶ To access a work over the Internet in the digital environment requires a temporary storage of the work into the computer's memory creating a temporary copy of the work. This raises the issue whether the control over making temporary copies should be given to the rights holders. The existing Chinese copyright law does not protect temporary copies. Sun investigates the issues of Chinese copyright law and relevant international agreements on how to protect broad-based reproduction rights: Haochen Sun, 'Reconstructing Reproduction Right Protection in China' (2005-2006) 53 *Journal of the Copyright Society of the U. S. A.* 223-286.

⁶⁷ In the digital environment, an effective model for distributing information and creative contents is by way of Digital Rights Management (DRM) consisting of the interaction of technology, law, and commercial licenses. Xie addresses the various aspects of DRM in the context of Chinese copyright law with such topics as the protection of DRM, the limitations and exceptions to DRM protection and recommendations on the regulation of DRM in China. He also explains the creation of the Right of Communication through the Information Network (RPRCIN) and its development, explores the prohibition in the new rules, highlights the scope and remedies contained therein, and discusses the exceptions to new rules offering proposals for further regulations: See Huijia Xie (respectively), 'The Regulation of Digital Rights Management in China' (2008) 39 *IIC: International Review of Intellectual Property and Competition Law* 662-679, and, 'The Regulation of Anti-Circumvention in China' (2007) 54 *Journal of the Copyright Society in the U. S. A.* 545-563.

⁶⁸ Leung seeks 'to illustrate how both the United States and the Recording Industry Association of America adopted narrow-minded approaches in a desperate attempt to curtail burgeoning intellectual property infringement, and how these approaches not only proved ineffective, but possibly exacerbated the problem': Tao Leung, 'Misconceptions, Miscalculations, and Mistakes: P2P, China, and Copyright' (2006) 30 *Hastings International and Comparative Law* 151, 152.

⁶⁹ Patel argues 'that China's turn to open source is the logical solution to software-related IPR enforcement in the aftermath of WTO accession... Part II [gives] an overview of the open source philosophy. Part III [provides] background on the current IPR situation in China. Part IV [discusses] the potential effects of open source on enforcement of IPR in the Chinese software market, using the example of Linux, an open software operating system. Finally, Part V [concludes] that recognizing open source is an important policy reason for strong copyright law will allow China to implement TRIPS-compliant laws and regulations addressing IP while avoiding a massive and ideological uncomfortable crack down on IPR violations': Nilay Patel, 'Open Source and China: Inverting Copyright' (2005) 23 *Wisconsin International Law Journal* 781, 783.

⁷⁰ Zhang suggests that China's current legal regime, which premises copyright liability upon a direct infringement and joint liability theory has caused significant confusion within both the judiciary and the affected industries. The theory of joint liability has been particularly troublesome for China's technology industry. The article argues that 'the Chinese copyright law needs to provide safe harbor to well-defined online services and technologies, and more important, adopt a secondary liability theory that requires a higher-than-negligence standard of culpability': Yiman Zhang, 'Establishing Secondary Liability with a Higher Degree of Culpability: Redefining Chinese Internet Copyright Law to Encourage Technology Development' (2007) 16 *Pacific Rim Law & Policy Journal* 257, 284.

based compensation system for sharing music and movies online;⁷¹ collective administration of copyright;⁷² the reasons for the greater protection of patents than copyright;⁷³ current issues relating to pharmaceuticals and copyright;⁷⁴ and, recent developments of performers' rights.⁷⁵ They also relate to concepts of industrial property such as counterfeit pharmaceuticals;⁷⁶ the limited benefit of the use of geographical

⁷¹ Priest, after examining the present legal framework in China for protecting copyright and the goals of the copyright law, contemplates three approaches to addressing the piracy problem: cracking down hard on piracy; staying the course; and, adopting a tax-funded, Internet-based compensation system for sharing music and movies online giving several reasons why the third option could prove to be the optional one: Eric Priest, 'The Future of Music and Film Piracy in China' (2006) 21 *Berkeley Technology Law Journal* 795-871.

⁷² Collective administration of copyright is a relatively new phenomenon in China, brought in by the revision of the copyright law in 2001. Chao Xu ('Collective Administration of Copyright in China' (2006) 37 *IIC: International Review of Intellectual Property and Competition Law* 586-599) overviews the system of collective administration of copyright in the context of the Chinese copyright law and regulations and introduces several Chinese groups involved in collective copyright administration, such as the Music Copyright Society of China, the China Literary Works Copyright Society, and the China Audio-Visual Products Copyright Society.

⁷³ Ronald S Fernando ('Understanding Judicial Patent Enforcement in China' [2008] (April) *China Patents and Trademarks* 24) states that a single-minded focus on patents as the engine of technological development may explain why intellectual property enforcement may vary more in trademark and copyright cases from region to region than it does in patent cases so that there is a greater protection of patents than copyright (24). This is shared by Mikhaelle Schiappacasse ('Intellectual Property Rights in China: Technology Transfer and Economic Development' (2004) 2 *Buffalo Intellectual Property Law Journal* 164) that much is written to discuss China's poor record in intellectual property protection and to suggest organizational or cultural changes to improve the intellectual property regime but this note takes a different view by 'addressing the underlying economic factors that should encourage such change, particularly in light of China's need to acquire growth-enhancing IP through technology transfer' (166).

⁷⁴ Jacobson focuses on copyright law as a way of addressing Chinese counterfeiting and issues of intellectual property. After a brief history of intellectual property law in America, the article briefly describes the history of international intellectual property law. It then discusses Chinese counterfeiting in drugs and considers the protection available to combat counterfeits. It concludes that China's own law fails to solve the problem due to flaws in the judicial system. On the other hand, international intellectual property laws are too hard to enforce in a sovereign nation like China unless non-legal measures, for example trade sanctions, are applied to force policy changes, and these may or may not work. The article suggests a real improvement must come from within, and that China is on the right track: Anna-Liisa Jacobson, 'The New Chinese Dynasty: How the United States and International Intellectual Property Laws are Failing to Protect Consumers and Inventors from Counterfeiting' (2008) 7 *Richmond Journal of Global Law and Business* 45-63.

⁷⁵ Wan examines Chinese copyright law regarding the legal protection of performers' rights in the context of standards established by international conventions and agreements in which China participates. Issues under discussion include the definition of performers, rental rights, and remuneration rights for broadcast and communications to the public: Yong Wan, 'Legal Protection of Performers' Rights in the Chinese Copyright Law' (2009) 56 *Journal of the Copyright Society of the U. S. A.* 669-694.

⁷⁶ Counterfeit pharmaceuticals are common in China. Bronshtein argues that a special agency be created to counter local corruption and disrupt the market for such drugs. It should have the power to investigate and educate the community on the problems posed by such medicines. The author identifies the main problem as being the autonomy of local governments which benefit from such activities: Dina M Bronshtein, 'Counterfeit Pharmaceuticals in China: Could Changes Bring Stronger Protection for Intellectual Property Rights and Human Health' [2008] (March) 17(2) *Pacific Rim Law & Policy Journal* 439-446.

indicators outside of Europe,⁷⁷ the trademark first-to-file principle;⁷⁸ flexibility in compulsory licensing of biotechnology;⁷⁹ and traditional medicines.⁸⁰ As well, the Chinese literature extends to other parts of the thesis relating to the Vietnamese legal system including studies of specialized division of courts to deal with intellectual property;⁸¹

⁷⁷ Bashaw points out that geographical indications (GIs) are available assets and that as a WTO member, China is required to protect GIs under the TRIPs Agreement, but it is free to protect GIs by relying on its trademark law, GI-specific laws called appellation of controlled origin (AOC), or unfair competition law. In fact, China has chosen to use both its trademark system and the AOC regime to protect GIs. The author argues that China would be better off if it abandoned the AOC regime and relied solely on the trademark system: Bradley M Bashaw, 'Geographical Indications in China: Why Protect GIs with Both Trademark Law and AOC-Type Legislation' (2008) 17 *Pacific Rim Law & Policy Journal* 73-102.

⁷⁸ Sun discusses the issue of first-to-file under China's trademark law. The first person to apply for a trademark with the government will register the trademark, regardless of actual use of the mark. Once a mark is registered, it enjoys exclusive rights against all others. This poses a serious problem for foreign brand owners as their trademarks can be registered by a Chinese entity without business connections with the trademark. It is advised how to deal with the problem, offering specific advice, including to file the trademark in China anyway, to oppose, invalidate, or cancel the rival registration, and to sue in court if necessary: Catherine Sun, 'Beat the First Filing Blues in China' '[2008] (May)' *Managing Intellectual Property* 40-42.

⁷⁹ Ellis argues that compulsory licensing of genetically-modified (GM) seeds may be useful in China and that to reduce frustration of Chinese people China should be able to declare food shortages a national emergency and require compulsory licensing to create GM crops for food security without violating its WTO obligations. It would avoid the fragmentation of intellectual property rights and avoids concerns about compromises in innovation which may result from parallel importation. The article states that while the public sector in developing countries, like China, is creating GM crops to ensure food security, the IPRs of many technologies required to create a single GM crop are often fragmented across the private and public sectors. This fragmentation of IPRs poses obstacles. It is argued that 'China should not hesitate to grant compulsory licenses against foreign agricultural biotechnology companies... The result would provide for protection against the limitations on the availability of technologies critical for food security that may result from the recent strengthening of China's IP laws and enforcement' (723): Gregory C Ellis, 'Intellectual Property Rights and the Public Sector: Why Compulsory Licensing of Protected Technologies Critical for Food Security Might Just Work in China' (2007) 16 *Pacific Rim Law & Policy Journal* 699-723.

⁸⁰ The poor protection given to Chinese traditional medicine by the WTO patent laws is dealt with by Benjamin Liu: 'Past Cultural Achievement as a Future Technological Resource: Contradictions and Opportunities in the Intellectual Property Protection of Chinese Medicine in China' (2003) 21 *UCLA Pacific Basin Law Journal* 75-98.

⁸¹ Li, a judge on China's Supreme Court, gives a quick overview of patent jurisdictions and parallel procedures under the Chinese law - the two core issues currently under discussion in the context of whether intellectual property specified courts should be set up to handle patent disputes. Presently, patent disputes and intellectual property matters are handled from the number of about 1600 judges and 172 divisions specializing in intellectual property in the Chinese courts. It is concluded that there are both pros and cons to specialized intellectual property courts, and thus more research and practice experience is needed to provide a basis for this decision: Jian Li, 'Debating the Specialized Intellectual Property Court in the People's Republic of China' '[2007] (December)' 19 *Intellectual Property and Technology Law Journal* 17-19.

greater transparency in the judicial system;⁸² and, limited benefits from judicial decisions and their enforcement.⁸³

2.2 Methodology

An investigation of how the TRIPs Agreement and its flexibilities are implemented and exploited in Vietnam, as focused on by this study needs to employ a phenomenological or qualitative research methodology. Based on that, its methods follow a strategy of using an array of interpretive techniques seeking to ‘describe, translate, or otherwise come to terms with the meaning’, and, not ‘frequency of certain more or less naturally occurring phenomena in the social world’.⁸⁴ The method then needs to first permit the gathering of data relating to the phenomena and after that to depict, analyze, explain, and sometimes predict the occurrence of the legal phenomena which are researched.⁸⁵

To carry out such an investigation with such a methodology, the context is of the first and foremost importance.⁸⁶ It is therefore impossible to separate the creation of TRIPs and the adaptation of its provisions to Vietnamese laws on intellectual property rights from socio-economic and political factors. This must be conducted in the context of globalization, liberalization of trade, and law and development, particularly in connection with the process of Vietnam’s integration into the WTO or the global multilateral trading system. In

⁸² Thomas E Volper, ‘TRIPs Enforcement in China: A Case for Judicial Transparency’ (2007) 33 *Brooklyn Journal of International Law* 309-346.

⁸³ Alexander discusses a particular decision, favorable to an American company. In December 2005 a Shanghai court ruled against a Chinese firm for infringing on Starbucks’ trademark. In this student note, the author ‘illustrates the limited importance of the Starbucks decision to the grater overall climate of foreign trademark protection in China, in light of the nature of Starbucks’ goods and the other problems China faces regarding the protection of foreign well-known marks ... Part III discusses the likely impotence of the Starbucks decision, given the uniqueness of Starbucks’ goods, the rampant problems of enforcement in China, and the benefits China receives from continued trademark infringement’ (885); Mary K Alexander, ‘The Starbucks Decision of the Shanghai No. 2 Immediate People’s Court: A Victory Limited to Lattes?’ (2008) 58 *Case Western Reserve Law Review* 881-931.

⁸⁴ Van Maanen (1983), quoting in Jill Hussey and Roger Hussey, *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* (Macmillan Press, 1997) 53.

⁸⁵ Hussey and Hussey, *ibid*, 10-1.

⁸⁶ W Lawrence Newman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 1997) 331.

other words, the meaning of law will have to be found in its economic, social, and political contexts. On this basis, it involves an elucidation of influences of certain 'economic phenomena' resulting in 'the creation and application of the law'.⁸⁷

Following the break-up of the countries of the Warsaw Pact and the collapse of the Soviet Union the Vietnamese economy could not develop without expanding its commercial and trading relations with other nations of which the current 153 WTO member states are very important.⁸⁸ One example is that after the first two years in 2002 and 2003 of the implementation of the Vietnam-US Trade Agreement, including Chapter II on intellectual property rights, exports from Vietnam to the United States doubled.⁸⁹ Likewise, as Vietnam has become the world's second largest rice exporter and a big exporter of other agricultural products such as coffee, cashew nuts, and tea, it must need to seek a greater share of the markets of other WTO member states. These economic features need be taken into account when analyzing the relationship between the WTO and the TRIPs Agreement and Vietnam's endeavour to join the WTO.

Analyzing the implementation of TRIPs in Vietnam especially focusing on how the flexibilities found in the Agreement have been exploited in domestic law means that there is a very close relationship between the intellectual property provisions in TRIPs and those in Vietnamese law. This requires a legal comparative analysis to be undertaken. The first major issue, or the key element, for any comparative study is to choose what units to compare.⁹⁰ Deriving from the research topic and the purposes of the study, the units selected are essentially Parts II and III of TRIPs, respectively the 'Standards Concerning the Availability, Scope and Use of Intellectual Property Rights' and the 'Enforcement of Intellectual Property Rights'. This means that the study concentrates on provisions relating

⁸⁷ Austin Chinhengo, *Essential Jurisprudence* (Cavendish Publishing, 2000) 3.

⁸⁸ Currently there are 160 members of the WTO on 26 June 2014: *Understanding WTO – Members and Observers* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

⁸⁹ Ronald Bruce St John, *Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam* (Routledge, 2006) 155.

⁹⁰ See David Nelken, 'Comparing Legal Cultures: An Introduction' (1-9), Malcolm M Feeley, 'Comparative Criminal Law for Criminologists: Comparing for What Purpose?' (93-104) in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth, 1997).

to seven categories of intellectual property rights. These, set out in Part II of TRIPs, are: copyright and related rights; trademarks; geographical indications; industrial designs; patents; layout designs (topographies) of integrated circuits; and undisclosed information.⁹¹ It also includes provisions on intellectual property enforcement from Part III on civil and administrative law, criminal procedures, and customs' boundary control measures.

These areas drawn from Parts II and III of TRIPs and related Vietnamese legislation research involve the comparison and analysis of legal rules, legal doctrines and policies. This study is an investigation into legal doctrines and policies and their transposition from international law into the domestic law of Vietnam. The questions asked in the context of those fields are research questions providing a theoretical framework which are supplemented by theoretical views from the view of comparative law.

In October 2005 the Council of Australian Law Deans (CALD) issued its *Statement on the Nature of Legal Research*.⁹² In summary CALD stated:

Legal research is multi-faceted. It is distinctive in some respects, and part of the mainstream of the humanities and social science in others. It would be equally mistaken to think of legal research as wholly different from, or wholly the same as, other research in the humanities and social sciences.

This project straddles all three of traditional categories of research recognized by CALD based on earlier understandings of what legal research is:

doctrinal – the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships;
reform-oriented – recommendations for change, based on critical examination;
theoretical – the conceptual bases of legal rules and principles.

⁹¹ This suits the meaning of the term 'intellectual property' mentioned in TRIPs Article 1(2), which states that 'For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.'

⁹² Council of Australian Law Deans, *Statement on the Nature of Legal Research* (October 2005) <<http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>>.

The second and third categories are less well developed in this thesis because of the size of the task in respect of the first category. However, there are elements of the second category in the exploitation of the further flexibilities in TRIPs which may be advantageous for Vietnam to adopt in its own law. There is an initial emphasis in Chapter 2 on the third category, legal theory and problems of language in legal rules which create problems for concepts built on them, such as the rule of law. This is returned to in the discussion of doctrinal language through the thesis and in Chapter 8 which considers the interpretation of the transposed law on copyright by the Vietnamese judiciary.

The CALD *Statement* continues to describe, in the context of legal research, the concept of legal reasoning, ‘a subtle and sophisticated jurisprudential concept’:

To a large extent, it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognized parallel to ‘discovery’ in the physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections of between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of ‘legal reasoning’ is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system’s simultaneous achievement of constancy and change.... If doctrinal research is a distinctive part of legal research, that distinctiveness permeates every other aspect of legal research for which the identification, analysis and evaluation of legal doctrine is a basis, starting point, platform or underpinning.

As such, this study considers relevant international law, Vietnamese law, preliminary materials, secondary sources, commentaries, journal articles, media statements, court decisions, and related materials. These documents need to be appropriately scanned, synthesized, and interpreted throughout the thesis in their economic, cultural, social, and legal contexts with a concentration on the textual provisions of TRIPs and Vietnam’s various intellectual property laws. To carry this out requires a positivist law approach to both determine what policies are the most important⁹³ and analyze how the provisions of

⁹³ Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 2003) 7.

intellectual property law and the language used in the law captures those policies.⁹⁴ This means that finding the answers in this study originates within the law itself, not from outside it. This is a positivist approach to law, reflecting that the law has a meaning which can be ascertained through interpreting its language.⁹⁵ This is utilized to pursue the objectives of the study which are to map the implementation of TRIPs from the provisions of the Agreement itself into the Vietnamese legal system and to make clear how the flexibilities within TRIPs have been exploited simultaneously with Vietnam's implementation of the Agreement's standards.

Chapter 8, the case studies, described the resolution of disputes over copyright by Vietnamese courts. Case studies are helpful method in testing and expanding theories by combining the existing theoretical knowledge with new empirical insights.⁹⁶ It can be particularly important in applying this to topics which have not attracted as much attention as they deserve.⁹⁷ This topic might be one of those, as noted earlier. Case studies can also be very useful for expanding the boundaries of existing knowledge so that new, testable and empirical valid theoretical and practical insights may be captured or developed.⁹⁸ A case study can moreover be itself a 'theory-building' as it does not necessarily have to rely on previous literature or prior empirical evidence.⁹⁹

The case studies also reveal the role the Vietnamese judiciary play in Vietnam's implementation of the TRIPs Agreement. It represents knowledge of how in Vietnam the impact of TRIPs is a 'contemporary phenomenon' within a 'real-life context'.¹⁰⁰ It seeks to demonstrate the flexibility in how the interpretation and enforcement of copyright law, which protects private rights, is modified the communitarian and patriotic values associated

⁹⁴ Chinhengo, above n 87, 27.

⁹⁵ Chinhengo, above n 87.

⁹⁶ Yin (1994), citing in Tiia Vissak, 'Recommendations for Using the Case Study Method in International Business Research' [2010] (March) 15(2) *The Qualitative Report* 370, 371.

⁹⁷ Vissak, *ibid.*

⁹⁸ Eisenhardt (1989), Eisenhardt and Graebner (2007), Ghauri (2004), Glaser and Strauss (1967), Stuart et al (2002), Tsoukas (1989), Voss, Tsikriktsis, and Frohlich (2002), citing in Vissak, above n 96.

⁹⁹ Eisenhardt (1989), citing in Vissak, *ibid.*

¹⁰⁰ Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 1989) 13.

with Vietnamese tradition and socialism. This is discussed in Chapter 2 in analyzing features of Vietnamese culture and society. Case study research can allow generalizations even from only one case if this may be helpful and useful for theory-building and testing.¹⁰¹ The judicial decisions and other relevant data have been collected and analyzed to take a closer view on how the courts deal with litigation around intellectual property rights, which provisions they have relied on, and what reasons they gave for their decisions.

2.3 Thesis Organization

The objective of this research and its original contribution to knowledge in mapping the transplantation of TRIPs into Vietnam's domestic law imposes some limits on this thesis. It covers seven categories of intellectual property rights and their enforcement. Some such as copyright and patents are covered in greater detail than others such as geographical indications or layout designs (topographies) of integrated circuits. As the study was conducted between 2006 and 2009 some of the relevant local legislation and other collected data may have changed, especially where intellectual property protection has developed relatively quickly.

The general reasons why law itself, whether national or international, and whether the TRIPs provisions or Vietnamese law, have inherent flexibilities are considered in Chapter 2: Conceptualizing Law's Flexibility. This takes a different approach from many studies of the transplantation of commercial law. They often consider the problems of the rule of law in developing economies such as Vietnam. This goes to a more fundamental issue relating to the rule of law in all legal systems.

Firstly, law's flexibility lies in problems of the law itself. Law is encoded in language and language is often vague or ambiguous. Language used in law is specialized and distinguished from other kinds of technical language. Using ideas from Hart it is recognized

¹⁰¹ Gummesson (2003), Stuart et al (2002), Tellis (1970), Dyer and Wilkins (1991), Bensabat et al (1987), citing in Vissak, above n 96, 373.

that words may have a core meaning but may have other meanings which create uncertainty.¹⁰²

The ambiguity of legal language increases when law is interpreted. There are conflicting rules for interpreting legal texts. Interpretation poses a difficulty at the outset. In transposing TRIPs from its original languages into Vietnamese choices have to be made about the meaning of the original text and the Vietnamese law. It is common practice in all legal systems to search for the meaning of legal provisions not only in the relevant statement of the law but also in the legislative debates, the reports of responsible bodies, and also in the purpose of the statute.¹⁰³

Law also has gaps in it. Kelsen is drawn on in considering that there are both proper or true gaps and technical gaps in law. A true gap appears where there is the absence of a general norm to apply for a case. True gaps can also exist where the law contains a general norm but lacks a particular content so it may become inequitable or unjust. A technical gap may present when lawmakers fail to prescribe something that they would have had to have prescribed to make it possible to apply the law.

Flexibility in law is also produced in circumstances where the law gets out of date because it does not reflect technological development or commercial practices, or where lawmakers do not have the experience or knowledge of commerce or technology, or where they cannot reach agreement.¹⁰⁴

¹⁰² This is discussed by established scholars including HLA Hart, in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) and *The Concept of Law* (Oxford University Press, 1961), for example.

¹⁰³ Here Llewellyn's conflicting rules of legal construction are considered, as well as how their use is guided within leeways of justice, reason, and legal doctrine, see Karl N Llewellyn, eg, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed' (1950) 3 *Vanderbilt Law Review* and *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962).

¹⁰⁴ Weber has insights into this. See Max Weber, eg, *Basic Concepts on Sociology* (translated by HP Secher (Citadel Press, 1962) and *From Max Weber: Essays in Sociology* (translated and edited with an Introduction by Hans H Gerth and C Wright Mills) (Oxford University Press, 1946).

As a developing country with a low per capita income and low levels of economic and technological development with no experience of, and little familiarity with intellectual property, law's flexibility in a Vietnamese context also relates to features of Vietnamese culture and society. This relates to both understanding and interpreting international and foreign intellectual property laws which have been transplanted into the local legal system. Vietnamese people traditionally favoured a cooperative communal life based on agriculture. They had little respect for commerce and merchants leading to the lack of development of both industrialization and urbanization. Prose and verse and other forms of artistic creation were not concerned with personal rewards. These values were supported by dominant spiritual beliefs including Confucianism and Buddhism. They were also supported by Vietnam's recent economic and political development including socialist theories opposing private ownership, especially of the means of production.

Finally, returning to the international law, conflicting interests are unavoidable when two or more sovereign contracting states sign a treaty or convention. Creating flexible provisions is important in dealing with such conflicts. Conflict is present in the WTO's integral agreements, including TRIPs, in particular between less-developed or non-industrial and developed or industrial countries. They differ from each other in levels of economic and technological development and in legal systems and practices. Conflict also lies behind the such four other intellectual property treaties incorporated into TRIPs as the Paris Convention (1967), the Berne Convention (1971), the Rome Convention, and the Washington or IPIC Treaty.

The third chapter discusses the process of acceding to the WTO and implementing TRIPs in Vietnam generally. As an economy in transition, indicated by the Memorandum of Foreign Trade Regime, Vietnam took a flexible approach in taking membership. It was also inevitable for Vietnam, as an acceding member, that it would incur both WTO-plus and TRIPs-plus requirements. This prolonged the period required to accede by adding time-consuming and costly legal and institutional reforms to meet WTO norms and TRIPs standards. The period was also prolonged by the local lack of familiarity with intellectual

property. Vietnam's implementation of TRIPs can be broken into three periods: 1995-1998, 1999-2004, and 2005 to date. In these periods Vietnamese law is found to have simultaneously responded to three flexibilities in TRIPs' general provisions: whether Vietnamese law represents a more extensive protection than that produced by TRIPs; how Vietnam chose its methods of implementing TRIPs; and, how Vietnam perceived TRIPs' incorporation of such four other treaties.

The fourth chapter examines copyright and related rights in Vietnam in the context of TRIPs' flexibilities. Copyrightable subject matter, the bundles of economic or property and personal or moral rights conferred by copyright, the periods of copyright protection, and limitations and exceptions to copyright infringement, as well as the protection of related or neighbouring rights have involved the application of TRIPs' flexibilities in Vietnamese law. For example, the local law resembles Article 2 of the Berne Convention by creating a list of protected works but further defining some so that the scope of the protection is limited. Also, it provides for copyright exceptions ranging from the non-commercial reproduction for personal or individual study, or library archival purposes, to public performance without charge and to information or review purposes. However, the local copyright law contains some provisions overlapping each other when requiring the fixation of a work in a material form.

In the fifth chapter the thesis investigates the relationship between Vietnamese law and the international standards for patents and the protection of plant varieties. The prescription of standards concerning the availability, scope and use of intellectual property rights to be reflected in national laws is at the heart of TRIPs with copyright and patents at its core.¹⁰⁵ Unlike the protection of copyright, which mostly relates to cultural products, patents relate directly to the level of a nation's technological development. This is because an effective legal system for patents requires an understanding of which only comes with that technological development. It confers on policy and law makers a knowledge of business

¹⁰⁵ Christopher Arup, *The World Trade Organization Knowledge Agreements* (Cambridge University Press, 2nd ed, 2008) 299-315.

and technology and their interactive effects in the evolution of both commercial practices and scientific and industrial knowledge. From this perspective it is important for Vietnam to use TRIPs' flexibilities in respect of patents but its low level of technological development has limited that use in practice. This is seen, for example, in the Vietnamese patent law which provides for exceptions to the exclusive rights of patent owners but often lacks particular or detailed regulations for their implementation. The local law is also seen to have made a choice to harmonize its protection of plant varieties with standards in a *sui generis* system set out in the UPOV Convention.

The next chapter concentrates on other categories of intellectual property protection under TRIPs' standards in Vietnam consisting of trademarks, geographical indications, industrial designs, layout designs (topographies) of integrated circuits, and undisclosed information. As with copyright and related rights and patents, the local law is found to involve some applications of the flexibilities within TRIPs. In respect of the protection of trademarks and geographical indications, Vietnamese law contains procedures for terminating a registered trademark on a non-use basis or permitting the use of trademarks which are identical with, or similar to, protected geographical indications where such trademarks have been used in good faith prior to the date of filing application for registration of such geographical indications. In respect of the protection of industrial designs, it excludes the appearance of a product which is dictated by the technical features of the product or which is invisible when being used from the scope of protection. Similarities are found with the protection of layout designs (topographies) of integrated circuits and undisclosed information.

The seventh chapter focuses on provisions for enforcing intellectual property in Vietnamese law under TRIPs' requirements. Enforcement plays such a significant role in the protection of intellectual property that in TRIPs, with its 73 Articles, intellectual property enforcement is contained in an individual part. This part has five sections with 21 Articles, from 41 to 61. Reflecting this central importance, provisions for the enforcement of intellectual property rights are found to be significant in Vietnamese law, including the 2005 Intellectual Property Law, the 2004 Civil Procedure Code, and other relevant government

or ministerial regulations such as Decree 106/2006/NĐ-CP of 22 September 2006 on Sanctioning Administrative Violations of Industrial Property and Decree 47/2009/NĐ-CP of 13 May 2009 on Penalizing Administrative Violations of Copyright and Related Rights. The TRIPs Agreement has one of its largest gaps in this area of enforcement. Its implementation neither obliges members to create a system of intellectual property enforcement distinct from their general law enforcement, nor does it affect members' capacity to enforce their law in general (Article 41:5). Vietnam has retained the same system and practices for enforcing its law in this area, in particular its distinctive system of administrative penalties. For example, inspectors, specialized in industrial property or copyright and related rights or plant varieties, and market management officials are empowered to deal with administrative infringements in accordance with their authorized areas of responsibility, levels of competency and monetary ranges for imposing fines.

Linked to the theme of enforcement with the authorities of differential state bodies in Chapter 7, the eighth chapter turns to case studies on copyright litigation dealt with by the provincial-level civil courts. Copyright infringement was chosen since it is the most commonly litigated intellectual property with many thinking specifically of enforcement when they think of copyright protection.¹⁰⁶ It was also chosen as getting access to documents and individual opinions is still in fact often seen as too politically sensitive for many local authorities.

The Vietnamese judicial system, composed of the Supreme People's Court and the People's Courts at provincial and district levels with the constitutional principle of trial by judges and people's assessors and procedures for hearing at courts of first instance and hearing at courts of appeal, is described. It is included in Appendix 1 to the thesis for those unfamiliar with it. Disputes over intellectual property rights, as well as the hearing of this kind of civil dispute, have been recognized as new and complex by the Supreme People's Court.¹⁰⁷ This

¹⁰⁶ Copyright & New Media Law Newsletter, 'The Copyright Monitor and Enforcer' (2010) 14(2) 1, 7 <http://www.sla.org/PDFs/clicku/2010/Copyright_newsletter_sample.pdf>.

¹⁰⁷ See Official Letter No. 97/KHXX of 21 August 1997 of the Supreme People's Court on the Determination of the Jurisdiction for Settling Disputes over Copyright and Industrial Property Rights.

is the main reason that courts at provincial level, rather than at district level, have been authorized to hear these cases since the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance. Ten selected copyright cases are discussed. These 10 cases fall into two broad sub-sections. The first is literary and artistic works as cultural and social products and the second is copyright regulation. This analysis demonstrates, to some extent, the judicial use of flexibilities. It describes how the Vietnamese judiciary, among other actors in intellectual property protection discussed in other chapters, has participated in implementing TRIPs protecting the rights of copyright holders in literary or artistic works. It also demonstrates the difficulties the courts face in handling the complexity of these cases within Vietnam's legal system. It lastly reflects the discussion of the ambiguities of law in Chapter 2 and how meaning is given to the language of the law by the social, political, and economic experiences of the judiciary.

The study concludes with the ninth chapter. This chapter summarizes the scheme for intellectual property and its protection in Vietnam focusing on the application of the flexibilities within the TRIPs Agreement. It concludes that although the TRIPs Agreement requirements have been incorporated into the national laws with a considerable number of flexibilities embodied in them Vietnam still has far to go in its use of those flexibilities in its implementation of the Agreement to promote the welfare of its own people.

CHAPTER 2: CONCEPTUALIZING LAW'S FLEXIBILITY

Synopsis

This chapter introduces the central purpose of the thesis which is to map the obligations imposed on Vietnam by TRIPs through its membership of the WTO with the rights, obligations and processes it has created in its domestic law. This is a foundational task which has not been previously undertaken. While consistent with the concept in contemporary comparative law of 'foreign law' or 'comparative official law' it has aspects of its other concept of 'comparative legal cultures'. It does this through its exploration of 'flexibilities' within the obligations found in the TRIPs Agreement and how Vietnam may have reordered them in their transposition into Vietnamese law.

It discusses a number of causes, explanations and models for flexibility in law as a background to discussing any variations to be found in the requirements of TRIPs and the intellectual property rights, and the provisions for their enforcement, now seen in Vietnamese law.

It considers, in order, how law is embedded in the ambiguous medium of language using Hart's analysis of core and penumbra of meaning; how law has conflicting rules for its interpretation using Llewellyn's concepts of interpretive leeways and justice, decency and legal doctrine; how the lacuna or gaps within law means that it may create space for law making using discretion by officials and judges following Kelsen's analyses; and the similar effects produced when law gets out of date with technological and commercial practices; and, how policy and law makers may not have sufficient technical knowledge of either commerce or technology.

Closer to the interests of comparative legal culture it explores the values which contribute to an understanding of law and its interpretation which may affect both how Vietnam understood its obligations under TRIPs and how those obligations, when ordered into Vietnamese law, may be understood by administrative officials as well as by judges. Vietnam's legal culture potentially affects any interpretation by them. That culture emphasises communal life and co-operation and de-emphasises the significance of commerce, urbanisation and industrialisation. This is influenced by the values of both Confucianism and Buddhism which were confirmed by the turn to socialism in the 20th century which opposed the private ownership of capital, which was entrenched in its socialist legal system. It considers, briefly, the limited influence of French law.

Finally it turns to the conflict in the WTO between developed and less-developed members over the value and meaning of TRIPs and the policies which underlie it which have also created ambiguity or incomplete policies.

These issues are returned to through the rest of the thesis to explain the manner in which Vietnam implemented its obligations under TRIPs and any variations which appear between Vietnamese law and its enforcement in Chapters 3 to 7. They are also significant in explaining the approach of the Vietnamese judiciary more generally to intellectual property disputes considered in Chapter 8.

CHAPTER 2: CONCEPTUALIZING LAW'S FLEXIBILITY

This is a mapping of the obligations of members of the WTO to implement in their national legal systems substantive and procedural rights in respect of intellectual property contained in the TRIPs Agreement against the system of intellectual property law which Vietnam created in response to those requirements on its accession.

It could be regarded as an exercise in 'comparative official law' or 'foreign law' as opposed to one in 'comparative legal cultures'.¹ Indeed much of it involves the task of comparing TRIPs' requirements with the rights and remedies provided in Vietnamese legislation. As research commenced in 2006 there was almost no practical application of the new laws, except by the administrative organs, including Customs, of the government of Vietnam. Litigation in the courts involved the application of earlier intellectual property laws to the disputes as they related to events before the 2005 Intellectual Property Law came into force. The study, however, includes an analysis of ten intellectual property disputes which may give some indication of how the new and revised law will be applied by the judiciary. So aspects of comparative legal culture, the other branch of contemporary comparative law is also relevant to the study.²

The study of comparative legal cultures often makes assumptions, or does not explore, more basic problems with law.³ This is why this thesis takes as its major theme the flexibility located within law associated with those problems. Flexibility has been used to

¹ Huxley suggests that 'the term "comparative law" is now so tainted that we should refer to context-rich comparative studies as a quite different discipline - as "legal cosmology" perhaps, or as "comparative legal cultures"': Andrew Huxley, 'Golden Yoke, Silken Text' (1997) 106 *Yale Law Journal* 1885, 1924-5; Lawrence M Friedman, 'Some Thoughts on Comparative Legal Culture' in David Scott Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker & Humblot, 1990) 49, 52-55. But see: Symposium, 'New Directions in Comparative Law' (1998) 46 *American Journal of Comparative Law* 597; and, Symposium, 'New Approaches to Comparative Law' (1997) *Utah Law Review* 255.

² See note 1.

³ There are conspicuous exceptions such as John Gillespie and Pip Nicholson, see below nn 12 and 132 respectively.

describe developments in intellectual property law.⁴ This occurs in a number of the layers of law involved in Vietnam's localization of the requirements of TRIPs in its own legal system. It occurs at the level of international law, within the language of TRIPs itself and the various conventions and treaties which it draws on. This sometimes gives members choices between a number of policy alternatives and often leeways within which to legislate, some of which are generated from the ambiguities of the language used. This is the major focus of the thesis. Flexibility also appears at the level of the national law enacted by a member. It gives further choices to administrative officials and to judges and also provides them with leeways within which to move in enforcing the law. The manner in which the law is enforced within the jurisdiction of the member in turn affects the extent to which it has met its obligations under TRIPs.

This chapter deals with how law itself, as an economic, social and political force, creates the flexibility which is seen at all of these levels. It deals with the problems of the medium in which it is expressed, language. The doctrinal body of the law may contain conflicting rules for interpreting it which, depending on the one chosen, may lead to different statements of the law. Administrative officers and judges may find that there are gaps or lacuna in the law. These may be because the lawmakers did not foresee the situation, a frequent problem with rapidly developing and changing technology, or they may not have had sufficient knowledge and experience. The lawmakers may not have been able to agree on how a gap was to be filled which occurred with some of the conflicts between developed and less-developed countries in the drafting of TRIPs. When law is transposed across cultures, as with TRIPs through the medium of international law, there are the issues which are raised by comparative legal culture relating to its interpretation and application. In the context of Vietnam this is significant with the borrowing of commercial law originating in

⁴ Some of these articles are: Alexandra G Watson, 'International Intellectual Property Rights: Do TRIPs' Flexibilities Permit Sufficient Access to Affordable HIV/AIDS Medicines in Developing Countries?' (2009) 32 *Boston College International Comparative Law Review* 143; Kevin Outterson, 'Should Access to Medicines and TRIPs Flexibilities Be Limited to Specific Diseases?' (2008) 34 *American Journal of Law and Medicine* 279; Caroline Henckels, 'The Ostensible 'Flexibility' in TRIPs: Can Essential Pharmaceuticals' (2007) 32 *Monash University Law Review* 335; and, 'The "Flexibility Factor" in Copyright, Trade Secret, and Patent Law of Computer Software: The Aftermath of Sony' [Sony Corp of America v Universal City Studios Inc, 464 US 417 (1984)] (1984) 11 *Ohio University Law Review* 333.

industrialized western states and adapting it to a culture which was traditionally Buddhist with Confucian influences, which emphasized collective interests, was agricultural, non-urbanized and non-industrial and which did not have a high regard for commerce. Overlaying this was a period of French colonial law followed by a socialist political order which emphasized many Confucian values and opposed private ownership of capital.

1. Problems of Law Itself

1.1 Law is Encoded in Language and Language is Ambiguous

The general view of law in contemporary Vietnam is a positivist one. Yet even positivists recognize that law is constructed by language. The language of the law is developed and specialized in its uses and meanings.⁵ Its formulation may take different forms, judicial decisions in common law systems, or guidance or circulars in that of Vietnam. Law is a product of language, but possessing some aspects of autonomy.⁶ It may be a kind of technical language, distinct from the technical language of physics or other fields.⁷ The meaning of the language of law is not solely in the words used but also in the structures which embody them.⁸ Determining the meaning of legal clauses depends on how the structure is understood including nominal character, binominal and multinominal expressions, initial case descriptions, qualifications, and syntactic discontinuities.⁹ The relationship between law and language is close and law and linguistics can both attract the same individual.¹⁰ Both language and law are constructed from words.

⁵ John Gibbons, 'Introduction: Language Constructing Law' (3, 3-4), Yon Maley, 'The Language of the Law' (11, 11-3) in John Gibbons (ed), *Language and the Law* (Longman, 1994).

⁶ Frederick Schauer (ed), 'Introduction' in *Law and Language* (Dartmouth, 1993) xi.

⁷ Mary Jane Morrison, 'Excursions into the Nature of Legal Language' (1989) 37 *Cleveland State Law Review* 271, 272, 290-309, 318-36.

⁸ Oliver Wendell Holmes, 'The Theory of Legal Interpretation' (1899) 12(6) *Harvard Law Review* 417, 417-20; Glanville L Williams, 'Language and the Law' (1945) 61 *Law Quarterly Review* 71 & (1946) 62 *Law Quarterly Review* 387 in Frederick F Schauer (ed), above n 6, 97, 179-83.

⁹ Vijay Bhatia, 'Cognitive Structuring in Legislative Provisions' in John Gibbons (ed), above n 5, 136, 154-5.

¹⁰ Sanford Schane, *Language and the Law* (Continuum, 2006) 1-3.

Vietnamese, unlike English, is not one of the languages used in international law.

International law has its own familiarity with the ambiguities of documents drafted in multiple languages which are equally valid.¹¹ Linguistic differences have caused difficulties in the previous use of Chinese, French, and Soviet terms in Vietnamese law.¹² An attempt to establish a vernacular legal lexicon to replace the confusion caused by Chinese-Vietnamese legal terms proved problematic and the former terms were gradually reverted to.¹³ Soviet legal meanings were subsequently grafted into them.¹⁴ *Doi Moi* and its legal terms have added to the problems requiring the translation of concepts in the absence of Vietnamese expressions.¹⁵ Underlying the new meanings of other recycled words are their older meanings.¹⁶ Even commonly used words may be ambiguous in Vietnamese.¹⁷

Observations are relevant to analysing the impact of this complexity. Hart recognized that law is encoded in words.¹⁸ He noted that words may have a core meaning that many agree on.¹⁹ They may have a penumbra of meaning which creates ambiguity.²⁰ Demonstrating the relevance of linguistic philosophy to the philosophy of law and jurisprudence, he wrote:

¹¹ See *Vienna Convention of the Law of Treaties 1969* art 33. See also Mark N Rosenberg, 'The Vienna Convention: Uniformity in Interpretation for Gap-Filling - An Analysis and Application' (1992) 20 *Australian Business Law Review* 442; Gillian White, 'Treaty Interpretation: The Vienna Convention 'Code' as Applied by the WTO Judiciary' (1999) 20 *Australian Year Book of International Law* 319.

¹² John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 137-9.

¹³ Gillespie, *ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ One typical instance is to be found in the greatest literary work in Vietnamese, the three centuries old, *Truyện Kiều* [The Tale of Kieu] by Nguyễn Du. He used the word 'ngài' as a noun meaning something with a beautiful quality but it has been interpreted very differently. It is used to describe the beauty of the figure or the body shape of Thúy Kiều's the younger sister, Thúy Vân. It is also used to describe the eyebrows of the hero, Từ Hải, to depict him as very heroic and manly. At the same time, it may be argued that the word is used, in both cases, only to describe the eyebrows of those two characters. See: Nguyễn Du, *Truyện Kiều* [The Tale of Kieu], verses 20-25 and 2270-2275 <<http://www.informatik.uni-leipzig.de/~duc/sach/kiou/>> (visited 3 March 2009). Such a way of interpreting the word is used by Vietnam's a famous scholar, Đào Duy Anh, who wrote *Từ Điển Truyện Kiều* [A Dictionary of The Tale of Kieu] (Social Scientific Publishing House, 1974) as the only annotations about *The Tale of Kieu* insofar.

¹⁸ HLA Hart, 'Essay 1: Definition and Theory in Jurisprudence' (first published 1953) 21-48 in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983). See also in this book 'Essay 3: Problems of the Philosophy of Law' (first published 1967) 89-98.

¹⁹ Hart, *ibid.*

²⁰ *Ibid.*

Questions such as ... 'What is law?' ... have great ambiguity. The same form of words may be used to demand a definition or the cause or the purpose or the justification or the origin of a legal or political institution.²¹

As a consequence, judges and other officials using law have discretion. In Hart's analysis, there are two kinds of legal rules and ambiguity can occur in both.²² They are the primary rules which are binding on individuals and the secondary rules or rules of recognition which are used by law officials to read whether a primary rule is binding law.²³ Where the primary rules are not sufficiently clear or intelligible, there may be uncertainty about the obligations which they impose.²⁴ At the same time, vagueness or ambiguity in the secondary rules may cause uncertainty over whether powers have been conferred on individuals in accordance with statutory requirements, whether legislators have the authority to change laws, or whether courts have jurisdiction over disputes concerning the interpretation and application of laws.²⁵ Hart also argued that by interpreting vague or indeterminate laws, judges may make new law.²⁶

Such ambiguities are prevalent in Vietnamese law.²⁷ There are principles for the interpretation of law in Vietnam, including those applied to interpreting the terms and

²¹ HLA Hart, 'Essay 1: Definition and Theory in Jurisprudence', above n 18, 21.

²² HLA Hart, 'Law as the Union of Primary and Secondary Rules' (77-96), 'The Foundation of a Legal System' (97-113), 'Formalism and Rule-Scepticism' (114-150) in *The Concept of Law* (Oxford University Press, 1961). A certain analysis of Hart's primary rules and secondary rules see, eg, Austin Chinhengo, *Essential Jurisprudence* (Cavendish Publishing, 2000) 51-5.

²³ Hart, *ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ During the period in which the Civil Code 1995 was in force, there was considerable debate over one of its provisions for courts declaring a person as missing or dead. The issue was whether a person who had disappeared from their place(s) of residence for a certain period could be declared dead. The phrase 'biệt tích' (disappearing) was used. This phrase is used, both in daily life and dictionaries, to refer to a person who has disappeared without leaving any single trace but who might return home if still alive. The law could be taken to mean that they were dead when they might only be missing. However, the purpose of the law was taken into account in interpreting it, that the provision was intended to be used to declare people dead. There were different periods for matters which had different consequences including management of property, marital and family relationships and inheritance and final property settlements. See: *Civil Code 1995* arts 84-93 (*Civil Code 2005* arts 74-83 currently).

conditions of a civil contract or the words used in a will.²⁸ The circumstance leading to the interpretation of a contract with vague terms may well be similar to how uncertainty is produced in other jurisdictions. The United States have well-known cases about whether ‘chicken’ includes ‘frozen eviscerated chickens’ or ‘dressed and eviscerated chickens’ to be broiled or fried or whether these chickens may be ‘manufactured products’.²⁹

These cases show the ambiguity of language. That ambiguity may be increased where there are translations from English, the most commonly used international commercial language, into Vietnamese. The documents for the WTO accession and the TRIPs implementation are in English. The two languages create further ambiguity in translation. English is complex and legal English is accepted as difficult to comprehend even for native speakers.³⁰ The problem for Vietnam is compounded by English being used very little in administration or education. There is also little literature on intellectual property laws published in English in Vietnam which has had a negative effect on foreign entrepreneurs in the country.³¹

The protection of intellectual property under TRIPs’ standards in the 1995 application for accession to the WTO, or the global multilateral trading system,³² started at a common point for all legal major initiatives in Vietnam in the agenda of the ruling party. After launching Doi Moi under the Sixth National Congress (December 1986) of the Communist Party of Vietnam (CPV), the policy of ‘making friends with all’ and ‘connecting the internal market with the world’s other markets’ was subsequently included in the Seventh National Congress (June 1991).³³ Under the Eighth National Congress (June 1996) resolutions, ‘to pressing and firmly carry out negotiations on a free trade agreement with

²⁸ *Civil Code 2005* arts 409 & 673 respectively.

²⁹ Schane, above n 10, 12-53.

³⁰ *Ibid*, 2-3.

³¹ Amanda J McBratney, ‘More Legislative Traffic on the ‘Doi Moi’ Superhighway: Technology Transfer, IP and Competition Laws in Vietnam’ (2003) 11(2) *Asia Pacific Law Review* 189, 189.

³² This is discussed in the next chapter, or Chapter 3, on localizing the TRIPs Agreement in Vietnam.

³³ Hùng Vũ, ‘Chủ trương, chính sách của Đảng và Nhà nước’ [Directions and Policies of the Party and the State] *Báo Điện tử Đảng Công sản Việt Nam* [Online Newspaper of CPV] <<http://www.cpv.org.vn>> (visited 20 September 2011).

America, to join APEC and the WTO' were adopted.³⁴ Five years later, the Political Bureau of the CPV (Politburo) formulated Solution 07-NQ/TW on 27 November 2001 on International Economic Integration³⁵ which proposed 'actively negotiating to join the WTO' in the nine specifically determined tasks in Section II.³⁶ The Prime Minister's Decision 37/2002/QĐ-TTg of 14 March 2002 on the Government's Action Program for Performing the Politburo's Solution 07-NQ/TW was adopted on that basis.³⁷

All of the rest of course of accession to the WTO, conducted by the government, and the process of making domestic laws in conformity with the WTO's binding agreements, including TRIPs, taken by the National Assembly,³⁸ follows these first steps.

Vietnamese culture and society meant that the country as a whole had little familiarity and experience with intellectual property protection, particularly in the forms required to meet the standards of the WTO and TRIPs.³⁹ The status of being a developing country in transition from a centrally-planned socialist economy with low per capita income and a low level of technological development added to the difficulties of Vietnamese policy and law makers in adapting law and practices to meet these standards.

The National Assembly legislated on a number of intellectual property areas in wide and general terms, devoid of details which added to the problems and discretion which the resulting ambiguities gave to administrative officers and the judiciary. The established system of guidance on implementing laws was used to issue ordinances, decrees, directives, and circulars by state organs, including the Supreme People's Court, to reduce the ambiguity. The greatest leeways produced by the ambiguities were enjoyed by the

³⁴ Ibid.

³⁵ Ibid.

³⁶ 'Nghị quyết của Bộ Chính trị số 07-NQ/TW về "Hội nhập kinh tế quốc tế" ngày 27 tháng 11 năm 2001' [Solution 07-NQ/TW of 27 November 2001 of the Politburo on International Economic Integration], Online Newspaper of CPV, above n 33.

³⁷ See above n 33.

³⁸ This is discussed in the next chapter, or Chapter 3, on internalizing the TRIPs Agreement in Vietnam.

³⁹ This is below discussed in the next section, or Section 2, of this chapter. See also Dang T H Thuy, 'The Protection of Well-Known Marks in Vietnam' in Christopher Heath and Kung-Chung Liu (eds), *The Protection of Well-Known Marks in Asia* (Kluwer Law International, 2000) 135, 146-7.

administrative officers because of the close way the judiciary observes this guidance once issued.⁴⁰ Those guidelines are suggested to be so extensive that they inhibit judicial reasoning and prevent the development of secondary source of law.⁴¹

Similar problems can be seen in transposing international law into Vietnamese law in other areas. The problem of ambiguous language can occur in all international agreements and in implementing them in all national jurisdictions. Encoded in languages authenticating the WTO Agreement, TRIPs itself gave rise to these problems.

There are commonly established practices for selecting the language used in international organizations and agreements. The largest international organization, the United Nations, uses six official languages: Arabic, Chinese, English, French, Russian, and Spanish. It has called for more efforts to create more material in languages other than English to fill the linguistic gaps left by the extensive use of English.⁴² The 1969 Vienna Convention on the Law of Treaties is authentically created in Chinese, English, French, Russian, and Spanish.⁴³ The WTO Agreement is presented ‘in a single copy, in English, French and Spanish languages’ with each being authentic.⁴⁴ The TRIPs Agreement has no similar statement. As one of the integral and annexed agreements to the WTO Agreement, it may be implied that the version in each of the three languages is similarly authentic. Yet, as with the United Nations, English is the most commonly used language including in global trade and commerce. Similarly with the World Intellectual Property Organization (WIPO) in the context of WTO/TRIPs,⁴⁵ it is much easier to look for or retrieve the text on international

⁴⁰ Gillespie, above n 12, 176, 217, 221-2.

⁴¹ Ibid.

⁴² *Language Parity, Implications of New, Traditional Technologies, Platforms on Freedom of Information Dominate Debate in Committee on Information*, UN Doc PI/1931 (27 April 2010) <<http://www.un.org/News/Press/docs/2010/pi1931.doc.htm>>.

⁴³ *Vienna Convention on the Law of Treaties 1969* art 85.

⁴⁴ *WTO Agreement* the last sentence immediately after art XVI(6).

⁴⁵ See, eg, *WTO Agreement* art V; *TRIPs Agreement* preamble para 8 and art 68. See also *Agreement between the World Intellectual Property Organization and the World Trade Organization* <http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm>.

and national intellectual property laws in English than in French or Spanish, though they may appear on part of the website.⁴⁶

The uncertain meanings of words used in TRIPs can give WTO members, including Vietnam, leeways in creating local laws. For example, members are permitted to exclude from patentable subject matter ‘diagnostic, therapeutic and surgical methods for the treatment of humans or animals’⁴⁷ and ‘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’.⁴⁸ There is no definition of these words or phrases. Members are concurrently obliged to protect plant varieties ‘either by patents or by an effective *sui generis* system or by any combination thereof’⁴⁹ without determining what the ‘effectiveness’ of such a *sui generis* system may mean. There have been considerable differences between member states in applying these provisions.⁵⁰

1.2 Law May Have Conflicting Rules for Interpreting Law

To be effective a law needs to be interpreted.⁵¹ A flexible application permits the use of a legal rule for a new set of facts arising in different times in different circumstances.⁵² Interpretation is generally done through consulting, for example, the relevant secondary materials, the legislative debates, the reports of responsible bodies, and dictionaries.⁵³ The purpose of the statute is also taken into consideration.⁵⁴

⁴⁶ English is the dominant language.

⁴⁷ *TRIPs Agreement* art 27(3)(a).

⁴⁸ *TRIPs Agreement* art 27(3)(b) the first sentence.

⁴⁹ *TRIPs Agreement* art 27(3)(b) the second sentence.

⁵⁰ This is further discussed in Chapter 5 on patents and plant varieties in Vietnam under TRIPs’ flexibilities.

⁵¹ Thomas Morawetz (ed), ‘Introduction’ in *Law and Language* (Dartmouth, 2000) xi.

⁵² Yon Maley, above n 5, 17.

⁵³ Max Radin, ‘Statutory Interpretation’ (1930) 43(6) *Harvard Law Review* 863, 872-3.

⁵⁴ *Ibid.*

The interpretation of law involves conflicting interpretations and conflicting philosophies of interpretation and methods.⁵⁵ Even within technical interpretations conflicting rules can also be perceived.⁵⁶ Where the purpose of a statute is not apparent, the interpreter may have to select one as the primary purpose among competing purposes.⁵⁷ The interpreter has a choice or discretion in making this decision.

Llewellyn realized that there is an inherent ambiguity in legal rules. According to him, indeterminacy is necessary for both justice to be generalized as legal rules and for it to be contextualized to the circumstances of each case.⁵⁸ This, he pointed out, was a constant tension in application of the law so that it has a ‘reasonable regulatory’.⁵⁹ Of ‘reasonable regularity’, he elaborated:

... the ideal is not [legal] certainty ... The true ideal is *reasonable regularity* of decision. If there is *regularity*, there is continuity enough ... The *reasonable* aspect of regularity, on the other hand, holds out full room to adjust any complex of tension to the hugely variant needs of whatever the relevant type-situation may be.⁶⁰

The phrase ‘*reasonable regularity* of decision’, Llewellyn adds, ‘is what German-speakers *ought* to be meaning with *Rechtssicherheit*’.⁶¹

He described twenty-eight paired and conflicting ways to interpret a statute.⁶² As there is always more than one available correct answer, he indicated, that decision-makers need to

⁵⁵ David Couzens Hoy, ‘Interpreting the Law: Hermeneutical and Poststructuralist Perspectives’ (1985) 58 *Southern California Law Review* 135, 176.

⁵⁶ *Ibid.*, 136-7.

⁵⁷ Radin, above n 53.

⁵⁸ Karl N Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962) 286.

⁵⁹ *Ibid.*

⁶⁰ Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown and Company 1960) 216.

⁶¹ ‘*Rechtssicherheit*’ means ‘legal certainty’ or ‘the predictability of legal decisions’, *ibid.*, n 208.

⁶² Karl N Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed’ (1950) 3 *Vanderbilt Law Review* 395, 395-405.

concentrate on the question: which of those will be selected and why they are to be selected.⁶³ He argued that all the 28 ways are correct but involve the exercise discretion.⁶⁴

Llewellyn also provides us with fourteen ‘major steadying factors’ in decision-making using laws.⁶⁵ These include ‘legal doctrine’ and ‘known doctrinal techniques’ under which he observed that courts need to be persuaded that both justice and decency require the use of a particular doctrine and also the result which is argued for.⁶⁶ This means that the manner in which facts are presented to give the context for the use of the doctrine is critical.⁶⁷ It also means that judges have broad but finite leeways, or discretions, in which they can interpret and apply the standards derived from legal doctrine.⁶⁸

Llewellyn’s concepts can be applied to the interpretation of international law. Conflicting interpretative rules can be seen in the Vienna Convention on the Law of Treaties 1969. An international treaty is not a supreme law of a sovereign to be imposed on member states.⁶⁹ It needs to be transplanted into its members’ laws.⁷⁰ Meaning and purpose must be given to its provisions in doing so.⁷¹

The Vienna Convention has rules which correspond with Llewellyn’s ideas of justice, decency and legal doctrine. The issue that a text is equally valid in a number of different

⁶³ Ibid.

⁶⁴ Ibid: Many of his canons of those conflicting rules reflect such choice or discretion. They include ‘A statute cannot go beyond its text’ contested with its opposite ‘To effect its purpose a statute may be implemented beyond its text.’ He also saw a choice between ‘Words and phrases which have received judicial construction before enactment are to be understood according to that construction’ but ‘Not if the statute clearly requires them to have a different meaning.’

⁶⁵ Llewellyn, above n 60, 9, 21-3.

⁶⁶ Ibid.

⁶⁷ Ibid, 237-9.

⁶⁸ Llewellyn argued that as techniques for the use of legal doctrine contain correct leeways producing variant results but almost contain no clear guidance for work with or within them, judges then feel and work within what to be called *The Law of Leeways*, which is described as ‘*the greater the felt need, because of felt sense, the wider is the leeway correctly and properly available in reshaping an authority or the authorities.*’ See Llewellyn, above n 60, 21-3, 219-22.

⁶⁹ See, eg, Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers, Vol. 18, 1995) 48; William Edward Hall, *A Treatise on International Law* (Oxford University Press, 2001, Reprint of 8th ed-Clarendon Press, 1924) 70.

⁷⁰ Ibid.

⁷¹ Ibid.

languages also needs to be addressed.⁷² The Convention firstly indicates as its most important prescription that a treaty must be interpreted ‘in good faith’ in accordance with ‘the ordinary meaning’ being given to ‘the terms of the treaty in their context and in the light of its object and purpose’.⁷³ This wording, in turn, requires further interpretation. What constitutes ‘good faith’ where it might be perceived differently among contracting states? However, the key factor is that the meaning of ‘the terms of the treaty’ must be taken from ‘their context’.⁷⁴ In addition to these core rules there are others.⁷⁵

Article 32 of the Vienna Convention also stipulates that supplementary materials, including ‘the preparatory work’ of a treaty and ‘the circumstances of its conclusions’, can be considered when the meaning is otherwise ‘ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’. They are different words and concepts but can be reconciled to Llewellyn’s ideas. His emphasis on justice and decency⁷⁶ is reminiscent of the frequently-invoked phrase in Vietnamese courts, ‘reason and sentiment in carrying out the law (*lý và tình* trong việc chấp hành pháp luật)’, surviving from the period before Doi Moi.⁷⁷ He would probably give greater emphasis to the steadying factor of legal doctrine.⁷⁸

The WTO itself has rules for the interpretation of the Marrakesh Agreement Establishing the World Trade Organization, as well as for the more than twenty other integral agreements annexed to this WTO Agreement.⁷⁹

⁷² *Vienna Convention on the Law of Treaties* 1969 art 33.

⁷³ *Vienna Convention on the Law of Treaties* 1969 art 31(1).

⁷⁴ *Vienna Convention on the Law of Treaties* 1969 art 31(1)-(2): These include any agreement in relation to the treaty that was made between all the parties in connection with the treaty conclusion, and any instrument that was made by one or more parties in connection with the treaty conclusion and accepted by the other parties as an instrument related to the treaty: *Vienna Convention on the Law of Treaties* art 31(2).

⁷⁵ These other rules include any subsequent agreement, any subsequent practice, any relevant rules of international law, and the like: *Vienna Convention on the Law of Treaties* art 31(3)-(4).

⁷⁶ Llewellyn, above n 60, 237-9.

⁷⁷ Gillespie, above n 12, 211.

⁷⁸ Llewellyn, above n 60, 22, 219-22.

⁷⁹ The entirety of the WTO agreements is listed in Chapter 3 in the context of Vietnam’s accession to the WTO and its implementation of the TRIPs Agreement.

(a) Interpretation within the WTO

The interpretation of the WTO agreements is difficult under the Vienna Convention as not all WTO members are parties to this Convention.⁸⁰ The power to interpret is given to the Ministerial Conference and the General Council within the WTO structure, composed of representatives of all member states.⁸¹ Both are provided with the exclusive authority to adopt interpretations of the WTO Agreement and the other multilateral trade agreements.⁸² These interpretations are often created in the resolution of disputes between member states. Annex 2 of the WTO Agreement, the DSU, is the most significant document in this respect.

According to the DSU, the General Council, acting as the Dispute Settlement Body, is given a number of responsibilities including establishing panels and adopting Panel and Appellate Body reports.⁸³ To deal with a dispute, a panel of three to five panellists is established⁸⁴ on the request of the complaining party.⁸⁵ The panel adjudicates in the dispute according to its terms of reference.⁸⁶ Panel reports are circulated to the members before

⁸⁰ The WTO has 153 members whereas the Vienna Convention has 109 parties: 'WTO Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>; 'Status at 7 August 2009 of the Vienna Convention on the Law of Treaties' <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp_mtdsg3&lang=en> (visited 8 August 2009).

(Currently there are 160 members of the WTO on 26 June 2014: *Understanding WTO – Members and Observers* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (visited 1 August 2014).

⁸¹ The Ministerial Conference meets at least once every two years. The General Council has the authority to conduct functions of the Ministerial Conference in the intervals between the Ministerial Conference meetings, being the WTO's highest-level decision-making body and having the authority to act on behalf of the Ministerial Conference: *WTO Agreement* art IV(1)-(2). See also *WTO Analytical Index: Marrakesh Agreement Establishing the World Trade Organization* <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm> (visited 4 March 2009).

⁸² *WTO Agreement* art IX(2).

⁸³ *WTO Agreement* art IV(3); *DSU* art 2(1). See also *WTO Analytical Index: Dispute Settlement Understanding/Understanding on Rules and Procedures Governing the Settlement of Disputes* <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm> (visited 4 March 2009).

⁸⁴ *DSU* art 8(5).

⁸⁵ *DSU* art 6(1).

⁸⁶ *DSU* art 7(1): The terms of reference of a panel in a dispute is emphasized with the importance in the Report of Appellate Body on *Brazil–Desiccated Coconut*, WTO Doc WT/DS22/AB/R (21 February 1997) [VI]. The request for establishing a panel is usually approved automatically at the Dispute Settlement Body meeting following the meeting at which the request first appears on the agenda of the Body. Among other doings, the panel needs to issue an interim report to the dispute parties for receipt of their comments: *DSU* arts 6(1) and 15(2).

being adopted by the Dispute Settlement Body.⁸⁷ Appeals against panel decisions are dealt with by a standing Appellate Body established by the Dispute Settlement Body.⁸⁸

In practice, the words, phrases, or the text of WTO agreements in a dispute are often interpreted by giving them a literal meaning. For example, a request to prohibit multiple panels being used in the same dispute between the same parties over the same matter was dismissed by the later-established panel which noted that the DSU's text made no mention of such prohibition.⁸⁹ Also, a request to review 'a whole of report review' of a panel while the dispute was being handled at the interim stage was determined in the same way. The words used in Article 15:2 of the DSU, which provide an opportunity for dispute parties in requesting the panel 'to review precise aspects of the interim report', were relied on in particular. Accordingly, the Panel ruled that it was unable to go beyond 'precise aspects' of the interim report.⁹⁰

This has led to suggestion that this interpretive approach is increasingly a form of precedent based law.⁹¹ In spite of the insistence in these cases of a literal reading of the text there are also examples of where the alternative and competing interpretive principle has been

⁸⁷ DSU art 16.

⁸⁸ DSU art 17(1): Reports of the Appellate Body are adopted by the Dispute Settlement Body. They must be unconditionally accepted by the dispute parties except that the Dispute Settlement Body decides, by consensus, not to adopt the report within thirty days following the date it is circulated to the members. See DSU art 17(14).

⁸⁹ Panel Report, *Australia – Automotive Leather II*, WTO Doc WT/DS126/R (25 May 1999) [9.12] & [9.14]--[9.15].

⁹⁰ Panel Report, *Australia – Salmon*, WTO Doc WT/DS18/R (12 June 1998) [7.3]: In the Report of the Appellate Body on *Japan – Alcoholic Beverages II*, WTO Doc WT/DS8/AB/R (10 October 1996) [E], the phrase 'exclusive authority' directly connected with the power of the Ministerial Conference and the General Council taken by 'a three-fourths majority of the Members' when adopting those reports with embodied interpretations was also used by the Appellate Body in indicating that such authority was impossible to be implied or inadvertent elsewhere by someone else including the GATT Contracting Parties and the WTO Dispute Settlement Body along with their adoption of panel reports.

⁹¹ Lanye Zhu, 'The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes only or Making Precedent at the Same Time?' (2003) 17 *Temple International and Comparative Law Journal* 221, 235.

used.⁹² Also good faith is an issue in settling these disputes⁹³ and customary rules of interpretation of international law are applied.⁹⁴

The TRIPs Agreement contains itself one provision, Article 64:1, articulating intellectual property dispute settlement in accordance with Articles XXII and XXIII of GATT 1994, as elaborated and applied by the DSU. It is to be used for consultations and the settlement of disputes under its provisions except where otherwise particularly provided. There have been a number of disputes between WTO members over their intellectual property national protection regimes under TRIPs.⁹⁵ Many of them involve the interpretation of TRIPs' provisions, Articles 1:1, 33, and 62:2, such as *The United States v Canada – Patent Term*⁹⁶ or Article 70:8(a), such as *The United States v India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*.⁹⁷ Other examples are discussed in Chapter 5 in the context of TRIPs' flexibilities and plant varietal rights.

Relating to this, one of more significant interpretations of the WTO Ministerial Conference influencing the use of TRIPs flexibilities is the Doha Declaration on the TRIPs Agreement

⁹² See, eg, Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12(1) *Journal of International Economic Law* 153 [analysing the Panel and Appellate Body decisions in *Brazil – Measures Affecting Imports of Retreaded Tyres*: Panel Report, WTO Doc WT/DS332/R (12 June 2007) and Appellate Report, WTO Doc WT/DS332/AB/R (3 December 2007) – But see also Arbitration Report, WTO Doc WT/DS332/16 (29 August 2008)]; Marco M Slotboom, 'Do Different Treaty Purposes Matter for Treaty Interpretation? The Elimination of Discriminatory Internal Taxes in EC and WTO Law' (2001) 4(3) *Journal of International Economic Law* 557 [comparing Article III(2) GATT and Article 90 of the EC Treaty on tax discrimination with similarly wording to see whether they would be similarly or differently interpreted from the different overarching objectives of the GATT and the EC Treaty].

⁹³ See Andrew D Mitchell, 'Good Faith in WTO Dispute Settlement' (2006) 7 *Melbourne Journal of International Law* 339-373.

⁹⁴ See Susy Frankel, 'The WTO's Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property' (2005) 46 *Virginia Journal of International Law* 365-431.

⁹⁵ After 15 years of the WTO between 1 January 1995 and 1 January 2010 there are a number of 27 in 402 disputes filed under the dispute settlement system to be a TRIPs issue often in combination with claims under other WTO agreements: Joost Pauwelyn, 'The Dog That Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO' 5-6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708026>.

⁹⁶ *Canada – Term of Patent Protection*, WTO Doc WT/DS170/R (5 May 2000).

⁹⁷ *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997).

and Public Health adopted in 14 November 2001.⁹⁸ In paragraph 4 of the Declaration the Ministerial Conference reaffirmed:

the right of WTO members to use, to the full, the provisions in the TRIPs Agreement, which provide flexibility for this purpose.

The use of ‘reaffirm’ suggests that resolving issues around public health was always a purpose of TRIPs. The Declaration also, in paragraph 5, recognized ‘that these flexibilities include’:

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) How Vietnam has Dealt with Interpretative Problems in Respect of the WTO

In implementing TRIPs in the local law Vietnamese legislative drafters have had to interpret the meaning of terms in the Agreement and choose a Vietnamese lexicon for them. This has involved choice. Within the system of Vietnamese law and administration, administrative officers have had to further interpret TRIPs and national legislation to make regulations, directives, and guidance. Formally, judicial officers are not permitted to interpret the law.⁹⁹ They struggle, in seeking to apply new concepts of commercial law, without access to the secondary sources available to western judges.¹⁰⁰

Vietnam has appreciated potential conflicts between its national legislation and international law on the protection of intellectual property under the WTO/TRIPs Agreement or other treaties and used different principles to deal with this. First, if there are intellectual property-related civil matters in existence but not provided for in the 2005

⁹⁸ The Declaration is further discussed in Chapter 5 on patents and plant varieties in Vietnam under TRIPs’ flexibilities.

⁹⁹ See below n 129.

¹⁰⁰ Gillespie, above n 12, 198.

Intellectual Property Law, the provisions of the 2005 Civil Code are to be applied.¹⁰¹

Second, where there is difference between the provisions of the Intellectual Property Law and other laws, the former is to prevail.¹⁰² Lastly, as a subject matter of national law within the international legal system, it is affirmed that if there are differences between the provisions of a treaty to which the Socialist Republic of Vietnam is a contracting party and provisions of its Intellectual Property Law, the former is to prevail.¹⁰³

The three above-mentioned principles have been implemented to resolve interpretive issues. In respect of the first principle, courts are required to read the relevant provisions of both the Intellectual Property Law and the 2005 Civil Code in determining whether the dispute is regulated by either of them.¹⁰⁴ If the dispute subject matter is concluded not to be stipulated in the Intellectual Property Law but the Civil Code, the latter provisions must be applied.¹⁰⁵ In respect of the second principle, courts are required to confine intellectual property laws, including the 2005 Civil Code, to make a comparison between the relevant provisions with those in the Intellectual Property Law.¹⁰⁶ On discovering differences between them the provisions of the Intellectual Property Law must be applied.¹⁰⁷ In respect of the last principle which requires the application of provisions of a treaty to which the Socialist Republic of Vietnam is a contracting party, which are different from those of the

¹⁰¹ *Intellectual Property Law 2005* art 5(1).

¹⁰² *Intellectual Property Law 2005* art 5(2).

¹⁰³ *Intellectual Property Law 2005* art 5(3): The third principle relates to Article 6 of the Law on Signing, Acceding to, and Implementing International Treaties (Law No. 41/2005/QH 11 of 14 June 2005) which allows the application of provisions of an international treaty directly where, for the same subject matter, there is difference between the provisions of a treaty to which Vietnam is a contracting party and provisions of a local law (paragraph 1) under some other requirements (paragraph 3).

¹⁰⁴ *Joint Circular 02/2008* Part A(IV)(1)(1.2): In the 2005 Civil Code, the relevant provisions are set out in Articles 736-757 in Part VI providing for intellectual property rights and technology transfer.

¹⁰⁵ An example is that provisions for 'Inheritance' of Part IV of the 2005 Civil Code are required to apply for handling disputes over the inheritance of copyright under Article 40 of the 2005 Intellectual Property Law.

¹⁰⁶ *Joint Circular 02/2008* Part A(IV)(1)(1.1).

¹⁰⁷ *Ibid*: An example is that Article 738(3) of the 2005 Civil Code provides five property rights for copyright holders: (i) reproducing the works; (ii) permitting the creation of derivative works; (iii) distributing, importing the originals and copies of the works; (iv) disseminating the works to the public; and, (v) leasing the originals or copies of computer programs. By comparison with Article 20(1) of the 2005 Intellectual Property Law, the former has differences in its stipulation for the rights (iv) and (v) as the latter provides the right to display the works to the public and the right to lease the originals or copies of cinematographic works and computer programs. Therefore, the courts are required to apply these sub-paragraphs (b) and (e) of Article 20(1) of the Intellectual Property Law when dealing with disputes over those rights.

2005 Intellectual Property Law, some other conditions are provided. The first is that the country's membership of the treaty is determined at the point of time of the act or the event which is the subject of the dispute.¹⁰⁸ The second is that the application is for the same subject matter as provided for in the treaty and in the law of Vietnam.¹⁰⁹ Next, if there is a matter in relation to intellectual property which is not provided for in the local law, courts are permitted to apply provisions of those treaties in correspondence with, or relevant to, the matter.¹¹⁰ Lastly, where a dispute over intellectual property rights involves foreign individuals or organizations whose country and Vietnam are both members of a treaty, the latest version of the treaty in effect is applied unless it is otherwise provided or agreed upon between the two countries.¹¹¹

1.3 Law May Have Gaps in It

Law may create further opportunities for the exercise of discretion where lawmakers have not foreseen all the contexts in which the principles and rules they create will be used. This is true of international law embodied in treaties and legislative law in national systems.

Hans Kelsen in his 'pure theory' of law expanded on the idea of 'gaps in the law' or lacuna. His theory of law is particularly focused on the codified forms of law found in civil jurisdictions. He pointed out that such gaps resulted from having no general positive norm to regulate it.¹¹² This is, however, a fiction as in a positive legal order there will always be an applicable rule although it may produce a result which is inequitable or unjust.¹¹³ He

¹⁰⁸ *Joint Circular 02/2008* Part A(IV)(2)(2.3)(a).

¹⁰⁹ *Joint Circular 02/2008* Part A(IV)(2)(2.3)(b).

¹¹⁰ *Joint Circular 02/2008* Part A(IV)(2)(2.3)(d).

¹¹¹ *Joint Circular 02/2008* Part A(IV)(2)(2.3)(đ): A clear example of the application of the last principle is the provisions regulating the term of the protection of copyright between the 2005 Intellectual Property Law and the United States - Vietnam Bilateral Trade Agreement. The former generally gives an author of a literary and artistic work a period of copyright protection during his or her life and fifty years after his or her death and this term may be up to no less than seventy-five years or one hundred years under the latter: See, respectively, Article 27 of the former and Article 4(4) Chapter II of the latter. Courts are required to apply the latter provisions when dealing with a copyright dispute over such conflicting terms between those of the two contracting party states: *Joint Circular 02/2008* Part A(IV)(2)(2.3)(b).

¹¹² Hans Kelsen (trans Max Knight), *Pure Theory of Law* (University of California Press, 1967) 246-7.

¹¹³ *Ibid.*

considered some gaps that may be intentionally created by the legislator as in a provision of the Swiss Civil Code, which permitted a judge, where there was no applicable law, to decide according to the rule the judge would make if he or she were the legislator.¹¹⁴ This fiction of gaps arises from ‘a lack, based on a subjective, moral-political value judgment, of a certain legal norm within a legal order’.¹¹⁵ He argued that these gaps are fictitious.¹¹⁶ Kelsen identified some gaps, as technical gaps. On this kind of gap, he wrote:

Beside the so-called true gap, sometimes “technical gaps” are distinguished which are considered possible even by those who deny, from their positivistic point of view, the existence of true gaps.

¹¹⁴ The Swiss Civil Code provision was quoted by Kelsen as the following: “The law is applicable to all legal problems for which it contains a rule explicitly or by interpretation. If no prescription is contained in the law, the judge shall decide according to custom and, where this too is lacking, according to the rule which he would establish were he a legislator.”

¹¹⁵ Kelsen, above n 112, 247.

¹¹⁶ In particular, Kelsen wrote that:

The legislator may be induced to use this fiction through the consideration that the application of a statute created by him may lead to an unsatisfactory result under certain unforeseen and unforeseeable circumstances; and that it is desirable therefore to authorize the court, not to apply in such cases the statute that predetermines the content of its judgment, but to create an individual norm, whose content is not determined by a statute but adapted to the circumstances not foreseen by the legislator. If he were to formulate this authorization in a theoretically correct fashion, that is, without fiction, he would have to say: “If the application of the valid legal order is unsatisfactory according to the moral-political opinion of the court in the present case then the court may decide the case according to its own discretion”. But such a formulation would allow far too great authority to the court. The judge would be authorized to decide according to his own discretion whenever he considers the application of a valid legal order as unsatisfactory even when he considered as unsatisfactory the application of general legal norm which imposes upon the defendant or accused the obligation which he has violated according to the plaintiff or public prosecutor. If the moral-political opinion of the judge replaces that of the legislator, then the legislator abdicates in favour of the judge. The attempt to limit the authorization to cases which the legislator has been foreseen is bound to fail because the legislator is unable to predetermine these cases; if he could predetermine them he would positively regulate them himself. The assumption of the court that a case had not been foreseen by the legislator and that the legislator would have formulated the law differently if he had foreseen the case usually rests on an unprovable guess. The legislator’s intention is recognizable with sufficient certainty only insofar as it is expressed in the law he has created. It is for *this* reason that the legislator, to limit the authorization of the courts which he regards as indispensable, uses the fiction that the valid legal order is inapplicable in certain cases for objective – and not for subjective, moral-political reasons; that the judge may function as a legislator only when the law has a gap.

But since the valid law is always applicable, since it has no gaps in this sense, the formula, when its fictitious character has been exposed, does not provide the intended limitation of the authorization granted to the court but its self-abolition. But if the court accepts the assumption that the law has gaps, then this theoretically untenable fiction may – practically – have the intended effect. For the judge – especially one controlled by a higher court – who is not inclined to assume the responsibility for creating new law will assume the existence of a gap only very rarely and therefore only rarely make use of his authorization to take the place of the legislator. (247-9).

Such a technical gap is present when the legislator fails to prescribe something which he would have had to prescribe if it should be technically possible at all to apply the law. However, that which is described as a technical gap is either a gap in the original sense of the word, that is, a difference between a positive law and a desired law, or that kind of uncertainty that results from the frame character of the general norm. The former is present if, for example, the law according to which in case of a sale, the seller is obligated to deliver the merchandise or, if he does not deliver, to compensate for the caused damage, does not determine who is running the risk when the sold merchandise perishes before it is handed over, though no fault of either parties. It is not true, however, that the legislator prescribes “nothing” for this case, but only that he does not prescribe that the seller is discharged from the obligation to deliver the merchandise or render compensation; a prescription, which is presumably regarded as desirable by those who assert that a gap exists here; a prescription which, however, in no way needs to be supplied to make the law applicable. Since the law does not even in the described case exempt the seller from the obligation to deliver the merchandise or render compensation, the law in fact prescribes that the seller is running the risk.¹¹⁷

Such technical gaps can be perceived in international intellectual property law when it appears to prescribe ‘nothing for the case’. One example, further discussed in Chapters 3 and 6, is the Washington Treaty which attempted to fill a gap which left layout-designs (topographies) of integrated circuits unprotected. Eight developing nations were the signatory states to the original Treaty. Two more have signed but many developing countries, including Vietnam, have not.¹¹⁸ The Washington Treaty has not been signed by any developed countries. Consequently it has never come into effect but parts of it have been subsequently drawn on in TRIPs to fill continuing gaps.

A perceivable technical gap is emerging in copyright law which does not provide for neighbouring or related rights in respect of journalist articles and the Internet. Publishers of newspapers are now arguing that this gap should be filled and pushing the European Commission and the United States government to take action.¹¹⁹

¹¹⁷ Kelsen, above n 112, 249-50.

¹¹⁸ WIPO-Administered Treaties, *Washington Treaty: Contracting Parties* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=29>.

¹¹⁹ The European Publishers’ Council has made this demand in the Hamburg Declaration. In the United States the Fair Syndication Consortium is pressing for the change. See: ‘Publishers claiming copyright theft by aggregators aim to protect content’ *The Guardian* (13 July 2009) <www.guardian.co.uk>

In its text TRIPs often has gaps, whether technical or true ones under Kelsen's classification, apart from the ambiguity of language used including in 'conferring rights squarely over communications online' requiring these to be dealt with in part by two 1996 WIPO Treaties.¹²⁰ These gaps are usually found in provisions providing general criteria for the limitations of, or exceptions to, intellectual property rights, controlling particular exemptions regulated in national legislation. As an international agreement is not from a supreme sovereign ranking above members and imposing specific provisions on them,¹²¹ this is inevitable.

Examples are seen in TRIPs Article 13, 'Limitations and Exceptions'. Members are permitted to create exceptions and limitations to copyright infringement subject to three conditions. They have to confine them to 'certain special cases' which 'do not conflict with a normal exploitation of the work' and which 'do not unreasonably prejudice the legitimate interests of the right holder'. Many questions may be asked about a local law utilizing this provision. What may fall within 'limitations' and 'exceptions'? Are the differences between them and, if so, what are they? Why does TRIPs mention the both? What is the scope of the provision? What are the limits to a normal exploitation of a work? What amounts to unreasonable prejudice? What are the legitimate interests of the right holder?¹²²

Kelsen's concept of legal gaps is also reflected within Vietnam's legal system and its laws on intellectual property. Historically, there are significant gaps in its legal system. After the 1945 Declaration of Independence, the Democratic Republic of Vietnam was established. Because of time, cost, lack of experience and expertise, and other factors, it was impossible to immediately create a new legal system. Courts were ordered to apply existing or colonial laws until new laws were made, provided that they did not run counter to the country's independence and the young democratic state's political regime.¹²³

¹²⁰ Christopher Arup, *The World Trade Organization Knowledge Agreements* (Cambridge University Press, 2nd ed, 2008) 453-9, 499-501.

¹²¹ Henkin and Hall, above n 69.

¹²² These are discussed in Chapter 4 on copyright and related rights in Vietnam under TRIPs' flexibilities.

¹²³ To promote this was Decree 47/SL of 10 October 1945, promulgated by President Ho Chi Minh. Those laws include: Bộ Dân Luật Bắc Kỳ 1931 [the Northern Region Civil Code of 1931]; (Bộ Dân Luật Trung Kỳ

Vietnam has endeavoured to create its own legal system with comprehensive laws.¹²⁴ To implement these codes, laws, and ordinances the government and ministries have made further decrees, decisions, directives, and circulars in giving guidance. This is required because of the high levels of generalization in legislation made by the National Assembly.¹²⁵ There are gaps in these instruments. As gaps are discovered, they are filled through law-making processes of enactment, amendment, or supplementation in a continuous program of law reform.¹²⁶ An example is the absence of principles protecting intellectual property have gradually been filled by, among other enactments, the Industrial Property Ordinance (1989), the Copyright Ordinance (1994), Part VI of the Civil Code (1995, 2005), and the Intellectual Property Law (2005, 2009).

Vietnam is a country with neither a civil law, nor common law tradition. It may have been once categorized as a third, or socialist legal system.¹²⁷ Now its legal system is a mixed one with many legal transplants, or imports, from other legal systems from different periods of its historical development including China, France, the former socialist countries, especially the Soviet Union, and increasingly western countries.

Formally judges are not authorized to interpret the law, limiting the flexibility open to them. The National Assembly is empowered to make and amend the Constitution and other

1936 [the Central Region Civil Code of 1936]; and, Bộ Dân Luật Giản Yếu Nam Kỳ 1883 [the Southern Region Concise Civil Code of 1883]. On 22 May 1950 President Ho Chi Minh enacted another order modifying or changing some rules of the old civil law system which did not suit the principles of the new regime. This included the equal treatment of women in marital, family, inheritance rights. On 10 July 1959 the Supreme People's Court issued an official instruction (Directive 772/TATC) to end that application.

¹²⁴ These include the four Constitutions of 1946, 1959, 1980, and 1992 (amended 2001); the Marriage and Family Law (1959, 1986, 2000); the Ordinance on Inheritance (1990); the Ordinance on Civil Contracts (1991); the Criminal Code (1985, 1999, 2009); the Criminal Procedure Code (1988, 2003); the Foreign Investment Law (1987, 1996, 2000, 2003, 2007); the Civil Code (1995, 2005); the Civil Procedure Code (2004); the Competition Law (2004); the Commercial Law (2005); the Enterprise Law (2005); the Technology Transfer Law (2006); and, the Law on the Enactment of Laws (1996, 2008).

¹²⁵ Gillespie, above n 12, 176.

¹²⁶ Ibid, 187: Gillespie describes how lawyers acting for foreign clients interact with senior officials in drafting these instruments. They explain how a neighbouring legal system, often Hong Kong or Singapore, dealt with the issue. He states: 'Incrementally, these interventions are beginning to weave a protective web around the private legal rights that secure the interests of capitalist enterprises.'

¹²⁷ Philip W Baker and Berry Fong-Chung Hsu, 'Common Law under Socialist Legal System: The Future of Hong Kong' (1991) 7 *China Law Reporter* 1, 4.

laws and to determine the program of the reform of laws and ordinances.¹²⁸ It is also empowered to interpret the Constitution, laws, and ordinances particularly through resolutions by its Standing Committee.¹²⁹ This power has rarely been used and is not widely considered or discussed.¹³⁰ The National Assembly also receives reports by the State President, its Standing Committee, the Government, the Supreme People's Court, and the Supreme People's Procuracy on their respective activities.¹³¹ This may extend to considering gaps in the laws that they administer. In principle, such bodies have the power to suggest that the law be reformed.

Neither precedent, nor explication, is made by the judges, although significant cases may be occasionally summarized for use by subsequent trial judges in the annual reports of the Supreme People's Court. It also publishes the *Supreme People's Court Journal*. Increasingly the Supreme People's Court is giving guidance to the lower courts through the cases brought to its Courts of Appeal and it is also increasingly proactive in drafting subordinate legislation to guide the lower courts.¹³² As well hundreds of official letters to lower courts and other organizations to give guidance on technical matters are issued each year.¹³³ They often deal with commercial cases.¹³⁴

In practice, a theory of filling legal gap, known as 'analogy', based on the similarity between the two given situations, is taught in law institutions and legislatively-stipulated and judicially-applied. Although analogy is argued to be one of the oldest methods of

¹²⁸ *Vietnam Constitution 1992* art 84(1).

¹²⁹ *Vietnam Constitution 1992* art 91(3); *Law on the Enactment of Laws 2008* arts 11(1) & 12(2): Besides, the National Assembly has an overriding power to supervise the observance of the Constitution and its laws, ordinances, and resolutions according to Article 84(2) of the 1992 Constitution.

¹³⁰ According to Võ Trí Hào, 'Vai trò giải thích pháp luật của tòa án' [The Role of Courts in Interpreting Law] (2003) 3 *Tạp chí Khoa học pháp lý* [Legal Science Review] <<http://www.hcmulaw.edu.vn>> (visited 10 March 2009) the Standing Committee of the National Assembly has used the power to interpret laws no more than three times.

¹³¹ *Vietnam Constitution 1992* art 84(2).

¹³² Pip Nicholson, *People Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007) 119-20, 266-7; Gillespie, above n 12, 209-10.

¹³³ *Ibid.*

¹³⁴ *Ibid*: The role of the Court and its Judicial Council is returned to in Chapter 8 and Appendix 1 to this thesis.

decision-making,¹³⁵ the utilization of it in Vietnam is influenced by the Soviet Union's legal practice.¹³⁶ Generations of local legal professionals were educated in the Soviet Union and Eastern Europe.¹³⁷

In Vietnamese legal theories, analogy is separated into analogy of law and analogy of legislation.¹³⁸ In the former instance, a judge may make the analogy to a specific provision in a law.¹³⁹ In the latter instance, the judge may refer to the whole legislative system, based on justice and common sense, to deal with a case.¹⁴⁰ The use of analogy in criminal law was terminated by the 1985 Criminal Code.¹⁴¹ Analogy in civil law was officially recognized, for the first time, by Article 14 of the 1995 Civil Code as a basic principle. It is now incorporated in Article 3 of the 2005 Civil Code but no longer as a basic principle.¹⁴² This may have decreased its formal importance but in practice its use may be even more common and provide both trial and appellate courts with another flexible tool.

In the context of its integration into the WTO Vietnam, through a sustained period of legislative reforms, has attempted to fill, step by step, gaps in its legislation to meet its WTO obligations. Moving to a free market from a socialist economy is a challenging

¹³⁵ Katja Langenbucher, 'Argument by Analogy in European Law' (1998) *Cambridge Law Journal* <<http://journals.cambridge.org/action/displayAbstract?aid=1541>>.

¹³⁶ In the Soviet Union, in a criminal case where a judge found an individual 'socially dangerous' he/she could convict him/her of crime though no specific article of the criminal code had been breached 'by finding the action of the accused analogous to some different but relatively similar action that had been defined as crime by the code.' In a civil case a judge was allowed to reject the application of a rule of the civil code if he saw that 'in the given situation its application would result in a decision that was out of keeping with the aims of the new society.' See John N Hazard, Isaac Shapiro and Peter B Maggs, *The Soviet Legal System: Commentary Documentation and Historical Commentary* (Oceana Publications, 1969) 6.

¹³⁷ See above Nicholson, n 132, 124-6; Gillespie, n 12, 61-2.

¹³⁸ See, eg, Hanoi University of Law textbooks, *Giáo trình Lý luận chung về nhà nước và pháp luật* [Textbook on General Theory on State and Law] and *Giáo trình Luật Dân sự Việt Nam* [Textbook on Vietnam Civil Law] (People's Public Security Publishing House, 2008: 483-6, 2006: 46-50, respectively).

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ See *Criminal Code 1985* art 2.

¹⁴² In particular, Article 3 of the 2005 Civil Code provides that in cases where it is neither provided for by law nor agreed upon by the parties, customary practice can be applied; if customary practice is unavailable, analogous provisions of law can be applied; and that customary practice and analogous provisions of law must not contravene the principles set out in the Code.

process.¹⁴³ Like other applicants with economies in transition the significant absence of domestic laws in respect of intellectual property rights compared with what required by TRIPs¹⁴⁴ was one of the biggest legislative gaps in Vietnamese law. This ended with the passing of the Intellectual Property Law 2005 but detailed regulations continue to be created, to ensure that there is an effective enforcement of those rights.¹⁴⁵

Whilst other WTO members may be concerned with Vietnam's failure to implement other requirements in its domestic laws,¹⁴⁶ there is regular review by Vietnam of its obligations in respect of intellectual property protection. This on-going monitoring by the National Office of Intellectual Property, often with other civil organizations,¹⁴⁷ has taken part in leading to amendments to the 2005 Intellectual Property Law in 2009 to further close the gaps.

1.4 Law May Get out of Date

Related to the issue of legislators not being able to foresee everything which will happen is the issue of change in technology and business practices. Law may get out of date, or tend to guess after the event. It may anticipate the immediate future but not be able to predict the long term future with any accuracy. Codified legal systems represent what Hayek called the 'synoptic delusion' and which was one of his reasons for preferring judge made law over legislative codes.¹⁴⁸ It assumes that it is possible to survey all the available information

¹⁴³ WTO News, *Speeches – DG Mike Moore: Ministerial Trade Conference for Central and South East Europe* (Zagreb - Croatia, 11-12 June 2002) <http://www.wto.org/english/news_e/spmm_e/spmm87_e.htm>.

¹⁴⁴ WTO Trade Policy Review, *First Press Release - Secretariat and Government Summaries: Romania September 1999* <http://www.wto.org/english/tratop_e/tpr_e/tp115_e.htm>.

¹⁴⁵ The detailed tracing of how Vietnam met its obligations, and how it used the flexibilities open to it, is taken up in Chapters 3 to 7 of this thesis.

¹⁴⁶ One relates to Vietnam's obligations to permit 100 per cent foreign owned joint stock companies to establish themselves in Vietnam: Ministry of Trade, *Báo cáo tóm tắt kết quả đàm phán gia nhập Tổ chức thương mại thế giới và phê chuẩn Nghị định thư gia nhập Hiệp định thành lập Tổ chức thương mại thế giới* [The Brief Report to the National Assembly on the Negotiating Results to Accede to the World Trade Organization and Approve the Accession Protocol] 1, 5 <www.chinhphu.vn> (visited 17 April 2007).

¹⁴⁷ On 12 August 2008, eg, according to the National Office of Intellectual Property (NOIP) <www.noip.gov.vn> (visited 9 March 2009) the Office and the Vietnam Intellectual Property Association did hold a seminar with the main theme of trademark protection.

¹⁴⁸ Friedrich A Von Hayek, *Law, Legislation and Liberty* (Volume 1 Rules and Order) (Chicago University Press, 1973) 15.

which may be relevant.¹⁴⁹ This must always fail to take adequate account of the ‘dispersed knowledge’ of a large community.¹⁵⁰ It is even more problematic if that knowledge changes rapidly.

In general, law is created sometime after the technological development it seeks to control or regulate. This seems contrary to notions that law on intellectual property is often made together with new advances in technologies. This is shown by copyright protection. It commenced in Europe 200 years after the mid-15th century invention of the machinery printing process. International law can take even longer to catch up. The first national legislation protecting copyright in printed material was in 1709.¹⁵¹ It was not until 1883 that the Berne Convention sought to harmonize national laws in protecting literary and artistic works. The Rome Convention 1961 and the Washington Treaty 1989 were signed relatively long after the development of technologies in the fields of radio and television broadcast and semiconductor products or chips.¹⁵² Technology changes so rapidly that even the national laws of developed states with well-resourced legal systems may be out of step.¹⁵³

In the case of Vietnam’s accession to the WTO, which brought it under the obligation to implement TRIPs in its national laws, changes were occurring in respect of technology but also in major foundational principles on which its national economic life was based and, consequently, in economic transactions. The country was in transition from a system of state or collective ownership to a mixed economy with private ownership.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ *The Statute of Anne, 1710* <<http://www.copyrighthistory.com/anne.html>> (visited 29 March 2010).

¹⁵² See, respectively, M Stephen Stewart and Hamish Sandison, *International Copyright and Neighbouring Rights* (Butterworths, 1989) 221; Yinghua Min and Charles Stroud, ‘Introduction’ in Laung-Terng Wang, Cheng-Wen Wu and Xiaoqing Wen (eds), *Very Large Scale Integration Test Principles and Architectures: Design for Testability* (Elsevier Morgan Kaufmann Publishers, 2006) 1, 1.

¹⁵³ In the United Kingdom the 1990 Human Fertilization and Embryology Act has been found to be defective in screening embryos to find suitable donor matters for siblings with life threatening illness, ‘The IVF Law is out of Date’ *The Independent* (2002). But see also ‘Most Exciting Breakthrough in IVF Treatment in 30 Years Could Triple Number of Births’ by Steve Corner (17 May 2013) (following the 2008 Human Fertilization and Embryology Act) <www.independent.co.uk> (visited 9 March 2009 and 28 September 2014 respectively).

This has required dramatic change to the laws and legal systems of states in transition, including China.¹⁵⁴ Vietnam undertook a time-consuming and costly program of reviewing its legislation.¹⁵⁵ It led to the removal of both laws and other instruments.¹⁵⁶

The program is on-going. There are considerable complaints about business licenses by business people but their abolition is practically difficult because of the local administration or bureaucracy.¹⁵⁷ The Government is committed to reduce them but the system is often used to extend beyond licensing to the management of enterprises.¹⁵⁸ In addition, the administrative system of enforcement, discussed in Chapter 7, is employed to levy fines which are difficult to review in the Administrative Courts.¹⁵⁹ The Courts refer to inconsistencies between the 1998 Law on Complaints and Denunciations and the 1996 Ordinance on Procedures for the Settlement of Administrative Cases to give themselves the flexibility to reject complaints.¹⁶⁰

International law is also not easily changed to respond to changed circumstances. A review of a treaty is a very time-consuming and uncertain process, especially where there are over

¹⁵⁴ In China, legal reform programs had led to the removal of approximately 532 statutes up to May 2002: Shan Hailing, *The Protection of Trade Secrets in China* (Kluwer Law International, 2008) 13. Also, over 2000 laws, regulations, and rules on trade in goods and in services, and trade-related intellectual property rights were adopted, revised, and abolished during the period from 1999 to 2005: WTO Trade Policy Review, *Report by the People's Republic of China*, WTO Doc WT/TPR/G/161 (17 March 2006) [45].

¹⁵⁵ This was initiated with Directive 166/CT of 1 January 1989 on Reviewing Laws and Regulations System [Chi thị của Chủ tịch Hội đồng Bộ trưởng về việc rà soát hệ thống văn bản pháp luật] and continued with Decision 355/TTg of 28 May 1997 on Establishing the Government Commission for Entirely Reviewing and Codifying Normative Legal Documents [Quyết định của Thủ tướng Chính phủ về việc thành lập Ban chỉ đạo của Chính phủ về tổng rà soát và hệ thống hóa văn bản quy phạm pháp luật]: Online Information Agency of the Socialist Republic of Vietnam Government <www.chinhphu.vn> (visited 11 March 2009).

¹⁵⁶ 'Of an estimated 270 licenses controlling market access, eighty-four were abolished by the Prime Minister in Decision No. 19-2000-QĐ-TTg on the Revocation of all Types of Licenses Inconsistent with the Provisions of the Law on Enterprises (2000)': Australian Government's Overseas Aid Program, *Vietnam: Legal and Judicial Development* (2000) 8 <http://aid.dfat.gov.au/publications/Documents/vietnam_wp3.pdf>.

¹⁵⁷ See, eg, Tuổi Trẻ Online, 'Khổ vì giấy phép' [Miseries with Business Licenses] (9 June 2007) <www.tuoiitre.com.vn>; Hội Máy Tính Thành Phố Hồ Chí Minh [Ho Chi Minh City Computer Association], 'Nóng bỏng... giấy phép' [Totally Hot... Business Licenses] (15 October 2005) <www.hca.org.vn>; VietNamNet, 'Giấy phép kinh doanh: "Đủ tốt" và "Đủ xấu" để cải cách' [Business Licenses: "Good Enough" and "Bad Enough" to Reform] (7 January 2006) <www.vietnamnet.vn> (visited 12 March 2009).

¹⁵⁸ Gillespie, above n 12, 181-2.

¹⁵⁹ Gillespie, *ibid.*, 196-7.

¹⁶⁰ *Ibid.*

100 contracting states.¹⁶¹ The Washington Treaty, dealing with the protection of layout-designs (topographies) of integrated circuits, exemplifies the failure to agree which has led to its never coming into force.¹⁶² Parts of it are drawn on to constitute TRIPs.

The international agreements constituting the WTO are no different. Opposing opinions are unavoidable in the WTO with more than 150 members, especially over sensitive but vital national issues relating to trade. Progress on filling gaps proceeds slowly.¹⁶³ Where the gaps are not filled members are left without mutual obligations about how they will be dealt with. Some members may be bound by free trade agreements between themselves. This can be seen in the United States-Vietnam Bilateral Trade Agreement.¹⁶⁴ Others are left free to deal with them as they wish in their own national laws.

1.5 Law Makers May Not Have Sufficient Knowledge

Policy and law makers are a part of the bureaucracy described by Max Weber. They are structured with a formal hierarchy, managed by rules, organized by functional specialities, employed full-time on the basis of technological qualifications, impersonal and un-

¹⁶¹ There are major gaps in the 1949 Geneva Conventions (and their Additional Protocols). As part of international humanitarian law, these Conventions concurrently deal with the issues of emergency relief assistance in wars, civil conflicts, natural disasters, etc. However, there is an uncovered symbiosis between that emergency relief assistance and sustainable development in countries with complex emergencies because of the concurrence of factors such as ethnic hostility, the proliferation of weapons, under-development, and the like: Jonathan Moore, 'The humanitarian-development gap' (31 March 1999) *International Review of the Cross Red* No. 833 <<http://www.icrc.org/eng/resources/documents/misc/57jpt2.htm>>.

¹⁶² The discussion on the Washington Treaty is mainly conducted in Chapters 3 and 6.

¹⁶³ Since the Doha Declaration of the Fourth Ministerial Conference in November 2001 giving the mandate for negotiations on a range of subjects and their work, the mandate has been refined. The original deadline of 1 January 2005 is missed during the Fifth and the Sixth Ministerial Conferences at Cancun and Hong Kong in 2003 and 2005 respectively alongside interval decisions of the General Council in Geneva in 2004. In his report to the General Council of 27 July 2007, Director-General Dr. Pascal Lamy spoke about 'significant differences' under which 'the necessary will and flexibility' are needed to close 'the gaps'. His report of 3 February 2009 indicated that progresses made in 2008 have provided 'a sound basis for an early resolution of the remaining differences': WTO 2009 News Items 3 and 4 February 2009, *Ministers Continue to Attach Highest Priority to the Round's Conclusion*, <http://www.wto.org/english/news_e/news09_e/tnc_chair_report_03feb09_e.htm>.

¹⁶⁴ This is mainly discussed in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam.

influenced by individual differences.¹⁶⁵ However, Weber recognized that such structures did not possess adequate knowledge of technology and business to make the best law.¹⁶⁶ Business often has the superior information which limits state bureaucratic development of policy and law in case poorly informed policy and legislative choices produce harmful and unintended consequences.¹⁶⁷ Even business people in a well-developed economy widely believe that policy and law makers have insufficient understanding of business to properly regulate it.¹⁶⁸

As in other modern states, law-making in Vietnam is a complex process. Legislation is formally made by the elected National Assembly,¹⁶⁹ the highest organ of state power and the highest-level representative body of the people.¹⁷⁰ The majority of the delegates are part-time.¹⁷¹ They attend two National Assembly sessions each year each of 30-days.¹⁷² The Standing Committee conducts the National Assembly's activities between the legislative

¹⁶⁵ See Max Weber, eg, *Basic Concepts in Sociology* (trans H P Secher) (Citadel Press, 1962) 71-83, 107-14; *From Max Weber: Essays in Sociology* (trans and edited with an Introduction by Hans H Gerth and C Wright Mills) (Oxford University Press, 1946) 196-264.

¹⁶⁶ Weber, *ibid.*

¹⁶⁷ Max Weber, Guenther Roth and Claus Wittich (eds), *Economy and Society* (University of California Press, 1978) 994. On the need for business people to be members of the National Assembly of Vietnam, see Gillespie, above n 12, 255-6.

¹⁶⁸ A recent survey of business people in the United Kingdom indicated that 'too few' politicians have business experience and 'too often' legislation passed without sufficient regard to its impact on business. It is also indicated that 'there is significant room for improvement in the general business-friendliness of the legislature': Industry and Parliament Trust and ComRes, *Do Our Lawmakers Understand Business: An Investigation into the Business Experience of Politicians* (April 2008) <www.comres.co.uk> (visited 12 March 2009).

¹⁶⁹ *Law on Election of the National Assembly Deputies 1997*, as amended 2001.

¹⁷⁰ *Vietnam Constitution 1992* art 83.

¹⁷¹ Article 45 of the 2001 Law on Organization of the National Assembly as amended 2007 provides that the proportion of full-time deputies is of at least 25 percent of the deputy entirety. According to the Centre for Improvement of Members Qualification of the National Assembly under the Standing Committee of the National Assembly (Trung tâm bồi dưỡng đại biểu dân cử) <www.ttbdd.gov.vn> (visited 13 March 2009) that proportion of the current 493 deputies of the Twelfth National Assembly (2007-2012) is 29.41%. See also Việt Báo, '493 Đại biểu Quốc hội Khóa XII' [493 Deputies of the Twelfth National Assembly] (30 May 2007) <<http://vietbao.vn/Xa-hoi/493-dai-bieu-Quoc-hoi-khoa-XII/70087263/157/>> (visited 28 August 2014).

¹⁷² New York University School of Law, 'Update Vietnam Legal Research' (May/June 2008) by Anh Luu <<http://www.nyulawglobal.org/globalex/vietnam1.htm>> (visited 3 November 2008).

sessions.¹⁷³ Reform of this process, including full-time and salaried members, is occasionally discussed.¹⁷⁴

The legislation passed by the National Assembly is generally drafted by ministries or administrative agencies of government as it is thought that the National Assembly does not have the expertise.¹⁷⁵ Drafts of the legislation are made by committees led by the ministry responsible for the area and composed of other relevant ministries, and the Ministry of Justice.¹⁷⁶ The bills are approved by the government, the cabinet headed by the Prime Minister and including Deputy Prime Ministers and the heads of ministries and commissions.¹⁷⁷ Commercial legislation, including the Technology Transfer Ordinance, has faced protracted delays indicating the need for prolonged consultations to resolve differences within government.¹⁷⁸ One was over the TRIPs Agreement and whether intellectual property should form a part of the Civil Code or be covered in a standalone law.¹⁷⁹ Other legislation associated with Doi Moi and the harmonization of the economy has sometimes faced some limited dissent in the National Assembly.¹⁸⁰

Even well-informed policy and law makers may not be able to deal with the gap between the different expectations of lawyers and business people.¹⁸¹ Law has its own doctrinal logic to achieve consistency as it is generalized to extend over different contexts and

¹⁷³ *Vietnam Constitution 1992* art 90(1); *Law on Organization of the National Assembly 2001* art 6(1), as amended 2007.

¹⁷⁴ VietNamNet, ‘Đại biểu Quốc hội phải được coi là một nghề’ [Deputies of the National Assembly Must Be Professionals] (16 March 2007) <<http://luatminhkhue.vn/hanh-chinh/dai-bieu-quoc-hoi-phai-duoc-coi-la-mot-nghe.aspx>> & <<http://chungta.com>> (visited 28 August 2014 and 13 March 2009 respectively).

¹⁷⁵ Gillespie, above n 12, 141-2.

¹⁷⁶ *Ibid.*, 140-62.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*: Gillespie’s case studies cover the Ordinance on the Transfer of Foreign Technology, the Ordinance on Economic Contracts, the Company Law, the Enterprise Law, and the Civil Code.

¹⁸¹ See, eg, Max Weber in *Wirtschaft und Gesellschaft* reprinted in Max Rheinstein (ed) (trans Edward Shils and Max Rheinstein), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954); Karl N Llewellyn, ‘The Effects of Legal Institutions upon Economics’ [1925] (December) 15(4) *American Economic Review* 665-683.

conflicts.¹⁸² Business people (including the rights holders of intellectual property) have different interests generally wanting a pragmatic, practical, and commercial resolution to their problems.¹⁸³

This was recognized by both Weber and Llewellyn in different ways. Weber saw the commercial parties being disappointed by the lawyers' insistence that their problems fit in the 'abstracted proposition of law'.¹⁸⁴ Llewellyn, in spite of his recognition of the importance of legal doctrines, noted above, thought that it would be difficult to develop rational principles to regulate business except by accident.¹⁸⁵

A more contemporary way to understand these gaps caused by interpretation is through the work of Fish in which language is used to form interpretative communities resulting in a different interpretive community of business people to lawyers.¹⁸⁶ The final issue to be considered in terms of the gaps which create flexibilities in the context of TRIPs is the interpretive communities within the Vietnamese legal system itself.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ The expectations of parties will often be disappointed by the results of a strictly professional legal logic. Such disappointments are inevitable indeed where the facts of life are juridically 'construed' in order to make them fit the abstracted propositions of law and in accordance with the maxim nothing can exist in the realm of law unless it can be 'conceived' by the jurist in conformity with those 'principles' which are revealed to him by juristic science. The expectations of the parties are oriented towards the economic and utilitarian meaning of the legal proposition. See *Max Weber on Law in Economy and Society*, above n 181, 305.

¹⁸⁵ Indeed it may be queried whether any sane public regulation of economic activity in the public interest – whatever that may be – is not largely accidental. The way of growth seems to be along whatever balance results from the pull and prodding of this and the other private interest. For private interests seem to have been the influential factors in law's major changes in the past, their working constitutes the striking phase of law's relation to economics today ... their justification consists in that they are, and that they work. See: Llewellyn, 'The Effects of Legal Institutions upon Economics', above n 181, 665, 672-3.

¹⁸⁶ He posed the question 'Is the reader or the text the source of meaning?' and replied that 'the reader's response is *not* to the meaning; it *is* the meaning, or at least the medium in which ... the meaning comes into being': Stanley Eugene Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1984) 1-3.

2. Vietnamese Culture and Society

Considering Vietnamese culture and society and the way in which it potentially influences the interpretation of law, particularly law which originates as international law or foreign law, moves closer to what may be considered to be comparative legal cultures.¹⁸⁷ This field also has long standing, and unresolved debates about legal transplants¹⁸⁸ and the role of law in economic development.¹⁸⁹ As this is an exercise in mapping the extent to which Vietnam's current law on intellectual property falls inside or outside its obligations under TRIPs, such issues are less relevant. It is, however, relevant to consider the effect of Vietnamese legal culture on the meaning or significance which may be given to both TRIPs and its own domestic laws. Vietnamese culture has been forged in its traditional agricultural economy emphasizing community life and cooperation.¹⁹⁰ It lacked urbanization and industrialization and commerce was not seen as having value in itself.¹⁹¹ These values were reinforced by religious ideals and political developments which also came to inform Vietnamese legal culture.

2.1 Favouring Community Life and Cooperation

Vietnamese culture is based in its traditional agricultural economy which favoured permanent residency in fixed localities.¹⁹² Its tropical monsoonal climate with an

¹⁸⁷ See above n 1 on the discussion of comparative laws into 'foreign laws' and 'comparative legal cultures.'

¹⁸⁸ See, eg, Otto Kahn-Freund, *Selected Writings* (Sweet & Maxwell, 1978) 294-319; Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79-84. Watson suggested that law was extremely borrowable. Kahn-Freund argued that there was a very strong relationship between law and society which may prevent law from being transplanted.

¹⁸⁹ See, eg, Curtis J Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008). The authors argue that there is no single optimum model and that there is a 'rolling relationship' between law and business in successful economies which cannot be generalized.

¹⁹⁰ A most substantial view of the Vietnamese culture including such characteristics see Trần Ngọc Thêm, *Tìm về bản sắc văn hóa Việt Nam* [Discovering the Identity of Vietnamese Culture: Typological Systematic Views] (Ho Chi Minh City Publishing House, first published 1996, 2001).

¹⁹¹ See Trần Ngọc Thêm, *ibid*, 215-7, 218-31. See also Phan Kế Bính, *Việt Nam: Phong Tục* [Vietnam: Customs] (Culture-Information Publishing House, first published 1915, 2001).

¹⁹² See Trần Ngọc Thêm, *above n* 190, 31-52.

interlacing system of rivers¹⁹³ developed a watered-rice agricultural economy, typical among south eastern Asian economies and cultures compared with those in the north Asia.¹⁹⁴ Communities were united by their need to cooperate in the face of poor weather, crop failures, and invasion.¹⁹⁵ Land was the most valued-resource. People's births, lives and deaths took place on their communal lands on which family and communal founders were also worshipped.¹⁹⁶ The basic unit of Vietnamese traditional society, the village, had a strong identity and genuine autonomy, reflected in sayings such as 'The king's law bows before village custom'.¹⁹⁷ Equality and individualism, fundamental principles generally underlying intellectual property in western cultures,¹⁹⁸ had no roots in this economy with these cultural characterizations.

2.2 Non-Development of Commerce, Urbanization, and Industrialization

The economy and cultures fixed people's lives to their village. Travel, or other activities such as commerce, were absent.¹⁹⁹ Barter was the principal form of commerce and it was limited as most necessities could be self-produced. Making profits by trading was made difficult by the absence of towns and cities where it could take place. There were traders but they were commonly disliked and not respected,²⁰⁰ even caricatured as dishonest and

¹⁹³ United States Library of Congress, *Vietnam* <<http://countrystudies.us/vietnam/33.htm>> (visited 17 March 2009).

¹⁹⁴ In his book, Trần Ngọc Thêm (above n 190, 31-52, 58-68, 75-81, 343-8, 395-422, and so on) explains very scientifically and logically why countries of eastern cultures, especially Vietnam, developed an agricultural economy in favour of permanent residency in a fixed locality with cultural characteristics including favouring community life and cooperation in comparison with those of northern cultures whose natural (geographical-climatic) and social (historical-economic) conditions made them in favour with a nomadic economy of preferring mobility with such cultural characteristics as individualism. Based on this, other differences between those eastern and northern cultures are profoundly discussed. Besides, the author analyzes features rooted deeply in the Vietnamese traditional agricultural economy to make it typical among those eastern.

¹⁹⁵ Ellen J Hammer, *Struggle for Indochina 1940-1955: Vietnam and the French Experience* (Stanford University Press, 1955) 63.

¹⁹⁶ See Trần Ngọc Thêm, above n 190, 180-217.

¹⁹⁷ Hammer, above n 195, 62: Hammer also cites there a remark between Vietnamese patriots identifying their strongest willing to fight for the homeland with community life and cooperation traditions 'We have fought a thousand years and we will fight another thousand if need be.' See also Trần Ngọc Thêm, *ibid*.

¹⁹⁸ Qu, below n 210.

¹⁹⁹ See above Phan Kế Bính, n 191; Trần Ngọc Thêm, n 190, 395-6.

²⁰⁰ *Ibid*: Phan Kế Bính, 343-8; Trần Ngọc Thêm, 503-4.

cheats.²⁰¹ In turn this led to the less development of urbanization and trade and industry in which were of limited significance in Vietnamese traditional society as a result.²⁰²

There was no room for creative products of the human mind to be commercialized. To commercialize such a thing went against another cultural feature, the promotion of learning and earning reputation through this.²⁰³ In their traditional society Vietnamese people love creating prose and verse, often create paintings and poems with a pleasant or romantic contexts without thinking of gaining incomes from their creations.²⁰⁴ These became communal property, freed from any commercial exploitation.²⁰⁵

This continues today with talented artists, who can be referred to as ‘the people’s artists’, such as Văn Cao (1923-1995) with his significant musical legacy including the song *Tiến Quân Ca* which had been created shortly before the 1945 August Revolution and which was chosen as the National Anthem in that month. They also include other artists and scientists such as Trịnh Công Sơn²⁰⁶ or Võ Tòng Xuân.²⁰⁷

²⁰¹ There is folk-poetry of that caricature such as (roughly translated) ‘Buôn gian bán lận’ [Trading is cheating]; ‘Lái trâu, lái lợn, lái bò - Trong ba anh ấy chớ nghe anh nào’ [Never trust three kinds of those traders who trade in water buffalos, pigs, and cows]; etc.

²⁰² In Vietnamese traditional society there are urban and trading areas with small sizes, including the so-called ‘Hanoi 36 Old Commercial Streets’ (Hà Nội ba sáu phố phường) distinguished by those handicraft products and streets often named in direct connection with products produced and traded there, eg, Hàng Bạc [Jewelry Street], Hàng Đường [Cane-Sugar Products Street]. More in detail of this see, eg, Vũ Bằng, *Miếng ngon Hà Nội* [Hanoi Special Cuisine] (Nam Chi Tùng Thư Publishing, 1960); Bằng Sơn, *Những nẻo đường Hà Nội* [Streets and Lanes in Hanoi] (Transport Publishing House, 1998); Nguyễn Thanh Bình (ed), *Hà Nội 36 góc nhìn* [Hanoi: 36 Angles of Seeing] (Youth Publishing House, 2003).

²⁰³ In his book, to discuss why trade is locally under-developed Phan Kế Bính (above n 191, 343-8) lists five reasons causing the Vietnamese to dislike being traders: (i) there is need products to be exchanged, (ii) no homesickness, (iii) no need to be dishonest, (iv) no need to be impatient, and (v) being able to gain reputation through learning rather than through trading.

²⁰⁴ Prose-verse is created in Vietnamese tradition even for arguments: Trần Ngọc Thêm, above n 190, 288-93.

²⁰⁵ Many of them are part of the Vietnamese cultural heritage, including well-known collections of folk-poetry, folk-songs (Bắc Ninh, Huế, Nam Bộ), and folk-pictures (Đông Hồ, Hàng Trống).

²⁰⁶ Trịnh Công Sơn (1939-2001) is a very well-known composer in Vietnam with his estate of about over 500 songs. The reason for his compositions is often said to come from and for his people and country in the context of his songs’ royalties collected by his heirs under the newly-created 2005 Intellectual Property Law. See, eg, Tuổi Trẻ Online, ‘Tác quyền ca khúc Trịnh Công Sơn: Hợp lý và bối rối’ [Paying Royalties to Trịnh Công Sơn’s Songs: Reasonableness and Wonderingness] (26 March 2008) <www.tuoitre.com.vn>; VnExpress, ‘Quan trọng là trân trọng quyền tác giả ca khúc’ [Of the Importance is the Respect to Songs’ Authorship], ‘Tác quyền không phải là chuyện dễ làm khó bỏ’ [Copyright is Not to Do it When Easy and Stop When Difficult] (27-28 March 2008) <www.vnexpress.net> (all visited 21 April 2009).

2.3 Religious and Political Factors

The people who have lived in the territory of modern Vietnam have long been exposed to outside cultures, particularly from China to their north. This was seen even after the first period of Vietnam's independence in the 10th century following the Bạch Đằng River victory of Ngô Quyền in 938, who became king in 939.

Confucianism spread from China to Vietnam, as it did to other Asian countries such as Japan and Korea. The influence of Confucianism increased when it became the model of national government in the 15th century.²⁰⁸ Its five fundamental principles taught people basic moral principles and to respect others in the five relationships.²⁰⁹ Besides minimising self interest, it reduced the significance of the equality and individualism of people. It taught people to obey the rules of respect in each of the relationships which put great power into the hands of the ruler.²¹⁰ The basic values underlying intellectual property in western cultures were minimised or absent under Confucianism. It encouraged individuals who may have created intellectual property to reject any personal reward as a negative expense

²⁰⁷ Professor Võ Tòng Xuân is a famous agricultural scientist who greatly worked and helped southern farmers increase their rice cultivation and crop so that they could export rice. Recently when it was potentially possible for a food crisis in the world asked about the speculation in the price of rice he replied that: 'Gạo là thứ lương thực sống còn đối với người dân của nhiều nước, nếu tìm cách cầu kết thu lợi nhuận cao hơn, làm thế không có nhân cách' [Rice is a kind of food of life or death meaning to people in many countries that finding a way to collude together for making higher profits is to have no morality]: BBC News Vietnamese, 'Thái Lan Việt Nam họp về gạo' [Thailand and Vietnam Meeting for Rice] (19 February 2009) <www.bbc.co.uk/vietnamese/> (visited 27 February 2009).

²⁰⁸ See, eg, Lương Chí Minh, 'Bàn về nho giáo ở Việt Nam' [A Discussion About Confucianism in Vietnam] (141-148), Shimao Minoru, 'Nhà nho và tục lệ ở Miền Bắc Việt Nam thế kỷ XIX' [Confucianists and Customs in the North Vietnam in the 19th Century] (411-420) in Phan Huy Lê (ed), *Các nhà Việt Nam học nước ngoài viết về Việt Nam* [Foreign Scholars of Vietnamese Studies Have Written About Vietnam] (World Publishing House, 2002).

²⁰⁹ The five fundamental principles are 'Nhân' [love and humanity], 'Nghĩa' [right actions in love and humility], 'Lễ' [observation of rites or rules of ceremony and courtesy], 'Trí' [to be educated and have knowledge], and 'Tin' [self-confidence and fidelity towards others] in five relationships as: the relationship between king (ruler) and subject; the relationship between father and son; the relationship between elder and younger brother; the relationship between husband and wife; and, the relationship between friend and friend. See United States Naval History and Heritage Department of Navy Library, *Religions of Vietnam: Teachings of Confucius* <www.history.navy.mil> (visited 3 July 2009).

²¹⁰ Sanqiang Qu, *Copyright in China* (Foreign Languages Press, 2002) 6-8.

imposed on others.²¹¹ It also encouraged them to see innovation as belonging to the community, not to the innovator.²¹² Other influential historians of Chinese science reveal a similar perspective so that the evolution and improvement of medicine was seen as ‘a social enterprise rather than a succession of breakthroughs by individual geniuses.’²¹³ This issue is discussed by Alford in his pioneering book, *To Steal a Book is an Elegant Offence*. He points to the cultural roots of the lack of an “IP consciousness” in what he calls “Old China”. He notes the imposition of intellectual property law “at gunpoint”, as he calls it, by western powers. He makes three arguments about the Chinese approach to intellectual property which are also relevant to the shared Confucian culture of Vietnam: it was necessary to disseminate knowledge by copying other’s creative works in a society where a majority of people were illiterate; imitation is not a bad way to disseminate knowledge; and, it is a great honour if someone copies an idea or work as this recognizes the work and achievement.²¹⁴

²¹¹ Alexander C Chen (1997), ‘Climbing to the Great Wall: A Guide to Intellectual Property Enforcement in the People’s Republic of China’, citing in Raymond M Gabriel, ‘The Patent Revolution: Proposed Reforms in Chinese Intellectual Property Law, Policy, and Practice Are The Latest Steps to Bolster Patent Protection in China’ (2008) 9(2) *Asian-Pacific Law & Policy Journal* 323, 326.

²¹² Peter K Yu ‘The Second Coming of Intellectual Property Rights in China’ (2002) 11 *Yeshiva University Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property* <<http://www.peteryu.com/2dcoming.pdf>>, citing in Gabriel, *ibid*.

²¹³ Nathan Sivin, Introduction to 6 Joseph Needham, *Science and Civilization in China*, Vol. 6 *Biology and Biological Technology*, Part VI *Medicine* (Nathan Sivin ed, Cambridge University Press, 2000) 1, 1.

²¹⁴ William P Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995) 30-5.

There are other views, however, especially relating to the 2008 Beijing Olympic Game. See, eg, Wei Shi, ‘Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offence’ (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 1-47 (arguing counterfeiting and piracy are not problems caused by the Confucian ethics as viewed by many, but they are rather common and unavoidable repercussions of inadequate economic development and a by-product of a unique set of socioeconomic crises deriving from the development of a dysfunctional institutional regime); Chun-Hsien Chen, ‘Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People’s Republic of China’ (2007) 10 *Tulane Journal of Technology and Intellectual Property* 211-258 (viewing Chinese traditional belief as not significantly as international political pressure in enforcing intellectual property rights); Aileen M McGill, ‘How China Succeeded in Protecting Olympic Trademarks and Why This Success May Not Generate Immediate Improvements in Intellectual Property Protection in China’ (2009-2010) 9(1) *Loyola Law and Technology Annual* 1-29 (discussing some cultural respect for the Olympic symbols to indicate that China was again a full member of the global community); Doris Estelle Long, ‘Intellectual Property: Protection in China, Post Olympics’ (18 August 2008) *The National Law Journal* S1 (suggesting that hosting the 2008 Beijing Olympic Games establishes new legal infrastructures in China for intellectual property protection); Scott J Palmer, ‘An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China’ (2001) 8(2) *Indiana Journal of Global Legal Studies* 449-478 (discussing that anyway rights in China would always be rights with Chinese

Buddhism was an earlier and stronger influence on the people than Confucianism.²¹⁵ In reality, not many Vietnamese people are conscious of the influence of Confucianism but most communities, especially in rural areas, have their own communal houses memorializing their village founders and pagodas, or temples, honouring the Buddha and other Buddhist divinities.²¹⁶ Buddhist beliefs in the circle of life, love and compassion, cause and effect, and so on, have had a deep influence on the people with more followers than any other religion.²¹⁷ Buddhist teachings, including the endurance of pain and the elimination of ambition, including property, are popularly understood.²¹⁸ These values were reinforced by communism or socialism in Vietnam. It also emphasized communal and collective interests and gave a narrow scope for private ownership, especially of the means of production in the society.²¹⁹

The legal protection of intellectual property analysed in this thesis started in Vietnam just three decades ago within a narrow scope of ownership limited by socialism and the centrally-planned economy. Widening the rights and the scope of their protection and seeing the rights as civil rights occurred almost simultaneously with Vietnam's process of accession to the WTO, following the approval of the Civil Code 1995. These were significant changes which challenged both traditional and contemporary values. There were

characteristics to possibly be incommensurate with their western counterparts); Jenifer L Donatuti, 'Can China Protect the Olympics, or Should the Olympics Be Protected from China' (2007) 15 *Journal of Intellectual Property Law* 203-237 (examining issues of the intellectual property right challenges inherent in hosting the Olympics to argue that China must take different approaches to protect Olympic intellectual property due to the country's special history and circumstances).

²¹⁵ Both Buddhism and Confucianism came to Vietnam within the first century BC. The former was almost immediately accepted peacefully, but the latter, which came under force from the north invasion, mostly had no place in the locality until 1070 where it was officially recognized through the building of the House worshipping some Confucianism founders in the Capital Thang Long: Trần Ngọc Thêm, above n 190, 451-75, 493-504. See also Lương Chí Minh, above n 208.

²¹⁶ A very strong and on-going influence of Buddhism on the Vietnamese can be read from the story of one of the best kings in Vietnam, Trần Nhân Tông, who had left the crown to go establishing his individual Buddhist school of Vietnam. See Lê Mạnh Thát, eg, *Trần Nhân Tông: Con người và tác phẩm* [Trần Nhân Tông: Personality and Works] (1999); *Toàn tập Trần Nhân Tông* [Complete Works of Trần Nhân Tông] (2000) (Ho Chi Minh City Publishing House).

²¹⁷ Trần Ngọc Thêm, above n 190, 463.

²¹⁸ For the history of Buddhism in Vietnam and its influence on Vietnamese people see Lê Mạnh Thát, *Lịch sử Phật giáo Việt Nam* [History of Vietnam Buddhism] (Ho Chi Minh City Publishing House, Vol. 1: 1999, Vol. 2: 2001, Vol. 3: 2002).

²¹⁹ This is further discussed below in Subsection 2.4 *Legal Legacy*.

no provisions for intellectual creativity in the oldest legal statute in the 15th to 18th centuries.²²⁰ In the three civil codes from the French-period there were also no such provisions.²²¹ This, again, makes Vietnam similar to China which developed neither any notion of intellectual property throughout its millennia-long imperial history, nor any legal provisions for copyright or informal concept of it before the early twentieth century.²²²

This is a very different experience from developed western countries with several hundreds of years of intellectual property protection. The United States Patent Office is over 200 years old.²²³ Many other countries have had patent offices for more than 150 years.²²⁴ The United Kingdom has had copyright laws for 300 years which have been constantly reformed.²²⁵ The concept of ‘moral rights’, or the value of authors’ creativity and their individuality is much older in western cultures. It can be traced back to the 5th century BC in Greek and Roman societies.²²⁶ This concept, specifically relating to the copying of poems or visual arts, accompanied the development of urbanization and commerce.²²⁷ In the European middle-ages, payments for copying religious books or manuscripts were imposed by some monasteries, abbeys, or churches.²²⁸ Its modern form originates in royal

²²⁰ This is the so-called Bộ Luật Hồng Đức, Bộ Luật Nhà Lê, Lê Triều Hình Luật, or Quốc Triều Hình Luật [Hồng Đức Code, Lê Dynasty Code, Lê Dynasty Penal Code or Lê Dynasty National Penal Code].

²²¹ They are: Bộ Dân Luật Bắc [the Northern Region Civil Code of 1931]; Bộ Dân Luật Trung [the Central Region Civil Code of 1936]; and, Bộ Dân Luật Giản Yếu Nam Kỳ [the Southern Region Concise Civil Code of 1883]. See also n 123 above.

²²² See above Qu, n 210, 3; Gabriel, n 211, 325-7; Yu, n 212, 4-5: China started to modernize its basic legal intellectual property system in the late 1970s: Naigen Zhang, ‘Intellectual Property Enforcement in China: Trade Issues, Policies and Practices’ (1997) 8(1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 62, 62-6.

²²³ See generally Stephen A Merrill, *Patent System for the 21st Century* (National Academy Press, 2004).

²²⁴ See Josh Lerner, ‘150 Years of Patent Office Practice’ (2000) 7(1) *American Law and Economics Review* 112 (Oxford University Press, 2005).

²²⁵ See, eg, Calgary Herald, ‘Britain Revamps 300-Year-Old Copyright Laws’ (4 August 2011) (Reuters); Radioandmusic, ‘UK Government Reforms Copyright Law’ (3 August 2011) (Mumbai) <www.proquest.com> (visited 19 September 2011); Dugie Standeford, ‘UK Copyright Modernisation Efforts Pick up Steam’ *Intellectual Property Watch* (31 August 2011) <<http://www.ip-watch.org/2011/08/31/uk-copyright-modernisation-effort-picks-up-steam/>>.

²²⁶ Julian R Pardo, ‘A Historical Approach to the Current Copyright Law in Spain’ (2006) 7 *European Intellectual Property Review* 389, 389; *Copyright and Multimedia* (Kluwer Law International, 2003) 17.

²²⁷ See, eg, Richard Watt, *Copyright and Economic Theory: Friends or Foes* (Edward Elgar Publishing, 2000) 18-9; Edward W Ploman and L Clark Hamilton, *Copyright: Intellectual Property in the Information Age*, (Routledge and Kegan Paul, 1980) 1-8.

²²⁸ Watt, *ibid*.

interests controlling the publication of Bibles and prayer books, as well as valuable monopolies conferred for the reasons of national interests on producers, traders, or manufacturers of different products embodying new techniques.²²⁹

In the 17th and 18th centuries European philosophers justified the private ownership of physical property, removing some moral obstacles to its ownership. They include John Locke in *Two Treatises on Government* and Georg Hegel in *Philosophy of Right*.²³⁰ They theorized about the ownership of physical property with its tangible or visible features. Macpherson sees Locke as one of the most faithful ideological servants of capitalism, providing ‘a moral foundation for bourgeois appropriation’.²³¹ Drahos poses the question whether their views can be used today to develop a distinctive theory of intellectual property.²³² He evaluated the application of the property theories of Locke, Hegel, and Karl Marx to intellectual property. He writes, for example, about the application of Locke’s theory:

The real value of Locke’s writing on property is that it shows us that the coherence or truth of an argument that relies on natural rights to justify intellectual property rights primarily depends on a concept of community and an accompanying metaphysical scheme. Appeals to labour in labour theories of property are essentially exhortations to keep certain metaphysical assumptions and a concept of community in place.²³³

Theories and practices of individual rights, private property, and protection of intellectual property rights originated in western cultures but have been diffused internationally. This

²²⁹ See, eg, Ramendra K Sharma, ‘History of Patents’ in Christophe Bellmann, Graham Dutfield and Recardor Melendez-Ortiz (eds), *Trading in Knowledge: Development Perspectives on TRIPs, Trade, and Sustainability*, (Earthscan Publications, 2003); Paul Marett, *Intellectual Property Law* (Sweet & Maxwell, 1996); Nuno P Carvalho, *The TRIPs Regime of Patent Rights* (Kluwer Law International, 2005).

²³⁰ *The Two Treatises on Government* (1680-1690) or books with Chapter V: Of Property in *Book II: An Essay Concerning the True Original, Extent and End of Civil Government* (The “Second Essay”): The Laws of Nature and Nature’s God <<http://www.lonang.com/exlibris/locke/loc-205.htm>>; *Philosophy of Right* with First Part: Abstract Right writing about property: Cornell University Library <<https://archive.org/details/cu31924014578979>>.

²³¹ Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate, 1996) 44.

²³² Drahos, *ibid*, 1.

²³³ Drahos, *ibid*, 41.

includes the intellectual property standards under the WTO/TRIPs Agreement. While Vietnamese culture and society were unfamiliar with them, TRIPs presents some flexibilities within which they can be adapted to accommodate local values. This flexibility in turn reflects a supple interrelationship between western and eastern cultures in a world increasingly interconnected and interdependent. As one of the WTO members Vietnam needs to overcome older cultural and social barriers, to be able to include concepts which are contrary to them. It also needs to use the flexibilities within TRIPs to create an intellectual property regime suitable to its own needs, a strategy it has used before in other contexts.²³⁴ Historic Vietnamese adaptation of its local conditions to outside legalism has also used such an approach. The continuation of traditional cultural values is seen not so much in the flexibility in implementing concepts from TRIPs but in the application of intellectual property laws in the case studies in Chapter 8 and the use of moral and sentimental discourse in courtroom.²³⁵

2.4 Legal Legacy

The present legal culture of Vietnam is also affected by its more recent political and social history in the period before Doi Moi and its accession to the WTO. The former includes the legal legacy of French colonization and the centrally-planned socialist economy.

(a) French Colonial Law of Limiting Industrial Development

The French invasion of Vietnam in 1858 was to have a profound effect on its official legal culture but its influence on popular law and custom was to be always limited.²³⁶ There had been no separation of private law from public law in Vietnamese feudalist dynasties.²³⁷ As

²³⁴ Historically Vietnamese kings were often, after defeating their northern enemies, to find a strategy so that their invaders could go back with some honour: Trần Ngọc Thêm, above n 190, 45.

²³⁵ Gillespie, above n 12, 210-2.

²³⁶ See above Hammer, n 195, 67; Gillespie, n 12, 49-50; Trần Ngọc Thêm, n 190, 191-2.

²³⁷ Civil provisions were found in criminal codes including the Lê Dynasty Penal Code (also see above n 220) from the 15th to 18th centuries and Laws and Decrees of the Nguyễn Dynasty as Hoàng Việt Luật Lệ or Nguyễn Triều Hình Luật [Hoàng Việt Laws and Decrees or Nguyễn Dynasty Penal Law] completed in 1815.

a western colonial power, the French brought a European style of economic and administrative systems including laws.²³⁸ This broke, at least in urban areas, the traditional framework of the Vietnamese governing themselves through customs and traditions.²³⁹ A colonial civil law system, mostly based on French models, was created.²⁴⁰ Just like Britain in the 19th century France appears to have had no imperial strategy for developing colonial intellectual property laws.²⁴¹ It inspired a separation of civil and criminal law and of public and private law but with little consideration of intellectual property law.

Under the French colonial policy known as ‘divide and rule’ or ‘divide and conquer’, three civil codes were created.²⁴² They include provisions for property, such as immovable or moveable property with possession and disposition rights. However, there is no mention of intellectual property as this was not contained in the 1804 Napoleon Civil Code.²⁴³ Colonial policies would be unlikely to give local people opportunities to gain from their intellectual creativity.

²³⁸ Hammer, above nn 195 & 236.

²³⁹ Hammer, *ibid*.

²⁴⁰ See Bernard Durand, ‘Các luật gia Pháp và vấn đề pháp điển hóa ở Việt Nam - Ví dụ về Luật tố tụng dân sự năm 1918’ [French Professionals and the Issue of Legal Codification in Vietnam: An Example of Civil Procedure Law in 1918] in Phan Huy Lê (ed), above n 208, 91-105.

²⁴¹ Lionel Bently, ‘The “Extraordinary Multiplicity” of Intellectual Property Laws in the British Colonies in the Nineteenth Century’ (January 2011) 12(1) *Theoretical Inquiries in Law* <www.proquest.com> (visited 9 September 2011).

²⁴² They are: Bộ Dân Luật Bắc [the Northern Region Civil Code of 1931]; Bộ Dân Luật Trung [the Central Region Civil Code of 1936]; and, Bộ Dân Luật Giản Yếu Nam Kỳ [the Southern Region Concise Civil Code of 1883] (see also above nn 123 & 221). For some in detail on these Codes see Phan Diem, ‘Civil Law Making in Vietnam during the 1945-1995 period’ *Vietnam Law & Legal Forum* (28 October 2004) <<http://news.vnanet.vn>> (visited 19 March 2009). These Codes were modeled on the 1804 Napoleon Code but they are shortened with 1455 Articles in the Northern Region Civil Code and 1709 Articles in the Central Region Civil Code, compared with 2283 Articles in the French original: World Legal Information Institute <www.worldlii.org> (visited 19 March 2009). The Southern Region Concise Civil Code was a copy of the French origin: Vũ Văn Mẫu, *Pháp Luật Diễn Giảng* [Lectures of Law] (Vol. 2, Book 1, 1973) 8-11, citing in Bùi Xuân Hải, ‘Vietnamese Company Law: The Development and Corporate Governance Issues’ (2006) 18(1) *Bond Law Review* 22, 24 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1314&context=blr>>.

²⁴³ Napoleon Series, *1804 Napoleon Civil Code* (English translation) <http://www.napoleon-series.org/research/government/c_code.html> (visited 20 March 2009).

Vietnam became a valuable source of raw materials for France.²⁴⁴ There was limited industrialization with some industrial products manufactured for immediate local consumption.²⁴⁵ When the French introduced some intellectual property law in the late 1800s it again borrowed from French law,²⁴⁶ and was only used by the non-Vietnamese.²⁴⁷ French legalism remained thinly spread and the Vietnamese had limited opportunity to develop industries or become accustomed with intellectual property. The period of French colonialism ended in 1945 but in some cases the French laws were continued until 1959, as noted earlier. Then those laws, and the French educated lawyers associated with them, were replaced with laws which were not tainted by colonialism and liberalism in the private ownership of property.²⁴⁸

(b) Socialist Legislation Opposing Private Ownership

Until the launch of Doi Moi 1986, Vietnam was influenced by other socialist legal systems. Generations of Vietnamese legal scholars were educated in the Soviet Union and Eastern Europe socialist countries.²⁴⁹ Theories of a non-separation of legislative, executive, and judicial powers and ‘rule by law’, differing from other western legal systems with the separation of powers and ‘rule of law’, were consequently absorbed. However, as with the French influence in parts of Vietnam, this was relatively thinly spread.

²⁴⁴ Martin W Chow, ‘Vietnam’ in Alan Gutterman and Robert Brown (eds), *Intellectual Property Laws of East Asia* (Sweet & Maxwell, 1997) 507, 508.

²⁴⁵ Ibid.

²⁴⁶ Phạm Duy Nghĩa, ‘Transplanted Law: An Ideological and Cultural Analysis of Industrial Property Law in Vietnam’ in Christoph Antons, Michael Blakeney and Christopher Heath (eds), *Intellectual Property Harmonization within ASEAN and APEC* (Kluwer Law International, 2004) 125, 128-9. An example of that was that a decree, issued on 29 December 1887, required, among other things, the French regulations on copyright of literary works to be applied in the South: Lê Tài Triền, ‘Copyright on Literary Works: Summary of Vietnamese and International Laws’ (1958) *Saigon Law School Economic and Law Journal* 3-4, citing in Đỗ Thị Kim Zung, ‘Copyright Law at the Cross-Roads: Vietnam Developments’ (2001) 6 *International Trade and Business Law Annual* 247, 251. Also, following another enactment on 23 June 1893 a local patent system was introduced with applications taking place in Vietnam and issuing French patents: Christopher Heath, ‘Industrial Property Protection in Vietnam’ 30 *International Review of Industrial Property and Copyright Law* 422, citing in Phạm Duy Nghĩa, ibid.

²⁴⁷ Phạm Duy Nghĩa, ‘Cần Thay Đổi Cách Nhìn Về Tài Sản Trí Tuệ’ [A Need to Change the Way of Seeing Intellectual Property] in *Một Góc Nhìn Của Trí Thức* [An Angle of View of Intellectuals] (Youth Publishing House and Tia Sáng Magazine, Vol. 4, 2005) 86, 95.

²⁴⁸ See above Nicholson, n 132, 211-22; Gillespie, n 12, 49-55.

²⁴⁹ See above n 137.

After the 1945 August Revolution, the 1946 Constitution mentioned private ownership of property only in Article 12. The Constitution could not be fully implemented as France occupied part of the North until 1954 and the South was not reunited until 1975. As Zweigert and Kotz noted Vietnam developed instead a close alliance with the Soviet Union, which had established a socialist economic system in 1928.²⁵⁰ The 1959 Constitution recognized the limited private ownership of property in the context of state ownership and collective ownership.²⁵¹ This was part of policy to advance the local economic and social system ‘step by step from people’s democracy to socialism’.²⁵² The 1959 Constitution marks a deeper integration of Vietnam into the socialist system.²⁵³

In accordance with socialist theory, society has the power to systematically eliminate the private ownership of the means of production and to limit the property rights of individuals to objects for ‘their own use or consumption and acquired by means of income earned from their labour’.²⁵⁴ This was emphasized because:

If socialist property carries with it a public character, then personal property represents individual property. However, not every individual possession can be considered as having a personal character. Personal property is a new economic phenomenon arising only in socialist society and is unknown to the exploitative structure. It begins to appear simultaneously with the consolidation and growth of socialist property, and its character and content are predetermined by the economic laws functioning under socialism.²⁵⁵

Based on such theories, personal property rights, including intellectual property rights, were displaced, or became derivatives of socialist property generated as a result of the labour of individuals in a socialist economic system.²⁵⁶ In the Soviet Union, the *Bases of Copyright*

²⁵⁰ Citing in Phạm Duy Nghĩa, above n 246.

²⁵¹ *Vietnam Constitution 1959* art 11.

²⁵² *Vietnam Constitution 1959* art 9.

²⁵³ Phạm Duy Nghĩa, above n 246.

²⁵⁴ Hazard, Shapiro and Maggs, above n 136, 383.

²⁵⁵ *Ibid*, 385.

²⁵⁶ *Ibid*, 386 & 388: Article 10 of the Soviet Union’s Constitution of 1936 provides for a scope of personal property rights of people as ‘in their incomes and savings from work, in their dwelling-houses and subsidiary husbandries, in articles of domestic economy and use and articles of personal convenience.’ This continued in

Legislation 1925²⁵⁷ was the first comprehensive intellectual property code²⁵⁸ which protected authors' creations by territory, not nationality.²⁵⁹ This was revised in 1928 in the *Fundamentals of Copyright Law* and remained the Soviet copyright law until 1961. In that year the Supreme Soviet of the USSR adopted the *Fundamentals of Civil Legislation* integrating copyright law into the civil code.²⁶⁰ Under this arrangement the rights of authors were divided into personal and property rights with five essential entitlements in respect of personal rights.²⁶¹ However, the property rights were 'not the equivalent of private property' and 'not a primary means of ensuring a fair return' on the authors' labours, but existed to enhance education and to disseminate cultural essence in the public interest.²⁶² The same pattern can be seen in the Soviet Union's patent laws as early as 1931. They offered two forms of protection, a patent with 15-year protection and an author's certificate.²⁶³ Only the state could engage in industrial and commercial activities under the

Article 13 of the 1977 Soviet Union Constitution: 'Earned income forms the basis of the personal property of Soviet citizens. The personal property of the USSR may include articles of everyday, personal consumption and convenience, the implements and other objects of a small holding, a house, and earned savings. The personal property of citizens and the right to inherit it are protected by the state': *Constitution (Fundamental Law) of the Union of the Soviet Socialist Republics* (7 October 1977) (Novosti Press Agency Publishing House, 1985) <www.friends-partners.org> (visited 24 March 2009). See also Alfred Watkins, 'From Knowledge to Wealth: Transforming Russian Science and Technology for a Modern Knowledge Economy', (2003) World Bank Group Working Paper No. 2974, citing in Simon Helm, 'Intellectual Property in Transition Economies: Assessing the Latvian Experience' (2003) 14 *Fordham Intellectual Property Media and Entertainment Law Journal* 119, 136.

²⁵⁷ Yuri Matveev, 'Copyright Protection in the U.S.S.R - The Eleventh Annual Jean Geiringer Memorial Lecture on International Copyright Law' (1973) citing in Brad Swenson, 'Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States' (1992) 21 *Denver Journal of International Law and Policy* 77, 80.

²⁵⁸ Michael A Newcity, 'Copyright Law in the Soviet Union' (1978) citing in Swenson, *ibid*.

²⁵⁹ Leonard A Radlauer, 'The U.S.S.R Joins the Universal Copyright Convention' (1973) citing in Swenson, *ibid* n 257: In particular, Section 1 of the Soviet Union Copyright Act 1925 states in pertinent part: 'Copyright to a work published on the territory of the U.S.S.R. ... or extant there as a manuscript, sketch or in any other material form, shall belong to the author or his successor in law, regardless of their nationality.'

²⁶⁰ Swenson, *ibid* n 257, 80.

²⁶¹ They are '(1) the right to be acknowledged as the author of the work; (2) the right to publish; (3) the right to reproduce and distribute; the right to have the work protected against improper alterations or adaptations by others; and (5) the right to royalties for its use under the system of compensation provided by copyright law': Edward W Ploman and L Clark Hamilton (1980), *Copyright: Intellectual Property in the Information Age*, Harold J Berman (1959), 'Rights of Foreign Authors Under Soviet Law', citing in Swenson, *ibid*, 81.

²⁶² Edward W Ploman and L Clark Hamilton (1980), citing in Swenson, *ibid*.

²⁶³ Laura A Pitta, 'Strengthening the Legal Basis of Perestroika: The U.S.S.R. Draft Laws on Inventive Activity' (1991) 7 *Santa Clara Computer & High Technology Law Journal* 321, 325-6.

former. The latter was the most widely-used right²⁶⁴ but an inventor's remuneration rarely exceeded hundreds of dollars.²⁶⁵

In Vietnam, there are no provisions for intellectual property in either the Constitutions of 1946 or 1959 apart from the limited recognition of the copyright of creative artists, discussed in Chapter 8. The 1980 Constitution had some provisions which resembled those in the Soviet Union's Constitution limiting private property.²⁶⁶ Consequently, it is not surprising that it was not until the 1980s that initial regulations on intellectual property were introduced²⁶⁷ and framed by ownership by the people in accordance with the 1980 Constitution and the concept of a centrally-planned socialist economy.²⁶⁸ These regulations were influenced by the Soviet Union's corresponding laws²⁶⁹ as this influence was common across the socialist legal systems, including jurisdictions in Eastern Europe²⁷⁰ and China.

²⁶⁴ Pitta, *ibid.*

²⁶⁵ Andrews, 'International Report: Soviet Effort for Patent Law Reform Gaining Momentum' *N.Y. Times* (2 July 1990), citing in Pitta, *ibid.*

²⁶⁶ See above n 256: In particular, the 1980 Constitution states the intention to advance the country 'directly from a society in which small-scale of production predominates to socialism, bypassing the stage of capitalist development, to build a society with a modern industrial-agricultural economy, advanced culture, science and technology, a strong defence potential and a civilized and happy life' (Article 15). It proposes to conduct 'a revolution in the relations of production, guides, utilizes and transforms non-socialist sector of the economy, institutes and consolidates the system of socialist ownership of the means of production, with the aim of building a national economy with two essential components – the State sector under the ownership of the entire people, and the collective economic sector under the collective ownership of the working people' (Article 18). In respect of personal ownership, it provides that 'The State protects the citizens' right of ownership of lawfully earned incomes, savings, housing, other personal possessions and the means of engaging in authorized private work' (Article 27): *The Constitutions of Vietnam: 1946-1959-1980-1992* (World Publishing House, 2003).

²⁶⁷ They include:

- Decree 31-CP of 23 January 1981 of the Government Council on Rationalizations and Inventions;
- Decision 175-CP of 29 April 1981 of the Government Council on Regulating the Entering into and Carrying out of Economic Contracts in Scientific Research and Technical Operations;
- Decree 197-HĐBT of 14 December 1982 of the Ministers Council on Rules for Goods-Marks;
- Decree 46/HĐBT of 10 May 1983 of the Ministers Council on Handling Administrative Violations of Speculating, Trafficking, Producing Fake Goods and Doing Business Illegally;
- Decree 142/HĐBT of 14 November 1986 on Copyright;
- Decree 85-HĐBT of 13 May 1988 on Rules for Industrial Designs; and
- Decrees 200-HĐBT on Rules for Utility Solutions and Decree 201/HĐBT on Rules for Licensing Invention Patents, Utility Solutions, Industrial Designs, Trademarks, and Know-how, both dated 28 December 1988.

²⁶⁸ Phạm Duy Nghĩa, above n 246, 130.

²⁶⁹ Pitta, above nn 263-265. See also n 15 in Chapter 1.

²⁷⁰ See, eg, David L Garrison and Lumila Gans (eds), *Intellectual Property in the Ex-Soviet Union Republics* (Skaya Publishing, 1992); Janet L Hoffman, 'Trademark Developments in the Former U.S.S.R. and Eastern

China's earliest intellectual property laws were based on Soviet models and Marxist ideology²⁷¹ before their more recent transformation.²⁷²

This emphasis has gradually changed since Doi Moi 1986, especially with the promulgation of the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance. Vietnam's intellectual property legislation became harmonized with that of other member states through its WTO accession of 1995-2007, mainly with the 1995 Civil Code enactment and the subsequent amendment of this Code and the passing of the Intellectual Property Law in 2005.

Socialist legality and legal culture were adopted by the Vietnamese people in a way that French law and culture had not been. It was consistent with existing Buddhist and Confucian values. There is also a lasting legitimacy in socialism given by its role in the unification of the country. Gillespie in his study of the judicial implementation of commercial law in Vietnam observed three enduring characteristics, reflecting these influences, which may be relevant to the interpretative approach taken to the 2005 Intellectual Property Law: the privileging of state interests; the narrow range of secondary sources used by judges; and, the limited adversarial role which lawyers are permitted to

Europe' (1993) 4 *Fordham Intellectual Property, Media and Entertainment Law Journal* 317; Swenson, above n 257; Laura A Pitta, 'Intellectual Property Laws in the Former Soviet Republics: A Time of Transition' (1992) 8 *Santa Clara Computer and High Technology Law Journal* 499 and 'Strengthening the Legal Basis of Perestroika: The U.S.S.R. Draft Laws on Inventive Activities', above n 263; Anatoliy P Pisarenko and Steven J Goldstein, 'The Intellectual Property Laws in Ukraine' (1996) 78 *Journal of the Patent and Trademark Office Society* 149; Helm, above n 256.

²⁷¹ The background of that in China see Tao-Tai Hsia and Kathryn A Haun, 'Laws of the People's Republic of China on Industrial and Intellectual Property' '[1973] (Summer)' 38(2) *Law and Contemporary Problems* 274, 275-84. See also Barden N Gale, 'Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions' (1978) 74 *The China Quarterly* 334, 340-53. A literature of Chinese intellectual property law's developments see Haibin Hu, 'Protection of Intellectual Property in China: A Selected Bibliography' (1997) 5 *University of Baltimore Intellectual Property Law Journal* 135.

²⁷² The transformation of China's patent law commenced with the Patent Law adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress on 12 March 1984, revised for the first time on 4 September 1992, for the second time on 25 August 2000, and for the third time on 27 December 2008. Likewise, the Copyright Law of the People's Republic of China was adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, amended for the first time on 27 October 2001, and for the second time on 26 February 2010. Similarly, the Chinese Trademark Law is adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982, revised for the first time on 22 February 1993, for the second time on 27 October 2001, and for the third time on 30 August 2013.

play.²⁷³ In the case studies of intellectual property disputes in Chapter 8 some of these can be seen in the values given by the courts to state enterprises, creative works produced with state funds and reliance on administrative agencies for both evidence and advice.

3. Conflict within the WTO/TRIPs Environment

The last source of law's flexibility to be considered returns to international law. An international organization may contain conflicts between members for many reasons. The WTO/TRIPs Agreement is no exception.

3.1 Conflicting Interests between Developing and Developed Members

Before TRIPs was created, there was considerable international controversy over the protection of intellectual property between developing and developed countries.²⁷⁴ This is understandable as different countries at different stages of economic development and industrialization can have different views about what should be considered when protecting such varied intangible assets. Even when it may be agreed that the creative labour and investment of one should not be subject of free-riding by others, a country may still decide that it should have an intellectual property regime which fits its own economic and political interests which may produce inconsistencies with the corresponding laws of other states. There appeared to be some consensus that protection of intellectual property is necessary for economic and technological development, particularly of knowledge-based economies. In this context not only the minority of developed, industrialized, and richer nations, but

²⁷³ See above Gillespie, n 12, 217-8; Nicholson, n 132, 235.

²⁷⁴ For details of that controversy see, eg, Alan Gutterman and Robert Brown (eds), 'Introduction', *Intellectual Property Laws of East Asia* (Sweet & Maxwell, 1997) 1-27; Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford University Press, 2001) 11-47; Abdulqawi A Yusuf, 'TRIPs: Background, Principles and General Provisions' in Carlos M Correa and Abdulqawi A Yusuf (eds), *Intellectual Property and International Trade: The TRIPs Agreement* (Kluwer Law International, 1998), 3-20. See also Arup, above n 120, 291-2; Paul Katzenberger and Annette Kur, 'TRIPs and Intellectual Property' in Fried-Karl Beier and Gerhard Schricker (eds), *From GATT to TRIPs: The Agreement on Trade Related Aspects of Intellectual Property Rights* (Weinheim, 1996) 1-17; Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003) 3; Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement* (Oxford University Press, 2007) 14-5.

also the majority of less-developed, non-industrialized, and poorer countries may wish to protect intellectual property. However, how to protect it in a globalizing world is difficult to reach agreement on. There are both optimistic and pessimistic attitudes towards globalization and trade liberalization. There is both convergence and divergence in economic developments, in political and cultural spheres. In the doctrinal fields of law itself there are different views on mediating between legalities relating to conflicts within intellectual property law and related laws such as competition law.²⁷⁵

Debates over these issues took place in the time-consuming Uruguay Round Negotiations of 1986–1994 resulting in the establishment of the WTO. Within this context, the concessions made by developed and developing countries were important in ensuring that the WTO Agreement and the other integrally-annexed agreements, including TRIPs, were concluded.²⁷⁶ Both general standards and flexibilities in harmonizing the protection of intellectual property rights were included in the text of TRIPs. The requirement for protecting patents for at least twenty-years was agreed on with certain exceptions to the exclusive rights of patent owners, for example. Even so, the limited flexibility in TRIPs still resulted in some pain for developing countries and their negotiators.²⁷⁷

3.2 TRIPs and the Incorporation of Previous International Conventions

Another important reason for flexibility within TRIPs results from the history of its drafting. There are four other treaties on intellectual property incorporated into TRIPs.

²⁷⁵ Arup, above n 120, 25-59.

²⁷⁶ Of such concessions Keith Maskus, 'Regulatory Standards in the WTO' (January 2000) *Peterson Institute for International Economics* <<http://www.iie.com/publications/wp/wp.cfm?ResearchID=121>> wrote that by 'agreeing to establish and respect standards for intellectual property protection in the WTO, governments recognize that their existing, separate regimes may be sub-optimal in some dimensions. Surrendering some discretion to international rules forcing stronger standards may promote both collective and national welfare.' See also Arup, above n 120, 286.

²⁷⁷ Raghavan (1990), Braithwaite and Drahos (2000), citing in Sisule Musungu and Cecilia Oh, *The Use of Flexibilities in TRIPs by Developing Countries: Can They Promote Access to Medicines?* (2005) *World Health Organization Commission on Intellectual Property Rights, Innovation and Public Health* 22 <<http://www.who.int/intellectualproperty/studies/TRIPSFLEXI.pdf?ua=1>>.

They are: the Paris Convention (1967), the Berne Convention (1971), the Rome Convention, and the Washington or IPIC Treaty.

Entering into a contract with multiple-parties diminishes the possibility that the relevant parties are of the one mind. They may still be separate in their interaction but bound by their commitments. It may take only two contracting party states to have conflicting interests because of differences in territory, population, culture, or economic development among other things. The traditional measure of dealing with this, or similar issues, ‘through conflict of laws criteria’²⁷⁸ should be included with flexible provisions for helping reduce conflict. The European Union has used flexibility in achieving ‘closer cooperation’ with three models of multi-speed, concentric circles, and ‘à la carte’.²⁷⁹ This is done with potential of aiding the re-configuration of national sovereignty from individual members to its ‘pooling’ at the level of the European Union and ‘making that process subject to clear limits set on an iterative basis according to explicit political choice’.²⁸⁰

In reality, it is very difficult to have an international agreement with a complete consensus. Conflicting interests between members can be seen in any international agreements, including the four treaties incorporated into TRIPs. Like TRIPs, these treaties contain flexible provisions to accommodate the different legal traditions of different members, apart from other differences. The two major legal traditions of common law and civil law differ historically over key concepts of the state, the constitution, human rights, the rule of law, international law, federalism and legislative power, authority, administration, police, criminal cases, and legal education.²⁸¹ At the same time, differences between those with a common law tradition including the United Kingdom, the United States, and Australia and

²⁷⁸ Arup, above n 120, 39-40.

²⁷⁹ Alex Warleigh, *Democracy and the European Union: Theory, Practice and Reform* (Sage, 2003) 69-70.

²⁸⁰ Ibid, 68.

²⁸¹ See Thomas Fleiner (summarized by Violaine Butty), *Common Law and Continental Law: Two Legal Systems* (April 2005), Swiss Agency for Development and Cooperation
<http://www.federalism.ch/files/documents/legalsystems_tipsheet_209.02_final.pdf>.

between those of the same civil law tradition including France and Germany also exist.²⁸² Creating, or using flexible provisions for coping with this diversity becomes one of the most important features in designing international treaties, taking into account differences in legal systems and practices of contracting party states. This includes TRIPs and the four treaties incorporated into it. The Agreement recognizes this in its provision taking into account its members' respective legal systems and practices leaving them freedom to decide the appropriate method when implementing its provisions.²⁸³ This is considered further in Chapter 3.

4. Locating TRIPs Flexibilities

The word 'flexibility' is used in TRIPs several times. Initially, it appears in the statement that the Agreement recognizes:

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.²⁸⁴

This provision can be narrowly understood as referring to the least-developed country members only. This context could be given to some other provisions, including those in Articles 66 and 67.

²⁸² A view on the world's legal families including Romanistic, Germanic, Nordic, Common Law or Anglo-American, and other legal cultures and traditions including Chinese, Japanese, Islamic, and Hindu see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press, 1998) 66-315. Another view of legal traditions of the world with Chthonic, Talmudic, Civilian, Scandinavian, Russian, Islamic, Common, Hindu, Buddhist, Chinese, and Japanese Laws see Patrick H Glenn, *Legal Traditions of the World* (Oxford University Press, 2nd ed, 2004) reviewed by Nicholas HD Foster 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition' (2006) 1 *Journal of Comparative Law* 100-199.

²⁸³ *TRIPs Agreement* art 1(1). Also, Article 4 of the Washington Treaty permits members to decide the protection of integrated circuits either by a specific law or any other laws or a combination of any of those laws such as copyright, patents, utility models, industrial designs, unfair competition, etc.

²⁸⁴ *TRIPs Agreement* preamble para 6.

Nonetheless, TRIPs flexibility can be understood in a more extensive sense as the Agreement produces choices and alternatives without mentioning ‘flexibility’.²⁸⁵ In respect of this, the application of TRIPs’ flexibilities can be widened to all WTO members, including the less-developed country members, whether they are developed or developing nations, under civil law or common law traditions. Flexibility can also be conceived from the language of TRIPs and its interpretation leaving members with choice, room, space, gap, freedom, liberty, latitude, leeway, discretion, allowance, and permission in its implementation.

From this perspective, TRIPs’ flexibilities are often marked by the modal auxiliary, ‘may’.²⁸⁶ Other markers include the use of the adjective ‘free’²⁸⁷ or the phrases ‘at least’ or ‘no less than’.²⁸⁸ In some cases they might be more difficult in locating or using because of the complexity of the language used in the relevant provisions. Under TRIPs Article 40:2, for example, the word ‘may’ is repeated three times in a long and complex structure detracting from its general facilitative meaning. Flexibility is also a significant concept in the 2001 Doha Declaration on the TRIPs Agreement and Public Health. This is further considered in Chapter 5 in the context of patents and the protection of plant varieties in Vietnam under TRIPs’ flexibilities.

This thesis also uses the concept of flexibility but in a wider sense. As observed in the preceding paragraphs flexibility is explicitly used in a number of places in TRIPs and by implication in other places. While the use of flexibility in this thesis is used to described the

²⁸⁵ This meets the dictionary definition of the word. Commonly, ‘flexibility’ is defined as ‘the quality of being flexible’, ‘pliancy’, ‘adaptability’, ‘freedom from stiffness or rigidity’ while ‘flexible’ is defined as ‘capable of being bent, admitting of change in figure without breaking’, ‘capable of modification or adaptation, pliant, supple’ according to *The Shorter Oxford English Dictionary* (Oxford University Press, 1973) 768.

²⁸⁶ See *TRIPs Agreement*, eg, arts 1(1) the second sentence; 3(2); 8; 14(4) the second sentence, (6) the first sentence; 15 (1) the third and fourth sentences, (3) the first sentence, (5) the second sentence; 17; 19(1) the first sentence; 21; 24(7); 25(1) the second and third sentences; 26(2); 27(2)-(3); 29; 30; 31(b) the first and second sentences, (k) the second sentence; 37(1) the second sentence; 38(3); 40(2); 43(2); 44(2) the first sentence; 45(2); 47; 48(1) the second sentence; 50(5); 51; 57 the third sentence; 58(a); 60; 61 the fourth sentence; 62(1); 65(3)-(4); and, 70(4) the first sentence.

²⁸⁷ See *TRIPs Agreement*, eg, arts 1(1) the third sentence, 25(2) the second sentence, and 34(2).

²⁸⁸ See *TRIPs Agreement*, eg, arts 11 the first sentence; 12; 14(5); 18; 19(1) the first sentence; 26(3), 34(1) the second sentence, and 38(2).

language used in TRIPs it is also used to describe the processes for its implementation in national law, its interpretation and its enforcement. In this context its meaning extends to synonyms which are associated with flexibility such as pliable or supple or even soft. ‘Soft’ as in ‘soft law’ has been used in the last decade to describe some features of law’s impact on regulation.²⁸⁹ These concepts can be used to describe the role or activities undertaken by a relevant actor in relation to TRIPs in different contexts and circumstances. It is impossible to understand Vietnam’s strategic flexibility in the decisions it made in the process of acceding to the WTO and coming under obligations to implement the TRIPs Agreement to suit its own purposes as having the same meaning as ‘flexibility’ when specifically used in the provisions of TRIPs or Vietnam’s corresponding laws, for example.

In this thesis TRIPs’ flexibilities are separated into those found in general provisions, or Part I – General Provisions and Basic Principles, and others in Parts II and III, or standards concerning the availability, scope, use, and enforcement of intellectual property rights.²⁹⁰ The latter are discussed in Chapters 4, 5, 6, and 7 while some of the former are examined within the next chapter, or Chapter 3.

²⁸⁹ See, eg, Robert Baldwin, ‘Regulation: After Command and Control’ in Keith Hawkins (ed), *The Human Face of Law* (Oxford University Press, 1997) 113-22. ‘Soft law’ is used to describe self regulation including the collective arrangements which may be non-legal, and/or involve no government intervention, unilateral adoption of standards, the involvement of industry in rule-formulation, neo-corporatist arrangements where the collective shares authority with the state to make decisions regarding standards, monitoring, and enforcement, but where the relationship with government may be different, and/or where others apart from those being regulated may play a role (editors, stakeholders). ‘Soft’ is also used in a less technical sense by Konstantinas K Athanasakou in ‘China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Questions to the WTO under TRIPs’ (2007) 39 *Georgetown Journal of International Law* 217-245.

²⁹⁰ A classification of TRIPs’ flexibilities, presenting in a report on the protection of patents in particular, into four classes is seen from WIPO’s. They are: the appropriate method of implementing TRIPs’ provisions; the design of members’ intellectual property system behind certain issues under TRIPs which are not addressed such as the ownership of patents; or not defined such as the definition of invention; and, those which are prescribed as alternative choices for the members such as ‘whether the best mode requirement be required or not’: WIPO Standing Committee on the Laws of Patents (Twelfth Session 23-27 June 2008), *Report on the International Patent System*, WIPO Doc SCP/12/3 (15 April 2008) 43 [146].

CHAPTER 3: LOCALIZING THE WTO TRIPS AGREEMENT IN VIETNAM

Synopsis

This chapter outlines the three stages in which Vietnam moved to join the WTO. It considers the overall structure of TRIPs and outlines the various categories of intellectual property rights protected by TRIPs which must be reflected in the national law of members. It then outlines the three stages in which Vietnam moved in a protracted process to localize its obligation under TRIPs in local law. It concludes by noting that international law is a source of law in the Vietnamese legal system which can be drawn on directly without further legislation, as well as by noting the obligations of Vietnam in respect of TRIPs-plus provisions in bilateral trade agreements.

It demonstrates how TRIPs draws on other international intellectual property conventions and treaties and also how it fills gaps which were created by them or by later development in technology and commercial practices. While this may come to limit flexibility, flexibility for members is increased in the Preamble to TRIPs through its reference to the importance of intellectual property in development and also to the freedom of members to determine the appropriate way to implement TRIPs provisions into their own national substantive and procedural law.

Vietnam faced considerable challenges commencing with Doi Moi in 1986 in reforming its legal system to conform more to a socialist-oriented market economy and to harmonize with international intellectual property law. The Constitution still continues to give primacy to public and collective ownership by the working people. The negotiations to join the WTO were protracted for reasons which also sought to diminish the flexibilities available to Vietnam. These delays and pressure came from a number of members which sought bilateral negotiations with Vietnam and the collective power of existing members to demand greater obligations of Vietnam than they themselves had had to meet. The delays both in acceding to the WTO and in creating a Civil Code and Intellectual Property Law which met the requirements of TRIPs reflected the initial lack of experience in negotiating such agreements and also the lack of capacity and experience among Vietnamese policy and law makers in respect of private ownership of intellectual property. Earlier versions of intellectual property reforms including in the 1995 Civil Code failed to sufficiently represent the standards of protection required by a number of international Conventions as well as TRIPs.

It points to an established feature of Vietnamese law, the extensive supplementary decrees, ordinances, regulations, directives, guidance and circulars which fill out details left by the 2005 Civil Code and the 2005 Intellectual Property Law and also give the necessary directions to enable them to be implemented by administrative branches of the government as well as by the judiciary.

The obligations of Vietnam incurred in TRIPs-plus provisions in bilateral free trade agreements such as those with the United States and Switzerland have further limited the flexibilities open to Vietnam in its local legislation.

CHAPTER 3: LOCALIZING THE WTO TRIPS AGREEMENT IN VIETNAM

1. Integration of Vietnam into the Global Multilateral Trading System

Over a 12-year process between 1995 and 2007 when Vietnam acceded to the WTO, the current regime of intellectual property law in Vietnam was created in conformity with the WTO's TRIPs Agreement. The application for accession to the WTO was the starting point in this process. The main issues discussed in this chapter are what obligations were undertaken by Vietnam as part of its WTO membership? Did it take any WTO-plus impositions? What local legislation has been enacted to implement the TRIPs standards in Vietnamese law? How have the flexibilities in TRIPs' general provisions been used by Vietnam in internalizing these obligations? Are there any 'TRIPs-plus' provisions from other free trade agreements binding on it?

The process of Vietnam's accession to the WTO is described emphasizing the communications raising questions and the answers to them. The main issues concentrated on in these exchanges are identified. The chapter focuses on the structure and main contents of TRIPs in the context of the three periods of internalizing TRIPs requirements in Vietnamese law: 1995-1998, 1999-2004 and 2005-present, and the flexibilities in TRIPs' general provisions which have been used in creating Vietnamese intellectual property law. Much of this reflects the flexible approach which Vietnam has taken overall in the course of integrating into the global economy. As an economy in transition it may take Vietnam some time to align its legal and institutional reforms with WTO norms, including the TRIPs Agreement. Vietnamese people, and policy and law makers, were generally unfamiliar with intellectual property protection¹ so that there is an evolutionary aspect to Vietnam's adaptation of its TRIPs obligations.

¹ For details see Subsection 1.1 *Law is Encoded in Language and Language is Ambiguous* (paragraphs 4-7 from the end) and Section 2. *Vietnamese Culture and Society* in Chapter 2.

1.1 A Transitional Economy

Before Doi Moi 1986 commenced to open Vietnam's economic door to the outside world, Vietnam had developed a centrally-planned economy.² As a subsequent step in the Doi Moi process, the 1980 Constitution was replaced by the 1992 Constitution. Unlike the 1980 Constitution which limited the ownership of economic property, the means of production and distribution to only two forms, the entire people and collective ownership by labour,³ Article 15 of the 1992 Constitution⁴ provides for diversified and new forms of private property rights:

The State promotes a multi-component commodity economy functioning in accordance with market mechanisms under the management of the State and following the socialist orientation. The multi-component economic structure with various forms of organization of production and trading is based on a system of ownership by the entire people, by collectives, and by private individuals, of which ownership by the entire people and by collectives constitutes the foundation.

This Article was amended in 2001 to give greater recognition to 'a multi-sector economic structure' and a 'socialist-oriented market economy' with public ownership being continued stating as the foundation of the economy.⁵

² See Subsection 2.4 (b) *Socialist Legislation Opposing Private Ownership* in Chapter 2 for more in detail.

³ Ibid.

⁴ Recently, the Thirteenth National Assembly of Vietnam on 28 November 2013 adopted at the sixth session a new Constitution. This Constitution has come into force on 1 January 2014 under Solution 64/2013/QH13 of 28 November 2013 of the National Assembly on Regulating Some Issues Regarding the Implementation the Constitution of Vietnam. Article 51(1) the 2013 Constitution provides that: 'The Vietnamese economy is a socialist-oriented market economy with multi-forms of ownership and multi-sectors of economic structure; and with the state economic sector playing the leading role.'

⁵ In the amendment of the 1992 Constitution in 2001, Article 15 has been supplemented as follows:

The State builds an independent and sovereign economy on the basis of bringing into full play internal resources and actively integrating into the international economy; and carries out national industrialization and modernization.

The State consistently implements the policy of developing a socialist-oriented market economy. The multi-sector economic structure with diversified forms of production and business organization is based on the regime of the entire people's ownership, collective ownership and private ownership, in which the entire people's ownership and collective ownership constitutes the foundation.

The liberalization of trade and the internal market gradually increased. From taking foreign aid and assistance and trading only with the socialist bloc, Vietnam joined ASEAN and normalized relations with the United States in 1995. In respect of WTO membership, as with Laos and Algeria, Vietnam rejected a shorter and easier path to membership by automatically transferring its status as a contracting party to GATT 1947,⁶ which may be done by a territory with the status of a colonized territory in 1947, set out in Article XXVI: 5(c) of GATT 1947 with a continuous relationship with GATT 1994 within the WTO framework and mechanisms. On the contrary, Vietnam accepted ‘a long and arduous process’⁷ to its WTO accession. Under Article XII of the WTO Agreement it made a formal request for accession on 4 January 1995.⁸

As a result of proceeding in this way, apart from its own best efforts to make legal reforms to bring national policy and legislation on trade in harmony with the WTO Agreements, Vietnam potentially faced additional requests and higher demands from the existing members as WTO accession through a process of negotiation is ‘on terms to be agreed’⁹ between the acceding country and existing WTO members. This has been depicted as an intended one-sided process with the full burden falling on the acceding country.¹⁰

Based on Vietnam’s request for accession to the WTO, the Working Party on the Accession of Vietnam was established on 31 January 1995.¹¹ Under WTO rules, Working Party membership was open to all WTO members. It attracted 38 interested members at the beginning which increased to 43 over several years.¹²

⁶ Craig VanGrasstek, ‘Why Demands on Acceding Countries Increase over Time: A Three-Dimensional Analysis of Multilateral Trade Diplomacy’ in *WTO Accession and Development Policies* (United Nations Conference on Trade and Development, 2001) 115, 123.

⁷ WTO 2006 News Items on 26 October 2006, *Working Party Completes Vietnam’s Membership Talks* <http://www.wto.org/english/news_e/news06_e/acc_vietnam_26oct06_e.htm>.

⁸ *Accessions of Vietnam: Status of Accession Working Party* <http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm>.

⁹ *WTO Agreement* art XII(1) the first sentence.

¹⁰ VanGrasstek, above n 6, 117.

¹¹ *Accessions of Vietnam: Status of Accession Working Party*, above n 8.

¹² WTO News Items on 15 June 2004 and 19 July 2006 respectively, *Members Praise Vietnam’s New Offers, but Seek Improvements and More Clarification* <http://www.wto.org/english/news_e/news04_e/acc_vietnam_15june04_e.htm>; *Bilaterals Done*,

Similar to other economies in transition to have experienced daunting challenges in creating a successful market economy to obtain membership of the WTO, including such former socialist nations of Central and Eastern Europe as Albania, Croatia, Estonia, Latvia, Lithuania, and Bulgaria,¹³ Vietnam had to overcome considerable difficulties in completing the accession procedure to become a full member of the WTO on 11 January 2007. It has been observed that the longer the process is deferred, the more additional commitments, or WTO-plus obligations, are imposed on an acceding country by the existing members.¹⁴

1.2 The Memorandum on Foreign Trade Regime

The period of warming-up, or ‘tell us about yourself’,¹⁵ required the submission of a memorandum on its foreign trade regime from Vietnam as the WTO acceding member to the Working Party on the Accession of Vietnam. This is the first important step in the accession process. Among other things, the memorandum can send a clear message to the other members that the acceding country will strongly adhere to the WTO’s rules. It took Vietnam nearly two years, from the date of its request for WTO membership in early 1995, to prepare and submit its Memorandum on Foreign Trade Regime on 24 September 1996.¹⁶

Multilateral Nearly, Vietnam’s Membership Now in Sight

<http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm> (counting the European Union and its member states as one).

¹³ See Marc Bacchetta and Zdenek Drabek, ‘Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries’ (April 2002) WTO Staff Working Paper DERD-2002-02 <http://www.wto.org/english/res_e/reser_e/derd200202_e.htm>. See also *Understanding the WTO: The Organization - Members and Observers* (160 members since 26 June 2014) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

¹⁴ See, eg, VanGrasstek, above n 6; Julia Ya Qin, ‘“WTO-Plus” Obligations and their Implications for the World Trade Organization Legal System’ (2003) 37(3) *Journal of World Trade* 483, 483-4, 518-22 (Kluwer Law International, 2003); P R Rajkarnikar, ‘Nepal: The Role of an NGO in Support of Accession’ *Managing the Challenges of WTO Participation: Case Study 130* <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case30_e.htm>.

¹⁵ *Understanding the WTO: The Organization - Membership, Alliances and Bureaucracy* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm>.

¹⁶ *Accessions of Vietnam: Status of Accession Working Party*, above n 8.

Under the format required by the WTO,¹⁷ the Memorandum gave a detailed description of Vietnam's contemporary economic situation and the fundamental features of its economic and foreign trade policies together with relevant statistical data.¹⁸ This included the national framework for making and enforcing policies affecting foreign trade in goods and in services, policies affecting trade in goods, and trade-related intellectual property regime.¹⁹ It was confirmed in the Memorandum that Vietnam would conduct legal reform programs so that the local legislative and institutional framework was brought into compliance with WTO rules, including the implementation of the TRIPs Agreement for respecting and protecting intellectual property rights.²⁰

Based on the circulation of the Memorandum, WTO members, especially those within the Working Party, were invited to raise written questions mainly to clarify the operation of its foreign trade regime in the light of the WTO binding agreements.²¹ This included questions on the protection of intellectual property.²² Vietnam's reply to these questions was also made in writing and the questions and replies were subsequently correlated before the

¹⁷ Handbook on Accession to the WTO Chapter IV: The Accession Process - the Procedures and How They Have been Applied, *Applicant's Memorandum on its Trade Regime and Supporting Data* <http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s4p1_e.htm>.

¹⁸ *Accession of Vietnam: Memorandum on the Foreign Trade Regime*, WTO Doc WT/ACC/VNM/2 (24 September 1996).

¹⁹ Ibid, paras III- V.

²⁰ Ibid. para V(1)(a).

²¹ The number of questions were approximately 1,700 up to early 2004 according to *VietNamNet* 20 February 2004 'Gian nan chặng đường chinh phục WTO' [A Miserably Hard Route to Conquer the WTO] <<http://vnn.vietnamnet.vn/wto/thoisu/2004/02/50539/>>. This can be compared with over 5,000 questions China received between 1987 and 2001 or about 4,000 questions for Russia from 1994 to 2001: Murrey Gibbs, 'UNCTAD's role in the WTO accession process' in *WTO Accession and Development Policies*, above n 6, 161-71.

²² This is below discussed in Subsection 1.4. There are about 500 questions relating to intellectual property among those sent to Vietnam. They are contained in WTO Documents: WT/ACC/VNM/46 (28 September 2006); WT/ACC/VNM/44 (9 June 2006); WT/ACC/VNM/41 (20 December 2005); WT/ACC/VNM/39 (2 September 2005); WT/ACC/VNM/38 (26 July 2005); WT/ACC/VNM/36 (7 April 2005); WT/ACC/VNM/33 (13 October 2004); WT/ACC/VNM/32 (28 April 2004); WT/ACC/VNM/29 (30 October 2003); WT/ACC/VNM/23 (6 March 2003); WT/ACC/VNM/16 (6 August 2001); WT/ACC/VNM/9 (26 June 2000); WT/ACC/VNM/7 (16 July 1999); WT/ACC/VNM/6 (20 April 1999); and, WT/ACC/VNM/2 Addendum-WT/ACC/VNM/3/Add.2 (20 August 1998).

meetings of the Working Party took place.²³ During this process the local legislation was gradually being made consistent with the WTO's binding agreements.²⁴

1.3 The Bilateral and Multilateral Negotiations

'Work out with us individually what you have to offer' is, within the process of WTO accession, characterized by bilateral market access negotiations on goods and services and on the other terms to be agreed to by the existing members.²⁵ This is arranged by the acceding country with interested members at their individual requests, and is normally conducted when the examination of the foreign trade regime by the working party on its accession to the WTO has become sufficiently advanced.²⁶ They are primarily aimed at opening or accessing more markets in the acceding country.

In total 28 WTO members expressed interest in having bilateral commercial talks with Vietnam.²⁷ Vietnamese negotiators completed more than 200 negotiating sessions with them.²⁸ For the first time participating in the global multilateral and bilateral trade negotiations, the Vietnamese negotiators became experienced not only with short and simple negotiations concluded over three sessions, but also with longer and harder

²³ Handbook on Accession to the WTO Chapter IV: The Accession Process - the Procedures and How They Have been Applied, *Working Party Examination of Applicant Trade Regime* <http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s5p1_e.htm>.

²⁴ In the case of intellectual property protection, eg, the questions raised almost relating to all corresponding laws and sub-laws, from the 1995 Civil Code (Part VI) with detailed regulations for the implementation in Decree 63/CP of 24 October 1996, Circular 3055/TT-SHCN of 31 December 1996, Decree 54/2000/NĐ-CP of 3 October 2000, Decree 01/2001/NĐ-CP of 1 February 2001, Decree 13/2001/NĐ-CP of 20 April 2001, Decree 42/2003/NĐ-CP of 2 May 2003, and the like up to drafts of the Intellectual Property Law until it was enacted in November 2005. They also related to other legislation, including the 1985 Penal Code, the 1999 Criminal Code, and the 2001 Customs Law. These local laws and regulations have eventually been created in harmonization with TRIP's requirements.

²⁵ *Understanding the WTO: The Organization - Membership, Alliances and Bureaucracy*, above n 15.

²⁶ Ibid.

²⁷ Ministry of Trade of Vietnam, *Báo cáo tóm tắt kết quả đàm phán gia nhập Tổ chức thương mại thế giới và phê chuẩn Nghị định thư gia nhập Hiệp định thành lập Tổ chức thương mại thế giới* [The Brief Report on the Results of Negotiations for the Accession to the WTO and to Approve the Protocol on the Accession of the Socialist Republic of Vietnam] (24 November 2006) <www.chinhphu.vn> (visited 17 April 2007).

²⁸ Ibid.

negotiations of up to thirteen sessions, as took place with the United States.²⁹ This was one reason why Vietnam's initial intention of taking membership by 2005 failed.

China's 15-year process of acceding to the WTO concluded in 2001. It acceded with 'WTO-plus' obligations, or obligations additional to those imposed by the existing WTO members. These ranged from the administration of the local trade regime, including transparency, judicial review, sub-national governments, and transitional review to new WTO investment disciplines applying to investment measures and the principle of national treatment of foreign investors.³⁰ As a later acceding member, it was inevitable that Vietnam would also have WTO-plus impositions.

One example of WTO-plus impositions relates to agricultural products. This was in response to those who asked for furthering liberalization of trade in Vietnam's agricultural sector. In spite of the fact that the majority of its population and a large number of its poorer people live in rural areas, Vietnam had to offer an average agricultural tariff of 25.3 percent, which was over 10 percent lower than that of other Asian countries with significant agricultural sectors already WTO members, including Thailand and the Philippines.³¹ Because of such pressures, the head of Vietnam's negotiating delegation called for WTO members not to press 'double standards' or 'WTO-plus' obligations on Vietnam greater than the capacity of the local economy to sustain, otherwise it might have to resist.³² These pressures created many difficulties for Vietnam in its stated intention to seek some flexibility in the obligations it incurred in the membership negotiations and also in its request for technical assistance in the 'challenging and painstaking' tasks it faced.³³

²⁹ VietnamNet, 'Căng thẳng đàm phán WTO: Những chi tiết mới tiết lộ' [Tensions in Negotiations for WTO Membership: Newly-Revealed Detailed News] (7 November 2006) <<http://tuoitre.vn/Kinh-te/171105/cang-thang-dam-phan-wto-nhung-chi-tiet-moi-tiet-lo.html>>.

³⁰ Qin, above n 14, 483.

³¹ Oxfam Briefing Paper, *Extortion at the Gate: Will Vietnam Join the WTO on Pro-Development Terms?* (October 2004) 2-3 <http://www.oxfam.de/files/20041101_extortionatthegatevietnam_248kb.pdf>.

³² WTO 2005 News Items on 20 September 2005, *Working Party Examines First Revision of Membership Report* <http://www.wto.org/english/news_e/news05_e/vietnam_15sep05_e.htm>.

³³ WTO 2003 News Items on 12 May 2003, *'Quantum jump' Needed if Vietnam is to Join in Two Years* <http://www.wto.org/english/news_e/news03_e/vietnam_member_nego_12may03_e.htm>.

Vietnam faced similar pressures on the protection of intellectual property rights under TRIPs. In taking models of intellectual property laws from some of the most developed countries based on policies for advanced economies, TRIPs already contains a very high and sophisticated level of intellectual property protection. Yet when Vietnam signed a bilateral trade agreement with the United States in 2000, in the post-TRIPs period, the United States insisted that the local level of the protection of intellectual property rights was higher than that required by TRIPs.

Other countries which have signed free trade agreements with the United States³⁴ attained ‘TRIPs-plus’ provisions for data exclusivity which are at a higher level of protection than TRIPs’ requirements for undisclosed information.³⁵ Like them, Vietnam was subject to such TRIPs-plus ‘data exclusivity’ strategies³⁶ which can prevent the production of generic drugs with lower prices. They also include provisions for copyright protection embodying the right to authorize or prohibit the importation of copies of the works,³⁷ which can prevent parallel imports of cheaper legitimate copyright products. In some cases, the term of copyright required is up to 75 or 100 years,³⁸ instead of the general 50-year period of copyright protection. This prolongs the time before which literary or artistic works will belong to the public domain permitting their free use, benefiting wider public interests.

In respect of such TRIPs-plus provisions, Vietnam was asked to make clear to other members how they would be applied to them. In response, Vietnam committed to observe WTO norms upon its accession when the circumstance required that they be applied, particularly to comply with the principle of most-favoured-nation treatment within the

³⁴ The United States has free trade agreements in force with 20 countries, including Australia, Chile, Singapore, Bahrain, Canada, and Mexico: Office of the United States Trade Representative, *Free Trade Agreements* <<http://www.ustr.gov/trade-agreements/free-trade-agreements>> (last visited 18 August 2014).

³⁵ United Nations Development Program, *Thailand National Technical Consultation on Free Trade Agreements and Intellectual Property Rights: Implications for Access to Medicines* (8 December 2005) 11-3 <<http://www.th.undp.org/content/dam/thailand/docs/UNDPTRIPS.pdf>>.

³⁶ *United States-Vietnam Bilateral Trade Agreement* art 9(5)-(6) ch II: This is further discussed in Chapter 6 on other TRIPs categories of protection in Vietnam.

³⁷ *United States-Vietnam Bilateral Trade Agreement* art 4(2)(A) ch II: This is more considered in Chapter 4 on copyright and related rights in Vietnam under TRIPs flexibilities.

³⁸ *United States-Vietnam Bilateral Trade Agreement* art 4(4) ch II.

meaning of Article I of the GATT 1994 with respect to customs duties and charges relating to importation and exportation.³⁹ In addition, it committed to fully comply with TRIPs from the date of its accession to the WTO without applying for any transitional period.⁴⁰

Vietnam was also required to attend multilateral negotiations demanded in the accession process. These were conducted by the Working Party under its terms of reference:

to examine the application of the Government of Vietnam to accede to the World Trade Organization under Article XII and to submit to the General Council recommendations which may include a draft Protocol of Accession.⁴¹

These included the examination of the acceding country's commitments to carry out WTO rules and disciplines upon its accession and the transitional periods required for making any legislative or structural changes when this may be necessary for implementing those commitments.⁴² In respect of this, the multilateral negotiations were generally connected with Vietnamese legal programs to reform the local legislative framework bringing it into consistency with the requirements of WTO's binding agreements.⁴³ Vietnam made the first legislative action plan for implementing the WTO Agreements, including TRIPs, in 2003 revising it five times before taking membership in 2007.⁴⁴

This is reflected in the legislative agenda of the National Assembly of Vietnam in 2005. In that year alone the National Assembly enacted 29 legal statutes, mainly to facilitate the WTO membership process. This contributed to the view that Vietnam was one of the 12 nations in the world which had conducted the most comprehensive legal reforms to gain

³⁹ *Accession of Vietnam: Report of the Working Party on the Accession of Vietnam*, WTO Doc WT/ACC/VNM/48 (27 October 2006) 130-1.

⁴⁰ *Ibid.*, 118.

⁴¹ *Accession of Vietnam: Working Party on Accession of Vietnam – Membership and Terms of Reference*, WTO Doc WT/ACC/VNM/1 (11 April 1995).

⁴² Ministry of Trade of Vietnam, above n 27.

⁴³ *Ibid.*

⁴⁴ *Accession of Vietnam: Legislation Action Plan to Implement WTO Agreements*, WTO Docs WT/ACC/VNM/31 (4 November 2003); WT/ACC/VNM/31/Rev.1 (26 April 2004); WT/ACC/VNM/31/Rev.2 (13 October 2004); WT/ACC/VNM/31/Rev.3 (3 April 2005); WT/ACC/VNM/31/Rev.4 (8 March 2006); and, WT/ACC/VNM/31/Rev.5 (14 July 2006).

admission to the WTO.⁴⁵ In respect of the adoption of the 2005 Intellectual Property Law, the questions and replies over Vietnam's intellectual property regime were significant.

1.4 Intellectual Property Questions and Replies Communications

The questions and replies documentation around Vietnam's intellectual property regime⁴⁶ shows the greatest number of questions on any topic. They related to the first legislation for implementing TRIPs in Vietnam and also to the 1995 Civil Code's intellectual property provisions and other relevant regulations for their implementation.⁴⁷ The local regime's lack of conformity with TRIPs attracted considerable attention. After each time the local legal texts were amended to be more consistent with TRIPs, often even more questions were asked.⁴⁸

Many questions were asked again and again.⁴⁹ Ignoring several trivial questions such as those made from mistaking information,⁵⁰ relatively irrelevance to TRIPs' contents,⁵¹ or

⁴⁵ WTO 2006 News Items on 27 March 2006, *Vietnam's Talks Now 'Well into Final Stages'* <http://www.wto.org/english/news_e/news06_e/acc_vietnam_27march06_e.htm>.

⁴⁶ *Accession of Vietnam: Questions and Replies to the Memorandum on the Foreign Trade Regime*, WTO Docs WT/ACC/VNM/2) Addendum - WT/ACC/VNM/3/Add.2 (20 August 1998).

⁴⁷ Relating to intellectual property the above-mentioned document contained 44 questions which may be compared with the latest document (WTO Doc WT/ACC/VNM/46 dated 28 September 2006) of nearly one year after Vietnam approved in 2005 the Civil Code and the Intellectual Property Law for completing its TRIPs standards to have seven questions.

⁴⁸ This is especially found in Vietnam's second period of 1999-2004, among its three periods of implementing TRIPs discussed in Section 3 below. For example, WTO Doc WT/ACC/VNM/6 (20 April 1999) to have 78 questions and WTO Doc WT/ACC/VNM/23 (6 March 2003) to contain 66 questions all in correspondence with such legal texts as created for covering TRIPs' other subject matters which were absent in the locality from the first period of 1995-1998. This can be compared, for instance, with WTO Docs WT/ACC/VNM/7 (16 July 1999), WT/ACC/VNM/9 (26 June 2000), WT/ACC/VNM/29 (30 October 2003), and WT/ACC/VNM/32 (28 April 2004) to have respectively 5, 15, 34, and 11 questions only.

⁴⁹ See below nn 58-59.

⁵⁰ See WTO Docs WT/ACC/VNM/3/Add.2 (20 August 1998) Questions 365, 368-369 and WT/ACC/VNM/9 (26 June 2000) Question 210 with mistaken information relating to trademark protection and registration by charitable organizations; WT/ACC/VNM/23 (6 March 2003) Question 141 on 'need for copyright' with the meaning of a denial for copyright protection; and WT/ACC/VNM/6 (20 April 1999) Questions 358-360, 362 relating to the validity of the 1995 Civil Code's intellectual property provisions which came into force on 1 July 1996 over the 1994 Copyright Ordinance.

⁵¹ See WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) Questions 528 about the size of the national patent office and its time of operation; 526 about annual numbers of patent applications and grants; and 536 about the numbers of patent and trademark applications and issuances in three years 1995-1997.

requests to explain the vagueness or ambiguity of language used,⁵² they can be classified into general, substantive, and procedural questions, essentially covering the protection of copyright and related rights, patents, trademarks, geographical indications, integrated circuits, and enforcement of intellectual property rights.

In respect of the first group or general questions, some were initially asked about planning for how TRIPs' standards would be applied domestically to ensure conformity with TRIPs.⁵³ Some other questions focused on what was seen as being inconsistent with TRIPs', and how this was to be dealt with.⁵⁴ The roles, structures, and functions of government agencies involving in the formulation, implementation, and enforcement of intellectual property law and policy were also questioned⁵⁵ including the lack of specific procedures for requesting investigations for alleged intellectual property violations.⁵⁶ Further, Vietnam's compliance with other TRIPs-incorporated intellectual property treaties was raised. It was asked for to show how the Paris Convention, the Berne Convention, the Rome Convention, and the IPIC Treaty had been internalized in domestic law and how it

⁵² They include 'before a right granted public examination takes place' and 'other works prescribed by law' in copyright law: Questions 495 and 506 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); 'discrete(s)' in connection with layout-designs of integrated circuits: Questions 167 of WTO Doc WT/ACC/VNM/23 (6 March 2003) and 130 of WTO Doc WT/ACC/VNM/29 (30 October 2003); and, 'scientific work' and 'press work' in relation to copyright protection: Question 145 of WTO Doc WT/ACC/VNM/23 (6 March 2003).

⁵³ See Questions 493-494 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998). It was replied by the year of 2000, confirmed later in Vietnam's Action Plan for Implementing the TRIPs Agreement: WTO Docs WT/ACC/VNM/12 (26 June 2000) and WT/ACC/VNM/21 (5 December 2001), revising in 2003 and 2004 (WTO Docs WT/ACC/VNM/21/Rev.1 of 4 November 2003 and WT/ACC/VNM/21/Rev.2 of 23 April 2004).

⁵⁴ See, eg, Questions 494 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 411 of WTO Doc WT/ACC/VNM/6 (20 April 1999): Those inconsistencies were given to fall into national treatment principle and almost all categories of intellectual property rights including copyright and related rights, trademarks, geographical indications, patents, plant varieties, layout-designs of integrated circuits, undisclosed information, and intellectual property enforcement as well. They were replied, for instance, that fees and service charges for industrial property rights had been applied for foreigners higher than for locals, that layout-designs of integrated circuits and undisclosed information had been not protected yet, and that no specific provisions on procedures and remedies against intellectual property infringements had been adopted. This was later seriously examined by the Vietnamese Government assisted by World Bank: Ministry of Science and Technology of Vietnam, *Accession to the WTO and the Intellectual Property System in Vietnam* (2003) <http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/vietIPR_hai.pdf>. (See also n 29 ch 1).

⁵⁵ See, eg, Questions 496, 497 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 414 of WTO Doc WT/ACC/VNM/6 (20 April 1999): They included the General Customs Department, the Trade Ministry's Market Control Divisions, the Interior Ministry's Economic Police, and the People's Committees.

⁵⁶ See Questions 496 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 411 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

was to adapt the law to agreements, include the Geneva Phonogram Convention, the UPOV Convention, and the two 1996 WIPO Treaties on copyright and on performance and phonograms respectively.⁵⁷

The second group or substantive law questions related to seven categories of intellectual property rights set out in TRIPs. The questions were the subject of the most extensive concern. Many were asked again and again to classify what was unclear⁵⁸ until the questioner was satisfied.⁵⁹ All inconsistencies with TRIPs were carefully questioned. This at first included the narrower scope of trademarks,⁶⁰ a less than adequate protection of geographical indications,⁶¹ ineffective protection for plant varieties,⁶² a scheme of copyright protection without provisions for computer software and compilations of data,⁶³ a patent system omitting microorganisms and micro-biological processes,⁶⁴ and the failure to

⁵⁷ See Questions 498-501, 531 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); 343, 407 of WTO Doc WT/ACC/VNM/6 (20 April 1999); and 114-117 of WTO Doc WT/ACC/VNM/29 (30 March 2003).

⁵⁸ See, eg, Question 510 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) compared with Question 367 of WTO Doc WT/ACC/VNM/6 (20 April 1999) relating to trademark protection. The same can be seen between: Questions 516 of the former and 395 of the latter in connection with protection of geographical indications; Questions 99 of WTO Doc WT/ACC/VNM/16 (6 August 2001) and 138 of WTO Doc WT/ACC/VNM/23 (6 March 2003) on fees and charges of industrial property rights; and, Questions 200 of WTO Doc WT/ACC/VNM/9 (26 June 2000) and 156 of WTO Doc WT/ACC/VNM/23 (6 March 2003) requiring an explanation of 'substantially a copy' of a protected design under Articles 796, 804 of the 1995 Civil Code and Section 34 of Government Decree 63/CP in light of TRIPs Article 26(1).

⁵⁹ The most consecutively asked question related to TRIPs Article 34 which obliges members to provide the burden of proof, in litigations over a patented process, to be shifted to the defendant(s) under Vietnam's civil procedure to put that on the plaintiff(s): See Questions 405 of WTO Doc WT/ACC/VNM/6 (20 April 1999); 205 of WTO Doc WT/ACC/VNM/9 (26 June 2000); 98 of WTO Doc WT/ACC/VNM/16 (6 August 2001); 165 of WTO Doc WT/ACC/VNM/23 (6 March 2003); 128 of WTO Doc WT/ACC/VNM/29 (30 October 2003); 153 of WTO Doc WT/ACC/VNM/33 (13 October 2004); 175 of WTO Doc WT/ACC/VNM/39 (2 September 2005); and, 194 of WTO Doc WT/ACC/VNM/44 (9 June 2006).

⁶⁰ See, eg, Questions 494, 507 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 364-393 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

⁶¹ See, eg, WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) with Questions 494, 515-516; WTO Doc WT/ACC/VNM/6 (20 April 1999) with Questions 394-395; and WTO Doc WT/ACC/VNM/23 (6 March 2003) with Questions 151-155.

⁶² See, eg, Questions 494, 529 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); 103 of WTO Doc WT/ACC/VNM/16 (6 June 2001); and, 132 of WTO Doc WT/ACC/VNM/32 (28 April 2004).

⁶³ See, eg, WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) with Questions 494, 503-504, 506; WTO Doc WT/ACC/VNM/6 (20 April 1999) with Questions 344-362; WTO Doc WT/ACC/VNM/9 (26 June 2000) with Questions 197-199; WTO Doc WT/ACC/VNM/16 (6 August 2001) with Question 100; WTO Doc WT/ACC/VNM/23 (6 March 2003) with Questions 139-145; and, WTO Doc WT/ACC/VNM/29 (30 October 2003) with Question 121.

⁶⁴ See, eg, Questions 494, 522-525 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); Questions 398, 400, 402, 404-405 of WTO Doc WT/ACC/VNM/6 (20 April 1999); Questions 203-205 of WTO Doc

protect layout-designs of integrated circuits and trade secrets.⁶⁵ All were persistently questioned until the local law was increasingly harmonized with TRIPs' requirements.⁶⁶

Vietnam's requirements for compulsory licensing and exceptions and limitations to intellectual property rights were often questioned. They were regularly and specially asked in connection with the system of granting non-voluntary licenses of patented inventions⁶⁷ and others including the compulsorily licensing of copyrightable works,⁶⁸ the grounds for refusing trademark registration,⁶⁹ and the exclusion from, or non-protectability of, patentable subject matters, and some other issues relating to industrial design protection.⁷⁰

In respect of the third group or procedural law questions only few questions of this kind was recorded in the first documentation.⁷¹ They were often included with other general or

WT/ACC/VNM/9 (26 June 2000); and, Questions 158-160, 163-165 of WTO Doc WT/ACC/VNM/23 (6 March 2003).

⁶⁵ See, eg, WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) with Questions 494, 530; WTO Doc WT/ACC/VNM/6 (20 April 1999) with Question 406; WTO Doc WT/ACC/VNM/9 (26 June 2000) with Question 206; WTO Doc WT/ACC/VNM/16 (6 August 2001) with Question 104; WTO Doc WT/ACC/VNM/23 (6 March 2003) with Questions 166-168; and, WTO Doc WT/ACC/VNM/29 (30 October 2003) with Question 130 relating to layout-designs non-protection and Questions 494, 532 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and Question 105 of WTO Doc WT/ACC/VNM/16 (6 August 2001) relating to trade secrets non-protection.

⁶⁶ In the case of fees and charges applying to the registration of industrial property rights, eg, the local theme of differing locals and foreigners in Circular 23-TC/TCT of 9 May 1997 was frequently asked for leveling it following TRIPs Article 3 until this was presented through Circular 132/2004/TT-BTC of 30 December 2004: See Questions 99 of WTO Doc WT/ACC/VNM/16 (6 August 2001); 135 of WTO Doc WT/ACC/VNM/23 (6 March 2003); 107 of WTO Doc WT/ACC/VNM/29 (30 October 2003); 132 of WTO Doc WT/ACC/VNM/32 (28 April 2004); and, 147 of WTO Doc WT/ACC/VNM/33 (13 October 2004).

⁶⁷ See Questions 521 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); 399, 403 of WTO Doc WT/ACC/VNM/6 (20 April 1999); 202 of WTO Doc WT/ACC/VNM/9 (26 June 2000); 160-162 of WTO Doc WT/ACC/VNM/23 (6 March 2003); 126, 129 of WTO Doc WT/ACC/VNM/29 (30 October 2003); 133 of WTO Doc WT/ACC/VNM/32 (28 April 2004); 151 of WTO Doc WT/ACC/VNM/33 (13 October 2004); 4 of WTO Doc WT/ACC/VNM/37 (7 April 2005); 286 of WTO Doc WT/ACC/VNM/41 (20 December 2005); and, 193 of WTO Doc WT/ACC/VNM/44 (9 June 2006).

⁶⁸ See, eg, Questions 502 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 354-356 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

⁶⁹ See, eg, Questions 509 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 382, 389 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

⁷⁰ See, eg, Questions 520 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998); 397, 401, 403 of WTO Doc WT/ACC/VNM/6 (20 April 1999); 204 of WTO Doc WT/ACC/VNM/9 (26 June 2000); and, 157-158, 164 of WTO Doc WT/ACC/VNM/23 (6 March 2003).

⁷¹ *Accession of Vietnam: Questions and Replies to the Memorandum on the Foreign Trade Regime*, above n 46.

substantive law questions without separating them from the other categories of questions.⁷² Gradually these questions came to be made focusing on individual topics⁷³ covering the requirements in TRIPs' enforcement mechanisms.⁷⁴ They could be more generally about the coverage of the TRIPs enforcement requirements in Articles 41 to 61 in general.⁷⁵ They could also be on more specific matters, for example, whether the local judicial, quasi-judicial and administrative bodies had the authority to demand the production of evidence, to order a party to desist from infringing activities, or to compensate for the damage to right holders, or to order that infringing goods be disposed outside of commercial transactions without compensation.⁷⁶

Understandably, this questioning was most intense around the time of the creation of the 2005 Intellectual Property Law. By this time Vietnam's enforcement of intellectual property rights under TRIPs' standards could be seriously reviewed by outsiders.⁷⁷ Vietnam was requested to make available a final version of the intellectual property law, which it planned to promulgate in November 2005.⁷⁸ Articles 249 and 255 of the draft law were the subject of questions to clarify aspects of them including the circumstances under which an infringement of intellectual property was to constitute a crime and the information required

⁷² There were not many enforcement laws or regulations presented in the 1996 Memorandum of the Foreign Trade Regime of Vietnam as the base for those questions. This was later reaffirmed that in Vietnam 'there are no special provisions on procedures and remedies against infringement of intellectual property rights': Questions 494 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 411 of WTO Doc WT/ACC/VNM/6 (20 April 1999). Then such questions were mentioned only about some aspects of copyright enforcement processes and remedies and trademark violation penalties: Questions 505, 514 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998).

⁷³ See individual topics with those questions made relating to intellectual property enforcement, eg, from Questions 412-416 of WTO Doc WT/ACC/VNM/6 (20 April 1999); 106 of WTO Doc WT/ACC/VNM/16 (6 August 2001); 172-192 of WTO Doc WT/ACC/VNM/23 (6 March 2003); 133 -137 of WTO Doc WT/ACC/VNM/29 (30 October 2003); 291-306 of WTO Doc WT/ACC/VNM/41 (20 December 2005); and, 75-77 of WTO Doc WT/ACC/VNM/46 (28 September 2006).

⁷⁴ See, eg, Questions 363 (about judicial authorities to hear and review infringement actions), 393 (about administrative and criminal sanctions), and 408-411 (about measures to control abuse of intellectual property rights) of WTO Doc WT/ACC/VNM/6 (20 April 1999); and, 107 (about adequate enforcement mechanisms and sanctions) of WTO Doc WT/ACC/VNM/29 (30 October 2003).

⁷⁵ See, eg, Question 412 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

⁷⁶ See, eg, Questions 412-413 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

⁷⁷ This was affirmed through, eg, Question 146 of WTO Doc WT/ACC/VNM/33 (13 October 2004). See also Questions 128 of WTO Doc WT/ACC/VNM/38 (26 July 2005); 173 of WTO Doc WT/ACC/VNM/39 (2 September 2005); and, 288 of WTO Doc WT/ACC/VNM/41 (20 December 2005).

⁷⁸ See Question 291 of WTO Doc WT/ACC/VNM/41 (20 December 2005).

to be submitted in applications to suspend customs procedures to clarify whether they complied with Articles 61 and 51 of TRIPs.⁷⁹ When the Intellectual Property Law had been made, a full and definite analysis of Vietnam's TRIPs compliance with enforcement was suggested, including procedural obligations which had been left for it to conform with later by implementing sub-laws, including decrees and circulars.⁸⁰ Vietnam was required to provide a schedule of how it was enforcing the newly-created Intellectual Property Law through civil, criminal, administrative, and border measures.⁸¹

1.5 Concluding Membership

Vietnam's accession process was said to be 'in sight' when it eventually completed the last bilateral negotiating sessions with the United States and Mexico in May 2006.⁸² This coincided with the near-completion of a multilateral report, prepared by the Working Party, which included Vietnam's commitments to make its laws and regulations conform to the WTO's binding agreements.⁸³ The multilateral report was completed a few months later. The Working Party was sufficiently satisfied that the issues raised by members had been resolved to state that it 'reached the conclusion that Vietnam be invited to accede to the Marrakesh Agreement Establishing the WTO under the provisions of Article XII'.⁸⁴

Subsequent to such conclusion and invitation, the other processes to officially become a WTO member are in the control of the acceding country. Vietnam needed to approve the WTO accession protocol to complete its accession, or membership, by 30 June 2007.⁸⁵

⁷⁹ See Question 292 of WTO Doc WT/ACC/VNM/41 (20 December 2005).

⁸⁰ See Question 176 of WTO Doc WT/ACC/VNM/44 (9 June 2006).

⁸¹ See Question 177 of WTO Doc WT/ACC/VNM/44 (9 June 2006).

⁸² WTO 2006 News Items on 19 July 2006, *Bilaterals Done, Multilateral Nearly, Vietnam's Membership now in Sight* <http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm>.

⁸³ Ibid.

⁸⁴ *Accession of Vietnam: Report of the Working Party on the Accession of Vietnam*, WTO Doc WT/ACC/VNM/48 (27 October 2006) 131.

⁸⁵ Ibid, 197.

Following a resolution by the National Assembly,⁸⁶ Vietnam became the WTO's 150th member on 11 January 2007, 30 days after it formerly accepted the accession protocol.⁸⁷

2. The TRIPs Agreement: Structure and Main Contents

Along with GATT 1994 and GATS, TRIPs is often posited as one of the main pillars⁸⁸ in 'the family of the WTO agreements'.⁸⁹ In respect of its special role relating to the protection and enforcement of intellectual property rights, it is popularly placed in a paramount position compared with any other intellectual property treaties or conventions.⁹⁰

Apart from its introductory statement or preamble, TRIPs is structured in seven parts. This discussion, following the thesis' main themes, concentrates on the Agreement's first three parts⁹¹ rather than the last four parts.⁹²

⁸⁶ Resolution 71/2006/QH11 of 29 November 2006 of the National Assembly of Vietnam on the Ratification of the WTO Accession Protocol under the WTO Agreement.

⁸⁷ *Accession of Vietnam: Report of the Working Party on the Accession of Vietnam*, above n 84.

⁸⁸ See, eg, Will Martin and Alan L Winters, 'The Uruguay Round – A Milestone for Developing Countries' (1-29), Carlos A P Braga, 'Trade-Related Intellectual Property Issues: the Uruguay Round Agreement and its Economic Implication' (341-79) in Will Martin and Alan L Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1996); Maurice Schiff and Alan L Winters, *Regional Integration and Development* (Oxford University Press, 2003) 258.

⁸⁹ Bhagirath L Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes* (Zed Books, 1998) 2: The WTO agreement is structured with four annexes. Annex 1 contains Annex 1A–Multilateral Agreements on Trade in Goods; Annex 1B–General Agreement on Trade in Services (GATS); and, Annex 1C–Trade-Related Aspects of Intellectual Property Rights (TRIPs) in which Annex 1A contains 13 agreements: GATT 1994 (Other Duties and Charges; State Trading Enterprises; Balance-of-payment; Regional Trade Agreements; Waivers of Obligations; Concession Withdrawal; and, Marrakesh Protocol to the GATT 1994); Agriculture; Sanitary and Phytosanitary Measures; Textiles and Clothing; Technical Barriers to Trade; Trade-Related Investment Measures; Anti-dumping; Customs Valuation; Preshipment Inspection; Rules of Origin; Import Licensing; Subsidies and Countervailing Measures; and, Safeguards. Annexes 2 and 3 mention only one from each: Dispute Settlement Understanding and Trade Policy Review Mechanism respectively. Annex 4 - Plurilateral Trade Agreements comprises: Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and, International Bovine Meat Agreement. Because of that the WTO can be counted as having more than 20, 22, or even 28 agreements.

⁹⁰ See, eg, Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books, 2000); Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (Sweet & Maxwell, 1998); Duncan Matthews, *Globalizing intellectual property rights: The TRIPs Agreement* (Routledge, 2002); Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003).

⁹¹ Respectively Part I General Provisions and Basic Principles; Part II Standards Concerning the Availability, Scope and Use of Intellectual Property Rights; and, Part III Enforcement of Intellectual Property Rights.

2.1 Preamble

In the very beginning, TRIPs reflects certain flexibilities through eight paragraphs of its introductory statement or preamble.⁹³ This is useful not only with the general interpretation issues but also specifically with the issue of gaps in the law, discussed in Chapter 2. Under ‘GATT law’, the preamble can be used by WTO panels if there is any uncertainty or divergent interpretations over the wording of a provision.⁹⁴

In this preamble, TRIPs recognizes the major public policy objectives for intellectual property protection, including developmental and technological objectives.⁹⁵ These should be given special consideration within the context of developing and least-developed members, including Vietnam, when their national intellectual property laws are built or relevant subject matters may be interpreted, for example. TRIPs also contains in its preamble one paragraph directly highlighting the special needs of the least-developed country members in respect of ‘maximum flexibility’ in their domestic implementation of relevant laws and regulations ‘in order to enable them to create a sound and viable technological base’.⁹⁶

In practice, the statement in TRIPs preamble that it takes into account ‘the need to promote effective and adequate protection of intellectual property rights’⁹⁷ was used in interpreting TRIPs Article 70(8)(a) in *The United States v India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*.⁹⁸ This dispute related to patent protection for drugs and agro-chemical products in India over the ‘mailbox applications’ for patent protection. The United States alleged that the Indian legislation was absent a means for the filing of

⁹² Respectively Part IV Acquisition and Maintenance of Intellectual Property Rights and Related *Inter-Partes* Procedures; Part V Dispute Prevention and Settlement; Part VI Transitional Arrangements; and, Part VII Institutional Arrangements; Final Provisions.

⁹³ The meaning of eight paragraphs in TRIPs’ preamble and history of their creation and drafting see Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2nd ed, 2003) 76-82.

⁹⁴ Gervais, *ibid*, 80.

⁹⁵ *TRIPs Agreement* preamble para 5.

⁹⁶ *TRIPs Agreement* preamble para 6.

⁹⁷ *TRIPs Agreement* preamble para 1.

⁹⁸ *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997).

patent applications for pharmaceutical and agricultural chemical products and also absent legal authority for the granting of exclusive marketing rights for these products pursuant to Article 70:8-9 of TRIPs. In dealing with this, the Appellate Body stated that:

Paragraphs (b) and (c) of Article 70:8 constitute part of the context for interpreting Article 70:8(a). Paragraphs (b) and (c) of Article 70:8 require that the ‘means’ provided by a Member under Article 70:8(a) must allow the filing of applications for patents for pharmaceutical and agricultural chemical products from 1 January 1995 and preserve the dates of filing and priority of those applications, so that the criteria for patentability may be applied as of those dates, and so that the patent protection eventually granted is dated back to the filing date. In this respect, we agree with the Panel that,

... in order to prevent the loss of the novelty of an invention ... filing and priority dates need to have a sound legal basis if the provisions of Article 70:8 are to fulfil their purpose. Moreover, if available, a filing must entitle the applicant to claim priority on the basis of an earlier filing in respect of the claimed invention over applications with subsequent filing or priority dates. Without legal sound filing and priority dates, the mechanism to be established on the basis of Article 70:8 will be rendered inoperational.

On this, the Panel is clearly correct. The Panel’s interpretation here is consistent also with the object and purpose of the *TRIPs Agreement*. The Agreement takes into account, *inter alia*, “the need to promote effective and adequate protection of intellectual property rights”.⁹⁹

Another paragraph of TRIPs preamble which confirms that intellectual property rights are private rights¹⁰⁰ has its influence on the corresponding legislation in Vietnam. The 1995 Civil Code includes, for the first time, provisions on intellectual property rights in Part VI – Intellectual Property Rights and Technology Transfer.¹⁰¹ This is an indirect affirmation of these rights as civil rights, also for the first time, because of their inclusion in the Civil Code. This has had a particular significance in applying criminal sanctions to intellectual

⁹⁹ Appellate Body Report, *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997) [56]-[57] (the emphasis is original).

¹⁰⁰ *TRIPs Agreement* preamble para 4.

¹⁰¹ *Civil Code 1995* arts 745-825.

property violations in Vietnam as criminal liability for infringing copyright or industrial property is applied, in some cases, at the request of the right holders rather than the state.¹⁰²

2.2 General Provisions

Similar to the preamble, there are flexibilities to be found in the general provisions of TRIPs. WTO members are free in expanding their laws on intellectual property to limit them to the minimum standards in TRIPs.¹⁰³ They are also free to determine the appropriate method of implementing TRIPs' provisions in their own legal systems and practices.¹⁰⁴ In general, the fulfilment of each member's obligation of implementing TRIPs' requirements depends on the constitutional law of each member country.¹⁰⁵ In particular, members may choose different methods to ratify treaties or to recognize the provisions in treaties, which have been developed and agreed under public international law, so that they can transform, execute, or incorporate those treaty provisions into their national laws.¹⁰⁶

Such freedom to determine the appropriate method for implementing TRIPs provisions fits with its introductory statement of taking into account 'differences in national legal systems' concerning provisions for enforcement of intellectual property¹⁰⁷ under which flexibility may be widened. For example, a member may prefer to establish a system of specialized intellectual property courts while another member may not. As discussed in Chapter 7 on enforcement of intellectual property in Vietnam under TRIPs, in the Vietnamese legal system powers to determine disputes and give remedies found in the judicial system of common law states are often to be found in Vietnam's administrative processes.

¹⁰² See *Criminal Procedure Code 2003* art 105(1) in correspondence with *Criminal Code 1999* arts 171a & 171 and *Joint Circular 01/2008* point 3.

¹⁰³ *TRIPs Agreement* art 1(1) the second sentence.

¹⁰⁴ *TRIPs Agreement* art 1(1) the third sentence.

¹⁰⁵ Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff Publishers, 2009) 78.

¹⁰⁶ BA Boczek (2005), A Cassese (2005), JH Currie (2001), M Dixon (2007), MD Evans (2006), citing in Stoll, Busche and Arend, *ibid*. This is more discussed in Sub-section 4.2 *Which Implementation Method?*

¹⁰⁷ *TRIPs Agreement* preamble para 2(c).

These particular provisions of TRIPs Article 1:1 were taken into account by the WTO Panels in *The United States v India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*¹⁰⁸ and in *The United States v Canada – Patent Term*.¹⁰⁹

In the former case, in finding India was obligated, by TRIPs Article 70:8(a), to stipulate:

a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates.¹¹⁰

the Appellate Body did ask ‘what constitutes such a sound legal basis in Indian law?’ In respect of this question, it observed that:

To answer this question, we must recall first an important general rule in the TRIPs Agreement. Article 1:1 of the TRIPs Agreement states, in pertinent part:

... Members shall be free to determine the appropriate method of implementing TRIPs provisions within their own legal system and practice.

Members, therefore, are free to determine how best to meet their obligations under the TRIPs Agreement within the context of their own legal system. And, as a Member, India is “free to determine the appropriate method of implementing” its obligations under the TRIPs Agreement within the context of its own legal system.¹¹¹

There are limits to this flexibility. In the latter case, Canada argued that in implementing TRIPs its old term of patent protection of 17 years, counted from the granting date, could be retained based on the freedom in TRIPs Article 1:1, that members are free ‘to determine the appropriate method of implementing the provisions of the Agreement within their own

¹⁰⁸ *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997).

¹⁰⁹ *Canada – Term of Patent Protection*, WTO Doc WT/DS170/R (5 May 2000).

¹¹⁰ Appellate Body Report, *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997) [58].

¹¹¹ *Ibid*, [59].

legal system and practice’.¹¹² In dismissing this argument, the Panel observed the relationship between TRIPs’ requirements being concurrently implemented. It pointed out that TRIPs Article 1:1 gave members the liberty to determine the appropriate method of implementing the two specific requirements, under TRIPs Article 33, for at least a 20-year term of patent protection, and Article 62:2, for avoiding ‘unwarranted curtailment of the period of protection’, and that Article 1:1 could not be read to ignore these other requirements concerning the length of the protection.¹¹³

Further flexibility for members in TRIPs’ general provisions can be found in Articles 6, 7, and 8. For example, TRIPs’ objectives and principles expressed in Articles 7 and 8 are potentially modified in the Doha Declaration. This Declaration, noted in Chapter 2, recognizes that TRIPs can be interpreted in a manner supportive of the right of WTO members to protect public health and promote access to medicines for all, as well as to fully use the flexibility within the relevant provisions of TRIPs for such purpose.¹¹⁴

2.3 Categories of Intellectual Property Rights

In comparison with other intellectual property treaties or conventions, TRIPs applies the widest scope to the forms which intellectual property rights take, covering seven categories of intellectual property rights.¹¹⁵ The protection given by the Agreement integrates into it a significant number of these international agreements.¹¹⁶ This makes TRIPs ‘plus-regime’, if the same construction as the terms ‘WTO-plus’ or ‘TRIPs-plus’ in the context of burdens

¹¹² Panel Report, *Canada – Term of Patent Protection*, WTO Doc WT/DS170/R (5 May 2000) [6.93].

¹¹³ Ibid, [6.94]-[6.95].

¹¹⁴ *Doha Declaration* para 4. This is further discussed in Chapter 5 on patents and plant varieties in Vietnam under TRIPs flexibilities.

¹¹⁵ They are copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits, and undisclosed information.

¹¹⁶ They consist of the Paris Convention (1967), the Berne Convention (1971), the Rome Convention, and the Washington or IPIC Treaty.

placed on new members were to be followed. Aside from some recently concluded,¹¹⁷ by mid 2007 there were 15 significant international agreements on intellectual property.¹¹⁸

(a) Copyright and Related Rights (Arts. 9-14)

Copyright and related rights are the first category of intellectual property rights protected under TRIPs Part II – Standards Concerning the Availability, Scope and Use of Intellectual Property Rights. The protection specified is directly connected with the Berne and Rome

¹¹⁷ These include Beijing Treaty on Audiovisual Performances (2012) and Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013).

¹¹⁸ They are as follows with, respectively, the time of signing and coming into force, and the number of contracting states:

- Paris Convention for the Protection of Industrial Property (1883-1884:171);
- Berne Convention for the Protection of Literary and Artistic Works (1886-1887:163);
- Madrid Agreement Concerning the International Registration of Marks (1891:57) and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989-1995:72);
- Hague Agreement Concerning the International Deposit of Industrial Designs (1925-1928:46);
- Universal Copyright Convention (1952-1955:99);
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957-1961:80);
- International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention) (1961-1964:86);
- International Convention for the Protection of New Varieties of Plants (UPOV Convention) (1961-1968:63);
- Patent Cooperation Treaty (1970-1978:137);
- International Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971-1973:76);
- Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974-1979:30);
- Treaty on Intellectual Property in Respect of Integrated Circuits (signed 26 May 1989 in Washington);
- Trademark Law Treaty (1994-1996:38);
- WIPO Copyright Treaty (WCT) (1996-03/2002:62); and
- WIPO Performances and Phonograms Treaty (WPPT) (1996-05/2002:60).

These treaties - except for the Universal Copyright Convention, the UPOV Convention, and the Rome Convention administered respectively by the United Nations Educational, Scientific, and Cultural Organization (UNESCO); the UPOV Union; and, jointly by WIPO, UNESCO, and ILO (the United Nations Labour Organization) - are managed by WIPO. A 'mutually supportive relationship' between WTO and WIPO is expressed in paragraph 6 of TRIPs Preamble as it incorporates much of the four other WIPO treaties. All are taken from websites of WIPO, United Nations, and UPOV Union <www.wipo.int>; <www.un.org>; <www.upov.int> (visited 25 January and 9 March 2007) and Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (Oxford University Press, 2006). The information about the coming into force of the UPOV Convention is based on an email from Mr. Rolf Jördens of 27 January 2007.

Conventions. In particular, members are obliged to comply with Articles 1 through 21 of the former¹¹⁹ while they can rely on the latter to provide for conditions, limitations, exceptions, and reservations in terms of the rights for performers, producers of phonograms, and broadcasting organizations specified in TRIPs provisions.¹²⁰

Because of its later creation, TRIPs fills some gaps which emerged in the Berne and Rome Conventions through their implementation or produced by technological change.¹²¹ The texts of TRIPs and the two Conventions create discretion allowing members leeways in creating national legal regimes and, which potentially, permit them to create further flexibilities in their own national laws. Significantly, members may provide exceptions to the reproduction right under Article 9:1 of the Berne Convention or exceptions from, and limitations on, copyright under Article 13 of TRIPs. Other flexibilities are seen in the possible interpretation of each criterion for an exemption in these two Articles.¹²²

(b) Trademarks, Geographical Indications, Industrial Designs, Patents (Arts. 15-34)

Along with several other subject matters, including utility solutions or petty patents, trade names, and the repression of unfair competition, the protection of trademarks, geographical indications, industrial designs, and patents as intellectual property in TRIPs reflects much of the Paris Convention on industrial property. The title of the Convention, *The Paris Convention for the Protection of Industrial Property*, reflects this.

Alongside the rights already provided for by the Paris Convention such as the priority right applying to some categories of industrial property,¹²³ TRIPs widens the protection for

¹¹⁹ *TRIPs Agreement* art 9(1).

¹²⁰ *TRIPs Agreement* art 14(6) the first sentence.

¹²¹ For example, TRIPs Article 9(2) makes clear that the protection of copyright applies only to the expression of ideas, procedures, methods of operation, or mathematical concepts, and not to ideas, procedures, methods of operation, or mathematical concepts themselves or Article 10 requires computer programs and compilations of data to be treated as literary works under the Berne Convention.

¹²² This is discussed in Chapter 4 on copyright and related rights in Vietnam under TRIPs' flexibilities.

¹²³ In particular this is provided for subsequent applications for a patent, a utility model, an industrial design, or a trademark under conditions set out in Article 4 of the Paris Convention.

trademarks, geographical indications, industrial designs, and patents. This is done by indicating the protectable subject matters or the scope of the protection, listing the rights conferred on the right holders, specifying conditions for exceptions or compulsory licences, etc. Flexibilities can be found in these provisions.¹²⁴

(c) Layout-Designs (Arts. 35-38)

In practice, the protection of layout designs attracts little interest amongst most members.¹²⁵ Among other reasons, not many firms have enough human and financial resources to invest in this field of technological creation.¹²⁶ Prior to TRIPs, the potential model for protection in international law was set out in the IPICT Treaty. The Treaty has not come into force since its 1989 creation mainly due to the refusal of the United States and Japan, the world's two leading creators and producers of semiconductor and other microchip products, to agree to the provisions for granting non-voluntary licences¹²⁷ and because of the eight-year period of protection which was shorter than the 10-years in their relevant laws.¹²⁸ By incorporating some provisions of the Treaty, TRIPs effectively brings part of it into force.¹²⁹ Both TRIPs and the Treaty contain provisions leaving WTO members some choice on the subject matter.¹³⁰

¹²⁴ For example, under TRIPs Article 27 members have discretion to regulate, in detail, the three criteria for patent protection of inventions: the novelty, the non-obviousness, and the industrial applicability, as well as to stipulate that immoral patents are excluded from the scope of patent protection: This is discussed in Chapter 5 on patents and plant varieties in Vietnam under TRIPs' flexibilities.

¹²⁵ Carlos M Correa, 'Layout Designs of Integrated Circuits' in Carlos M Correa and Abdulqawi A Yusuf (eds), *Intellectual Property and International Trade: The TRIPs Agreement* (Kluwer Law International, 2008) 259-69.

¹²⁶ Ibid.

¹²⁷ Đỗ Khắc Chiến, 'Bảo hộ thiết kế bố trí mạch tích hợp bán dẫn' [Protection of Layout Designs of Integrated Circuits] Intellectual Property Teaching Documents for Training Programs, Institute of Justice (August 2000 and June 2002).

¹²⁸ Michael Blakeney, 'Unit 5 Integrated Circuits' (October 2007) EC-ASEAN Intellectual Property Rights Cooperation Programme (ECAP II) <www.ecapproject.com> (visited 24 July 2008); Michael Fuerch, 'Dreadful Policing: Are the Semiconductor Industry Giants Content with Yesterday's International Protection for Integrated Circuits?' (2009) 16(2) *Richmond Journal of Law and Technology* 1, 5-6.

¹²⁹ In particular, TRIPs Article 35 requires members to make their national laws on integrated circuits accord with Articles 2 to 7, except for Article 6(3) permitting the grant of compulsory licensing of layout designs, and Articles 12 and 16(3), of the IPICT Treaty.

¹³⁰ For example, the IPICT Treaty's Article 4, picked up by TRIPs, allows members to decide protection of layout-designs by either a special law or within laws on copyright, patent, and so on, or a sui generis system.

(d) Undisclosed Information (Art. 39)

In its contents TRIPs brings some of sensitive information on private or business interests, trade secrets, often protected in the domestic law of WTO members, into its protection scope. Section 7 of Part II of the Agreement is entitled ‘Protection of Undisclosed Information’ but contains solely Article 39. To the extent that such title suggests the scope of the protection might include personal confidential information, this goes beyond TRIPs, which is intended to cover only ‘trade-related aspects of intellectual property rights’.

This Article 39 also indicates that such suggestion is not the case. Relying on provisions against unfair competition under Article 10*bis* of the Paris Convention, members are required first to protect secret information with commercial practice and of commercial value. Personal or governmental confidentiality may not fall within this. Subsequently, members are obliged to protect data submitted to the governments or government agencies for marketing approvals of pharmaceutical or agro-chemical products. The protection term for this data is not specified that members may self-decide it under such freedom.¹³¹

2.4 Enforcement of Intellectual Property Rights (Arts. 41-61)

Because of its characteristics of physical intangibility and tangible value produced by its commercial use, the protection of intellectual property rights is more difficult than rights in tangible or visible property.¹³² The same thing is seen in the enforcement of intellectual property rights, especially in an international system.¹³³ This is made more difficult by the rapid development of advanced technologies which may, in many cases, facilitate the

They may fix one among the protection terms under TRIPs Article 38, either no less than 10 years counted from the date of filing a registration application or 15 years counted from the creation of the layout design, for example. This is discussed further in Chapter 6 on other TRIPs categories of protection in Vietnam.

¹³¹ This is further discussed in Chapter 6 on other TRIPs categories of protection in Vietnam.

¹³² Nigel Eastaway (et al), *Intellectual Property Law and Taxation* (Sweet & Maxwell, 2008) 3-4.

¹³³ Gervais, above n 93, 3.

illegal use of the intellectual property embedded in products.¹³⁴ To deal with these difficulties, the TRIPs Agreement requires all possible strategies to be used in the legal enforcement of the protections for intellectual property. Not only must civil and criminal judicial procedures be deployed but also the administrative procedures of the members including border measures, or customs activities, for preventing the transportation of goods bearing counterfeit trademarks or representing pirated copyright across national boundaries.

The requirements in respect of enforcement are wide-ranging across the judicial and administrative systems of members. They extend from general obligations to particular requirements. In respect of the harmonization of its standards with national legal systems, TRIPs preamble refers to the ‘effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems’.¹³⁵ This is partly re-stated later that members’ obligation to enforce intellectual property neither requires them creating a separate system for intellectual property, nor affects their capacity giving effect to their laws.¹³⁶ Rather, TRIPs’ intellectual property enforcement is to be in accordance with members’ own systems of legal enforcement.¹³⁷ In respect of procedural law, such statements make it very clear that members can enforce intellectual property rights using their own legal processes and procedures.

The obligations required by TRIPs of Vietnam can be now found in Vietnamese intellectual property law. These local provisions are outlined in Section 3 below.

3. Internalizing TRIPs Provisions in Vietnam

Some cultural, social, and economic characteristics of Vietnamese tradition, discussed in Chapter 2, can be given as the reasons for a general lack of familiarity with, or experience

¹³⁴ Christopher Arup, *The World Trade Organization Knowledge Agreements* (Cambridge University Press, 2nd ed, 2008) 445-8, 500.

¹³⁵ *TRIPs Agreement* preamble para 2(c).

¹³⁶ *TRIPs Agreement* art 41(5).

¹³⁷ *Ibid.*

of, intellectual property in Vietnam. In traditional Vietnamese society with a typical watered-rice agricultural economy,¹³⁸ these include a desire to stay quietly at home, respect for communal life, cooperation in dealing with the effects of bad weather and a poor climate, and limited social esteem for both commerce and business people.¹³⁹ This led to a society which did not value commercialization, urbanization, or industrialization.¹⁴⁰ Such values were reinforced not only by religious and ethical teachings, including Buddhism and Confucianism, but also from the almost complete absence of any legal legacy of intellectual property from the French colonization and the more recent socialist opposition to private ownership of the means of production.¹⁴¹ The consequence of this was that Vietnam did require a flexible strategy for implementing TRIPs which it had to develop.

TRIPs' implementation from a developing country's perspective brings both benefits and costs. On the one hand, intellectual property is viewed as

‘an asset generated by creative action ... to garner its returns through commercial exploitation. It is the ability to appropriate these returns that provides the necessary incentive for further creative activity, a big factor in an economy's commercial and cultural growth.’¹⁴²

This benefit is mainly expected to encourage technology transfer from transnational corporations as their technology will be adequately protected, which will increase research and development, and which will diffuse more technological development information.¹⁴³ On the other hand, strengthening intellectual property protection may essentially increase

¹³⁸ For details see Subsection 2.1 *Favouring Community Life and Cooperation* in Chapter 2.

¹³⁹ See Subsection 2.2 *Non-Development of Commerce, Urbanization, and Industrialization* in Chapter 2 for more in detail.

¹⁴⁰ Ibid.

¹⁴¹ For details see Subsections 2.3 *Religious and Political Factors* and 2.4 *Legal Legacy* in Chapter 2.

¹⁴² Keith Markus (June 1989), citing in Malcolm D Rowat, ‘An Assessment of Intellectual Property Protection in LDCs from Both a Legal and Economic Perspective - Case Studies of Mexico, Chile and Argentina’ (1993) 21(2) *Denver Journal of International Law and Policy* 401, 408-9. See also Keith Markus, *Intellectual Property Rights in the Global Economy* (Peterson Institute for International Economics, 2000) 11-2, 236 regarding economic and other costs from making stronger intellectual property protection <<http://bookstore.piie.com/book-store/99.html>>.

¹⁴³ C Primo Braga, ‘The Developing Country Case For or Against Intellectual Property Protection’ in *Strengthening Protection of Intellectual Property in Developing Countries* (World Bank, 1990) (69-87) citing in Malcolm D Rowat, *ibid*, 413-4.

royalty payments in licensing contracts, displace local ‘on-patent products’ because of the assumption that the foreign holders of intellectual property will obtain most of the extra demand, and foster anti-competitive effects through the exercise of market power which may, among other things, reduce output and raise prices.¹⁴⁴

In practice, the implementation of TRIPs in Vietnam was a costly and time-consuming process¹⁴⁵ as it has been in most other developing countries.¹⁴⁶ This includes the direct costs of adapting legal and administrative frameworks and enforcement infrastructures to meet the Agreement’s requirements and the indirect costs associated with more goods and services being protected by intellectual property rights, resulting in higher prices charged by the right holders for accessing or using them.¹⁴⁷ A 2001 World Bank study¹⁴⁸ revealed that ‘poor countries will have to pay abroad an additional \$20 billion as a result of TRIPs implementation’.¹⁴⁹

Three periods of legal and administrative reform in TRIPs’ implementation in Vietnam, which complement the three external stages of its accession to the WTO previously noted, can be seen: the warming-up, covering other TRIPs subject matters, and full-completion.

3.1 The Warming-up Period 1995-1998

The warming-up period in implementing TRIPs extended from 1995 to 1998. This period saw the passing of the 1995 Civil Code, including specific provisions for intellectual property, and government and ministerial regulations for the implementation of both the Civil Code and its intellectual property provisions. When compared with the standards

¹⁴⁴ Braga, *ibid*, 412-3.

¹⁴⁵ The implementation of TRIPs in Vietnam is officially stated to carry out Vietnam’s aims of quickly integrating into the WTO and paving the way for foreign investments: *Review of Legislation – Vietnam*, WTO Doc IP/Q/VNM/1, IP/Q2/VNM/1, IP/Q3/VNM/1, IP/Q4/VNM/1 (7 September 2010) [1].

¹⁴⁶ Travis J Lybbert, ‘On Assessing the Cost of TRIPs Implementation’ (2002) 1(3) *World Trade Review* 309, 310.

¹⁴⁷ Lybbert, *ibid*.

¹⁴⁸ *Launching “Development Round” Could Help Poor Countries Facing Global Downturn: While New Short-Term Forecast Is Gloomy, Trade Could Spur Medium-Term Growth*.

¹⁴⁹ Lybbert, *above n* 146.

required by TRIPs, these provisions contained inconsistencies representing impediments to full membership, which need to be addressed in the next period from 1999 to 2004.

(a) The 1995 Civil Code

Following the application for WTO accession on 4 January 1995, the Vietnamese National Assembly enacted the Civil Code on 28 October 1995, which, for the first time, contained provisions creating and recognizing intellectual property rights. These provisions were drafted in consultation with standards from international treaties including TRIPs.¹⁵⁰ The Agreement was implemented almost simultaneously with Vietnam's approach to the WTO for membership. The drafting of the Code had commenced a long time before the WTO's creation but its 1995 enactment proved timely in the context of Vietnam's intention to join the WTO. By that time increasing significance was given to legal experts and the need to embody 'rule of law' concepts, legal transparency, and doctrinal certainty in drafting such laws.¹⁵¹ The power of some ministries, including Science and Technology Ministry, and concepts such as state economic development were not as significant as they had been.¹⁵²

A state committee for drafting a Civil Code consisting of representatives of the Ministry of Justice, the Supreme People's Court, the Supreme People's Procuracy, the Central Fatherland Front, and the representatives of other state agencies and organizations was established in 1980.¹⁵³ The conflicts between the primary principles of a Civil Code, the recognition of private rights, and the principles of a centrally-planned economy with the recognition of public or collective rights made the drafting progressed very slowly.¹⁵⁴ This changed with the introduction of Doi Moi 1986 but the first draft of the Code was still not

¹⁵⁰ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, WTO Doc WT/ACC/VNM/12 (26 June 2000) 2.

¹⁵¹ John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 144-7.

¹⁵² Gillespie, *ibid.*

¹⁵³ Justice Ministry Democracy and Law Review, *Số chuyên đề về Bộ luật Dân sự của nước Cộng hòa xã hội chủ nghĩa Việt Nam* [Special Issue on the Civil Code of the Socialist Republic of Vietnam] (November 1995) 211-42, 213-4.

¹⁵⁴ *Ibid.*, 214. See also Gillespie, above n 151.

completed until 1991.¹⁵⁵ The fourteenth draft was officially approved as the Civil Code by the Ninth National Assembly in 1995. The Code was drafted after a review of relevant laws in France, Germany, Thailand, Japan, China, Canada, the Russian Federation, and Poland.¹⁵⁶ Previous legislation made under Doi Moi including the Technology Transfer Ordinance 1988, the Industrial Property Ordinance 1989, the Inheritance Ordinance 1990, the Civil Contract Ordinance 1991, and the Copyright Ordinance 1994 was retained by incorporating them into the Code.¹⁵⁷ The result is clearly a codification though it has been argued there is no formal process for codification in Vietnamese law.¹⁵⁸

The 1995 Civil Code intellectual property provisions imported some international standards of the protection into Vietnamese law¹⁵⁹ partly resulted from the comparative work done on laws in other national legal systems. The Code provided for five categories of intellectual property rights comprising copyright¹⁶⁰ (containing related rights),¹⁶¹ inventions, utility solutions, industrial designs, trademarks, and appellations of origin of goods. These are divided into two broader fields of copyright and industrial property rights.

In respect of copyright, the Code provides for the protection of various kinds of authors' creation as largely depicted in the Berne Convention and TRIPs including written works, lectures and speeches, theatrical works and other forms of artistic performance, cinematographic and video works, radio broadcasting and television broadcasting works, journalistic works, musical works, architectural works, photographic works, computer software, and so on.¹⁶² The rights of authors and other copyright holders are divided into three types: those who are the authors and who are simultaneously the owners of works

¹⁵⁵ Justice Ministry Democracy and Law Review, above n 153.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ New York University School of Law, 'Update Vietnam Legal Research' (May/June 2008) by Anh Luu <www.nyulawglobal.org> (visited 3 November 2008).

¹⁵⁹ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, above n 150.

¹⁶⁰ Literally translated as 'authors' rights'.

¹⁶¹ Related rights are literally protected in the Code (Articles 773-779) under the title 'The Rights and Obligations of Performers and Organizations Producing Audio or Video Tapes and Disks, and Radio and Television Broadcasting Organizations'.

¹⁶² *Civil Code 1995* art 747(1).

have the widest rights which are equivalent of the entire rights of the other two rights holders; those who are authors not concurrently owners of the works; and, those who are owners not simultaneously authors of the works.¹⁶³ The authors and other copyright holders have both personal and property rights.

In respect of industrial property rights, the definition of, or the three criteria for granting patent for invention which is defined as a technical solution under the Code are mostly extracted from TRIPs. These criteria are: (i) new compared to the technical level of the world; (ii) creative in character; and, (iii) capable of being applied in economic and social fields.¹⁶⁴ In comparison with inventions, only the same two criteria (i) and (iii) are applied, orderly re-arranged as (i) and (ii) respectively, to the grant of patents for utility solutions.¹⁶⁵ The owners of inventions, utility solutions, industrial designs, and trademarks are entitled to: (i) have the exclusive right to use the protected subject matter of industrial property;¹⁶⁶ (ii) transfer the right to use the protected subject matter to another person;¹⁶⁷ and, (iii) request the authorized state body to compel any person who has violated their ownership rights to cease the violation and compensate for any damage.¹⁶⁸ The person who is entitled to use an appellation of origin of goods is given the right to use the appellation for his or her products¹⁶⁹ and request the authorized state body to compel any person who unlawfully uses the appellation to cease such unlawful use and to compensate for any damage.¹⁷⁰

These Civil Code provisions are subject to guidance, directed to both judicial and administrative organs, by many governmental and ministerial regulations in accordance with the practices of Vietnam's socialist legality.

¹⁶³ See *Civil Code 1995* arts 751-753.

¹⁶⁴ *Civil Code 1995* art 782.

¹⁶⁵ *Civil Code 1995* art 783.

¹⁶⁶ *Civil Code 1995* art 796(1)(a).

¹⁶⁷ *Civil Code 1995* art 796(1)(b).

¹⁶⁸ *Civil Code 1995* art 796(1)(c).

¹⁶⁹ *Civil Code 1995* art 797(1)(a).

¹⁷⁰ *Civil Code 1995* art 797(1)(b).

(b) The 1995 Civil Code Implementation Regulations

Vietnamese legal codes and laws, approved by the National Assembly, and ordinances, enacted by its Standing Committee are generally subject to guidance for the implementation by sub-laws or subordinate laws, regulations and sub-regulations, including largely government decrees and ministerial circulars. The 1995 Civil Code is no exception. Guidance made for the implementation of its intellectual property provisions include:

- Decree 63/CP of 24 October 1996 on Industrial Property (Decree 63/CP);
- Decree 76/CP of 29 November 1996 on Copyright (Decree 76/CP);
- Circular 3055/TT-SHCN of 31 December 1996 of the Ministry of Science, Technology and Environment guiding Decree 63/CP (Circular 3055);
- Finance Ministry Circular 23-TC/TCT of 9 May 1997 on Industrial Property Fees and Charges (Circular 23-TC/TCT); and
- Finance Ministry Circular 166/1998/TT-TC of 19 December 1998 on Copyright Registration Fees (Circular 166/TT-TC).

The non-compliance of the 1995 Civil Code intellectual property provisions and of these regulations with TRIPs' requirements is discussed below.

(c) Legislative Impediments

Representing the unfamiliarity of Vietnamese policy and law makers with intellectual property protection, Vietnam's relevant legislation in the warming-up period is almost inconsistent with TRIPs. The Ministry of Science and Technology of Vietnam in 2002 concluded that it was '*inadequate and ineffective*' and '*far from in compliance with the TRIPs Agreement*'.¹⁷¹

¹⁷¹ Ministry of Science and Technology of Vietnam, *Accession to the WTO and the Intellectual Property System in Vietnam* (2003) 13 (the emphasis is original)
<http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/vietIPR_hai.pdf>.

In respect of copyright and related rights, the local law was stated to have, among other shortcomings, no detailed regulations for the protection of computer programs, no provisions for the protection of compilations of data, and no provisions for the period for the length of a term of the protection for related rights of performers, producers of phonograms, and broadcasting organizations.¹⁷²

In respect of industrial property rights, the scope of trademark protection was narrower than that provided in TRIPs.¹⁷³ The provision on the right to use the protected trademark of a trademark owner in the 1995 Civil Code, for example, did not cover the exclusive right,¹⁷⁴ required by TRIPs Article 16:1, to prevent:

all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.¹⁷⁵

Continuously, the Code was found having almost no provisions for well-known marks required by TRIPs Article 16.¹⁷⁶ It restricted the scope of geographical indication protection to only cover appellations of origin, not all geographical indications that symbols of a country or locality from which the goods originated could be protected.¹⁷⁷ It lacked detailed provisions for patenting microorganisms including examination and deposit procedures.¹⁷⁸

¹⁷² *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, above n 150, 3. See also Question 494 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998).

¹⁷³ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, *ibid*, 4. See also Question 494, *ibid*.

¹⁷⁴ See *Civil Code 1995* art 796(1); *Decree 63/CP* arts 34(c) & 53(1).

¹⁷⁵ *TRIPs Agreement* art 16(1) the first sentence.

¹⁷⁶ See above n 173: There is no mention of protection of well-known marks in the 1995 Civil Code, only very little of that set out in Article 6(1) of Decree 63/CP under which some signs can be registered or excluded from trademark registration. These provisions did not cover Article 16(2)-(3) of TRIPs requirements that members comply with Article 6bis of the Paris Convention protecting well-known marks, applying to both goods and services, against their unauthorized registration or use.

¹⁷⁷ See *Civil Code 1995* art 786 and *Decree 63/CP* art 7 in comparison with *TRIPs Agreement* art 22.

¹⁷⁸ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, above n 150, 5. See also Question 494, above n 172.

It was absent protection for layout designs and undisclosed information.¹⁷⁹ One the other regulation was found to contain differential treatment of locals and foreigners in terms of fees and charges for registration of industrial property.¹⁸⁰

In respect of the enforcement of intellectual property rights, it was not just ‘cumbersome’ but its ‘administrative nature’, ‘decentralized authority’, ‘overlapping functions’ and lack of ‘cooperative power’ between local enforcement agencies were already recognized as problems.¹⁸¹ It was also found to be almost completely inconsistent with TRIPs’ requirements.¹⁸² The 1990 Customs Ordinance contained no provisions to prevent goods infringing intellectual property from crossing Vietnam’s customs barriers. The 1995 Ordinance on Handling Administrative Violations had no provisions relevant to violations of copyright or industrial property. Except for the 1989 Ordinance on Procedures for the Settlement of Civil Cases, there was no other procedural legislation for civil injunctions or remedies in hearing disputes over intellectual property specified under TRIPs enforcement requirements. The 1985 Criminal Code was criticized from providing death penalty for serious counterfeiting trademarks.¹⁸³

¹⁷⁹ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, *ibid*, 7-8. See also Question 494, *ibid*.

¹⁸⁰ Under Circular 23/TT-TCT the patent application filing fee was VND 150,000 (about US\$15) for locals but US\$40 for foreigners.

¹⁸¹ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, above n 150, 11-2.

¹⁸² See Questions 494 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998) and 411 of WTO Doc WT/ACC/VNM/6 (20 April 1999).

¹⁸³ See Question 211 of WTO Doc WT/ACC/VNM/9 (26 June 2000). In particular, Article 167 of the 1985 Criminal Code reads:

1. Any person who has involved in the producing of, or the trading in, counterfeit goods shall be sentenced to imprisonment from one to seven years.
2. Any person who has committed the crime shall be sentenced to imprisonment from five to fifteen years in the following cases:
 - a) Counterfeit goods are foodstuffs, medicines, prophylactics, construction materials, fertilizers, pesticides;
 - b) Having committed it organizationally or professionally;
 - c) Having committed it by taking advantage of the position, the power or under the name of State authorities, social organizations;
 - d) Counterfeit goods are in great quantity, great result in unlawful profits;
 - e) Having repeated the crime seriously.
3. The crime which has been committed with special seriousness shall be sentenced to imprisonment from 12 to 20 years, life imprisonment or death.

It has been argued that the inadequate protection of intellectual property resulted from the lack of experience and the unfamiliarity with it of the Vietnamese society as a whole, say, government officials, the business community, the judiciary, and the public.¹⁸⁴ All shortcomings need be made up for the TRIPs implementation. It continued with the second stage of this implementation beginning in 1999.

3.2 The Period of Covering Other TRIPs Subject Matters 1999-2004

The second period of implementing TRIPs in Vietnam dealt with the shortcomings in Vietnamese law in two areas, the scope of the protection of intellectual property and the enforcement of intellectual property rights.

(a) Covering the Scope of Intellectual Property Protection

After the first phase revealed significant lack of compliance with TRIPs, Vietnam set a target of full-conformity with the Agreement by the year 2000.¹⁸⁵ This was the deadline, provided by TRIPs Article 65 on transitional arrangements for those members, which were developing countries or those in transition, to comply with TRIPs requirements.¹⁸⁶ The target was not met. It took Vietnam from 1999 to 2004 to cover most of the shortcomings.

The 1995 Civil Code remained important at this stage in Vietnam's transition. It confirmed the protection of literary and artistic works other than those already provided for and of other industrial property subject matters as well.¹⁸⁷ This was confirmed that other sub-laws

¹⁸⁴ Đặng T H Thủy, 'The Protection of Well-Known Marks in Vietnam' in Christopher Heath and Kung Chung-Liu (eds), *The Protection of Well-Known Marks in Asia* (Kluwer Law International, 2000) 135, 146. See also Gillespie, above n 151.

¹⁸⁵ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, above n 150, 2. See also, eg, Questions 493-494 of WTO Doc WT/ACC/VNM/2 (20 August 1998).

¹⁸⁶ Ministry of Science and Technology of Vietnam, above n 171, 12.

¹⁸⁷ *Civil Code 1995* arts 747(1)(p) & 780.

on copyright particularly and on intellectual property generally could be made without the necessity of modifying or amending the Code.¹⁸⁸

As such, Decree 54/2000/NĐ-CP, made on 3 October 2000, provided for the protection of business secrets, geographical indications, trade names, and rules against unfair competition relating to industrial property. Decrees 13/2001/NĐ-CP and 42/2003/NĐ-CP, dated respectively 20 April 2001 and 2 May 2003, provided for the protection of new plant varieties and layout designs. Decree 01/NĐ-CP/2001, adopted on 1 January 2001, primarily added provisions for well-known marks to Decree 63/1996. The Ordinance on Libraries was passed by the Standing Committee of the National Assembly on 28 December 2000.

In addition, the Finance Ministry's Circular 132/2004/TT-BTC replaced the 1997 Circular 23 applying the same fees and charges of industrial property to locals and foreigners.¹⁸⁹

(b) Provisions for Intellectual Property Enforcement

Changes to the provisions for enforcement of intellectual property rights were made by a series of decrees and ordinances. Decree 12/1999/NĐ-CP, adopted on 6 March 1999, dealt with administrative violations of industrial property rights. Decree 31/2001/NĐ-CP, dated 26 June 2001 covering administrative violations in the cultural and information sector, including copyright in literary and artistic works. This was further enhanced where the 1995 Ordinance on Handling Administrative Violations was substituted with the Ordinance on the Settlement of Administrative Violations, adopted 2 July 2002. Moreover, Joint Circular 01/2001/TANDTC-VKSNDTC-BVHTT, made on 5 December 2001, gave guidance on civil procedures for hearing disputes over copyright.¹⁹⁰ The procedural law for

¹⁸⁸ See Question 506 of WTO Doc WT/ACC/VNM/2 (20 August 1998).

¹⁸⁹ Circular 132/2004/TT-BTC, dated 30 December 2004, was modified and supplemented two years later by Circular 115/2006/TT-BTC of 19 December 2006 until a new one, Circular 22/2009/TT-BTC, was adopted on 4 February 2009.

¹⁹⁰ The principal legislation was the Industrial Property Ordinance of 28 January 1989 and the Ordinance on Copyright of 2 December 1994. Courts at the provincial level were authorized to hear disputes over industrial property and copyright, according to Article 29 of the former and Articles 44-45 of the latter. In accordance

civil cases, under the 1989 Ordinance on the Procedures for the Settlement of Civil Cases, was replaced by the Civil Procedure Code of 15 June 2004.

Meanwhile, substantive and procedural provisions for the protection of intellectual property at the borders appeared in the Customs Law on 29 June 2001. The 1985 Criminal Code was substituted by the Criminal Code of 21 December 1999. It contained Articles 131 and 171 setting intellectual property infringements and criminal punishment required by TRIPs.

Vietnam made many legal reforms in a short period. But some of its laws still remained inconsistent with TRIPs' requirements. For example, the local law had no provision meeting TRIPs Article 34 requiring the burden of proof to be placed on defendants in certain situation with process patents.¹⁹¹ As the burden of proof in Vietnamese law lies with the plaintiff, rather than the defendant,¹⁹² the absence of that is understandable. Such inconsistency was the main reason that Vietnam's action plan for the implementation of TRIPs was revised several times¹⁹³ before it concluded with the Intellectual Property Law promulgating in 2005. Vietnam was asked to implement TRIPs by the time of its accession to the WTO,¹⁹⁴ no longer by the end of 2000 as it had previously intended.¹⁹⁵

with Article 33 of the Industrial Property Ordinance, providing that 'The Supreme People's Court shall guide the hearing of disputes over the protection of industrial property rights', the Supreme People's Court enacted Circular 03/NCPL on 22 July 1989 giving guidance on hearing disputes over industrial property rights.

¹⁹¹ Before the enactment of the 2005 Intellectual Property Law to have contained in it Article 203(4) as the implementation of requirements of TRIPs Article 34, Vietnam had been, especially within the second period of 1999-2004 of its implementation of TRIPs, consecutively asked for this matter: See above n 59.

¹⁹² This was affirmed by Vietnam in the course of conducting those questions-replies communications, see, eg, respectively Questions 405, 205, and 165 of WTO Docs WT/ACC/VNM/6 (20 April 1999); WT/ACC/VNM/9 (26 June 2000); and, WT/ACC/VNM/23 (6 March 2003): It is also a feature shared between Vietnam and China whose burden of proof is, under Chinese rules of evidence, mainly on the plaintiff: Shilin Wei, 'Proving Network Copyright and E-Commerce Claims in Chinese Courts' '[2008] (Summer)' 37 *International Law News* 14-16.

¹⁹³ *Accession of Vietnam: Action Plan for the Implementation of the TRIPs Agreement*, WTO Docs WT/ACC/VNM/21 (5 December 2001); WT/ACC/VNM/21/Rev.1 (4 November 2003); and, WT/ACC/VNM/21/Rev.2 (23 April 2004).

¹⁹⁴ See Question 97 of WTO Doc WT/ACC/VNM/16 (6 August 2001).

¹⁹⁵ See above n 185.

3.3 The Full Completion of TRIPs Requirements 2005 -

In 2005 Vietnam saw the amendment of the 1995 Civil Code and the enactment of the Intellectual Property Law. There are a number of government decrees and ministerial circulars guiding the implementation of both.

(a) Enacting the Intellectual Property Law and Amending the Civil Code

Vietnamese policy and law makers were challenged in creating and adopting the Intellectual Property Law. Many problems had to be overcome. These included the translation of TRIPs provisions from English into Vietnamese dealing with the ambiguities of both languages, the lack of experience and expertise amongst policy advisers and legislative drafters, and the lawmakers' lack of knowledge of business and intellectual property produced by Vietnam's cultural background and its economic situation as both a developing and a transitional economy.

In November 2004 the Ministry of Science and Technology accepted responsibility for drafting the Intellectual Property Law in cooperation with the Ministry of Culture and Information (Culture, Sports, and Tourism Ministry currently) and the Ministry of Agriculture and Rural Development.¹⁹⁶ The number of unofficial drafts of the law ran into the hundreds.¹⁹⁷ The work was done mainly by the officials of the National Office of Intellectual Property who consulted corresponding laws of other countries.¹⁹⁸ They received advice from officials in highly-industrialized countries including the United States, Switzerland, and Japan, and from international organizations including WTO, WHO, ECAP, and Oxfam before the final draft was approved on 29 November 2005.¹⁹⁹

¹⁹⁶ Copyright Office of Vietnam, 'Quá trình soạn thảo Luật Sở hữu trí tuệ' [About Vietnam's Draft Law on Intellectual Property] <www.cov.gov.vn> (visited 4 August 2009).

¹⁹⁷ Email communications from an official in the National Office of Intellectual Property to the author on 13 June 2007.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

The new system of intellectual property included the amendments to the 1995 Civil Code, on 14 June 2005, shortly before the adoption of the Intellectual Property Law. These two Code and Law form a complete and uniform system of intellectual property in Vietnam complying with TRIPs' standards. The report by the Working Party envisaged almost no impediment in the local intellectual property legislation to Vietnam's accession.²⁰⁰

(b) Guiding the Implementation of the Intellectual Property Law and the New Civil Code

Vietnam was committed to fully comply with the whole TRIPs provisions from the date of its accession to the WTO (11 January 2007) without any transitional period.²⁰¹ Significant decrees, ordinances, regulations, directives, and circulars were issued. To fully implement the new system of intellectual property, they were made shortly either before Vietnam's formal accession to the WTO or after its adoption of the 2005 Civil Code and the 2005 Intellectual Property Law. This reflects both the need for the generalized principles found in Vietnamese legislation subject to further guidance and the specific role of government agencies in directing the implementation of legislation.²⁰²

In the second part of 2006, or before Vietnam's official accession to the WTO, a series of decrees were made by the Government (which, with only one exception, were all in September) putting the finishing touches to the new legislation scheme.²⁰³ Also in September 2006, the Ministry of Agriculture and Rural Development and the Ministry of

²⁰⁰ *Accession of Vietnam: Report of the Working Party on the Accession of Vietnam*, above n 39, 95-118.

²⁰¹ *Ibid*, 118.

²⁰² Gillespie, above n 151, 206-7.

²⁰³ They include:

- Decree 56/2006/NĐ-CP on Sanctioning Administrative Violations in Culture and Information Sector (6 June 2006);
- Decree 100/2006/NĐ-CP on Copyright (21 September 2006);
- Decree 103/2006/NĐ-CP on Industrial Property (22 September 2006);
- Decree 104/2006/NĐ-CP on Plant Varieties (22 September 2006);
- Decree 105/2006/NĐ-CP on the Protection of Intellectual Property Rights and the State Management of Intellectual Property (22 September 2006); and
- Decree 106/2006/NĐ-CP on Sanctioning Administrative Violations in the Field of Industrial Property (22 September 2006).

Health adopted decisions relating to the confidentiality of tested data of agro-chemical products and data submitted for the approval of marketing pharmaceutical products.²⁰⁴

Not surprisingly, there has been further subsequent fine tuning of this flood of legislation as well as guiding to its implementation.²⁰⁵ Intellectual property, once virtually unknown to policy and law makers and administrative officials, has become a regular subject matter dealt with by many state and government organs involving in creating these sub-laws and regulations and in giving guidance on their implementation.²⁰⁶ These, along with the

²⁰⁴ These are respectively Decision 69/2006/QĐ-BNN of 13 September 2006 and Decision 30/2006/QĐ-BYT of 30 September 2006.

²⁰⁵ They include:

- The 2002 Ordinance on Handling Administrative Violations was twice amended, respectively on 8 March 2007 and on 2 April 2008, by the Standing Committee of the National Assembly;
- Government Decree 172/2007/NĐ-CP of 28 November 2007 Amending and Supplementing Decree 57/2005/NĐ-CP of 27 April 2005 on Sanctioning Administrative Violations in the Field of Plant Varieties;
- Prime Minister Directives No. 04/2007/CT-TTg of 22 February 2007 on Enhancing Copyright Protection of Computer Programs and No. 36/2008/CT-TTg of 31 December 2008 on Strengthening the Management and Implementation of the Protection of Copyright and Related Rights. (These two Directives relate to Vietnam's commitment to use computer software in government offices in compliance with its intellectual property laws: See Question 190 of WTO Document WT/ACC/VNM/44 (9 June 2006) and *Report of the Working Party on the Accession of Vietnam*, above n 39, 101. See also *Review of Legislation - Vietnam*, WTO Doc IP/Q/VNM/1, IP/Q2/VNM/1, IP/Q3/VNM/1, IP/Q4/VNM/1 (7 September 2010) [6]);
- Government Decree 154/2005/NĐ-CP of 15 December 2005 Detailing a Number of Articles of the Customs Law 2001, as amended in 2005, on Customs Procedures, Customs Examination and Supervision;
- Circular 01/2007/TT-BKHCN of 14 February 2007 of the Ministry of Science and Technology Guiding the Implementation of Decree 103/2006/NĐ-CP;
- Decision 42/2007/QĐ-BTC of 4 June 2007 of the Ministry of Finance Regulating the Customs Responsibilities for the Protection of Intellectual Property Rights and the Prevention of Counterfeit Goods;
- Joint Circular 01/2008/TTLT-TANDTC-VKSNDTC-BCA-BTP of 29 February 2008 Guiding Criminal Liability to Infringements of Intellectual Property Rights;
- Joint Circular 02/2008/TTLB-TANDTC-VKSNDTC-BVHTTDL-BKHCN-BTP of 3 April 2008 Guiding the Application of Some Legislative Provisions in Dealing with Disputes over Intellectual Property Rights in People's Courts;
- Finance Ministry Circular 12/2008/TT-BTC of 22 October 2008 Guiding the Receipt, Register, and Handling of Applications for Tackling Administrative Cases of Violating Intellectual Property in Market Management Offices;
- Finance Ministry Circular 22/2009/TT-BTC of 4 February 2009 on Fees and Charges for Industrial Property; and
Government Decree 47/2009/NĐ-CP of 13 May 2009 on Penalizing Administrative Violations of Copyright and Related Rights

²⁰⁶ On 19 June 2009, the Twelfth National Assembly of Vietnam in its fifth session passed the Law on the Amendment and Supplementation of a Number of Articles of the Intellectual Property Law (2005) and the

adoption of the 2005 Intellectual Property Law and the new 2005 Civil Code by the National Assembly, have changed the national legislative regime of intellectual property under the influence, or the transplantation, of western ‘rule of law’ into both local legalism and institutionalism.²⁰⁷ The TRIPs Agreement has been implemented showing a deep international integration of intellectual property protection in Vietnam.²⁰⁸ But as argued elsewhere this should not have been done without taking greater advantage of the flexibilities within TRIPs to ensure that there was a better balance between the rights and obligations under intellectual property law in a developing country.

The exploitation of TRIPs’ flexibilities in Vietnamese intellectual property legislation, including the above-mentioned instruments, is examined in the next Chapters 4, 5, 6, and 7 of this thesis. How Vietnam used the flexibilities found in TRIPs’ general provisions is below discussed.

4. Flexibilities in TRIPs General Provisions in Vietnam

As mentioned earlier, TRIPs’ flexibilities can be separated into those stemming from the general provisions and the others emanating from the standards, principles, and rules concerning the availability, scope, use, and enforcement of intellectual property rights. This section seeks to answer the question of how discretion embedded in TRIPs general provisions affects the broader protection of intellectual property, the choice of

Law on the Amendment and Supplementation of a Number of Articles of the Criminal Code (1999), including provisions on criminal liability for intellectual property infringement, both coming into force on 1 January 2010. This relates to the review by the TRIPs Council (*Review of Legislation - Vietnam*, above n 205 in relation to Prime Minister Directives 04/2007 and 36/2008, eg, [13], [18]-[19]). Thirty three of the 222 Articles of the 2005 Intellectual Property Law have been amended and supplemented (see below n 249). Some of the above-listed regulations have been replaced or revised in accordance with them as a result. They include Government Decrees 97/2010 and 88/2010 replacing respectively Decrees 106/2006 and 104/2006; and Decrees 119/2010 and 122/2010 revising respectively Decrees 105/2006 and 103/2006. They also include Finance Ministry Circular 44/2011 (replacing previous implementing regulations contrary to its detailed contents, eg, in the above-mentioned Decision 42/2007). The author was only able to access to some limited information about the amendments shortly before this thesis was submitted in August 2009 so that their relevant contents have now been introduced in the thesis.

²⁰⁷ Gillespie, above n 151, 287.

²⁰⁸ Kieu Thi Thanh, ‘The 2005 Intellectual Property Law and its 2009 Revised Version: Deep International Integration of Intellectual Property Protection in Vietnam’, *Vietnam Law & Legal Forum* (182-10/2009) 13.

implementation methods, and the joining of the other intellectual property treaties which have been used in shaping Vietnamese law.

4.1 A More Extensive Protection?

In Article 1 TRIPs acknowledges that:

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.²⁰⁹

In this acknowledgement, the Agreement recognizes the diversity of the level of economic and technological development and industrialization among WTO members, as well as other differences, for example, in their legal traditions and cultures. It is not to create a uniform protection of intellectual property but to harmonize national intellectual property protection regimes from TRIPs formulation.²¹⁰ As the provision indicates, members are given an intended freedom that they can create laws on intellectual property which give greater protection than TRIPs' minimum standards.

In practice, a 'more extensive protection' perspective was in existence before the conclusion of TRIPs in 1994. For example, the general term of copyright protection required by TRIPs is the life of the author and 50 years after his or her death but this has been increased to 70 years in European Union member states since 1993.²¹¹ The term is up to 95, or even 120, years in the United States in the case of an anonymous or a pseudonymous work or a work made for hire, determined from the year of the first publication or the creation of the work whichever expires first.²¹²

²⁰⁹ *TRIPs Agreement* art 1 the second sentence.

²¹⁰ Stoll, Busche and Arend, above n 105, 80.

²¹¹ *Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights* (1993) art 1 (WIPO-Lex).

²¹² 17 USC § 302, as amended 2003 (WIPO-Lex).

Because of the context of its origin in western legal systems, TRIPs is already largely embodied in the laws for the protection of intellectual property in the most developed or industrialized countries. Consequently, developing countries, including Vietnam, should generally avoid creating a higher or more extensive protection.

There is another issue. Under the so-called ‘TRIPs-plus’ provisions, the question is that whether a developing country with provisions for more extensive protection of intellectual property in a free trade agreement with another developed country must apply them to the nationals of other members?

As extracted above, TRIPs states that ‘Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement’. This has at least two implications. First, members are free to adopt ‘more extensive protection’ in agreements with other members.²¹³ Second, where these ‘more extensive protection’ or ‘TRIPs-plus’ provisions have been adopted, members are not obligated to implement them in their law.²¹⁴ In other words, it is not obligatory to adopt such TRIPs-plus standards.

Similarly, the nationals of other members are ensured of the same protection as citizens of one WTO member being received under their national law, under TRIPs Article 3 on national treatment, with minimum standards of intellectual property rights set out in TRIPs. Hence, whether ‘TRIPs-plus’ or ‘more extensive protection’ provisions are applied to the nationals of other members depending upon whether the principle of ‘most-favoured-nation’ treatment, obliged under TRIPs Article 4, is incorporated into a free trade agreement between the concerned parties or members.

The United States-Vietnam Bilateral Trade Agreement includes Chapter II – Intellectual Property Rights (Articles 1-18). Unlike Chapter I – Trade in Goods (Articles 1-9) and Chapter III – Trade in Services (Articles 1-11) referring to both most-favoured-nation and

²¹³ UNCTAD & ICTSD, *Resource Book on TRIPs and Development* (Cambridge University Press, 2005) 24.

²¹⁴ Ibid.

national treatment respectively in Articles 1-2 of the former and Articles 2 and 7 of the latter, Chapter II mentions only national treatment (Article 3), not ‘most-favoured-nation’ treatment.

This is the reason Vietnam indicated to some members that it would apply provisions of the Vietnam-United States Bilateral Trade Agreement, particularly in conformity with the principle of most-favoured-nation treatment within the meaning of Article I of GATT 1994 with respect to import or export customs duties and charges,²¹⁵ rather than apply TRIPs Article 4 on most-favoured-nation treatment relating to intellectual property protection.²¹⁶

Therefore, when Vietnam incorporated some ‘TRIPs-plus’ provisions from its 2000 bilateral trade agreement with the United States into the 2005 Intellectual Property Law, it was a voluntary undertaking in providing more extensive protection in accordance with ‘TRIPs-plus’ provisions, not obligation on Vietnam. The country creates the right to distribute or import originals or copies of copyright works as one of the property rights of authors.²¹⁷ It also grants the right to prevent others from using data submitted to the authorized government agency, for the approval of the marketing of pharmaceutical or agro-chemical products, for a five-year period.²¹⁸ Another example of that effect is that in Vietnamese law authors of photographic works have a term of 75 or 100 years of protection, which are three or four times more than the minimal term required by the international standards.²¹⁹

²¹⁵ *Accession of Vietnam: Report of the Working Party on the Accession of Vietnam*, above n 39, 130-1.

²¹⁶ For an analysis of the bilateral trade agreement between Vietnam and the United States with only national treatment principle embodied in its chapter on intellectual property rights see Võ Thanh Thu, Nguyễn Cương, Đoàn Thị Hồng Vân, *Hỏi Đáp Về Hiệp Định Thương Mại Việt Mỹ* [Questions and Replies on the Vietnam-United States Bilateral Trade Agreement] (Statistic Publishing House, 2001).

²¹⁷ See *Intellectual Property Law 2005* art 20(1)(d) in comparison with *United States-Vietnam Bilateral Trade Agreement* art 4(2) ch II, *TRIPs Agreement* art 9, and *Berne Convention* arts 1 to 21.

²¹⁸ See *Intellectual Property Law 2005* arts 123(1)(b) & 128 in comparison with *United States-Vietnam Bilateral Trade Agreement* art 9(5)-(6) ch II, *TRIPs Agreement* art 39, and *Berne Convention* art 10bis.

²¹⁹ See *Intellectual Property Law 2005* art 27(2)(a) in comparison with *TRIPs Agreement* art 12 and *Berne Convention* art 7(4).

4.2 Which Implementation Method?

Immediately after stating that members have the freedom to decide on more extensive protections, TRIPs Article 1 continues confirming that they are free to determine ‘the appropriate method of implementing the provisions of this Agreement within their own legal system and practice’.²²⁰ In discussing this provision, it has been suggested that members are also free to decide whether they apply TRIPs’ provisions directly or give them a ‘direct’ or ‘self-executing’ effect, depending on their legal system and practice.²²¹

It is clear that the provision reflects potential differences in implementing TRIPs between members, depending on their individual legal systems and practices. In *The United States v India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*,²²² the Appellate Body stated in its interpretation relating to TRIPs Article 1:1 that members were free to determine ‘the appropriate method of implementing the provisions of this Agreement within their own legal system and practice’ and that India was free to determine the appropriate method of implementing its obligations under TRIPs within the context of its own legal system.²²³

This indicates that it is a matter for members to decide how to implement TRIPs, which partly depends on the constitution of the member states.²²⁴ Civil law jurisdictions often regard international treaties or conventions as a source of law without further action by the legislature.²²⁵ Meanwhile, common law jurisdictions often require that an international treaty or convention be implemented in domestic law by legislation.²²⁶

²²⁰ *TRIPs Agreement* art 1 the third sentence.

²²¹ UNCTAD & ICTSD, above n 213, 25-7: Notably, even one country may apply such a ‘direct’ or ‘self-executing’ effect of the WTO/TRIPs agreement(s), it is not as such to create the WTO the role as a lawmaker of that country but self-executing international law would make it one has been recognized. The consequences of this are that the law it makes must still be enforced at the domestic level through existing legal processes.

²²² *India – Patents (US)*, WTO Doc WT/DS50/AB/R (19 December 1997).

²²³ The details are given within Sub-section 2.2 *General Provisions*.

²²⁴ Stoll, Busche and Arend, above n 105, 78.

²²⁵ For example, Article 36 of Argentina Patent Law No. 24.481 as amended by Law No. 24.572 of 1995 (WIPO-Lex & JPO) states that: ‘The rights conferred by a patent shall have no effect against... (c) any person who acquires, uses, imports or any way deals in the product patented or obtained by the patented process once

In Vietnam, the National Assembly has the authority to decide on fundamental foreign affairs, to ratify or nullify international treaties signed directly by the State President, and to ratify or nullify other international treaties signed or acceded to at the proposal of the State President.²²⁷ On 14 June 2005, the National Assembly adopted the Law on Signing, Acceding to, and Implementing International Treaties.²²⁸ The principle set out in Article 6 of the Law puts Vietnam in a situation close to that of other civil law countries. In accordance with this principle, where, on the same subject matters, exists differences between provisions of a national law and those of an international treaty to which Vietnam is a contracting party, the latter prevails.²²⁹

Vietnam reflects a mixed method in implementing TRIPs in its national law. Firstly, it both transforms and incorporates the TRIPs' requirements into its domestic legal provisions on intellectual property. This is done through the 1995 Civil Code, as amended in 2005 and in the 2005 Intellectual Property Law. Under the Vietnamese Constitution, a legal code, including the Civil Code, or a law, including the Intellectual Property Law, must be passed by the National Assembly.²³⁰ A legal code has an authority as a statement of law only lower

the said product has been lawfully placed on the market in any country; placing on the market shall be considered lawful when it conforms to Section 4 of Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights.'

²²⁶ For instance, Section 104(c) of the United States Code Title 17--Copyrights (WIPO-Lex) provides that: 'No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.' But it should be noted that to support this the United States Supreme Court in *Medellin v Texas* (2008) has held that, because of the provisions in the US Constitution, even if an international treaty constitutes an international commitment, it is not binding as domestic law unless three conditions are met: (i) the treaty itself is self-executing; (ii) the United States Congress has adopted it; and, (iii) there is no need to enact a statute implementing it: Nguyễn Thanh Tú, *Pháp luật cạnh tranh Chuyển giao công nghệ và Hiệp định TRIPs: Kinh nghiệm cho Việt Nam* [Competition Law, Technology Transfer and the TRIPs Agreement: Implications for Vietnam] (National Political Publishing House, 2010) 39-40. See also Nguyễn Thanh Tú, *Competition Law, Technology Transfer and the TRIPs Agreement: Implications for Developing Countries* (Edward Elgar, 2010).

²²⁷ *Vietnam Constitution 1992* art 84(13).

²²⁸ This Law No. 41/2005/QH 11 of 14 June 2005 substituted the Ordinance on Signing and Implementing International Treaties, dated 20 August 1998.

²²⁹ *Law on Signing, Acceding to, and Implementing International Treaties 2005* art 6.

²³⁰ See, eg, *Vietnam Constitution 1992* art 84(13); *Law on the Enactment of Laws 2008* arts 2 & 11.

than that of the Constitution itself.²³¹ It is unclear how to distinguish whether a legislative statement of the National Assembly is ‘code’ or ‘law’. A legal code often deals with many related issues and subjects, whereas a law may deal with only one subject matter, such as intellectual property or foreign investment. In actuality, a legal code often contains a very large number of articles in comparison with any other legislative statements.²³²

Secondly, implementing TRIPs in Vietnamese law possesses some aspect of ‘direct’ or ‘self-executing’ effect. According to Article 5:3 of the 2005 Intellectual Property Law where a treaty to which Vietnam is a contracting party contains provisions, which are different from the Law, the treaty provisions prevail. This principle appears, directly or indirectly, in some other provisions of the 2005 Intellectual Property Law.²³³ It has also been used in the formal guidance issued for the implementation or the application of the Law by the courts.²³⁴ This includes a number of treaties incorporated into TRIPs. Several of these treaties are discussed in Subsection 4.3 below.

4.3 Other TRIPs-Incorporated Treaties?

As noted earlier, TRIPs is in part constructed with provisions from the Paris Convention (1967), the Berne Convention (1971), the Rome Convention 1961, and the IPIC or Washington Treaty 1989. Basically, when providing protection for ‘the relevant intellectual property right’ for the nationals of other members, members are required to apply the eligibility criteria in these treaties,²³⁵ as well as to comply with Articles 1-12 and 19 of the Paris Convention,²³⁶ Articles 1-21 but not Article 6*bis* of the Berne Convention,²³⁷ and Articles 2-7 but not Article 6:3, 12, and 16:3 of the IPIC Treaty.²³⁸

²³¹ Ibid.

²³² The 1995 Civil Code with 838 Articles and the 2005 Civil Code with 777 Articles have the greatest number of articles in any legislation passed in Vietnam to date.

²³³ See *Intellectual Property Law 2005*, eg, arts 13(2), 17(1)(d), 2(b) & 3(b).

²³⁴ Joint Circular 02/2008: See Subsection 1.2 (b) *How Vietnam Has Dealt with Interpretative Problems in Respect of the WTO* in Chapter 2 on conceptualizing law’s flexibility for an analysis of the guiding for such an application of the 2005 Intellectual Property Law and Joint Circular 02/2008.

²³⁵ *TRIPs Agreement* art 1(3) the first and second sentences.

²³⁶ *TRIPs Agreement* art 2(1).

Within the process of Vietnam's accession to the WTO, Vietnam was requested by some members to subscribe to these treaties to carry out its TRIPs obligations.²³⁹ The question posed here is, whether this is obligatory under TRIPs? The answer appears to be no.

Firstly, there is no indication in TRIPs that a member is required to become a party to these four treaties. In other words, TRIPs does not contain any text indicating that a member must join them to meet its TRIPs' requirements. Secondly, only parts of the four treaties are incorporated into TRIPs obligating members to comply with these provisions, not the whole of the provisions. If a state were to become a party to a treaty generally the contracting state would be required to respect the treaty as a whole. Thirdly, deciding to join an international organization, including the WTO, must always be voluntary or an internal issue for a state. National sovereignty permits a state to make such a decision, even though it may have to overcome strict requirements to reach membership of the international organization, as in the accession to the WTO of Vietnam.

In addition, such TRIPs' requirements can be complied with by creating provisions in domestic law based on those treaties' standards without joining the treaties as a party. There are also member states which are WTO members without concurrently being a party to these treaties.²⁴⁰ This is particularly the case of the IPIC Treaty. As it has never come into force, a WTO member is unable to perform any TRIPs requirements by joining it.²⁴¹

²³⁷ *TRIPs Agreement* art 9(1).

²³⁸ *TRIPs Agreement* art 35.

²³⁹ See above n 57.

²⁴⁰ For example, the WTO membership of Singapore, Republic of Korea, and Indonesia commenced in 1 January 1995 but they only became parties to the Berne Convention after that, on 21 December 1998, 21 August 1996, and 5 September 1997 respectively: See *Understanding the WTO: The Organization: Members and Observers* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>; WIPO-Administered Treaties, *The Berne Convention for the Protection of Literary and Artistic Works: Contracting Parties* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>.

²⁴¹ Article 16(1) of the Washington Treaty provides that 'This Treaty shall enter into force, with respect to each of the first five States or Intergovernmental Organizations which have deposited their instruments of ratification, acceptance, approval or accession, three months after the date on which the fifth instrument of ratification, acceptance, approval or accession has been deposited.' At present, there have been 10 countries which are signatories to the IPIC Treaty but only three of them have ratified or acceded to it: WIPO-Administered Treaties, *Washington Treaty on Intellectual Property in Respect of Integrated Circuits: Contracting Parties* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=29>.

Vietnam has exercised its freedom to join those treaties. Except for the IPIC Treaty which is not in effect, its membership of the Paris Convention long predates its application of 4 January 1995 for acceding to the WTO.²⁴² It joined the rest of the TRIPs incorporated treaties before acceding to the WTO or shortly after becoming a member.²⁴³

There are a number of reasons for Vietnam to have become a party to these Conventions apart from wishing to have its enterprises and citizens protected at home and abroad in an equivalent manner and respecting intellectual creativity and cultural products. Other bilateral intellectual property agreements obliged it to join those conventions. This is seen, for example, in the bilateral agreements between Vietnam and the United States and between Vietnam and Switzerland.

In particular, Article 1(3) Chapter II of the United States-Vietnam Bilateral Trade Agreement²⁴⁴ and Article 2(1) and paragraph 1 of Annex 1 of the Vietnam-Switzerland Intellectual Property Agreement²⁴⁵ are of the very relevance. These two Articles in these

²⁴² Relating to the date of the Paris Convention membership of Vietnam, it is WIPO recorded as 3 August 1949 <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2>.

²⁴³ In particular, Vietnam became a member of the Berne Convention on 26 October 2004, the UPOV Convention on 24 December 2006, and the Rome Convention on 1 March 2007.

²⁴⁴ Specifically, this provision states that:

3. To provide adequate and effective protection and enforcement of intellectual property rights, each Party shall, at a minimum, give effect to this Chapter and the substantive economic provisions of:
- A. the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (Geneva Convention);
 - B. the Berne Convention for the Protection of Literary and Artistic Works, 1971 (Berne Convention);
 - C. the Paris Convention for the Protection of Industrial Property, 1967 (Paris Convention);
 - D. the International Convention for the Protection of New Varieties of Plants, 1978 (UPOV Convention (1978)), or the International Convention for the Protection of New Varieties of Plants, 1991 (UPOV Convention (1991)); and
 - E. the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974).

If a Party has not acceded to the specified text of any such Conventions on or before the date of entry into force of this Agreement, it shall promptly make every effort to accede.

²⁴⁵ In particular, these provisions specify the following international agreements for the Contracting Parties to take measures to adhere to, taking into account the progress made with regard to the WTO:

- the Paris Convention, of 20 March 1883, for the Protection of Industrial Property (Stockholm Act, 1967);
- the Patent Cooperation Treaty (PCT) of 19 June 1970;
- the Madrid Agreement, of 14 April 1891, Concerning the Registration of Marks (Stockholm, 1967);

two agreements stipulate the major treaties on intellectual property. This in brief was the reason for Vietnam to become a party to them at the same time it became a WTO member.

5. Conclusions

The application for WTO accession on 4 January 1995 became the starting point for harmonizing Vietnamese law on intellectual property with international standards set out in TRIPs and in other treaties incorporated into it. This began with the enactment of the 1995 Civil Code setting out in Part VI intellectual property provisions, and completed in 2005 with the enactment of the new Civil Code and the Intellectual Property Law. It took Vietnam two years more to give sufficient guidance to this newly-created legislation for it to officially take WTO membership on 11 January 2007.

Vietnam went through three stages in accomplishing its WTO membership. As a transitional economy and a poor developing country, each stage had challenges that the country had to overcome. Within the first ‘warming-up’ of ‘telling other WTO members about itself’ nearly two years to prepare was required for the submission of the Memorandum on Foreign Trade Regime to the Working Party in September 1996. The rest of the accession process over the next ten years saw Vietnam struggling. Both bilateral talks conducted individually with those interested members and legal reforms in making its domestic legislation comply with the WTO’s binding agreements took place in this time. Six legislative action plans for implementing WTO Agreements, including TRIPs, were required before Vietnam eventually took its WTO membership.²⁴⁶

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- the WTO Agreement, of 15 April 1994, on Trade-Related Aspects of Intellectual Property Rights;
 - the Berne Convention, of 9 September 1886, for the Protection of Literary and Artistic Works (Paris Act, 1971);
 - the International Convention, of 26 October 1961, for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention);
 - the International Convention for the Protection of New Varieties of Plants, of 2 December 1961 (UPOV Convention).

²⁴⁶ See above n 44.

In this context Vietnam made enormous efforts to implement TRIPs. This partly paralleled the activities undertaken to accede to the WTO but took longer. It emphasizes what is discussed in Chapter 2 how foreign and unfamiliar intellectual property protection was in Vietnam. Approximately 500 questions were sent to and replied by Vietnam during the three periods in implementing TRIPs.²⁴⁷ The first, 1995-1998 or ‘warming-up’, started with the adoption of the 1995 Civil Code including provisions for intellectual property. The second period, 1999-2004, saw a great number of legal enactments on intellectual property, especially government decrees, addressing shortcomings revealed in the first period. The last period, or ‘full completion’ started in 2005 with the adoption of the new Civil Code and the Intellectual Property Law. It needed more time with guidance, sub-laws or regulations, for the implementation of the newly-created legislation. In the review conducted by the TRIPs Council, there were still some inconsistencies with TRIPs²⁴⁸ so the Intellectual Property Law 2005, and the Criminal Code 1999, were both amended in 2009. A total of 33 of the 222 Articles of the Intellectual Property Law 2005 were amended²⁴⁹ with a number of the sub-laws or regulations giving guidance to its implementation replaced or revised accordingly.²⁵⁰

Creating an intellectual property regime under TRIPs has as such made a long and very arduous task to Vietnamese policy and law makers. This seems much deriving from Vietnam’s circumstances of unfamiliarity with intellectual property protection, discussed within Chapter 2, especially with TRIPs’ models from highly developed or industrialized countries, presented within Chapter 1. Vietnam further receives TRIPs-plus impositions resulting from free trade agreements with some other member states. This makes it more difficult in taking the advice to developing countries by non-governmental organizations

²⁴⁷ See above n 22 and Subsection 1.4 *Intellectual Property Questions and Replies Communications*.

²⁴⁸ *Review of Legislation: Vietnam*, WTO Doc IP/Q/VNM/1, IP/Q2/VNM/1, IP/Q3/VNM/1, IP/Q4/VNM/1 (7 September 2010). See also above nn 205-206.

²⁴⁹ In the 2005 Intellectual Property Law many provisions in Articles 3, 4, 7, 8, 14, 25, 26, 27, 30, 33, 41, 42, 87, 90, 119, 134, 154, 157, 160, 163, 165, 186, 187, 190, 194, 201, 211, 214, 218, and 220 have been amended under Article 1, apart from a few other provisions in Articles 11, 50, and 51 revised under Article 2, of the 2009 Law on the Amendment and Supplementation of a Number of Articles of the Intellectual Property Law.

²⁵⁰ See above n 206.

and scholars that they should utilize TRIPs' flexibilities as much as possible.²⁵¹ How Vietnam has exploited the flexibilities in TRIPs general provisions is discussed, and analysed, in the last section of this chapter. The next chapter, or Chapter 4, explores this particularly with protection of copyright and related rights under TRIPs in Vietnam.

²⁵¹ See, eg, South Centre, *The Implementation Game: Developing Countries, the TRIPs Agreements, and the Global Politics of Intellectual Property* (5 December 2007) <www.southcentre.org> (visited 17 April 2008); Consumers International Asia Pacific Office, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* (20 February 2006) <<http://www.consumersinternational.org/news-and-media/resource-zone/copyright-and-access-to-knowledge/>>; Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books, 2000); Brook K Baker, *Processes and Issues for Improving Access to Medicines: Willingness and Ability to Utilize TRIPs Flexibilities in Non-Producing Countries* (August 2004), DFID Health Systems Resource Centre, <http://www.iprsonline.org/resources/docs/Baker_TRIPS_Flex.pdf>; Deere Carolyn, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009).

CHAPTER 4: COPYRIGHT AND RELATED RIGHTS IN VIETNAM UNDER TRIPS' FLEXIBILITIES

Synopsis

This chapter deals with what can be subject to copyright, the bundles of economic or property and personal or moral rights conferred by copyright, the periods of protection, exceptions and limitations on what would otherwise be infringements of copyright and the protection of related or neighbouring rights.

Vietnamese legislation on copyright represents the fulfillment of its obligations under TRIPs to provide such protection. TRIPs itself incorporates obligations from the Berne and Rome Conventions. Both contain flexibilities which can be applied by members, particularly developing countries. TRIPs itself has filled some gaps in these Conventions.

Vietnam had limited law on copyright which was shaped by the socialist emphasis on the technological and cultural development and the collective interests of the Vietnamese people. Within a short period of time Vietnam has produced a comprehensive law on copyright which is harmonized with international and national laws but one which is not as well designed to meet its own national interests as it may have been.

Protectability under the Berne Convention gives some scope to national lawmakers to define what is copyrightable but the concepts are difficult to generalize and there is a tendency to resort, as the Berne Convention does, to examples and analogy. Vietnamese law also follows both TRIPs and the Berne Convention in excluding certain subject matters from protection so that, for example, it is only the representation of ideas and not the ideas themselves which are protected. Further flexibility is also possible in the context of limitations and exceptions referred to in the international law which in themselves are not free of ambiguity. Vietnam has implemented the economic or property rights originating in the Berne Convention with limited implementation of the optional moral or personal rights. It has, for example, no *droit de suite*. It has also taken up in its national law exemptions and limitations, including exemptions for related rights which are similar to those in other national laws. Significant exemptions are intended to promote education, human development and cultural life by limiting the impact of what would otherwise be copyright infringement including reproduction for personal study and the use of quotations and illustrations for teaching. It has exercised some other options under TRIPs. It provides for rental rights in both computer programs and cinematographic works but has taken the freedom offered by TRIPs to limit the rights of copyright holders in computer programs, not in cinematographic works.

As such, Vietnam seems to have chosen to use many of the flexibilities open to it. But this has been limited in some ways, including overlaps between the law and a sub-law provision relating to the fixation of a spoken work and the general reflection in its copyright law of the requirements in the Free Trade Agreement with the United States limiting parallel imports. It could have made more exploitation of the flexibilities available to it in respect of the exhaustion of distribution rights with the first sale. It has also extended the terms of some forms of copyright in circumstances where may be neither required nor desired.

At a number of points the generality of the law creates ambiguities and gaps making it difficult for courts, or lawyers, to apply in the absence of further regulation or guidance from administrative bodies or the Supreme People's Court on its implementation. These include the exclusion of particular types of works from copyright protection. While Vietnam has stated that it will avail itself of the potentially important right to use compulsory licensing under the Appendix to the Berne Convention for developing countries to publish translations or for use in education, it has not taken the required steps to implement this in its national law. If it chose to do so there is considerable choice offered by the flexibilities in the Appendix.

CHAPTER 4: COPYRIGHT AND RELATED RIGHTS IN VIETNAM UNDER TRIPS' FLEXIBILITIES

Vietnamese law, before the application to join the WTO in January 1995, had limited provisions dealing with copyright. The slow evolution of copyright is discussed in Chapter 8, in the context of determining copyright disputes in Vietnam.¹ Not surprisingly during the struggle for reunification, which ended in 1975, there was little development of copyright law. There was limited protection of the interests of authors and other creative artists who were seen as significant in that struggle, commencing with a decree made by President Ho Chi Minh in 1946.²

The centrally-planned economy, which emerged after reunification, emphasized the technological and cultural progress and the collective interests of the Vietnamese people. It saw some further recognition of the rights of authors and creators to protect the artistic integrity of their works as well as some entitlements to royalties in respect of its exploitation. This became part of a more widespread protection of intellectual property but Vietnamese law remained significantly different from that in western jurisdictions.³ As shown in the discussion of the trial of copyright cases in Chapter 8 distinctive issues of rights in creative works produced with State funds or within employment in State-owned enterprises reoccur because of the amount of creative works produced by State-owned enterprises. Many of the new provisions introduced by TRIPs will relate not to the rights of individuals or privately-owned companies but to State-owned enterprises with responsibilities to the community and the State.

Under Doi Moi after 1986, while the centrally-planned economy remained significant, a mixed market economy began to emerge and there were concerted efforts to attract foreign direct investment. The legal system, including the court system, was reformed to deal with the recognition of private economic property, including copyright when the Copyright

¹ This is discussed in Section 1. *Overview of Intellectual Property Trials in Vietnam* in Chapter 8.

² The details are given in note 11 in Chapter 8.

³ The details are given in note 17 in Chapter 8.

Ordinance was promulgated in 1994.⁴ As discussed in Chapter 3, the direction of reform of intellectual property law generally and copyright law particularly was increasingly driven by a policy of having it converge with relevant international law and consequently the national laws of other states.

Within this landscape, the State Copyright Office, the forerunner of which had been the Vietnam Copyright Protecting Firm, was established on 20 February 1987.⁵ This was several months after the adoption of Decree 142/HĐBT of the Ministers' Council, dated 14 November 1986, which was the first regulations on copyright. Initially, the Office had only four officials.⁶ With the integration of Vietnam into the WTO and the implementation of TRIPs, it has developed four divisions: the Administrative Office, the Copyright Division, the Related Rights Division, and the Information Division. It employed 25 staff members in 2014.⁷ Under the Ministry of Culture, Sports, and Tourism the Office has responsibilities for the state management and protection of copyright and related rights, including registration of these subject matters voluntarily applied for by the rights holders⁸ with over 20,000 certificates issued.⁹

Alongside this development, the Office has had success in handling over 500 petitions, claims, complaints, and denunciations relating to copyright and related rights.¹⁰ As with

⁴ The details are given in notes 23-24 in Chapter 8.

⁵ Copyright Office of Vietnam, 'Giới thiệu hoạt động (của Cục Bản quyền tác giả)' [Introductory Statement] <http://www.cov.gov.vn/cbq/index.php?option=com_content&view=article&id=54&Itemid=74>.

⁶ Ibid.

⁷ Ibid.

⁸ This is set out in Decision 41/2008/QĐ-BVHTTDL of 15 May 2008 of the Minister of Culture, Sports, and Tourism on Authorities, Functions, and Organization of the Copyright Office: Copyright Office of Vietnam, 'Tổ chức bộ máy của Cục Bản quyền tác giả' [Organizational Structure of the Copyright Office] <www.cov.gov.vn> (visited 23 June 2010 and 14 September 2011). Recently this Decision has been replaced by Decision 4036/2013/QĐ-BVHTTDL of 14 November 2013 of the Minister of Culture, Sports, and Tourism on Authorities, Functions, and Organization of the Copyright Office: Copyright Office of Vietnam, 'Chức năng nhiệm vụ (của Cục Bản quyền tác giả)' [Authorities and Functions of the Copyright Office] <http://www.cov.gov.vn/cbq/index.php?option=com_content&view=article&id=47&Itemid=71>.

⁹ Copyright Office of Vietnam, 'Giới thiệu hoạt động của Cục Bản quyền tác giả' [Introductory Statement]; 'Tổ chức bộ máy của Cục Bản quyền tác giả' [Institutional Mechanism of the Copyright Office], above n 8.

¹⁰ Ibid: The cases include the dispute over the determination of whether the lyrics of the national anthem, *Tiến Quân Ca*, mentioned in Section 2. *Vietnamese Culture and Society* in Chapter 2 on conceptualizing law's flexibility, were also authored by another person. More detail of the events leading to the conclusion that the

other government agencies protecting intellectual property and its own operation, it has coordinated with, and had support from, such international organizations and collective management societies of copyright and related rights as WIPO, CISAC (the International Confederation of Authors and Composers Societies), and IFPI (the International Federation of the Phonographic Industry).¹¹ The laws it applies in its operation are discussed below.

1. Copyrightable Subject Matter

As indicated in Chapter 3, copyright and related rights are the first category of intellectual property protected under TRIPs Part II – Standards Concerning the Availability, Scope and Use of Intellectual Property Rights.

The possibility of creative works being protected by copyright law is set forth in TRIPs Article 9:1, which picks up and applies Articles 2 and 2*bis* of the Berne Convention, and TRIPs Article 10. Also as indicated in Chapter 3, TRIPs, because of its creation after the Berne and Rome Conventions, sought to fill some gaps and problems of interpretation in these Conventions.¹²

1.1 Protectability

Article 2:1 of the Berne Convention provides a very wide definition of the literary and artistic works subject to copyright and lists a large number of examples to demonstrate this scope:

anthem was created only by Văn Cao see ‘Về ông X, người tranh chấp quyền tác giả phần lời bài *Tiến Quân Ca*’ [About Mr. X who Litigated the Lyrics of the National Anthem] (18 March 2010) <<https://cavenui.wordpress.com/2010/03/>> (visited 23 June 2010). See also Lao Động (with News from Dân Trí) Newspapers, ‘Chuyện ít biết về số phận bi tráng của Quốc ca Việt Nam’ [Few Have Known of These Woeful and Majestic Stories of the Vietnamese National Anthem] (2 September 2013) <<http://laodong.com.vn/chinh-tri/chuyen-it-biet-ve-so-phan-bi-trang-cua-quoc-ca-viet-nam-135805.bld>> (last visited 20 August 2014).

¹¹ See above n 5.

¹² See, eg, *TRIPs Agreement* art 9(2) in relation to *Berne Convention* art 2.

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

This is a non-exhaustive list of works to be protected. From its beginning ‘The expression “literary and artistic works” shall include *every production* in the literary, scientific and artistic domain, *whatever may be the mode or form of its expression, such as ...*’,¹³ especially the words ... every ... and ... whatever ..., the provision seems to suggest that all creative works may fall within its scope and become subject to copyright protection.

The phrase ‘such as’, as used in the provision, makes for ‘a non-exhaustive list’.¹⁴ However, this has its language ambiguity as the grammatical structure and the words used in the whole provision including the phrase ‘such as’ with the meaning constructed not only by words but also by the examples embodied making it capable of other and competing interpretations. This has led to limits being imposed on ‘every production’ and ‘whatever’ when the provision is implemented in national laws.

An affirmative structure runs through the provision. It begins with a declaration of what must be protected within the scope of copyright: ‘*The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain*’. It continues with another emphatic declaration on the form of such expression: ‘*whatever may be the mode or form of its expression*’. It next highlights and particularizes the previous

¹³ The emphasis is added.

¹⁴ WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (November 2003) 22-4
<http://www.wipo.int/export/sites/www/freepublications/en/copyright/891/wipo_pub_891.pdf>.

declarations by using the phrase ‘*such as*’.¹⁵ After this phrase an extensive list of examples, or instances, of such modes or forms of expression is given. Yet the list is finished with a full stop, not with phrases which may refer to a possible or potential continuity of what has been specified such as ‘and the like’ or ‘and so on’ or ‘etc’.

This list imposes some limits on the scope of the provision. It indicates that what can be protected by copyright is limited and exhaustive. The examples, or instances, which follow ‘such as’ enumerate and classify in a separate and distinctive manner. The examples are creative works themselves, not definitions of what are creative works. Their use creates further flexibility and uncertainty: to what extent can an analogy be used to include or exclude new forms of literary and artistic works from copyright protection? Different views of what an analogy requires can be taken at the level of international law in discussions and arguments between states parties to the Berne Convention and members of the WTO. As seen below, the use of analogy is imported into Vietnamese law through the use of these examples in the 2005 Intellectual Property Law.

The definition in the Berne Convention leaves considerable freedom to national legislators of member countries. These lawmakers may decide to give a wide or narrow scope to what is copyrightable subject matter. They need to provide protection to all the listed forms of creative works, but these can be widened or narrowed depending on what is defined, or determined, to fall within the scope of each form. Their copyright provisions can be constructed to be within, or to go beyond, the works listed in Article 2:1 of the Berne Convention. They can vary between member countries reflecting differences between legal, cultural, and social traditions. For example, a claim for copyright protection for a creative work which is not within the national legislative provisions may be more easily included by judicial interpretation in countries with common law traditions¹⁶ but in countries with civil law traditions it must be specifically included within the text of the legislation.¹⁷ In these

¹⁵ All emphases are added.

¹⁶ HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 77-96, 97-113, 114-50.

¹⁷ This is discussed along with ‘gaps in the law’ by Hans Kelsen, Max Knight (translator), *Pure Theory of Law* (University of California Press, 1967).

latter jurisdictions analogy can be a more important form of reasoning in including or excluding creative works afforded copyright protection.

The approach to copyrightable subject matters in countries with common law traditions is well illustrated in *Bleistein v Donald Lithographing Company*, tried by the well-known judge and proto-Realist, Oliver Wendell Holmes, at the beginning of the 20th century in the United States.¹⁸ Holmes illustrates the greater plasticity of common law methodology with the reverberations of his opinions echoing in United States' copyright case law over a century later.¹⁹

The Courier Lithographing Company, owned by six partners who were the plaintiffs, had designed and printed advertising posters for a travelling circus.²⁰ The circus company had asked the defendant, the Donaldson Lithographing Company, to print some more when it ran short of posters.²¹ The defendant had carried out this request, using the plaintiffs' designs as the models.²² The plaintiffs sought damages of one dollar for each copy made by the defendant.²³ Three poster designs created by the plaintiffs had been used by the defendant: the 'Spectacular Ballet Design', the 'Stirk Family Design' (featuring cyclists), and the 'Statuary Act Design'.²⁴ The reproductions made by the defendant were mostly identical to the originals created by the plaintiffs, only differing by their smaller size and reproduction in black and white rather than colour.²⁵ There were 23,795 copies made of the three posters using five metal electrotypes plates.²⁶

¹⁸ *Bleistein v Donald Lithographing Company*, 188 US 239 (1903).

¹⁹ Jane C Ginsburg and Rochelle Cooper Dreyfuss (eds), *Intellectual Property Stories* (Foundation Press, 2006) 77.

²⁰ *Ibid.*, 77-85.

²¹ *Ibid.*

²² *Ibid.*, 77-8.

²³ *Ibid.*

²⁴ *Ibid.*, 83-4.

²⁵ *Ibid.*

²⁶ *Ibid.*

The case is seen as significant, among other things, for ‘compliance with the technical intricacies of perfecting a copyright under the existing law’.²⁷ The decision considerably expanded what could be protected by copyright by including creative works which were not considered to be ‘art’.²⁸ The plaintiffs had no witnesses to prove or address whether their three posters were subject to copyright, and also made no other effort to show that the posters had special merits or reflected artistic talent.²⁹ They only insisted that they had rights in their three works or posters because these works or posters fell within the creative category, created by statute, of ‘print, cut, or engraving’.³⁰

In the United States Supreme Court, the two following questions were raised. Firstly, whether the trial court had acted properly in dealing with the jury question of whether the posters had sufficient value to be fit subjects for copyright.³¹ Secondly, even if copyright was available to such works whether it had been perfected, in respect of the posters, in compliance with applicable law.³² In respect of the latter question, Justice Holmes found that it could and that this was an issue of fact to be determined in the trial.³³

Justice Holmes had a well-developed understanding of the value of copyright, which he himself had shown an artistic aptitude from his earliest youth to adulthood, especially in creating prints, woodcuts, and engravings.³⁴ Also, he previously tried, but failed, to stop the unauthorized reproduction of his father’s famous book of essays, *The Autocrat of the Breakfast Table*, for the reason that the essays in the book had originally been published in a magazine, *The Atlantic*, where they had appeared without the statutorily required copyright notice.³⁵

²⁷ Ibid, 86.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid, 91.

³² Ibid.

³³ Ibid.

³⁴ Ibid, 94-5.

³⁵ Ibid.

Subsequently, he wrote on the division of opinion in the Court and on his own approach:

I fired off a decision upholding the cause of law and art and deciding that a poster for a circus representing décolletés and fat legged ballet girls could be copyrighted. Harlan, that stout old Kentuckian, not exactly an esthete, dissented for high art ...

For persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. As the one extreme, some works of genius would be sure to miss appreciation ... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public ... it would be bold to say that they have not an aesthetic and educational value – and the taste of any public is not to be treated with contempt.³⁶

The interpretative approach taken by Justice Holmes and the majority would not be formally open to judges in the Vietnamese legal system as the judges are not permitted to interpret the law, noted in Chapter 2.³⁷

Vietnamese law follows Article 2:1 of the Berne Convention in providing a list of copyrightable works. This is similar to most national copyright laws,³⁸ including that of China.³⁹ The list includes the copyright protectability added by TRIPs Article 10. Using the

³⁶ Ibid, 95-6.

³⁷ The details are given in notes 99, 129-130 in Chapter 2.

³⁸ Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2nd ed, 2003) 130.

³⁹ In particular, Article 3 of China Copyright Law 1990, as amended in 2010 (WIPO-Lex) reads:

For the purposes of this Law, the term “works” include, among other things, works of literature, art, natural sciences, social sciences, engineering technology, which are expressed in any of the following forms:

- (1) written works;
- (2) oral works;
- (3) musical, dramatic, quyi’, choreographic and acrobatic works;
- (4) works of fine art and architecture;
- (5) photographic works;
- (6) cinematographic works and works created by a process analogous to cinematography;
- (7) graphic works such as drawings of engineering designs and product designs, maps and sketches, and model works;
- (8) computer software; and
- (9) other works as provided for in laws and administrative regulations.

freedom found in the Berne Convention provisions, definitions of some copyrightable works are given. In principle, a work must fall within this definition to be protected.

In particular, the local law protects the following literary, artistic, and scientific works:

- literary and scientific works, textbooks, teaching materials, and other works which are expressed in the form of written languages or other characters;⁴⁰
- lectures, addresses, and other speeches;⁴¹
- journalistic works;⁴²
- musical works;⁴³
- dramatic works (literally theatrical works);⁴⁴
- cinematographic works and works created by a process which is analogous to cinematography;⁴⁵
- fine-art works, and applied-art works;⁴⁶
- photographic works;⁴⁷
- architectural works;⁴⁸
- sketches, plans, maps, drawings relating to topography, architecture, or scientific works;⁴⁹
- folk literary and artistic works;⁵⁰ and
- computer programs and compilations of data.⁵¹

Some of these works are further defined by subordinate regulations.⁵² It is difficult to generalize the distinguishing characteristics of those copyrightable classes in order to make

⁴⁰ *Intellectual Property Law 2005* art 14(1)(a).

⁴¹ *Intellectual Property Law 2005* art 14(1)(b).

⁴² *Intellectual Property Law 2005* art 14(1)(c).

⁴³ *Intellectual Property Law 2005* art 14(1)(d).

⁴⁴ *Intellectual Property Law 2005* art 14(1)(d).

⁴⁵ *Intellectual Property Law 2005* art 14(1)(e).

⁴⁶ *Intellectual Property Law 2005* art 14(1)(g).

⁴⁷ *Intellectual Property Law 2005* art 14(1)(h).

⁴⁸ *Intellectual Property Law 2005* art 14(1)(i).

⁴⁹ *Intellectual Property Law 2005* art 14(1)(k).

⁵⁰ *Intellectual Property Law 2005* art 14(1)(l).

⁵¹ *Intellectual Property Law 2005* art 14(1)(m).

formal definitions. Attempts to generalize may use language which is overinclusive or underinclusive with problems of vagueness and ambiguity in their application seen in the examples of ‘manufactured products’ and ‘frozen eviscerated chickens’.⁵³ A list, providing examples, of each class is often preferable.⁵⁴

1.2 Exclusions from Protection

There are other flexibilities in both TRIPs and the Berne Convention which can be exploited to increase or decrease the scope of copyrightable subject matter. They may be the true gaps, described by Hans Kelsen, resulting from traditional jurisprudence in determining a case which has no applicable general norm governing it, or the technical gaps, created when legislators fail to prescribe something which they ‘would have had to prescribe if it should be technically possible at all to apply the law.’⁵⁵

Again, developing countries, including Vietnam, are often advised by non-governmental organizations and scholars to limit what can be subject to intellectual property generally and copyright particularly and to pay specific attention to those provisions containing such flexibilities.⁵⁶ While people will be motivated to spend their time and labour on what will be protected as intellectual property, other people may freely use what is not protected or what is excluded or specified as exemptions by law. This should be especially good for developing countries where the poor might contribute to a majority of the population. In

⁵² An architectural work under Article 14(1)(i) of the 2005 Intellectual Property Law is, eg, defined by Article 17 of Decree 100/2006 as a design drawing in any form describing creative ideas about houses, constructions, or spatial planning (construction planning) which have or have not been constructed, consisting of design drawings of floor spaces, elevations, cross-sections, perspectives showing creative ideas about a house, a construction, a group of constructions, or about a spatial organization, landscape architecture for an area, an urban plan, a system of urban plans, a zone with urban functions, or a region for rural hamlets or villages.

⁵³ The details are given in note 29 in Chapter 2.

⁵⁴ For example, a definition of what might be characterized, or generalized, as a journalistic or news media work is not given by either the 2005 Intellectual Property Law or Decree 100/2006 but included, by the latter’s Article 11, with reportage, contemporary or reflective news, reports, interviews, recounts, investigative stories, commentaries, editorials, special issue articles, memoirs, and other forms of journalistic or news media works, which are published in newspapers or transmitted by radio, television, online, or through other media.

⁵⁵ Hans Kelsen, Max Knight (translator), *Pure Theory of Law* (University of California Press, 1967) 246, 249.

⁵⁶ The details are given in note 6 in Chapter 1 and note 251 in Chapter 3.

respect of this, it is regrettable that a large number of developing, including the least-developed countries with low income per capita have gone well beyond TRIPs' requirements by enacting 'TRIPs-plus' provisions.⁵⁷ Many of them have also forgone the flexibilities within TRIPs in spite of the absence of international pressure on them or domestic economic factors.⁵⁸ A surprising example is found in Cambodian and Kazakhstani laws where both national laws give explicit copyright protection to the 'title of a work'.⁵⁹

Considerable discretion is present in Articles 9-10 of TRIPs and Articles 2-2bis of the Berne Convention.

(a) Non-Protectability

TRIPs Article 9:2 provides that:

Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

This provision makes it very clear that copyright protection applies only to the literary or artistic expressions of ideas, procedures, methods of operation, and mathematical concepts and not to the ideas, procedures, methods of operation, or mathematical concepts themselves. Where this non-protectability subject matter provision is not incorporated into national law, it may prejudice the public interest in the use or the diffusion of useful knowledge or information contained in literary or artistic works. It may be difficult in some cases, such as web pages, to distinguish between an idea, non-protectable by copyright, and the expression of an idea, protected by copyright. In regard to the standardization of the law

⁵⁷ Deere Carolyn, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009) 9.

⁵⁸ Ibid.

⁵⁹ Consumers International Asia Pacific Office, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* (20 February 2006) 19-20
<<http://www.consumersinternational.org/news-and-media/resource-zone/copyright-and-access-to-knowledge/>>.

to computers and the internet in particular it has been argued that copyright law needs to strike a delicate balance between providing incentives to creators and securing the public interest in the freedom of information.⁶⁰

A similar policy underlines Article 2:8 of the Berne Convention. It states that ‘*The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information*’.⁶¹ So members can exclude such news or facts from copyright protection.

Likewise, TRIPs Article 10:2 states that the protection of the compilation of data does not extend to the data or the material compiled itself. Where this distinction is recognized in national laws, the use of such data, which may play an important role in conducting other research or study or in making other data compilations, is not subject to an exclusive right vested in the compiler of the data. This also means that copyright is not given to materials used in making a data compilation which have already fallen into the public domain.⁶²

These policies, and this distinction, are taken up in Vietnamese law. According to Article 15 of the 2005 Intellectual Property Law, the following subject matters are excluded from copyright protection:

- news of the day, characterized as mere items of press information;⁶³
- legislative, administrative, and judicial documents and their official translations;⁶⁴
- and
- processes, systems, methods of operation, definitions, concepts, and data.⁶⁵

⁶⁰ Jiarui Liu and Fang Fang, ‘The Idea/Expression Dichotomy in Cyberspace: A Comparative Study of Web Page Copyrights in the United States and in China’ (2003) 25 *European Intellectual Property Review* 504, 514.

⁶¹ The emphasis is added.

⁶² Consumers International Asia Pacific Office, above n 59, 32.

⁶³ *Intellectual Property Law 2005* art 15(1).

⁶⁴ *Intellectual Property Law 2005* art 15(2).

⁶⁵ *Intellectual Property Law 2005* art 15(3).

It is apparent that these provisions represent general principle-based exceptions. Therefore, it may be difficult for the judicial authorities to apply them in specific contexts, especially where evidence may be unclear or confusing. As Vietnamese courts, or judges, are not permitted to interpret legislative provisions, specific issues have been particularized in governmental or ministerial regulations or guidelines for judicial use.⁶⁶

The civil division of the Vietnamese courts appears to have dealt with only one case involving this issue. Mathematic formulas were ruled to be freely available for the use in writings or articles by other authors in *Đào Quang Triệu v Phạm Văn Lang*,⁶⁷ which is discussed in Chapter 8 in the case studies on the enforcement of copyright.

(b) Fixation

The Berne Convention specifies that national law may prescribe that ‘works in general or any specified categories of works shall not be protected unless they have been fixed in some material form’.⁶⁸ This, again, gives national lawmakers some freedom in defining what fixation in some ‘material form’ means.⁶⁹

Fixation was found to be necessary for some kinds of works to enable them to be identified or proven to exist.⁷⁰ Therefore, when choreographic works and entertainment in dumb shows or pantomimes were included in the list of examples of literary and artistic works of

⁶⁶ For example, Article 21 of Decree 100/2006 gives guidance on the meaning of the news of the day as mere items of press information. It means daily briefs or short news for the purpose of providing information only without any creative purpose (paragraph 1). The Decree also excludes from copyright protection documents issued by state organs, political organizations, political-social organizations, political-social-professional organizations, social organizations, social-professional organizations, economic organizations, units of the people’s armed forces, and other organizations established in accordance with law (paragraph 2). These are administrative documents within the meaning of Article 15(2) of the 2005 Intellectual Property Law reflecting the contents of Articles 2(4) and 2*bis*(1) of the Berne Convention.

⁶⁷ Case No. 07/DSST Hanoi People’s Court (27-28 March 1998).

⁶⁸ *Berne Convention* art 2(2).

⁶⁹ Consumers International Asia Pacific Office, above n 59, 25-6.

⁷⁰ WIPO, above n 14, 27-8.

the Berne Convention at the 1908 Berlin revision conference, the condition was added that their presentation must be fixed ‘in writing or otherwise’.⁷¹

The general fixation condition was reconsidered at the 1967 Stockholm revision conference. It left the issue to the discretion of national law makers.⁷² Some countries, including the United States, use it in their copyright law.⁷³ Differing from this approach none of the 11 developing nations in the Asia Pacific (Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines, and Thailand) has defined ‘material form’ with only one of them (Malaysia) provided fixation as a condition before works qualify for copyright protection.⁷⁴

Vietnamese law stipulates that copyright arises at the moment a work is created and fixed in a certain material form, regardless of its content, quality, presentation, means of fixation, language, and regardless of whether it has been published or not.⁷⁵ This retains the principle for copyright enjoyment without any formality under Article 5:2 of the Berne Convention. However, in determining copyright in respect of lectures, addresses, and other oral works as spoken works a sub-law provision requires that these works be fixed in a certain material form.⁷⁶ As there are no other laws or sub-law provisions clarifying these two overlapping legal statements, the second should be removed or otherwise widened to apply as a fixation requirement for any type of work, not just spoken works.

2. Granting Bundles of Rights

There are two categories of rights under the Berne Convention: economic or property and moral or personal rights. However, TRIPs excludes the latter from the scope of its

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Consumers International Asia Pacific Office, above nn 59 & 69.

⁷⁵ *Intellectual Property Law 2005* art 6(1).

⁷⁶ *Decree 100/2006* art 10.

obligatory implementation by stating members have neither rights nor obligations in respect of the rights conferred under Article 6*bis* of the Berne Convention.⁷⁷

Personal rights in copyright in Vietnam could originate in either its membership of the Berne Convention or in the continuity of its own legal tradition as respecting personal rights is appropriate for Vietnamese culture and society.⁷⁸ When initially adopted in 1986,⁷⁹ for example, the regulations on copyright were stated to be for the purpose of protecting the personal and material legitimate interests of the creators of literary, artistic, scientific, and technical works.⁸⁰ It provided for authors with, among other rights, the right to put their real names or pseudonyms to their creative works and the right to permit, or not permit, others to modify their works.⁸¹ These rights are kept developed later.⁸²

2.1 Property Rights

In their entirety, there are ten kinds of economic or property rights given to authors of literary and artistic works by TRIPs and the Berne Convention. They are:

- the right of translation;⁸³
- the right of reproduction;⁸⁴
- the public performance right;⁸⁵
- the broadcasting right;⁸⁶

⁷⁷ *TRIPs Agreement* art 9(1) the second sentence.

⁷⁸ This is further discussed in Chapter 7 on enforcement of intellectual property in Vietnam under TRIPs in the context of civil remedies compensating for material and non-material damages for infringing property rights and personal rights and in Chapter 8 on hearing of copyright disputes in Vietnam with judicial decisions permitting compensation for the infringement of personal rights of the authors or the owners of copyright.

⁷⁹ Decree 142/HĐBT of 14 November 1986 of the Council of Ministers on Copyright (Decree 142/HĐBT).

⁸⁰ *Decree 142/HĐBT* art 1.

⁸¹ *Decree 142/HĐBT* art 3.

⁸² See, eg, Articles 2, 10, 42 of the 1994 Copyright Ordinance; 750-753 of the 1995 Civil Code; 738, 745 of the 2005 Civil Code; and, 18-19, 29, 204-205 of the 2005 Intellectual Property Law.

⁸³ *Berne Convention* art 8.

⁸⁴ *Berne Convention* art 9.

⁸⁵ *Berne Convention* art 11.

⁸⁶ *Berne Convention* art 11*bis*.

- the public recitation right;⁸⁷
- the right of adaptation, arrangement, and other alteration;⁸⁸
- the recording right;⁸⁹
- the right of cinematography;⁹⁰
- ‘droit de suite’ or the resale right;⁹¹ and
- the rental right.⁹²

Except for the resale right, or ‘droit de suite’, all the others have been localized in Vietnam’s TRIPs implementation.⁹³ They are less-particularized than in Chinese law with both personal and property rights defined in a single Article.⁹⁴ In respect of the definitions

⁸⁷ *Berne Convention* art 11*ter*.

⁸⁸ *Berne Convention* art 12.

⁸⁹ *Berne Convention* art 13.

⁹⁰ *Berne Convention* art 14.

⁹¹ *Berne Convention* art 14*ter*.

⁹² *TRIPs Agreement* art 11.

⁹³ According to Article 20(1) of the 2005 Intellectual Property Law they comprise: the right to make derivative works; the right to display the works to the public; the right to reproduce the works; the right to distribute or import the original works or copies therefrom; the right to communicate the works to the public by wire or wireless means, electronic information networks or any other technical devices; and, the right to lease the original cinematographic works and computer programs and copies thereof.

⁹⁴ In particular, Article 10 of China’s Copyright Law 1990, as amended in 2010 (WIPO-Lex), states that copyright includes the following personal rights and property rights:

- (1) the right of publication, that is, the right to decide whether to make a work available to the public’;
- (2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author’s name mentioned in connection with, a work;
- (3) the right of revision, that is, the right to revise or authorize others to revise a work;
- (4) the right of integrity, that is, the right to protect a work against distortion and mutilation;
- (5) the right of reproduction, that is, the right to reproduce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means;
- (6) the right of distribution, that is, the right to provide the original copy or reproductions of a work to the public by selling or donating;
- (7) the right of rental, that is, the right to authorize others to use temporarily a cinematographic work or a work created by a process analogous to cinematography, or computer software, except where the software itself is not the essential object of the rental;
- (8) the right of exhibition, that is, the right to publicly display the original copy or reproduction of a work of the fine arts or of a photographic work;
- (9) the right of performance, that is, the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process;
- (10) the right of presentation, that is, the right to publicly present a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to

of the right of performance, the right of recitation, and the right of broadcasting internationally stipulated by the Berne Convention, TRIPs, and the WIPO Treaty it is argued that there are ambiguities and gaps in Chinese copyright law when compared with the definitions in international law and that it should be amended. The proposal is to introduce a new concept, ‘the right of communication to the public’ to harmonize Chinese domestic law with international standards.⁹⁵

2.2 ‘Droit de suite’

The silence of Vietnamese law on the ‘droit de suite’, or the resale right, is permissible. It is an exception to national treatment under the Berne Convention so that members are free to decide whether it should be recognized.⁹⁶

‘Droit de suite’ appeared first in French law in 1920.⁹⁷ It remains controversial. In the United States there is only one state California where droit de suite has been adopted.⁹⁸

cinematography, or other works, by projectors, slide projectors or any other technology or instrument;

(11) the right of broadcasting, that is, the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images;

(12) the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them;

(13) the right of making cinematography, that is, the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography;

(14) the right of adaptation, that is, the right to change a work into a new one with originality;

(15) the right of translation, that is, the right to change the language in which the work written into another language;

(16) the right of compilation, that is, the right to compile by selection or arrangement preexisting works or passages therefrom into a new work; and,

(17) other rights to be enjoyed by copyright owners.

⁹⁵ Yong Wan, ‘A Modest Proposal to Amend the Chinese Copyright Law: Introducing a Concept of Right of Communication to the Public’ (2008) 55 *Journal of Copyright Society of the U. S. A.* 603-22.

⁹⁶ In particular, Article 14^{ter}(2) of the Berne Convention reads: ‘The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.’

⁹⁷ It is variously claimed that it originated in the poverty of the widow of the impressionist artist, Millet, as his works brought high prices, to assist the widows of artists killed in the First World War or, in the actions of a group of benevolent art speculators, La Peau de L’Ours (The Bear’s Skin). See Paul Lewis, ‘The Resale

There was considerable discussion of its effects when it was introduced in the United Kingdom in 2006 as a result of a Directive of the European Parliament and of the European Council.⁹⁹ It was feared that the imposition of ‘droit de suite’ would drive international art sales from London to New York.¹⁰⁰

‘Droit de suite’ may reduce the price an artist receives for a work because of the payment which has to be made on resale, in effect a forced saving.¹⁰¹ It also involves administrative costs.¹⁰² Australia, in 2009, after considerable discussion and delay is proposing to introduce ‘droit de suite’.¹⁰³ It is argued that the legislation is flawed because of the transactions excluded from it.¹⁰⁴ It will not apply to the first resale or to sales of visual art works where the first sale is for less than \$1,000.¹⁰⁵ It is claimed that private sales and the transfer of sale transactions to foreign jurisdictions will avoid its operation.¹⁰⁶ But it is also argued that it is important to folk or indigenous artists. An art work originally sold by an indigenous Australian artist for AU\$1,200 was sold for AU\$2.4 million at auction in 2007.¹⁰⁷

There are justifiable policy reasons why countries, including Vietnam, have not adopted ‘droit de suite’ in their domestic laws. The art market, like other sectors of the economy

Royalty and Australian Visual Artists: Painting the Full Picture’ (2003) 8(4) *Media and Arts Law Review* 306, 306-7.

⁹⁸ Harvard Law School, ‘Image Rights: Resale Right (Droit de suite)’

<http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm>; Ann Avery Andres (1999), ‘The Artist’s Right to Share in the Resale of Art’ <<http://www.tfaoi.com/articles/andres/aa3.htm>>.

⁹⁹ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art (2001) OJ L 272/32 (WIPO-Lex).

¹⁰⁰ Ian Black and Dan Atkinson, ‘Britain gives up the fight against European art sale tax’ *Guardian* (16 February 2000) <<http://www.theguardian.com/business/2000/feb/16/7>>.

¹⁰¹ Katryn Graddy and Stefan Symanski, ‘A Study into the Likely Impact of the Implementation of the Resale Right for the Benefit of the Author of the Original Work of Art’ (October 2005) *Intellectual Property Institute* 20-3 <<http://www.ipo.gov.uk/ipinstitutestudy.pdf>>. See also John L Solow, ‘An Economic Analysis of the Droit de Suite’ (1998) 22 *Journal of Cultural Economics* 209-226.

¹⁰² Ibid.

¹⁰³ Resale Royalty Right for Visual Artists Bill 2008.

¹⁰⁴ Price David, ‘The Resale Royalty Rights for Visual Artists Bill 2008: Australia’s Own Droit de Suite Scheme - a Sketch or a Masterpiece?’ 2009 2(1)-(2) *Journal of the Australian Law Teachers Association* 85, 85.

¹⁰⁵ Ibid, 87, 91.

¹⁰⁶ Ibid, 96.

¹⁰⁷ Ibid, 93.

remains under-developed, and, as revealed in the Chapter 8 case studies, artists are still influenced by socialist and patriotic ideas. Unfamiliarity with foreign law on the protection of intellectual property rights in general, and ‘droit de suite’ in particular, within Vietnam is another reason.

2.3 Rental Rights

As a developing country with both its traditional and socialist culture and law minimizing the importance of personal reward for creative works, Vietnam should seriously consider the advice offered by non-governmental organizations and scholars on developing countries. This includes limiting its copyright law only to those rights required by TRIPs, while exploiting the relevant flexibilities which TRIPs offers where possible.¹⁰⁸ However, as with other developing countries, there may be other factors affecting the choices made by local law and policy makers, including their lack of expertise and experience with intellectual property law and its administration.

In respect of rental rights, Vietnam has taken the freedom offered by TRIPs to limit the rights of copyright holders in computer programs but not the rights of copyright holders in cinematographic works. In requiring members to grant rental rights, TRIPs Article 11 provides that:

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

¹⁰⁸ Consumers International Asia Pacific Office, above n 59, 20-1.

It is apparent on the face of this provision that members are not required to provide in their domestic law for copyright holders to have these rental rights in computer programs and cinematographic works unconditionally. On the contrary, they can stipulate conditions for the authorization or the prohibition of commercial rentals. In respect of cinematographic works there is no requirement to provide the right holders with the right to authorize or prohibit commercial rentals, unless they are able to prove the material impairment of their control over the right to reproduce audiovisual works.¹⁰⁹ In respect of computer programs there is again no requirement to provide a similar right to the copyright holders where the program itself is not the essential object of the rental. Utilizing these conditions permits national legislation to balance the interests of the right holders and the public regarding to local conditions, in the case of cinematographic works, or the main purpose of the rental, in respect of computer programs.

Vietnamese law gives the right to copyright holders in computer programs to authorize or prohibit their rental¹¹⁰ unless these computer programs themselves do not constitute the essential object of the rental.¹¹¹ It gives the same right to copyright holders in cinematographic works¹¹² but does not make other reference to the TRIPs' condition that the right can be withheld unless such rental has led to 'widespread copying of such works which is materially impairing the exclusive right of reproduction'. This means that the copying of cinematographic works should be kept under review so that, if and when it falls to such a level that the right of the copyright holders to reproduce such works is not impaired, the right could be removed from the legislation.

¹⁰⁹ Gervais, above n 38, 140.

¹¹⁰ *Intellectual Property Law 2005* art 20(1)(e).

¹¹¹ *Decree 100/2006* art 23(5).

¹¹² See above n 110.

2.4 Copyright Non-Voluntary Licensing

(a) Non-Exclusive and Non-Transferable Compulsory Licenses under the Appendix of the Berne Convention

In international copyright law, a non-voluntary or compulsory license to allow the use of works in certain circumstances without permission by the holder of rights but paying compensation can be utilized for two main reasons. The first relates to the emerging of new technologies for the dissemination of works to the public and the second specifically relates to national legislatures which may fear that the holders of rights could prevent new technology from developing through the refusal of permissions to use works.¹¹³

Since the 1971 Paris revision conference, the Berne Convention has an attached Appendix which comprises special provisions in respect of developing countries dealing with a regime for non-exclusive and non-transferable compulsory licenses for translation and reproduction of works otherwise protected by copyright.¹¹⁴ The provisions are complex and their interpretation is problematic.¹¹⁵

For these reasons it has been stated that the actual use of this compulsory licensing regime is limited to members of the Berne Convention Union.¹¹⁶ However, the regime should be considered because of the explicit statement permitting the ‘publication’ of works in translation or reproduction under compulsory licensing for use in education.¹¹⁷ In respect of this, Vietnam declared that it would avail itself of both the options provided for in the Appendix¹¹⁸ but having made no further regulations to do so in its national law. Other

¹¹³ WIPO, *Understanding Copyright and Related Rights*, WIPO Publication No. 909(E), 10 <http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf>.

¹¹⁴ WIPO, above n 14, 101.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Consumers International Asia Pacific Office, above n 59, ix-x, 24-5.

¹¹⁸ Berne Notification No. 241, *Berne Convention for the Protection of Literary and Artistic Works: Accession by the Socialist Republic of Vietnam* (26 July 2004) <http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_241.html>.

developing countries including Mongolia and the Philippines have done so.¹¹⁹ Many other developing countries have not made such declaration but have incorporated, wholly or partly, the Appendix into their laws, including India, Bhutan, and Cambodia.¹²⁰

Under the Appendix, there are two options for compulsory licensing regimes. The first allows developing country members to grant a compulsory licence making a translation of a work for the purpose of teaching, scholarship, or research (in educational and research establishments or institutions such as schools, colleges, and universities or broadcasting organizations) and the publication of such a translation for non-commercial purposes.¹²¹ The second permits the grant of a compulsory licence reproducing a work for use in connection with systematic instructional activities and the publication of such a reproduction.¹²² Subject to these licences, the works may be published in printed or reproduced in forms analogous to the original form of reproduction.¹²³

The first, or compulsory licence for translation, is very significant for a developing country such as Vietnam where English has never been widely used in education or government so that those works would need to be translated into Vietnamese for them to be accessible. The second, or compulsory licence for reproduction, is crucial for all developing countries because of the importance of education in the transfer of knowledge and skills in economic, social, and political development programs.

To enable the use of such a compulsory regime in their jurisdiction, members need to submit their declaration of intent to do so.¹²⁴ In order to make their election internally effective members need ensure that their laws, regulations, or administrative practices are consistent with the requirements of the Appendix. At present, there are no such provisions in Vietnamese law. The complexity of the provisions in the Appendix, and their

¹¹⁹ Consumers International Asia Pacific Office, above n 59 (see also n 117) x.

¹²⁰ *Ibid.*

¹²¹ *Berne Convention* (Appendix) art II.

¹²² *Berne Convention* (Appendix) art III.

¹²³ *Berne Convention* (Appendix) arts II(1)- (2)(a), (9)(a); III(9).

¹²⁴ *Berne Convention* (Appendix) arts II(1); III(1).

problematic interpretation, create further opportunities for Vietnam to take a flexible approach to their implementation in national law and a much more flexible approach to copyright protection overall.

(b) Other Non-Voluntary Licenses under the Berne Convention

The Appendix of the Berne Convention privileges developing countries in allowing them to grant non-exclusive and non-transferable compulsory licenses relating to translation and reproduction of works for educational and research purposes. In respect of broadcasting and related rights, Article 11*bis*:2 of the Convention allows the national legislation to determine the conditions under which a non-voluntary licensing regime of these rights may be formulated provided that they are not prejudicial to the moral rights, nor to the right to receive equitable remuneration of the rights holder, which is fixed by a competent authority in the absence of agreement.

This is a relatively self-explanatory provision.¹²⁵ It is regulated in Vietnamese law. In particular, broadcasting organizations are allowed to use, without obtaining authorization, published works for broadcast with sponsorships, advertisements, or money collected in any form.¹²⁶ There is an exception applying to cinematographic works¹²⁷ and the conditions for use must be without prejudice to the normal exploitation of the work or to the rights of the author or the copyright owner.¹²⁸ It must provide information about the name of the author and the source of the work used.¹²⁹ Copyright owners must be paid remuneration

¹²⁵ WIPO, above n 14, 79.

¹²⁶ *Intellectual Property Law 2005* art 26(1) the first paragraph.

¹²⁷ *Intellectual Property Law 2005* art 26(3): Article 11*bis*(2) of the Berne Convention is uncertain over what “conditions” means. This is generally interpreted as a permission to introduce compulsory licenses (WIPO, above n 125), it can be seen that in Vietnam the law is relatively conscious of that so that the relevant local provision (introduced immediately below) reflects important elements contents of not only Article 11*bis*(2) but also Article 13(1) (stipulating that compulsory licenses apply to musical works) and Article 14(3) (excluding the scope of Article 13(1) from cinematographic works) of the Berne Convention as well as Article 13 of the TRIPs Agreement (discussed and analyzed below in Section 4. *Exceptions to Infringement*).

¹²⁸ *Intellectual Property Law 2005* art 26(2).

¹²⁹ *Ibid.*

under an agreement.¹³⁰ Where there is no agreement, the related parties can rely on a government-regulated regime or bring a legal action.¹³¹ But when the use of those published works is by a broadcasting organization without sponsorship, advertisement, or money being collection in any form, the remuneration is paid under the government-regulated regime.¹³² Neither negotiated agreements nor legal actions are mentioned in this case.¹³³

2.5 Parallel Imports and Exhaustion of Rights

Parallel (or ‘grey market’) importing takes place where legitimate or genuine copies of goods which have been placed in a foreign market, or the country of export, are imported into a second market, or the country of import, by a reseller without the authorization of the holder of intellectual property rights in those goods in the country of import.¹³⁴ These goods (i) have been released in a foreign market, the country from which they are exported; (ii) have been produced with the consent of the intellectual property right holder under trademark, patent, or copyright protection; (iii) generally have the same quality as the original product; and, (iv) are directly purchased by a non-authorized reseller in the country into which they are imported and the authorized intellectual property right holder has not given authorization to this local reseller to resell the goods.¹³⁵

Parallel imports as such permit the importation of products subject to copyright from other countries where they have been permitted under the laws of those countries. They may give

¹³⁰ *Intellectual Property Law 2005* art 26(1) the first paragraph.

¹³¹ *Ibid.*

¹³² *Intellectual Property Law 2005* art 26(1) the second paragraph.

¹³³ *Ibid.*

¹³⁴ Kerrin M Vautier, ‘The Economics of Parallel Imports’ in Christopher Heath and Anselm K Sanders (eds), *Industrial Property in the Bio-Medical Age: Challenges for Asia* (Kluwer Law International, 2003) 185, 185-6; Australian Chamber of Commerce and Industry, ‘Consumers Misled by Parallel Imports’ 58 *ACCI Review* (December 1999).

¹³⁵ Kerrin M Vautier, ‘Economic Considerations on Parallel Imports’ in Christopher Heath (ed), *Parallel Imports in Asia* (Kluwer Law International, 2004) 1, 1.

consumers more choice of copyright products at cheaper prices¹³⁶ so that it is generally suggested that national laws should not give the exclusive right of distribution or importation of the originals or copies of works to the holders of copyright.¹³⁷ However, in the United States-Vietnam Bilateral Trade Agreement, Vietnam agreed to provide to the United States holders of copyright, among other rights, the right to authorize or prohibit ‘the importation into the Party’s territory of copies of the work’ and ‘the first public distribution of the original and each copy of the work by sale, rental or otherwise’ to ‘authors and their successors in interest’.¹³⁸ This reflected the economic pressure on Vietnam to ‘normalize’ its relationship with the United States as the world’s largest economy.¹³⁹ Not surprisingly, to distribute or import the originals or copies of the work(s) therefrom is provided for as one of the property rights of copyright holders under Vietnamese law.¹⁴⁰ Parallel imports affect the issue of the exhaustion of rights.

(a) What Is the Exhaustion of Rights?

In order to limit an excessively broad exercise of intellectual property rights, particularly under patent, trademark, and copyright laws, the concept of ‘exhaustion’ has been incorporated into many languages and legal systems including French, Spanish, Portuguese, Japanese, German, and, of course, English.¹⁴¹ The concept was first used in the imperial German Federal Supreme Court around the 1900s with the word ‘Konsumtion’ meaning ‘consumption’.¹⁴²

¹³⁶ Commonwealth of Learning, ‘Copyright Audit: Copyright Law and Education’ by Achal Prabhata and Tobias Schonwetter (December 2006) <www.col.org>; Australian Competition and Consumer Commission, ‘Copyright Reform: Parallel Importation of Software Products’; ‘Parallel Imports and Intellectual Property Restrains: The Australian Competition and Consumer Commission’s Perspective’ by Ross Jones (United Nations Regional Seminar on Competition Law and Policy for Asia-Pacific, India, 14 April 2000) 4-5 <www.accc.gov.au> (visited 10 July 2008).

¹³⁷ Consumers International Asia Pacific Office, above n 59, 11-2, 23-4.

¹³⁸ *United States-Vietnam Bilateral Trade Agreement* art 4(2) ch II.

¹³⁹ See, eg, Mark E Manyin, ‘The Vietnam-U.S. Bilateral Trade Agreement’ (29-46), Vladimir N Pregelj, ‘Vietnam Trade Agreement: Approval and Implementing Procedure’ (47-53) in V Largo (ed), *Vietnam: Current Issues and Historical Background* (Nova Science Publishers, 2002).

¹⁴⁰ *Intellectual Property Law 2005* art 20(1).

¹⁴¹ Christopher Heath, ‘Legal Concepts of Exhaustion and Parallel Imports’ in Christopher Heath (ed), *Parallel Imports in Asia*, above n 135, 13, 13.

¹⁴² *Ibid.*

Under patent and copyright laws, the owners of patents and copyright are granted the exclusive rights in both the production and the commercial distribution of the protected products, enabling them to control not only the production and first sale but also all subsequent acts of resale, lending, rental, export, or import of such protected products.¹⁴³ If no limit was placed on these rights it could lead to a complete suffocation of any trade in these products.¹⁴⁴ To deal with this, a number of related concepts have been evolved.

The doctrine of ‘implied licence’ was developed in English common law, making intellectual property right protected products subject to the same rules which applied to other property rights in personal property.¹⁴⁵ Generally this meant that all proprietary rights in a product or a good must be transferred to the purchaser on sale by its owner.¹⁴⁶ In Germany, Josef Kohler concluded that the opportunity for a reward, given by a patent to a patentee, by excluding others from using it should be obtained only once for each product.¹⁴⁷ Once the patentee had used the patented invention with respect to a certain product, he or she could no longer exercise his or her patent right in this specific product.¹⁴⁸ This was not confined to the form of use chosen but to all the different forms of use and all subsequent acts of commercial use of the product.¹⁴⁹ In 1906 the German Federal Supreme Court stated that ‘Once the copyright owner or publisher has sold copies of the work to the general public and thus brought into commerce, thereby exercising their rights, these rights are exhausted’.¹⁵⁰ In the United States, this is known as the ‘first-sale doctrine’ which is codified in Section 109 (a) of the Copyright Act.¹⁵¹

¹⁴³ Ibid, 14.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, 15

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid, 20.

¹⁵¹ Ibid.

(b) What Are Parallel Imports?

Trading, or arbitrage, in products or services between markets is possible, and potentially efficient, in economic terms whenever the cost of a specific product or service in one market is higher than its cost in another market.¹⁵² This applies to trading in products protected by intellectual property rights.

Under the first-sale doctrine, the holders of an intellectual property right are seen being able to obtain an economic return from the first-sale, or placing in the market of the goods or services embodying the right.¹⁵³ This means that they then lose the right to control the future sale, transfer, or use of the product or service, leaving them unable to prevent others who have purchased the product from transferring it to, or importing it into, another market, even back into the original domestic market in which it was purchased.¹⁵⁴

Parallel imports, therefore, depend on the first-sale doctrine and the exhaustion of intellectual property rights under it.¹⁵⁵ Where this doctrine is recognized at a national level, the holder of an intellectual property right may no longer be able to commercially exploit his or her 'first-sale' products embodying the intellectual property right in that national territory.¹⁵⁶ As self-protecting he or she may seek to obtain the right to authorize the importation of the products into each national territory.¹⁵⁷ He or she could then retain control over imports of the subject matter into such territories, provided that he or she holds the intellectual property rights in those territories.¹⁵⁸ It is common that the same holders of intellectual property rights may hold equivalent or 'parallel' rights in many countries.¹⁵⁹

¹⁵² Christopher Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (Hart Publishing, 2007) 1.

¹⁵³ UNCTAD & ICTSD, *Resource Book on TRIPs and Development* (Cambridge University Press, 2005) 93.

¹⁵⁴ *Ibid.*

¹⁵⁵ W A Rothnie, *Parallel Imports* (Sweet & Maxwell, 1993), citing in Gervais, above n 38, 112-3.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO-Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff Publishers, 2009) 170.

¹⁵⁹ UNCTAD & ICTSD, above n 153.

Conversely, where the exhaustion of intellectual property rights is exercised at international and regional levels, the holder of an intellectual property right can no longer commercially exploit his or her 'first-sale' products embodying the intellectual property right in the relevant national territories.¹⁶⁰ This means the importation of the products into third countries or countries applying the exhaustion of intellectual property rights at international and regional levels is no longer subject to the authorization of the intellectual property right holder and parallel imports are therefore allowed.¹⁶¹

Parallel imports remain controversial. On the one side, they may weaken price discrimination between national territories¹⁶² and may give consumers a cheaper patented, copyrighted, and trademarked product, including drugs or medicines, books, and other cultural and educational publications.¹⁶³ Because of this, developing countries are often advised to permit or provide for parallel imports in the intellectual property law.¹⁶⁴ On the other side, they may lead to difficulties in identifying products imported without the approval of the holders of intellectual property rights and those sold with that approval which may permit counterfeit goods to be more easily passed off as authentic.¹⁶⁵ Products imported by parallel import traders might not have the equivalent quality as those authorized by the holders of intellectual property rights in the national territory.¹⁶⁶ Consequently, parallel imports have been accepted in some judicial decisions only where the qualities of the goods are comparable.¹⁶⁷

Where a country allows parallel imports under copyright law, there may still be other restrictions on importation.¹⁶⁸ The same products may be covered by different intellectual

¹⁶⁰ Ibid, 171.

¹⁶¹ Ibid.

¹⁶² Jones, above n 136.

¹⁶³ See above n 136. See also Consumers International Asia Pacific Office, above n 59, 11-5, 23-4.

¹⁶⁴ Consumers International Asia Pacific Office, *ibid*; Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books, 2000) 81-8.

¹⁶⁵ See above Heath, n 141, 17-8; Australian Chamber of Commerce and Industry, n 134.

¹⁶⁶ Ibid.

¹⁶⁷ Heath, *ibid*.

¹⁶⁸ Ibid, 22.

property rights.¹⁶⁹ For example, a drug can be produced under a patent, packed or labeled under a trademark, and being used following instructions protected under copyright.¹⁷⁰ If a country permits parallel imports, the owner of the other intellectual property rights under trademark, patent, or copyright law may still use these other rights to prevent parallel importation.¹⁷¹ In the context of Vietnam, all these may impact upon its legislation on parallel importation.

(c) TRIPs Flexibility on Exhaustion of Intellectual Property Rights

The TRIPs Agreement contains one specific provision, Article 6, addressing the exhaustion issue of intellectual property rights. This Article is entitled ‘Exhaustion’, suggesting that the rules of TRIPs relating to intellectual property rights might be used by members for disputes over the issue of the exhaustion of these rights.¹⁷² However, the Article states briefly that:

For the purpose of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

It leaves members free to deal with the issue in their own way in their national legislation. A member can adopt any measures without facing claims by other members as having violated TRIPs provisions.¹⁷³ This particularly relates to the principles of national treatment and most-favoured-nation treatment under TRIPs Articles 3 and 4.

In the case of Vietnam, it used the freedom given to it in TRIPs to make restrictive provisions over importation and distribution rights in its 2000 bilateral trade agreement with the United States. It has incorporated these provisions into the 2005 Intellectual

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² UNCTAD & ICTSD, above n 153, 104.

¹⁷³ Correa, above n 164, 83.

Property Law.¹⁷⁴ As a consequence, local enterprises have to seek the consent of the United States', or of other WTO member countries' copyright holders, before importing legitimate products embodying their rights from a third country into Vietnam. In theory, parallel imports permit cheaper versions of legitimate pharmaceuticals or computer software, for example, to be sold in a domestic market because of differences in production costs or currency exchange rates. In practice, Vietnam is a developing country with low per capita incomes and a net importer of intellectual property products including copyright materials. It would be better if the domestic law were to be framed around international exhaustion of distribution rights on the first sale making cheaper parallel imports possible.

3. The Terms of Protection

Under the Berne Convention the term of copyright protection is the author's life and 50 years after his or her death.¹⁷⁵ However, copyright in cinematographic works and anonymous or pseudonymous works is in general 50 years after they have been made available to the public.¹⁷⁶ The minimum term of copyright in photographic works and works of applied-art is 25 years from the making of such a work.¹⁷⁷ Where a work is jointly created, the term is calculated from the death of the last surviving author.¹⁷⁸

Reflecting this, TRIPs provides that:

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be 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.¹⁷⁹

¹⁷⁴ *Intellectual Property Law 2005* art 20(1); *United States-Vietnam Bilateral Trade Agreement* art 4(2) ch II.

¹⁷⁵ *Berne Convention* art 7(1).

¹⁷⁶ *Berne Convention* art 7(2)-(3).

¹⁷⁷ *Berne Convention* art 7(4).

¹⁷⁸ *Berne Convention* art 7bis.

¹⁷⁹ *TRIPs Agreement* art 12.

When copyright expires, the works fall into the public domain. They are then freely available for use by any individuals or organizations. Although this can be beneficial to all in either developed or developing countries, it is particularly beneficial for citizens of developing countries in getting access to knowledge and cultural enjoyment. They are advised that ‘national lawmakers should ensure that they do not grant copyright protection beyond the minimum duration required under the international copyright instruments’.¹⁸⁰

However, up to 10 of the 11 developing Asian countries (Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, and Thailand but not the Philippines) have extended duration of copyright protection for some or all forms of works ‘beyond the minimum duration required by their treaty obligations’.¹⁸¹

Enduring copyright protection for the life of the author and for 50 years after his or her death is in general provided for all kinds of works in Vietnam.¹⁸² Cinematographic, photographic, anonymous works and works of applied art are specifically protected for 75 years after they are first published.¹⁸³ Within a 25-year period from the date of fixation of cinematographic works, photographic works, and works of applied art which have not been published, the term will be 100 years from the date of their fixation.¹⁸⁴ This period of protection of photographic works and works of applied art makes Vietnam similar to the 10 above-mentioned Asian countries as it is very much longer than the international minimal requirement. The requirement for the term of copyright protection in Vietnam’s bilateral trade agreement with the United States may be one reason for that,¹⁸⁵ though it is not obligatory for Vietnam to incorporate its ‘TRIPs-plus’ provisions.¹⁸⁶

¹⁸⁰ Consumers International Asia Pacific Office, above n 59, ix.

¹⁸¹ Ibid.

¹⁸² *Intellectual Property Law 2005* art 27(2)(b); *Decree 100/2006* art 26.

¹⁸³ *Intellectual Property Law 2005* art 27(2)(a); *Decree 100/2006* art 26.

¹⁸⁴ Ibid.

¹⁸⁵ In particular, Article 4(4) Chapter II of the United States-Vietnam Bilateral Trade Agreement states that: ‘Each Party shall provide that, where the term of protection of a work is to be calculated on a basis other than the life of a natural person, the term shall be not 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 from the creation of the work, not less than 100 years from the end of the calendar year of the creation of the work.’

¹⁸⁶ This is discussed in Sub-section 4.1 *A More Extensive Protection?* in Chapter 3.

4. Exceptions to Infringement

Further flexibility for members is potentially permitted by TRIPs Article 13 which allows them to grant exemptions from copyright. It is entitled ‘Limitations and Exceptions’, and states that:

Members shall 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.

It is very clear that this provision leaves substantial room for subjective judgments to be made in both creating and enforcing national laws. It is also rich in the ambiguity of legal language discussed within Chapter 2,¹⁸⁷ again offering choice to national lawmakers and to judges where the ambiguities are reproduced in national law. What may be meant by ‘limitations’ and ‘exceptions’? Why does TRIPs mention both? What may be the differences between them? What is the scope of the provision? Is it applicable to all the exclusive rights under TRIPs and the Berne Convention or only under TRIPs? Does the provision apply to related rights? What degree of conflict is required? What are the limits to a normal exploitation of a work? What amounts to unreasonable prejudice? What are the legitimate interests of the right holder?

4.1 The Meaning of ‘Limitations’ and ‘Exceptions’ Provision

The provision defines neither ‘limitations’ nor ‘exceptions’, nor suggests from their context what the limits to their meaning may be.

¹⁸⁷ The issue is discussed in Sub-section 1.1 *Law is Encoded in Language and Language is Ambiguous* in Chapter 2.

‘Limitation’ has different and conflicting meanings.¹⁸⁸ The inherent nature of copyright protects authors’ rights and, in doing so, limits the public’s access to, and use, of literary and artistic works. Balancing these competing interests will vary, depending on the context. That balancing involves the use of these concepts of ‘limitation’ and ‘exception’.

‘Limitation’ is defined as ‘the action of limiting, the condition of being limited, a point or respect in which something is limited, a limiting provision, rule, or circumstance’.¹⁸⁹

‘Exception’ has a different meaning, ‘the action of excepting from the scope of a proposition, rule, etc; something that is excepted; a person, thing, or case to which the general rule is not applicable’.¹⁹⁰ In spite of these differences in meaning, ‘limitations’ and ‘exceptions’ are related concepts in this context. An ‘exception’ may impose a ‘limitation’. A ‘limitation’ may appear to be an ‘exception’.

‘Limitations’ and ‘exceptions’ were considered by the Panel in *The European Communities v The United States (US – Section 110(5) Copyright Act)*.¹⁹¹ The European Communities and their member states (referred to as the European Communities) requested consultations with the United States under Article 4, ‘Consultations’, of the Dispute Settlement Understanding and Article 64:1, ‘Dispute Settlement’, of TRIPs. The consultations were over Section 110(5) of the United States Copyright Act of 1976, amended by the Fairness in Music Licensing Act on 27 October 1998.¹⁹² The provisions of Section 110(5) place

¹⁸⁸ The word is defined by *The Shorter Oxford English Dictionary* (Oxford University Press, 1973, 1215-6) as ‘the action of limiting, an instance of this; an allotted space, the district or circuit of an itinerant officer or preaching friar, the region belonging to a particular nation; an allotted time; the condition of being limited; a point or respect in which something is limited, a limiting provision, rule, or circumstance; the statutory specification of a period, or the period specified by statute, within which an action must be brought; the specification of a period, or the period specified, for the continuance of an estate or the operation of a law; the settlement of an estate by a special provision or with a special modification; the modification or provision itself.’

¹⁸⁹ *The Shorter Oxford English Dictionary*, *ibid.*

¹⁹⁰ *The Shorter Oxford English Dictionary*, *ibid.*, 696.

¹⁹¹ *US-Section 110(5) Copyright Act*, WTO Doc WT/DS160/R (15 June 2000).

¹⁹² In particular, the Panel extracted Section 110(5) of the United States Copyright Act of 1976 as below:

(5)(A) except as provided in sub-paragraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(i) a direct charge is made to see or hear the transmission; or

limitations on the exclusive rights granted to owners of copyright in Section 106 of the Copyright Act of 1976 with regard to certain performances and displays.¹⁹³ In respect of the United States copyright legislation, subparagraph (A) of Section 110(5) essentially reproduces the text of the ‘homestyle’ exemption contained in Section 110(5) of the Copyright Act of 1976.¹⁹⁴ When it was amended in 1998, the homestyle exemption was moved to a new subparagraph (A) and the words ‘except as provided in subparagraph (B)’

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- (ii) the transmission thus received is further transmitted to the public;
 - (B) communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if–
 - (i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and–
 - (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
 - (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
 - (ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and–
 - (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
 - (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
 - (iii) no direct charge is made to see or hear the transmission or retransmission;
 - (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and
 - (v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed.

¹⁹³ Panel Report, *US–Section 110(5) Copyright Act*, WTO Doc WT/DS160/R (15 June 2000) [2.1].

¹⁹⁴ *Ibid.*, [2.4].

were added to the beginning of the text.¹⁹⁵ The European Communities alleged that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the 1976 Copyright Act were inconsistent with TRIPs Article 9:1 as well as Articles 11:1(ii) and 11*bis*:1(iii) of the Berne Convention, that they were not justified under any explicit or implicit exception or limitation permitted by TRIPs or the Berne Convention, and that they caused prejudice to the legitimate interests of copyright owners or nullified and impaired the rights of the European Communities.¹⁹⁶

When dealing with this dispute, the Panel ruled that an ‘exception’ eliminated an existing exclusive right, while a ‘limitation’ restricts to a certain extent such a right.¹⁹⁷ In terms of copyright protection, ‘limitations’ and ‘exceptions’ impact upon the exclusive rights of authors or the interests of the public or both.

4.2 The Scope of the ‘Limitations’ and ‘Exceptions’ Provision

In TRIPs’ structure, Article 13 is one of the provisions within Section 1: Copyright and Related Rights of Part II - Standards Concerning the Availability, Scope and Use of Intellectual Property Rights. All of the preceding provisions, or Articles 9-12, relate to copyright. This includes the exclusive rights set out in Articles 1-21 of the Berne Convention and in Article 11 of TRIPs.

It is clear that the scope of Article 13, or the ‘limitations’ and ‘exceptions’ provision, covers copyright and the exclusive rights provided for by TRIPs. However, it is unclear whether the provision also covers related rights and, especially, other exclusive rights of authors, provided for by the Berne Convention.

On the one hand, Section 1 of Part II of TRIPs is entitled ‘Copyright and Related Rights’. One may argue that this shows a clear intention that the ‘limitations’ and ‘exceptions’

¹⁹⁵ Ibid.

¹⁹⁶ Ibid, [3.1].

¹⁹⁷ Citing in Stoll, Busche and Arend, above n 158, 279.

provision applies to related rights. On the other hand, only Article 14, which is entitled ‘Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations’, relates to the subject matters of related rights. In respect of this, one may argue that the ‘limitations’ and ‘exceptions’ provision goes beyond those related rights. This is supported by the ‘limitations’ and ‘exceptions’ provision in TRIPs resembling Article 9:2 of the Berne Convention, which provides only rules for possible exceptions to the reproduction rights of authors.

Further, it may be argued that the expression ‘the work’, as used in TRIPs Article 13, may refer to the author’s intellectual labour so that the scope of the ‘limitations’ and ‘exceptions’ provision covers copyright only. However, a product created by the holders of related rights may also be described as ‘a work’. This makes it possible to argue that the ‘limitations’ and ‘exceptions’ provision applies to related rights.

At this stage, TRIPs Article 7 is relevant. It states that the objectives of 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 technological knowledge and in a manner *conducive to social and economic welfare*, and to a *balance of rights and obligations*.¹⁹⁸

When providing for these rights in their national law members are also allowed, under TRIPs Article 8, 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 technological development*.¹⁹⁹

TRIPs Article 13 reflects the accommodation of such ‘a balance of rights and obligations’ or such promotion of ‘the public interest’, by providing for exceptions and limitations on

¹⁹⁸ The emphasis is added.

¹⁹⁹ *TRIPs Agreement* art 8(1) (emphasis added).

copyright and related rights, or in other Articles 30-31 providing for exceptions to the exclusive rights of patent owners. Although such ‘a balance rights and obligations’ and such ‘public interest’ are not directly stated in the Berne Convention, they are indirectly stated through the provisions permitting exceptions to the exclusive rights or for free use, including Articles 9:2, 10, 10*bis*, or through the Appendix allowing the grant of compulsory licences to the translation and reproduction rights.

In addition, TRIPs Article 9:1 requires members to use Articles 1-21 of the Berne Convention as the basis of their domestic law on copyright protection but it has no provision stating that the exclusive rights under those Articles are excluded from the scope of the permissible exceptions and limitations under TRIPs Article 13. In other words, there is no indication in the TRIPs text to interpret TRIPs Article 13 as only applying to the exclusive rights created by it. Supporting this view, in *The European Communities v the United States (US – Section 110(5) Copyright Act)* the Panel stated that:

Article 13 of the TRIPs Agreement applies to Articles 11*bis*(1) (iii) and 11(1) (ii) of the Berne Convention (1971) as incorporated into the TRIPs Agreement, given that neither the express wording nor the context of Article 13 or any other provision of the TRIPs Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPs Agreement.²⁰⁰

4.3 The Prerequisites for Limitations and Exceptions

Under TRIPs Article 13 three conditions or criteria are stipulated for any limitations and exceptions to the exclusive rights of copyright holders. They must: (i) be confined to certain special cases; (ii) not conflict with a normal exploitation of the work; and, (iii) not unreasonably prejudice the legitimate interests of the rights holder.

²⁰⁰ Panel Report, *US–Section 110(5) Copyright Act*, WTO Doc WT/DS 160/R (15 June 2000) [6.94].

Again, it is clear that these conditions give considerable leeways to members in creating national law. For example, what might fall within ‘certain special cases’, or what are the standards for concluding that a national provision for limitations or exceptions is within, or without, ‘a normal exploitation’ of the work?

There has been extensive discussion, comment, and analysis of these three criteria or conditions for copyright exceptions.²⁰¹ They have been interpreted as being ‘neither restrictive nor redundant’.²⁰² They have also been interpreted as being cumulative, so that domestic legislation which stipulates only one or two of the three conditions would not comply with the requirement.²⁰³

4.4 Exceptions to Copyright Protection in Vietnamese Law

There are many exceptions in Vietnamese law to the restrictions otherwise imposed by copyright. They include fair use or fair dealing, private use or personal use or non-profit use, media review, freedom of expression, and so on. This is basically provided for in Article 25 of the 2005 Intellectual Property Law, as amended 2009. These listed exceptions, discussed below, can be compared with those from other national laws, such as the US, the UK and China.²⁰⁴ Finding acceptable exceptions to copyright infringements occurred in

²⁰¹ See, eg, Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (Oxford University Press, 2006) 764-73, 850-61; Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004) 99-243; J A L Sterling, *World Copyright Law* (Sweet & Maxwell, 2003) 439-44; Gervais, above n 38, 144-7; Stoll, Busche and Arend, above n 158, 278-84.

²⁰² Stoll, Busche and Arend, *ibid*, 278.

²⁰³ Stoll, Busche and Arend, *ibid*, 281; Gervais, above n 38, 146.

²⁰⁴ Article 25 of the 2005 Intellectual Property Law lists instances under which different acts otherwise constituting copyright infringement are permissible. About half of these cases fall into the scope of ‘fair use’ for purposes such as criticism, comment, news reporting, teaching, scholarship, or research under Section 107 of United States Copyright Act 1976 as amended 2003 (17 USC). Apart from other exceptions set out in, eg, Sections 108-112 of the US Act and Sections 31-76 of the UK Act, they also fall into ‘fair dealing’ for the purpose of research or private study, criticism, review and current events reporting under Sections 29-30 of the UK Copyright, Designs and Patents Act 1988. This can be compared with the Chinese Copyright Law 1990, as amended 2010 which provides for copyright exceptions in Article 22. These exceptions include use of another person’s published work for purposes of the user’s own personal study, research or appreciation; appropriate quotation from another person’s published work in one’s own work for the purpose of introducing or commenting a certain work, or explaining a certain point; unavoidable inclusion or quotation of a published

national legal systems well before the conclusion of the Berne Convention.²⁰⁵ Most of these exceptions have become common in national legal systems.²⁰⁶

As copyright is likely to cover many aspects of cultural life and the dissemination of knowledge, particularly in education, the exclusive right of the authors of literary and artistic works needs to be balanced against the rights of getting access to culture, knowledge, and education.²⁰⁷ This may be more necessary and important in developing countries, with their developmental needs in the context of a global knowledge-based economy.²⁰⁸ Even in developed countries the price differential represented by the costs of intellectual property may limit the opportunities of poorer citizens to access education and knowledge as well as diminish their cultural enjoyment.²⁰⁹

work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events; publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted; and so on. This has been discussed with the possibility of reforming the scheme through the recognition of the local judicial opinions and how judges harmonize the different provisions about fair use in the Copyright Act and its regulations, how they have used the doctrine to go beyond the Copyright Act in solving disputes between copyright holders and unauthorized users over both published and unpublished works, as well as proposing a legal solution for the doctrine under Chinese law (Zhiwen Liang, 'Beyond the Copyright Act: The Fair Use Doctrine under Chinese Judicial Opinions' (2009) 56 *Journal of Copyright Society of the U. S. A.* 695-717). Further, Jiarui Liu ('New Development in Digital Copyright Protection in China - The Landmark Case of Zheng Chengsi v Shusheng' (2006) 28 *European Intellectual Property Review* 299-304) discusses the significance of a Chinese court decision involving digital copyright protection where a website permitted users to read and download the text of books using a special browser to determine whether the web infringed the authors' copyright or whether such use was fair use legally protected. For similar issues see Eric Priest, 'The Future of Music and Film Piracy in China' (2006) 21 *Berkeley Technology Law Journal* 795-81 with discussions about temporary copies, digital rights management, the share of music and movies online in connection with digital environment, information networks, and the Internet in China.

²⁰⁵ Ricketson and Ginsburg, above n 201, 16, 756.

²⁰⁶ See Makeen F Makeen, *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK and French Law* (Kluwer Law International, 2000) 79, 137-8.

²⁰⁷ See, eg, Michael Rushton, 'Copyright and Freedom of Expression: An Economic Analysis' (51-62), Thomas Gallagher, 'Copyright Compulsory Licensing and Incentives' (85-98) in Ruth Towse (ed), *Copyright in the Cultural Industries*, (Edward Elgar, 2002).

²⁰⁸ See generally, eg, Keith E Maskus (ed), *The WTO, Intellectual Property Rights, and the Knowledge Economy* (Edward Elgar Publishing, 2004); J Michael Finger and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford University Press, 2004).

²⁰⁹ See, eg, Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 1, 140, 190; Paul LC Torremans (ed), *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (Kluwer Law International, 2004) 18, 20, 162, 168.

Regrettably, many developing countries have not given much consideration to the flexibilities, explicit and implicit, in the international copyright instruments in general and these provisions for exceptions in particular.²¹⁰ The cost of printed books in Vietnam, especially foreign books not in Vietnamese, has been claimed to be ‘sky high’ for families with an average to low income.²¹¹ A comparative study of book prices, based on per capita income, covering Thailand, Indonesia, and the United States, found that Indonesian students needed to spend approximately 8.4 percent of the per capita income (US\$970) to purchase a textbook in comparison with the United States students who needed to spend 0.34% of the per capita income (US\$37,648) for the same text book. This is in spite of textbooks in Indonesia or Thailand having a lower retail price of textbooks compared with similar textbooks in the United States.²¹²

Vietnamese copyright law constitutes a number of specific exceptions to what otherwise would be copyright infringement.

(a) The General Criteria for Exceptions

The specified exceptions in Vietnamese law require that individuals or organizations in their use of the material subject to copyright must neither affect the normal exploitation of the work nor cause prejudice to the rights of the copyright holders.²¹³ They must provide full information about the name of the authors and the origins of the works used.²¹⁴

These represent two of the three international criteria for limiting copyright in TRIPs Article 13, that they do ‘not conflict with a normal exploitation of the work’ and that they do ‘not unreasonably prejudice the legitimate interests of the right holder’. With the

²¹⁰ Consumers International Asia Pacific Office, above n 59, ix-xii.

²¹¹ VietTimes, ‘Sách cho người có thu nhập thấp’ [Books for People with Low Income] by Thanh Thảo <<http://viettimes.vietnamnet.vn>> (visited 23 October 2007).

²¹² Consumers International Asia Pacific Office, above n 59, 41-2.

²¹³ *Intellectual Property Law 2005* arts 25(2), 26(2).

²¹⁴ Ibid.

possible difference in meaning produced in translating such provisions into Vietnamese from English, the local law meets these two requirements of the international law.

No particular regulations or guidelines have been made by the Supreme People's Court or other government agencies further clarifying or providing examples of these two conditions. In theory, this may make it difficult for the administrative and judicial authorities to apply the law. In practice, it may free them to take a more flexible and pragmatic approach to their application. For example, the judicial authorities might decide a case depending on its facts in accordance with their understanding of the meaning of these provisions but stopping short of a former interpretation.²¹⁵ They may prefer to request a higher judicial authority, generally the Supreme People's Court, to give instructions on any difficulties in applying the provisions.²¹⁶ Where this latter event occurs, among other factors, the higher judicial body might then consider the dictionary meanings of relevant words to determine the meaning of the provisions. This would replicate the approach and methodology used by the WTO Panels in resolving disputes in similar circumstances.²¹⁷

(b) The Particular Case Criterion

Vietnamese law is silent on the first of the three criteria in TRIPs Article 13. This reflects the understanding that where the second and third conditions or criteria are satisfied, it is likely that the first criterion, that any exceptions or limitations be confined to 'certain

²¹⁵ This is seen in *Nguyễn Quảng Tuân v Đào Thái Tôn*, heard by the Court of Appeal (Case No. 127/2007/DSPT, 14 June 2007) discussed in Chapter 8 on hearing of copyright disputes in Vietnam.

²¹⁶ Phạm Duy Nghĩa, 'Exhaustion and Parallel Imports in Vietnam' in Christopher Heath (ed), *Parallel Imports in Asia* (Kluwer Law International, 2004) 85, 86.

²¹⁷ Ricketson and Ginsburg (above n 201, 767-77) determine the criterion 'does not conflict with the normal exploitation of the work', as set out in Article 9(2) of the Berne Convention and almost resembled in TRIPs Article 13, by indicating that the Panel in *The European Communities v the United States (US–Section 110:5 Copyright Act)* referred to definitions in *The Shorter Oxford English Dictionary* of 'normal exploitation' to see it combined by 'exploitation' and 'normal', which is argued by taking empirical and normative connotations of the phrase. In an empirical approach, or a pure quantitative assessment, the main issue is to determine 'whether the exempted use would fall within the range of activities from which the copyright owner would usually expect to receive compensation.' In a normative approach, or a more qualitative assessment, the primary issue is to seek to foresee future technology and market developments, eg, into those areas not presently controlled by copyright owners.

special cases', has been satisfied.²¹⁸ This is implied in Vietnamese law in the specified cases which are separated into the following particular categories.

- **Reproduction Right Exemptions**

Reproduction rights exemptions are required to be in conformity with Article 9:2 but a Berne Convention Union developing country member may also apply the Appendix attached to it for a compulsory licensing system in respect of translation and reproduction rights. In Vietnam, the Appendix is declared to apply but domestic provisions implementing this have not yet been made.²¹⁹ There are two forms of reproduction rights exemptions. The first is the replication of a single copy of the work by a person for that person's own non-commercial scientific research or individual study.²²⁰ The second is the reproduction of no more than one copy of the work for archival and research purposes of a library.²²¹ To further ensure libraries observing this restriction, they are forbidden to reproduce and distribute other copies of the work to the public, including digital copies.²²²

The provision relating to libraries is unproblematic. In respect of the first exemption, the making of one single copy for individual scientific research or teaching, a comparison with other countries such as the United Kingdom or Australia shows that Vietnam has taken a more restrictive approach compared with them. In similar cases the United Kingdom and Australian copyright law could permit the copying of up to 10 percent, or no more than one chapter, from a book. This could still be said to be unreasonable where books may contain over 1500 pages, for example, a book rightly on *Copyright* by Copinger and Skone James²²³ or on *International Copyright and Related Rights* by Sam Ricketson and Jane

²¹⁸ Senftleben, above n 201, 126-7.

²¹⁹ For more in detail see Sub-section 2.4 (a) *Non-Exclusive and Non-Transferable Compulsory Licences under Appendix of the Berne Convention*.

²²⁰ *Intellectual Property Law 2005* art 25(1)(a); *Decree 100/2006* art 25(1).

²²¹ *Intellectual Property Law 2005* art 25(1)(d); *Decree 100/2006* art 25(2) the first sentence.

²²² *Decree 100/2006* art 25(2) the second sentence.

²²³ Paul Marett, *Intellectual Property Law* (Sweet & Maxwell, 1996) 48-9.

Ginsburg. Such a comparison of the laws between different countries can be difficult because of differences between them in publishing practices.

Although the three criteria are stipulated, both TRIPs Article 13 and the Berne Convention Article 9:2 leave considerable leeways within this exception relating to reproduction rights. Consequently, the three prerequisites should be examined through the situation or practice of each member country, not a gross generalization. The local legislation should be in accordance with the members' cultural, social, and economic contexts.

In countries with a high level of industrialization, urbanization, and commercialization and with a high per capita income, it can be seen as more reasonable, or even necessary, to prevent others from being exempted from the protection authorized to copyright holders which would effectively override the creative labour of the authors. In a poorer non-industrial developing country with about over 70 percent of the population living in rural areas and a low per capita income, such as Vietnam, a higher percentage use in both number and content should be seen as necessary, or acceptable, provided that the non-commercial and research or teaching purposes are observed. These purposes are satisfied in Vietnamese law as the provision says very clearly (in Vietnamese) that such a copy for such purposes must be made by the individual user.²²⁴

The legislation could be made clearer, however, in respect of such users. The law does not make it clear whether it is the individual who wants to make a copy on his or her own initiative or who makes a copy with the author's permission or the very author herself or himself. Although the latter view is confirmed in an official translation of the law into English,²²⁵ the former view is still arguable in the original Vietnamese text.²²⁶

²²⁴ *Intellectual Property Law 2005* art 25(1)(a); *Decree 100/2006* art 25(1).

²²⁵ Article 25(1)(a) of the 2005 Intellectual Property Law is officially translated into English (WIPO-Lex) as 'Duplication of works by authors for scientific research or teaching purpose.'

²²⁶ In the original Vietnamese text, that exception in Article 25(1)(a) of the 2005 Intellectual Property Law is worded as 'Tự sao chép một bản nhằm mục đích nghiên cứu khoa học, giảng dạy của cá nhân' which may be literally translated as 'Self-reproducing one single copy for the purposes of scientific research and teaching of an individual.'

There is another unresolved question, whether the provision permits the making of such a copy with the assistance of a machine such as a photocopier? As noted elsewhere, in Vietnamese history and culture there are generations who have left their creative works to be freely used by communities and society. In conformity with that spirit of the law it should be made clear that an individual or a person can use a machine when making such a copy. This is more reasonable as it is stated that architectural works, fine-art works, and computer programs are all excluded from subject matters of the reproduction right exceptions provided for in Article 25:1 (a) and (d) of the Intellectual Property Law, which are without permission and payment, to copyright infringement.²²⁷

- **Free Quotations and Illustrations and Other Free Uses of Works**

Article 10 of the Berne Convention provides for the free use of creative works by way of quotations and illustrations for teaching, with the requirement that the source and the authors are indicated. Other possible free uses of works are also provided for by the Convention under Article 10*bis*. These relate to certain articles and broadcast works and works which are seen or heard in connection with current events in particular.

A ‘quotation’ is a copy or repetition of a passage, a statement, etc. from a book, a document, a speech, etc.²²⁸ In the Convention, the length or size of a quotation is subject to fair practice and a generally-justified purpose.²²⁹ It must also be ‘lawfully made available to the public’.²³⁰ There is no listing of classes of quotations, no determining of the ways of quoting, and no further explaining of the requirement what ‘lawfully made available to the public’ may mean.²³¹ Consequently, developing countries are advised not to restrict the ways in which quotations can be made, nor to limit the length of quotation or the types of

²²⁷ *Intellectual Property Law 2005* art 25(3).

²²⁸ *The Shorter Oxford English Dictionary*, above n 188, 1734.

²²⁹ *Berne Convention* art 10(1).

²³⁰ *Ibid.*

²³¹ Consumers International Asia Pacific Office, above n 59, 31-2.

work which can be quoted, to interpret liberally the requirement that the work quoted must be made available to the public, and not to place limitations on the purposes of quotation.²³²

For teaching purposes Article 10:2 of the Berne Convention allows members to create exemptions for illustrations. As with quotations, there is considerable flexibility in how members incorporate these exemptions into their national law. The Convention neither makes clear whether ‘the utilization’ of literary or artistic works by way of illustration may be part or whole, nor the number of copies which may be made.²³³ It also says nothing about the types or forms of the utilization.²³⁴ The word ‘utilization’, used in the Convention, is argued to encompass different categories of rights including reproduction, translation, and adaptation rights and possibly the right of communication to the public.²³⁵

Other possible free uses of works for a specific informational purpose as already set out in Article 10*bis*:1 of the 1886 original Act of the Paris Convention²³⁶ are necessity and importance. Although this provision only took its final form after the 1967 revised version of the Convention, the scope of the works applying under this exception was extended so that the free flow of information about current matters could be facilitated.²³⁷ Also aimed at granting a concession to freedom of information²³⁸ Article 10*bis*:2 of the Paris Convention permits members to determine the conditions under which literary or artistic works, which are as such seen or heard in the course of the event by means of photography, cinematography, broadcasting or communication to the public by wire, may be reproduced and made available to the public. This is generally recognized by national laws which allow it freely used.²³⁹

²³² Ibid.

²³³ Ibid, 29-30.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ WIPO, above n 14, 65.

²³⁷ Ibid.

²³⁸ WIPO, above n 14, 66.

²³⁹ Ibid, 67.

All these exceptions are in general reflected in Vietnamese law. A person is permitted to reasonably quote or cite literary or artistic works for commentary or illustration without altering the contents of the work.²⁴⁰ There are two criteria in determining whether the use is reasonable. First, the quotation must aim to introduce, comment on, or clarify matters mentioned in the work of the person who makes the quotation.²⁴¹ Second, the amount and the essence of the quotation must not be prejudicial to the rights of the copyright holder in the work quoted, determined by the nature and the character of the work quoted.²⁴²

Likewise, a person is allowed to cite or quote literary or artistic works to use in articles, periodicals, radio or television programs, and documentary films without altering the contents of the work.²⁴³ Also, a literary or artistic work can be, non-commercially, quoted or cited for teaching in schools without altering the contents of the work.²⁴⁴ Directly making sound recordings, visual recordings of a performance for informational or teaching purposes is, in Vietnamese law, provided for as a final exemption in the scheme for free quotations and illustrations for teaching and other free uses of works under Articles 10 and 10*bis* of the Berne Convention.²⁴⁵

By implication, because of the use permitted under both exceptions in Vietnamese law, some reasonable adaptation and communication to the public, as well as translation, appear to be permitted. No further guidance by the Supreme People's Court or government administrative agencies has been given on these rights. As noted above, it is argued that such rights are within the meaning of 'utilization' as used in the Berne Convention.

²⁴⁰ *Intellectual Property Law 2005* art 25(1)(b): Literally, the provision may be translated as 'to reasonably quote or cite works without misrepresenting the authors' views in those works to comment on, or to illustrate in, the work of the person who makes such quotation.'

²⁴¹ *Decree 100/2006* art 24(1)(a).

²⁴² *Decree 100/2006* art 24(1)(b).

²⁴³ *Intellectual Property Law 2005* art 25(1)(c): Literally, the provision may be translated as 'to cite or quote works without misrepresenting the authors' views to write articles, to use in periodical publications or in radio or television programs or documentary films.'

²⁴⁴ *Intellectual Property Law 2005* art 25(1)(d): The provisions may be literally translated as 'to cite or quote works for teaching in schools without misrepresenting the authors' views and without commercial purposes.'

²⁴⁵ *Intellectual Property Law 2005* art 25(1)(g).

- **Other Miscellaneous Exemptions**

In terms of copyright protection and the exceptions to copyright infringement made under TRIPs Article 13, there are other exceptions provided for in Vietnamese law. They are on the basis of:

- performing dramatic works or other kinds of performing-art in mass cultural performances, propagation or communication activities without any charge;²⁴⁶
- photographing or televising fine-art, architectural, photographic, and applied-art works having been publicly displayed for making known their pictures or images;²⁴⁷
- translating the work into Braille or other languages for the blind;²⁴⁸ and
- importing no more than one single copy of a work for personal or private use.²⁴⁹

5. The Protection of Related or Neighbouring Rights

The protection of related rights, sometimes called neighbouring rights, is one of the subject matters covered by TRIPs. The word ‘related’, or ‘neighbouring’, reflects the relationship between the creative labour of the authors who enjoy copyright and those who have related, or neighbouring, rights, particularly through permitted use of the copyright material.

In this relationship, the latter may use the literary or artistic works by the former in carrying out their performances or making their products including sound and visual recordings. The interests of the former, or the authors of those literary or artistic works, were first referred to in the Berne Convention and, later, the relevant issues were turned to the Rome Convention.²⁵⁰ Unlike the drafting of the Berne Convention, there was a long debate before

²⁴⁶ *Intellectual Property Law 2005* art 25(1)(e).

²⁴⁷ *Intellectual Property Law 2005* art 25(1)(h).

²⁴⁸ *Intellectual Property Law 2005* art 25(1)(i).

²⁴⁹ *Intellectual Property Law 2005* art 25(1)(k).

²⁵⁰ There are provisions for sound and visual recordings, broadcast works, or public performances of works under Articles 9, 10, 10*bis*, 11, and 11*bis* of the Berne Convention, for example. Later, it is affirmed in Article 1 of the Rome Convention that ‘Protection granted under this Convention shall leave intact and shall

performers, producers of phonograms, and broadcasting organizations were given independent protection in the 1961 Rome Convention.²⁵¹

The protection of related rights in Vietnam is required by its membership not only of the WTO/TRIPs Agreement and its accession to the Rome Convention²⁵² but also of other treaties.²⁵³ Because of the obligations under these treaties, the protection given in Vietnamese law may be more than that required by TRIPs or the Rome Convention incorporated into TRIPs. For instance, it not only protects performances, phonograms and video recordings which are performed or produced by Vietnamese and foreign citizens, and broadcasts and encrypted program-carrying satellite signals belonging to broadcasting organizations,²⁵⁴ but also has over double the protection term of the rights of broadcasting organizations, required at least 20 years in TRIPs²⁵⁵ being 50 years in Vietnam.²⁵⁶

In respect of the protected rights required by TRIPs Article 14²⁵⁷ under Vietnamese law performers enjoy the property rights of:²⁵⁸

in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.'

²⁵¹ Stephen M Stewart and Hamish Sandison, *International Copyright and Neighbouring Rights* (Butterworths, 1989) 221.

²⁵² Vietnam became a member of this Convention on 1 March 2007.

²⁵³ They include the Phonograms Convention (Vietnam joined this Convention on 6 July 2005) and the Brussels Convention (the date of Vietnam's membership to this Convention is 12 January 2006).

²⁵⁴ *Intellectual Property Law 2005* arts 16-17.

²⁵⁵ *TRIPs Agreement* art 14(3) and (5).

²⁵⁶ *Intellectual Property Law 2005* art 34(3).

²⁵⁷ They are also set out in Articles 7, 10, 13 of the Rome Convention. Vietnam's membership of the Convention should make it consider these provisions when providing for the rights of performers, producers of phonograms, and broadcasting organizations. High standards of intellectual property protection contain in TRIPs may make such thing less important, however.

²⁵⁸ Besides these property rights, performers are provided with personal rights in accordance with Article 29(1)-(2) of the 2005 Intellectual Property Law. They consist of the right to have their names acknowledged when performing, where sound/visual recordings are distributed, or where performances are broadcast and the right to protect the integrity of performed figures, preventing others from modifying, mutilating, or distorting in whatever form prejudicial to their honor and reputation. Performers' personal rights are also found in the Chinese Copyright Law 1990, as amended 2010 (WIPO-Lex). In this Law Article 38(1)-(2) states that performers enjoy the rights to claim performer-ship and to protect the image inherent in their performance from distortion. Then Article 39 stipulates no time limit for the protection of these rights. To compare with, in Vietnam Article 34(1) of the 2005 Intellectual Property Law has no separation of the term of performers' personal rights, only generally states their rights are protected for 50 years counted from the year following the fixation of their performance.

- fixing live-performance on phonograms or video recordings;²⁵⁹
- reproducing directly or indirectly performances which have been fixed on phonograms or video recordings;²⁶⁰
- broadcasting or otherwise communicating to the public unfixed performances in a way accessible to the public, except where such performances are intended for broadcasting;²⁶¹ and
- distributing to the public original performances and copies thereof through sale, rental, or distribution by whatever technical means accessible to the public.²⁶²

Meanwhile, producers of sound and visual recordings have the rights to reproduce directly or indirectly sound and visual recordings and to import, distribute to the public original sound and visual recordings and copies thereof through sale, rental, or distribution by whatever technical means accessible to the public.²⁶³ Broadcasting organizations enjoy the rights to broadcast, re-broadcast, distribute to the public, fix, and reproduce, their broadcasts.²⁶⁴

Relating to exceptions to these related rights, TRIPs Article 13 provides for exemptions for copyright infringement. This is regulated in Vietnamese law as discussed in the next paragraph. In requiring members to confer certain authorizations on performers, producers of phonograms, and broadcasting organizations the Agreement permits them to decide the 'conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.'²⁶⁵

The principle relevant provision is Article 15 which provides that:

²⁵⁹ *Intellectual Property Law 2005* art 29(3)(a).

²⁶⁰ *Intellectual Property Law 2005* art 29(3)(b).

²⁶¹ *Intellectual Property Law 2005* art 29(3)(c).

²⁶² *Intellectual Property Law 2005* art 29(3)(d).

²⁶³ *Intellectual Property Law 2005* art 30.

²⁶⁴ *Intellectual Property Law 2005* art 31.

²⁶⁵ *TRIPs Agreement* art 14(6).

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

All exceptions relying on this provision are more or less adaptations of those already permitted under copyright.²⁶⁶ It may be no surprise that the two above-mentioned in Article 15:1(b)-(c) are set out in Articles 10*bis*:2 and 11*bis*:3 of the Berne Convention.²⁶⁷ Whereas members may grant compulsory licenses of related rights under Article 15:2 only by utilizing Article 13 of the Rome Convention.

This has been applied in Vietnam. Similar to the law on copyright exceptions, there are general criteria or conditions which create exceptions to related rights. These are almost identical to those in respect of copyright. In particular, all exceptions are generally required neither affecting the normal exploitation of the protected subject matters, nor prejudicing the rights of performers, producers of phonograms, or broadcasting organizations.²⁶⁸ In respect of these general conditions, the following exceptions are provided for which can be used without seeking permission and paying royalties:

²⁶⁶ *TRIPs Agreement* art 14(3) the second sentence.

²⁶⁷ WIPO, above n 14, 155.

²⁶⁸ *Intellectual Property Law 2005* arts 32(2) and 33(2).

- duplicating for one-self one single copy of a work for the purpose of personal scientific research;²⁶⁹
- duplicating for one-self one single copy of a work for the purpose of teaching, except where a performance, phonogram, video recording, or broadcast has been published for teaching purposes;²⁷⁰
- quoting reasonably for the purpose of providing information;²⁷¹ and
- making, for broadcasting, of a temporary or provisional copy by a broadcasting organization itself when it is entitled to the right to broadcast.²⁷²

What is a reasonable quotation of a performance, phonogram, video-recording, or broadcast for the purpose of providing information is further defined. First, the part quoted must be aimed only at introducing, commenting on, or clarifying some matters in respect of the information provided.²⁷³ Second, the amount and the essence of the part quoted must be without prejudice to the rights of performers, producers of phonograms, or broadcasting organizations, determined by the nature and the character of the performance, phonogram, video recording, or broadcast quoted.²⁷⁴ Similarly, a provisional copy for a broadcasting organization which is entitled to the broadcasting right is defined as the copy which is made or fixed by the broadcasting organization through its instruments and equipment to be used immediately for its forthcoming broadcast.²⁷⁵ In special cases, such a copy can be stored in the organization's archive.²⁷⁶

There are other exceptions dispensing with the requirement for permission. They reflect non-voluntary licenses of related rights under Article 13 of the Rome Convention. In particular, organizations and individuals are allowed to use directly or indirectly, without obtaining authorization, published phonograms or visual recordings for commercial

²⁶⁹ *Intellectual Property Law 2005* art 32(1)(a).

²⁷⁰ *Intellectual Property Law 2005* art 32(1)(b).

²⁷¹ *Intellectual Property Law 2005* art 32(1)(c).

²⁷² *Intellectual Property Law 2005* art 32(1)(d).

²⁷³ *Decree 100/2006* art 33(1).

²⁷⁴ *Decree 100/2006* art 33(2).

²⁷⁵ *Decree 100/2006* art 34 the first sentence.

²⁷⁶ *Decree 100/2006* art 34 the second sentence.

purposes for broadcast.²⁷⁷ If this is accompanied with sponsorship, advertising, or charging in any form, remuneration must be paid to authors, copyright owners, performers, producers of phonogram or visual recordings, and broadcasting organizations by agreement.²⁷⁸ Where there is no agreement, the parties can rely on the relevant government-regulated regime or take legal action.²⁷⁹ But when those published phonograms or visual recordings are used without sponsorship, advertising, or charging in any form, the remuneration is paid under the government-regulated regime.²⁸⁰ Neither agreement nor legal action is mentioned in this context.²⁸¹

The direct use of a published phonogram or video recording for commercial purposes as part of broadcasts with sponsoring, advertising, or collecting money in any form is understood to be the transmission by wire or wireless means, including satellite transmission or in a digital environment, by a broadcasting organization of such phonogram or video recording.²⁸² The indirect use of a published phonogram or video recording for commercial purposes as part of broadcasts with sponsoring, advertising, or collecting money in any form is described as the relay or the retransmission of transmitted broadcasts or repeating broadcasts transmitted in a digital environment in a wireless environment.²⁸³

Furthermore, it is provided that when using published phonograms or visual recordings in business or commercial activities without obtaining authorization, organizations or individuals must pay remuneration to authors, owners of copyright, performers, producers of phonogram or visual recordings, and broadcasting organizations by agreement.²⁸⁴ When this is not agreed on, the parties can rely on the relevant government-regulated regime or take legal action.²⁸⁵

²⁷⁷ *Intellectual Property Law 2005* art 33(1) the first paragraph.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Intellectual Property Law 2005* art 33(1) the second paragraph.

²⁸¹ *Ibid.*

²⁸² *Decree 100/2006* art 35(1) the first paragraph.

²⁸³ *Decree 100/2006* art 35(1) the second paragraph.

²⁸⁴ *Intellectual Property Law 2005* art 33(2).

²⁸⁵ *Ibid.*

6. Conclusions

Overall, the provisions of Vietnamese law on copyright and related rights as a whole must be seen as a serious endeavour by Vietnamese lawmakers to create a local system for the protection of copyright and related rights which conforms to international law and practice. The local protection of copyright and related rights has been harmonized with international standards and the interests of authors and related rights holders have been legally protected.

As well, the local law can be seen to have embodied the flexibilities found in TRIPs' corresponding provisions and in other relevant treaties incorporated into TRIPs. This occurs in a number of ways. The flexibilities may be found in the ambiguity or vagueness of language used, gaps in the law, or for the other reasons of law's flexibility discussed in Chapter 2. From these, the public interests in having access to information, educational material, and cultural enjoyment can be balanced with the rights of the creators.

In respect of copyright protection, the available flexibilities have been regularly engaged. For example, Vietnam has restated Articles 2:4, 2:8, and *2bis*:1 of the Berne Convention and Article 9:2 of TRIPs by excluding news of the day, official texts and translations of a legislative, administrative or a judicial nature, concepts, definitions, and the like from copyright protection. This is set out in Article 15 of the 2005 Intellectual Property Law, guided by Article 21 of Decree 100/2006.

Likewise, it is seen with the requirement for fixing a work in a certain material form, even though this should not have been required. It occurs because of overlaps between what is provided for in Article 6:1 of the 2005 Intellectual Property Law, which applies to works in general, and the guidance in Article 10 of Decree 100/2006 to use it for oral or spoken works only. The Law similarly has provisions for exceptions to copyright infringement, essentially permitted under TRIPs Article 13 and Articles 9:2 and 10 of the Berne Convention. These include the use of a published work for the purposes of personal or non-commercial study and research, quotations and illustrations for teaching, and news or

current affairs reporting, basically provided for in Article 25 of the 2005 Intellectual Property Law and in guidance for their implementation given by Articles 24-25 of Decree 100/2006.

In the protection of related rights, in addition to the exploitation of permission under the Rome Convention to have set out the conditions under which the communication right of broadcasting organizations can be exercised without obtaining authorization but paying remuneration,²⁸⁶ Vietnamese law is seen to have taken advantage of Article 14:6 of TRIPs and Article 15 of the Rome Convention. These are foundations for the local provisions that, without seeking the authorization of rights holders and paying royalties to them, people may, among other things, duplicate for themselves one single copy, or make a reasonable quotation, of a performance, a phonogram, a video-recording, or a broadcast for the purposes of non-profit scientific research or teaching or providing information.²⁸⁷

But Vietnamese law or sub-law provisions exploiting the flexibilities have often been too limited in their application or too general for their effective implementation. In other cases, the use of those flexibilities is limited by TRIPs-plus provisions, such in the free trade agreement with the United States, which have given the right to control the importation or distribution of originals or copies thereof of the works to the copyright holders.²⁸⁸ This can lead to the limitations of parallel imports of cheaper legitimately copyrighted products at a competitive price. Similarly it has granted the right of control of the importation or distribution of originals or copies of sound and video recordings to the producers of these products²⁸⁹ and extended the duration of copyright to 75 or 100 years for some kinds of work, including cinematographic, photographic, and applied-art works.²⁹⁰ This prolongs the time before these works fall into the public domain which would benefit public interests

²⁸⁶ See *Intellectual Property Law 2005* art 33 in connection with *Rome Convention* art 13(1)(d).

²⁸⁷ *Intellectual Property Law 2005* art 32(1).

²⁸⁸ *Intellectual Property Law 2005* art 20(1); *United States-Vietnam Bilateral Trade Agreement* art 4(2)(A)-(B) ch II.

²⁸⁹ *Intellectual Property Law 2005* art 30(1).

²⁹⁰ *Intellectual Property Law 2005* art 27(2).

from Vietnam's position as a developing country with low per capita income and low levels of economic and technological development.

These restrictions, alongside traditional cultural characteristics, discussed in Chapter 2, which have made Vietnam as a whole unfamiliar with copyright protection in particular and intellectual property in general. This has left Vietnam less experienced than other members in negotiating with other nations over relevant matters. The United States experience with negotiations over TRIPs related rights is very different from that of Vietnam, which may have a similar experience to other developing countries. Consequently, it has been difficult for Vietnam to both protect intellectual property in accordance with TRIPs' requirements and take advantage of all the flexibilities to be found in it. This should improve over the longer term with Vietnam's integration into the WTO and Vietnam's law and policy makers should consider revising these flexibilities. Similar issues are considered in respect of patents and the protection of plant varieties in the next chapter.

CHAPTER 5: PATENTS AND PLANT VARIETIES IN VIETNAM UNDER TRIPS' FLEXIBILITIES

Synopsis

This chapter deals with patents and plant varieties and is divided into four sections covering patentability, patentable exclusions, patent exceptions and plant varieties.

Vietnamese legislation on patents and plant varieties represent the fulfilment of Vietnam's obligations under TRIPs to provide for the protection of technological inventions and for plants bred with novel and distinctive characteristics. TRIPs itself imports requirements of the Paris Convention to which it has added other obligations on members. Vietnam is also a party to the 1991 International Convention for the protection of New Varieties of Plants (1961). The requirements for both patents and plant varieties are met principally in the 2005 Intellectual Property Law. The administration of the law is divided between a number of government agencies.

The patents legislation, both in respect of what is patentable and exceptions permitting the use of patent subject matter without the patent holder's consent, broadly resembles the national laws of other members of TRIPs. Vietnam, for example, follows other national laws and TRIPs in establishing three general criteria to establish patentability and uses similar concepts for exceptions and compulsory licences. It has also followed others to exclude mere *discoveries* from protectability.

Important exceptions for Vietnam relate to public health and the availability of affordable pharmaceuticals which constitute part of the longest Articles in TRIPs and have been controversial in their implementation. These have also involved significant issues of interpretation and led to the 2001 Doha Declaration on the TRIPs Agreement and Public Health. Vietnam has not taken steps to implement *paragraph 6*. It has only created the regulations required to compulsory licence the manufacture of some HIV-related drugs. The language used in TRIPs has also given Vietnam some choice in the language which it has used. Some concepts are difficult to define and have no generally agreed on meanings. Where that language has been transposed into Vietnamese law further choice has been given to administrators and also to judges on what it means in its practical application. These include *ordre public* and *morality*.

Vietnam's law on plant varieties has drawn on the International Convention for the Protection of New Varieties of Plants in developing its own *sui generis* scheme rather than rely on patents for the protection of plants to ensure that it meets one of the requirements of TRIPs, that the scheme be effective. Again there is no agreement on basic terms which define Vietnam's obligations under TRIPs as well as the rights and liabilities in domestic law including *micro-organisms* and *non-biological and microbiological processes*.

The law again reflects the limited knowledge and experience of policy and law makers with intellectual property. There is also limited expertise in their administration. The law is marked by ambiguity of language and gaps. Further regulations and administrative guidance issued by government agencies are needed to make parts of the law workable in the Vietnamese legal and administrative systems. However, Vietnam, like other developing countries finds that there is more assistance available to enforce the patent rights of foreign patent holders than in how to use the flexibilities in TRIPs in ways which are more appropriate for its level of economic development. As with the law on copyright, the law on patents and plant varieties law are not widely known or used.

CHAPTER 5: PATENTS AND PLANT VARIETIES IN VIETNAM UNDER TRIPS' FLEXIBILITIES

1. Patentability

The prescription of standards to be reflected in national laws concerning the availability, scope and use of intellectual property rights are at the heart of TRIPs and copyright and patents are at its core.¹ When doing this, TRIPs integrates much which is significant from, respectively, the Berne Convention and the Paris Convention. It also adds more provisions in respect of patents than it does to copyright. These include the requirement to protect plant varieties and members have a choice to use their systems of patent law to do this.

Unlike the protection of copyright, which mostly relates to cultural products as is clear from the previous chapter, patents, required by TRIPs Article 27:1 to be 'available for any inventions whether products or processes in all fields of technology', relate directly to the level of a nation's technological development. This is recognized by the TRIPs' preamble in which it is recognized that the special needs of the least-developed country members are taken into account.² This includes maximum flexibility in the domestic implementation of laws and regulations to enable them to create a sound and viable technological base.³ To create an effective legal system for patents requires a certain level of national technological development and knowledge by policy and law makers of both business and technology, as well as the effect of the evolution of both commercial practices and scientific and industrial knowledge.

In the course of integrating into the global economy Vietnam has seen significant changes in its commerce and technology and achieved considerable progress, including high economic growth and the reduction of poverty. However, it is still classified amongst low

¹ Christopher Arup, *The World Trade Organization Knowledge Agreements* (Cambridge University Press, 2nd ed, 2008) 299-315.

² *TRIPs Agreement* preamble para 6.

³ Ibid.

income economies⁴ and as having a low level of technological development as well.⁵ This can be seen in its low numbers of applications for international patents under the PCT compared with other developing and developed countries.⁶ As well it can be seen from the numbers of applications for domestic patents and utility solutions⁷ including more utility solutions than inventions unlike China.⁸ The lack of institutional capacity and technical expertise required to maximize the advantages to be found in the flexibilities in TRIPs is clear from what follows.⁹

As noted above patents, together with copyright, form the heart of TRIPs. In the same way as copyright in the Agreement relies on the Berne Convention, TRIPs' provisions on patents draw on the Paris Convention. The patent provisions, however, have been further supplemented by requiring protection for plant varieties.

The subject matter required for patentability is specified in Article 27:1 of TRIPs:

Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights

⁴ According to the most recent classification in 2007 by the World Bank, Vietnam is among 49 low-income economies with gross national income per capita of US\$935 or less: World Bank, *Data and Statistics: Country Groups* <www.worldbank.org> (visited 11 June 2009).

⁵ This level of development is said to be 30 years behind Thailand as a country with an average level of technology and far behind other industrialized countries: Thanh Ngọc, 'Nghịch lý giáo dục đại học Việt Nam' [The Paradox of University Education in Vietnam] *Vietnam Chamber for Commerce and Industry* <www.vcci.com.vn> (visited 27 August 2007). See also Văn Thành, 'Mọi hoạt động giảng dạy và nghiên cứu khoa học đều cần hướng theo các chuẩn mực quốc tế' [Every Activity in Teaching and Researching Needs to Be Taken towards International Standards] (239-247) and Trần Văn Thọ, 'Bàn lại vấn đề học vị tiến sĩ' [Re-Discussion on the Matter of PhD Degrees] (288-297) in *Một góc nhìn của trí thức* [An Angle of View of Intellectuals] (Tia Sang Magazine and Young Publishing House, Vol. 4, 2005).

⁶ See Appendices 5-7 to this thesis.

⁷ See Appendices 2-3 to this thesis.

⁸ The number of Chinese patent applications has grown dramatically every year from 1985 to 2000 but over 60% of these applications are utility models: Yahong Li, 'Utility Models in China' in Christopher Heath and Anselm Kamperman Sanders (eds), *Industrial Property in the Bio-medical Age: Challenges for Asia* (Kluwer Law International, 2003) 257-268.

⁹ Duncan Matthews, 'TRIPs Flexibilities and Access to Medicine in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements' (2005) 11 *European Intellectual Property Review* 420, 420.

enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

This provision adds to the Paris Convention's requirements. The Convention recognizes various kinds of industrial patents, such as patents of importation or patents of improvement, but it provides no general definition of patentability.¹⁰ In requiring members to grant patents to inventions in the manner stated in the second sentence, when incorporating such TRIPs criteria into their national laws, it is necessary, for example, to define 'invention' and to give details to each criterion specified in the definition. This is a TRIPs gap which may lead to problems of ambiguity in the text of the Agreement, determined in Chapter 2.

1.1 Determining Inventions

Three conditions, or criteria for conferring a patent on inventions, appear in such TRIPs provision without fully stating what may be an invention. They are the requirements that the invention be new, involve an inventive step, and be capable of industrial application. How these terms are defined determines how wide or narrow the space of patentability will be as well as, in part, how it will be filled. The width of the concept and its content will also be determined by how 'invention' is defined.

There is the initial question of what is an invention. It is often distinguished from 'discovery'. Discoveries, in themselves, are not patentable. But discoveries and inventions resemble each other as they both relate to creative or inventive labour working out something new or what has not ever been known before.

Discovery is generally defined as the finding out or the bringing to light of what which was previously unknown or the making known something that has not been known, found out,

¹⁰ See *Paris Convention*, eg, arts 1, 4, 4bis, 4ter, 4quarter, 5, 5bis, 5ter, 5quarter, and 11.

revealed, or brought to light before.¹¹ Invention is something which is devised or contrived and may be the production of a new method, a new art, a new kind of instrument which are previously unknown.¹² While establishing chemical elements of a known medicinal plant may be treated as a discovery, combining these chemical entities for a new medical treatment may be considered as an invention with the possibility of a patent for a new pharmaceutical product produced from it.

Such TRIPs provision obligates members only to protect inventions by granting patents to them, not discoveries. Some countries, however, give some protection to discoveries so that a new finding may be encouraged and rewarded. Hence, discoveries may be treated differently between national legal systems. The United States, for example, protects some forms of discoveries.¹³ Most national patent laws exclude mere discoveries from patentability.¹⁴ Vietnam is amongst them.¹⁵

Although countries may differ on whether to grant or not grant a patent for a discovery, they often agree on giving no definition of ‘discovery’.¹⁶ Similarly, although defining ‘invention’ is possible, by either reference to characteristics which relate to the inventor’s creative activities or the results that are obtained from such creative activities, most countries choose not to do so in their patent laws.¹⁷

¹¹ *The Shorter Oxford English Dictionary* (Oxford University Press, 1973) 563.

¹² *Ibid*, 1107.

¹³ 35 USC §§ 100(a), 101, as amended 2007 (WIPO-Lex & JPO).

¹⁴ See, eg, Section 1(2)(a) of UK Patents Act 1977, as last amended by the Copyright, Designs and Patents Act 1988; Section 1(1) of Sweden Patent Act 1967, as amended by Act 1158 of 2000; Article 6(a) of Argentina Patent Law No. 24.481, as amended by Law No. 24.572 of 1995; Section 22(1) of Philippines Intellectual Property Code of 6/6/1997 No. 8293; Section 13(1)(a) of Malaysia Patents Act 1983, as incorporated latest amendment by Act A1137/2002 (WIPO-Lex & JPO).

¹⁵ *Intellectual Property Law 2005* art 59(1).

¹⁶ Non-definition of discoveries is found in all patent laws of countries mentioned in notes 14 and 15 above.

¹⁷ Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books, 2000) 51.

In respect of this, the lack of a comprehensive definition of ‘invention’ in TRIPs is understandable.¹⁸ National laws often establish the criteria for patentability without further defining ‘invention’ together with lists what is not invention and what is non-patentable.¹⁹

But there are some countries which have sought to define ‘invention’. They include Argentina, Mexico, and Japan. The definition is often short and general to be particularized or detailed in sub-laws, or in administrative and judicial practices.²⁰

These countries also include Vietnam. In particular, Article 4:12 of the 2005 Intellectual Property Law defines an invention as:

a technical solution in form of a product or a process purposing at handling a determined problem by application of laws of nature.

This definition possesses some similarity to that found in the Japanese Patent Act, which defines invention as ‘the highly advanced creation of technical ideas utilizing the laws of nature’.²¹ Except for the ambiguity or vagueness in both the Japanese and Vietnamese versions and in the translation of those into English,²² the same concept of ‘applying or utilizing the laws of nature’ is mentioned. The highly-advanced technological level and

¹⁸ Ibid.

¹⁹ For example, Article 24 of the Poland Industrial Property Law provides that patents shall be ‘granted for any inventions which are new, which involve an inventive step and which are susceptible of industrial application’. Subsequently, Article 28 of the Law provides a list of non-inventions, including discoveries, scientific theories and mathematical methods; aesthetic creations; and schemes, rules and methods for performing mental acts, doing business or playing games. Similarities to these in the Polish Law can be found in patent laws of many other countries including Spain (WIPO-Lex & JPO).

²⁰ In particular, Article 4(a) of the Argentina Patent Law reads ‘For the purpose of this Law, any human creation that permits material or energy to be transformed for exploitation by man shall be considered an invention’. Similar to this provision, Article 15 of the Mexico Intellectual Property Law states ‘Any human creation that allows matter or energy existing in nature to be transformed for use by man for the satisfaction of his specific needs shall be considered an invention’. Meanwhile, Article 2(1) of the Japan Patent Act says “‘Invention’ in this Act means the highly advanced creation of technical ideas utilizing the laws of nature’ (WIPO-Lex & JPO).

²¹ Ibid.

²² This is discussed in Subsection 1.1 *Law is Encoded in Language and Language is Ambiguous* in Chapter 2 on conceptualizing law’s flexibility.

legal system of Japan indicates that Vietnamese drafters of the Intellectual Property Law were assisted by referring to the Japanese law.²³

In accordance with a ministerial circular, an application for a patent grant for an invention must represent a technical solution, whether a product or a process.²⁴ A technical solution is defined as a collection of prerequisite and sufficient information on technical methods and/or technical devices to accomplish a given task or to resolve a given problem.²⁵ It may take the form of a tangible object including a tool, machine, equipment, or an electric circuit or be in the form of a process including technological process and method of diagnosing, forecasting, or checking.²⁶

In theory, patents are important and necessary to protect the investment of both local and foreign investors. In practice, a much greater number of patents are in Vietnam granted to foreign individuals or enterprises.²⁷ As patents can be used as a tool to lock up the development of local technologies, a developing country like Vietnam should not give a

²³ The details are given in notes 196-199 in Chapter 3 on localizing the WTO/TRIPs Agreement in Vietnam. The drafting course of the 2005 Intellectual Property Law with the main responsibilities of the NOIP under the Ministry of Science and Technology with substantial supports by foreign countries including Japan and international organizations including WIPO is discussed. It should be the same from the NOIP's development at the 1982 establishment (the Patent Office) to have 27 staff members divided into two divisions of management and information up to 31 December 2008 being facilitated with 281 professional and supporting staff members dividing into 19 divisions. The Office has had bilateral relationships, cooperated with, and received assistance from foreign projects, including MOIPA (the Industrial Property Administration System or IPAS), UTIPINFO (the Japan-Vietnam Cooperation Project for Utilization of Intellectual Property Information in Vietnam), ECAP II (the EC-ASEAN Intellectual Property Rights Co-operation Programs), and SPC (the Vietnam-Switzerland Special Cooperation on Intellectual Property), as well as from the Patent Offices in France, Japan, the United States, Europe, and other countries. See National Office of Intellectual Property, *Giới thiệu - Lịch sử phát triển - Quá trình hình thành và phát triển của Cục Sở hữu trí tuệ qua các năm* [About NOIP: Development History]; *Hoạt động sở hữu trí tuệ 2005* [Annual Report 2005] 17-22, 27; *Hoạt động sở hữu trí tuệ 2007* [Annual Report 2007] 24-27; *Hội thảo "Phát triển và ứng dụng thông tin sở hữu trí tuệ tại Việt Nam* [National Workshop on Development and Utilization of Intellectual Property Information in Vietnam] <www.noip.gov.vn>. See also NOIP Centre for Research and Training, *Giới thiệu dự án hiện đại hóa quản trị sở hữu công nghiệp* [About the Project of Modernization of Industrial Property Administration] <<http://www.elearning-noip.org>>; ASEAN Project on the Protection of Intellectual Property Rights (ECAP III), *The ECAP II Program* <<http://www.ecap-project.org>> (all visited 23-24 June 2010).

²⁴ *Circular 01/2007* point 25.3(a).

²⁵ *Circular 01/2007* point 25.3(b).

²⁶ *Circular 01/2007* point 25.3(b)(i)-(ii).

²⁷ See Appendices 2 to 4 to this thesis.

wider scope to what is patentable. This can be narrower or widened by the criteria to be met by inventions for the grant of a patent, discussed below.

1.2 Detailing the Patent Criteria

The statement in TRIPs that ‘patents shall be available for any inventions... provided that they are new, involve an inventive step and are capable of industrial application’ leaves considerable gaps. Each of these three criteria needs to be further detailed or particularized by members. This freedom may be reflected in national patent laws to widen or narrow the scope of patentable inventions.

Representing an assembling of TRIPs’ criteria for patents, the 2005 Intellectual Property Law provides for the grant of patents for inventions which possess novelty, involve an inventive step, and are capable of industrial applications.²⁸ Each of them is followed by greater detailed provisions.

(a) Novelty

In patent law, a patent gives the patentee the right to exclude competitors from using the subject matter of the patent. To be awarded this, according to the policy underlying patent law, there must be an investment or effort in creating or inventing something new. The ‘newness’ of this creation or invention results from a comparison of the state of the art prior to the filing or priority date of the application. This can be provided for differently in the national legislative systems of the members.

In most national legal systems the novelty of an invention is considered lost if the invention has been published anywhere, whether in oral or written forms or by any other means.²⁹ By way of contrast with the United States law, which an invention is not seen losing its novelty

²⁸ *Intellectual Property Law 2005* art 58(1).

²⁹ Correa, above n 17, 58.

if has been disclosed outside the United States in a non-written manner, including its public use or on sale,³⁰ the scope of patentable inventions in such systems is narrower. The law in Vietnam represents this common choice.

In particular, Article 60:1 of the 2005 Intellectual Property Law stipulates an invention is novel if it has not been publicized by use or by description in writing or in any other form, anywhere worldwide. The provision does not mention directly oral or electronic forms of disclosure of inventions but these are covered by the general wording ‘any other form’.

In addition, the Article affirms that the novelty of an invention is not lost if there is only a limited number of persons who have known of the invention and they have been obligated to keep it secret.³¹ No particular number of people is specified. This is a gap in the local law which does not originate in TRIPs.

Novelty is also recognized, if the application is filed within six months from the date of any publication³² in the three following circumstances:

- where an invention is published without permission by a person other than those who have the right to register it as specified by Article 86;³³

³⁰ 35 USC § 102(b), as amended 2007 (WIPO-Lex & JPO).

³¹ *Intellectual Property Law 2005* art 60(2).

³² *Intellectual Property Law 2005* art 60(3) the first sentence.

³³ *Intellectual Property Law 2005* art 60(3)(a). In particular, Article 86 of the Law provides that:

1. The following organizations or individuals have the right to register an invention, industrial design, or layout design:
 - a. Authors who have created the invention, industrial design, or layout design by their own efforts and expenses;
 - b. Organizations or individuals which have invested finance or material facilities in the creation (of the invention, industrial design, or layout design) of authors in the form of a job assignment or hiring unless otherwise agreed non-contrary to paragraph 2 of this Article.
2. The Government shall provide for the right to register inventions, industrial designs, or layout designs created by State material-technical facilities, budget, or funds.
3. Where more than one organizations or individuals have jointly created or invested in the creation of an invention, industrial design, or layout design, the right to register the invention, industrial design, or layout design belongs to all those and the registration must be carried out by their agreement.

- where an invention is published in the form of a scientific presentation by those who have the right to register it as specified by Article 86;³⁴ and
- where an invention is displayed by those who have the right to register it as specified by Article 86, in Vietnam's national exhibition or an official or officially-recognized international exhibition.³⁵

(b) Inventive ness

One of the conditions for patentability is inventiveness, provided for in the United States law as 'non-obvious subject matter'.³⁶ This may be the reason that a footnote in TRIPs specifies that 'inventive step' can be understood as a synonym for 'non-obvious'.³⁷

An invention can be seen as having a significant effect on, or being a significant development in, technologies. Therefore, one of the criteria for protectable inventions should be the presence of 'a development over prior art' or an inventive step in the art of the relevant technical effect, not only something merely new.³⁸ Relating to this requirement, the European Patent Office states that:

Inventive step is distinguished from technical progress ... technical progress comparisons with marketed products as alleged support for this requirement being satisfied are not sufficient. There must be demonstrated the presence of an inventive step with regard to the closest state of art.³⁹

An invention can be considered patentable if it reflects a surprising level of creation which is not obvious, the criterion in the United States law referred to above, to a skilled person or

4. Those that have the right to register inventions, industrial designs, or layout designs under this Article may transfer such right to other organizations or individuals, including where the registration application has been filed, under a written contract or by inheritance.

³⁴ *Intellectual Property Law 2005* art 60(3)(b).

³⁵ *Intellectual Property Law 2005* art 60(3)(c).

³⁶ 35 USC § 103, as amended 2007 (WIPO-Lex & JPO).

³⁷ *TRIPs Agreement* note 5.

³⁸ UNCTAD & ICTSD, *Resource Book on TRIPs and Development* (Cambridge University Press, 2005) 359.

³⁹ Citing in UNCTAD & ICTSD, *ibid.*

a specialist with normal skills in that technological field.⁴⁰ This is taken up by Article 61 of the 2005 Intellectual Property Law of Vietnam. Accordingly, the assessment that something is an inventive step in a technical solution depends on the question whether the invention has made ‘an inventive progress’ and one unable to be ‘easily-created by a person with average knowledge in the art’. This assessment is conducted by examiners under the National Office of Intellectual Property (NOIP) by assessing the distinctive substantial indicators of invention, stated in the protection claim.⁴¹ They need to ascertain whether or not the distinctive substantial indicators disclose the mandatory minimum information required,⁴² and whether or not the combination of the distinctive substantial indicators of invention is considered obvious to a person with an average knowledge in the art.⁴³

The mandatory minimum information to be searched, in relation to the assessment of an inventive step, is, at the time of filing, in correspondence with the first-to-file rule, recognized by Vietnam.⁴⁴ This makes Vietnamese law alike most other national patent laws, except the United States which establishes and applies the first-to-invent principle.⁴⁵ Accordingly, the information search must be conducted at least, but is not confined to, of all invention applications, received by the NOIP, with the same patent classification criteria for technical solutions⁴⁶ as those of the subject matter which is stated in the examining application, taking into account sub-criteria (the third-class criteria) of that patent

⁴⁰ Wegner 1994, citing in Correa, above n 17, 60.

⁴¹ Circular 01/2007 point 25.6(b).

⁴² Circular 01/2007 point 25.6(b)(i).

⁴³ Circular 01/2007 point 25.6(b)(ii).

⁴⁴ Intellectual Property Law 2005 art 90.

⁴⁵ John H Barton, ‘Issues Posed by a World Patent System’ 7(2) *Journal of International Economic Law* 341, 348 in Maskus and Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press, 2004). See also Michael F Martin, ‘The End of “First-To-Invent” Rule: A Concise History of its Origin’ (2009) 49(3) *IDEA - The Intellectual Property Law Review* 435; Michael A Glenn and Peter J Nagle, ‘Article I and the First Inventor to File: Patent Reform or Doublespeak?’ (2010) 50(3) *IDEA - The Intellectual Property Law Review* 441; Rebecca C E McFadyen, ‘The “First To File” Patent System: Why Adoption is Not an Option’ (2007) 14(3) *Richmond Journal of Law and Technology* 1.

⁴⁶ This must be carried out in accordance with the Strasbourg Agreement Concerning the International Patent Classification of 24 March 1971, as amended on 28 September 1979, according to Clause 23.5 of Circular 01/2007. The latest version of this international patent classification is published by the NOIP in the Industrial Property Official Gazette. According to WIPO, *Frequently Asked Questions about the International Patent Classification (IPC): Which Countries are Members of the Strasbourg Agreement*, there are 62 countries to have been members of the Agreement until July 2013 <<http://www.wipo.int/classifications/ipc/en/faq/>>.

classification for technical solutions, and with filing dates, or dates of priority, earlier than the filing or priority date of the examining application.⁴⁷ This aims at identifying applications of the same invention with the earliest filing or priority date.⁴⁸ If there are many applications for registration of the same invention, the patent is granted only to the application with the earliest filing or priority date satisfying the grant's conditions.⁴⁹

In terms of these two criteria for novelty and inventiveness, there is a gap in TRIPs which is found in Vietnamese law but often provided for in other countries' patent laws. As TRIPs neither requires members to grant patents for new uses of a known idea nor excludes them from patentability, members are free to decide whether they provide for new uses or not.

Such a subsequent use of a known idea may be considered 'new' but it may be difficult to prove that it meets the criteria for novelty and inventiveness. This dilemma has resulted in it either being protected in more than 30 countries,⁵⁰ including the United States,⁵¹ Poland,⁵² and the European Union,⁵³ or left with no protection in other countries.⁵⁴ It is an issue of some significance and so is a surprising gap. It particularly affects consumers in the pharmaceutical industry because of that industry's practice of 'evergreening'.⁵⁵ Law and policy makers need to consciously consider the merits of the patentability of new uses.

⁴⁷ Circular 01/2007 point 25.7(a).

⁴⁸ Circular 01/2007 point 25.7(b).

⁴⁹ Circular 01/2007 point 25.7(c).

⁵⁰ Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford University Press, 2000) 104-5.

⁵¹ 35 USC § 100(b), as amended 2007 (WIPO-Lex & JPO).

⁵² *Industrial Property Law* (Poland) art 25(4) (WIPO: CLEA-Lex & JPO).

⁵³ Guy Tritton, *Intellectual Property in Europe* (Sweet & Maxwell, 2008) 120-4.

⁵⁴ Article 6(f) of Argentina Patent Law (WIPO-Lex & JPO), eg, confirms that 'the juxtaposition of known inventions or mixtures of known products, changes in the shape, dimensions or constituent materials thereof...' is not considered inventions.

⁵⁵ In the pharmaceutical industry 'evergreening' strategies have been used by pharmaceutical corporations in the United States since 1983 and in Canada since 1993, for preventing generic competitors from producing cheaper generic drugs when their patents expire: Thomas Faunce, 'An awful truth about evergreening', *The Age* (7 August 2004) <<http://www.theage.com.au/articles/2004/08/06/1091732084185.html>>. Evergreening has been widened to cover other fields of technology including computer software or hardware resources by the original manufacturer 'stockpiling' patent protection by obtaining separate 20-year patents on multiple attributes of a single product: European Generic Medicines Association, 'Evergreening of Pharmaceutical Market Protection' <<http://webmail.egagenerics.com/gen-evergm.htm>>.

Given Vietnam's developing status they may have well-decided that it would be preferable not to make such new uses patentable.⁵⁶

(c) Industrial Applicability

As with the inventive step criterion, the last criterion 'capable of industrial application' is the subject of a footnote in TRIPs stating that it corresponds with the meaning of 'useful'.⁵⁷ This again appears to relate to the United States law which requires patent for inventions to be operable and capable of satisfying some function of benefit to humanity.⁵⁸ This shows a broad scope of patentability as it brings within patentable subject matters 'purely experimental inventions'.⁵⁹ The corresponding criterion often provided for in other national legislation is relatively narrower, 'industrial applicability'⁶⁰ or 'capable of industrial application'⁶¹ worded in TRIPs.⁶²

Vietnamese law represents this last approach. It requires 'being susceptible of industrial application' as the last of the three conditions. Article 62 of the 2005 Intellectual Property Law states that an invention is considered 'susceptible of industrial application':

⁵⁶ A similar issue is that a WTO member may decide itself whether to confer patents on traditional medicines. This is generally kept silent in Vietnam. In China, it has been discussed whether the patent law can give adequate protection to traditional knowledge in light of the criteria of novelty and inventive step under the Chinese patent law and whether Chinese traditional medicine or medical knowledge forms part of the prior art defined under the patent law to be offered with a description of the patent examination criterion for medicines applying by the China Patent Office: Xuan Li, 'Novelty and Inventive Step: Obstacles to Traditional Knowledge Protection under Patent Regimes: A Case Study in China' (2007) 29 *European Intellectual Property Review* 134-139.

⁵⁷ *TRIPs Agreement* note 5.

⁵⁸ Chisum and Jacobs (1992), citing in Correa, above n 17, 60.

⁵⁹ Bainbridge (1992), citing in Correa, *ibid*, 60-1; UNCTAD & ICTSD, above n 38, 361.

⁶⁰ *Ibid*.

⁶¹ *TRIPs Agreement* art 27(1) the first sentence.

⁶² See, eg, Article 4(e) of Argentina Patent Law No. 24.481, as amended by Law No. 24.572 of 1995; Articles L611-10(1), L611-15 of France Intellectual Property Code, as amended by Act No. 2006-236 of 1 March 2006; Chapter I: 2(1)(a)(ac) of India Patents Act, as amended by Act No. 15 of 4 April 2005; Article 29(1) of Japan Patent Act No. 121 of 1959, as amended by Act No. 109 of 2006; Sections 13(1)(c), 16 of Singapore Patents Act 1995, as amended by Patents (Amendment) Act 2004 (WIPO-Lex & JPO).

if it is possible to carry out mass manufacture or production of products or repeated application of the process that is the subject matter of the invention and achieve stable results .

There are two questions in resolving whether a technical solution is ‘susceptible of industrial application’. The first is whether the information on the nature of the technical solution and the instructions on its necessary technical conditions are indicated so clearly and adequately that any person with an average of knowledge in the art can create, produce, utilize, exploit or realize it.⁶³ The second is whether this creating, producing, utilizing, exploiting, or realizing of the technical solution may be repeated with the same or identical result as stated in the invention description.⁶⁴

2. Patentable Exclusions

National laws prior to international conventions on intellectual property and also TRIPs excluded concepts which might otherwise have been patentable from being patented. They reflect a number of policy choices about where the limits should be drawn to the rewards offered to encourage inventiveness. This is based in part on Article 4*quater* in the Paris Convention:

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

This was done so that a conflict with a statute law in national legislation would not be sufficient ground for rejecting a patent application. It is also reflected in Article 53(a) of the European Patent Convention:

⁶³ *Circular 01/2007* point 25.4(a)(i).

⁶⁴ *Circular 01/2007* point 25.4(a)(ii).

European patents shall not be granted in respect of inventions the commercial exploitation of which would be contrary to “ordre public” or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the contracting states.

These are reflected in TRIPs. From Article 27:1, which has been considered above, TRIPs Article 27:2 and 3 continues:

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

- (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. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The use of ‘may’, or the modal auxiliary used most often in TRIPs indicating the flexibility left to members in legislating to meet its requirements,⁶⁵ in these provisions gives members considerable discretion to decide on non-patentable subject matters. This discretion may be divided into two broad categories based on two grounds following TRIPs: *ordre public* or morality and other public interests. Other discretions are contained, for example, in determining *ordre public* or morality.

In addition, members are free to decide on whether to use patent law or a *sui generis* law or a combination of these two when carrying out the obligation of protecting plant varieties. This is discussed in Section 4 below.

⁶⁵ The details are given in note 286 in Chapter 2 on conceptualizing law’s flexibility.

2.1 Ordre Public or Morality

An exact English translation of the French '*ordre public*' is difficult as English law has developed no English term for it that this French phrase is kept unchanged in the authentic English text of TRIPs.⁶⁶ Although the phrase may be understood as a synonym with 'morality' in English, it may create more ambiguity when translated or incorporated into members' laws in languages other than French or English. It is not an uncommon expression in international law, and it has been used in both common and civil legal systems in the context of intellectual property.⁶⁷

The word 'morality' is commonly defined as moral discourse or instruction; moral science, moral principles or rules, a particular system of morals, ethical aspect (of a question); the quality or fact of being moral; and moral conduct.⁶⁸ What is moral can indeed be perceived differently from country to country, culture to culture, or religion to religion. In the context of protecting or granting patents to inventions, it is here argued that the general perception or opinion about 'morality', as the ground of patentable exclusion or prevention, should be connected with what might be seen as 'harmful' or 'destructive' or 'unethical' inventions, or harmful, destructive, or unethical uses of them.

Paragraphs 2-3 in TRIPs Article 27, relating to the rationale for what could and could not be excluded from patentability on the grounds that inventions are contrary to *ordre public* or morality, contain many debatable issues with many different opinions between WTO members.⁶⁹ These include issues relating to public health, restrictions on research materials, human rights, agricultural security, biopiracy, and traditional knowledge.⁷⁰ Patenting of life forms is argued being in itself so unethical and harmful that should be unconditionally

⁶⁶ UNCTAD & ICTSD, above n 38, 375.

⁶⁷ Rairier Moufang, 'The Concept of "Ordre Public" and Morality in Patent Law' in Geetru Van Overwalle (ed), *Patent Law, Ethics and Biotechnology* (Katholieke Universiteit Brussels, 1998) 69.

⁶⁸ *The Shorter Oxford English Dictionary*, above n 11, 1355.

⁶⁹ *Review of the Provisions of Article 27.3(B): Summary of Issues Raised and Points Made*, WTO Doc IP/C/W/369/Rev.1 (9 March 2006) (Note by the Secretariat).

⁷⁰ *Ibid*, 10.

prohibited.⁷¹ Also, it is argued that ethical and moral matters do not relate to commercial benefits that should not be affected by reasoning relating to commercial factors.⁷²

Given the criticism that ‘patent offices may grant patents to any kind of invention, without considering ethical issues whatsoever’,⁷³ excluding inventions of having harmful, destructive, or unethical effects from patentability is necessary. However, how to determine an invention is ‘harmful’, ‘destructive’, or ‘unethical’ to exclude it from patenting is an uneasy matter. This might explain why such general phrase is so often used in patent laws and why WTO members often deal with the issue in a general way in their national laws, not creating more particular criteria.⁷⁴ This in turn gives patent offices considerable leeway when considering moral or immoral of an invention.

As with this ‘*ordre public*’ or morality, there may be ambiguities when ‘health’ or ‘environment’, mentioned in TRIPs Article 27:2 as ‘*ordre public*’ or morality, is interpreted in members’ patent laws. ‘Health’ has different meanings, including ‘soundness of body; the general conditions of the body; healing; cure; spiritual, moral, or mental soundness; well-being; safety’.⁷⁵ It may be interpreted to embrace medical care and the satisfaction of basic needs such as adequate food, safe water, shelter, clothing, warmth, and safety.⁷⁶ Similarly, the ‘environment’ may refer to the ‘surrounding objects, region, or conditions, especially circumstances of life of person or society’.⁷⁷

⁷¹ Ibid.

⁷² Ibid, 11.

⁷³ Bercovitz (1996), citing in Correa, above n 17, 63.

⁷⁴ See, eg, Article 7(a) of Argentina Patent Law No. 24.481, as amended by Law No.24.572 of 1995; Chapter I: 3(b) of India Patens Act, as amended by Act No. 15 of 4 April 2005; Article 32 of Korea Patent Act 28 November 1949, as last amended by Act No. 9381 on 30 January 2009; Article 29(1)(i) of Poland Industrial Property Law 30 June 2000, as amended by Act of 23 January 2004 and Act of 29 June 2007; Section 22(6) of Philippines Intellectual Property Code of 6/6/1997 No. 8293; Article L611-17 of France Intellectual Property Code, as amended by Act No. 2006--236 of 1 March 2006; Article 7(a) of Indonesia Patent Law, as amended by Law No. 14 of 1 August 2001; Article 32 of Japan Patent Act No. 121 of 1959, as amended by Act No. 109 of 2006 (WIPO-Lex & JPO).

⁷⁵ *The Shorter Oxford English Dictionary*, above n 11, 938.

⁷⁶ Robert Beaglehole and Ruth Bonita (1999), Fraser Mustard in Daniel and Terry Sullivan (eds) (1999), citing in UNCTAD & ICTSD, above n 38, 376.

⁷⁷ *The Concise Oxford Dictionary* (323), citing in UNCTAD & ICTSD, *ibid*.

Vietnam has used this flexibility in a similar way to that found in other countries' patent laws. In particular, the legislation affirms that intellectual property subject matters which are contrary to social ethics, public order, or prejudicial to national defence and security are not to be protected.⁷⁸ Moreover, the exercise of intellectual property rights cannot prejudice the State's interests, the public interest, or the legitimate rights and interests of other organizations or individuals, as well as cannot violate other applicable provisions of relevant laws.⁷⁹ In accordance with these provisions, the concept of 'health' or 'environment' may only be interpreted in an indirect manner, by referring to other relevant laws, such as the 1989 Law on People's Health Protection and the 2005 Law on Environment Protection. They have no further explanation of how the patent office may apply its discretion when applying them in practice.

2.2 Diagnostic Methods, Plants and Animals, Essentially Biological Processes and Other Exclusions

In allowing members to exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals, plants and animals, but not micro-organisms, and essentially biological processes for the production of plants and animal, but not non-biological and microbiological processes, TRIPs again leaves a gap in defining these concepts and in determining the criteria should be used in excluding them from that.

Transposing the same or similar words to those used in TRIPs into national patent laws means that the gap may be filled, or the latitude may be exercised, by national officials and judges when applying the law in practice. This is seen in Argentina whose law states that 'methods of surgical, therapeutic or diagnostic treatment applicable to the human body or to animals' are not considered inventions.⁸⁰ Almost the same approach is taken by Mexico which 'methods of surgical, therapeutic or diagnostic treatment applicable to the human

⁷⁸ *Intellectual Property Law 2005* art 8(1) the second sentence.

⁷⁹ *Intellectual Property Law 2005* art 7(2).

⁸⁰ *Patent Law No. 24.481* (Argentina) art 6(e), as amended by Law No. 24.572 of 1995 (WIPO-Lex & JPO).

body and to animals’ are specified as not being inventions.⁸¹ Similarly, the Philippines law excludes from patentability ‘methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body’⁸² but this does not apply to ‘products and composition for use in any of these methods’.⁸³ This is also found in the United Kingdom law.⁸⁴

The discretions within TRIPs, and their transcription into domestic law, on the non-patentability of plants and animals, but not micro-organisms, and essentially biological processes for the production of plants and animals, but not non-biological and microbiological processes, make them one of the most disputed areas within TRIPs review procedures.⁸⁵ Conflicts include disputes over the definitions of plants, animals, microorganisms, essentially biological processes, non-biological and microbiological processes and the scope of these subject matters as well.⁸⁶

Vietnam has taken a moderate approach to such issues. Article 59 of the 2005 Intellectual Property Law resembles TRIPs provisions in excluding from patentability ‘plant and animal varieties or species’⁸⁷ and ‘essential biological processes of the production of plants and animals other than microbiological processes’.⁸⁸ Again, any ambiguities in these expressions may be resolved by administrators and judges.

Other non-patentable subject matters specified in the Law include discoveries, scientific theories, and mathematical methods;⁸⁹ schemes, plans, rules and methods for performing

⁸¹ *Industrial Property Law 1991* (Mexico) art 19(VII), as amended 1997 (WIPO-Lex & JPO).

⁸² *Intellectual Property Code of 6/6/1997 No. 8293* (Philippines) s 22(3) (WIPO-Lex & JPO).

⁸³ *Ibid.*

⁸⁴ According to Section 4(2)-(3) of UK Patent Act 1977 as last amended by the Copyright, Designs and Patents Act 1988 (WIPO-Lex & JPO), an invention of a method ‘of treatment of the human or animal body by surgery or therapy or of diagnosis practiced on the human or animal body’ is not considered being capable of industrial application but this does not prevent ‘a product consisting of a substance or composition being treated as capable of industrial application merely because it is invented for use in any such method.’

⁸⁵ *Review of the Provisions of Article 27.3(B)*, above n 69.

⁸⁶ This is discussed further in Section 4 below.

⁸⁷ *Intellectual Property Law 2005* art 59(5).

⁸⁸ *Intellectual Property Law 2005* art 59(6).

⁸⁹ *Intellectual Property Law 2005* art 59(1).

mental acts, training domestic animals, playing games, doing business, computer programs;⁹⁰ methods of presenting information;⁹¹ solutions or measures created with only aesthetical characteristics;⁹² and, methods of disease prevention, diagnosis and the treatment of humans and animals.⁹³ These exclusions have much in common with many other national patent laws.⁹⁴ They are listed briefly without further explanation or guidance.⁹⁵ The lack of this is understandable because of the state of technological development in Vietnam. This is problematic, except for assistance in improving the protection or enforcement it is difficult for responsible officials in developing countries to call for assistance of professional international organizations or foreign industrial countries over how to use the flexibilities in intellectual property treaties and conventions including TRIPs.⁹⁶ The patent office has a broad discretion when applying each of the exclusions in

⁹⁰ *Intellectual Property Law 2005* art 59(2).

⁹¹ *Intellectual Property Law 2005* art 59(3).

⁹² *Intellectual Property Law 2005* art 59(4).

⁹³ *Intellectual Property Law 2005* art 59(7).

⁹⁴ See, eg, Article 6 of Argentina Patent Law No. 24.481, as amended by Law No. 24.572 of 1995; Article 25 of China Patent Law 1984, as amended for the third time on 27 December 2008; Section 22 of Philippines Intellectual Property Code of 6/6/1997 No. 8293; Article 19 of Mexico Industrial Property Law 1991, as amended 26 December 1997; Section 1(2) of UK Patent Act 1977, as last amended by the Copyright, Designs and Patents Act 1988; Article L611–10(2) of France Intellectual Property Code, as amended by Act No. 2006-236 of 1 March 2006; Article 28 of Poland Industrial Property Law 30 June 2000, as amended by Act of 23 January 2004 and Act of 29 June 2007; Article 27 of Peru Industrial Property Law 23 April 1996; Section 125 of Ecuador Intellectual Property Law (WIPO-Lex & JPO).

⁹⁵ But they might differ from each other in some other aspects, eg, whether to give patent protection to computer programs or to patent business methods. This subject matter is either protected in Vietnam's 2005 Intellectual Property Law under copyright according to respectively Articles 14(1)(m) and 22(1) or excluded from patentability according to Article 59(2) but it has attracted attention in China. Xiang and Shan discuss the 2006 Chinese official guidelines on the examination of patent applications with a focus on those for inventions involving computer programs and describing the current practice of patent examinations conducting by the China Patent Office, compare the Chinese practice with that of the United States and the European Union and offer practical and detailed advice to foreign businesses on how they can successfully obtain patents for their inventions in China: Yu Xiang and Liu Shan, 'The New Developments in Patent Protection for Invention Involving Computer Programs in China - A Study Based on Newly Amended Chinese Patent Examination Guidelines' (2007) 38 *IIC: International Review of Intellectual Property and Competition Law* 659-668. Meanwhile, Zhang and Yu examine the patentability of business methods within the Chinese patent law with the use of the banking industry as an example to give illustrations of the patents applied for and awarded in considering the subject matters excluded from the patentability, the technical requirements for inventions to be patentable, the procedures for patent examination, and how the Chinese approach to business method patents in comparison with that of the European Patent Office: Yurong Zhang and Xiang Yu, 'The Patent Protection for Business Method Inventions in China' (2008) 30 *European Intellectual Property Review* 412-419.

⁹⁶ See, eg, Matthews, above n 9, 423; Consumers International Asia Pacific Office, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* (20 February 2006) xii & 36 <<http://www.consumersinternational.org/news-and-media/resource-zone/copyright-and-access-to->

practice. There may be different ideas over their application, such as how to define ‘method of presenting information’ and what may differ between this method of information presentation and other methods of expressing information or ideas in literary or artistic works protectable by copyright law.

3. Patent Exceptions and Compulsory Licenses

Exceptions to the exclusive rights of patent owners or the right holders and patent compulsory licences are found in Articles 30 and 31 of TRIPs. Article 31 provides for ‘other use without authorization of the right holder’ in which ‘other use’ is footnoted as being ‘use other than that allowed under Article 30’.

3.1 Exceptions to the Exclusive Rights

The conditions, in TRIPs Article 30, to providing ‘limited exceptions to the exclusive rights conferred by a patent’ that they ‘do not unreasonably conflict with a normal exploitation of the patent’ and ‘do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties’ are relatively similar to those stated in Article 13 permitting members to give exemptions to what would otherwise be copyright infringement. The conditions under these two Articles have been interpreted as applying cumulatively in the WTO dispute settlement cases.⁹⁷ Among other TRIPs provisions, conditions for patent exceptions in Article 30 were disputed by the European Union and Canada in the context of the patent protection of pharmaceutical products.

The European Union alleged that by permitting the production and stockpiling of pharmaceutical products without the consent of the patent holder during the six-months

knowledge/>; Brook K Baker, *Processes and Issues for Improving Access to Medicines: Willingness and Ability to Utilize TRIPs Flexibilities in Non-Producing Countries* (August 2004), DFID Health Systems Resource Centre 8-9 <http://www.iprsonline.org/resources/docs/Baker_TRIPS_Flex.pdf>.

⁹⁷ Panel Reports, *Canada – Patent Protection of Pharmaceutical Products*, WTO Doc WT/DS114/R (17 March 2000) [7.20]–[7.21]; *US – Section 110(5) Copyright Act*, WTO Doc WT/DS160/R (15 June 2000) [6.97].

immediately prior to the expiration of the 20-year patent term, Canada violated Articles 28:1 and 33 of TRIPs.⁹⁸ Objecting to this, Canada said that each of its relevant measures was a limited exception to the exclusive rights conferred by a patent within the meaning of TRIPs Article 30.⁹⁹ It argued that its two measures were limited exceptions as they allowed patent owners complete freedom to exploit their rights throughout the patent protection term, leaving the monopoly of commercial exploitation and the exclusivity of economic benefits unimpaired during the patent life.¹⁰⁰ According to Canada, these measures did not conflict with the normal exploitation of the patent nor prejudice the legitimate interests of the patent owner as they only affected the patent holder's commercial exploitation after the patent had expired.¹⁰¹ Canada also argued that it took into account the legitimate interests of third parties by allowing potential competitors to compete freely after the patent expired.¹⁰² Although, according to Canada, it allowed measures which limited exclusive rights, there was no commercial exploitation, meaning sale, to take place during the patent's term.¹⁰³ Canada kept arguing that any other interpretation would ignore the existence of the word 'unreasonably' and the fact that conflicts with normal exploitations and prejudices to the patent owner's interests were allowed.¹⁰⁴

The European Union, to the contrary, insisted that such Canada's measures could not be justified under TRIPs Article 30 as they did not satisfy the specified conditions.¹⁰⁵ According to it the curtailment of patent rights under the relevant Canadian law did not constitute limited exceptions to the exclusive rights conferred by a patent, it unreasonably conflicted with a normal exploitation of the patent, and, unreasonably prejudiced the legitimate interests of the patent owner, taking into account the interests of third parties.¹⁰⁶

⁹⁸ Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, *ibid.*, [3.1(a)].

⁹⁹ *Ibid.*, [3.2(a)].

¹⁰⁰ *Ibid.*, [4.10(a)].

¹⁰¹ *Ibid.*, [4.10(b)].

¹⁰² *Ibid.*, [4.10(d)].

¹⁰³ *Ibid.*, [4.11].

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, [4.8].

¹⁰⁶ *Ibid.*

Each of the conditions, or criteria, for patent exceptions under TRIPs Article 30, was interpreted by the Panel. In respect of the first criterion, it stated that ‘limited’ is to be measured ‘by the extent to which the exclusive rights of the patent owner have been curtailed’.¹⁰⁷ This interpretation would be justified in ‘reading the text literally, focusing on the extent to which the exclusive rights of the patent owner have been curtailed, rather than the size or extent of economic impact’.¹⁰⁸ It also found that ‘the following two conditions of Article 30 ask more about the economic impact of the exception’.¹⁰⁹

In respect of the second criterion, the Panel found that ‘exploitation’ refers to ‘the commercial activity by which patent owners employ their exclusive patent rights to extract economic value from their patent’, and that the term ‘normal’ defines the kind of commercial activity sought to be protected.¹¹⁰ It pointed out that this term is used in the TRIPs Article in a sense that combined the two meanings that:

The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent’s grant of market exclusivity. The specific forms of patent exploitation are not static, of course, for to be effective exploitation must adapt to changing forms of competition due to technological development and the evolution of marketing practices.¹¹¹

In respect of the third criterion, the Panel found that ‘legitimate interests’ must be given the meaning that the term is often given in legal discourse “as a normative claim calling for protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms”. The statement that “X has no legitimate interest being able to do Y” was given as an example.¹¹² The exception under which one can use the patented product for scientific experimentation, during the patent term and without the

¹⁰⁷ Ibid, [7.31].

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, [7.54].

¹¹¹ Ibid, [7.55].

¹¹² Ibid, [7.69].

consent of the patent owner, was recognized as the most widely-adopted illustration of such sense in national patent laws.¹¹³

According to the Panel, this exception was often used to argue that the key public policy purpose underlying patent laws was to facilitate the dissemination and advancement of technical knowledge as the patent owner was unable to prevent experimental use during the patent term which would advance technical knowledge.¹¹⁴ The Panel indicated that both society and scientists, under the policy, had a ‘legitimate interest’ in using the patent disclosure to support the advance of science and technology.¹¹⁵ This legal analysis, adopted by the Panel, in searching for the ordinary meaning of ‘legitimate interests’ worded in TRIPs Article 30 led it to dismiss the European Communities’ claim that the term only referred to legal interests under TRIPs Article 28:1.¹¹⁶

Additionally, the Panel relied on the negotiating history of Article 9:2 of the Berne Convention, which provides for similar conditions when permitting members to regulate exceptions to the reproduction right of the authors of literary or artistic works, in supporting its interpretation of ‘legitimate interests’.¹¹⁷

3.2 TRIPs and Post-TRIPs Compulsory Licensing Systems

Compulsory licensing of patented inventions is provided for in TRIPs Article 31. In principle, this can be applied to any field of patents. However, it is its application to access to pharmaceutical products between developing and developed members which has led to most conflicts and debates.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid, [7.73].

¹¹⁷ Ibid, [7.70]-[7.72].

The three of the lengthiest Articles in TRIPs, Articles 24, 31, and 70, relate to this issue. They either create limitations on intellectual property rights (Articles 24 and 31) or connect the exceptions with relevant fields of patents (Article 70). Two of them relate to patents, especially for pharmaceutical products (Articles 31 and 70). The patent compulsory licensing system under Article 31 is the most sensitive and complicated amongst them. This Article allows members to grant non-voluntary licenses, including use by a national government or third parties authorized by the government, under conditions. For example, the licences can only be granted on a case by case basis, because of failed negotiations to use the subject matter of the patent, or in a national emergency, in other circumstances of extreme urgency, or in cases of public non-commercial use of the invention.

Building a compulsory licensing system for patents involves members using this freedom given by TRIPs. It also leaves members considerable liberties both to legislate and to exercise discretions under such legislation. For example, what is a ‘national emergency’ or ‘other circumstances of extreme urgency’,¹¹⁸ and who is to determine this and how are they to reach any required conclusions? On the other hand, the Article states that the licence is ‘predominantly for the supply of the domestic market’¹¹⁹ and this could limit the ability of members cannot manufacture pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are produced, preventing people, especially the poor, from getting access to medicines, including life-saving drugs such as HIV/AIDS treatment.

A majority of developing country members have procured a solution to that issue. This was achieved in the Doha Declaration adopted in 2001, referred to in Chapter 2, in the context of the use of intention in the interpretation of TRIPs. The Declaration recognized the importance of intellectual property protection in creating new medicines and the concern about the effects of that protection on drug prices.¹²⁰ Further, it emphasized the significance of protecting public health so that ‘TRIPs does not and should not prevent members from

¹¹⁸ *TRIPs Agreement* art 31(b).

¹¹⁹ *TRIPs Agreement* art 31(f).

¹²⁰ *Doha Declaration* [3].

taking measures to protect public health'.¹²¹ Therefore, it prescribed that the TRIPs

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.¹²²

The Declaration re-confirmed that each member has the right to grant compulsory licences and the freedom to determine the grounds on which such licenses can be granted.¹²³ It originated the 'paragraph 6 system' by recognizing, in its paragraph 6, 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.

The 'paragraph 6 system' was implemented by the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration. The effect of this resulted in another General Council Decision on 6 December 2005 amending the TRIPs Agreement, particularly Article 31, paragraphs (f) and (h).¹²⁴ In respect of these paragraphs

¹²¹ *Doha Declaration* [4] the first sentence.

¹²² *Doha Declaration* [4] the second sentence.

¹²³ *Doha Declaration* [5(b)].

¹²⁴ Specifically, the Protocol amending the TRIPs Agreement (Article 31, paragraphs f & h in particular), set out in its Annex by inserting Article 31*bis* after Article 31 and by inserting the Annex to the TRIPs Agreement after Article 73 (the last Article of the TRIPs Agreement), is attached to the 2005 Decision. The Protocol is open for acceptance by members until 1 December 2007 but the deadline has been extended to 31 December 2009 and later to 31 December 2011 under the General Council Decisions of 18 December 2007 and 17 December 2009, respectively. The proposal for a decision to further extend the period for acceptance of the Protocol until 31 December 2013, and later, until 31 December 2015, was drafted. It will enter into force in accordance with Article X(3) of the WTO Agreement upon acceptance by two-thirds of the WTO members. With the United States as the earliest member to deposit its acceptance instrument with the Director-General on 17 December 2005 and Croatia, Cambodia, and Trinidad and Tobago among the most recent members to do so on 6 December 2010, 1 November 2011 and 9 September 2013 respectively, there have been 48 members accepting the Amendment (the European Union counted as one). See *General Council Decision of 6 December 2005*, WTO Doc WT/L/641 (8 December 2005); *General Council Decision of 18 December 2007*, WTO Doc WT/L/711 (21 December 2007); *General Council Decision of 17 December 2009*, WTO Doc WT/L/785 (18 December 2009); *Annual Review of the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*, WTO Doc IP/C/61 (18 November 2011) (Report to General Council); *Annual Review of the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*, WTO Doc IP/C/66 (23 October 2013) (Report to General Council) (Last updated 15 August 2014).

in TRIPs Article 31, the 2003 Decision noted existing exceptional circumstances to justify waivers from the obligations set out in them with regard to pharmaceutical products.

After defining ‘pharmaceutical product’, ‘eligible importing Member’, and ‘exporting Member’,¹²⁵ the 2003 Decision states that the obligations of an exporting member under TRIPs Article 31:f are to be waived, with respect to its grant of a non-voluntary licence to the necessary extent for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing member, in accordance with the following conditions:

- (a) the eligible importing Member(s) has made a notification to the Council for TRIPs, that:
 - (i) specifies the names and expected quantities of the product(s) needed;
 - (ii) confirms that the eligible importing Member in question, other than a least developed country Member, has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question in one of the ways set out in the Annex to this Decision; and
 - (iii) confirms that, where a pharmaceutical product is patented in its territory, it has granted or intends to grant a compulsory licence in accordance with Article 31 of the TRIPs Agreement and the provisions of this Decision.
- (b) the compulsory licence issued by the exporting Member under this Decision shall contain the following conditions:
 - (i) only the amount necessary to meet the needs of the eligible importing Member(s) may be manufactured under the licence and the entirety of this production shall be exported to the Member(s) which has notified its needs to the Council for TRIPs;
 - (ii) the products produced under the licence shall be clearly identified as being produced under the system set out in this Decision through specific labeling or marking. Suppliers should distinguish such products through special packaging and/or special colouring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price; and
 - (iii) before shipment begins, the licensee shall post on a website the following information:
 - the quantities being supplied to each destination as referred to in indent (i) above;and

¹²⁵ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*, WTO Doc WT/L/540 (2 September 2003) (Decision of 30 August 2003) para 1.

- the distinguishing features of the product(s) referred to in indent (ii) above.
- (c) the exporting Member shall notify the Council for TRIPs of the grant of the licence, including the conditions attached to it. The information shall include the name and address of the licensee, the product(s) for which the licence has been granted, the quantity(ies) for which it has been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the licence. The notification shall also indicate the address of the website referred to in subparagraph (b) (iii) above.¹²⁶

In respect of TRIPs Article 31:h on adequate remuneration being paid for the patent holder where a non-voluntary licence may be granted, the 2003 Decision specifies that:

Where a compulsory licence is granted in an exporting Member under the system set out in this Decision, adequate remuneration pursuant to Article 31(h) of the TRIPs Agreement shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory licence is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall be waived in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.¹²⁷

To apply ‘paragraph 6 system’, or other TRIPs exception provisions, the relevant provisions need be incorporated into national legislation. Regrettably, this has often not been done by less-developed countries.¹²⁸ Notably, there have been workshops to help

¹²⁶ Ibid, para 2: These specific conditions are too elaborate and onerous to potentially characterize themselves among the reasons which make the system not being used as much as possible. It has been discussed that the taking of the form of a system of rules under the ‘paragraph 6’ solution with which many saw as the promotion of uncertainty or the very thing itself preferably to avoid by both potential exporters and importers of those drugs is the basic problem of the system (Peter Drahos, ‘Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines’ (2007) 28 *Liverpool Law Review* 11, 13) and that it is a defeat for developing countries (Brook K Baker, ‘Arthritic Flexibilities for Accessing Medicines: Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health’ (2004) 14 *Indiana International Comparative Law Review* 613, citing in Peter Drahos, *ibid*). A discussion about potential problems of the implementation of ‘paragraph 6’ system see Gemma O’ Farrell, ‘One Small Step or One Giant Leap towards Access to Medicines for All’ (2008) 30(6) *European Intellectual Property Review* 211, 212-3.

¹²⁷ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*, above n 124, para 3.

¹²⁸ See, eg, Baker, above n 96; Sisule F Musungu and Cecilia Oh, *The Use of Flexibilities in TRIPs by Developing Countries: Can They Promote Access to Medicines?* World Health Organization Commission on

officials in developing country members in using these flexibilities with patented pharmaceutical products.¹²⁹ The first notification of applying ‘paragraph 6 system’ took place in 2007 to deal with public health problems in Rwanda.¹³⁰ This permitted the country to import cheaper generic drugs for HIV/AIDS treatment made under compulsory licensing in Canada.¹³¹ The importation occurred for the first time in September 2008.¹³² It was stated by the Director-General, also in 2008, that access to medicines has improved since the 2001 Doha Declaration, especially through considerably reducing the prices of drugs and through the use of some of the TRIPs flexibilities by select members.¹³³

3.3 Patent Exceptions and Non-Voluntary Licenses in Vietnam

National laws of members may take up the provisions for non-voluntary licensing. Correa has completed a list of adoptable exceptions, consisting of:

- act done privately on a non-commercial scale or for a non-commercial purpose;
- the use of invention for research or teaching purposes,
- the use of invention for experimentation to test or improve on it;

Intellectual Property Rights, Innovation and Public Health (2005)

<http://www.who.int/intellectualproperty/studies/TRIPS_flexibilities/en/>.

¹²⁹ These workshops were held for the third, fourth, fifth, and sixth times respectively in December of 2007 and 2008, November 2009, and September 2010 with 19, 24, 25, and 24 developing-country official to have participated in them: WTO 2007 News Items on 7 December 2007, *3rd Geneva Workshop Helps Officials Use Health Patent Flexibilities* <http://www.wto.org/english/news_e/news07_e/trips_wp_7dec07_e.htm>; WTO 2008 News Items on 5 December 2008, *4th Geneva Workshop Helps Officials Use Health Patent Flexibilities* <http://www.wto.org/english/news_e/news08_e/trips_5dec08_e.htm>; WTO 2009 New Items on 5 November 2009, *5th Geneva Workshop Helps Officials Use Health Patent Flexibilities* <http://www.wto.org/english/news_e/news09_e/heal_05nov09_e.htm>; and, WTO 2010 News Items on 24 September 2010, *6th Geneva Workshop Helps Officials Use Intellectual Property Flexibilities for Health* <http://www.wto.org/english/news_e/news10_e/heal_24sep10_e.htm>.

¹³⁰ WTO 2007 News Items on 20 July 2007, *Patents and Health: WTO Receives First Notification under ‘Paragraph 6’ System* <http://www.wto.org/english/news_e/news07_e/public_health_july07_e.htm>.

¹³¹ WTO News Items on 4 October 2007, *Canada is First to Notify Compulsory Licence to Export Generic Drug* <http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm>.

¹³² WTO News: Speeches – DGPascal Lamy 9 December 2008, “Access to Medicines has been Improved” Lamy <http://www.wto.org/english/news_e/sppl_e/sppl11_e.htm>.

¹³³ Ibid.

- the use of invention to prepare for individual medical prescription or to make experiment for the purpose of seeking regulatory approval for marketing a product after the expiration of a patent;
- the use of invention ‘bona fide’ by a third party before the date of filing the patent application or other prior use; and
- importing a patented product that has been marketed in another country with the agreement of the patent owner, or, parallel importation.¹³⁴

Almost all these exceptions are stipulated in Vietnamese law but often very briefly. The exceptions are stated simply and generally without any further explication requiring the exercise of discretion to fill in, either by issuing guidelines to administrators and judges or in them applying the law without such guidelines.

But TRIPs also only gives limited guidance for using a patent without violating the rights in it under Article 30 with three conditions: ‘limited exceptions’; ‘do not unreasonably conflict with a normal exploitation of the patent’; and, ‘do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties’. Any exceptions in Vietnamese law will be consistent with its obligations under TRIPs, provided that they satisfy these three conditions. As there have been no claims requiring the consideration of the practical effect of these exceptions, it is difficult to conclude whether or not they are satisfactory.

(a) Exceptions to the Patent Use Prevention Right

In implementing TRIPs Article 28, Vietnam grants patentees the right to permit or prevent others from using their patented inventions. These rights are particularized and concurrently regulated with limitations under specified conditions in which the other is allowed using the

¹³⁴ Correa, above n 17, 75-6.

protected invention without infringing the exclusive rights of the patent owner.¹³⁵ They fall into some separate categories in Article 125 of the 2005 Intellectual Property Law.

Firstly, patent owners are stated to have no right to prevent others from using inventions for personal needs, non-commercial purposes, or for the purpose of evaluation, analysis, research, teaching, testing, pilot production, or collecting information in order to carry out procedures for applying for licenses for production, importation, or product circulation.¹³⁶

Secondly, patent owners have no right to preclude others from circulating, importing, or exploiting the useful features of products which have been put lawfully on the market, including foreign markets, except in the case of foreign markets, where they were not placed on the market by the trademark owner or his or her licensees.¹³⁷ As importing products is otherwise permitted the parallel importation of cheaper legitimate patent products may be allowed. For example, a local Vietnamese trader may seek a licence to import a medical device legally-produced in an Asian country, say, Singapore or India, in competition with the same devices exported by the patent owner from the United States or imported by the rights holder, or an agent, in Vietnam. This has a special importance in developing economies. It is particularly true in Vietnam, especially in the pharmaceutical industry where the local producers are capable of supplying only half of the local demand making it highly depend on imported medicines.¹³⁸

Thirdly, patent owners have no right to prevent others from using inventions in the operation of other countries' means of transport which are in transit in Vietnam or entering

¹³⁵ *Intellectual Property Law 2005* arts 123(1), 124(1), and 125(1).

¹³⁶ *Intellectual Property Law 2005* art 125(2)(a): Notably, the subject matter is worded by the provision as 'owners of industrial property objects' that the owner of an patented invention is among them.

¹³⁷ *Intellectual Property Law 2005* art 125(2)(b).

¹³⁸ Peter Drahos and Victor JV Spengler, 'Mission Report for Vietnam' in *Regional Report: The ASEAN-Rockefeller Foundation Project on Intellectual Property Laws Review and Capacity Building on Intellectual Property Rights Related to Public Health in the ASIAN Region* (ASEAN Secretariat, Indonesia, 2005) 186, 187 < www.anu.edu.au > (visited 16 July 2008).

the territory of Vietnam temporarily.¹³⁹ This exception is permitted, or otherwise, required as an obligation of members on each other under Article 5^{ter} of the Paris Convention.

(b) A Prior User

Provisions relating to prior use are relatively common in national patent laws.¹⁴⁰ Vietnam has now joined these countries. Prior use deals with the problem which may arise when a number of people discover the same technological solution to the same problem. This is especially likely to occur when they are all involved in producing or manufacturing the same product or providing the same service. An on-going use by these people may be protected by the prior use right while the exclusive rights may be granted to only one of them, the one who sought patent protection.

Article 134 of the 2005 Intellectual Property Law, as amended 2009, provides for the prior use right of invention and industrial design:

1. Prior to the filing or priority date of an application for registering an invention or industrial design, a person who has used, or has made necessary preparation for using, another invention or industrial design created independently but identical with the invention or industrial design being filed or applied for registration (hereafter referred to as the prior user) then, after the protection title or certificate is granted, he or she is entitled to continue using such invention or industrial design within the same scope and scale as previously used or prepared to use, without permission or payment to the owner of the protected invention or industrial design. This use does not infringe the right of the invention or industrial design owner.
2. A prior user of inventions or industrial designs cannot transfer such right to another person unless it is transferred together with the business or production premises or establishments which have used,

¹³⁹ *Intellectual Property Law 2005* art 125(2)(c).

¹⁴⁰ See, eg, Section 119 of Australia Patents Act of 1990, as amended up to Act No. 160 of 2001; Section 73 of Philippines Intellectual Property Code of 6/6/1997 No. 8293; Section 36(2)(2) of Thailand Patent Act B.E 2522 (1979), as amended by Patent Act (No. 2) B.E 2535 (1992) and Patent Act (No. 3) B.E 2542 (1999); Article 22(III) of Mexico Industrial Property Law 1991, as amended 26 December 1997; Article 45 of Brazil Industrial Property Law No. 9279 of 14 May 1996, as amended by Law No. 10196 of 14 February 2001 (WIPO-Lex & JPO).

or prepared to use, the inventions or industrial designs. He or she cannot widen the scope and scale of the use except where permitted by the owners of the inventions or industrial designs.

The application date of a patent application is critical in determining the prior user. In Vietnam, a valid application for registering an invention is published in the Official Gazette of Industrial Property by the NOIP in the nineteenth month from the filing or priority date of the application.¹⁴¹ It may also be published within two months after being accepted valid, depending on which of the two dates is later.¹⁴² A request for an earlier publication may be made and, if approved, the application can be published within two months from the date on which the request is received or the application is seen valid, whichever is later.¹⁴³

(c) An Interim User

In addition to the right of prior use, Vietnamese law provides for the interim right to use an invention, industrial design, or layout design by a person other than the owner of it, also other than a prior user (of an invention or industrial design), under specified conditions.

In respect of invention, where an applicant for invention registration knows or becomes aware that the invention is being used for commercial purposes by another person other than a prior user, he or she can give this person a written notice that that person may cease, or continue, to use the invention.¹⁴⁴ The notice must clearly specify the filing date and the publication date of application in the Official Gazette of Industrial Property.¹⁴⁵ Where such person has been so notified but continues using the invention, as soon as the patent is granted the patent holder is entitled to require him or her to pay remuneration according to the extent and the time over which the invention has been used.¹⁴⁶

¹⁴¹ *Intellectual Property Law 2005* art 110(2); *Circular 01/2007* point 14.2(a)(i).

¹⁴² *Circular 01/2007* point 14.2(a)(i).

¹⁴³ *Intellectual Property Law 2005* art 110(2); *Circular 01/2007* point 14.2(a)(iii).

¹⁴⁴ *Intellectual Property Law 2005* art 131(1).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Intellectual Property Law 2005* art 131(3).

The right of prior use is restricted to invention or industrial design while the right of interim use is widened to apply also to layout design. This relates to flexibilities embodied in TRIPs from the 1989 IPIC Treaty.¹⁴⁷ Among other differences, the owner of an invention, industrial design, or layout design can require an interim user to pay remuneration but this cannot be done in the case of a prior user.

(d) Non-Voluntary Licensing

The system of non-voluntary licensing of patents in TRIPs Article 31 has been introduced into Vietnamese law. However, some provisions, such as government use, may be difficult to apply or utilize as there have been no further specific regulations made, or guidance given on their application, to implement them.

Non-voluntary licensing can be classified into two particular categories: government use and dependent invention.

- **Government Use**

Article 133 of the 2005 Intellectual Property Law introduces government use into the locality consistent with what permissible under TRIPs. In particular, a licence for government use can be applied to a patented invention, without obtaining the consent of its owner or the licensee, for public non-commercial purposes or in services of national defense, security, disease prevention and treatment, nutrition for the people, and other urgent needs of the society.¹⁴⁸ It can be conducted by a ministry, or another ministerial-level government body in accordance with its authorized area of responsibility on behalf of the State.¹⁴⁹ It must be carried out in a limited scope and under the conditions specified in

¹⁴⁷ This is discussed in the next chapter on other TRIPs categories of protection in Vietnam.

¹⁴⁸ *Intellectual Property Law 2005* art 133(1).

¹⁴⁹ *Ibid.*

Article 146:1 of the Law, unless the invention has been created using state technical facilities or funding from the state budget.¹⁵⁰

Similar to most other developing countries in which intellectual property responsibilities have often been divided between an industrial office controlled by the ministry of trade or industry, a copyright office managed by a ministry charged with issues relating to culture, and another independent office dealing with plant varieties,¹⁵¹ there are three main ministries controlling intellectual property issues in Vietnam. The Ministry of Science and Technology has responsibilities for intellectual property in general (and industrial property in particular) in combination with the Ministry of Culture, Sports and Tourism (which takes the responsibility for copyright and related rights), and the Ministry of Agriculture and Rural Development (which is charged with issues relating to plant varieties).¹⁵²

The Ministry of Science and Technology is authorized, under Article 147 of the 2005 Intellectual Property Law, to issue a non-voluntary licence in the following cases:

- where the holder of the exclusive right to use an invention fails to perform the obligation of using it under Articles 136:1 and 142:5 of the Law upon the expiration of a four-year period from the filing date of the patent application and the expiration of a three-year period from the patent granting date;¹⁵³
- where a person who wishes to use an invention is unable, within a reasonable time, to enter into a contract licensing the invention with the holder of the exclusive right despite having offered, within a reasonable time, satisfactory commercial price and conditions;¹⁵⁴ and

¹⁵⁰ *Intellectual Property Law 2005* art 133(2).

¹⁵¹ Carolyn Deere, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009) 199.

¹⁵² *Intellectual Property Law 2005* art 11(2).

¹⁵³ *Intellectual Property Law 2005* arts 147(1) the first sentence, and 145(1)(b).

¹⁵⁴ *Intellectual Property Law 2005* arts 147(1) the first sentence, and 145(1)(c).

- where the holder of the exclusive right to use an invention is considered having performed an act of unfair competition prohibited by competition legislation.¹⁵⁵

Article 147 also authorizes another ministry, or a ministerial-level government body, to issue a non-voluntary licence in accordance with its authorized area of responsibility with consultation from the Ministry of Science and Technology, where the use of an invention is for public non-commercial purpose or in service of national defense, security, disease prevention and treatment, nutrition for the people, or other urgent needs of the society.¹⁵⁶

Provisions for compulsory licensing are seen in other countries, including China.¹⁵⁷ These systems have been utilized for the production of pharmaceutical products used in public health emergencies. The following table shows the country, time, product, duration of the licences, and the royalties.

¹⁵⁵ *Intellectual Property Law 2005* arts 147(1) the first sentence, and 145(1)(d).

¹⁵⁶ *Intellectual Property Law 2005* arts 147(1) the second sentence, and 145(1)(a).

¹⁵⁷ Chapter VI (Articles 48-58) of China's Patent Law, as amended in 2008 (WIPO-Lex & JPO), provides for compulsory license for exploitation of a patent in which Article 48 states that:

Under any of the following circumstances, the patent administration department under the State Council may, upon application made by any unit or individual that possesses the conditions for exploitation, grant a compulsory license for exploitation of an invention patent or utility model patent:

(1) When it has been three years since the date the patent right is granted and four years since the date the patent application is submitted, the patentee, without legitimate reasons, fails to have the patent exploited or fully exploited; or

(2) The patentee's exercise of the patent right is in accordance with law, confirmed as monopoly and its negative impact on competition needs to be eliminated or reduced.

Subsequently, Article 49 of the Law reads:

Where a national emergency or any extraordinary state of affairs occurs, or public interests so require, the patent administration department under the State Council may grant a compulsory license for exploitation of an invention patent or utility model patent.

As such, it may be compared that in China the specialist patent administration department under the State Council has the authority to grant a compulsory licence while this is the Ministry of Science and Technology in Vietnam. Still, it is also mentioned 'utility models' in the former but only 'inventions' in the latter.

Table 1: *Applications for Non-Compulsory Patent Licences of Pharmaceutical Products in Some Developing Countries from 2003 to 2007*

Country	Date	Product	Duration	Royalties
Zimbabwe	April 2003	All HIV/AIDS-related medicines	Not indicated	Not indicated
Malaysia	October 2003	- Didanosine - Zidovudine - FDC didanosine+ zidovudine	2 years	Not indicated
Zambia	September 2004	FDC Lamivudine+stavudine+nevirapine	Until notification of expiry of the compulsory licence	2.5% (of the turnover of the product)
Indonesia	October 2004	- Lamivudine - Nevirapine	7-8 years (end patent term)	0.5%
Thailand	November 2006	Efavirenz	Until 31 December 2011	0.5%
Thailand	January 2007	Lopinavir/ritonavir	Until 31 January 2012	0.5%
Thailand	January 2007	Clopidogrel	Until patent expiry or no longer needed	0.5%
Indonesia	March 2007	Efavirenz	Until 7 August 2013	0.5%
Brazil	May 2007	Efavirenz	5 years	1.5%

Source: The World Health Organization¹⁵⁸

Non-voluntary licences for pharmaceutical products are claimed to have reduced the average treatment costs by about 80 percent in Malaysia,¹⁵⁹ 30 percent in Thailand,¹⁶⁰ and immediately reduced by 27 percent the price of drugs in circulation in Ecuador.¹⁶¹ This is not the case for Vietnam which appears not to have ever issued a compulsory licence. However it has both produced and imported, from some European pharmaceutical firms, cheaper HIV drugs.¹⁶² HIV/AIDS has never been epidemic in Vietnam but the Government,

¹⁵⁸ *Improving Access to Medicines in Thailand: The Use of TRIPs Flexibilities* (31 January – 6 February 2008), Report of WHO Mission, 20
<<http://www.moph.go.th/hot/THAIMissionReport%20FINAL15feb08.pdf>>.

¹⁵⁹ Ibid, 21.

¹⁶⁰ Ibid, 23.

¹⁶¹ Recently it is reported that Ecuador in April 2010 granted the first compulsory license for a patented drug of HIV/AIDS treatment under a President Decree declared in November 2009 instructed for the implementation by the Ecuadorean Intellectual Property Institute in January 2010. See, eg, Catherine Saez, 'Ecuador Grants First Compulsory Licence, for HIV/AIDS Drug' (22 April 2010), Intellectual Property Watch <<http://www.ip-watch.org/2010/04/22/ecuador-grants-first-compulsory-licence-for-hiv-aids-drug/>>; Public Citizen, 'By Authorizing Generic Competition, Ecuador Cuts Cost of Key HIV/AIDS Drug' (22 April 2010) <<http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3116>>.

¹⁶² See, eg, Tiền Phong Online, 'Công ty VN đầu tiên cung ứng thuốc điều trị HIV giá rẻ' [The First Vietnamese Company Has Supplied Cheaper HIV Treatment Drugs] (17 May 2007) <<http://www.tienphong.vn/Khoe-Dep-Suc-Khoe/cong-ty-vn-dau-tien-cung-ung-thuoc-dieu-tri-hiv-gia-re-84386.tpo>>; ICA Biotechnological & Pharmaceutical (21 May 2007), 'Cung ứng gần 1 triệu viên thuốc điều trị HIV giá rẻ' [Having Supplied Nearly One Million HIV Tablets at a Cheaper Price] <<http://www.icapharma.com.vn/icanewsdetail.php?id=11>>.

on 1 February 2009, adopted a regulation applying for a non-voluntary licence for producing HIV drugs by seven enterprises determined to possess the capacity to manufacture or to import them at cheaper prices.¹⁶³ This approach could be adopted for the treatment of other devastating illnesses which Vietnam has recently faced including severe acute respiratory syndrome (SARS) and avian influenza A (H5N1).¹⁶⁴ Other easily-spread diseases such as cholera and diarrhea also occasionally create serious public concerns.¹⁶⁵ When confronting SARS' outbreak in 2003 the government intended to issue, for the first time, a compulsory licence for manufacturing a cheaper drug.¹⁶⁶ This did not occur, however, as no local enterprise had the capacity to produce them.¹⁶⁷

- **Dependent Invention**

The exception of dependent invention is found in TRIPs Article 31:l and it has been transposed into Article 137 of the 2005 Intellectual Property Law.

The TRIPs exception operates in respect of two patents, the first or main patent, and, a second or dependent patent in which the latter cannot be exploited without otherwise

¹⁶³ Tuổi Trẻ Online, 'Thuốc điều trị HIV/AIDS: Có thể bắt buộc chuyển giao quyền sáng chế' [Drugs for HIV/AIDS Treatment: Non-Voluntary Licences Can Be Issued] (2 February 2009) <<http://tuoitre.vn/Chinh-tri-xa-hoi/Song-khoe/299759/Thuoc-dieu-tri-HIVAIDS-Co-the-bat-buoc-chuyen-giao-quyen-sang-che.html>>.

¹⁶⁴ See, eg, Asia Business Council, 'Containing Pandemic and Epidemic Diseases in Asia' (2010) 3 <<http://www.asiabusinesscouncil.org/docs/DiseaseBriefing.pdf>>; Seth Mydans, 'The SARS Epidemic: Containment; How Vietnam Halted SARS and Saved the Life of a Nurse', The New York Times (7 May 2003) <<http://www.nytimes.com/2003/05/07/world/sars-epidemic-containment-vietnam-halted-sars-saved-life-nurse.html>>; Jonathan Herington, 'Securitization of Infectious Diseases in Vietnam: The Cases of HIV and Avian Influenza' (2010) 25(6) *Health and Policy Planning* 467, 467.

¹⁶⁵ See, eg, MedicalNet, 'Dịch tả có phải do ăn mắm tôm?' [Is Cholera Caused by Eating Shrimp Sauce?] (5 November 2007) <<http://www.ykhoa.net/binhluan/nguyendinhnguyen/dichta03.htm>>; VietNamNet, 'Công bố dịch tiêu chảy cấm mắm tôm, mắm tép' [Having Publicized the Diarrhea to Have Banned Shrimp Sauce, Fish Sauce] (30 October 2007) <<http://vnn.vietnamnet.vn/suckhoe/2007/10/752181/>>; Dân Trí Online, 'Đã có 111 ca nghi nhiễm tiêu chảy cấp nghiêm trọng' [There Have Been 111 Cases Suspecting of Severe Acute Diarrhea] (1 November 2007) <<http://dantri.com.vn/xa-hoi/da-co-111-ca-bi-nghi-nhiem-tieu-chay-cap-nghiem-trong-203738.htm>>.

¹⁶⁶ Hanoi Embassy of Sweden, *Sustainable Technology Transfer in Health, Environment and Energy Discussed* (19 October 2010) - 'Compulsory Licensing and the Laws of Vietnam' working paper presented by Le Thi Nam Giang and Tran Viet Dzung at *International Conference on 'Sustainable Technology Transfer* (Hanoi, HCM City, Lund, Nagoya and Suffolk Faculties of Law, Ho Chi Minh City, 19-21 October 2010) <<http://www.swedenabroad.com/Pages/StandardPage.aspx?id=13610&epslanguage=en-GB>>.

¹⁶⁷ Ibid.

infringing the former patent. The Agreement authorizes laws which allow the competent authority in a member country to permit the use of the first patent without the consent of the patentee, subject to conditions. This exception is clearly intended to further advance technology and to prevent protection under patent law from being an obstacle to such technological advancement.

Under the text of TRIPs, members are free both to provide for this exception and to define a dependent or second patent in their national laws. Like some other developing countries,¹⁶⁸ Vietnam has taken some advantage of these provisions.

There are some criteria specified for a dependent invention in Vietnam. In particular, the dependent invention must require the use of the principal invention to be utilized.¹⁶⁹ It must represent an important technical development compared with the principal invention, as well as be of economic significance.¹⁷⁰ Its inventor must seek a licence from the holder of the patent rights in respect of the principal invention at reasonable commercial price and conditions.¹⁷¹ A voluntary licence may be reached with the terms agreed to.

Where the dependent inventor is unable to make an agreement with the owner of the principal patent and the owner of this patent cannot reasonably justify the refusal, a non-voluntary license may be granted by the competent state authority.¹⁷² Although this is a form of compulsory licensing, negotiations must be held before the relevant state authority is requested to issue it.

¹⁶⁸ See, eg, Article 46 of Argentina Patent Law No. 24.481, as amended by Law No. 24.572 of 1995 and Section 49A of Malaysia Patents Act 1983, as incorporated latest amendment - Act A1137/2002 (WIPO-Lex & JPO).

¹⁶⁹ *Intellectual Property Law 2005* art 137(1).

¹⁷⁰ *Intellectual Property Law 2005* art 137(2) the first sentence.

¹⁷¹ *Ibid.*

¹⁷² *Intellectual Property Law 2005* art 137(2) the second sentence.

4. The Protection of Plant Varieties in Vietnam under TRIPs

In requiring members to protect intellectual property in plant varieties, TRIPs Article 27:3 allows them to do so ‘either by patents or by an effective *sui generis* system or by any combination thereof’.¹⁷³ This gives members considerable flexibility. The reason for the width of choice which is given to members lies in the origins of national and international law relating to intellectual property in plant varieties.

At the time TRIPs was drafted, many countries, including individual nations of the European Union, had provided a *sui generis* system for the protection of plant varieties or breeders’ rights through their membership of the 1961 International Convention for the Protection of New Varieties of Plants.¹⁷⁴ They were prohibited by this from granting double protection by recognizing both the rights of a plant breeder and granting a patent for a plant variety.¹⁷⁵ The 1973 European Patent Convention, which came into force in 1977, did not allow its members to protect plant varieties by patents.¹⁷⁶ Other countries, however, had used patents to protect plant varieties and wished to continue with that system or a combination of patents and a *sui generis* system.¹⁷⁷

TRIPs Article 27:3:b is complicated. It states that members may exclude from patentability:

*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.*¹⁷⁸

¹⁷³ *TRIPs Agreement* art 27(3)(b) the second sentence.

¹⁷⁴ Tritton, above n 53, 129 & 597.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ In protecting plant varieties the majority of member states of the UPOV Convention opted for a UPOV-based *sui generis* system, sometimes parallel with patent protection: Rolf Jördens, ‘Plant Biotechnology Developments in the International Framework’ (24 October 2003), WIPO-UPOV Symposium on Intellectual Property Rights in Plant Biotechnology, [5]

<http://www.upov.int/export/sites/upov/meetings/en/Symposium2003/wipo_upov_sym_01.pdf>.

¹⁷⁸ *TRIPs Agreement* art 27(3)(b) the first sentence (the emphasis is added).

As such, members are, on the one hand, allowed to exclude some kinds of invention, ‘plants and animals’ and ‘essentially biological processes’, from patenting. On the other hand, they are required to patent ‘micro-organisms’ and ‘non-biological and microbiological processes’.¹⁷⁹ As noted earlier, they are obliged to protect ‘plant varieties’ by either patents or an effective sui generis system or any combination of both. In respect of this, they may decide to grant plant patents. Here, ‘plant’ can be defined as:

a member of the vegetable kingdom; a vegetable; generally distinguished from an animal by the absence of locomotion and of special organs of sensation and digestion, and by the power of feeding wholly on inorganic substances.¹⁸⁰

The patentability or non-patentability of plant and animal inventions and the protection of plant varieties is one of the most controversial issues in TRIPs. This is reflected in the 2001 Doha Declaration. In accordance with the Declaration, in pursuing its work programs, including the review of TRIPs Article 27:3, the TRIPs Council is authorized to examine, inter alia, the relationship between TRIPs and the United Nations Convention on Biological Diversity (CBD), and the protection of traditional knowledge and folklore.¹⁸¹

Similar circumstances apply to ‘micro-organisms’ and ‘non-biological and microbiological processes’. Members are obliged to protect them by granting patents, as required by the TRIPs provision. However, defining them is problematic and controversial. Ordinarily, ‘micro-organism’ is defined as a microbe.¹⁸² This is used for a very small living creature or an extremely tiny or minute living being, whether plant or animal, especially bacteria which cause disease and fermentation.¹⁸³ *The Concise Oxford Dictionary* defines ‘micro-organism’ as ‘an organism not visible to the naked eye, e.g., bacterium or virus’.¹⁸⁴

¹⁷⁹ The emphasis is added.

¹⁸⁰ *The Shorter Oxford English Dictionary*, above n 11, 1599.

¹⁸¹ *Doha Declaration* [19].

¹⁸² *The Shorter Oxford English Dictionary*, above n 11, 1319.

¹⁸³ *Ibid.*

¹⁸⁴ Citing in *Review of the Provisions of Article 27.3(B)*, above n 69, 8-9.

Nevertheless, it is argued that micro-organisms consist of only bacteria, fungi, algae, protozoa and viruses and not consist of biological material including cell lines, enzymes, plasmids, cosmids, and genes.¹⁸⁵ It is both claimed and denied that there is no scientific basis for the distinction between plants, animals, and micro-organisms.¹⁸⁶ The absence of an agreed definition of ‘micro-organism’ between patent experts including in the Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for the Purposes of Patent Procedure has been the explication why it is absent in TRIPs.¹⁸⁷ Similarly, it is argued that microbiological processes are also biological processes so that they should be treated as the same in TRIPs.¹⁸⁸ Consequently, TRIPs is criticized artificially distinguishing ‘essentially biological processes’ from ‘microbiological and non-biological processes’ and that this should be removed or clarified.¹⁸⁹

4.1 Patentability or Non-Patentability of Plant and Animal Inventions

Although TRIPs Article 27.3:b states that ‘plants and animals’ and ‘essentially biological processes for the production of plants and animals’ may be excluded from national legislative systems for patents, there have been suggestions that these exceptions are unnecessary and that patent protection should be extended to all patentable inventions of both plants and animals.¹⁹⁰ This is reinforced by Article 27:1 which requires members to grant patents to ‘*any inventions, whether products or processes, in all fields of technology*’ provided that they are new, non-obvious and capable of industrial application.¹⁹¹

There have been contrary arguments that such exceptions should be retained and that the TRIPs provisions should be amended or clarified so that the patenting of all life forms and all other living organisms and their parts, as well as the patenting of inventions based on

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid, 10.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, 2-4.

¹⁹¹ *TRIPs Agreement* art 27(1) the first sentence (the emphasis is added).

traditional knowledge, should be prohibited.¹⁹² Peru, for example, has consistently argued against patents granted on the basis of traditional knowledge which has originated in developing countries.¹⁹³

Unsurprisingly, the former suggestion that all plants and animals should be patentable often comes from developed or industrialized countries, including the United States and Japan, and the latter opinion, that the TRIPs patent exceptions for plants and animals be retained is often advanced by developing or non-industrialized nations, including Brazil and India.¹⁹⁴

However, any amendment of TRIPs' provisions, especially Article 4 on most-favoured-nation treatment, which aims at adjusting the levels of intellectual property protection, will face considerable difficulties within WTO mechanism for amending the Multilateral Trade Agreements, including TRIPs.¹⁹⁵

The scope of the exceptions depends on how the key terms, discussed above, are defined. There have been suggestions that the terms used in TRIPs Article 27:3 should be defined, including 'plants', 'animals', 'microorganisms', and 'non-biological and micro-biological processes'.¹⁹⁶ As it is claimed that there is no consensus on the meaning of 'micro-organism' in the scientific community,¹⁹⁷ it seems unlikely that the review by the TRIPs Council of the Agreement's provisions will produce such definitions. Until this is done, the issue is still within the members' discretion in their national legislation.

¹⁹² *Review of the Provisions of Article 27.3(B)*, above n 69, 2-4.

¹⁹³ See, eg, *Article 27.3(B), Relationship between the TRIPs Agreement and the CBD and the Protection of Traditional Knowledge and Folklore*, WTO Doc IP/C/W/441/Rev.1 (19 May 2005) (Communication from Peru); *Analysis of Potential Cases of Biopiracy*, WTO Doc IP/C/W/458 (7 November 2005) (Communication from Peru); *Response to Comments Contained in Document IP/C/W/469 Relating to the Peruvian Communication IP/C/W/458*, WTO Doc IP/C/W/484 (2 November 2006) (Communication from Peru); *Combating Biopiracy – the Peruvian Experience*, WTO Doc IP/C/W/493 (19 September 2007) (Communication from Peru); *The Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge*, WTO Doc IP/C/W/356 (24 June 2002) (Communication from Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe).

¹⁹⁴ *Review of the Provisions of Article 27.3(B)*, above nn 69, 190 & 192.

¹⁹⁵ See *TRIPs Agreement* art 71 and *WTO Agreement* art X.

¹⁹⁶ *Review of the Provisions of Article 27.3(B)*, above n 69, 7-10.

¹⁹⁷ *Ibid*, 8.

As a recent member of the WTO with a very moderate level of technological development, Vietnam has used this TRIPs flexibility so that ‘plant and animal varieties or species’ and ‘essential biological processes of the production of plants and animals other than microbiological processes’ are excluded from patentability.¹⁹⁸

4.2 The Protection of Plant Varieties

Relating to TRIPs’ requirement that plant varieties be protected, it was already the experience of many member countries that a *sui generis* system was the most effective way to do so and they have retained the status quo so such systems remain in force in their legal territories.¹⁹⁹ However, TRIPs requires ‘an *effective sui generis* system’²⁰⁰ without further specifying what may be the criteria for judging the effectiveness of such system. As there will be difficulties in obtaining a general consensus among members about what that might mean, it may be exploited as another indirect or unintended flexibility within TRIPs. In other words, members can justify for themselves how effective their system is. The UPOV Convention also does not further specify what an effective system of protection will be.

Members are given a choice between a patent regime and a *sui generis* system for the protection of plant varieties by TRIPs. They may also decide to have one the other from combining those two for that protection. One matter to consider is that which might be better, or more suited to the level of technological development in a member country?

In resolving that issue developed or industrialized countries may have a number of choices. However, it may not be so for developing, or non-industrialized countries, including Vietnam. Where a member country includes plant varieties in its patent scheme without a technological capacity to provide for more particularized provisions, there is a question, depending on how the law is phrased, whether this might lead to the patenting of animal-based inventions, as well as animal and plant inventions, though ‘animals and plants’, as

¹⁹⁸ *Intellectual Property Law 2005* art 59(5)-(6) respectively.

¹⁹⁹ *Review of the Provisions of Article 27.3(B)*, above n 69, 15.

²⁰⁰ The emphasis is added.

worded by TRIPs Article 27:3, can be excluded from patentability.²⁰¹ There is another question, whether it might produce a positive outcome for national agriculture and local farmers, especially in a developing economy. At the same time, a sui generis system, under the UPOV Convention, ensures that such system applies to plant varieties only.

Sui generis systems, established under this Convention, have been commonly recognized as effective ones.²⁰² Becoming a UPOV member might make a member with very limited experience of intellectual property protection like Vietnam feel more confident that it is complying with TRIPs requirements. By joining the 1991 UPOV Convention on 24 December 2006, among other things, Vietnam indicated that it favours such a sui generis system for plant varieties. In implementing this, the Ministry of Agriculture and Rural Development has the responsibility for plant varieties.²⁰³

Although legislation on plants and animals emerged in Vietnam some decades ago,²⁰⁴ they basically originated in, and suited, the centrally-planned economy. This experience might be built on when the legislation was supplemented before the creation of the 2005 Intellectual Property Law in which provisions for plant varieties are included.²⁰⁵ Further reform could be made with assistance under the UPOV. Before joining the UPOV

²⁰¹ Even in such a highly-developed country as the United Kingdom in its implementation of TRIPs relating to the protection of intellectual property in plants there were concerns about whether or not genes should be patentable and whether they derived from plants, humans, or animals: *Integrating Intellectual Property Rights and Development Policy* (September 2002), Report of the Commission on Intellectual Property Rights 1, 95 <http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf>.

²⁰² See *UPOV 2005 Report on the Impact of Plant Variety Protection*, UPOV Publication No. 353; *Position UPOV Concerning Decision VI/5 of the Conference of the Parties to the Convention on Biological Diversity*, UPOV Doc C (Extr)/20/4 (10 April 2003); Jördens, above n 177.

²⁰³ *Intellectual Property Law 2005* art 11(2); *Decree 104/2006* art 4: There, however, given its own responsibilities including the development of agriculture and of rural communities, there are some possible conflicts of interests in that arrangement. They could be lessened by the responsibility being allocated to a body with general responsibility for intellectual property, such as the Patent Office or the NOIP.

²⁰⁴ They include Circular 35-TTg of 6 May 1963 of Prime Minister on Policies for Encouraging Domestic Livestock; Decree 344-CP of 22 September 1979 on Rules for Protection of Plants in Agricultural Production; and, Resolution 357-CP of 3 October 1979 on Policies for Encouraging Home-Bred Cattle.

²⁰⁵ This is the case of Decree 13/2001/NĐ-CP dated 20 April 2001 on the Protection of New Plant Varieties and the Ordinance on Plant Varieties of 24 March 2004.

Convention Union, a non-member country is requested to ask the UPOV Council for advice on making its laws consistent with the Convention provisions.²⁰⁶

In the process of Vietnam's accession to the WTO, alongside the adoption of Government Decree 13/2001/NĐ-CP of 20 April 2001 on new plant varieties,²⁰⁷ the Office for Protection of Plant Varieties was established in 2002 within the Ministry of Agriculture and Rural Development, under the Viticulture Department.²⁰⁸ In the context of Vietnam's agricultural economy, the Office has issued 18, 1, and 22 protection titles respectively to the breeders of new varieties of rice, groundnuts,²⁰⁹ and corn.²¹⁰ A large number of regulations for conducting tests for the distinctiveness, uniformity, and stability (DUS) of lotus, rose, lily, daisy, avocado, banana, mango, tomato, carrot, sugar-cane, sweet-potato, tea, etc have been issued as well. The Office has also cooperated with, and received assistance from, international organizations, including the UPOV Union and PIPRA (the Public Intellectual Property Resource for Agriculture), and from France, Holland, Japan, Australia, and other countries.²¹¹

²⁰⁶ In particular, Article 34(3) of the 1991 UPOV Convention provides that:

[Advice of the Council] Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

²⁰⁷ This is discussed in the context of Chapter 3 on localizing the WTO/TRIPs Agreement in Vietnam.

²⁰⁸ Its establishment is through Decision 12/2002/QĐ-BNN-TCCB of 19 February 2002: Office for Protection of Plant Varieties, 'Introductory Statement' <<http://pvpo.mard.gov.vn>> (visited 23 June 2010).

²⁰⁹ Office for Protection of Plant Varieties, 'Danh mục giống cây trồng đã được cấp bằng' [List of Plant Varieties Certificates Issued], *ibid.*

²¹⁰ 'Danh mục giống ngô đã được cấp bằng' [List of Varieties of Corn Certificates Issued], *ibid.* (visited 14 September 2011).

²¹¹ See, eg, *Hội thảo "Quyền sở hữu trí tuệ và thương mại hóa kết quả nghiên cứu trong lĩnh vực nông nghiệp và sinh học nông nghiệp"* [Conference on Intellectual Property Rights and Commercialization of Research Results in the Fields of Agriculture and Bio-Agriculture] (31 October 2008); *Hội thảo "Thực trạng công tác bảo hộ và phát triển giống cây trồng mới ở Việt Nam"* [Conference on the Reality of New Plant Variety Protection and Development Activities in Vietnam] (10 January 2008); *Hội thảo "Bảo hộ giống cây trồng khu vực Đông Nam Á"* [Conference on Plant Variety Protection in Southeast Asia] (26 February 2008); *Khóa đào tạo trong nước về bảo hộ giống cây trồng và khảo nghiệm DUS* [A National Training Course on Protection of Plant Varieties and DUS Tests]: Office for Protection of Plant Varieties, 'News and Events', above n 208.

4.3 The Main Features of the Vietnamese System on Plant Varieties

As a result of Vietnam's UPOV Convention Union membership, the legislation on plant varieties in Vietnam has been harmonized with a *sui generis* regime protecting plant varieties within the UPOV system. Therefore, its main features should correspond with UPOV Convention requirements.

(a) The Criteria for Plant Variety Protection

To be granted the rights of a breeder of plant varieties, a variety must belong to the list of State-protected plant species issued by the Ministry of Agriculture and Rural Development²¹² and be novel, distinct, uniform, stable, and designated by a proper denomination.²¹³

- **Novelty**

A plant variety is new, or satisfies the novelty criterion if, one year prior to the filing date of the application, its reproductive or harvested materials have not been sold or otherwise distributed by the person(s) who have the right to register the plant variety under Article 164 of the 2005 Intellectual Property Law for the purpose of exploiting it in the territory of Vietnam.²¹⁴ Where the exploitation is outside Vietnam's, the time of such reproductive or harvested materials not having been sold or otherwise distributed by such person(s) is six-

²¹² Such a list of State-protected plant species is provided by, eg, Decision 54/2003/QĐ-BNN of 7 April 2003 Issuing the List of Plant Varieties to Have to Announce Quality Standards and Decision 68/QĐ-BNN of 13 September 2006 Issuing the Additional List of Plant Varieties to Have to Satisfy Standards as Being Provided for.

²¹³ See *Intellectual Property Law 2005* art 158 in connection with *UPOV Convention* arts 5 and 20: In the former, Article 158 is given in more detail in next five Articles 159-163 and guided for the implementation essentially through Articles 12-16, 19 of Decree 104/2006. In implementing the 2009 revised version of the 2005 Intellectual Property Law, Decree 104/2006 has been replaced by Decree 88/2010: See note 206 in Chapter 3 for details.

²¹⁴ See *Intellectual Property Law 2005* art 159 in correspondence with *UPOV Convention* art 6(1).

year for timber trees or vines, or four-year for other plant varieties, prior to the filing date of the application.²¹⁵

- **Distinctiveness**

A plant variety is distinct or satisfies the distinctiveness criterion, if it is clearly distinguishable from any other variety the existence of which is a matter of common knowledge at the time of filing of the application, or on the priority date if this has been claimed.²¹⁶ Priority rights are provided for in Article 167 of the 2005 Intellectual Property Law and guided by Article 8 of Decree 104/2006.

Where an application for registering a plant variety is filed within 12 months from the date of filing the application for the same plant variety in another country with which Vietnam has concluded an agreement on plant variety protection, it can claim the priority right.²¹⁷ To enjoy this, among other requirements, the applicant must provide copies of documents of the first application within three months after the filing date.²¹⁸ If the application is eligible for the priority right, the priority date is the first filing date.²¹⁹ This date may be very

²¹⁵ Ibid. In particular, Article 164 of the 2005 Intellectual Property Law reads:

1. To obtain protection of rights to a plant variety, an organization or individual must file a protection registration application to the state agency in charge of rights to plant varieties.
2. Those having the right of registering a plant variety for protection (hereinafter referred to as registrants) include:
 - a) The breeder who has selected and bred or discovered and developed the plant variety with his or her own efforts and expenses;
 - b) The organization or individual who has invested in the selection and the breeding, or the discovery and the development of the plant variety of the breeder in the form of job assignment or hiring unless otherwise agreed upon; and
 - c) The organization or individual which is transferred, or inherited, the right of registering the plant variety.
3. For plant varieties which are selected and bred or discovered and developed from the state budget or under state-managed projects, the rights to such plant varieties shall belong to the State. The Government shall specify the registration of rights to plant varieties mentioned in this paragraph.

²¹⁶ See *Intellectual Property Law 2005* art 160(1) in relation to *UPOV Convention* art 7.

²¹⁷ *Intellectual Property Law 2005* art 167(1).

²¹⁸ *Intellectual Property Law 2005* art 167(2).

²¹⁹ *Intellectual Property Law 2005* art 167(3).

important where two or more parties file independent applications for the same plant variety. The protection can be given only to the earliest valid application.²²⁰

There are four circumstances in which a plant variety is considered to be a matter of common knowledge or not distinctive.²²¹

- **Uniformity**

A plant variety is uniform or satisfies the uniformity criterion if, subject to the variation that may be permitted or expected from the particular features of its propagation process, it is sufficiently uniform in its relevant characteristics.²²²

- **Stability**

A plant variety is stable or satisfies the stability condition, if its relevant originally-described characteristics remain unchanged after repeated propagation or, in the case of a particular circle of propagation, at the end of each circle.²²³

- **Variety Denomination**

To satisfy this condition, an applicant must designate a proper denomination for his or her plant variety, which must be the same as the denomination registered in any country which

²²⁰ *Intellectual Property Law 2005* art 166(1).

²²¹ This is set out in Article 160(2) of the 2005 Intellectual Property Law as the following:

2. A plant variety whose existence is a matter of common knowledge defined in paragraph 1 of this Article where it falls into one of the following cases:
 - a) Its reproductive or harvested materials have been widely used in the market of any country at the time of filling of the application;
 - b) Has been protected or made into the list of plant varieties in any country; and
 - c) Has been the subject matter of a protection registration application, or of an application for making it into the list of plant varieties in any country, provided that these applications have not been rejected.

²²² See *Intellectual Property Law 2005* art 161 in connection with *UPOV Convention* art 8.

²²³ See *Intellectual Property Law 2005* art 162 in correspondence with *UPOV Convention* art 9.

has concluded with Vietnam an agreement on the protection of plant varieties.²²⁴ The variety denomination is considered proper if it is easily distinguishable from those of other plant varieties, of which there is common knowledge, of the same or similar species.²²⁵

The examination of the appropriateness of a proposed denomination for a plant variety is done by considering the same plant species, or a species close to the species of the denominated plant variety, which have been recognized by Vietnam or by any country which has signed an agreement on the protection of plant varieties with Vietnam.²²⁶ The applicant may be given a notice to change a denomination or to submit another denomination, in place of an improper denomination.²²⁷

(b) The Rights to Plant Varieties

In Vietnam, the intellectual property rights in plant varieties are separated into two categories. There are the rights provided for the breeders, and those provided for the holders of protection titles or certificates of plant varieties.

The breeder of a plant variety has the right to be named as the author of the plant variety as recorded in the protection certificate and in the national register of protected plant varieties, as well as in those relevant published documents on plant varieties.²²⁸ He or she is also entitled to receive remuneration, one of the obligations owed by the holders of the relevant protection certificates.²²⁹ The holders of the protection titles or certificates of plant varieties, a private agricultural research institution, for example, have the obligation of paying remuneration to breeders or authors of plant varieties, such as agricultural scientists working for the institution. This can be paid under an agreement between the two parties²³⁰

²²⁴ See *Intellectual Property Law 2005* art 163(1) in relation to *UPOV Convention* art 20.

²²⁵ See *Intellectual Property Law 2005* art 163(2) in connection with *UPOV Convention* art 20.

²²⁶ *Decree 104/2006* art 13(1).

²²⁷ *Ibid.*

²²⁸ *Intellectual Property Law 2005* art 185(1).

²²⁹ *Intellectual Property Law 2005* art 185(2).

²³⁰ *Intellectual Property Law 2005* art 191(1); *Decree 104/2006* art 29(1)(a).

otherwise it must be equal to 30 percent of collected copyright benefits.²³¹ Where the plant variety is selected and bred or discovered and developed from the state budget, the remuneration follows an internal government regulation.²³² If this is not otherwise regulated, the payment is also equal to 30 percent of collected copyright benefits.²³³

These personal and property rights of breeders of plant varieties suit agricultural practices in Vietnam where the private sector is still not very developed that plant varieties, especially rice and other well-exported species, are mostly selected and propagated by state-owned research and development institutes or universities.

Relating to this, a state agricultural institution, the Mekong Delta Institute for Rice Studies, claimed in 2007 that 70 percent of the local propagation rice market was provided from its own research, but that for 70 percent of the varieties, which it had developed, it received no royalties for authors or creators of those new rice varieties.²³⁴ It seemed also unsatisfactory that over two years after the 2005 Intellectual Property Law was adopted Vietnam issued the first protection title on plant varieties in 2007.²³⁵ This appeared to indicate a lack of knowledge and experience, in research institutes and also within government agencies, of intellectual property rights and processes. But things may also be changing after the adoption of the 2005 Intellectual Property Law.²³⁶

²³¹ *Decree 104/2006* art 29(1)(b).

²³² *Decree 104/2006* art 29(1)(c) the first sentence.

²³³ *Decree 104/2006* art 29(1)(c) the second sentence.

²³⁴ Khoa Học & Phát Triển [Science & Development], ‘Xác lập quyền tác giả trong lĩnh vực nông nghiệp: Lò giải chưa thỏa đáng’ [Royalties for Creators in the Agricultural Field: A Non-Satisfactory Practice] (6 December 2007) <<http://www.baomoi.com/Xac-lap-quyen-tac-gia-trong-linh-vuc-nong-nghiep-Loi-giai-chua-thoa-dang/45/1216707.epi>>.

²³⁵ *Ibid.*

²³⁶ For example, a famous female agricultural scientist has signed a contract, valued at 10 billion dong with a private enterprise for the use of a new crossbred rice variety, preferred by most local farmers. Prior to this contract, the scientist also crossbred another new rice variety and licensed it to a state plant variety company for seven hundred million dong. See, eg, Tuổi Trẻ Online, ‘Giống lúa 10 tỷ đồng’ [The (Shocked) 10 Billion-Dong Price of a Rice Variety] (21 June 2007) <<http://tuoitre.vn/Chinh-tri-Xa-hoi/Phong-su-Ky-su/264566/Giong-lua-10-ti-dong.html#ad-image-0>>; Dân Trí Online, ‘Lúa lai ‘Made in Vietnam’ được bán với giá 10 tỷ đồng’ [A Cross-Breeding Rice Plant Variety “Made in Vietnam” Has Been Sold at 10 Billion VND] (27 June 2008) <<http://dantri.com.vn/kinh-doanh/lua-lai-made-in-vietnam-duoc-ban-voi-gia-10-ty-dong-238827.htm>>.

In respect of the propagating material from a protected plant variety, the following acts can only be carried out by the protection certificate holder or under his or her authorization:

- production or propagation;²³⁷
- processing for the purpose of propagation;²³⁸
- offering for sale;²³⁹
- selling, or conducting other marketing activities;²⁴⁰
- exporting;²⁴¹
- importing;²⁴² and
- stocking for carrying out any of acts previously-mentioned.²⁴³

(c) The Duration of Protection

In respect of Article 19 of the UPOV Convention on duration of the breeder's right, Vietnam provides 25-year of protection for timber trees and vines, 20-year for other plant varieties calculated from the date of granting the plant variety protection certificate.²⁴⁴

(d) Exceptions and Restrictions

Under Article 15 of the UPOV Convention, the use of a protected plant variety in the following circumstances is exceptions to the rights to plant varieties in Vietnam under Article 190 of the 2005 Intellectual Property Law, as amended 2009:

- for personal and non-commercial purposes;²⁴⁵

²³⁷ See *Intellectual Property Law 2005* art 186(1)(a) in relation to *UPOV Convention* art 14(1)(a)(i).

²³⁸ See *Intellectual Property Law 2005* art 186(1)(b) in connection with *UPOV Convention* art 14(1)(a)(ii).

²³⁹ See *Intellectual Property Law 2005* art 186(1)(c) in relation to *UPOV Convention* art 14(1)(a)(iii).

²⁴⁰ See *Intellectual Property Law 2005* art 186(1)(d) in connection with *UPOV Convention* art 14(1)(a)(iv).

²⁴¹ See *Intellectual Property Law 2005* art 186(1)(d) in relation to *UPOV Convention* art 14(1)(a)(v).

²⁴² See *Intellectual Property Law 2005* art 186(1)(e) in connection with *UPOV Convention* art 14(1)(a)(vi).

²⁴³ See *Intellectual Property Law 2005* art 186(1)(g) in relation to *UPOV Convention* art 14(1)(a)(vii).

²⁴⁴ See *Intellectual Property Law 2005* art 169(2).

²⁴⁵ *Intellectual Property Law 2005* art 190(1)(a).

- for testing purposes;²⁴⁶
- for creating other plant varieties, except the case provided for in Article 187 of this Law;²⁴⁷ and
- where farmers, for self-propagating and cultivating purposes in the next season on their own holdings, use harvested products, obtained by planting on their own holdings, of the protected plant variety.²⁴⁸

Exploiting Article 17 of the UPOV Convention, which permits restriction on the exercise of the breeder's rights, Vietnamese law provides for compulsory licensing of a protected plant variety in three situations with similar public interest to exceptions found in patent law:

- where its use is for public and non-commercial purposes, in service of national defence, security, nutrition for the people, or other urgent needs of the society,²⁴⁹ including natural disasters, epidemics, wars, or widespread environmental pollution;²⁵⁰
- where the person who wishes to use it is unable, within a reasonable time, to enter into a licence contract with the rights holder despite having offered a satisfactory commercial price and conditions;²⁵¹ and
- where the rights holder is considered engaging in act of unfair competition banned by competition legislation.²⁵²

5. Conclusions

As with the previous chapter on copyright and related rights in Vietnam's implementation of TRIPs, this chapter has found that in carrying out the obligation to protect patents,

²⁴⁶ *Intellectual Property Law 2005* art 190(1)(b).

²⁴⁷ *Intellectual Property Law 2005* art 190(1)(c).

²⁴⁸ *Intellectual Property Law 2005* art 190(1)(d).

²⁴⁹ *Intellectual Property Law 2005* art 195(1)(a).

²⁵⁰ *Decree 104/2006* art 33.

²⁵¹ *Intellectual Property Law 2005* art 190(1)(b).

²⁵² *Intellectual Property Law 2005* art 190(1)(c).

Vietnamese law has also exploited the flexibilities in TRIPs, most often in the form of gaps or lacunae in the law, or TRIPs itself, discussed in Chapter 2. It is seen to have used the Agreement's Article 27:3 to exclude from patentability, for example, discoveries and scientific theories; plant varieties, animal breeds and essentially biological processes for the production of plants or animals; and diagnostic, therapeutic and surgical methods for treatment of human or animals.²⁵³

Of significance, Vietnam is also found to have created a number of exceptions to the exclusive rights of the holders of patents while provided for compulsory licensing subject to conditions under TRIPs Articles 30-31. Acts falling within exceptions to the exclusive rights include the use of patented inventions for personal needs, non-commercial purposes, or for the purpose of evaluation, analysis, research, teaching, testing, pilot production or collecting information in order to carry out the procedures applying for licences for production, importation, or product circulation.²⁵⁴ They also include the use by government in cases of public non-commercial purposes, national defense, security, disease prevention and treatment, nutrition of the people, and other urgent needs of the society.²⁵⁵

Vietnamese law is seen to take up other flexibilities within TRIPs. When implementing TRIPs' requirement to protect plant varieties by patents, or an effective sui generis system, or any combination of the two, the second option has been chosen. This means that plant varieties are protected in Vietnam under a sui generis system established by the UPOV Convention Union following Vietnam's UPOV membership. No TRIPs criteria for assessing the effectiveness of members' sui generis systems in protecting plant varieties that like many other WTO members with UPOV membership, Vietnam may rely on the UPOV system for ensuring that other members, or dispute tribunals, find that its system is effective. Exceptions to, and restrictions on, the rights in plant varieties under the UPOV Convention are also seen in the local law. Of these, allowing farmers, for self-propagating and cultivating purposes in the next season on their own holdings, to use harvested

²⁵³ *Intellectual Property Law 2005* art 59.

²⁵⁴ *Intellectual Property Law 2005* art 125(2).

²⁵⁵ *Intellectual Property Law 2005* arts 133 & 145-147.

products, obtaining by planting on their own holdings, of a protected plant variety²⁵⁶ must be significant in Vietnam regarding its status as a developing country with low per capita income and an agricultural economy.

The appropriateness of the legal foundation for patent protection of inventions, including provisions for exceptions or limitations, directly relates to the technological development level of a country. Although Vietnam has harmonized its intellectual property protection generally, and patents particularly, with that of the international community, like many other developing countries, its applications and grants of patents, especially relating to the Patent Cooperation Treaty, as indicated in Appendices 2 to 7 to this thesis, are in general relatively low. The lack of institutional capacity and technical expertise required to put the flexibilities within TRIPs into practice is pointed out as the reason why real flexibility in developing countries like Vietnam is so limited.²⁵⁷ Countries like Vietnam have also found it difficult to obtain international technical assistance for the legal exploitation of further flexibilities. This assistance is likely to concern itself with the conformity to the provisions which advance the rights of patent holders rather than in enlarging the built-in flexibilities.²⁵⁸ This may cause further difficulties for Vietnam taking advantage of opportunities within TRIPs to have more appropriate laws on patents and plant varieties more suited to its interests. The provisions in the local law are often short and incomplete,

²⁵⁶ *Intellectual Property Law 2005* art 190; *Decree 104/2006* art 28: Notably, in the course of implementing the 2009 revision of the 2005 Intellectual Property Law Decree 104/2006 has been substituted by Decree 88/2010 (see also above n 213) with some reduction in guiding for exceptions or limitations to the rights to plant varieties and some increase in giving guidance to compulsory licensing of a protected plant variety.

²⁵⁷ Matthews, above n 9.

²⁵⁸ See above n 96: There have been some recent changes. Within the WIPO system there has been work on flexibilities around particular areas including culture and creative industries; patents and innovation; brands and design sector; respect for intellectual property; development sector; and, global issues. These are done under the work of respectively: the Standing Committee on Copyright and Related Rights (SCCR); the Standing Committee on the Law of Patents (SCP); the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT); the Advisory Committee on Enforcement (ACE); the WIPO Academy; the Committee on Development and Intellectual Property (CDIP); and, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Consequently, a Development Agenda with 45 recommendations to enhance the development dimension of the Organization's activities has been developed. The key is to focus on enhancing the understanding and use of flexibilities in the intellectual property system. See 'Flexibilities in the Intellectual Property System: Road Map – Work Related to Flexibilities in the IP System within WIPO' <<http://www.wipo.int/ip-development/en/agenda/flexibilities/>>.

particularly requiring guidance for the implementation. The absence of such provisions may explain why it has never been applied for a compulsory licence in Vietnam, even in the pharmaceutical industry which relies heavily on importation to meet local demands.²⁵⁹

However, as with the development of the NOIP²⁶⁰ and the Copyright Office as well,²⁶¹ the Office for Protection of Plant Varieties²⁶² might be gradually enhanced by the further integration of Vietnam into the WTO. This may result in the institutional and administrative capacity in both legalizing TRIPs standards and exploiting the Agreement's flexibilities in protecting intellectual property in general and patents and plant varieties being more effectively achieved. The administration and experiment of some other aspects of intellectual property law are considered in the next chapter on other categories of intellectual property rights in Vietnam under TRIPs minimum standards.

²⁵⁹ Drahos and Spengler, above n 138.

²⁶⁰ See above n 23.

²⁶¹ The details are given in notes 5-11 in the previous chapter, or Chapter 4, on copyright and related rights in Vietnam under TRIPs' flexibilities.

²⁶² See above nn 208-211 above.

CHAPTER 6: OTHER TRIPs CATEGORIES OF PROTECTION IN VIETNAM

Synopsis

This chapter deals with the remaining industrial property, apart from patents and plant variety rights, which a member is obligated to protect under TRIPs. They are trademarks, service marks, well-known marks, geographical indications, industrial designs, layout designs (topographies) of integrated circuits, and undisclosed information. There are some similarities between the first four of these categories and between the last three as well.

Vietnam has legislated for all of these categories to fulfil its obligations under TRIPs to protect the rights which they represent. TRIPs mainly incorporates obligations specified in the Paris Convention. The rights in respect of layout designs which it specifies originate in the inoperative Washington Treaty. As with the provisions in Conventions discussed in the previous two chapters they again contain flexibilities which can be utilized by members in creating laws for local conditions. TRIPs itself has again filled some gaps in the law left by these Conventions, particularly in respect of the Washington Treaty which is not entered into force.

These categories of intellectual property serve different purposes and seek to achieve varying policy goals depending on the category of intellectual property protected. Undisclosed information, for example, has been protected in different ways and by different processes in national legal systems. Not surprisingly given the breadth of rights involved and the extensive, and sometimes conflicting, policies which underline them Vietnam has sometimes stayed close to the text of TRIPs in restating the rights and protections in local law.

Vietnamese law and policy makers have taken advantage of some flexibilities in drafting legislation. Using only the term ‘marks’ in the law, for example, restricting registration to visually perceptible marks and not to scents or sounds is appropriate to both its present stage of development and the resources available to government agencies in registering such marks. Vietnamese law has sought to make its own definition of ‘interested party’ able to invoke the protection and enforcement of geographical indications. It has sought to group some legislative aspects of the last three categories of rights – industrial designs, layout designs (topographies) of integrated circuits, and undisclosed information – together because of their similarities. In respect of confidential information Vietnam has no previous law except on state secrets which could in some circumstances extend to commercially valuable information held by state-owned enterprises.

Vietnam has not always chosen to use the flexibilities open to it. At a number of points the generality of the law which has been made again creates ambiguities and gaps making it difficult for administrators, judges, or lawyers, to apply in the absence of further regulation or guidance from administrative bodies or the Supreme People’s Court on its implementation. The failure to fill these gaps reflects the reality that even though Vietnam has made a comprehensive law Vietnamese law and policy makers are not familiar with the purpose or practical application of such laws and that the laws are little known and not always suited to its present level of development.

CHAPTER 6: OTHER TRIPS CATEGORIES OF PROTECTION IN VIETNAM

Apart from patents, the scope of industrial property in Vietnam is widened by other categories of intellectual property, including trademarks, service marks, well-known marks, geographical indications, industrial designs, layout-designs (topographies) of integrated circuits, and undisclosed information obliging to be protected by TRIPs. Except for layout designs, the rights in respect of which are referenced to the Washington Treaty, all of the rest, as with patents, are mostly incorporated from the Paris Convention. This chapter explores these other industrial property categories and their protection in Vietnamese law under TRIPs. Its main focus is again how TRIPs' flexibilities are reflected in the national law. The first of these other industrial property categories to be considered is trademarks.

1. Trademarks

Trademarks have existed in India and China for over 2000 years but the protection connected to their economic importance is derived from western economic and legal systems.¹ In the UK, it was not until 1875 that a trade mark registry was established and the developing law was consolidated in legislation in 1883.² Trade marks were defined for the first time in 1905 in revised legislation regarded as the first effective legislation.³ It was created largely through the work of the London Chamber of Commerce. In the United States, the statutory law emerged from concepts of goodwill protected by the tort of passing off⁴ and legislation appeared in 1870 which was ruled to be constitutionally invalid and narrow new legislation to protect foreign registrable marks, as required by international agreements, was passed in 1881.⁵ This was substantially reformed in 1905 to protect United States trademarks as well.⁶

¹ WIPO Handbook, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2nd ed, 2004) 67-8.

² *Patents, Designs and Trade Mark Act 1883* (UK) 46-47 Vic. c 57. See also Roger William Wallace, *The Patents, Designs and Trade Marks Act 1883* (W Maxwell & Son, 1884) 113-41.

³ *Trade Mark Act 1905* (UK) 7 Edw. VII. c 15.

⁴ Anne M McCarthy, 'The Post-Sale Confusion Doctrine' (1999) 68 *Fordham Law Review* 67.

⁵ *Trade Mark Cases* 100 US 82 (1879); *Trade Marks Act of 1881*.

⁶ *Trade Marks Act of 1905*.

The 1886 Paris Convention resulted from, among other things, the need to harmonize the emerging national trademark laws and made the first attempt to harmonize intellectual property laws.⁷ It evolved in the course of the 20th century to reflect changes in commerce and technology, being revised several times with the last in 1967 incorporated into TRIPs. Apart from picking up the Convention requirements including making available priority rights for trademark registration and the protection of well-known marks and service marks, when providing for trademarks TRIPs emphasizes some other aspects of trademark law including protectability, trademark rights, and term of protection.

1.1 Protectable Subject Matter

In terms of their qualities as distinctive signs, the protection of trademarks has some in common with geographical indications'. Neither of them relates to the technological characterization of a product. While TRIPs' requirements and flexibilities for patents may remain difficult for developing countries with a low level of technological development, including Vietnam, internalizing TRIPs' provisions for trademarks and geographical indications may be easier for them from that respect.

By defining a trademark as any sign or any combination of signs which is capable of distinguishing the goods or services undertaken by different enterprises or traders,⁸ TRIPs makes clear that the scope of trademark protection covers both goods and services. This fills a gap left in the Paris Convention. In requiring members to protect marks or trademarks, there is only Article 6*sexies* in the Convention, which contains a very short provision (23 words in totality), mentioning service marks to be protected without registration. This Article, or provision, was introduced by the 1958 Revision Conference of Lisbon which refused to further assimilate service marks throughout the Convention.⁹

⁷ WIPO, *Introduction to Intellectual Property: Theory and Practice* (Kluwer Law International, 1997) 359.

⁸ *TRIPs Agreement* art 15(1) the first sentence.

⁹ GHC Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property (the Stockholm Act 1967)* (United International Bureau x for the Protection of Intellectual Property, 1968) 75, 122.

After the definition to cover the gap in the Paris Convention, discussed above, TRIPs Article 15:1 subsequently contains two ‘may’ or permissive provisions in creating flexibility.¹⁰ When obligating members to make laws capable of registering personal names, letters, numerals, figurative elements and combinations of colour as trademarks,¹¹ it states that members ‘may’ make registrability dependent on a distinctiveness acquired through the use of signs which are not inherently capable of distinguishing the relevant goods or services.¹² Members ‘may’ also decide whether or not to require a visual perception of signs as a condition for registration of a trademark or a service mark.¹³ These provisions give members freedom to decide on these issues for their own legal systems.

Vietnam is seen, firstly, to use only the term ‘mark(s)’. Technically, this implies that the scope of its trademark protection covers all protected marks, either for goods or for services, without need to add or use any additional term ‘trade’ or ‘service’ before them.¹⁴

Secondly, the local law takes up the leeways in TRIPs when it requires a visible capacity for signs as a condition for registering marks. In particular, signs applying for registration as a mark must be visibly perceived, such as letters, words, drawings, and images, including three-dimensional holograms.¹⁵ TRIPs’ use of the word ‘numerals’ or Vietnam’s obligation to provide registrability for ‘numerals’ does not appear in this provision but added later by a ministerial circular.¹⁶

Such provision of excluding invisible signs from trademark registration makes the scope of trademark protection in Vietnam narrower than, and different from, some other countries, which allow sounds, scents, tastes, and textures to be registered as a trademark. The United

¹⁰ See Section 4. *Locating TRIPs Flexibilities* in Chapter 2 for more detail.

¹¹ *TRIPs Agreement* art 15(1) the second sentence.

¹² *TRIPs Agreement* art 15(1) the third sentence.

¹³ *TRIPs Agreement* art 15(1) the fourth sentence.

¹⁴ According to UNCTAD & ICTSD, *Resource Book on TRIPs and Development* (Cambridge University Press, 2005) 216 the term ‘trademark’, written without separation of the words in the texts of both the Paris Convention and the TRIPs Agreement, follows the style of the United States English. It can be separated into two words as ‘trade mark’ in the style of British English.

¹⁵ *Intellectual Property Law 2005* art 72(1).

¹⁶ *Circular 01/2007* point 39.2(a).

States was the first jurisdiction to widen the scope of registration beyond a visible sign by allowing the registration of a smell mark – the fresh floral fragrance reminiscent of plumeria blossoms used in sewing thread and embroidery yarn in 1990.¹⁷ Later, it was supported to register the smell of fresh cut grass in respect of tennis balls in the European Union in 1999.¹⁸ The result of this can now be seen from, for example, French law under which audible signs, such as sounds or musical phrases, may constitute a trademark.¹⁹

Compared with the laws of these developed economies, the transitional nature of the economy in Vietnam makes its choice understandable. The production of goods bearing those kinds of trademark requires certain technological development levels and examining and registering them as trademarks may create considerable costs to the government or the trademark office. Both of these factors may have affected Vietnam's decision to ignore trademark registrability for invisible signs.

A further TRIPs leeway is seen taken by Vietnam. When stating that signs which refer to time, place, manufacturing methods, category, quantity, quality, properties, ingredients, intended utility, value or other characteristics which reflect a description of goods or services have insufficient distinctiveness to be registered as a trademark,²⁰ Vietnamese law provides an exception. Such signs can still be registered if they have acquired distinctiveness through use prior to the filing of the application.²¹ To fall within this 'exception of exception' the applicant must provide evidence of the wide use of such mark, including the beginning time and the present scope and level of its use.²² The mark is only considered being in use where it has been used in lawful production, business, commerce, advertisement, or marketing and only when its distinctiveness has been presented in the form in which it is used widely and uninterruptedly.²³

¹⁷ WIPO Handbook, above n 1, 57.

¹⁸ Ibid.

¹⁹ *Intellectual Property Code* (French) art L.711–1(b) (WIPO-Lex & JPO)

²⁰ *Intellectual Property Law 2005* art 74(2)(c).

²¹ Ibid.

²² *Circular 01/2007* point 39.5(b).

²³ Ibid.

This aligns Vietnam's trademark law with other countries', including the United States', where a descriptive mark can be registered after proving 'secondary meaning'. This secondary meaning must be provided by the applicant of a descriptive mark as this mark simply describes certain qualities or characteristics of the goods or services.²⁴ It is self-clear that the applicant then must show some meaning to the public beyond any obvious meaning of the mark itself.²⁵ A descriptive mark, which normally only refers to a product itself, is considered having acquired secondary enabling it to be registered if the use of the mark has shown the required significance, from the awareness of the consuming public associating it with the source of the goods or services bearing it.²⁶

In addition, TRIPs Article 15:1 defines a trademark without specifying what may constitute a capacity of distinguishing goods or services by signs or symbols. Vietnam has filled this gap by specifying additional relevant features in ruling trademarks.

In particular, a mark is considered distinctive if satisfying two requirements. The first is the mark must consist of one or several easily noticeable and memorable elements.²⁷ Where it is created by more than one element, these elements must form an easily noticeable and memorable combination.²⁸ The second is the mark does not fall within categories which are seen as non-distinctive.²⁹ These include simple shapes and geometric figures; numerals, letters, or scripts of uncommonly-used languages; and conventional signs or symbols, pictures or common names of goods or services in any language which have been regularly and widely used and known to many people.³⁰ Here, it is, again, included with 'exception of exception', say, simple shapes or geometric figures, numerals, letters, or scripts of

²⁴ Richard Stim, *Trademark Law* (West Legal Studies–Thomson Learning, 2000) 23-4.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Intellectual Property Law 2005* art 74(1).

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ For all categories of signs to be considered non-distinctive see Article 74(2) of the 2005 Intellectual Property Law mainly guided by points 39.3 and 39.4 of Circular 01/2007.

uncommonly-used languages to have been used as a mark and become widely-known to consumers to distinguish the relevant goods or services from other goods or services.³¹

Even so, it is difficult for Vietnam or the Trademark Office to exercise its authority in practice regarding the country's less-developed economic status. Although the number of local trademarks has considerably increased, especially in comparison with that in the former centrally-planned economy,³² they are still very few compared with other WTO counterparties which have traditionally had a market economy and centuries of rational and enforceable trademark laws.³³

1.2 Trademark Rights

Relating to trademark rights, TRIPs Article 16:1 provides that:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

Again, this TRIPs provision fills some further gaps in the Paris Convention. There are many provisions of the Convention providing for trademarks, Articles 6, 6*bis*, 6*ter*, 7, and 7*bis*, for example. But with the exception of just Article 5:C, there is no other Article or provision in the Convention mentioning what rights the holders of trademarks have. Article

³¹ *Intellectual Property Law 2005* art 74(2)(a), (c) & (d); *Circular 01/2007* point 39.5.

³² According to the National Office of Intellectual Property <www.noip.gov.vn> (visited 10 September 2008) during the period 1982-1989 there were 1550 mark certificates issued of which 380 were for locals and 1170 were to foreigners but in 2007 these numbers increased up to 10,660 to locals and 5200 for foreigners.

³³ For example, according to the Annual Report of 2006-2007 of the Indian Controller General of Patent, Design and Trademark <www.patentoffice.nic.in> the number of registered trademarks in India at the time was 109,361. Also at this time the number of registered trademarks in Australia was 111,822: *About IP Australia: Statistics* <www.ipaustralia.gov.au> (visited 8 July 2009).

5:C mainly refers to the possibility that under some national laws the use of a registered mark may be compulsory and then the mark registration cancellation may only be taken after a reasonable period and if the concerned person does not justify his or her inaction. In the above-extracted Article 16:1, TRIPs harmonizes minimum standards for the trademark owners' rights amongst members. Implementing this provision, Vietnamese law states mark owners to have the rights of using, authorizing, or preventing others from using their protected marks with particular acts of marks' use being given.³⁴

The Agreement again leaves some leeways in Article 17, however. Accordingly, members 'may' provide 'limited exceptions' to rights otherwise conferred by a trademark, such as the fair use of descriptive terms, provided that 'such exceptions take account of the legitimate interests of the owner of the trademark and of third parties'. This enables national lawmakers to incorporate limited exceptions to trademark rights into their own laws, which is mostly done in the context of unfair competition principles.³⁵

The wording of TRIPs Article 17 has some in common with its Articles 13 and 30 providing for exceptions to copyright and patent rights respectively and with Article 9:2 of the Paris Convention regulating exemptions to the reproduction right of authors of literary and artistic works. However, different categories of intellectual property rights have different functions that the public interests being considered differ from each.³⁶ Regarding this, the permissible exceptions to trademark rights in TRIPs Article 17 may be much narrower than those in Articles 13 and 30.

This TRIPs provision is worded with 'the fair use of descriptive terms' after 'such as' that it becomes an example of a permitted exception under the criteria specified by the provision. The argument that the concept of such 'fair use of descriptive terms' comprises 'those usages of the mark protected under trademark law which serve the sole purpose of

³⁴ *Intellectual Property Law 2005* arts 123(1), 124(5) & 125(1).

³⁵ Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff Publishers, 2009) 332-3.

³⁶ UNCTAD & ICTSD, above n 14, 243.

informing the customer of the usage of the goods' is reasonable as trademark law features, among other things, the protection of the goodwill or reputation acquired by ensuring the quality of goods or services is known with rules against misleading comparative advertisements as an example.³⁷ In determining whether advertising is misleading, say, it is stated within the European Union that all of the advertising's features should be considered and, in particular, any information it contains which concerns:

- (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purposes, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
- (c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.³⁸

In the situation of Vietnam's developing market economy, not only intellectual property protection generally but also trademark protection particularly are still relatively unfamiliar in the locality. There are no official surveys or statistics on the use of trademarks and advertising but relying on such descriptive marks is not as common as a marketing strategy by local enterprises as it is in developed economies. Therefore, it is uneasy to have similar provisions in exploiting such feature of TRIPs in Vietnam and the local law is silent on this.

Vietnamese law has excluded several categories from trademark protection, however. They include signs which are identical with, or confusingly similar to, national flags or emblems, or those which mislead or confuse or deceive consumers of the origin, properties, intended utilities, qualities, value or other characteristics of goods or services.³⁹ They also make

³⁷ Stoll, Busche and Arend, above n 35, 334.

³⁸ *European Parliament and Council Directive 2006/114/EC of 12 December 2006 Concerning Misleading and Comparative Advertising* [2006] OJ L 376/21, art 3 (WIPO-Lex).

³⁹ For details see, eg, *Intellectual Property Law 2005* art 73; *Circular 01/2007* points 37.3(c)(i)-(ii) & 39.3(k).

unregistrable signs that would infringe rights acquired by third parties because they are considered indistinguishable from other marks. These exclusions are either permitted under the Paris Convention⁴⁰ or appear in most national laws.⁴¹

1.3 Term of Protection

In practice, a trademark can be protected for an unlimited time along with the goods or services bearing it. Regarding this, TRIPs stipulates a minimal period of initial mark registration of seven-year and obligates members to permit the renewal of this indefinitely.⁴² Consequently, members have discretion to decide on a longer term of initial and subsequent protection.

Under its bilateral trade agreement with the United States in 2000, Vietnam agreed to provide for the initial registration of a trademark for a term of at least 10-year with indefinite renewals when the conditions for the renewal are satisfied.⁴³ This appears in the 2005 Intellectual Property Law.⁴⁴ The initial 10-year is calculated from the filing date of the application and this can consecutively be renewed indefinitely.⁴⁵

1.4 The Termination of a Registered Mark on Non-Use Basis

Again, under the Paris Convention members can regulate the use of a registered trademark is obligatory on the owner to maintain it.⁴⁶ If it is not used, members are required to ensure that the cancellation of the mark can take place only after ‘a reasonable period’ of non-use and where the owner is unable to justify his or her inaction.⁴⁷ These provisions are mostly repeated by TRIPs Article 19:1 in which the continuing use for the continuity of trademark

⁴⁰ See *Paris Convention* arts 6ter and 6quinquies(B)(1) respectively.

⁴¹ WIPO Handbook, above n 1, 76-7.

⁴² *TRIPs Agreement* art 18.

⁴³ *United States-Vietnam Bilateral Trade Agreement* art 6(8) ch II.

⁴⁴ *Intellectual Property Law 2005* art 93(6).

⁴⁵ *Ibid.*

⁴⁶ *Paris Convention* art 5(C)(1).

⁴⁷ *Ibid.*

registration is permissible but not obligatory.⁴⁸ But it stipulates an at least three-year period of un-interrupted non-use be provided for before the termination of a registered mark based on that can take place.⁴⁹

In this context, members are clearly given the freedom to decide on at least three related issues. The first is whether they create a provision under which the use of registered marks is obligated on mark owners. The second is whether they may provide for a period longer than the TRIPs minimum's requirement. The third is the manner in which a mark owner is permitted to justify his or her non-use of the mark before decision to cancel it may be made.

Responding to these discretions, Vietnam provides that the continuous use of a registered mark by the mark's owner, or his or her licensee, is mandatory.⁵⁰ The period of non-use without justifiable reasons which leads to the cancellation of a mark is no less than five-year consecutively before the request is made to declare the mark invalid.⁵¹ However, if the

⁴⁸ Stoll, Busche and Arend, above n 35, 341-2.

⁴⁹ *TRIPs Agreement* art 19(1) the first sentence.

⁵⁰ *Intellectual Property Law 2005* art 136(2).

⁵¹ *Intellectual Property Law 2005* arts 136(2) & 95(1)(d): As discussed in Chapter 1 there is almost no literature or data on this in Vietnamese law. In China the same obligation of using a registered trademark is provided for by the trademark law under which the period of non-use which may lead to the cancellation of the trademark is no less than three years. To cancel a trademark under this provision it has been estimated that the Chinese Trademark Office takes one to two years to make a decision. The cancellation of a trademark based on other grounds such as relating to a famous trademark can take from five to seven years. This is why enterprises are advised that they should register their trademarks early to prevent counterfeiting. It normally takes 28 to 36 months to obtain a trademark registration in China with 10-years of protection. The protection is generally effective on the registered date rather than retroactive to the filing date as in Australia or many other countries. See Wine Australia, *How to Protect Trade Marks in China* (IP Australia 2006) 1-3 <<https://www.wineaustralia.com/>> (visited 6 September 2014). See also EU-China IPR 2, *Roadmap for Intellectual Property Protection in China: Trademark Protection in China* (2008) <http://www.ipr2.org/storage/Roadmap%20Trademark%20Protection_EN.pdf>.

In Vietnam, a term of 10 years for mark protection is effective on the date of registration rather than the filing date and the term can be renewed for successive 10-year periods, set out in Article 93(6) of the 2005 Intellectual Property Law. This is similar to Chinese Law. Subsequently, Article 119(1)-(3) of the Law provides that the period for examining the form of an industrial property registration is one month from the filing date and another period of the substantive examination of nine months from the date of publishing the application for a mark registration. But for a substantive re-examination this can be renewed to two-thirds of that initial time limit and in complicated cases may be further prolonged but without exceeding the time limit for the initial examination.

use of the mark is commenced or resumed at least three months before the making of the request for cancellation, the mark cannot be cancelled.⁵²

1.5 The Protection of Well-Known Marks

As noted earlier, the Paris Convention has only a very short provision obligating members to protect service marks without registration.⁵³ It also does not seek to assimilate service marks to positions similar to trademarks.⁵⁴ TRIPs extends the protection for service marks by stating that the provisions for well-known marks set out in Article 6*bis* of the Paris Convention must be applied, *mutatis mutandis*, to services.⁵⁵ The TRIPs provision creates a space within which national law makers may move in formulating local laws. It instructs members to take into account ‘the knowledge of the trademark in the relevant sector of the public’, which includes ‘knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark’, when determining the well-known status of a trademark.⁵⁶ No further explanation is given either in the Paris Convention or in TRIPs and Vietnamese law is seen filling out this lacuna.

First, it determines a well-known mark is one widely-known by consumers throughout the territory of Vietnam.⁵⁷ Second, it specifies eight components, or elements, to be considered in concluding that a mark is well-known.⁵⁸ This has been further given in detail in their

⁵² Ibid.

⁵³ *Paris Convention* art 6*sexies*.

⁵⁴ Bodenhausen, above n 9.

⁵⁵ *TRIPs Agreement* art 16(2) the first sentence.

⁵⁶ *TRIPs Agreement* art 16(2) the second sentence.

⁵⁷ *Intellectual Property Law 2005* art 4(20).

⁵⁸ Specifically, Article 75 of the 2005 Intellectual Property Law provides for these eight elements. The first relates to the number of consumers in the relevant market sector who are aware of the mark through purchase or use of goods or services bearing it or through advertising. The second determines the territorial scope within which the goods or the services bearing the mark are circulated. The third connects with the turnover of the goods or services which bear the mark, or the quantity of the goods sold or the volume of the services supplied. The fourth relates to the period of the continuous use of the mark. The fifth investigates how widespread is the goodwill of the goods, or the services, bearing the mark. The sixth connects to the number of countries which have granted the protection to the mark. The seventh determines the number of the countries to have recognized the mark as well-known. The eighth, or the last, relates to the price which the assignment or licensing or investment capital contributes to the value of the mark.

implementation by Circular 01/2007.⁵⁹ These differ from China's implementation of the same requirement in TRIPs.⁶⁰

1.6 The Protection of Trade Names

There is no provision for trade names in TRIPs. Like service marks, their protection is very briefly mentioned in the Paris Convention. Accordingly, a trade name is required protected 'without the obligation of filing or registration, whether or not it forms part of a trademark'.⁶¹ This does not specify how such protection should be given that members again have leeways to decide, for example, to create a specific law or to use legislation against unfair competition or other appropriate means when carrying out such obligation.⁶²

The Paris Convention provision does not define a trade name and the definition of this varies amongst its member countries.⁶³ Taking up this flexibility, a trade name is defined, under Vietnamese law, as a designation of an organization or individual in business

⁵⁹ To prove that their marks satisfy the conditions for being considered well-known mark owners, eg, can present information on the scope, scale, level, and continuity of the use of the mark and this may include an explanation of the origin, history and time of the continuous use of the mark, the list of goods or services bearing the mark, the investment in and expenditure for advertising and marketing the mark, and the like (*Circular 01/2007* point 42.3).

⁶⁰ In particular, Article 13 of China Trademark Law, as amended in 2013 (WIPO: CLEA) states that:

Should any rights of a trademark well known to the relevant public be infringed, the trademark holder can follow the relevant provisions in this law to request the protection of the said famous trademark.

Where a mark is a reproduction, imitation, or translation of a third-party's famous trademark which has not been registered in China and where the goods are identical or similar, which may cause public confusion and damage the interests of the registrant of the famous mark, no registration shall be granted and the use of the mark shall be prohibited.

Where a mark is a reproduction, imitation, or translation of a third-party's famous trademark which has been registered in China and where the goods are not identical or dissimilar, which may mislead the public and cause injury to the interests of the registrant of the famous trademark, no registration shall be granted and the use of the mark shall be prohibited.

Article 14 of the Law stipulates the following factors to be considered in determining a famous trademark based on the parties' request: (i) the degree of public recognition of the mark in its trading areas; (ii) how long the mark has been in use; (iii) the duration and extent of advertising and publicity of the mark, and the geographical extent of the trading areas in which the mark is used; (iv) protection of the mark as a famous trademark; and, (v) other reasons for the fame of the trademark.

⁶¹ *Paris Convention* art 8.

⁶² Bodenhausen, above n 9, 133.

⁶³ *Ibid.*

activities which is capable of distinguishing the business entity holding it from others in the same business field and area.⁶⁴ A business area means a geographical territory in which a trader or an enterprise has business partners, clients, or reputation.⁶⁵ State and State-relevant entities are non-profit organizations so that their names are protected outside the scope of trade-name protection.⁶⁶ They include ministries or people's committees at any level: provincial, district, or communal, as well as political organizations, socio-political organizations, social organizations, and socio-professional organizations, such as the Vietnam Fatherland Front and the Vietnam Women's Union.⁶⁷

Other exploitation of the flexibility in the international law is seen in Vietnamese law on trade-name protection. They are given three criteria for determining the distinctiveness of a designation of an organization or individual in business activities for it to be protected as a trade name, for example.⁶⁸

2. Geographical Indications

Both TRIPs and the Paris Convention contain many provisions for the protection of geographical indications, including individual provisions for wines and spirits in TRIPs. Unlike patent protection, which was much debated amongst WTO members over the level and extent of protection, there was little division between developing and developed countries in the TRIPs drafting negotiations over geographical indications.⁶⁹

⁶⁴ *Intellectual Property Law 2005* art 4(21) the first sentence.

⁶⁵ *Intellectual Property Law 2005* art 4(21) the second sentence.

⁶⁶ *Intellectual Property Law 2005* art 77.

⁶⁷ See, eg, the 2004 Rules of the Vietnam Fatherland Front <www.ubmttg.hcmc.gov.vn> or the 1987 Rules of the Vietnam Women's Union <<http://hoilhp.org.vn>> (visited 9 July 2009).

⁶⁸ The first is that the designation must consist of a proper name of the business entity holding it, except where it has been widely known through use; the second is that it must not be identical with or confusingly similar to another trade name which has been used earlier by another business entity in the same field and area of business; and, the third is that it must not be identical with or confusingly similar to a mark or geographical indication subject to protection prior to its date of use: *Intellectual Property Law 2005* art 78.

⁶⁹ See, eg, Rangnekar (2002), citing in Carlos M Correa, *Protection of Geographical Indications in Caricom Countries* (2002) 1 n 2 <<http://www.crim.org>> (visited 16 July 2008); Dwijen Rangnekar, *Demanding Stronger Protection of Geographical Indications: the Relationship between Local Knowledge, Information, and Reputation* (2004) 7 <<http://www.intech.unu.edu/publications/discussion-papers/2004-11.pdf>>; Stoll, Busche and Arend, above n 35, 377-8.

The trend to protect geographical indications by state instrumentalities commenced in western countries in the late 1800s.⁷⁰ Often laws against false trade descriptions or passing off were used.⁷¹ The protection given to the consumers, as with other forms of passing off, were considered to be worth the limitations imposed by recognizing a regional monopoly.⁷²

Again, the protection of trademarks has some in common with geographical indication protection. There is generally no relation between the technological characterization of a product protected by trademark or geographical indication though some products may involve distinctive methods of creation or manufacture.⁷³ Both relate to distinctive signs indicating their qualities and informing consumers to have their choice between various competing products available in the market.

These two categories of intellectual property also substantially differ from each other. Fundamentally, trademark owners have exclusive rights while the users of geographical indications cannot be provided with these rights.⁷⁴ The reason is that a geographical indication is not the property of an individual right holder but a territorial generic description which can be used by all traders within a locality or region.⁷⁵

The protection of geographical indications should be very important to a country with an agricultural economy like Vietnam. It potentially contributes to the strength of its exports of

⁷⁰ WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Geographical Indications: Historical Background, Nature of Rights, Existing Systems for Protection and Obtaining Effective Protection in Other Countries* (Document Prepared by the International Bureau), WIPO Doc SCT/6/3 (25 January 2001) [20].

⁷¹ Ibid, [9].

⁷² Ibid, [16]-[17].

⁷³ Champagne, eg, has a regional association but requires particular processes to be used in its fermentation: Kolleen M Guy, *When Champagne Became French: Wine and the Making of a National Identity* (Johns Hopkins University Press, 2003) 2, 16, 80.

⁷⁴ As a reflection of such difference, while TRIPs requires members to grant the owner of a registered trademark the exclusive right to prevent third parties, without his or her consent, from using identical or similar signs for goods or services that are identical or similar to those in which the trademark is registered where such use would result in a likelihood of confusion, it only obliges members to provide the legal means for interested parties to, among other things, prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner that misleads the public as to the geographical origin of the good.

⁷⁵ See above UNCTAD & ICTSD, n 14, 270; Correa, n 69.

rice, coffee, tea, pepper, and seafood with famous products such as Phú Quốc fish sauce, Lục Ngạn litchie, Mộc Châu tea, Buôn Ma Thuật coffee, Hải Hậu sweet-smelling rice, etc. Nevertheless, because of the widespread unfamiliarity with the protection of intellectual property and its less-developed economy and commerce in general, few certificates of geographical indications have been issued in Vietnam.⁷⁶

2.1 Identifying Geographical Indications of Origin

Appropriate to geographical indications, TRIPs Article 22:1 uses a number of key terms including ‘identify’, ‘territory’, ‘region’, ‘locality’, ‘quality’, and ‘reputation’. Also, the Agreement has, appropriately, no requirement for national lawmakers to give exclusive rights to the users of geographical indications. The usual phrase ‘right holders’ for intellectual property rights is replaced by ‘interested parties’. In this way, TRIPs leaves considerable latitude to its members.

In respect of TRIPs definition that geographical indications are indications which identify a good as originating in a territory, or a region, or a locality where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin,⁷⁷ members may vary over some relevant matters in implementing this. They may differ over the meaning of ‘good(s)’ covered by geographical origin. Could they include a service? What contributes to the ‘reputation’ of goods? How this can be seen as ‘essentially attributable’ to a geographical origin of the goods? Dealing with these issues may produce problems because of ambiguity of language used, discussed within Chapter 2.

By stating that geographical indications are ‘indications which identify a good as originating in the territory of a Member’ the TRIPs provision is clearly self-explicable that geographical indication protection applies to a ‘good’ only, not a ‘service’. As TRIPs

⁷⁶ According to the National Office of Intellectual Property, *Seminar on Protection of Geographical Indications* <<http://www.noip.gov.vn>> (visited 17 February 2009) up to October 2008 there are a total of 13 geographical indication certificates to have been issued of which two were to foreigners.

⁷⁷ *TRIPs Agreement* art 22(1).

negotiators rejected the proposal that services should qualify the attribution to territories, a claim of misleading attribution of the source of services may have to use laws other than geographical indication, say, unfair competition legislation.⁷⁸ Still, TRIPs has no further explanation of the concept of ‘good’ relating to its geographical origin that it may be broadly interpreted to cover any marketable products, including agricultural commodities and industrial products such as foodstuffs, textiles, hardware, and machinery.⁷⁹ However, it has been argued that to determine the geographical origin of a product there need have an attribution to geographical relevant factors including soil and climate so that the concept of ‘good’ is restricted to agricultural products only.⁸⁰ This argument is strengthened by TRIPs drafting history where its negotiators rejected the text ‘including natural and human factors’, proposed by the European Communities, for inclusion in the text of Article 22:1.⁸¹

Similarly, members may vary over other issues in their national laws, including how to determine the ‘reputation’ element of a geographical indication? One broader interpretative approach sees geographical indications based on policies relating to marketing, including advertising, to conclude that any geographical indication would deserve protection.⁸² Another narrower interpretative approach places it in the ordinary meaning of ‘reputation’ that ‘any generic, qualitatively neutral geographical indication’ would not fall within the protection scope.⁸³ Whilst relying on the ordinary meaning of words for interpreting a legal clause is normally acceptable, the commercial purpose in protecting only geographical indications having established their reputation makes this latter approach more reasonable.

This is the approach that Vietnam has taken. Using language which resembles the words used by TRIPs Vietnamese law defines geographical indication as signs used to indicate or identify products as originating from a specific area, locality, region, or country.⁸⁴ To be

⁷⁸ UNCTAD & ICTSD, above n 14, 285.

⁷⁹ Stoll, Busche and Arend, above n 35, 386.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid, 389-90.

⁸³ Ibid.

⁸⁴ *Intellectual Property Law 2005* art 4(22).

protected, a geographical indication needs to satisfy two criteria. First, the product bearing the geographical indication must originate from the area, locality, region, or country corresponding with the geographical indication.⁸⁵ Second, the product must have a recognized reputation, quality, or characteristic essentially attributable to the geographical conditions of the area, locality, region, or country corresponding with the geographical indication it carrying.⁸⁶ The reputation of a product bearing a geographical indication is determined by reference to the trust of consumers, knowing of the origin, represented by their choice of the product.⁸⁷ The quality and characteristics of products bearing a geographical indication are determined through one, or some, qualitative and quantitative criteria or perceptible physical, chemical, or microbiological characteristics which can be tested by technical means or by experts using appropriate testing methods.⁸⁸

In the meantime, geographical conditions connecting to the protection of a geographical indication are defined in terms of both natural and human factors which are decisive to reputation, quality, or characteristics of products bearing the geographical indication.⁸⁹ The phrase ‘natural and human factors’ are there worded but Vietnamese law on geographical indications seems neither wide nor narrow. This is because human factors are determined to relate to the skills, the special qualities of producers, and traditional local production methods.⁹⁰ Climate, hydrograph, geology, terrain, ecological system, and other natural conditions fall within the relevant natural factors.⁹¹

⁸⁵ *Intellectual Property Law 2005* art 79(1).

⁸⁶ *Intellectual Property Law 2005* art 79(2).

⁸⁷ *Intellectual Property Law 2005* art 81(1).

⁸⁸ *Intellectual Property Law 2005* art 81(2).

⁸⁹ *Intellectual Property Law 2005* art 82(1).

⁹⁰ *Intellectual Property Law 2005* art 82(3).

⁹¹ *Intellectual Property Law 2005* art 82(2).

2.2 Protection against Misleading and Unfair Use

A competitor may take advantage of the same provisions certifying geographical indications by providing competitive products from a different geographical origin.⁹² To protect both consumers and competitors from deceptive names, TRIPs directly relates geographical indication protection to unfair competition. Article 22:2 of TRIPs states that:

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

This provision obliges members to provide ‘the legal means’ but not a specified legal means that they have discretion to decide on which legal means, including unfair competition, passing-off, registration of collective marks and certification marks, registration of geographical indications and appellations of origin, and administrative mechanism, may suit their own practice in implementing the requirement.⁹³ In practice, only a few rely on unfair competition law.⁹⁴ Most use either their trademark laws or geographical indication specific laws modelled often on the AOC (appellation of controlled origin) system first developed in France to meet such obligation.⁹⁵ As both trademark and geographical indication legislation is applied in China, it has been argued that this generates uncertainty and conflicts with uncertainty about the hierarchy of rights granted under the

⁹² Conrad 1996, citing in Stoll, Busche and Arend, above n 35, 393.

⁹³ UNCTAD & ICTSD, above n 14, 291-2.

⁹⁴ Bradley M Bashaw, ‘Geographical Indications in China: Why Protect GIs with Both Trademark Law and AOC-Type Legislation’ (2008) 17(1) *Pacific Rim Law & Policy Journal* 73, 73.

⁹⁵ Bashaw, *ibid*.

two systems.⁹⁶ It has also been argued that China would benefit from abandoning the AOC-type system of protection of geographical indications.⁹⁷

The provision also relates to Article 10*bis* of the Paris Convention on members' legislation against unfair competition. Prior to this Article, Article 10 of the Convention includes any producer, manufacturer, or merchant in specified circumstances to be interested parties. This can be applied for the clarification of 'the interested parties' concept in the TRIPs provision, especially where TRIPs, by another Article 2:1, requires members to comply with Articles 1-12 and 19 of the Paris Convention.⁹⁸ There is no further reference to how members may deal with not only the concept of 'the public' but also in what circumstances a designation can be seen misleading the public that a member may continue with these liberties in implementing that TRIPs obligation.⁹⁹

Vietnamese law is seen to have taken this opportunity. There are some circumstances in which the use of a designation will be regarded as misleading the public under the law. In relation to trademark protection, a mark is determined as being indistinctive if it contains signs which are identical with, or similar to, a geographical indication being protected where the use of such signs, if permitted, is likely to cause confusion to consumers over the geographical origin of the goods.¹⁰⁰ There is no further explication of 'consumers' in this provision that the concept of 'consumers' applied in determining the status of 'well-known' marks may be used.¹⁰¹ Arguably, they could be general consumers with limited knowledge of the origin of products or a more specialized group of consumers who may regularly purchase the products in question.¹⁰²

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Gervais (2003), citing in Stoll, Busche and Arend, above n 35, 395.

⁹⁹ UNCTAD & ICTSD, above n 14, 292.

¹⁰⁰ *Intellectual Property Law 2005* art 74(2)(i); *Circular 01/2007* point 39.12(ii).

¹⁰¹ Details for that see Subsection 1.5 *The Protection of Well-Known Marks*.

¹⁰² UNCTAD & ICTSD, above n 14, 292.

In the context of the internet, the act of registering a domain name, in order to possess or to use it, which is identical with, or confusingly similar to, geographical indications held by others is determined as one of the unfair-competition acts.¹⁰³

2.3 The Higher Level of Geographical Indication Protection for Wines and Spirits

During the Uruguay Round negotiations, the United States, despite being one of the strongest supporters of intellectual property protection, paid little attention to geographical indications including additional protection of geographical indications for wines and spirits, unlike the European Communities.¹⁰⁴ Presently, members are divided into two groups in the debate over whether this higher level of protection for wines and spirits is to be applied or extended to other products bearing geographical indications.¹⁰⁵

The use of geographical indications is so common, significant, and sensitive in the case of wines and spirits that TRIPs devotes Article 23 to them.¹⁰⁶ Most importantly, this Article requires members to provide the legal means for their greater protection from the use of false geographical indications, including their use in translation into other languages or being accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like.¹⁰⁷ Besides, it establishes a relationship between trademark and geographical indication protection for wines and spirits¹⁰⁸ and, restricted to wines, obliges members to differentiate between homonymous geographical indications¹⁰⁹ and to facilitate the registration of geographical indications.¹¹⁰

¹⁰³ *Intellectual Property Law 2005* art 130(1)(d).

¹⁰⁴ See, eg, Roland Knaak, 'The Protection of Geographical Indications According to the TRIPs Agreement' in Friedrich-Karl Beier and Gerhard Schricker (eds), *From GATT to TRIPs—the Agreement on Trade-Related Aspects of Intellectual Property Rights* (Weinheim, 1996) 120, 127; Stoll, Busche and Arend, above n 35, 377-80.

¹⁰⁵ WTO, *TRIPs: Geographical Indications – Background and the Current Situation* <http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm> (last visited 6 September 2014).

¹⁰⁶ Stoll, Busche and Arend, above n 35, 408.

¹⁰⁷ *TRIPs Agreement* art 23(1).

¹⁰⁸ *TRIPs Agreement* art 23(2).

¹⁰⁹ *TRIPs Agreement* art 23(3).

¹¹⁰ *TRIPs Agreement* art 23(4).

These provisions again create spaces to be filled by local legislation. For example, they only mention ‘wines’ and/or ‘spirits’ without any further determination. So, members may decide on a wider or narrower scope for the protection, say, they might limit ‘wines’ only to those made from grapes or other kinds of fruit, following the usual dictionary meaning of the word, but might widen them over wines made from cereal.¹¹¹ Similarly, the definition of ‘spirits’ may vary depending on the percentage of alcohol it contains.¹¹²

Vietnamese law has not taken advantage of these possibilities. To implement such TRIPs requirements, several provisions include wines and spirits. They generally literally translate and repeat the legal language of TRIPs. This includes the provision, in terms of trademark registration, which emphasizes that marks are considered indistinctive if they consist of signs which are identical with, or contain geographical indications, or are translated or transcribed from geographical indications for protection for wines or spirits, where such signs put forward for registration relate to wines or spirits which do not originate from geographical areas with such geographical indications.¹¹³ Similarly, it provides for the infringement of the rights to geographical indications from the act of using protected geographical indications of wines or spirits for wines or spirits which do not originate from geographical areas bearing such geographical indications.¹¹⁴ This provision extends to situations even where the true origin of goods is indicated or geographical indications are used in the form of a translation or transcription, or accompanied by expressions such as ‘kind’, ‘style’, ‘category’, ‘imitation’, or the like.¹¹⁵ All have a strong sense of resembling the TRIPs’ requirements.

¹¹¹ UNCTAD & ICTSD, above n 14, 296.

¹¹² Ibid.

¹¹³ *Intellectual Property Law 2005* art 74(2)(m).

¹¹⁴ *Intellectual Property Law 2005* art 129(3)(d).

¹¹⁵ Ibid.

2.4 Exceptions to Geographical Indication Protection

Under TRIPs Article 24, members may create some exceptions to the protection of geographical indications otherwise obligated by Articles 22-23. Article 24 is one of only a few long Articles in TRIPs, reflecting the extensive debate between members which supported or opposed strong protection of geographical indications.¹¹⁶

One of the permissible exceptions, provided for in TRIPs Article 24:4, the so-called ‘grandfather clause’,¹¹⁷ has its basis in an Australian proposal.¹¹⁸ This provision allows members to stipulate the right of ‘continued and similar use’ of a particular geographical indication of another member which identifies wines or spirits in connection with goods or services provided by any of their ‘nationals or domiciliaries’. However, this is only permitted under the condition that such use of the particular geographical indication has been in a continuous manner, with the same or related goods or services, in the member’s territory for at least 10 years before the establishment of the WTO/TRIPs of 15 April 1994 or that the use has otherwise been ‘in good faith’ prior to this date.

Another allowable exception, set out in TRIPs Article 24:5, the so-called ‘continued use of bona fide acquired trademarks’, also stems from a proposal by Australia.¹¹⁹ This provision allows members to grant a right with ‘indefinite length to the continued use of trademarks’¹²⁰ which are ‘identical with, or similar to, a geographical indication’¹²¹ provided that they have been acquired or registered ‘in good faith’,¹²² either before the date of entry into force of the TRIPs provisions on geographical indications for the country

¹¹⁶ Stoll, Busche and Arend, above n 35, 422.

¹¹⁷ Gervais (2003) and Calboli (2006), citing in Stoll, Busche and Arend, *ibid.*

¹¹⁸ Stoll, Busche and Arend, *ibid.*

¹¹⁹ Stoll, Busche and Arend, *ibid.*, 424.

¹²⁰ *Ibid.*

¹²¹ *TRIPs Agreement* art 24(5).

¹²² *Ibid.*

subject to the application, determined under Part VI ‘Transitional Arrangements’, or before the geographical indication is protected in its country of origin.¹²³

In respect of the former exception, what may constitute ‘continued and similar use’ of such geographical indication may not be open to argument, particularly where the provision itself provides that the exception’s application must be for a period of at least 10-year before the date of TRIPs’ creation or 15 April 1994. Similarly, there may be not much debate over the interpretation of the ‘nationals or domiciliaries’ concept as these words, or their meanings, are previously used in TRIPs Article 1:3 and footnote 1 thereto. There is also no argument over whether the scope of the exception applies to both ‘goods’ and ‘services’ as both ‘goods’ and ‘services’ are specified by the provision itself.

Unlike these elements, the ‘good faith’ element, phrased in both exceptions, is a potential source of debate and flexibility.¹²⁴ It might be understood as being determined from the belief by the party adopting such geographical indication that doing so did not violate any legal rule at the time the indication was adopted, and that it was unaware, or did not have reason to be aware, of the geographical indication adopted so that any adoption of an overseas geographical indication allowed by national law before 15 April 1994 may satisfy this meaning of good faith.¹²⁵ This is because it is uneasy to prove the contrary that a geographical indication was adopted in ‘bad faith’, following the text of TRIPs Article 39:2.¹²⁶ This provision refers to ‘a manner contrary to honest commercial practices’ and possesses a footnote to further clarify the meaning of this phrase. In accordance with this, any action in ‘bad faith’ implies a wrongful conduct, which, in the commercial context, means that which is contrary to legal norms.¹²⁷ It will be difficult, if not impossible, to prove this where there were no laws prohibiting it.¹²⁸

¹²³ Ibid.

¹²⁴ UNCTAD & ICTSD, above n 14, 304.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

These two exceptions, as noted, were proposals from Australia. This country had a long established national wine and spirits industry which had originated, with its population, in Western Europe.¹²⁹ This industry used many terms for its products which were to be recognized over time as being European geographical indications.¹³⁰ The industry was forced to invent new terms for its products as its exports expanded at the same time as developments in international law relating to geographical indications increasingly restricted those terms to products produced in specific European regions.¹³¹ It developed new descriptors of its products, based both on grape varieties and its geographical indications for its own regions, as set out in the relevant legislation supporting these changes.¹³² This legislation includes the Australian Wine and Brandy Corporation Act 1980, the Trademark Act 1995, and the Trade Practices Act 1974.¹³³ In addition, the Australian and New Zealand Food Authority Labelling and Advertising Standards and the Australian Food Standards Code Spirit Standard are relevant.¹³⁴

An Australian wide protection of geographical indications for wines can be read from the maps for Australian Wine Zones and the Australian Wine Regions and Sub-Regions.¹³⁵ There is a register of Australian geographical indications with protected names.¹³⁶ Each entry of a protected name includes a textual description and a map as graphic representation within which the textual description takes precedence when there is an inconsistency.¹³⁷ For instance, the geographical indication 'HIGH EDEN' is firstly given with a geographical indication textual description, determining it located within the region Eden Valley, within

¹²⁹ See, eg, Bernard O'Connor, *The Law of Geographical Indications* (Cameron May, 2004) 270-80; Des Ryan, 'The Protection of Geographical Indications in Australia under the EC/Australia Wine Agreement' (1994) 12 *European Intellectual Property Review* 521; Stephen Stern, 'The Overlap between Geographical Indications and Trademarks in Australia' (2001) *Melbourne Journal of International Law* 224-240 <<http://www.law.unimelb.edu.au/files/dmfile/download3e371.pdf>> (visited 29 July 2009).

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ O'Connor, *ibid.*, 270; Stern, *ibid.*

¹³⁴ O'Connor, *ibid.*

¹³⁵ Australian Wine, *Register of Protected Names Section (a) Australian Geographical Indication: Textual Descriptions and Maps* <www.wineaustralia.com> (visited 14 July 2009).

¹³⁶ Ibid.

¹³⁷ Ibid.

the zone Barossa, within the State of South Australia, Australia.¹³⁸ It is secondly described by geographical indication area boundaries depicted on the official Angaston Topographical Map and Barossa Topographical Map, forming part of a layered structure of a geographical indication with 'BAROSSA' as the state/zone and 'EDEN VALLEY' as the sub-region of such 'HIGH EDEN' geographical indication.¹³⁹ All the scale, extent, and comprehensive nature of the classifications reflect the wealth, skills, and sophistication of a valuable industry in an advanced economy with a highly-developed legal system.

Vietnam's circumstances are very different. Its market economy is generally less-developed. The population in specific localities is still largely unfamiliar with intellectual property protection. There has been an increase in the number of protected geographical indications but in effect they give little protection.¹⁴⁰ In reality, Vietnam is not a country with international famous trademarks or geographical indications for its wines or spirits. This might explain why Vietnamese law has created as many exceptions to the protection of geographical indications as possible but often in a very brief manner. This will certainly require other, more detailed, subordinate laws or regulations for their implementation.

In particular, the local law provides for the second proviso put forward by Australia, the continuing use of marks which are identical with, or similar to, protected geographical indications where such marks have in good faith acquired the protection prior to the date of filing applications for registration of such geographical indications.¹⁴¹ This takes advantage of the flexibility in TRIPs Article 24:5. In addition, there are four other exceptions covered:

- (i) names or geographical indications which have become generic names of goods in Vietnam;¹⁴²

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ See above n 76. Recently, according to the list published by the National Office of Intellectual Property <<http://www.noip.gov.vn>> (visited 14 September 2011) up to 10 August 2011 27 geographical indication certificates have been issued, of which three were to foreigners.

¹⁴¹ *Intellectual Property Law 2005* art 125(2)(g).

¹⁴² *Intellectual Property Law 2005* art 80(1).

- (ii) geographical indications of foreign countries which have not, or which have no longer, protected or used in their countries of origin;¹⁴³
- (iii) geographical indications which are identical with, or similar to a protected mark, where the use of such geographical indications, if permitted, is likely to cause confusion over the origin of products;¹⁴⁴ and
- (iv) geographical indications which mislead consumers of the true geographical origin of products bearing such geographical indications.¹⁴⁵

There has been no further guidance given for implementing these exceptions but they are permissible under other provisions of TRIPs Article 24. For example, it is stated that members may provide for a right to the continued use of geographical indications which have become generic terms for goods or services, or the continued use of generic designations for grape varieties.¹⁴⁶ Similarly, members have no obligation to protect geographical indications which are not subject to, or which have ceased to be granted, the protection in their country of origin or have fallen into disuse there.¹⁴⁷

3. Industrial Designs

Industrial designs concern the patterns of styles and colours, or aesthetic appearance, of articles or goods ranging from kitchenware and bathroom accessories to other products including cars, trains, furniture, and other home decorations.¹⁴⁸ As these articles or objects can be mass produced by industrial manufacturing, the purpose of modern design law is to protect the visual form of mass-produced goods with exclusive monopoly rights for a limited term.¹⁴⁹ As with many other forms of intellectual property, the protection of industrial designs appeared in the industrial revolution associating with mass production in

¹⁴³ *Intellectual Property Law 2005* art 80(2).

¹⁴⁴ *Intellectual Property Law 2005* art 80(3).

¹⁴⁵ *Intellectual Property Law 2005* art 80(4).

¹⁴⁶ *TRIPs Agreement* art 24(6): An analysis of this exception see Stoll, Busche and Arend, above n 35, 427-9.

¹⁴⁷ *TRIPs Agreement* art 24(9).

¹⁴⁸ Jill McKeough and Andrew Stewart, *Intellectual Property in Australia* (Butterworths, 1991) 186.

¹⁴⁹ *Ibid*, 186-7.

Western Europe.¹⁵⁰ The first specific legislation, the British Designing and Printing of Linens, Cottons, Calicoes and Muslins Act 1787 to give protection for a two-month period to ‘every person who shall invent, design and print, or cause to be printed, designed and printed, and become the proprietor of any new original pattern or patterns for printing Linens, Cotton, Calicoes or Muslins.’¹⁵¹ The protection was further extended to other materials under the Designs Act 1842.¹⁵² It continued to evolve with economic growth in the 19th and 20th centuries and has further developed with explosion of design patents in such countries as China.¹⁵³

There are only two Articles, 25 and 26, in TRIPs specifying requirements for the protection of industrial designs. Significantly, each of them offers considerable flexibility in their implementation.

For example, Article 25 states that:

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.
2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the

¹⁵⁰ WIPO Handbook, above n 1, 112-3.

¹⁵¹ Quoted in WIPO Handbook, *ibid*, 113. See also *Designing and Printing of Linens, Cottons, Calicoes and Muslins Act 1787* (UK) 27 Geo. 3 c 28.

¹⁵² *Ibid*. See also *Designs Act 1842* (UK) 5 & 6 Vic. c 100.

¹⁵³ It has been claimed that more design patents have been granted in China than in any other jurisdiction. Notably, the Japanese Patent Office led the world in design patent applications between the 1950s and 1990s and the Korean Intellectual Property Office and the United States Patent and Trademark Office (USPTO) have had steady upward trends but since about 2000 the number of design applications has far quickly developed in China. The Chinese Intellectual Property Office has now issued more design patents than the next closest twenty offices. The number is ten times higher than the USPTO’s according to WIPO statistics. See Chris Neumeyer, ‘Design Patents in China: Applications, Infringement and Enforcement’ (7 May 2013) *International Law Technology Blog* <<http://www.ipwatchdog.com/2013/05/07/design-patents-in-china-applications-infringement-and-enforcement/id=40026/>>.

opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

This Article contains two ‘may’, and one ‘free’, provisions, in addition to the first paragraph providing for the criterion of ‘new’ or ‘original’ in respect of protected industrial designs without further explanation. All again can be regulated with considerable discretion from national lawmakers. The following sub-section presents the use of this in Vietnam.

3.1 Protectability

To gain the protection, an industrial design must qualify TRIPs’ criterion of ‘novelty’ or ‘originality’. To be protected in Vietnam, an industrial design must meet three conditions: novelty, creativity, and industrial applicability.¹⁵⁴

(a) Novelty

‘Novelty’ is one of the three criteria for patents. The question is whether this can have the same meaning in industrial design as in patent protection. As noted by Hart in Chapter 2, the same word may have different legal effects because of the changed context.¹⁵⁵ The ‘novelty’ of an invention relates to an advanced step of technical progress but relates to aesthetic or ornamental aspects in terms of industrial designs.

An industrial design is considered new or novel in Vietnam if there is significant difference between it and other industrial designs which have been publicized through use or description in writing or in any other descriptive form, within or outside Vietnam, prior to the filing date or the priority date of the application.¹⁵⁶ This provision takes some advantage of the freedom in TRIPs where it, extracted above, states that members may provide a

¹⁵⁴ *Intellectual Property Law 2005* art 63.

¹⁵⁵ The details are given in note 21 in Chapter 2 on conceptualizing law’s flexibility.

¹⁵⁶ *Intellectual Property Law 2005* art 65(1).

design is not new or original if it does not significantly differ from designs which have been known, or because it is simply a combination of known design features.

In particularizing this condition, two industrial designs are not considered significantly different from each other if they differ only in features of external appearance which are not easily noticeable and memorable and which cannot be wholly used to distinguish them.¹⁵⁷

An industrial design is regarded not having been publicized if it is known only to a limited number of persons obliged to keep it confidential.¹⁵⁸ Again, no particular number of people is specified that makes it merely a gap in the local law, not originating in TRIPs.¹⁵⁹

(b) Creativity

‘Creativity’ may be naturally attributed to any industrial design possessing new aesthetic or ornamental aspects. As it is separated condition in Vietnam, it might mean that an industrial design only need satisfy the other two requirements.

In particular, an industrial design is considered creative if, based on other industrial designs having been publicly disclosed through use or description in writing or in any other descriptive form, inside or outside of Vietnam, prior to the filing date or the priority date of the application, the industrial design cannot easily be created by a person with average knowledge in the art.¹⁶⁰ To assess this condition, an intellectual property examiner is required, by examining existing industrial designs, to make a comparison between the substantial design features of the industrial design in question and those of other known

¹⁵⁷ *Intellectual Property Law 2005* art 65(2).

¹⁵⁸ *Intellectual Property Law 2005* art 65(3).

¹⁵⁹ This is the same as in Article 60(2) of the 2005 Intellectual Property Law where the ‘novelty’ criterion for inventions is provided. Particularly in relation to the industrial design protection in Article 65(4) the Law provides that an industrial design is considered not to have lost its novelty in the three following circumstances if the application is filed within six months from the date of any publication: (a) where it is published without permission by a person other than those who have the right to register it as specified by Article 86 of the Law; (b) where it is published in the form of a scientific presentation by those who have the right to register it as specified by Article 86 of the Law; and, (c) where it is displayed by those who have the right to register it as specified by Article 86 of the Law in a Vietnamese national exhibition or an official or officially-recognized international exhibition.

¹⁶⁰ *Intellectual Property Law 2005* art 66.

industrial designs which are identical or most similar to it.¹⁶¹ Besides, there are some cases if falling into an industrial design will not be seen satisfying this ‘creativity’ criterion.¹⁶²

(c) Industrial Applicability

As indicated above, the protection of registered industrial designs directly derives from the growth of industrialization and methods of mass production.¹⁶³ In a country with a well-developed economy and a mature system of intellectual property laws, it may no longer be necessary to provide for ‘industrial applicability’ as another condition for enjoying industrial design rights. In a developing country seeking to increase industrialization like Vietnam, this condition could be seen necessary to encourage and achieve such objective.

Specifically, an industrial design is seen satisfying this industrial applicability criterion if it can be used as a model for mass-production, using industrial or handicraft methods, of products whose appearance embodies it.¹⁶⁴

3.2 The Protection of Textile Designs

In practice, industrial design protection is most significant in the fashion industry and to designers working in it. As noted, the first statutory protection was for printed cotton and linens in Britain in 1787. A textile design, or other ornamental objects, has aspects of artistic creation.

¹⁶¹ *Circular 01/2007* points 35.7(a) & 35.8(a).

¹⁶² Where the industrial design is (i) only a simple combination of known design features; (ii) a reproduction or imitation, partly or wholly, of the inherent natural shape of a tree, fruit, or an animal, or shapes of geometric figures which are widely-known; (iii) a simple reproduction of the shape of a product or a work which has been well known or publicly known in Vietnam or elsewhere; and, (iv) an imitation of an industrial design in another field if this imitation is widely-known: *Circular 01/2007* point 35.8(b).

¹⁶³ See above McKeough and Stewart, n 148; WIPO Handbook, n 1, 112-3.

¹⁶⁴ *Intellectual Property Law 2005* art 67.

The aesthetic or artistic creation expressed in an object or article might qualify both the protection of industrial design and copyright.¹⁶⁵ The question is that whether both can be simultaneously and concurrently applied to that creation.

In some countries including France and Germany the response is affirmative, meaning that the designer then can invoke the cumulative protection of either, or both, the copyright law and industrial design law, depending on his or her choice.¹⁶⁶ Meanwhile, most other countries have a co-existence system, or the creator of an industrial design may choose either industrial design law or copyright law to protect his or her creation and once this is made, he or she can no longer use the other for his or her claim.¹⁶⁷

As quoted, TRIPs Article 25:2 leaves members freedom to decide on the use of copyright or industrial design law in carrying out the obligation of ensuring that the requirements in their national laws for securing textile-design protection do not unreasonably impair the opportunity to seek and obtain such protection. Consequently, a member may choose to apply industrial design law to all industrial designs, including textile designs.

As a country still largely unfamiliar with intellectual property protection, including industrial designs, it is preferable for Vietnam to apply industrial design rules to textile designs because of the costs and time in creating further legislative provisions and providing for their regulation and enforcement. For example, Vietnam's copyright, industrial property and industrial design provisions do not have specific provisions for textile designs. This leads to the assumption that textile designs are protected in the same way as other industrial designs. It was confirmed in the process of Vietnam's accession to the WTO that the same manner of protecting other industrial designs was applied to textile designs and that there were no special legislative provisions for them.¹⁶⁸

¹⁶⁵ WIPO Handbook, above n 1, 118.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ See Question 519 of WTO Doc WT/ACC/VNM/3/Add.2 (20 August 1998).

3.3 Exceptions to Industrial Design Protection

TRIPs obliges members to provide the owner of a protected industrial design the right to prevent third parties, without the consent of the owner, from ‘making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy’ of the protected design when such acts are conducted for commercial purposes.¹⁶⁹ In implementing this obligation Vietnam first states that the owners of intellectual property, including industrial designs, have the right to use, or to give others the permission to use, the protected subject matters.¹⁷⁰ This use right is, second, confirmed to consist of acts of manufacturing, circulating, advertising, offering, stocking for circulation, and importing products bearing a protected industrial design.¹⁷¹ With some exceptions, those owners have the right to prevent others from using their protected industrial designs.¹⁷²

TRIPs Article 26:2 gives members permission to decide on exceptions to the protection of industrial designs. The structure of this provision is similar to Articles 13, 17, and 30, which provide for exceptions to the exclusive rights of copyright, trademark, and patent holders respectively.¹⁷³ It permits limited exceptions to the protection of industrial designs, provided that:

such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

Vietnamese law on industrial designs follows these exceptions. First, the owner of a protected industrial design is provided to have no right to prevent others from using the design for personal need, non-commercial purposes, or for the purpose of evaluation,

¹⁶⁹ *TRIPs Agreement* art 26(1).

¹⁷⁰ *Intellectual Property Law 2005* art 123(1)(a).

¹⁷¹ *Intellectual Property Law 2005* art 124(2).

¹⁷² *Intellectual Property Law 2005* arts 123(1)(b) & 125(1)-(2)(a)-(c).

¹⁷³ These are discussed in Chapters 4 and 5 respectively on copyright and related rights and on patents and plant varieties in Vietnam under TRIPs’ flexibilities, as well discussed above in this Chapter 6 in relation to trademark rights.

analysis, research, teaching, testing, pilot production, or information collection in order to carry out procedures for applying for licenses for production, importation, or circulation of products.¹⁷⁴ Second, such owners have no right to prevent others from circulating, importing and exploiting the utilities of products which have been lawfully put on the market, including foreign markets, except for those put on foreign markets otherwise than by the mark owners or their licensees.¹⁷⁵ Third, such owner has no right to prevent others from the use of the design through the operation of a means of transport which are in transit in Vietnam or entering the territory of Vietnam temporarily.¹⁷⁶ Fourth, such owner has no right to prevent the use of the design by a person who is entitled to do so by the prior use right under Article 134 of the 2005 Intellectual Property Law.¹⁷⁷

In addition, the local law excludes the three following subject matters from the protection of industrial designs:

- (i) the appearance of a product which is dictated by the technical features of the product;¹⁷⁸
- (ii) the appearance of a civil engineering or industrial building work;¹⁷⁹ and
- (iii) the appearance of a product which is not visible when being used.¹⁸⁰

The first and second exclusions are clearly permissible under TRIPs Article 25:1. The third justification comes from the fact that the protection of industrial designs is essentially connected with the visual aesthetic or visually-ornamental features of a product. It is reasonable from this perspective for the non-visual appearance of a product not to be protected as an industrial design.

¹⁷⁴ *Intellectual Property Law 2005* art 125(2)(a).

¹⁷⁵ *Intellectual Property Law 2005* art 125(2)(b).

¹⁷⁶ *Intellectual Property Law 2005* art 125(2)(c).

¹⁷⁷ *Intellectual Property Law 2005* art 125(2)(d): The industrial design exceptions are generally constructed in the same way as exceptions to the patent rights and, to a lesser extent, exceptions to the intellectual property rights in layout-designs (topographies) of integrated circuits.

¹⁷⁸ *Intellectual Property Law 2005* art 64(1).

¹⁷⁹ *Intellectual Property Law 2005* art 64(2).

¹⁸⁰ *Intellectual Property Law 2005* art 64(3).

3.4 The Duration of Protection

In requiring members to harmonize the period during which industrial designs are protected, TRIPs states very shortly that ‘The duration of protection available shall amount to at least 10 years’.¹⁸¹ As such, members are free to decide, for example, on a longer period or to provide for the 10-year term in a more technical way by permitting an initial shorter term but one which can renew for a longer period. Both are seen in Vietnam.

A majority of jurisdictions provide for more than 10 years as the term of industrial design protection in their domestic laws.¹⁸² This trend is reflected in Vietnamese law. In particular, it affords industrial designs an initial term of five-year and allows two consecutive renewals of five-years for each.¹⁸³ In their entirety, an industrial design can be protected for up to 15 years. This 15-year period is seen in the national laws of one third of WIPO’s members.¹⁸⁴

4. Layout-Designs (Topographies) of Integrated Circuits¹⁸⁵

Again, in requiring members to protect layout designs TRIPs incorporates some provisions of the IPIC or Washington Treaty. They Articles 2 to 7, but not Article 6:3, and Articles 12 and 16:3.¹⁸⁶

The word ‘design(s)’ is in TRIPs used in the same way between the protection of industrial designs and layout designs. But its meaning may not be understood the same because of the juxtaposition of ‘industrial’ and ‘layout’. As a word relevant to ‘industrial’, ‘design’ is, in this context, fits with the italicized part of this dictionary definition:

¹⁸¹ *TRIPs Agreement* art 26(3).

¹⁸² WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Industrial Design Law and Practice—Analysis of the Returns to WIPO Questionnaire* (Prepared by the Secretariat), WIPO Doc SCT/19/6 (13 May 2008) [46]-[47].

¹⁸³ *Intellectual Property Law 2005* art 93(4).

¹⁸⁴ WIPO, above n 182.

¹⁸⁵ Hereinafter referred to as layout designs.

¹⁸⁶ *TRIPs Agreement* art 35.

a preliminary sketch for a work of art; the plan of a building, or part of it, or of a piece of decorative work, after which the structure or texture is to be completed; *a delineation, pattern; the combination of details which go to make up a work of art; artistic idea as executed; a piece of decorative work, an artistic device.*¹⁸⁷

In relation to ‘layout’, ‘design’ fits better with this italicized part of a dictionary definition:

*a plan or scheme conceived in the mind of something to be done; the preliminary conception of an idea that is to be carried into effect by action; contrivance in accordance with a preconceived plan; adaptation of means to end; prearranged purpose.*¹⁸⁸

It was because circuit-layouts or mask-works in the United States fitted poorly into categories of intellectual property including patents, copyright, and industrial designs that layout designs came to be separately provided for in national and then international law.¹⁸⁹ This gave an example of how technological change produced gaps which created problems in the interpretation and application of existing laws, discussed in Chapter 2.

The protection of industrial designs concerns ornamental or decorative aspects of articles, objects, or products; whereas layout-design protection is about the miniaturization of integrated circuits (or microelectronics, microchips, chips) of semiconductor products.¹⁹⁰ This is reflected in the definitions of ‘integrated circuits’ and ‘layout design’ in Article 2 of the IPIC Treaty.¹⁹¹

¹⁸⁷ *The Shorter Oxford English Dictionary*, Oxford University Press, London, 1973, 528.

¹⁸⁸ *Ibid.*

¹⁸⁹ Michael Blakeney, ‘Unit 5 Integrated Circuits’ (October 2007), EC-ASEAN Intellectual Property Rights Cooperation Programme (ECAP II) <www.ecaproject.org> (visited 25 July 2008); Knowledgerush, ‘Mask works, copyright, and read-only memory’ <http://knowledgerush.com/kr/encyclopedia/Mask_work/> (visited 5 August 2009); Michael Fuerch, ‘Dreadful Policing: Are the Semiconductor Industry Giants Content with Yesterday’s International Protection for Integrated Circuits?’ (2009) 26(2) *Richmond Journal of Law and Technology* 1, 15-21.

¹⁹⁰ Fuerch, *ibid.*, 3-4; Yinghua Min and Charles Stroud, ‘Introduction’ in Laung-Terng Wang, Cheng-Wen Wu and Xiaoqing Wen (eds), *Very Large Scale Integration Test Principles and Architectures: Design for Testability* (Elsevier Morgan Kaufmann Publishers, 2006) 1, 1.

¹⁹¹ In particular, Article 2 of the Washington Treaty, among other definitions, define:

(i) “integrated circuits” means (sic) a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are

The need to create, and protect, new layout designs developed quickly. In the 1960s they were at the beginning just on a small scale where tens of transistors were incorporated in integrated devices but up to hundreds of transistors integrated at the end.¹⁹² By the 1970s the integration was on a large scale with thousands and tens of thousands of transistors to become a very large scale with hundreds of thousands by the early 1980s and then hundreds of millions in concurrently reducing the dimensions of existing layout designs while expanding their functions.¹⁹³ This, in turn, required qualified experts and big investments in both time and money.¹⁹⁴ The United States was the first country to protect layout designs in 1984 under a sui generis system with features of both patent and copyright protection.¹⁹⁵ Then Japan followed, introducing a law for integrated circuits in 1985, with much in common with the law in the United States.¹⁹⁶

The IPIC Treaty was concluded on 26 May 1989 following earlier models of international conventions to harmonize the intellectual property protection of national laws to reduce the conflict between legal systems.¹⁹⁷ From initially eight signatory developing countries to ten

integrally formed in and/or on a piece of material and which is intended to perform an electronic function,

(ii) “layout-design (topography)” means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

¹⁹² Min and Stroud, above n 190. See also National Law School of India University, ‘Semiconductor and Integrated Circuits’ by Vintee Mishra (Brain League IP Services Pvt Ltd 2008) <<http://www.nls.ac.in>> (visited 27 September 2011).

¹⁹³ Ibid.

¹⁹⁴ See, eg, Đỗ Khắc Chiến, ‘Bảo hộ thiết kế bố trí mạch tích hợp bán dẫn’ [Protection of Layout Designs of Integrated Circuits] (August 2000 and July 2002), Intellectual Property Teaching Documents for Training Programs, Institute of Justice; Blakeney, Fuerch, above n 189; Sattapong Malisuwan and Jun Xu, ‘Industrial Property Rights Protection: Analysis of the Integrated Circuits Acts of Thailand’ [2006] (September & October) 14(3) *International Journal of the Computer, the Internet and Management* 1, 1

<http://ijcim.th.org/past_editions/2006V14N3/pp1-Industrial%20Property%20Rights%20Protection.pdf>.

¹⁹⁵ Đỗ Khắc Chiến, Blakeney, Fuerch, Malisuwan and Xu, *ibid.* See also Mishra, above n 192.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. See also Marshall A Leaffer (ed), *International Treaties on Intellectual Property* (Bureau of National Affairs, 1990) 456. According to Blakeney (above n 189) the Washington Treaty was mostly modeled on the United States Semiconductor Chip Protection Act of 1984 under which a sui generis intellectual property right to protect layout designs was provided. This was approved although it had been opined, prior to the enactment of the Act, that copyright protection should be used instead. This was rejected through concerns that other countries might not protect layout designs under their copyright provisions so that through the application of

currently¹⁹⁸ it has lacked representation of many other non-industrialized countries, including Vietnam, and all industrialized nations. The United States and Japan voiced strong objections to, among other things, provisions for the compulsory licensing of layout designs in the Treaty.¹⁹⁹ To date, with TRIPs as the exception, it is the only treaty concerning the protection of layout designs of integrated circuits.²⁰⁰ This makes it questionable whether the developers of quick to advance semiconductor technologies have been able to obtain proper protection from the relevant international treaties.²⁰¹

One of the now ‘effective’ provisions of the Treaty states each contracting party has the freedom to protect layout designs by ‘a special law or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of any of those laws’.²⁰² How Vietnam has used this freedom is below considered.

4.1 The Legal Form of Protection

In a country mostly unfamiliar with intellectual property rights, it is not very difficult to understand the choice made of the legal form for this protection, and the failure to apply some additional flexibilities.²⁰³ As indicated by the meaning of ‘sui generis’ as ‘a class of its own, unique’²⁰⁴ constituting a sui generis system for layout designs requires, amongst other things, deep understanding of, and experience with, the technologies applied in their

national treatment principle, America could place itself in the position of granting the protection to the nationals of other countries which did not protect layout designs of integrated circuits.

¹⁹⁸ WIPO, ‘Contracting Parties: Washington Treaty’

<http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=29>.

¹⁹⁹ Đỗ Khắc Chiến, above n 194.

²⁰⁰ Recently, dated 28 March 2006, the European Union stated that it was glad to approach to international agreement that aims at boosting trade in new generation of semiconductors: EUROPA, *Commission Welcomes International Agreement to Boost Trade in New Generation of Semiconductors*

<http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127985.pdf> (visited 1 August 2008).

²⁰¹ Fuerch, above n 189.

²⁰² *Washington Treaty* art 4.

²⁰³ It is argued that there are other leeways left from TRIPs’ incorporation of the IPIC Treaty which are not used in Vietnamese law. These leeways give members the possibility of excluding from the protectable subject matters two-dimensional mask works because they are not ‘three-dimensional dispositions’, and computer models of the layout design because they include no ‘active element’ under the IPIC Treaty’s definition of a layout-design: Fuerch, above n 189, 8.

²⁰⁴ Princeton University WorldNet <<http://worldnet.princeton.edu>> (visited 15 July 2009).

production. This clearly lacks in Vietnam. Unlike China, which issued its first regulations on the protection of layout designs of integrated circuits in 2001 with 36 articles in entirety,²⁰⁵ all of the TRIPs' requirements came to be met essentially through Part III – Industrial Property Rights of the 2005 Intellectual Property Law.

In particular, this Part contains provisions for patents, industrial designs, layout designs, marks, trade names, geographical indications, and business secrets. Consequently, layout designs are protected in combination with these subject matters of intellectual property protection. Within this framework, the relevant unique characteristics of layout designs are individually provided for, including the criteria for protection.²⁰⁶ At the same time, the creation of layout designs has some similarities with patents and industrial designs that other provisions can be generally used for all these three categories.²⁰⁷

As with the other forms of industrial property included in Part III, mentioned above, the owners of layout designs are firstly given, by Article 123:1 of the Intellectual Property Law, these three general rights:

- (i) to use or give others permission to use the protected subject matters in accordance with Article 124 and Chapter X of the Law;
- (ii) to prevent others from using the protected subject matters in accordance with Article 125 of the Law; and
- (iii) to dispose of the protected subject matters in accordance with Chapter X of the Law.

²⁰⁵ 'Regulations on the Protection of Layout-Designs of Integrated Circuits' (2001) *Ministry of Science and Technology of the People's Republic of China*
<http://www.most.gov.cn/eng/policies/regulations/200501/t20050112_18585.htm>

²⁰⁶ *Intellectual Property Law 2005* arts 68-71.

²⁰⁷ This combination is seen, eg, in Articles 86, 122, 125(2)(a)-(c), 126, 131, and 135 of the 2005 Intellectual Property Law.

Next, Article 124:3 of the Law, in conformity with Article 6:1 of the IPIC Treaty, confirms that the right to use, or to give others the permission to use, a protected layout design can be done through acts of:

- reproducing the layout design or manufacturing semiconductor integrated circuits under the layout design;
- selling, leasing, advertising, offering or stocking copies of the layout design or semiconductor integrated circuits manufactured under the layout design or articles containing such semiconductor integrated circuits; and
- importing copies of the layout design or semiconductor integrated circuits manufactured under the layout design or articles containing such semiconductor integrated circuits.

Other requirements for layout design protection, set forth in TRIPs or the IPIC Treaty, are implemented in Vietnam. For example, TRIPs Article 36 obliges members to consider unlawful acts of ‘importing, selling, or otherwise distributing for commercial purposes’ of integrated circuits containing a protected layout design conducted without the authorization of the rights holder. Meeting with this, Article 126:1 of the 2005 Intellectual Property Law provides that any act using a protected layout design or any of its original part within the term of protection without the permission of the rights holder is an infringement of the rights to layout designs. Acts which are regulated as using a protected layout design in Article 124:3, quoted above, are clearly more extensive than those listed in the TRIPs provision. But both TRIPs and the IPIC Treaty contain flexibilities that a WTO member may prefer to apply. These include exceptions to the rights given to layout designs owners.

4.2 Exceptions or Limitations to Layout Design Rights

In Vietnam, TRIPs Article 37, and also some provisions of Article 6 of the IPIC Treaty have been used to provide for some exceptions to the rights of layout design owners. Because of the structure of Part III of the 2005 Intellectual Property Law, this is often done

in combination with the exceptions to the rights of owners of other industrial property subject matters, particularly patents and industrial designs.

For example, Article 125:2, in accordance with Article 123:1, excerpted above, of the Law states that the owners of industrial property subject matters cannot prevent others from performing the following acts in which layout designs are mentioned:

- using an invention, industrial design, or layout design for personal need or non-commercial purposes, or for the purpose of evaluation, analysis, research, teaching, testing, pilot production, or information collection in order to carry out procedures for applying for licenses for production, importation, or circulation of products;²⁰⁸
- circulating, importing or exploiting the utilities of products which have been lawfully put on the market, including foreign markets, except for those put on foreign markets by others than the mark owners or licensees;²⁰⁹
- using an invention, industrial design, or layout design through the operation of the means of transport which are in transit in Vietnam or entering the territory of Vietnam temporarily; and²¹⁰
- using a layout design without knowing, or having no reasonable ground to know, that the layout design is protected.²¹¹

In addition, Vietnamese law regulates some subject matters which are not protected as layout designs. They are (i) principles, processes, systems, or methods which are operated by semiconductor integrated circuits²¹² and (ii) information or documentation associated with software contained in semiconductor integrated circuits.²¹³

²⁰⁸ *Intellectual Property Law 2005* art 125(2)(a).

²⁰⁹ *Intellectual Property Law 2005* art 125(2)(b).

²¹⁰ *Intellectual Property Law 2005* art 125(2)(c).

²¹¹ *Intellectual Property Law 2005* art 125(2)(e).

²¹² *Intellectual Property Law 2005* art 69(1).

²¹³ *Intellectual Property Law 2005* art 69(2).

4.3 The Term of Protection

Considerable leeway is left in TRIPs' provisions requiring members to establish a period for the protection of layout designs.

In leaving members the freedom to decide whether layout designs need be registered for protection TRIPs distinguishes between how a domestic legal system has choice to protect such property. Where registration is required as a condition of protection, the obligated term is 10-year calculated from the filing date of the application or from the first commercial exploitation.²¹⁴ Where members do not require registration as a condition for protection, the required term is no less than 10-year counted from the date of the first commercial exploitation.²¹⁵ As a third choice, members may choose to create a term of 15-year protection dated from the creation of the layout design.²¹⁶

Vietnam stipulates procedures for registering layout designs parallel to the application of the third possibility within such TRIPs flexibilities. In accordance with this, it calculates the term of either 10-year or 15-year for a layout design from the date on which the protection certificate is granted and expires on the earliest of these three dates:

- (i) the end of 10-year from the filing date of the registration application;²¹⁷
- (ii) the end of 10-year from the date of its first commercial exploitation occurring wherever in the world by the person who has the registration right or by his or her licensee;²¹⁸ or
- (iii) the end of 15-year from the creation date of the layout design.²¹⁹

²¹⁴ *TRIPs Agreement* art 38(1).

²¹⁵ *TRIPs Agreement* art 38(2).

²¹⁶ *TRIPs Agreement* art 38(3).

²¹⁷ *Intellectual Property Law 2005* art 93(5)(a).

²¹⁸ *Intellectual Property Law 2005* art 93(5)(b): The right to register layout designs is set out in Article 86 of the 2005 Intellectual Property Law as the same way as that provided for inventions and industrial designs. This has been discussed above in Section 3. *Industrial Designs* in the context of the 'novelty' condition for the protection of industrial designs. This is provided for the same in most details, discussed in Subsection 1.2 *Detailing the Patent Criteria* in Chapter 5 on patents and plant varieties in Vietnam under TRIPs Flexibilities, in the context of the 'novelty' criterion for the grant of patents for inventions.

5. Undisclosed Information

Among categories of intellectual property rights, undisclosed information appears the only one known by many different names. Terms include trade or commercial secrets, business secrets, know-how, classified information, confidential information, and the like. The proliferation of these terms, and the associated legal concepts, is because they have arisen independently in different countries with different legal systems. TRIPs gathers them under the term ‘undisclosed information’,²²⁰ the terminology proposed by the European Community.²²¹ The ‘undisclosed’ nature of the information is captured by this neutral terminology, though it does not reveal its characterization or generalization.²²²

Before TRIPs’ formulation, the international protection of undisclosed commercial sensitive information might only fall within the Paris Convention scope, under Article 10*bis*, the text of which was first introduced and gradually added from the Revision Conferences of 1900, 1911, 1925, and 1958.²²³

In practice, undisclosed information can cover any secret information with commercial value resulting from experience and intellectual activity, such as chemical formulas for pharmaceutical or medical compounds, manufacturing processes, marketing plans, customer lists, or any other business-related information which gives the owner advantage over competitors.²²⁴ Many of these may easily satisfy the criteria for patent protection. Where they are filed for a patent, their owners are granted 20-year monopoly protection for exploiting the protected subject matter(s) in exchange of making the information public. If they choose not to do this, they may maintain the monopoly and protect the information

²¹⁹ *Intellectual Property Law 2005* art 93(5)(c).

²²⁰ J Cambeau (1996), citing in F Dessemontet, ‘Protection of Trade Secrets and Confidential Information’ in Carlos M Correa and A Yusuf (eds), *Intellectual Property and International Trade: The TRIPs Agreement* (Kluwer Law International, 2008) 271.

²²¹ Stoll, Busche and Arend, above n 35, 637.

²²² UNCTAD & ICTSD, above n 14, 521.

²²³ Bodenhausen, above n 9, 142-3.

²²⁴ UNCTAD & ICTSD, above n 222.

indefinitely, provided that the information meets the conditions to be classified as a trade or business secret. The cost of this latter is often much lower compared with the former.

In requiring members to protect undisclosed information, TRIPs Article 39:1 refers them to Article 10*bis* of the Paris Convention against unfair competition, making clear that the protection to be conferred in the next two paragraphs is based on the policies underlying unfair competition.²²⁵ The provisions contained in these two paragraphs create TRIPs' own conditions for undisclosed information protection and for protection of information submitted to governments or government agencies for marketing approvals for pharmaceutical or agro-chemical products. Protection of trade secrets is so important to economies such as the United States that it adopted the Economic Espionage Act in 1996.²²⁶ It was cited as the top intellectual property concern in a survey recently conducted by the United States-China Business Council (USCBC).²²⁷

These TRIPs requirements for undisclosed information are implemented in Vietnam mainly through the 2005 Intellectual Property Law and some other relevant sub-laws, including Decision 69/2006 and Decision 30/2006.

5.1 Protectability

A mixed market economy has only recently developed in Vietnam, along with the recognition in the 1992 Constitution. Intellectual property protection utilizing TRIPs standards has come even later and had even less time in which to develop. Business confidentiality was already known in the context of traditional techniques used in producing famous products often connected with geographical indications in an agricultural

²²⁵ Ibid.

²²⁶ 18 USC § 1831 - Economic Espionage (18 USC Chapter 90 - Protection of Trade Secrets).

²²⁷ USCBC 2012 *China Business Environment Survey Results* 1, 12

<<http://www.uschina.org/sites/default/files/uscbc-2012-member-survey-results.pdf>>.

society based on rice cultivation²²⁸ such as Nga Sơn rush mat, Bát Tràng pottery, Vạn Phúc silk, and Nam Định textile. However, Vietnam lacks the experience of intellectual property protection generally and geographical indications and trade secrets particularly seen in western jurisdictions and reproduced in TRIPs.

Prior to the 2000 enactment of regulations on business secrets as part of the process of Vietnam's accession to the WTO and implementing TRIPs,²²⁹ some legal statements had been produced which referred to 'know-how' in the context, or reflecting the significant influences, of the centrally-planned economy.²³⁰ The legislative provisions often related to State secrets.²³¹ Confidential information or know-how used in state-owned enterprises could fall within some category of state secrets and be protected in this way.

Given this background, it is not surprising that Vietnamese law stipulates the criteria for the protection of business secrets often without substantial difference from those specified by TRIPs. In other words, to meet this TRIPs requirement Vietnam appears to have directly transposed the external international law into the internal legislation.

Article 39:2 of TRIPs, for example, provides three conditions for the protection of undisclosed information. It requires that the information:

²²⁸ This is discussed in Subsections 2.1 *Favouring Community Life and Cooperation* and 2.2 *Non-Development of Commerce, Urbanization, and Industrialization* in the context of Chapter 2 on conceptualizing law's flexibility.

²²⁹ This is the case of Government Decree 54/2000/NĐ-CP of 3 October 2000 on the Protection of Business Secrets, Geographical Indications, Trade Names, and Rules against Unfair Competition in Respect of Industrial Property.

²³⁰ 'Know-how' is occasionally mentioned as a potentially possible subject matter of technology transfer contracts without its features as intellectual property being recognized. See, eg, the Ordinance on Foreign Technology Transfer of 10 December 1988, guiding for the implementation by Government Decree 49-HĐBT of 4 March 1991; Decree 201/HĐBT of 28 December 1988 on Rules for Licensing Invention Patents, Utility Models, Industrial Designs, Goods-Marks, and Know-How; and, the 1995 Civil Code's Part Six, Chapter III on Technology Transfer with Decree 45/1998/NĐ-CP of 1 July 1998 of the Government Guiding the Implementation of the 1995 Civil Code's Provisions for Technology Transfer and Circular 1254/1999/TT-BKHCNMT of 12 July 1999 of Ministry of Science, Technology, and Environment on the Implementation of Decree 45/1998.

²³¹ See, eg, Decree 154-SL of 17 November 1950 and Decree 69/SL of 10 December 1951, promulgated both by President Ho Chi Minh, respectively on disciplines to state officials, military officers, or ordinary people revealing office or government secrets and on protection of national secrets; and the Ordinance on Protection of State Secrets, dated 28 October 1991.

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Article 84 of the Intellectual Property Law promulgates these three general criteria to determine the eligibility for the information being protected:

- is neither common knowledge nor easily obtained;
- is capable of bringing advantages to its holder over others who do not hold or use it when being used in business activities; and
- has been kept secret by its owner through necessary measures so that it has not been disclosed and is not easily accessible.

The protection of business secrets is also confirmed as not requiring registration.²³²

Therefore, some of the leeways in the TRIPs provisions, for example, to determine when the information is considered possessing ‘commercial value’ or what might be ‘reasonable steps’ in keeping it secret,²³³ are left as gaps in the local legal system. To make the law applicable in practice, these gaps must be bridged.

But Vietnamese law avails itself of another leeway within TRIPs. This is the failure of TRIPs to define undisclosed information. This is uneasy concept to define because of the varieties of forms which information, subject to such protection, has taken in a variety of national laws, as noted above. A business secret is, under Article 4:23 of the 2005 Intellectual Property Law, defined as information which is obtained from financial and/or intellectual investment, not being disclosed, and, which can be applied in commerce.

²³² *Intellectual Property Law 2005* arts 6(3)(c); *Decree 103/2006* art 6(4); *Circular 01/2007* point 1.7.

²³³ UNCTAD & ICTSD, above n 14, 529-30.

5.2 Protection for Undisclosed Data Relating to Pharmaceutical and Agro-Chemical Products

The pharmaceutical industry was one of the strongest lobbyists when TRIPs being formulated.²³⁴ Consequently, TRIPs provisions relating to both patents and the protection of otherwise undisclosed information submitted to regulatory agencies as a condition for marketing approvals give extensive protection to the information relating to the industry's products. This protection is also of the importance to countries with a history of strong development in agricultural and veterinary products, such as Australia.²³⁵

The protection of test information relating to the testing of such products is significant in terms of intellectual and financial investments. Its disclosure to the government agencies is important in securing the health of people and animals and in ensuring foodstuffs not contaminated. To develop and bring a new drug to market requires the conduct of extensive chemical, pharmacological, toxicological, and clinical research and testing, on average costing US\$800 million over the period of 10-15 years.²³⁶ To offer a new agrochemical product for farmers, used with farm animals, requires over 120 different tests and the

²³⁴ Vandana Shiva, 'Protecting our Biological and Intellectual Heritage: The Transnational Corporation Bias in TRIPs' in Peter Drahos (ed), *Intellectual Property* (Ashgate, 1999) 141, 158; Willem Pretorius, 'TRIPs and Developing Countries: How Level is the Playing Field?' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access, and Development* (Palgrave Macmillan, 2002) 183, 184-5.

²³⁵ National Association for Crop Protection and Animal Health, 'Test Data Protection' for Agvet Regulatory Data – Underpinning Solutions for the Future' <www.ipaustralia.gov.au> (visited 17 June 2008).

²³⁶ International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), citing in Carlos M Correa, 'Protecting Test Data for Pharmaceutical and Agrochemical Products under Free Trade Agreements' (1-18, 2): UNCTAD-ICTSD Dialogues, *Moving the Pro-Development IP Agenda Forward: Preserving Public Goods in Health, Education, and Learning* (29 November - 3 December 2004) <http://www.iprsonline.org/unctadictsd/bellagio/docs/FinalReport_Bellagio4.pdf>; Joseph A DiMasi, Ronald W Hansen and Henry G Grabowski, 'The Price of Innovation: New Estimates of Drug Development Costs' (2003) 22 *Journal of Health Economics* 151, 151-2, 180 <http://moglen.law.columbia.edu/twiki/pub/LawNetSoc/BahradSokhansanjFirstPaper/22JHealthEcon151_drug_development_costs_2003.pdf> citing in Charles Clift, 'Data Protection and Data Exclusivity in Pharmaceuticals and Agrochemicals' in Anatole Krattiger, Richard T Mahoney and Lita Nelsen (eds - et al), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (MIHR, 2007) 431, 431 <www.ipHandbook.org> (visited 17 June 2008).

screening of up to 15,000 different compounds over 9 years from discovery to the first commercial sale, costing between US\$180 million to US\$220 million.²³⁷

Without indicating any time limit TRIPs Article 39:3 has been discussed to oblige members the following undertakings:

1. to protect data on new chemical entities, the collection of which involved considerable effort, against unfair commercial use;
2. to protect such data against disclosure, except where necessary to protect the public; and
3. to protect such data against disclosure, unless steps are taken to ensure that the data is protected against unfair commercial use.²³⁸

In imposing these, the provision again leaves members some discretion in its implementation. For example, members may decide not to require any information to be submitted for marketing approval but may instead recognize other members' existing approvals since TRIPs has no provisions prohibiting them from adopting such approach.²³⁹ Also, they may determine themselves what constitutes a pharmaceutical or agro-chemical product as this is not defined in TRIPs.²⁴⁰

A number of factors should be considered in assessing how effectively Vietnam has been able to adapt these requirements to suit its own needs. It possesses an agricultural economy which is dependent on agro-chemical products. It is also highly dependent on the importation of pharmaceutical products with little investment in medical research and development.²⁴¹ When signing the free trade agreement with the United States in 2000 it

²³⁷ Crop Life International Brussels (2004), citing in Correa, *ibid*; Clift, *ibid*; Javier Fernandez, 'Test Data Protection: A Regulatory Tool for Quality Improvement' (1-4: 1) Crop Life International Washington D.C (2005) <www.croplife.org> (visited 18 February 2009).

²³⁸ Clift, above n 236, 432.

²³⁹ Stoll, Busche and Arend, above n 35, 649.

²⁴⁰ *Ibid*, 649-50: It is there argued based on the ordinary meaning of the words used to define a pharmaceutical or agro-chemical product as a drug provided in pharmacies and used in medical treatment.

²⁴¹ Peter Drahos and Victor JV Spengler, 'Vietnam: Mission Report' (186-195, 187) in *Regional Report: The ASEAN-Rockefeller Foundation Project on Intellectual Property Laws Review and Capacity Building on Intellectual Property Rights Related to Public Health in the ASIAN Region*, ASEAN Secretariat Indonesia 2005 <www.anu.edu.au> (visited 16 July 2008).

agreed to impose some ‘TRIPs-plus’ provisions. The TRIPs provision gives some considerable flexibility to local lawmakers in terms of the protection length because of giving no time limit. However, a five-year period of data exclusivity was set out in that Vietnam-America bilateral trade agreement²⁴² and this is reflected in the 2005 Intellectual Property Law. This form of protection has been argued being a much stronger right than a patent as it contains, among other restrictions, no exceptions or no opportunities for government use in national emergencies.²⁴³

In particular, the ‘data exclusivity’ right in Vietnam is provided for in Article 128 of the 2005 Intellectual Property Law as below:

1. Where it is required by law that an applicant for a licence to trade in or circulate pharmaceutical or agricultural chemical products must submit test results or any other data constituting business secrets obtained by significant efforts and the applicant requests that such test results or data be kept secret, the competent licensing agency has the obligation to apply necessary measures so that the test results or data are neither used for unfair commercial purposes, nor disclosed, except where a disclosure is necessary to protect the public.
2. Within five years of the licence being granted, the competent licensing agency must not allow any subsequent applicants to use such test results or data without the consent of the applicant, except in the cases provided for in Point d, Clause 3, Article 125 of this Law.

Three relevant ministries: the Ministry of Health, the Ministry of Agriculture and Rural Development, and the Ministry of Science and Technology, are authorized to give guidelines implementing provisions of this Article.²⁴⁴

The guidance issued by the Health Ministry, on the necessary measures to protect the information of test results required to be submitted, relates to toxicity and clinical drug test

²⁴² *United States- Vietnam Bilateral Trade Agreement* art 9(6) ch II.

²⁴³ Clift, above n 236, 433.

²⁴⁴ *Decree 103/2006* art 20.

data of new drugs which have not been revealed.²⁴⁵ The data is protected for five-year after the drug, for which the registration dossier containing the protected information is submitted, is granted permission or approval to be marketed or circulated.²⁴⁶ Other data, except for additional indications, formulas, and forms of preparation, can be requested to be secretly secured if satisfying the four specified conditions.²⁴⁷ First, they must meet the conditions of being a business secret specified by law.²⁴⁸ Second, they must be proven resulting from significant efforts.²⁴⁹ Third, they must come from, or be supplied by, registered companies operating under current regulations on drug registration.²⁵⁰ Lastly, there must be request to keep them secure by the drug companies.²⁵¹

Under the guidance issued by the Ministry of Agriculture and Rural Development, test results or data in relation to agro-chemical products falling within the scope of protection include information on chemical constituents having novel character and commercial value which have resulted from significant investment.²⁵² Agro-chemical products are stated to be chemical products used in agriculture or for rural development purposes, including chemical fertilizers, agricultural chemicals for protection of plants, chemicals used in breeding livestock, veterinary drugs or veterinary chemical-pharmaceutical products, and chemicals used in preserving or processing agricultural or wooden products.²⁵³ It is further provided that other information, which may lead to unfair competition if were to be revealed or disclosed, may be applied.²⁵⁴

Like the Health Ministry guidance, this Ministry of Agriculture and Rural Development guidance repeats the 2005 Intellectual Property Law when regulating the period during

²⁴⁵ *Decision 30/2006* art 3(1).

²⁴⁶ *Decision 30/2006* art 10(2).

²⁴⁷ *Decision 30/2006* art 3(2).

²⁴⁸ *Decision 30/2006* art 4(1).

²⁴⁹ *Decision 30/2006* art 4(2).

²⁵⁰ *Decision 30/2006* art 4(3).

²⁵¹ *Decision 30/2006* art 4(4).

²⁵² *Decision 69/2006* art 1 the second paragraph..

²⁵³ *Decision 69/2006* art 1 the third paragraph.

²⁵⁴ *Ibid.*

which the data is protected.²⁵⁵ The period of exclusivity is five-year counted from the date on which the competent agency receives or accepts those applications.²⁵⁶

6. Conclusions

Apart from copyright, including related rights, and patents, including plant varieties, respectively discussed in the previous Chapters 4 and 5, this chapter surveys the remaining categories of intellectual property rights in Vietnam in domestically implementing TRIPs. They comprise trademarks, geographical indications, industrial designs, layout-designs (topographies) of integrated circuits, and undisclosed information. Again, in the context of the theories discussed in Chapter 2 on the conceptualization of law's flexibilities, the chapter seeks to highlight how the flexibilities within TRIPs have been adopted by Vietnam.

Again, the national law is found to have exploited some of those flexibilities in ways which advantage Vietnam. When providing for trademark rights, for example, it has adopted, based on the leeway left within TRIPs Article 15:1, the requirement for registration that signs filed for a trademark protection must be visually perceptible.²⁵⁷ Although this prevents some signs, including sounds or scents, from being registered as trademarks, it is the preferred outcome since the technological development situation of Vietnam means that it faces difficulties in carrying out the examination of invisible signs. It has similarly chosen to adopt some more restrictive choices in that TRIPs' provision. A descriptive sign can still be registered as a trademark if the applicant succeeds in proving that the sign has acquired distinctiveness through use, for example, by conducting a marketing strategy.²⁵⁸

Other flexibilities within TRIPs, including members' freedom to decide limitations or exceptions to the protection of geographical indications, industrial designs, or layout

²⁵⁵ *Decision 30/2006* art 10(2) and *Decision 69/2006* art 7, respectively.

²⁵⁶ *Decision 69/2006* art 7.

²⁵⁷ *Intellectual Property Law 2005* art 72.

²⁵⁸ *Intellectual Property Law 2005* art 74(2)(c).

designs, are seen to be embodied in the local law. For instance, under what left by TRIPs in Article 25:1 it excludes the appearance of a product which is dictated by the technical features of the product and the appearance of a product which is invisible when being used from the protection for industrial designs.²⁵⁹ It also, among other exceptions, permits the use of a layout design for personal need or the purpose of evaluation, analysis, research, teaching, testing, pilot production, or collection of information in order to carry out procedures for applying for licenses for production, importation, or circulation of products.²⁶⁰ This has been incorporated together with the liberty, set out in Article 4 of the IPIC Treaty integrated into TRIPs, that members may either create an individual and special law or incorporate the provisions in any law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of them. As a result, layout designs have been protected in Vietnam within the scope of industrial property rights in particular and intellectual property rights in general.

Alongside such uses of TRIPs' flexibilities, Vietnam is, again, seen to have limited its potential to exploit them by its commitment in other free trade agreements. For example, the United States-Vietnam Bilateral Trade Agreement requires a five-year period of exclusivity for the data submitted to the competent authority for the approval of the marketing of pharmaceutical or agro-chemical products.²⁶¹ This prolongs the period before another applicant can use the data for the same approval after the concerning patent expires. Vietnam can be seen to not always have chosen to use the flexibilities open to it. Its legislation, for example, is silent on potential exceptions to the rights of trademark owners found in TRIPs Article 17.

Still, the local provisions do exploit those flexibilities which are generally or sometimes briefly prescribed, subject to more detailed guidelines for their implementation. A typical example is the exceptions, provided for in a general manner in Article 125:2(a) of the 2005 Intellectual Property Law, to the exclusive rights of the owners of patents, industrial

²⁵⁹ *Intellectual Property Law 2005* art 64.

²⁶⁰ *Intellectual Property Law 2005* art 125(2)(a).

²⁶¹ *Intellectual Property Law 2005* art 128; *United States-Vietnam Bilateral Trade Agreement* art 9(6) ch II.

designs, and layout designs. This reflects the lack of experience, expertise, and administrative capacity in Vietnam in respect of intellectual property, discussed elsewhere. It is a feature that Vietnam shares with other developing country members of the WTO because of the lower level of their economic, commercial, and technological development. In order to bring greater benefits to the public, which is appropriate to its status as a developing country with low per capita income, Vietnam needs to consider how to improve or make changes to those provisions. How Vietnam has implemented the TRIPs' requirements for the enforcement of intellectual property rights by civil, administrative, and criminal procedures, and through the Customs barriers at borders, as well as its exploitation of the flexibilities left by such TRIPs requirements are considered in the next chapter, and Chapter 7, on enforcement of intellectual property rights in Vietnam under TRIPs.

CHAPTER 7: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM UNDER TRIPS

Synopsis

This chapter deals with the provisions of Vietnamese law relating to the enforcement of intellectual property rights made under its TRIPS obligations. It deals with the enforcement by way of civil remedies, administrative penalties, criminal penalties, and enforcement by Customs at the customs barrier.

The TRIPS provisions on enforcement sought to fill a gap in international law as previous conventions and treaties had not bound contracting states to enforcement regimes. TRIPS requires members to have provisions for the enforcement of civil remedies and, in respect of commercial activities breaching trademarks and copyright, criminal offences and penalties. The TRIPS provisions are regarded as less than effective as they rely on the legal systems and processes of member states which may vary considerably.

In Vietnamese law civil remedies are provided for in respect of both material and moral damage resulting from the breach of intellectual property rights in the context of the general procedure for enforcing civil claims. Courts are given broad discretionary powers to order the cessation of infringing acts; apologies and rectifications; the performance of other civil obligations; damages for loss of property; reduction in profits and business opportunities; and, destruction or distribution in non-commercial channels of the goods involved. Criminal offences established in the Criminal Code are also tried and punishable in the courts and appear to be under-enforced, particularly in respect of trademarks.

Reflecting Vietnam's socialist legality the most widespread enforcement takes place through the use of administrative penalties imposed by government agencies, particularly specialized scientific-technological inspectorates, culture-sports-tourism inspectorates, plant varieties inspectorates, market management offices, police offices, and People's Committees or local governments. The Customs operates in a similar way, but under different TRIPS requirements and local laws. It also has an active record in using these powers. Administrative enforcement actions extend from warnings to financial penalties to the seizure and destruction of goods. Again there is considerable discretion and flexibility in how these powers are used.

The TRIPS Agreement contains a number of ambiguous terms. Members must provide for 'injunctions' but the term is not defined. Vietnamese law and policy makers have taken advantage of some flexibilities in respect of enforcement. The provision for the placing of illegitimate goods of an infringement into non-commercial channels is particularly complex with its own ambiguities. The degree of seriousness of an infringement required to constitute criminal misconduct is also not clearly defined. The local legislation has picked this up as actions resulting in 'serious consequences' and circulars seek to give further guidance on this.

Vietnam, like other members, has been able to use the wide scope of flexibility given to it under TRIPS to construct a system which reflects its distinctive civil and criminal law regimes and, more significantly, its widespread system of administrative enforcement. It has taken advantage of some other leeways in its local legislation. In respect of software piracy its system of enforcement appears to have some success.

CHAPTER 7: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM UNDER TRIPS

Enforcement is considered to be the most difficult and far-reaching feature of the international system of intellectual property protection.¹ There is no surprise that TRIPs contains an enforcement mechanism which is missing from other intellectual property treaties.² This mechanism reflects both a decentralized approach, that the laws of member states are individually created under TRIPs standards, and a centralized approach, that the TRIPs Council is authorized to bridge gaps found in the decentralized approach.³ Such two-pronged strategy is however argued to be more theoretical than practical that the TRIPs enforcement is criticized as not being a significant achievement.⁴

Members are obliged to enforce intellectual property through civil, administrative, criminal procedures and customs barriers. Complying with this Vietnam has created a system of procedural and substantive laws. These include the 2005 Intellectual Property Law (Part V: Protection of Intellectual Property Rights, Articles 198-219) and the 1999 Penal Code, both amended in 2009; the 2004 Civil Procedure Code, as amended in 2011; and the 2001 Customs Law, amended in 2005.⁵ They also include Decree 105/2006 and Decree 106/2006, as amended by Decree 119/2010 and substituted by Decree 97/2010 respectively.

¹ Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2nd ed, 2003) 3.

² For an overview of international intellectual property treaties with their enforcement provisions see generally Thomas Dreier, 'TRIPs and the Enforcement of Intellectual Property Rights' in Friedrich-Karl Beier and Gerhard Schricker (eds), *From GATT to TRIPs—The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Weinheim, 1996) 249-77.

³ Jerome H Reichman, 'Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement' in Carlos M Correa and Abdulqawi A Yusuf (eds), *Intellectual Property and International Trade: the TRIPs Agreement* (Kluwer Law International, 2008) 23, 65-6.

⁴ Reichman, *ibid.* According to Gervais, above n 1, 287 n 80, the TRIPs Agreement is both praised as one of the main achievements of the Uruguay Round and criticized for its provisions for enforcement procedure as 'the Achilles heel.'

⁵ Recently, the Thirteenth National Assembly of Vietnam on 23 June 2014 adopted at the seventh session a new Law on Customs replacing all the previous laws. It is to come into force on 1 January 2015. In this Law the relevant provisions for the Customs measures of enforcement of intellectual property rights are provided for in Subchapter 8: Check, Supervision Customs Procedures to Imported or Exported Goods with Intellectual Property Protection Request (Articles 73-76) of Chapter III: Customs Procedures, Regime of Customs Check and Supervision (Articles 16-82). The relevant provisions of the 2001 Customs Law, as amended in 2005, are analyzed in this thesis in general and this Chapter in particular. This is done as the final revision of the thesis is being undertaken in late 2014.

As well there is: Decree 57/2005 as amended by Decree 172/2007 and both substituted by Decree 114/2013; Decree 47/2009, as amended by Decree 109/2011; Joint Circular 01/2008; and, Joint Circular 02/2008.

Article 41:5 of TRIPs confirms that the implementation of TRIPs' provisions for enforcement of intellectual property rights neither obliges members to create a system of intellectual property enforcement distinct from the enforcement of their law in general, nor affects members' capacity to enforce their law in general. This is one of the biggest gaps created in TRIPs, reinforcing the principle of 'taking into account differences in national legal systems', stated within its introductory statement. Such TRIPs confirmation makes it clear that carrying out the enforcement obligations under TRIPs in Vietnam can be conducted within the capacity of the local legal system according to the local practice. The structure of the Chinese judicial system is four-tiers of courts.⁶ The Vietnamese judicial system is composed of three tiers: the Supreme People's Court and the People's Courts at provincial and district levels. This structure and the constitutional principle of trial by judges and people's assessors, and the procedures for hearings in courts of first instance and courts of appeal are described in Appendix 1 to the thesis. The enforcement of the law is explored through four areas of civil law, administrative law, criminal law, and customs barriers.

Vietnamese intellectual property legislation relating to enforcement through the judicial system is generally recognized as much improved and in line with TRIPs' requirements.⁷ The country has made a significant legislative effort to have enacted the revisions of both

⁶ Together with such special courts as maritime courts, railway courts, and military courts, there are four different tiers in the Chinese judicial system operating at the national, provincial, prefecture, and county levels. They are respectively: the Supreme People's Court; the 32 High People's Courts; the 403 Intermediate People's Courts; and, the 3132 Local People's Courts. These numbers include the courts of special jurisdiction: the 10 maritime courts, the 60 railway courts, and the 88 military courts. See Mo Zhang, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System' (2002) 25 *Boston College International and Comparative Law Review* 59, 60-1. See also Douglas Clark, 'Intellectual Property Litigation in China' (2004) *The China Business Review* (November–December 2004) 25, 27.

⁷ See Question 16 of both the European Commission Intellectual Property Enforcement Surveys of 2006 and 2009 in the case of Vietnam <<http://ec.europa.eu/trade>> (visited 30 August 2008 and 9 September 2011). See also the United States Special 301 Reports, below n 11.

the 2005 Intellectual Property Law and the 1999 Criminal Code apart from nearly 40 other pieces of legislation and implementing decrees, circulars, and ordinances since the end of 2006, for example.⁸ Improvements in Vietnam's enforcement of this legislation have been seen and, to some extent, have also been recognized.⁹ But its enforcement remains the biggest concern, however.¹⁰ This particularly relates to the United States' Special 301 Reports. Vietnam has never been a 'priority foreign country' but has remained on the 'watch list' between 2000 and 2014 because of overall inadequate efforts for deterring piracy and counterfeiting.¹¹ This seems to be the same in the case of China which was on the 'priority watch list' in 1989-1990 and 2006-2014.¹² The emphasis on China and the different status given to it may be more from the size of its economy.

It is claimed that it is the enforcement of the infringement of intellectual property rights as well as indigenous innovation policies in China which have undermined American firms' competitive positions. The infringements of intellectual property, it is claimed, had led to

⁸ See 'European Commission - DG Trade - IPR Survey 2010: Vietnam (Executive Summary)' <<http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/enforcement/>>.

⁹ See 'Executive Summary' and Questions 15-16 of the European Commission Intellectual Property Enforcement Survey 2009, above n 7. See also 'European Commission - DG Trade - IPR Survey 2010: Vietnam' [1.2] (the second bullet), *ibid*.

¹⁰ Phil Taylor, 'Creativity Leads to Unusual Intellectual Property Cases in Asia' *Asialaw* (May 2008) <<http://www.asialaw.com/Article/1970722/Creativity-leads-to-unusual-IP-cases-in-Asia.html>>. See also respectively Questions 15, and 13, of the European Commission Intellectual Property Enforcement Surveys 2006, and 2009, in the case of Vietnam (above n 7) and 'European Commission - DG Trade - IPR Survey 2010: Vietnam' [1.2] (the first bullet) (above n 8).

¹¹ In particular, it was alleged that in Vietnam up to nearly 100 percent of CDs, VCDs, and DVDs on sale were pirated between 2000 and 2006. Intellectual property infringement rates are described as 'high' in 2007 while in 2008 'significant weaknesses' are described as remaining in the enforcement measures for criminal, administrative, and border enforcement regimes. A lack of enforcement is also described against 'internet piracy and optical media containing unauthorized content.' In 2009, piracy rates remained high with 'greater internet piracy' and 'rising piracy levels'. In 2010, local enforcement efforts remained 'insufficient to address rampant piracy and counterfeiting' with 'growth in internet piracy'. In 2011, a high level of copyright piracy and an increasing level over the Internet, as well the piracy of satellite and cable signals and the general availability of counterfeit goods in the marketplace are alleged. In 2012, 'widespread piracy and counterfeiting' remained as a serious concern. In 2013 and 2014, 'book piracy, software piracy (including on government computer systems), and cable and satellite signal theft' have been seen to continue widespread. See USTR Special 301 Reports from 1989 to 2014 (in the case of Vietnam), *Knowledge Ecology International* <<http://keionline.org>> and *United States Trade Representative* <www.ustr.gov> (visited 16 July 2008, 17 June 2010, 22 September 2011 and 11 September 2014).

¹² See United States Special 301 Reports from 1989 to 2014 (in the case of China), *ibid*.

economic losses of US\$48.2 billion by 2009.¹³ There has been considerable concern about China's enforcement of intellectual property rights as a consequence.¹⁴ As there is a difference between having adequate laws and achieving their effective enforcement, there is a lot of advice about successfully doing business and protecting intellectual property in China.¹⁵ These includes: taking advice from Chinese intellectual property experts; consulting publications and websites on Chinese intellectual property rights and protection; being aware of the possibility of small-scale infringers; assessing the risks of the market and making preparations; registering intellectual property rights; considering mediation before any defensive legal actions; and, then bringing civil litigation which has a much more potent deterrent effect than administrative enforcement.¹⁶ However, utilizing

¹³ United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the US Economy* (May 2011) (Investigation No. 332-519, USITC Publication 4226) i & xiv <<http://www.usitc.gov/publications/332/pub4226.pdf>>.

¹⁴ Up to 95 per cent of responses in a survey indicated that they are either somewhat or very concerned about intellectual property enforcement in China with over half seeing some improvement in the past year. It is also reported that 'Laws against counterfeiting and trademark infringement are unevenly and slowly enforced.' See United States-China Business Council, *USCBC 2012 China Business Environment Survey Results* 1, 11-2 <<http://www.uschina.org/sites/default/files/uscbc-2012-member-survey-results.pdf>>.

¹⁵ Foreign companies and investors are advised to take seven steps. They are: (i) Learn about China; (ii) Find the right partner; (iii) Start small; (iv) Hire the right people; (v) Have a realistic and flexible strategy; (vi) Listen to the customers; and, (vii) Be prepared for fast growth: Paul M Denlinger, '7 Secrets to Business Success in China' (2003) *China Business Strategy* <<http://www.china-ready.com/articles/SevenSecretsToBusinessSuccessInChina.htm>>. Relating to intellectual property they are advised that they should register their trademarks early as the best way to prevent counterfeiting or a third-party registering an identical or a similar trademark of their own: IP Australia, *How to Protect Trademarks in China* (2006) Wine Australia 1-3 <<https://www.wineaustralia.com>> (visited 6 September 2014); EU-China IPR 2, *Roadmap for Intellectual Property Protection in China* (Summer 2008) 4 <http://www.ipr2.org/storage/Roadmap%20Trademark%20Protection_EN.pdf>. This fits with the observation that foreign holders of intellectual property rights would typically find their rights infringed by six kinds of Chinese enterprises: (i) solely-owned enterprises; (ii) Hong Kong invested firms; (iii) state-owned companies; (iv) trading companies; (v) import and export companies; and, domestic wholesale and retailers: Gordon Gao (2000), citing in Samir B Dahman, 'Protecting your IP Rights in China: An Overview of the Process' (2006) 1 *Entrepreneurial Business Law Journal* 63, 70 n 56. But as with all other members of the WTO under the requirements for making their intellectual property laws in line with TRIPs' minimum standards, there would be few significant differences between the law of China and that of developed countries' as China has introduced legislation covering every aspect of intellectual property protection. Most Western lawyers find this comprehensive, systematic and familiar: UK Intellectual Property Office, *Intellectual Property Rights in China* (March 2013) 4-5, 7 <<http://www.ipo.gov.uk/ipchina.pdf>>.

¹⁶ UK Intellectual Property Office, *ibid*, 7-8.

administrative remedies has been seen as one feature dominating the protection of intellectual property rights in China.¹⁷

Regarding the matter of enforcement of law in general and laws on intellectual property rights in particular, Vietnam and China have, again, many characteristics in common. First, both countries have a tradition of Confucianism, socialist ideology and an anti-colonialist scepticism¹⁸ that has led to a different understanding of the role of law in society.¹⁹ These factors make it difficult for the two jurisdictions to set clear boundaries which distinguish between law and politics, individual and community interests, and to the public and the private.²⁰ Second, both Vietnam and China are single-party states in which the principle of the leadership of the Communist Party is still supreme.²¹ They have also inherited from the Soviet Union the principle that the constitution coordinates rather than checks or constrains the power of the leading party and the state.²² The introduction of a functional separation between party and state organs has not weakened or diminished the parties' authority and influence.²³ Therefore, state officials' activities may be affected by party influence and decisions leading to unequal treatment of citizens.

¹⁷ Dahman, above n 15, 64. See also Kristina Sepetys and Alan Cox, 'Intellectual Property Rights in China: Trends in Litigation and Economic Damages' (2009) *NERA Economic Consulting* 1, 4 <http://www.nera.com/extImage/PUB_IPR_Protection_China_0109_final.pdf>.

¹⁸ This is discussed in Subsection 2.3 *Religious and Political Factors* in Chapter 2. See also Aaron Schwabach, 'Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere' (2008) 2(1) *Journal of International Media and Entertainment Law* 65 (arguing that there is little enthusiasm in China for enforcing a law which protects foreign owners of intellectual property rights and raises memories of colonialism: 79-80)

¹⁹ See generally Adam Day, *Legal Reform and Economic Development in Vietnam and China* (Master of Arts in Law and Diplomacy Thesis, Tufts University Fletcher School, 2004) <<http://fletcher.tufts.edu>>.

²⁰ Day, *ibid*, 8.

²¹ In the case of Vietnam this is discussed in Subsection 1.1 *Law is Encoded in Language and Language is Ambiguous* in Chapter 2 in the context of the first steps of the country's course of acceding to the WTO. See also *Vietnam Constitutions 1980, 1992 (as revised in 2001), 2013* arts 4; *China Constitution 1982* (as amended 2004) Preamble's the fifth, seventh, and tenth paragraphs; *Chinese Government's Official Web Portal*, 'Constitution of the People's Republic of China 1982, as amended in 2004' <http://english.gov.cn/2005-08/05/content_20813.htm>.

²² John Gillespie and Albert Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010); *Comparing Legal Development in China and Vietnam: An Introduction*, University of Hong Kong Faculty of Law Research Paper No. 2013/049, 38 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410778>.

²³ Gillespie and Chen, *ibid*.

Also, the two countries in more recent decades have both actively pursued an agenda of economic and legal reforms which have, among other things, emphasized the importance of law; led to the enactment of numerous laws and regulations; promoted a socialist law-based state and public administration marked by the rule of law; and, further developed the court systems, legal professions, legal aid and legal education.²⁴ At present, China and Vietnam remain socialist countries with socialist civil law infrastructures based on the Soviet model.²⁵ They have no strong tradition of judicial independence and no constitutional courts.²⁶ They experience weakness in enforcing court judgments while struggling with corruption, debt-ridden state enterprises, and vast black markets.²⁷ All of these factors may impact on judicial decision-making as well as on any enforcement process discussed below.

1. Civil Law Remedies

A civil remedy can be defined as any order which can be made by a court in a civil as opposed to a criminal proceeding for litigants whose rights or interests are violated or infringed.²⁸ TRIPs requires that members provide for injunctions,²⁹ and damages,³⁰ as well some additional and specific remedies such as the destruction or delivery up of infringing goods and, where it is appropriate, the disposal of materials and implements used outside the channels of commerce.³¹

As indicated, enforcement is to be the biggest weakness, or gap, in TRIPs. Other specific spaces are also found. The power of the judicial authorities in granting ‘injunctions’ is obligated under TRIPs Article 44 without clearly defining the concept of ‘injunctions’, for example. It is argued that there is no universally agreed on meaning for ‘injunction’ and it

²⁴ Gillespie and Chen, *ibid*, 26-37. See also Day, *above n* 19, 13, 53-75.

²⁵ Day, *ibid*, 19-20.

²⁶ Day, *ibid*, 40-9.

²⁷ Day, *ibid*, 5.

²⁸ Douglas Laycock (2003), citing in Shan Hailing, *The Protection of Trade Secrets in China* (Wolters Kluwer, 2008) 95.

²⁹ *TRIPs Agreement* art 44.

³⁰ *TRIPs Agreement* art 45.

³¹ *TRIPs Agreement* art 46.

is used in varying degrees of vagueness in national legal systems that the scope of ‘injunctions’ varies.³² Also, the phrase ‘shall have the authority’, which appears towards the beginning of TRIPs Articles 43 to 48, is not further explicated. This makes it a contested phrase subject to argument in the WTO dispute settlement system and further compounded by the addition of ‘the issue of judicial discretion’.³³ An authority must be conferred on the courts within these requirements.³⁴

This section concentrates on the civil remedies for intellectual property infringements as well as related issues of the burden of proof.

1.1 Classifying Wrongs against Intellectual Property Rights

Both the Civil Codes (1995, 2005) Vietnam created many grounds for civil liability. These include acts of infringing on the life, health, honour, dignity, prestige, property, or other legitimate rights and interests of individuals intentionally or unintentionally.³⁵ The provisions embody the cultural and social features of Vietnamese society and the Vietnamese people’s moral and personal values.

Reflecting these distinctions, the 2005 Intellectual Property Law separates infringement of intellectual property rights into two kinds: material, physical, or property damages and moral, non-material, non-physical, non-property, or personal damages.

(a) Material Damages

Material damages include property losses, reduction in income and loss of profit, loss of business opportunities, and reasonable expenses for preventing and remedying of such

³² Gervais, above n 1, 296.

³³ Panel Report, *India–Patent* (EU), WTO Doc WT/DS79/R (24 August 1998) [7.66].

³⁴ Gervais, citing in Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff Publishers, 2009) 709.

³⁵ *Civil Code 2005* art 604(1).

damage.³⁶ Of these material damages, reasonable expenses for the prevention and avoidance of damage include expenditure on temporary custody, maintenance, or storage of infringing goods, and the costs of implementation of temporary measures.³⁷ Such material damages also include reasonable expenses for the assessment of any damage, the prevention of an infringing act, and the costs of notification and the correction in the mass media in relation to the infringing act.³⁸

Where plaintiffs succeed in proving that the act infringing their intellectual property rights has caused them material damages, they can request the court to decide on an appropriate level of compensation, which may be:

- the total damage, calculated by the amount of money plus profit gained by defendants as a result of the infringement where the profit has not been counted in the total damage;³⁹ or
- the price of licensing the use of the intellectual property rights on the presumption that the defendants had been licensed by the plaintiffs to use such rights under a contract to the extent equivalent to the act of infringement committed;⁴⁰ or
- where a level of compensation is impossible to determine under the two previously-cited provisions, an amount decided by the court depending on the extent of the damage but not exceeding VND 500,000,000.⁴¹

In a similar case relating to copyright in China the infringer has to pay compensation, including the reasonable expenses the right holder has paid to stop the infringement, for the actual losses suffered by the right holder, or the amount of the unlawful gains of the infringer where it is difficult to calculate the actual losses.⁴² Where these are both

³⁶ *Intellectual Property Law 2005* art 204(1)(a).

³⁷ *Decree 105/2006* art 20.

³⁸ *Ibid.*

³⁹ *Intellectual Property Law 2005* art 205(1)(a).

⁴⁰ *Intellectual Property Law 2005* art 205(1)(b).

⁴¹ *Intellectual Property Law 2005* art 205(1)(c).

⁴² *Copyright Law 1990* (China) art 49, as amended 2010 (WIPO-Lex).

impossible to determine, the reward is decided by the court but not exceeding RMB 500,000.⁴³

(b) Moral Damage

Moral damages include damage to the honour, dignity, prestige, reputation or other moral losses caused to authors of literary, artistic, and scientific works; performers; creators of inventions, industrial designs, and layout designs; or breeders of plant varieties.⁴⁴ They are provided in connection with the infringement of the personal rights of these rights holders under copyright and related rights, industrial property, and plant variety provisions. It is justified that where these personal rights are violated it may have a deleterious effect on the creators' honour, dignity, or lead to a reduction or loss in their prestige or reputation.⁴⁵

Where plaintiffs succeed in proving that an act infringing their intellectual property rights has caused them moral damage, they can request the court to decide compensation ranging from VND 5,000,000 to VND 50,000,000 depending on the extent of the damage.⁴⁶

In addition, the holders of intellectual property rights are allowed to request the court to compel organizations or individuals whose acts have infringed upon their rights to pay the reasonable costs of hiring lawyers,⁴⁷ including attorney fees and the costs of travel and accommodation specified in Article 55 of the 2006 Law on Lawyers.⁴⁸ This, required by TRIPs Article 45:2, assists them to enforce their rights and to deter both the infringer, and others, from the repeated infringement of intellectual property rights.

⁴³ Ibid.

⁴⁴ *Intellectual Property Law 2005* art 204(1)(b).

⁴⁵ *Joint Circular 02/2008* Part B(I)(1)(1.8).

⁴⁶ *Intellectual Property Law 2005* art 205(2); *Joint Circular 02/2008* Part B(I)(2)(2.2).

⁴⁷ *Intellectual Property Law 2005* art 205(3).

⁴⁸ *Joint Circular 02/2008* Part (B)(I)(2)(2.4) the last paragraph.

1.2 The Burden of Proof

In the Vietnamese legal system, the litigants in civil cases consist not only of the two parties, the plaintiffs and the defendants, but also other parties with relevant interests or duties.⁴⁹ A plaintiff is defined as the person who files a petition in a court alleging that his or her rights or legitimate interests have been infringed.⁵⁰ A defendant is defined as the person who is sued by the plaintiff.⁵¹ A relevant person is someone other than the plaintiffs and the defendants whose interests or duties are involved in the settlement of the case.⁵² Such relevant persons can ask to be joined, or be proposed by other litigants and accepted by the court, or requested by the court to join the action.⁵³

When filing a petition, to have it being accepted plaintiffs must comply with any requirements for the application form, including specifying the responses requested from the defendant or any other relevant persons.⁵⁴ These requests can be partly, or wholly, accepted or objected to by the defendants.⁵⁵ A relevant person can make independent requests⁵⁶ or join either the plaintiffs or the defendants in their requests.⁵⁷ Any proceedings can only address such requests as have been made.

All litigants in a civil case have both the right, and the obligation, to provide documents, evidence, or to bear the burden of proof supporting their requests⁵⁸ or supporting their objections to requests which have been made by other litigants.⁵⁹ As plaintiffs must comply

⁴⁹ *Civil Procedure Code 2004* art 56(1).

⁵⁰ *Civil Procedure Code 2004* art 56(2).

⁵¹ *Civil Procedure Code 2004* art 56(3).

⁵² *Civil Procedure Code 2004* art 56(4).

⁵³ *Ibid.*

⁵⁴ *Civil Procedure Code 2004* art 164(2)(g).

⁵⁵ *Civil Procedure Code 2004* art 60(3).

⁵⁶ *Civil Procedure Code 2004* art 61(2).

⁵⁷ *Civil Procedure Code 2004* art 61(3)-(4).

⁵⁸ *Civil Procedure Code 2004* arts 58(2)(b) and 79(1).

⁵⁹ *Civil Procedure Code 2004* art 79(2).

with the specified requirements for the form of a petition when a legal action against defendants is initiated,⁶⁰ they will generally bear the burden of proof.⁶¹

Article 203 of the 2005 Intellectual Property Law places the burden of proof on the plaintiff. In accordance with this provision, plaintiffs in an action for infringement of intellectual property rights or acts of unfair competition must produce evidence of that.⁶² But the burden of proof is placed on defendants where the action is about process patents, under the requirements in Article 34 of TRIPs.⁶³ The implementation in Vietnam of this Article is confirmed by the roundtable of the Working Party on the Accession of Vietnam.⁶⁴

1.3 Civil Remedies for Intellectual Property Infringements

In Article 44, TRIPs obliges members to provide their judicial authorities with the authority to order a party:

to desist from an infringement, *inter alia*, to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods.⁶⁵

The Agreement clearly leaves members freedom to decide the scope of injunctions that can be granted by the courts to stop infringement and prevent the circulation of infringing goods in the market.

In relation to this obligation, and to another obligation under TRIPs Article 46 on additional remedies, Vietnam has given the courts the authority to order:

⁶⁰ *Civil Procedure Code 2004* arts 164 and 165.

⁶¹ This is stated by Vietnam in communication with the Working Party on the Accession of Vietnam. See, eg, Questions 405 of WTO Doc WT/ACC/VNM/6 (20 April 1999); 205 of WTO Doc WT/ACC/VNM/9 (26 June 2000); and, 165 of WTO Doc WT/ACC/VNM/23 (6 March 2003).

⁶² *Intellectual Property Law 2005* art 203(3).

⁶³ *Intellectual Property Law 2005* art 203(4).

⁶⁴ See Question 194 of WTO Doc WT/ACC/VNM/44 (9 June 2006).

⁶⁵ *TRIPs Agreement* art 44(1) the first sentence.

- the cessation of wrongful acts;⁶⁶
- the making of public apologies and corrections;⁶⁷
- the performance of civil obligations;⁶⁸
- the payment of compensation for any damage;⁶⁹ and
- the destruction, distribution or use for non-commercial purposes of goods, raw materials, materials and means used mainly for the production or trading of goods which infringe intellectual property rights, provided that such destruction, distribution or use does not affect the exploitation of their rights by the holders of intellectual property rights.⁷⁰

The granting of these remedies is subject to some discretion which derives from TRIPs. For example, the courts may grant injunctions requiring the making of public apologies or the performance of civil obligations, or the distribution or use of those goods or raw materials, materials, and means under certain conditions.

(a) Cessation of Infringing Acts

As stated earlier, Vietnamese civil procedure law obligates plaintiffs, when filing a petition, to comply with the requirements specified in the application form including their requests for responses from the defendant or any other relevant persons. Inherent in this procedure any remedy to compel cessation of infringing acts is to be decided by the courts upon the request of the applicants.⁷¹ In practice, hearing disputes over intellectual property rights is still unfamiliar in Vietnam and Joint Circular 02/2008 gives guidance and examples of when such an injunction should be granted, including ordering a ‘pirate’ to stop reproducing a work without the consent of the author or the copyright owner and ordering

⁶⁶ *Intellectual Property Law 2005* art 202(1).

⁶⁷ *Intellectual Property Law 2005* art 202(2).

⁶⁸ *Intellectual Property Law 2005* art 202(3).

⁶⁹ *Intellectual Property Law 2005* art 202(4).

⁷⁰ *Intellectual Property Law 2005* art 202(5).

⁷¹ *Joint Circular 02/2008* Part B(IV)(1)(1.1).

an infringer of a trademark to stop using signs which are identical with a protected mark for similar goods or services.⁷²

(b) Ordering an Apology or Rectifying Publicity

Making public apologies or rectification of an improper action is aimed at protecting the personal rights of the authors of literary, artistic, and scientific works under Article 19 of the 2005 Intellectual Property Law.⁷³ This can be ordered to be carried out directly at the main residential address of the holder of the rights or published publicly three consecutive times in national or local daily newspapers published in the locality which is the main residential address of the person to whom the public apology is to be made or to whom rectification of the improper action is aimed.⁷⁴

(c) Ordering the Performance of Civil Obligations

This remedy is aimed at persons who have infringed their obligations to the holders of intellectual property rights as they have not carried out their obligations under a contract or have carried out them wrongfully.⁷⁵ As such, it seems that there must be a contractual relationship between the two parties prior to the dispute but this is left unclear from the guidance given in Joint Circular 02/2008. Because of its invocation of civil obligations, when deciding to apply this remedy, the courts are required to follow the corresponding provisions set out in Section II (Performance of Civil Obligations, Articles 283-301) and Section III (Civil Liability, Articles 302-308) of Chapter XVII (General Provisions) of Part Three (Civil Obligations and Civil Contracts) of the 2005 Civil Code.⁷⁶

⁷² Ibid.

⁷³ *Joint Circular 02/2008* Part B(IV)(2)(2.1).

⁷⁴ *Joint Circular 02/2008* Part B(IV)(2)(2.2).

⁷⁵ *Joint Circular 02/2008* Part B(IV)(3) the first sentence.

⁷⁶ *Joint Circular 02/2008* Part B(IV)(3) the second sentence.

(d) Payment of Damages

Compensation for material and non-material damages for infringing intellectual property rights, outside the breach of a contract, is to be in accordance with the grounds set out in Article 604:1 of the 2005 Civil Code.⁷⁷

In addition, when deciding to award damages, the courts are required to apply, among other relevant laws and regulations, Part I:1 of Resolution 03/2006/NQ-HĐTP of 8 July 2006 of the Supreme People's Court on Guiding the Application of Some Provisions of the 2005 Civil Code on Compensation for Damages outside Contracts (Resolution 03/2006).⁷⁸ As the determination of the damage suffered is very important in deciding the amount of compensation, four kinds of material damages need to be considered: property loss, reduction in income or profit, loss of business opportunities, and reasonable expenses.⁷⁹ This is relatively similar to a patent case in Chinese law.⁸⁰

⁷⁷ In particular, Article 604(1) of the 2005 Civil Code provides that:

A person who intentionally, or unintentionally, harms the life, health, honour, dignity, prestige, property, or other legal rights or interests of an individual, or who harms the honour, reputation, or property of a legal entity or other subject, must compensate for such damage.

⁷⁸ *Joint Circular 02/2008* Part B(IV)(4)(4.1): In particular, Part I(1) of Resolution 03/2006 guides courts on six issues: (i) The liability to compensate for damages; (ii) Principles for damage compensation; (iii) The capacity to compensate for damages; (iv) Reasonable expenses; (v) Burden of proof of litigants; and, (vi) The statute of limitations for initiating a lawsuit for compensation for damages.

⁷⁹ *Decree 105/2006* arts 16-20.

⁸⁰ In China the courts only award 'compensatory damages' in a patent litigation: Zhongqi Zhou, 'Judicial Protection of Patent Rights' (2004) *Managing Intellectual Property China IP Focus* 43, citing in Dahman, above n 15, 81 n 169. Article 65 of China's Patent Law 1984, as amended 2008 (WIPO-Lex) provides for the determination of compensation in patent litigation as follows:

The amount of compensation for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement. If it is hard to determine the actual losses, the amount of compensation may be determined according to the benefits acquired by the infringer through the infringement. If it is hard to determine the losses of the patentee or the benefits acquired by the infringer, the amount of compensation may be determined according to the reasonably multiplied amount of the royalties of that patent. The amount of compensation shall include the reasonable expenses paid by the patentee for putting an end to the infringement.

If the losses of the patentee, benefits of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range from 10,000 yuan to 1,000,000 yuan.

- **Property Loss**

Property loss is determined in accordance with the reduced value or loss of the cash value of the subject matter protected by the intellectual property rights.⁸¹ This may be:

- the price of transferring the ownership or licensing of the protected intellectual property subject matter;⁸²
- the value of the business capital contributed in the form of intellectual property rights;⁸³
- the value of these intellectual property rights in the total assets of an enterprise;⁸⁴ or
- the investment in creating and developing the subject matter protected by the intellectual property rights including marketing, researching, advertising, labour costs, taxes, and other expenses.⁸⁵

- **Reduction in Income or Profit**

Reduction in income or profit is determined by a comparison made between the income or profit, gained through the direct use or exploitation, lease, or licensing of the intellectual property subject matter, and that gained by the infringing acts.⁸⁶ This can be done by making a comparison between the yields or volumes of products, goods, or services consumed or supplied, or between the sale price of the products, goods, or services before and after the infringing acts.⁸⁷

⁸¹ *Decree 105/2006* art 17(1).

⁸² *Decree 105/2006* art 17(2)(a).

⁸³ *Decree 105/2006* art 17(2)(b).

⁸⁴ *Decree 105/2006* art 17(2)(c).

⁸⁵ *Decree 105/2006* art 17(2)(d).

⁸⁶ *Decree 105/2006* art 18(1)-(2)(a).

⁸⁷ *Decree 105/2006* art 18(1)-(2)(b)-(c).

- **Loss of Business Opportunity**

Loss of business opportunity is seen as loss of the cash value which would otherwise have been obtained if there had been no infringement.⁸⁸ The loss of the possibility of the direct use, exploitation or leasing or licensing of the intellectual property subject matter are included.⁸⁹

- **Reasonable Expenses**

These reasonable expenses, as used for the preventing and remedying of any damage include the costs of the temporary custody, maintenance, storage of infringing goods, the implementation of provisional urgent measures, the use of assessment services, the prevention and remedy of the consequences of any infringing acts, and notification and correction in the mass media.⁹⁰

(e) Ordering the Destruction, Distribution, or Use of Those on Conditions

This last remedy reflects the implementation of the ‘other remedies’ required by TRIPs Article 46. It reflects some freedom in the manner in which it has been implemented. To make this clear, the meaning of TRIPs Article 46 needs to be considered.

This Article represents a very complex grammatical structure and vocabulary. In the first sentence, it contains six commas to make seven co-ordinate clauses, requiring that the goods which have been found by the judicial authorities to be infringing must be disposed of outside the channels of commerce ‘*in such a manner as to avoid any harm caused to the right holder*’ or destroyed ‘*unless this would be contrary to existing constitutional requirements*’. In the second and third sentences, the same measures apply to materials and

⁸⁸ Decree 105/2006 art 19(2).

⁸⁹ Decree 105/2006 art 19(1).

⁹⁰ Decree 105/2006 art 20.

implements predominantly used in the creation of the infringing goods, subject to a degree of proportionality, *‘in such a manner as to minimize the risks of further infringements’*. In the last sentence, with regard to counterfeit trademark goods it is specified that *‘the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce’*.⁹¹

These provisions raise at least four issues. First, whether such destruction is required to be applied to such materials and implements? Second, how might ‘contrary to existing constitutional requirements’ be understood or explained? Third, what may be the factors considered in the context of ‘proportionality’? Fourth, under what criteria or conditions might a case be seen as ‘exceptional’ so that the counterfeit trademarked goods could be released into the channels of commerce after the simple removal of trademarks unlawfully affixed?

In respect of the first issue, the statement that ‘the same principle applies to materials and implements’,⁹² meaning that these materials and implements can be destroyed like the infringing goods, is argued to be inappropriate. The phrase *‘in such a manner’* appears in the first and the second sentences of the Article and should be understood as having the same meaning. But ‘in such a manner’ is subsequently supplemented by *‘as to avoid any harm caused to the right holder’* in the first sentence and by *‘as to minimize the risks of further infringements’* in the second sentence. In combination with the other words used in the two sentences, the former supplementing phrase gives the clause, ‘in such a manner as to avoid any harm caused to the right holder’, the meaning that the infringing goods must be disposed of outside the channels of commerce to avoid any harm caused to the right holder or destroyed unless this (destruction) ‘would be contrary to existing constitutional requirements’. Whereas, the latter supplementing phrase gives the clause, ‘in such a manner as to minimize the risks of further infringements’, the meaning that materials and implements predominantly used in the creation of the infringing goods must be disposed of

⁹¹ All emphases are added.

⁹² Gervais, above n 1, 300.

outside the channels of commerce to minimize the risks of further infringements. They give no any further indication that these materials and implements can also be destroyed like such infringing goods.

In other words, the same phrase or the same form of words may have different meanings as indicated by Hart, as discussed in Chapter 2.⁹³ In this case it does not lead to an understanding that those materials and implements can also be destroyed like those infringing goods. This is supported by the structure and wording of the second sentence which makes it clear that those materials and implements are obliged to be ‘disposed of outside the channels of commerce’ only, not destroyed. This meaning suits the nature of those ‘materials and implements’ which are predominantly used only for producing the infringing goods, not the infringing goods themselves so that their destruction may be unnecessary in practice.

In respect of the second issue, the Article does not make clear what is meant by ‘contrary to existing constitutional requirements’. This phrase is once previously used in the last sentence of Article 42 in requiring ‘fair and equitable procedures’ to be provided in judicial proceedings in general.

However, in Article 42, ‘contrary to existing constitutional requirements’ is used in its last sentence to directly qualify the means to identify and protect confidential information. The construction of the sentence ‘The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements’ has at least two implications.

First, the word ‘procedure’ is singular used with the definite article ‘the’. So the phrase ‘the procedure’ must refer to what is required only in the sentence. Second, the whole sentence excludes ‘the procedure’ or ‘a means to identify and protect confidential information’

⁹³ The details are given in note 21 in Chapter 2 on conceptualizing law’s flexibility.

where it, or the identification and protection of confidential information, is ‘contrary to existing constitutional requirements’.

This has been argued to apply where a national constitution may ban secrecy in civil judicial proceedings⁹⁴ as found in the constitutions of some South American or Southeast Asian countries.⁹⁵ Consequently, it is argued that where the members’ constitutional requirements prevent them from destroying the products in question, they are limited to choosing this option.⁹⁶ While the former seems easy to be admitted as a general issue which may be reasonably determined by the national constitution, the latter is not so easily accepted. This is because it is uncommon for a national constitution to have such provisions. It may be that another law, made under the constitution, has that affect and this may be regarded as falling within the provision.

Similarly, there are arguments over the meaning of the third and the fourth issues. For example, there are issues about the objective circumstances of an individual case, such as the commercial or the systemic business nature of the actions, and the subjective criteria, such as the degree of fault and the intentionality or negligence of the infringing behaviour, should be taken into account to produce proportionality between the seriousness of the infringement and the remedies ordered as well as the impact on third parties’ interests.⁹⁷ In respect of the fourth issue, where an infringement is conducted in a private, non-professional, non-business, or non-systemic environment and the counterfeit trademark goods, after the removal of the infringing labels, are ordered to be given to charity, it has been argued that this meets the ‘exceptional’ criterion.⁹⁸

The implementation of these TRIPs provisions in Vietnam firstly provides in the 2005 Intellectual Property Law for the compulsory destruction, distribution, or putting into use

⁹⁴ See above Gervais, n 1, 291; Stoll, Busche and Arend, n 34, 707.

⁹⁵ Gervais, *ibid.*

⁹⁶ Stoll, Busche and Arend, above n 34, 725.

⁹⁷ *Ibid.*, 727.

⁹⁸ *Ibid.*, 728.

for non-commercial purposes of goods, raw materials, materials, and devices mainly used for producing or trading of goods which infringe intellectual property rights, provided that such destruction, distribution, or use does not affect the exploitation of their rights by the right holders.⁹⁹

A government sub-law permits to distribute or to use counterfeit goods compulsorily for non-commercial purposes. The goods must be useable,¹⁰⁰ infringing elements must have been removed,¹⁰¹ and the normal exploitation of the rights of the intellectual property holder must not be unreasonably affected.¹⁰² Humanitarian, charitable, and public interests are privileged,¹⁰³ and the persons to whom the goods are distributed or delivered for use must not be potential customers of the intellectual property rights holder.¹⁰⁴ Where these conditions are not satisfied, the intellectual property counterfeit goods, infringing goods, raw materials, materials, and devices mainly used for the production or trading of such goods are compelled to be destroyed.¹⁰⁵ Usually the courts can only make awards requested by the parties but the guidance given to them in this case indicates that they are able to order such destruction, distribution, or use without depending upon whether such a request has been made by the holders of the intellectual property rights.¹⁰⁶

2. Administrative Measures

Apart from the general obligations applying to all procedures for the enforcement of intellectual property rights, TRIPs briefly refers to administrative procedures:

⁹⁹ *Intellectual Property Law 2005* art 202(5).

¹⁰⁰ *Decree 105/2006* art 30(1)(a).

¹⁰¹ *Decree 105/2006* art 30(1)(b).

¹⁰² *Decree 105/2006* art 30(1)(c).

¹⁰³ *Ibid.*

¹⁰⁴ *Decree 105/2006* art 30(1)(d).

¹⁰⁵ *Decree 105/2006* art 31.

¹⁰⁶ *Joint Circular 02/2008* Part B(IV)(4)(5.1).

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this section.¹⁰⁷

This provision relates back to Articles 42-48 which, together with Article 49, are placed under the title, ‘Civil and Administrative Procedures and Remedies’. The effect of this is the phrase or words ‘the judicial authorities shall have the authority’, as used throughout these Articles in respect of civil procedures, also extend to administrative measures.

In implementing this requirement, Vietnamese law essentially provides for administrative sanctions for acts infringing rules for intellectual property rights,¹⁰⁸ the forms of these administrative penalties and remedies,¹⁰⁹ and also for preventive measures.¹¹⁰ TRIPs Article 41:5 confirms that the enforcement of intellectual property does not affect the capacity of members to enforce their general law. As a result, Vietnam can still use its own system of administrative agencies which apply administrative remedies and measures. Since TRIPs Article 49 obliges members to conform to ‘principles’, not ‘provisions’, it has been argued that this leaves considerable room in which national legislators may adapt administrative procedures to enforce intellectual property rights.¹¹¹

Vietnam has established an extensive system of government agencies provided with the authority to tackle violations against administrative rules. This is a feature which it may share with China. Chinese intellectual property cases are mostly dealt with in the administrative system rather than in civil or criminal courts.¹¹² It is argued that the administrative system should be chosen because of its more flexible, less expensive aspects

¹⁰⁷ *TRIPs Agreement* art 49.

¹⁰⁸ *Intellectual Property Law 2005* art 211.

¹⁰⁹ *Intellectual Property Law 2005* art 214.

¹¹⁰ *Intellectual Property Law 2005* art 215.

¹¹¹ UNCTAD & ICTSD, *Resource Book on TRIPs and Development* (Cambridge University Press, 2005) 600.

¹¹² Natalie P Stoianoff, ‘Convergence, Coercion and Counterfeiting: Intellectual Property Rights Enforcement in the People’s Republic of China’ (2007) 4 *Macquarie Journal of Business Law* 245, 259-60; BBC Monitoring Asia Pacific, ‘US intellectual property envoy interviewed on China’s IPR enforcement conundrum’ (30 April 2006) <www.proquest.com> (visited 22 October 2011).

and because it results in the seizure of large quantities of counterfeit goods.¹¹³ But it is also argued that it may be effective in stopping the conduct but that the system is ineffective in imposing damages.¹¹⁴ In Vietnam, enforcing intellectual property rights in administrative processes overseen by government agencies is the most common approach.¹¹⁵ This has, as indicated below, seemingly proven more effective than actions before the courts or the threat of such actions.¹¹⁶

According to the 2012 Law on Handling Violations against Administrative Rules, government agencies which are empowered to handle administrative violations include the People's Committees at every level (communal, district, and provincial); the Police; the Boundary Defence Force; the Coast Guard; the Customs; the Forest Patrol; the Tax Office; the Market Control Unit; the Specialized Inspectorates such as Industrial Property Specialist Inspectorates and Culture-Sports-Tourism Inspectorates; the Seaport, Airport, and Inland Waterway Port Authorities; the People's Courts; and the Civil Judgement Enforcement Agencies.¹¹⁷ Apart from other primary and additional forms of administrative penalties, monetary fines, which serve as one of the primary penalty forms,¹¹⁸ are provided

¹¹³ Daniel C K Chow, 'Organized Crime, Local Protectionism, and the Trade in Counterfeit Goods in China' (2003) 14 *China Economic Review* 473, 483, citing in Dahman, above n 15, 67 n 17.

¹¹⁴ Dahman, above n 15, 85; Jeffrey M Duncan, Michelle A Sherwood and Yuanlin Shen, 'A Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China' (2008) 7(3) *John Marshall Review of Intellectual Property Law* 529, 539-40. See also Sepetys and Cox, above n 17.

¹¹⁵ The Vietnamese administrative systems have dealt with up to 90 percent of detected violations according to a study conducted by the National University of Hanoi in 2005: The Supreme People's Court's Institute for Hearing Improvement, *Chuyên đề khoa học xét xử: Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân* [Special Issue: Legislation on Civil Procedures for Handling Disputes Over Intellectual Property Rights in the People's Courts] (Justice Publishing House, 2010) 47. See also Global Intellectual Property, below n 126.

¹¹⁶ The number of intellectual property cases in general and copyright cases in particular which have been heard in the Vietnamese judiciary is discussed in the next chapter, or Chapter 8, on case studies of the trial of disputes over copyright in Vietnam.

¹¹⁷ See *Law on Handling Violations against Administrative 2012* arts 38-51: This Law substitutes the 2002 Ordinance on Handling Violations against Administrative Rules, as amended 2007 and 2008. The extensive use of administrative agencies in this way is a characteristic of the modern state. It is also a feature of civil and socialist legal traditions. In particular, socialism significantly reduced the role of the laws and the courts for ideological reasons. See generally Pip Nicholson, *People Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007); John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 60-2.

¹¹⁸ *Law on Handling Violations against Administrative 2012* art 21(1)-(2).

ranging from VND 50,000 to VND 1,000,000,000 applied to individuals' administrative violations and VND 100,000 to VND 2,000,000,000 applied to organizations.¹¹⁹

In respect of the administrative enforcement of intellectual property rights, the application of administrative remedies is regulated to fall within the competence of inspectorates, police offices, market control offices, customs offices, and people's committees at all levels.¹²⁰ In appropriate cases, these bodies are entitled to apply administrative sanctions and other preventive measures in accordance with laws and regulations.¹²¹ In fighting with these infringements, for example, in the four years between 1999 and 2003 the Customs handled around 400 cases relating to imports and exports while the Science and Technology Inspectorate took action in respect of 252 factories and offices, imposing a total of VND 750,000,000 of monetary fines as well as issuing warnings.¹²² Also, from 1996 to the first quarter of 2004, the Culture and Information Inspectorate discovered 166,887 cases of infringement to have transferred 788 cases to criminal investigation.¹²³ Not only the Inspectorate based on that seized 1,701,074 video tapes, 1,270,503 CDs, VCDs and DVDs, and 4,133 transceivers or television sets which infringed intellectual property rights, but also suspended the activity of 7,970 firms and fined them VND 120,000,000.¹²⁴

This progress continued in 2007, for example, with 2,496 cases undertaken by the Market Management Unit; 27 cases by the Customs; and 400 cases by the Cultural-Sports-Tourism Inspectorate.¹²⁵ In 2012, it was reported that the Scientific-Technological Inspectorate inspected 69 enterprises, detected and sanctioned 36 cases of infringement, forced the removal of infringing elements from 25,703 products, and confiscated for destruction 7,462

¹¹⁹ *Law on Handling Violations against Administrative* 2012 art 2.

¹²⁰ *Intellectual Property Law 2005* art 200(3) the first sentence.

¹²¹ *Intellectual Property Law 2005* art 200(3) the second sentence.

¹²² See Question 299 of WTO Doc WT/ACC/VNM/41 (20 December 2005).

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ See Question 16, European Commission Intellectual Property Enforcement Survey 2009 (in the case of Vietnam), above n 7.

products containing infringing signs.¹²⁶ Also in this year, the Market Management Units handled 9,556 cases of infringement with total fines of VND 3,800,000,000.¹²⁷ At the same time, the Customs received and handled approximately 100 requests for boundary checking and monitoring of goods with intellectual property protection with sanctions amounting to nearly VND 300,000,000.¹²⁸ A similar trend is seen in Police Offices. In 2012 these Offices investigated and detected 156 cases of counterfeiters producing and trading in counterfeit goods including food, clothes, cosmetics, wine, accessories, and drugs with fines of over VND 2,400,000,000.¹²⁹

Except for the Customs authority being discussed later in the context of border measures under TRIPs, the other competent government agencies responsible for administrative enforcement, particularly the relevant specialist inspectorates, are considered below.

2.1 Scientific-Technological Specialized Inspectorates

In general, the scientific-technological inspectorates are authorized to deal with breaches of administrative rules relating to industrial property provided for in Articles 5 to 14 of Decree 97/2010,¹³⁰ except for those committed in the transit or import of goods.¹³¹

¹²⁶ Global Intellectual Property, *Infringement of Intellectual Property Rights in Vietnam* 1-3 GIP ASEAN <<http://gip-asean.com/information/newsletter201404vn.pdf>>.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Articles 5-14 Decree 97/2010 stipulates the following administrative violations presented here by the title of the article and with the minimum and maximum amounts of fines in VND in brackets:

- Article 5: Violations of Rules on Procedures for Establishment, Exercise, and Protection of Industrial Property Rights (5 million - 20 million);
- Article 6: Violations of Rules on Indications of Protection of Industrial Property Rights (3 million - 5 million);
- Article 7: Violations of Rules on Industrial Property Representation (2 million - 20 million);
- Article 8: Violations of Rules on Industrial Property Assessment (2 million - 20 million);
- Article 9: Violations of Rules on Industrial Property Check and Monitoring (1 million - 20 million);
- Article 10: Violations of the Rights to Inventions, Utility Solutions, or Layout Designs (2 million - 500 million);
- Article 11: Violations of the Rights to Marks, Geographical Indications, Trade Names, or Industrial Designs (3 million - 500 million);
- Article 12: Producing, Importing, Trading, Transporting, or Storing for Sale of Goods Bearing Counterfeit Marks or Geographical Indications (4 million - 500 million);

(a) Industrial Property Administrative Violations

Administrative breaches within the jurisdiction of the scientific-technological inspectorates include violations of provisions on the state management of industrial property and infringements of industrial property rights or acts of unfair competition in relation to industrial property.¹³²

(b) Primary and Extra Penalties

Administrative penalties are divided into different forms with either primary or extra penalties.¹³³ Primary penalties consist of cautions or warnings and fines.¹³⁴ A caution can be given to violations in cases which are specified in Article 13 of the Ordinance on Handling Violations against Administrative Rules and in other provisions of Decree 97/2010 which allow the application of it to such provided acts.¹³⁵ Fines must be calculated based on the prescribed range for each violation specified in relevant provisions of Decree 97/2010 with the maximum amount up to VND 500,000,000.¹³⁶ Scientific-technological inspectors have some discretion to apply the law within those limits.

In addition, one or more extra penalties can be applied together with one only of the two forms of primary penalties.¹³⁷ These extra, or additional, penalties comprise:

- confiscating evidence, means of violation, including goods bearing counterfeit marks or geographical indications; raw materials, materials, and devices mainly

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- Article 13: Producing, Importing, Trading, Transporting, or Storing for Sale of Stamps, Labels, or Articles Bearing Counterfeit Marks or Geographical Indications (1 million - 70 million); and
 - Article 14: Unfair Competition in the Industrial Property Domain (2 million - 70 million).

¹³¹ Decree 97/2010 art 15(1).

¹³² Decree 97/2010 art 2.

¹³³ Decree 97/2010 art 3(1)-(2).

¹³⁴ Decree 97/2010 art 3(1) the first sentence.

¹³⁵ Decree 97/2010 art 3(1)(a): The Ordinance on Handling Violations against Administrative Rules 2002, as amended 2007 and 2008, has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

¹³⁶ Decree 97/2010 art 3(1)(b).

¹³⁷ Decree 97/2010 art 3(2) the first sentence.

used for producing or trading in such goods; stamps, labels, packages, and other articles bearing infringing elements; means of business, including servicing and advertising means containing infringing elements; and, protection titles, certificates or other documents having been modified, erased, or forged;¹³⁸

- depriving, for a limited period or indefinitely, certificates authorizing practice as industrial property representative, the accreditation card of an industrial property assessor; or certificates of eligibility for assessment practice;¹³⁹ and
- suspending for a limited period production and business activities which infringe industrial property rights in products or services.¹⁴⁰

(c) Administrative Remedies

Apart from the primary and extra penalties, violators of industrial property rights may be compelled to undertake one or more of the following remedies:

- removing the infringing elements from goods or means of business; removing information or indications on infringing goods or services from means of business, including advertising means, computer networks or altering and revocating domain names or enterprise names containing infringing elements;¹⁴¹
- distributing or putting into use for non-commercial purposes goods bearing counterfeit marks or geographical indications or goods infringing on industrial property rights or raw materials, materials, or devices mainly used for producing or trading in such goods providing that such distribution or use does not affect the exploitation of their rights by industrial property holders;¹⁴²
- removing from the territory of Vietnam goods in transit infringing upon industrial property rights or to re-export goods with counterfeit marks or geographical

¹³⁸ Decree 97/2010 art 3(2)(a).

¹³⁹ Decree 97/2010 art 3(2)(b).

¹⁴⁰ Decree 97/2010 art 3(2)(c).

¹⁴¹ Decree 97/2010 art 3(3)(a).

¹⁴² Decree 97/2010 art 3(3)(b).

indications, or imported devices, raw materials, and materials used primarily for producing or trading in such goods, after infringing elements have been removed from the goods;¹⁴³

- destroying infringing elements, infringing goods, evidence, devices from which the infringing elements cannot be removed or infringing goods which may cause harm to human health, or to animals, plants, or the environment; destroying stamps, labels, packages, and other articles bearing infringing elements;¹⁴⁴
- modifying or adding (to goods) the indications of industrial property;¹⁴⁵
- publicly rectifying wrongful indications of industrial property rights;¹⁴⁶
- collecting evidence, or the means, of violation of industrial property rights which are dispersed or hidden;¹⁴⁷ and
- handing over to the state budget the earnings made from committing the offences subject to administrative remedies.¹⁴⁸

(d) Competence to Issue Penalties

While they are on duty, inspectors of Science and Technology Ministry's Inspectorate and provincial-level Science and Technology Departments' Inspectorates can issue a warning;¹⁴⁹ decide to confiscate evidence or the means of violation to the value of VND 2,000,000;¹⁵⁰ and they may apply remedies provided for in Article 3(a), (d), (đ), (e) and (g) of Decree 97/2010.¹⁵¹

¹⁴³ Decree 97/2010 art 3(3)(c).

¹⁴⁴ Decree 97/2010 art 3(3)(d).

¹⁴⁵ Decree 97/2010 art 3(3)(d).

¹⁴⁶ Decree 97/2010 art 3(3)(e).

¹⁴⁷ Decree 97/2010 art 3(3)(g).

¹⁴⁸ Decree 97/2010 art 3(3)(h).

¹⁴⁹ Decree 97/2010 art 16(1)(a).

¹⁵⁰ Decree 97/2010 art 16(1)(b).

¹⁵¹ Decree 97/2010 art 16(1)(c).

The chief inspectors of provincial-level Science and Technology Departments' Inspectorates are authorized to decide a caution¹⁵² or a fine of up to VND 30,000,000.¹⁵³ They are empowered: to confiscate evidence and means of industrial property violation;¹⁵⁴ to deprive, for a limited period, certificates authorizing practice as an industrial property representative;¹⁵⁵ to suspend for up to three months the business activities which infringe the industrial property rights in products or services;¹⁵⁶ and, to apply other remedies provided for in Article 3(3)(a), (b), (d), (d), (e), (g), and (h) of Decree 97/2010.¹⁵⁷

The chief inspector of Science and Technology Ministry's Inspectorate can decide to caution¹⁵⁸ or to impose a fine of up to VND 500,000,000.¹⁵⁹ He or she is empowered to impose a number of sanctions: depriving, for a limited period or indefinitely, certificates authorizing practice as industrial property representative, the accreditation card of an industrial property assessor, or certificates of eligibility for assessment practice;¹⁶⁰ suspending for up to six months the business activities which infringe the industrial property rights in products or services;¹⁶¹ confiscating evidence and means of industrial property violation;¹⁶² and, applying remedies provided for in Article 3(3)(a), (b), (d), (d), (e), (g), and (h) of Decree 97/2010.¹⁶³

Acts of infringement and particular sanctions and levels of sanctioning are provided in Decree 97/2010.¹⁶⁴ These provisions permit scientific-technological inspectors to take a flexible approach to infringements. For instance, a fine of between VND 5,000,000 and VND 10,000,000 may be imposed where an individual or organization has modified or

¹⁵² Decree 97/2010 art 16(2)(a).

¹⁵³ Decree 97/2010 art 16(2)(b).

¹⁵⁴ Decree 97/2010 art 16(2)(c).

¹⁵⁵ Decree 97/2010 art 16(2)(d).

¹⁵⁶ Decree 97/2010 art 16(2)(đ).

¹⁵⁷ Decree 97/2010 art 16(2)(e).

¹⁵⁸ Decree 97/2010 art 16(3)(a).

¹⁵⁹ Decree 97/2010 art 16(3)(b).

¹⁶⁰ Decree 97/2010 art 16(3)(c).

¹⁶¹ Decree 97/2010 art 16(3)(d).

¹⁶² Decree 97/2010 art 16(3)(đ).

¹⁶³ Decree 97/2010 art 16(3)(e).

¹⁶⁴ See above n 130.

erased titles or documents evidencing industrial property rights.¹⁶⁵ Similarly, where a product is found to have been produced from a process infringing upon the protected rights to inventions or utility solutions and with the goods detected in the violation valued between over VND 70,000,000 and VND 100,000,000, a fine of between VND 50,000,000 and VND 80,000,000 can be imposed if one of the acts provided for in Article 10:1 of Decree 97/2010.¹⁶⁶ These include selling; offering for sale; transporting, including transiting; storing; or displaying for sale that product for business purposes. Also, a fine of between VND 10,000,000 and VND 20,000,000 can be applied where an individual or organization has carried out the act of advertising products infringing on the protected rights to inventions, utility solutions, layout designs, or products produced from a process infringing upon the protected rights to inventions or utility solutions.¹⁶⁷ Some additional penalties and remedies are also provided in the context of this infringement.¹⁶⁸

2.2 Culture-Sports-Tourism Specialized Inspectorates

As with the inspectorates of science and technology dealing with administrative violations of industrial property rights, specialized inspectorates in the culture, sports, and tourism sectors handle administrative infringements of copyright and related rights.

As with the scientific-technological inspectorates, there are principal and additional sanctions and remedies which these officials may impose when handling violations of copyright and related rights.

(a) Principal and Additional Sanctions

The principal administrative sanctions for violating copyright and related rights consist of warnings or cautions and fines.¹⁶⁹ There are the following additional penalties:

¹⁶⁵ *Decree 97/2010* art 5(1)(a).

¹⁶⁶ *Decree 97/2010* art 10(6).

¹⁶⁷ *Decree 97/2010* art 10(14).

¹⁶⁸ See *Decree 97/2010* art 10(15)-(16).

¹⁶⁹ *Decree 47/2009* art 3(1).

- confiscating goods infringing copyright or related rights, raw materials, materials, devices and apparatuses used for producing or trading in such goods;¹⁷⁰
- suspending business, consulting, or servicing activities for a definite period of between 90 to 180 days;¹⁷¹
- confiscating copyright or related rights certificates and other relevant documents which are modified, erased, forged, or revoked;¹⁷² and
- depriving the right to use the accreditation card as an assessor of copyright or related rights.¹⁷³

(b) Administrative Remedies

Apart from the primary and extra penalties, infringers of copyright and related rights may be forced to comply with orders relating to one or more of the following remedies:

- to rectify the names of authors, titles of works, the mention of the names, or the integrity of works, performances, sound recordings, visual recordings, and broadcasts;¹⁷⁴
- to destroy goods infringing copyright or related rights;¹⁷⁵
- to destroy, distribute, or put into use raw materials, materials, and devices used for producing goods infringing copyright or related rights, providing that such destruction, distribution, or use does not affect the exploitation of their rights by the holders of copyright or related rights;¹⁷⁶
- to remove from the territory of Vietnam or to re-export:
 - + goods in transit or imports infringing copyright or related rights;¹⁷⁷

¹⁷⁰ Decree 47/2009 art 3(2)(a).

¹⁷¹ Decree 47/2009 art 3(2)(b).

¹⁷² Decree 47/2009 art 3(2)(c).

¹⁷³ Decree 47/2009 art 3(2)(d).

¹⁷⁴ Decree 47/2009 art 4(1).

¹⁷⁵ Decree 47/2009 art 4(2).

¹⁷⁶ Decree 47/2009 art 4(3).

¹⁷⁷ Decree 47/2009 art 4(4)(a).

- + imported devices, apparatuses, raw materials, or materials used for producing or trading in copies made without the permission of the holders of copyright or related rights or of the collective organizations representing the holders of copyright or related rights;¹⁷⁸ and
- + apparatuses in transit or imports used for making technical measures, which can be devised by the owners of copyright or related rights for preventing the infringement of their rights, unable to operate.¹⁷⁹
- to collect back or hand over evidence or the means of infringement which are dispersed or hidden;¹⁸⁰
- to remove the originals or copies of works, performances, sound recordings, visual recordings, and broadcasts which are illegally diffused over the internet;¹⁸¹ and
- to detach copies of works, performances, sound recordings, visual recordings, and broadcasts which are unlawfully made in an electronic form.¹⁸²

(c) Competence to Issue Sanctions

Specialized inspectors of the Ministry of Culture, Sports, and Tourism and of provincial Departments of Culture, Sports, and Tourism, while on duty, can issue a caution or impose a fine of up to VND 500,000.¹⁸³ They can also decide to confiscate evidence, devices used for producing or trading in goods infringing copyright or related rights valued at up to VND 2,000,000.¹⁸⁴ Except for the remedy of enforcing the removal from the territory of Vietnam or re-exporting goods infringing copyright or related rights, they are authorized to apply all other remedies as indicated in sub-section (b) above.¹⁸⁵

¹⁷⁸ Decree 47/2009 art 4(4)(b).

¹⁷⁹ Decree 47/2009 art 4(4)(c).

¹⁸⁰ Decree 47/2009 art 4(5).

¹⁸¹ Decree 47/2009 art 4(6).

¹⁸² Decree 47/2009 art 4(7).

¹⁸³ Decree 47/2009 art 45(1)(a).

¹⁸⁴ Decree 47/2009 art 45(1)(b).

¹⁸⁵ Decree 47/2009 art 45(1)(c).

Both the chief inspector of the Ministry of Culture, Sports, and Tourism and the chief inspector of a provincial Department of Culture, Sports, and Tourism are empowered to issue a warning or impose a fine.¹⁸⁶ This fine may be up to VND 30,000,000 for the latter but up to the maximum level of the ranges set out in Decree 47/2009 for the former.¹⁸⁷ Except for the remedy of enforcing the removal from the territory of Vietnam or re-exporting goods infringing copyright or related rights, they are authorized to apply all other extra penalties and remedies as indicated in sub-sections (a) and (b) above.¹⁸⁸

Similar to administrative violations of industrial property rights under Decree 106/2006, substituted by Decree 97/2010,¹⁸⁹ acts of infringement of copyright and related rights and particular sanctions are set out in Decree 47/2009, as revised by Decree 109/2011. Again, there is considerable flexibility in applying these provisions. For instance, a fine of between VND 5,000,000 and VND 10,000,000 is provided for where a collective representative organization of copyright or related rights operates beyond the activities for which it is licensed.¹⁹⁰ These amounts also apply to the act of transporting goods infringing copyright or related rights.¹⁹¹ In this case the infringing goods can be subject to an extra or additional sanction of confiscation and remedies of compelling their destruction or removing from the territory of Vietnam or re-exporting if they are in transit or imported.¹⁹² Here, the issues for those inspectors are that what may be the grounds for exercising their discretion in determining the amount of the penalty so that it is reasonable and that whether their decision to impose extra or additional penalties or remedies is rightly based on the circumstances and merits of the case, and so on.¹⁹³

¹⁸⁶ *Decree 47/2009* art 45(2)(a)-(3)(a).

¹⁸⁷ *Ibid.*

¹⁸⁸ *Decree 47/2009* art 45(2)(b)(c)-(3)(b)(c).

¹⁸⁹ See above n 130.

¹⁹⁰ *Decree 47/2009* art 7(2).

¹⁹¹ *Decree 47/2009* art 11(1).

¹⁹² *Decree 47/2009* art 11(2)-(3).

¹⁹³ This is particularly found in provisions of Articles 6-44 Decree 47/2009 which stipulate the following administrative violations presented here by the title of the article and with the minimum and maximum amounts of fines in VND in brackets: 6- Violations of Rules on Registration (200 thousand - 15 million); 7- Violations of Rules on the Operation of Collective Management Organizations (1 million - 15 million); 8- Violations of Rules on Assessment of Copyright and Related Rights (5 million - 10 million); 9- Violations of Rules on Copyright or Related Rights Consultancy and Service (2 million - 20 million); 10- Illegally Impeding

2.3 Plant Varieties Specialized Inspectorates

As discussed in Chapter 5, the intellectual property rights to plant varieties are protected under the 2005 Intellectual Property Law as well as other relevant laws and regulations.

Inspectorates specialized in plant varieties are organized within the Ministry of Agriculture and Rural Development and provincial Departments of Agriculture and Rural Development apart from such other relevant divisions as Forestry Branch and Plant Protection Branch.¹⁹⁴ The maximum monetary penalty for an act violating intellectual property rights in plant varieties is up to VND 50,000,000 for an individual and VND 100,000,000 for a legal

State Managing, Inspecting, and Monitoring Copyright and Related Rights (200 thousand - 15 million); 11-Transporting Goods Infringing Copyright or Related Rights (5 million - 10 million); 12-Storing or Harboring Goods Infringing Copyright or Related Rights (20 million - 30 million); 13-Advertising Goods Infringing Copyright or Related Rights (1 million - 10 million); 14-Violations of Authors' Rights to Put Names to Works or to Name Works (200 thousand - 20 million); 15-Violations of Authors' Right to Protect the Integrity of Works (3 million - 15 million); 16-Violations of Copyright Holders' Right to Publish Works (5 million - 30 million); 17-Violations of Copyright Holders' Right to Make Derivative Works (2 million - 20 million); 18-Violations of Copyright Holders' Right to Perform Works to the Public (2 million - 30 million); 19-Violations of Copyright Holders' Right to Lease Originals or Copies of Cinematographic Works or Computers Software (10 million - 50 million); 20-Violations of Copyright Holders' Right to Distribute Works by Sale Form (500 thousand - 500 million); 21-Violations of Copyright Holders' Right to Import Originals or Copies of Works (10 million - 50 million); 22-Violations of Copyright Holders' Right to Communicate Works to the Public (20 million - 100 million); 23-Violations of Copyright Holders' Right to Reproduce Works (1 million - 500 million); 24-Violations of Making Works with Authors' Signature Forged (15 million - 30 million); 25-Violations of Selling Works with Authors' Signature Forged (10 million - 20 million); 26-Violations of Copyright Holders' Right to Use Technological Measures to Self-Protect Copyright (5 million - 60 million); 27-Violations of Making Copyright Holders' Rights to Wrong Persons Enjoyed (70 million - 500 million); 28-Violations of Performers' Right to Be Introduced Names When Performing (200 thousand - 15 million); 29-Violations of Performers' Right to Protect the Performing Integrity (3 million - 20 million); 30-Violations of Rights to Fix a Live Performance (5 million - 15 million); 31-Violations of Rights to Directly or Indirectly Reproduce Performances (1 million - 500 million); 32-Violations of Rights to Broadcast or Diffuse by Other Devices Unfixed Performances (30 million - 70 million); 33-Violations of Rights to Distribute to the Public Originals or Copies of Performances (500 thousand - 500 million); 34-Violations of Rights to Directly or Indirectly Reproduce Sound or Visual Recordings (1 million - 500 million); 35-Violations of Rights to Distribute to the Public Originals or Copies of Sound or Visual Recordings (500 thousand - 500 million); 36-Violations of Using Others' Published Sound or Visual Recordings for Commercial Purposes (20 million - 50 million); 37-Violations of Rights to Publish, Produce, and Distribute Sound or Visual Recordings (500 thousand - 500 million); 38-Violations of Rights to Broadcast or Rebroadcast Broadcasts (50 million - 100 million); 39-Violations of Rights to Distribute to the Public Broadcasts (500 thousand - 500 million); 40-Violations of Rights to Fix Broadcasts (20 million - 50 million); 41-Violations of Rights to Reproduce Broadcasts (1 million - 500 million); 42-Violations of Extracting Broadcasts [to Make them into Another] (10 million - 50 million); 43-Violations of Rights to Use Technological Measures to Self-Protect Related Rights (5 million - 100 million); and, 44-Violations of Making the Holders' Related Rights to Wrong Persons Enjoyed (70 million - 500 million).

¹⁹⁴ See *Decree 114/2013* art 33.

entity.¹⁹⁵ The chief inspector of the Ministry of Agriculture and Rural Development is empowered to decide a fine of up to this amount¹⁹⁶ while the chief inspector of provincial Departments of Agriculture and Rural Development can impose up to half of it.¹⁹⁷ There are also primary and extra sanctions and remedies. Primary sanctions consist of cautions or warnings and fines.¹⁹⁸ Extra sanctions and remedies include: depriving the right to use business licenses or certificates for a professional practice; suspending, for a limited period, activities which infringe intellectual property rights in plant varieties; confiscating evidence and means of plant variety violation; compelling the carrying out of measures for handling the environment or epidemic; and, forcing the removal from the territory of Vietnam or re-exporting infringing goods, objects and devices.¹⁹⁹

Similar to the structure of Decree 97/2010 (replacing Decree 106/2006) and Decree 47/2009 (revising by Decree 109/2011),²⁰⁰ Decree 114/2013 (substituting Decree 57/2005 and Decree 72/2007) Articles 6-18 describes administrative violations with infringing acts, penalty forms, and remedies from each.²⁰¹

¹⁹⁵ Decree 114/2013 art 5(1).

¹⁹⁶ See Decree 114/2013 arts 5(2) & 33(4)(b).

¹⁹⁷ Decree 114/2013 arts 5(2) & 33(2)(b).

¹⁹⁸ Decree 114/2013 art 4(1).

¹⁹⁹ Decree 114/2013 art 4(2)-(3).

²⁰⁰ See above nn 130 & 193.

²⁰¹ In particular, Articles 6-18 of Decree 114/2013 stipulates the following administrative violations presented here by the title of the article and with the minimum and maximum amounts of fines in VND in brackets:

- Article 6: Violations of [Rules on] Management, Use, and Preservation of Genetic Resources of Plant Varieties in Reservation Parks (3 million - 20 million);
- Article 7: Violations of [Rules on] Collection and Preservation of Genetic Resources of Rare Plant Varieties Named in the Rare Plant Species Conservation List (15 million - 40 million);
- Article 8: Violations of [Rules on] Exporting Genetic Resources of Rare Plant Species (10 million - 50 million);
- Article 9: Violations of [Rules on] Value for Cultivation and Use [VCU] Testing or Distinctness, Uniformity and Stability [DUS] Testing (3 million - 15 million);
- Article 10: Violations of [Rules on] Using New Plant Varieties Being in the Testing Process or Pilot Production (5 million - 20 million);
- Article 11: Violations of [Rules on] Management of the Best Cultivars, the Gardens for the Best Fiber Crops or Old Fruit Trees (5 million - 10 million);
- Article 12: Violations of the Rights of Protection Title Holders (20 million - 50 million);
- Article 13: Violations of [Rules on Performing] Obligations of Holders of Protection Title and Authors (15 million - 50 million);
- Article 14: Violations of [Rules on] Producing and Trading in Primary Plant Varieties (5 million - 20 million);

Also similar to administrative violations of industrial property rights and copyright and related rights, certain flexibilities are often seen in dealing with the infringement of the rights of plant variety breeders. For example, a fine of between VND 40,000,000 and VND 50,000,000 applies to one of the following acts where it is performed without authorization of the holder of the protection title in respect of reproductive materials of the protected plant variety: production or multiplication; processing for propagation purposes; offering for sale; selling or marketing; exporting; importing; storing for carrying out one of the afore-mentioned acts; and, conducting one of those afore-mentioned acts to a plant variety whose production requires a repeated use of the protected plant variety or to a plant variety which originates from the protected plant variety except that the protected plant variety originates from another protected plant variety.²⁰²

2.4 Market Control Units

Market control units in Vietnam are regulated by Government Decree 10/CP of 23 January 1995 on Organization, Function, and Authority of Market Control System (Decree 10/CP). These units are originally organized within the Department of Market Control under the Ministry of Commerce, provincial Sub-Departments of Market Control, and district Teams of Market Control.²⁰³ They are now within the Ministry of Industry and Commerce which amalgamated the Ministries of Industry and Commerce.²⁰⁴

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- Article 15: Violations of [Rules on] Producing Plant Varieties (5 million - 50 million);
 - Article 16: Violations of [Rules on] Doing Business in Plant Varieties (15 million - 25 million);
 - Article 17: Violations of [Rules on] Exporting or Importing Plant Varieties or Genetic Resources of Non-Rare Plant Species (15 million - 50 million); and
 - Article 18: Violations of [Rules on] Monitoring Business Licenses or Certificates for Professional Practice of Plant Varieties (1 million - 20 million).

²⁰² *Decree 114/2013* art 12(2).

²⁰³ *Decree 10/CP* art 2.

²⁰⁴ The Ministry of Industry and Commerce is established under Government Decree 189/2007/NĐ-CP of 27 December 2007. As relating to market control units, Decree 10/CP is amended and supplemented by Government Decree 27/2008/NĐ-CP of 13 March 2008. Almost one year later, the Prime Minister enacted Decision 19/2009/QĐ-TTg of 6 February 2009 on Regulating the Function, Authority, and Structure of the Department of Market Control under the Ministry of Industry and Commerce.

In terms of industrial property administrative enforcement, not all officers in market management units are authorized to deal with administrative violations. The power is limited to Heads of Market Control Teams, Directors of Market Control Sub-Departments and the Director of the Market Control Department.²⁰⁵

These officials are empowered to handle industrial property violations set out in Articles 6, 9 and infringing acts set out in Articles 11, 12, 13 of Decree 97/2010 in the trading and transporting of goods in domestic markets.²⁰⁶ Further, Article 18 of Decree 97/2010 states:

1. Heads of Market Control Teams are empowered to impose:
 - a. a caution;
 - b. a fine of up to VND 5,000,000;
 - c. the confiscation of evidence and the means of infringement valued at up to VND 30,000,000; and
 - d. the application of remedies provided for in Article 3(3)(a), (d), (d), (e), (g) and (h) of this Decree (97/2010).
2. Directors of Market Control Sub-departments are empowered to impose:
 - a. a caution;
 - b. a fine of up to VND 20,000,000;
 - c. the confiscation of evidence and the means of infringement;
 - d. deprivation of the right to use business licences or certificates for work in accordance with the authorized level; and
 - e. the application of remedies provided for in Article 3(3)(a), (b), (d), (d), (e), (g) and (h) of this Decree (97/2010).
3. The Director of the Market Control Department shall have the authority to decide:
 - a. a caution;
 - b. a fine of up to VND 70,000,000;
 - c. the confiscation of evidence and the means of infringement;
 - d. deprivation of the right to use business licences or certificates for work in accordance with the authorized level; and
 - e. the application of remedies provided for in Article 3(3)(a), (b), (d), (d), (e), (g) and (h) of this Decree (97/2010).

²⁰⁵ Decree 97/2010 arts 15(3) & 18.

²⁰⁶ Decree 97/2010 art 15(3). See also n 130 above.

With regard to administrative enforcement of copyright and related rights, these subject matters are indeed often easily violated and their violation is also often easily discovered and proved. Consequently, the authority to handle this kind of violation is more widely conferred on market control units under Decree 47/2009 (revised by Decree 109/2011) than that in respect of industrial property under Decree 106/2010 (replaced by Decree 97/2010).

According to Article 45:8, the first paragraph, of Decree 47/2009 market control officers, while on duty, are empowered to deal with infringements of copyright and related rights in accordance with Clause 1 of Article 37 of the Ordinance on Handling Administrative Violations.²⁰⁷ Among other authorizations, Heads of Market Control Teams are authorized to impose sanctions, cautions, and fines up to VND 5,000,000, for violations of copyright and related rights in accordance with Points (a) and (b), Clause 2, Article 37, of the Ordinance on Handling Administrative Violations.²⁰⁸ The authority of Directors of Market Control Sub-Departments and the Director of the Market Control Department is greater.²⁰⁹ For example, the former can impose a fine up to VND 20,000,000, for copyright or related rights infringements in accordance with Points (a) and (b), Clause 3, Article 37 of the Ordinance on Handling Administrative Violations.²¹⁰

In practice, the enforcement of administrative penalties by these agencies in respect of intellectual property rights, including copyright and related rights, have seemingly currently proved relatively effective. For example, Team No.14 of the Market Control Sub-Department of Hanoi together with the Hanoi Police Department for the Investigation of Economic Management and Position-Related Crimes found nearly 4,000 copies of best-seller books illegally published, including *Quyền Lực Tuyệt Đối* (The Absolute Power) and

²⁰⁷ Specifically, Article 37(1) of the 2002 Ordinance on Handling Administrative Violations, as amended 2007 and 2008, provides market management officers, while on duty, with the authority to decide a caution or impose a fine of up to VND 200,000: The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

²⁰⁸ Decree 47/2009 art 45(8) the second paragraph.

²⁰⁹ Decree 47/2009 art 45(8) the third and fourth paragraphs.

²¹⁰ Decree 47/2009 art 45(8) the third paragraph: The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

Trăng Non (New Moon).²¹¹ Previously, Team No.14 had been successful in other infringement cases, including the infringement of trademark rights, for example, when the Hai Ha Food Processing Enterprise labelled 3,200 wine bottles with *Nếp Mới* (New Glutinous Rice) and *Lúa Mới* (New Rice). These are the widely-known trademarks of the Hanoi Alcohol Company (HALICO).²¹²

Relating to the field of plant varieties, market control officers authorized to handle administrative violations are empowered to investigate and decide sanctions and apply remedies set out in Decree 114/2013 in accordance with their authorized level and with Articles 45, 52 of the 2012 Law on Handling Violations against Administrative Rules.²¹³

2.5 Police Offices

As with market control units, not all police-officers are authorized to handle administrative violations in respect of industrial property rights, whereas the power to deal with infringement of copyright and related rights is more extensively held.

According to Article 20:1 of Decree 97/2010, heads of police offices at the district-level, of police sections for investigation of economic management and position-related crimes, and of border-gate or export processing zone police stations are empowered to impose:

- a caution;²¹⁴
- a fine of up to VND 10,000,000;²¹⁵
- the confiscation of evidence and the means of infringement;²¹⁶

²¹¹ Việt Báo, ‘Hà Nội: Tạm giữ gần 4.000 cuốn sách lậu’ [Hanoi: Having Seized Nearly 4,000 Books Illegally Published] (21 April 2009) <<http://vietbao.vn>> (visited 29 May 2009).

²¹² Việt Báo, ‘Giữ hơn 3.000 chai rượu có dấu hiệu nhái nhãn mác’ [Having Seized over 3000 Wine Bottles with Signs of Counterfeited Trademarks] (30 December 2003), *ibid.*

²¹³ Decree 114/2013 art 35(3). See also n 201 above.

²¹⁴ Decree 97/2010 art 20(1)(a).

²¹⁵ Decree 97/2010 art 20(1)(b).

²¹⁶ Decree 97/2010 art 20(1)(c).

- deprivation of the right to use business licences or certificates for work in accordance with the authorized level;²¹⁷ and
- application of remedies provided for in Article 3(3)(a), (d), (đ), (e), and (g) of Decree 97/2010.²¹⁸

In accordance with Article 20:2 of Decree 97/2010, the following sanctions and remedies may be imposed by the heads of police offices at the provincial-level:

- a caution;²¹⁹
- a fine of up to VND 30,000,000;²²⁰
- the confiscation of evidence and the means of infringement;²²¹
- deprivation of the right to use business licences or certificates for work in accordance with the authorized level;²²² and
- the application of remedies provided for in Article 3(3)(a), (b), (d), (đ), (e), (g) and (h) of Decree 97/2010.²²³

The Head of Police Department for Investigation of Economic Management and Position-Related Crimes are empowered to impose:

- a caution;²²⁴
- a fine of up to VND 500,000,000;²²⁵
- the confiscation of evidence and the means of infringement;²²⁶
- deprivation of the right to use business licences or certificates for work in accordance with the authorized level;²²⁷ and

²¹⁷ Decree 97/2010 art 20(1)(d).

²¹⁸ Decree 97/2010 art 20(1)(đ).

²¹⁹ Decree 97/2010 art 20(2)(a).

²²⁰ Decree 97/2010 art 20(2)(b).

²²¹ Decree 97/2010 art 20(2)(c).

²²² Decree 97/2010 art 20(2)(d).

²²³ Decree 97/2010 art 20(2)(đ).

²²⁴ Decree 97/2010 art 20(3)(a).

²²⁵ Decree 97/2010 art 20(3)(b).

²²⁶ Decree 97/2010 art 20(3)(c).

- the application of remedies provided for in Article 3(3)(a), (b), (d), (đ), (e), (g) and (h) of Decree 97/2010.²²⁸

Before that, Decree 97/2010 authorizes the above-mentioned police officers to handle industrial property violations set out in Article 9 and infringing acts set out in Articles 12-13 of Decree 97/2010.²²⁹

In the fight against administrative violations of copyright and related rights, Decree 47/2009 provides that police-officers, while on duty, are authorized to impose suitable sanctions for administrative violations of copyright and related rights by Article 31:1 of the Ordinance on Handling Administrative Violations²³⁰ and heads of police teams or police stations, while on duty, can penalize these violations in accordance with Article 31:2 of this Ordinance (the first and second paragraphs of Article 45:9 respectively).²³¹

Decree 47/2009 also authorizes other police-officers, to penalize administrative violations against copyright and related rights in accordance with its provisions and of the Ordinance on Handling Administrative Violations.²³² These officers include heads of police offices at the district level²³³ and heads of police offices at the provincial level,²³⁴ and the head of the police departments for the investigation of economic management and position-related crimes and other departments under the Ministry of Police.²³⁵

²²⁷ Decree 97/2010 art 20(3)(d).

²²⁸ Decree 97/2010 art 20(3)(đ).

²²⁹ Decree 97/2010 art 15(5). See also n 130 above.

²³⁰ Specifically, Article 31(1) of the 2002 Ordinance on Handling Administrative Violations, as amended 2007 and 2008, provides police officers, while on duty, with the authority to impose a caution or a fine up to VND 200,000: The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

²³¹ Particularly, Article 31(2) of the 2002 Ordinance on Handling Administrative Violations, as amended 2007 and 2008, regulates heads of police teams, while on duty, with the authority to impose a caution or a fine up to VND 500,000: The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

²³² Decree 47/2009 art 45(9) from the third to the seventh, or last, paragraph: The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

²³³ Decree 47/2009 art 45(9) the fourth paragraph.

²³⁴ Decree 47/2009 art 45(9) the sixth paragraph.

²³⁵ Decree 47/2009 art 45(9) the seventh, or last, paragraph.

Relating to the field of plant varieties, police-officers authorized to handle administrative violations are empowered to investigate and decide sanctions as well as to apply remedies set out in Decree 114/2013 in accordance with their authorized level under Articles 39 and 52 of the 2012 Law on Handling Violations against Administrative Rules.²³⁶

2.6 People's Committees

In Vietnam local governments, or People's Committees, are organized at three levels: the provincial, the district, and the communal. In general, these local governments at the provincial and the district levels are given the authority to deal with the administrative violations of industrial property rights which have taken place in their respective localities following principles of competence determination set out in Article 42 of the Ordinance on Handling Administrative Violations.²³⁷ In particular, presidents of People's Committees at these two levels are authorized to decide specific penalties applying to those violations and applicable remedies.²³⁸ For example, presidents of People's Committees at the district-level are competent to decide on a caution or to impose a fine of up to VND 30,000,000.²³⁹ They are also empowered to apply some extra sanctions and remedies.²⁴⁰

Wider power is given to presidents of People's Committees at all three levels to deal with violations against copyright and related rights.²⁴¹ In respect of these matters they can impose a fine up to VND 2,000,000 for presidents of People's Committees at the communal or lowest level,²⁴² or up to VND 30,000,000 for presidents of People's

²³⁶ *Decree 114/2013* art 35(1). See also n 201 above.

²³⁷ *Decree 97/2010* art 15(7): The Ordinance has now been substituted by the 2012 Law on Handling Violations against Administrative Rules.

²³⁸ *Decree 97/2010* art 22.

²³⁹ *Decree 97/2010* art 22(1)(a)-(b).

²⁴⁰ *Decree 97/2010* art 22(1)(c), (d), and (đ).

²⁴¹ *Decree 47/2009* art 45(4)-(6).

²⁴² *Decree 47/2009* art 45(4)(a).

Committees at the district level,²⁴³ or up to the maximum level of the fine ranges set out in Decree 47/2009 for presidents of People's Committees at the provincial level.²⁴⁴

3. Criminal Offences

In TRIPs provisions for enforcement of intellectual property members are required to establish criminal offences, and punishment for those convicted, for wilfully counterfeiting trademarks or pirating copyright on 'a commercial scale.'²⁴⁵ The Agreement does not require the application of criminal liability to actions done negligently or to infringements of patents or other intellectual property rights that members have freedom to decide these subject matters.²⁴⁶ As well as the variety of procedures for applying penal liability and the diversity of sanctions available in criminal case, legislative space also comes from the provisions determining what 'a commercial scale' means.

In practice across jurisdictions this often depends upon the subject matter involved, the importance of the infringement, and whether it is a repeat offence.²⁴⁷ It is in the hands of national legislators to particularize this definitely or indefinitely, in a clear or vague language.²⁴⁸ An example is the United States Copyright Act. This Act specifies that a phono-record infringement becomes a crime depending on the number of copies illegally made or distributed and their retail value.²⁴⁹ It stipulates a penalty of up to five years in prison or a fine, or both, where at least 10 copies are made or distributed above a minimum retail value during six months and it may be increased to up to 10 years in prison for a subsequent infringement.²⁵⁰ This makes it understandable that the United States has recently filed a claim relating to the relevant Chinese law which criminalizes such actions 'only if the amount of illegal gains is relatively large or huge or if there are other

²⁴³ Decree 47/2009 art 45(5)(a).

²⁴⁴ Decree 47/2009 art 45(6)(a).

²⁴⁵ TRIPs Agreement art 61 the first sentence.

²⁴⁶ TRIPs Agreement art 61 the last sentence.

²⁴⁷ UNCTAD & ICTSD, above n 111, 621.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

(especially) serious circumstances’, which are far general in comparison with those in the United States.²⁵¹ The Chinese law is also criticized not to define in the legislation itself how to be seen as ‘serious’, ‘especially serious’, ‘relatively large’, and ‘huge’ as used.²⁵²

Vietnam has implemented this TRIPs obligation in its criminal legislation on intellectual property. Not only copyright piracy and the counterfeiting of trademarks are criminalized but the infringements of industrial property rights are also criminally punishable. This was commented on as ‘very positive’ by the Working Party on the Accession of Vietnam.²⁵³

The 1999 Criminal Code creates criminal offences for breaches of copyright and related rights in Article 131:

1. A person who has committed one of the following acts causing serious consequences, or who has been administratively penalized for one of the acts stipulated under this Article, or who has been sentenced for this crime, and who is not yet entitled to omit the relevant criminal record but repeats it, shall be punishable by a fine of between VND 20,000,000 and VND 200,000,000 or non-custodial reform for up to two years:

- a) Appropriating the copyright in literary, artistic, scientific, or journalist works, audio programs, video tapes and disks;
- b) Attributing non-genuine authors’ names to literary, artistic, scientific, or journalist works, programs of audio, video tapes and disks;
- c) Altering unlawfully the contents of literary, artistic, scientific, or journalist works, programs of audio, video tapes and disks;
- d) Announcing or disseminating illegally literary, artistic, scientific, or journalist works, programs of audio, video tapes and disks.

2. Offenders who fall within one of the following circumstances shall be liable to imprisonment for a term of between six months to three years:

- a) Committing it in an organized manner;
- b) Committing it more than once;
- c) Causing very serious or particularly serious consequences.

²⁵¹ Stoll, Busche and Arend, above n 34, 782-3.

²⁵² Ibid.

²⁵³ See Question 292 of WTO Doc WT/ACC/VNM/41 (20 December 2005).

3. Those which have convicted of this crime may be punished with a fine of between VND 10,000,000 and VND 100,000,000, a ban from holding office position, or a ban from practicing specified occupations or doing specified jobs for one to five years.²⁵⁴

The criminal infringement of industrial property rights is provided for in Article 171:

1. A person who, for commercial purposes, appropriates or uses illegally inventions, utility solutions, industrial designs, trademarks, appellations of origin, or other industrial property subject matters being protected in Vietnam, causing serious consequences or who has been administratively penalized for such acts or sentenced for this crime, and who is not yet entitled to omit the relevant criminal record but repeats it, shall be punishable by a fine of between VND 20,000,000 and VND 200,000,000 or non-custodial reform for up to two years.

2. Offenders who fall within in one of the following circumstances shall be liable to imprisonment for a term of between six months to three years:

- a) Committing it in an organized manner;
- b) Committing it more than once;
- c) Causing very serious or particularly serious consequences.

3. Those which have convicted of this crime may be punished with a fine of between VND 10,000,000 and VND 100,000,000, a ban from holding office position, or a ban from practicing specified occupations or doing specified jobs for one to five years.²⁵⁵

²⁵⁴ This Article has been substituted by Article 170a and moved from Chapter XIII to Chapter XVI to be placed before Article 170 by the Law on the Amendment and Supplementation of the Criminal Code of 19 June 2009, coming into effect on 1 January 2010. In particular, Article 170a of the Law states that:

1. A person without authorization of the holders of copyright or related rights which carries out one of the following acts on a commercial scale to have infringed upon such holders' protected rights in Vietnam shall be punishable by a fine of between VND 50,000,000 and VND 500,000,000 or non-custodial reform for up to two years:

- a) reproducing works, sound recording, or visual recordings;
- b) distributing to the public copies of works, sound recordings, or visual recordings.

2. Offenders who fall within one of the following circumstances shall be punishable by a fine of between VND 400,000,000 and VND 1,000,000,000 or liable to imprisonment for a term of between six months to three years:

- a) Committing it in an organized manner;
- b) Committing it more than once.

3. Those which have convicted of this crime may be punished with a fine of between VND 20,000,000 and VND 200,000,000, a ban from holding office position, or a ban from practicing specified occupations or doing specified jobs for one to five years.

The implementation of these two Articles has been guided by Joint Circular 01/2008. As in some other countries including Switzerland,²⁵⁶ a criminal prosecution for the crimes, provided in paragraphs 1 of both, can only be brought at the request of the person whose copyright or related rights, or trademark or geographical indication rights have been infringed.²⁵⁷ Criminal liability, following the TRIPs Agreement, requires the infringement to be intentional.²⁵⁸

Subsequent guidelines for the application of liability under the different clauses in the two Articles are specific and relatively clear. For example, causing ‘very serious consequences’ is guided to require an intentional act of infringing on copyright or related rights as listed in Articles 28 and 35 of the 2005 Intellectual Property Law together with:

- making profits of between VND 30,000,000 and VND 100,000,000;²⁵⁹ or
- causing damage to the right holders of between VND 150,000,000 and VND 450,000,000;²⁶⁰ or
- infringing goods being valued at VND 150,000,000 to VND 500,000,000.²⁶¹

²⁵⁵ In the Law on the Amendment and Supplementation of a Number of Articles of the Criminal Code of 19 June 2009 coming into force on 1 January 2010 this Article has been amended as below:

1. A person who intentionally infringes upon industrial property rights of a mark or geographical indication which is being protected in Vietnam on a commercial scale shall be punishable by a fine of between VND 50,000,000 and VND 500,000,000 or non-custodial reform for up to two years.
2. Offenders who fall within one of the following circumstances shall be punishable by a fine of between VND 400,000,000 and VND 1,000,000,000 or liable to imprisonment for a term of between six months to three years:
 - a) Committing it in an organized manner;
 - b) Committing it more than once.
3. Those which have convicted of this crime may be punished with a fine of between VND 20,000,000 and VND 200,000,000, a ban from holding office position, or a ban from practicing specified occupations or doing specified jobs for one to five years.

²⁵⁶ See Articles 67-73 of the Federal Law of Switzerland on Copyright and Related Rights of 9 October 1992, as amended by the Law of 16 December 1994 (WIPO-Lex).

²⁵⁷ *Criminal Procedure Code 2003* art 105(1); *Joint Circular 01/2008* point 3.

²⁵⁸ *Joint Circular 01/2008* points (1)(1.1)-(1.4) & (2)(2.1)-(2.3).

²⁵⁹ *Joint Circular 01/2008* point (1)(1.2)(a).

²⁶⁰ *Joint Circular 01/2008* point (1)(1.2)(b).

²⁶¹ *Joint Circular 01/2008* point (1)(1.2)(c).

Where the profit made is over VND 100,000,000 or the damage caused is over VND 450,000,000 or the infringing goods are valued at over VND 500,000,000 actions are seen to cause ‘particularly serious consequences.’²⁶²

4. Customs Measures²⁶³

Apart from civil, administrative, and criminal procedures, TRIPs requires members to take special measures in direct relation to Customs’ operations and the importation of goods infringing intellectual property rights in trademarks or copyright.²⁶⁴ The reason for this is that such goods may be very easily transported across national boundaries without any special Customs’ requirement.²⁶⁵

Members are free to decide a special border strategy to apply to goods involving other violations of intellectual property rights being implemented²⁶⁶ or exported from their territories.²⁶⁷ It creates further room for members in implementing these particular provisions of TRIPs.

For instance, TRIPs Article 60 stipulates that:

Members *may* exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers’ personal luggage or sent in small consignments.²⁶⁸

²⁶² *Joint Circular 01/2008* point (1)(1.3).

²⁶³ Together with border measures discussed below in Vietnam the Customs is authorized to handle administrative violations of intellectual property rights. This authority is provided for in, eg, Articles 200(3) the first sentence of the 2005 Intellectual Property Law; 45(7) of Decree 47/2009; 19 of Decree 97/2010; and, 35(2) of Decree 114/2013.

²⁶⁴ *TRIPs Agreement* art 51 the first sentence.

²⁶⁵ The definitions of ‘counterfeit trademark goods’ and ‘pirated copyright goods’ are mentioned in note 14 under Article 51 of the TRIPs Agreement.

²⁶⁶ *TRIPs Agreement* art 51 the second sentence.

²⁶⁷ *TRIPs Agreement* art 51 the third sentence.

²⁶⁸ The emphasis is added.

As this provision is the last in Section 4: Special Requirements Related to Border Measures,²⁶⁹ all other Section provisions are subject to this exclusion where members decide to rely on these conditions. It appears to be taken in national laws. In reality, customs authorities face considerable difficulty in controlling small quantities of the imports of those goods, especially where they are in the personal luggage of passengers.²⁷⁰ The right holders also would not choose to undertake the cost of enforcement procedures in such cases.²⁷¹ In the case of Vietnam the administrative penalties applicable by Customs Offices make the enforcement of the law in respect of small quantities much easier.

Vietnam carries out this obligation essentially through some provisions in the 2005 Intellectual Property Law,²⁷² the Customs Law,²⁷³ and a number of regulations and authorized procedures.²⁷⁴

Regulations permit the temporary suspension of the release of goods suspected of bearing counterfeiting trademarks or being ‘pirate’ goods breaching copyright, upon the request of the right holders, both in respect of imports and exports. This can be applied not only to incidents of false trademarks or pirated copyright but also to other infringements of intellectual property rights. TRIPs Article 60, or such ‘may’ provision, is taken to exclude some goods from the application of the law. Both are seen in Article 57 of the Customs Law, which provides that:

1. An owner of intellectual property rights which are protected in accordance with the law of Vietnam shall be entitled to make a request, on a long-term basis or on the basis of a particular case, to the customs office to temporarily suspend customs procedures in respect of imported or exported goods which infringe intellectual property rights.

²⁶⁹ *TRIPs Agreement* arts 51-60.

²⁷⁰ See above Gervais, n 1, 325-6; UNCTAD & ICTSD, n 111, 619.

²⁷¹ *Ibid.*

²⁷² *Intellectual Property Law 2005* arts 216-219.

²⁷³ *Customs Law 2001* arts 57-58. See also n 5 above.

²⁷⁴ This includes Government Decree 154/2005 and Finance Ministry Decision 42/2007: In the course of the implementation of the 2005 Intellectual Property Law as amended in 2009 the Ministry of Finance adopted Circular 44/2011 in which Article 23(a) states that it is replacing previous implementing regulations contrary to these Circular provisions, eg, those in Decision 42/2007. See note 206 in Chapter 3 for more details of this.

2. The customs office may only make a decision on the temporary suspension of customs procedures in connection with imported or exported goods where all conditions set forth in Article 58 of this Law are satisfied.
3. The provisions of this Law on temporary suspension of customs procedures in respect of imported or exported goods which infringe intellectual property rights shall not apply to non-commercial goods or to goods in transit.

The Article makes it clear that the temporary suspension of customs procedures for those goods may be applied to both imported goods and exported goods, which are alleged violations of intellectual property rights in general, not just counterfeit trademark or pirated copyright goods. It is also made clear that there are some cases where the application of the procedures is excluded.

To apply the procedure in Article 57, applicants must complete an application form and pay fees and charges.²⁷⁵ They are obligated to provide a security by depositing:

- an amount of money equal to 20 percent of the value of the goods subject to the procedure application;²⁷⁶ or
- at least VND 20,000,000 where it is impossible to value the goods;²⁷⁷ or
- a guarantee from a bank or another credit organization.²⁷⁸

Such deposit is aimed at securing the payment of damages or other expenses to persons whose goods are subject to such Customs' procedures where the goods are found not to have infringed intellectual property rights.²⁷⁹

²⁷⁵ *Intellectual Property Law 2005* art 217(1)(c); *Decree 154/2005* art 48(3)(a)-(b) the first and last sentences.

²⁷⁶ *Intellectual Property Law 2005* art 217(2)(a); *Decree 154/2005* art 48(3)(b) the eighth sentence; *Circular 44/2011* art 9(2)(a).

²⁷⁷ *Ibid.*

²⁷⁸ *Intellectual Property Law 2005* art 217(2)(b); *Decree 154/2005* art 48(3)(b) the eighth sentence; *Circular 44/2011* art 9(2)(a).

²⁷⁹ *Intellectual Property Law 2005* art 217(1)(d); *Decree 154/2005* art 48(3)(b) the eighth sentence.

Where an application is made on a long term basis, it expires after one year from the date of being accepted.²⁸⁰ Its validity can be renewed on an annual basis but not exceeding the term of the protected intellectual property rights.²⁸¹ Applicants must provide a detailed description of the goods alleged to have infringed the intellectual property rights to identify them from genuine goods and a list of exporters or importers of these goods.²⁸²

Where an application is on a case by case basis it is obligatory to provide information about the time and place where the customs procedures for the export or import of the goods should be carried out.²⁸³

The prevention of goods infringing intellectual property rights, especially imported goods, from passing the customs barrier, is recognized as important in Vietnam. In September 2008, the General Department of Customs under the Ministry of Finance held an official meeting with representatives of enterprises to hear their opinions on how to improve its operations in protecting intellectual property rights and preventing goods infringing these rights from entering Vietnam.²⁸⁴ From the beginning of 2008 to February 2009, the General Department of Customs handled 26 applications for the examination and control of the export or import of goods relating to intellectual property rights including those bearing the well-known trademarks of Nokia, Chanel, Nike, Seiko, HP, Gucci, Casio, Gillette, and the like.²⁸⁵ It is reported to have discovered and successfully dealt with infringements with fines of billions of VND with the infringing goods being destroyed.²⁸⁶

²⁸⁰ *Decree 154/2005* arts 48(1) and 49(1) the first sentence; *Circular 44/2011* art 14(3)(a).

²⁸¹ *Decree 154/2005* arts 48(1) and 49(1) the second sentence; *Circular 44/2011* art 14(3)(a).

²⁸² *Decree 154/2005* art 48(3)(a). See also *Decree 105/2006* art 22(1); *Circular 44/2011* art 15.

²⁸³ *Decree 154/2005* art 48(3)(b). See also *Decree 105/2006* art 22(1); *Circular 44/2011* art 15.

²⁸⁴ Finance Ministry Department of Customs, 'Bảo hộ quyền sở hữu trí tuệ: Phải thực hiện từ biên giới' [Protection of Intellectual Property Rights: Need to Do it from the Borders] <www.customs.gov.vn> (visited 2 June 2009).

²⁸⁵ *Ibid.*

²⁸⁶ Khoa Học & Phát Triển (Science & Development), 'The Customs Force: To Improve the Effect of Enforcement of Intellectual Property Rights' [Lực lượng Hải quan: Nâng cao hiệu quả thực thi bảo hộ quyền sở hữu trí tuệ] (2 May 2009) <www.khoahocphattrien.com.vn> (visited 2 June 2009).

5. Conclusions

This Chapter has continued the theme from the three prior Chapters 4, 5, and 6 which discussed respectively copyright and related rights, patents and plant varieties, and other categories of intellectual property rights in Vietnam under its implementation of TRIPs. That theme has been how the Agreement's flexibilities have been used locally. This chapter has explored the enforcement of intellectual property rights under TRIPs standards in the context of civil remedies, administrative procedures, criminal penalties, and the Customs' boundary barrier measures.

Article 41:5 of TRIPs Agreement potentially leaves the biggest gap in its implementation in domestic law. In particular, this provision allows members to exploit their own law enforcement systems, and does not require them to create a specific system for intellectual property. Vietnam is, therefore, able to keep developing its own systems for law enforcement for intellectual property violations.

As a consequence, the use of Vietnam's well-developed system of administrative penalties, a feature of its socialist legality, has considerably extended the implementation of intellectual property laws under TRIPs. It has also extended the protection of intellectual property rights well beyond the reach of the judicial system and its processes for hearing civil, commercial, and administrative disputes over intellectual property rights.

Acts infringing intellectual property rights can be dealt with not only by administrative sanctions but also by criminal penalties and special customs barrier measures. This is within both general and particular requirements of TRIPs. But TRIPs is unable to build an effective enforcement system in the territories of member countries. Members retain the freedom to carry out TRIPs obligations in ways suitable to their own legal systems and practices. Participation in the enforcement of intellectual property rights in Vietnam is found throughout other government agencies, not merely the Customs in preventing infringing goods from crossing the national boundaries. Specialized inspectorates in

industrial property, copyright and related rights and other specialist agencies, including market control or management units and economic police offices, also participate extensively in the implementation of the law.

The law on the enforcing of intellectual property rights under TRIPs in Vietnam has been standardized. But enforcing the law in practice is different from merely legislating for its enforcement. The Vietnamese enforcement system for intellectual property appears to have had some success. Internally, there have been achievements in the operation of administrative enforcement in government agencies.²⁸⁷ Externally, it is reported that Vietnam has achieved a three-percent reduction in software piracy.²⁸⁸ This has been the most significant decline among Southeast Asian nations. It is no longer listed as one of those with the highest copyright infringement ratios.²⁸⁹

However, crucial difficulties remain in the enforcement of these rights in Vietnam as in other jurisdictions. Vietnamese intellectual property legislation is recognized as much improved and in line with TRIPs' requirements,²⁹⁰ but its enforcement remains the biggest concern.²⁹¹ This is particularly seen in the US Special 301 Reports.²⁹² There has been evidence of 'very low' effectiveness of the measures taken due to time taken and the soft punishment generally imposed²⁹³ while the infringements are 'constantly increasing and increasingly complicated.'²⁹⁴

²⁸⁷ See above nn 122-129, 211-212, and 285-286.

²⁸⁸ Bangkok Post, 'Software piracy rate dips by 2%; BSA cites latest IDC survey figures' (21 May 2008); Thai News Service, 'Vietnam: Illegal software users may face legal action' (17 June 2008). See also above note 9.

²⁸⁹ Bangkok Post and Thai News Service, *ibid*.

²⁹⁰ See above nn 7-8.

²⁹¹ See above n 10.

²⁹² See above n 11.

²⁹³ See Question 10 of the 2006 European Commission Intellectual Property Enforcement Survey in the case of Vietnam, above n 7.

²⁹⁴ Global Intellectual Property, above n 126, the first paragraph. See also 'European Commission - DG Trade - IPR Survey 2010: Vietnam', above n 8, [1.3]-[1-6].

Clearly, improvements have been seen, as noted earlier, and, to some extent, have also been recognized.²⁹⁵ However, more efforts are needed. Domestically this needs both better resources and efforts. It also requires the cooperation of, and assistance from, foreign governments such as the US and Japan, and international organizations such as WIPO. Foreign assistance is important in the training and qualifying officials. This has been described as the one thing which is likely to affect enforcement.²⁹⁶ The hearing of intellectual property disputes in civil proceedings is discussed in the next chapter, or Chapter 8, which contains case studies on judicial trials of copyright disputes.

²⁹⁵ See above nn 9 & 288-289.

²⁹⁶ See respectively Questions 15, and 14, of the European Commission Intellectual Property Enforcement Surveys 2006, and 2009, in the case of Vietnam, above n 7.

CHAPTER 8: THE HEARING OF COPYRIGHT DISPUTES IN VIETNAM

Synopsis

This chapter is an analysis of copyright cases tried in Vietnam between 1997 and 2006. It reviews briefly the reform of the courts under Doi Moi following the attachment to Appendix 1 to this thesis. It considers the requirements for appointment as a judge or as an assessor. It describes the courts which have jurisdiction in intellectual property cases, the Provincial People's Courts, as the trial courts, and the Court of Appeal of the Supreme People's Court, as the appellate court. It outlines the procedures for trials, including mediation and interlocutory orders, and the two methods of review by cassation and appeal. It briefly recounts the period prior to 1996 before turning to examine 10 cases tried between 1997 and 2006. These are determined under the relevant law of the time because of the principle of no retrospectivity.

Of these cases six relate to copyright in written works, three to musical works, and one to each of photographic work, derivative work, and exception to copyright. All involve decisions of the Provincial People's Courts and some the appellate decisions of the Court of Appeal. Overall there is still little litigation of intellectual property issues. Judges have also been challenged by the novelty and complexity of the legislation.

The cases show that for some time courts will need to deal with works created by state-owned enterprises or using state funds before the mixed market economy and individual property rights emerged. One case relates to the manner in which socialist countries freely exchanged cultural works produced by state-owned enterprises for use in other countries. Another relates to the moral and social issues when such enterprises may use state funds to produce a film which could be considered immoral and unpatriotic. Two involve exceptions to scholarly works. One involves the publication of complete articles in a debate over literary interpretations found to be justified given the detailed criticism of them. Another involved the use of mathematical formula which was found to fall outside the scope of copyright protection. These cases reflect a principle based approach to applying norms to conflicts over property using forms of judicial reasoning found in western legal systems. This is also seen in some of the cases in the context of the assessment of damages.

Other decisions show an attention to the legal rules and guidance offered without much interest in wider legal reasoning. They reveal the continuing dependency of judges on the guidance issued by the Supreme People's Court and government agencies and also on advice and information from government agencies.

Some reveal a sense that justice should be based on moral reasons and sentiment rather than legal arguments. In respect of scholarly articles about literary criticism the court was willing to find that the reproduction in their entirety represented a fair use of them because of the accompanying detailed criticism and indicated that the plaintiff could reply to the criticism by publishing replies in literary journals. The presence of lay assessors adds to the pressure to use moral reasons and sentiment or a situational sense of where justice lies.

CHAPTER 8: THE HEARING OF COPYRIGHT DISPUTES IN VIETNAM

After considering the conformity of Vietnamese intellectual property law with TRIPs' requirements, focusing on aspects of flexibilities, the thesis turns to case studies of the trial of copyright disputes. It seeks to reveal how Vietnam complies with TRIPs in practice, not just in theory.

The Vietnamese court system is struggling with intellectual property disputes as the protection of intellectual property is generally still unfamiliar to lawyers and judges. In issuing Official Letter No.97/KHXX of 21 August 1997 the Supreme People's Court recognized that disputes over intellectual property rights and the trial of this kind of civil dispute are new and complex. This is the main reason that courts at provincial level, rather than at district level, are authorized as the courts of first instance to hear these cases from the date of the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance.

The TRIPs Agreement does not generally intervene with the members' legal systems or processes for enforcing laws, including the enforcement of intellectual property rights.¹ Vietnam is able to apply its own legal processes through its own established administrative systems, discussed in the previous chapter, and through its own established judicial system, outlined in Appendix 1 to this thesis. Flexibility within TRIPs may be more extensive in this area than in any other because of the diversity of the various legal traditions and cultures of WTO member countries.

There are not many intellectual property lawsuits in Vietnam. This chapter addresses the same themes as the whole of the thesis to explore the implementation of TRIPs in Vietnam concurrently with the country's exploitation of the Agreement's flexibilities. It provides specific and detailed evidence from one part of Vietnamese legal practice. It gives particular examples of how the enforcement of the law is informed by socialist sensibilities and by a socialist sense of patriotism in respect of Vietnamese culture and history. As well

¹ See *TRIPs Agreement* art 41(5).

it provides examples of the role the judiciary plays in adding flexibility in the application of copyright law.

1. Overview of Intellectual Property Trials in Vietnam

Unlike Western countries which rely on judicial processes to protect intellectual property including copyright,² countries with socialist systems of law such as Vietnam and China rely more on administrative processes. These are depicted in China as being ineffective in imposing damages but possibly effectively in stopping the conduct.³ Western systems have proved to be effective but also truly costly. An enforceable first-instance decision in patent litigation costs an average around €50,000 in Germany and between €150,000 and €1,500,000 in the United Kingdom.⁴ In the United States, the cost ranges from US\$500,000 to over US\$4,000,000,000 per party.⁵ In the pharmaceutical sector, the average cost is €993,000 in the United Kingdom; €476,000 in Netherlands; €449,000 in France; €76,000 in Germany; and, €46,000 in Austria.⁶

By comparison the cost of proceedings for infringement of intellectual property rights in countries with socialist legal systems is said to be not so high but it may create other hidden

² BBC Monitoring Asia Pacific, 'US intellectual property envoy interviewed on China's IPR enforcement conundrum' (London 30 April 2006) <www.proquest.com> (visited 22 October 2011).

³ See, eg, Jeffrey M Duncan, Michelle A Sherwood and Yuanlin Shen, 'A Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China' (2008) 7(3) *The John Marshall Review of Intellectual Property Law* 529, 539-40; Samir B Dahman, 'Protecting your IP Rights in China: An Overview of the Process' (2006) 1 *Entrepreneurial Business Law Journal* 63, 85; Kristina Sepetys and Alan Cox, 'Intellectual Property Rights in China: Trends in Litigation and Economic Damages' (2009) *NERA Economic Consulting* 1, 4 <http://www.nera.com/extImage/PUB_IPR_Protection_China_0109_final.pdf>.

⁴ Eike Schaper, 'Efficient IP Enforcement at Trade Shows in Germany' (July--August 2011) 6(4) *The IP Litigator: Devoted to Intellectual Property Litigation and Enforcement* <<http://proquest.umi.com>> (visited 8 September 2011).

⁵ Jeff A Ronspies, 'Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection' (2004) 4 *The John Marshall Review of Intellectual Property Law* 184, 211 n 4, citing in Michael A Glenn and Peter J Nagle, 'Article I and the First Inventor to File: Patent Reform or Doublespeak?' (2010) 50(3) *IDEA – The Intellectual Property Law Review* 441, 458 n 107.

⁶ Schaper, above n 4.

or unofficial costs.⁷ The so-called ‘dual track’ system, which permits both administrative and judicial proceedings,⁸ is also often described as marked by ‘ineffectiveness’, ‘deficiency’, or ‘available in the law but not implemented.’⁹

There are not many intellectual property cases tried before the Vietnamese judiciary. The enactment, for the first time, in the 1995 Civil Code of Part VI with its intellectual property provisions led, also for the first time, to the two intellectual property disputes both over copyright being heard in Hanoi and Ho Chi Minh City Courts, the two largest courts. These first judicial proceedings over intellectual property drew considerable public attention. Over 10 years between 1997 and 2006, it is unofficially estimated that there were a little more than 10 intellectual property cases heard in Hanoi People’s Court and approximately 40 in the Ho Chi Minh City People’s Court.¹⁰ There appears to have been almost no other intellectual property cases in other courts in other commercial centres during this time. This is further discussed below.

⁷ See respectively Questions 10 and 15, and Questions 9 and 14, of the European Commission Intellectual Property Enforcement Surveys 2006 and 2009 in the case of both Vietnam and China <<http://ec.europa.eu/trade>> (visited 30 August 2008 and 9 September 2011).

⁸ Feng states that ‘One Chinese scholarly authority, distinguishing the two by calling administrative proceedings “rights control” and judicial proceedings “rights vindication”, claims that while the administrative track for public IP enforcement has proven a remarkable success, the judicial track for private enforcement is “in crisis”’: Peter Feng, *Intellectual Property in China* (Sweet & Maxwell Asia, 2nd ed, 2003) 16. See also Duncan, Sherwood and Shen, above n 3 (discussing a somewhat ‘foreign’ concept to West companies in using a government agency, or the administrative route, to enforce intellectual property but it may be the best route compared with the judicial route depending on the circumstances); Natalie P Stoianoff, ‘Convergence, Coercion and Counterfeiting: Intellectual Property Rights Enforcement in the People’s Republic of China’ (2007) 4 *Macquarie Journal of Business Law* 245 (viewing that through the administrative pathways the most action has been taken place in relation to intellectual property rights enforcement in China: 259-60). In Vietnam, the administrative route has dealt with up to 90 percent of those detected violations according to a study conducted by the National University of Hanoi in 2005: The Supreme People’s Court’s Institute for Hearing Improvement, *Chuyên đề khoa học xét xử: Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân* [Special Issue: Legislation on Civil Procedures for Handling Disputes Over Intellectual Property Rights in the People’s Courts] (Justice Publishing House, 2010) 47.

⁹ See respectively Questions 14 and 15, and Questions 13 and 14, of the European Commission Intellectual Property Enforcement Surveys 2006 and 2009 in the case of both Vietnam and China, above n 7.

¹⁰ This unofficial estimation suits the estimates given by the Supreme People’s Court (above n 8, 44-6). Accordingly, in the period of 2000-2005 there are 33 of 93 industrial property and copyright disputed cases to have reached their decisions within the courtroom. In the later years of 2006 to 2009 the numbers of those registered cases both in the first-instance and appeal courts are 17, 20, 28, and 36 respectively.

Intellectual property disputes in Vietnam fall into three periods from 1945 to 1980, from 1980 to 1995, and from 1995 to the present.

1.1 The Pre-1980s Period

After the Declaration of Independence of 2 September 1945, Vietnam faced division into North and South with lengthy wars until its reunification on 30 April 1975. The goal of unifying Vietnam was privileged over all other interests. This not only affected the legal adoption of copyright or industrial property but also economic and civil law in general. It is not surprising that in the Constitutions of 1946 and 1959, there are no provisions for copyright, industrial property, or intellectual property, though some other legal regulations gave some limited protection.¹¹

Although there are no official statistics it seems likely that there were no disputes over copyright or industrial property heard by courts in Vietnam during this period.¹²

1.2 The Period 1980-1995

After reunification in 1975, Vietnam began to build a centrally-planned economy opposing to the private ownership of property. The 1980 Constitution stated that it was intended to

¹¹ During the struggle for unification, the protection of the interests of authors, especially those whose works contributed to the struggle, received some recognition. This was done through some regulations, including:

- Decree 18-SL of 31 January 1946, promulgated by President Ho Chi Minh, on Copyright Deposits;
- Decree 282-SL of 14 December 1956 on the Journalistic Regime, promulgated by President Ho Chi Minh;
- Decree 168-CP of 7 December 1967 of the Government Council on Amending the Principles for Paying Royalties to Literary, Artistic, Scientific and Technological Works Set out in Resolution 25-CP of 24 February 1961;
- Resolution 25-CP of 24 February 1961 of the Government Council on Royalty Regime to Literary, Artistic, Scientific and Technological Works;
- Resolution 125/CP of 20 May 1974 of the Government Council on Royalty Regime to Literary, Artistic, Scientific and Technological Works; and
- Circular 114-VH/TT on Guiding the Implementation of Resolution 125-CP of 20 May 1974 and Decision 113-VH/QĐ on Royalty Regime to Literary, Artistic, Scientific and Technological Works, both enacted by the Ministry of Culture on 20 December 1975.

¹² The situation might be different in the South prior to reunification in 1975.

advance the country ‘directly from a society in which small-scale production predominates to socialism, bypassing the stage of capitalist development’.¹³ The Constitution was also designed to promote ‘the scientific and technological revolution’,¹⁴ to encourage ‘research, inventions and discoveries’¹⁵ and to promote ‘the development of professional and amateur literary and artistic activities’.¹⁶ This underlined a number of regulations on copyright and industrial property introduced during the 1980s in the context of the centrally-planned economy.¹⁷

Doi Moi was launched in 1986. It led to the 1987 Foreign Investment Ordinance and the 1989 Industrial Property Ordinance. Vietnam began to gradually integrate into the global economy. The promotion of a socialist-oriented market economy was further confirmed under the 1992 Constitution.¹⁸ The Constitution prescribes the protection of ‘copyright and industrial proprietorship’.¹⁹ The 1994 Copyright Ordinance was made under this.

¹³ *Vietnam Constitution 1980* art 15 the first part of the first paragraph: *The Constitutions of Vietnam: 1946, 1959, 1980, 1992* (World Publishing House, 2003).

¹⁴ *Vietnam Constitution 1980* art 42, *ibid*.

¹⁵ *Vietnam Constitution 1980* art 43, *ibid*.

¹⁶ *Vietnam Constitution 1980* art 44, *ibid*.

¹⁷ They include:

- Decree 31-CP of 23 January 1981 on Rationalizations and Inventions;
- Decision 175-CP of 29 April 1981 on Regulating the Entering into and Carrying out of Economic Contracts in Scientific Research and Technically-Deploying Activities;
- Circular 1679/VHTT-VP of 19 September 1981 on Providing an Extra Rate of 50 Percent to Literary, Artistic, Scientific and Technological Works with Royalties Paid under Decision 113/VH-QĐ of 20 December 1975;
- Decree 197-HĐBT of 14 December 1982 on Rules for Goods-Marks;
- Decision 784/VH-QĐ of 30 December 1982 on Providing a Rise of 100 Percent in Primary Royalty Rate to Literary, Artistic, Scientific and Technological Works under Circular 1769/VHTT-VP of 19 September 1981;
- Decree 46-HĐBT of 10 May 1983 of the Ministers Council on Handling Administrative Violations of Speculating, Trafficking, Producing Fake Goods and Doing Business Illegally;
- Decree 142-HĐBT of 14 November 1986 on Copyright;
- Circular 04/VH-TT of 7 January 1987 of the Ministry of Culture Guiding the Implementation of Decree 142- HĐBT;
- Decree 85-HĐBT of 13 May 1988 on Rules for Industrial Designs; and
- Decree 200-HĐBT on Rules for Utility Solutions and Decree 201/HĐBT on Rules for Licensing Invention Patents, Utility Solutions, Industrial Designs, Goods-Marks, and Know-how, both dated 28 December 1988.

¹⁸ *Vietnam Constitution 1992* art 15.

¹⁹ *Vietnam Constitution 1992* art 60.

The effect of the centrally-planned economy on laws and the judicial system in the period from Doi Moi in 1986 to 1995 was significant.²⁰ However, the attraction of foreign direct investment and the promotion of economic growth strengthened the trend towards the new mixed-market economy. Many pieces of legislation reflect this.²¹

The judiciary also needed to be reformed to assist the settlement of economic and commercial disputes in a mixed-market economy. Under the 1992 Law on the Organization of Courts, the present court system was reformed consisting of the Supreme People's Court, the provincial People's Courts, and the district People's Courts hearing criminal, civil, marriage and family, labour, and other cases specified by law. The Standing Committee of the National Assembly adopted the Ordinance on the Procedures for Settlement of Economic Cases in March 1994 to provide for the hearing of commercial and economic disputes in the court system. This Ordinance shortly followed Solution 106/NQ/UBTVQH of 2 February 1994 disbanding the system of state economic mediators, replacing them by the new economic or commercial specialist courts which came into operation on 1 July 1994.²² Economic and commercial cases have been heard in these courts since then.

Following these trends, provincial courts were authorized to hear, as first instance courts, disputes over industrial property and copyright under the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance.²³ These two Ordinances further gave the People's Court of Hanoi and the People's Court of Ho Chi Minh City the power to hear

²⁰ This is confirmed, eg, from the resolution of some appeals relating to industrial property rights by the National Office of Intellectual Property and the Ministry of Science and Technology in an internal document by Lê Hồng Vân, 'Trích yếu tóm tắt các vụ việc và quyết định giải quyết khiếu nại, tố cáo của Bộ Khoa học và Công nghệ thuộc lĩnh vực sở hữu công nghiệp' [Brief Summaries and Excerpts of Industrial Property Appeals and Decisions of Resolving These Appeals from the Ministry of Science and Technology] (2004) 7.

²¹ For example, the Ordinance on Economic Contracts 1989 and the Ordinance on Economic Mediators 1990 introduced some market principles to state-owned economic units together with a system of state economic mediators dealing with economic contracts, or the Ordinance on the Procedures for the Settlement of Civil Cases 1989 and the Ordinance on Civil Contracts 1991 acknowledged the existence of private economic and contractual relations.

²² *Vietnam Encyclopaedia* <<http://dictionary.bachkhoatoanthu.gov.vn>> (visited 29 April 2009).

²³ See, respectively, Article 29, the first sentence, of the 1989 Industrial Property Ordinance and Article 44 of the 1994 Copyright Ordinance.

those disputes involving foreign individuals or organizations.²⁴ To give guidance in these cases, in respect of this, the Supreme People's Court issued Circular 03/NCPL Guiding the Trial of Some Disputes over Industrial Property Rights on 22 July 1989. No similar guidance had been given on disputes over copyright in this period of 1980-1995.

As in the previous period, there are no official statistics on intellectual property cases heard in this period. However, as in that period, it is likely that there were no cases or only a very small number. It would have been difficult to bring cases for the protection of intellectual property without the procedural and enforcement provisions made to meet the obligations under TRIPs. Besides, it was not until the adoption of the 1995 Civil Code that such actions could be easily undertaken. With its introduction, two copyright lawsuits, commonly and popularly seen as the first intellectual property cases, were brought.

1.3 The Period after 1996-

The 1995 Civil Code, containing specific provisions for intellectual property rights, came into force on 1 July 1996. It took further time and cost to create a Civil Procedure Code to correspond with the Civil Code's provisions. To deal with disputes over copyright or industrial property rights until the promulgation of the 2004 Civil Procedure Code, the 1987 Ordinance on Procedures for the Settlement of Civil Cases was kept in effect. The Supreme People's Court also issued Official Letter No.97/KHXX of 21 August 1997 determining the jurisdiction for handling such cases was of the People's Courts at the provincial level, as provided for by the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance. This was because they were new and complex cases raising novel and potentially difficult legal issues.²⁵

²⁴ See Article 29, the second sentence, of the 1989 Industrial Property Ordinance and Article 45 of the 1994 Copyright Ordinance, respectively.

²⁵ Still Joint Circular 01/2001 by the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Culture and Information (the Ministry of Culture, Sports, and Tourism currently) providing guidelines to implement some provisions of the 1995 Civil Code in handling disputes over copyright, was continued on 5 December 2001.

The enactment of the 1995 Civil Code led to two copyright lawsuits which draw considerable public attention. They were the first legal actions for copyright infringement, coming from the two biggest economic, commercial, cultural, and social centres, Hanoi and Ho Chi Minh City. They were heard in the two largest courts. Both connected to copyright in musical works, or exactly famous songs, created by two well-known composers. Trần Tiến brought his legal action in Ho Chi Minh City People's Court in October 1996 against Saigon Video Production and Service Company for the use of ten of his songs in the cassette: '*Trần Tiến's Romance Songs: Saying Goodbye to Swallows*' (*Tình Khúc Trần Tiến: Tạm Biệt Chim Én*). In the other case, Vietnam Music Publishing House and Ho Chi Minh City Youth Film Production Studio were sued by Lê Vinh in May 1997 for using his composition '*Hanoi and I*' (*Hà Nội Và Tôi*). In both cases it was alleged that the composers had not been asked for permission before the use of their widely known and loved songs.²⁶

After these two cases there were no many other disputes over intellectual property rights heard in these two Courts up to 2006. Both could have been expected to try these disputes because of their jurisdiction in the two largest commercial centres. It is unofficially-estimated that there were a little more than 10 such cases heard in Hanoi People's Court and approximately 40 in Ho Chi Minh City People's Court during the 10-year period between 1997 and 2006. There were almost no other cases in other courts in other commercial centres such as Hải Phòng, Đà Nẵng, Bình Dương, or Cần Thơ. This is confirmed by the absence of any mention of the experiences of trying intellectual property cases, as is often done with other kinds of civil trials, in the annual reports of the Supreme People's Court during the over 10 years of 1999-2010.²⁷ This contrasts with the increasing number of civil cases over this period.²⁸ It confirms that litigation over intellectual property has been very limited and that it is not typical litigation before the courts. There may be some reasons specific to Vietnam for this, such as a societal psychology limiting access to

²⁶ These two cases are below analysed.

²⁷ See Annual Reports of the Supreme People's Court from 1999 to 2010.

²⁸ For example, civil cases rose dramatically from approximately 25,000 in 1994 to over 50,000 in 2004 (Gillespie, below n 29, 197) and then to 192,336 in 2008; 214,174 in 2009; and 215,741 in 2010 (including disputes arising from labour and commercial relations) according to the Supreme People's Court's Annual Reports of 2008 (3), 2009 (2), and 2010 (3) respectively.

the courts.²⁹ In practice, instead of taking a legal action, there has been an understandable and common preference for going to the National Office of Intellectual Property to appeal for the protection of industrial property rights.³⁰ This reflects the pervasiveness of administrative remedies in Vietnam's socialist legality.³¹

Ten typical copyright cases in Hanoi and Ho Chi Minh City People's Courts are examined:

- *Trần Tiến v Saigon Video*, Case No. 32/DSST (15 April 1997) Ho Chi Minh City People's Court;
- *Lê Quang Vinh (Lê Vinh) v Ho Chi Minh City Tre Film Production Studio (Youth Film Production Studio) and Vietnam Music Publishing House Vietnam (DIHAVINA)*, Case No. 23/DSST (19 May 2000) Hanoi People's Court;
- *Đào Quang Triệu v Phạm Văn Lang*, Case No. 07/DSST (27-28 March 1998) Hanoi People's Court;
- *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi I*, Case No. 41/DSST (16-17-19 October 1998) Hanoi People's Court;
- *Lê Văn Hùng v Ben Thanh Audio-Video*, Case No. 1293/DSST (7 August 2002) Ho Chi Minh City People's Court;
- *Nguyễn Văn Bảo v Cultural-Ethnic Publishing House*, Case No. 25/DSST (26 August 2003) Hanoi People's Court;
- *Lê Phước Vinh v Ho Chi Minh City Van Nghe Publishing House*, Case No. 706/DSST (14 April 2005) Ho Chi Minh City People's Court;
- *Trần Khoan Dũng v Nguyễn Ngọc Tuấn*, Case No. 787/DSST (22 April 2005) Ho Chi Minh City People's Court;

²⁹ John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 194; Pip Nicholson, *People Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007) 229-30.

³⁰ During the period 1995-2002 the National Office of Intellectual Property settled 126 cases relating to the granting of industrial designs certificates and 2,644 cases relating to the granting of trademarks certificates. It also dealt with 407 allegations of infringements of industrial designs and 1,173 allegations of the infringement trademarks: *Statistics- Settlement of Industrial Property Appeals* <www.noip.gov.vn> (visited 22 April 2009).

³¹ This is discussed in Chapter 7 on the enforcement of intellectual property rights in Vietnam under TRIPs.

- *Phạm Thị Hà v Culture-Information Publishing House*, Case No. 27/2006/DSST (26 June 2006) Hanoi People's Court; and
- *Nguyễn Quảng Tuân v Đào Thái Tôn*, Case No. 68/2006/DSST (25-26 December 2006) Hanoi People's Court.

The categories of intellectual property rights infringed and the courts in which the cases proceeded are indicated in the following tables:

Table 2: *The 10 Copyright Cases in Court in Vietnam from 1997 to 2006 by Jurisdiction*

Jurisdiction	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Hanoi People's Court	1	2		1		1	1		2	2	10
	<ul style="list-style-type: none"> - Case No. 07/DSST (27-28 March 1998) - Case No. 41/DSST (16-17-19 October 1998) - Case No. 23/DSST (19 May 2000) - Case No. 25/DSST (26 August 2003) - Case No. 27/2006/DSST (26 June 2006) - Case No. 68/2006/DSST (25-26 December 2006) 										6
Ho Chi Minh City People's Court	<ul style="list-style-type: none"> - Case No. 32/DSST (15 April 1997) - Case No. 1293/DSST (7 August 2002) - Case No. 787/DSST (22 April 2005) - Case No. 706/DSST (14 April 2005) 										4
The Appeal Court of the Supreme People's Court in Hanoi	<i>First Instance Judgment:</i> <ul style="list-style-type: none"> - Case No. 41/DSST (16-17-19 October 1998) - Case No. 23/DSST (19 May 2000) - Case No. 27/2006/DSST (26 June 2006) - Case No. 68/2006/DSST (25-26 December 2006) 					<i>Appeal Judgment:</i> <ul style="list-style-type: none"> - Decision 117/QĐ/DSPT (7 October 1999) - Case 129/DSPT (9 August 2001) - Case 237/2006/DSPT (17 November 2006) - Case 127/2007/DSPT (14 June 2007) 					4

Table 3: *The 10 Copyright Cases in Court in Vietnam from 1997 to 2006 by Issue*

Issue	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Written Works or Related to Written Works	1	2		1		1	1		2	2	10
	<ul style="list-style-type: none">- Case No. 706/DSST (14 April 2005)- Case No. 27/2006/DSST (26 June 2006)- Case No. 68/2006/DSST (25-26 December 2006)- Case No. 41/DSST (16-17-19 October 1998)- Case No. 07/DSST (27-28 March 1998)- Case No. 787/DSST (22 April 2005)										6
Musical Works	<ul style="list-style-type: none">- Case No. 32/DSST (15 April 1997)- Case No. 23/DSST (19 May 2000)- Case No. 1293/DSST (7 August 2002)										3
Photographic Works	<ul style="list-style-type: none">- Case No. 25/DSST (26 August 2003)										1
Derivative Works	<ul style="list-style-type: none">- Case No. 41/DSST (16-17-19 October 1998)										1
Exception to Copyright	<ul style="list-style-type: none">- Case No. 68/2006/DSST (25-26 December 2006)										1
Others	<ul style="list-style-type: none">- Case No. 07/DSST (27-28 March 1998)- Case No. 787/DSST (22 April 2005)										2

2. Copyright Trials

This section analyses the ten copyright cases referred to. After exploring how the courts dealt with copyright protection concerning literary and artistic works as cultural and social products especially in wartime Vietnam, it continues with copyright regulation, including the application of legislation before and after the 1995 Civil Code, the protection of written works, of musical works, and of investment in authorship.³²

2.1 Literary and Artistic Works as Cultural and Social Products

Vietnam has a long tradition of prose, poetry, songs, and music created, and enjoyed, by its people. The Vietnamese people have created a great national cultural heritage of folklore,

³² As all individual plaintiffs or defendants in these ten cases are advanced in years (ages and residential addresses of plaintiffs and defendants and other relevant parties must be shown in judgments), the titles of Mr. or Ms. are frequently placed before their first or full names when the cases are referred to or analyzed, in accordance with the honorifics extended to such people in Vietnamese culture.

folk paintings, folk poetry, folk songs, and other traditional knowledge.³³ Much of it was created without any thought of financial reward. It has become the common heritage of the people of Vietnam. The law enacted in Vietnam in applying TRIPs has used some flexibility to accommodate the social and cultural values associated with these traditions.

The tradition of ignoring personal reward has continued, to some extent, to be reflected in modern Vietnam. The lengthy wars from the 1945 Declaration of Independence to the 1975 reunification and the long struggle for a complete national independence made many Vietnamese people forget personal interest in struggling for a united country. Creators of literary and artistic work, including journalists, photographers, writers, painters, and composers, often shared these national concerns. In practice, they received public recognition and enjoyed some payment by the state media reproducing and distributing their works, including Vietnam Radio and Vietnam Television. Their names were often widely known. They had national reputations and fame. They were encouraged by the state and themselves in creativity with their works in many cases being created as part of their state employment. These works gave great support to the lengthy struggle for a united and independent country. Many of great songs and other musical works and paintings were created during this time. Listening to this music and songs, and looking at these pictures, brings back to many Vietnamese people this great epoch in Vietnamese history.

The collaborative relationship between the State and the artist during this period is seen in *Nguyễn Văn Bảo v Cultural-Ethnic Publishing House*.³⁴ During his employment at the Vietnam News Agency, Mr. Bảo went to Hà Bắc province in 1966.³⁵ This was the period in which United States Air Force B52 planes were engaged in extensive bombing.³⁶ Mr. Bảo took a photo of an American pilot who was captured by the local people and soldiers.³⁷ Taller and larger than his captors he was being transported in a small and simple cart

³³ This is protected through the Law on Cultural Heritages of 29 June 2001, Articles 4, 5, 8, 23, for example.

³⁴ Case No. 25/DSST (26 August 2003).

³⁵ Ibid, 2-7.

³⁶ Ibid.

³⁷ Ibid.

commonly-used in northern rural areas.³⁸ The photo was captioned: *From Supersonic Jet Plane to Hand-Made Cart (Từ Phán Lực Siêu Âm Đến Chiếc Xe Trâu Kẹo Kẹt)*.³⁹ It was reproduced by Cultural-Ethnic Publishing House without the permission of either Mr. Bảo or the Vietnam News Agency.⁴⁰

At the trial, the Panel recognized the intellectual property of both Mr. Bảo, as the creator, and of the Vietnam News Agency, as the owner, of the photo.⁴¹ The Panel affirmed that Mr. Bảo had the personal and property rights of an author who was not concurrently the owner of the work and that the Vietnam News Agency had the personal and property rights of an owner who was not concurrently the author of the work.⁴² These rights of Mr. Bảo, and of the Vietnam News Agency, were provided for under Articles 752 and 753 of the 1995 Civil Code, respectively.⁴³ As a relevant party invited to indicate its opinions, the Vietnam News

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ In particular, Article 752 of the 1995 Civil Code provides that:

1. An author who is not also the owner of a work shall have personal rights with regard to the work, consisting of [the right]:
 - a. To name the work;
 - b. To place his or her name or a pseudonym on the work and have such name or pseudonym acknowledged when the work is published, disseminated, or used; and
 - c. To protect the integrity of the work from any alteration and authorize or not authorize other persons to change the contents of the work.
2. An author who is not also the owner of a work shall have property rights with regard to the work, consisting of [the right]:
 - a. To enjoy royalties;
 - b. To receive remuneration when the work is used; and
 - c. To receive awards for the work, unless the work is not protected by the State.

As well, Article 753 of the Code states that:

1. An owner who is not also the author of a work shall have personal rights with regard to the work, consisting of [the right]:
 - a. To publish or disseminate the work, or authorize other persons to publish or to disseminate the work, unless the owner and the author have otherwise agreed; and
 - b. To authorize, or not authorize, other persons to use the work, unless the owner and the author have otherwise agreed.
2. An owner who is not also the author of a work shall be entitled to receive the material benefits from the use of the work in the following forms:
 - a. Publishing, republishing, displaying, exhibiting, performing, broadcasting, televising, audio and video recording, or photographing;
 - b. Translating, adapting, re-writing, or transforming; and
 - c. Leasing.

Agency stated that it had not sued Cultural-Ethnic Publishing House, nor had it required royalties to be paid to it, nor sought compensation.⁴⁴ However, it required Cultural-Ethnic Publishing House to acknowledge the rights of the author and itself as the owner of the photo when the photo was re-published.⁴⁵

Obligations arising from employment relationships, particularly employment in state owned enterprises, are also seen to be significant in *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi I*.⁴⁶ Moreover, the discussion of the Trial Panel reflects ‘reason and sentiment’ based in a socialist legality which is respectful of the collective ownership represented by State-owned enterprise and the way in which such State-owned enterprise must conform to socialist values.⁴⁷ It also reflects a sensibility relating to moral issues deeply rooted in traditional Vietnamese morality,⁴⁸ echoing Llewellyn’s interpretative model of justice reason discussed in Chapter 2.

Mr. Ánh sued both director Phạm Lộc and Film Production Studio Hanoi I alleging that they had destroyed the integrity of his written work or screenplay, *Marriage without Registration (Hôn Nhân Không Giá Trị)*, in adapting or transforming it into a movie under the same title.⁴⁹ The screenplay was written for a contest organized and assessed by the National Board for Cinematographic Screenplays in 1995 and took the second prize.⁵⁰ The prize recognized that the screenplay was intended to create a film telling of both the courage and the emotional and personal lives of members of the air force in wartime.⁵¹ The Ministry of Culture and Information, based on an agreement with Mr. Ánh, issued Decision 823/VH-QĐ of 16 April 1997, permitting Film Production Studio Hanoi I to produce *Marriage without Registration* under the 1997 State-funded plan.⁵² Phạm Lộc directed the

⁴⁴ Case No. 25/DSST (26 August 2003) 2-7.

⁴⁵ Ibid.

⁴⁶ Case No. 41/DSST (16-17-19 October 1998): This case is discussed in Gillespie, above n 29, 207-8.

⁴⁷ See above n 29 Gillespie, 202-11; Nicholson, 225, 267.

⁴⁸ Gillespie and Nicholson, *ibid*.

⁴⁹ Case No. 41/DSST (16-17-19 October 1998).

⁵⁰ Ibid, 2, 10.

⁵¹ Ibid, 2-3, 10-11.

⁵² Ibid, 11-12.

movie as part of his employment at Film Production Studio Hanoi I.⁵³ When the movie was completed the Ministry issued another decision, No.10/ĐA-QĐ of 16 December 1997, allowing it disseminated and prohibiting any alteration, deletion, or modification to it.⁵⁴

When considering Mr. Anh's allegations, the Trial Panel found that some changes in transforming the screenplay into the film were required because of considerations of public policy in making a film, the use of the State Funding in the production, and the relationship between state entities.⁵⁵ In particular, the Panel found it reasonable several details of the relationship of the two lovers in the screenplay, Oanh, an air-force pilot and Tuyết, a university student, should have not been depicted in the film.⁵⁶ This was because it found that these details in respect of Tuyết were inexact and unrealistic characterizations of Vietnamese women.⁵⁷ The quality of Vietnamese women generally, it found, is to be very faithful, especially in wartime.⁵⁸ It was therefore impossible in wartime for a Vietnamese woman to forget her previous beautiful and deep love and fall in love with another person so quickly, just five days after their first meeting, as depicted in the screenplay.⁵⁹

The Panel further recognized that marrying without registration, or living together without caring about societal reactions to such moral conduct, could happen, but judged that it was not common in Vietnamese society, especially in wartime.⁶⁰ According to the Panel, this kind of conduct was frequently criticized on serious moral grounds but also was supported by neither the Marriage and Family Law 1960, nor 1987, the current law.⁶¹ The Panel went on to note that up to five pairs of marriage without registration were depicted in the

⁵³ Ibid, 2, 13-15.

⁵⁴ Ibid, 12-13.

⁵⁵ Ibid, 18-21.

⁵⁶ Ibid, 21-22.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

screenplay.⁶² It found that this was another unrealistic feature, especially for pilots in wartime, with their very strict discipline, which should not have been reflected in the film.⁶³

The Panel also found that another change in the film, the removing of references to the uncertain parentage of one pilot, was justified.⁶⁴ According to the Panel, some episodes were filmed at a military airbase.⁶⁵ The air-force objected to such description of the pilot and would not permit the air-base use unless it was changed.⁶⁶ The Panel noted that, among other criteria, the air-force only selected its members from those with clear parentage.⁶⁷

The use of creative works as cultural and social products was a feature of the relationships between centrally-planned socialist economies in the past. The opposition to private ownership of property or more exactly, of the means of production, made it easier for Vietnam to use works of foreign authors from other socialist countries and vice versa. In the course of completing the master thesis on copyright law in Vietnam in 1999-2000, the author conducted some informal interviews with writers from the Publishing House of the Vietnam's Writers Association. Royalties paid by the State to writers, particularly in wartime, were considered good, compared with general standards of living at the time.⁶⁸ Some writers stated that there was often only a low rate or a small amount of royalties paid to them by foreign authors or publishers for permission to reproduce their works, so that it was just a symbolic royalty payment.⁶⁹ They also said that the local publishers in Vietnam would be allowed to use the works of overseas authors or publishers freely in many cases.⁷⁰

Some of these values, and the expectations based on them, are seen in *Nguyễn Văn Bảo và Cultural-Ethnic Publishing House*. Mr. Bảo discovered that a cut-down version of his

⁶² Ibid, 9, 22.

⁶³ Ibid, 19, 23.

⁶⁴ Ibid, 9, 21-23.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Kieu Thi Thanh, *Hội nhập quốc tế về bảo hộ quyền sở hữu trí tuệ ở Việt Nam* [International Integration of Protection of Intellectual Property Rights in Vietnam] (Political-Administrative Publishing House, 2013) 27.

⁶⁹ Ibid.

⁷⁰ Ibid.

famous photo of the captured United States pilot was contained in *Vietnam: The War 1858-1975* (*Việt Nam: Cuộc Chiến 1858-1975*) published by Cultural-Ethnic Publishing House without his permission or payment to him of a royalty.⁷¹ He requested Cultural-Ethnic Publishing House to publicly apologize to him for the infringements of his rights.⁷²

The Trial Panel found that the publication *Vietnam: The War 1858-1975* contained a selection of 656 photos, including the photo taken by Mr. Bảo.⁷³ This photo, however, was an exact reproduction from photo No.74 used as an illustration in another publication, *Only One Vietnam* (*Chỉ Có Một Việt Nam*) published in 1972 in Hungary by a Hungarian author.⁷⁴ The image of the local soldier, who had captured the United States pilot, in the Hungarian publication had been taken again at the Vietnam News Agency, reduced to 40 percent compared with the image from the photo by Mr. Bảo. All the other details in the two photos were the same.⁷⁵ The Panel concluded that there was no evidence that Cultural-Ethnic Publishing House and the editors had interfered with the integrity of the photo authored by Mr. Bảo as the photo used had been sourced from the foreign publication.⁷⁶

2.2 Copyright Regulation

The integration of Vietnam into the world economy, starting with Doi Moi 1986, has led to Vietnam initiating laws and regulations on copyright in harmonization with global legal developments. Local people have come to know that these laws and regulations may lead to different views taken of the rights which they may now have in the copyright in the literary and artistic works which they have created. They may choose to take the infringement by others of their rights to court, or to seek administrative remedies discussed in Chapter 7.

⁷¹ Case No. 25/DSST (26 August 2003) 2-7.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

Where they turn to the judicial system for a remedy they will find that the hearing of this kind of dispute is still not straightforward. Apart from other factors, this comes from the complexity of invisible rights in intangible intellectual creations and the historical context of Vietnam. To resolve a copyright case, like any other civil case, courts need follow both substantive and procedural laws and regulations. These have been provided for differently during the periods of economic and social development, outlined above, and the enactment of the 1995 Civil Code and later the 2005 Civil Code and the 2005 Intellectual Property Law. The implementation of TRIPs has made it easier to bring such cases. Nevertheless, the previous laws and regulations may be applied by the courts under the general principle of no retroactive application of legislation.⁷⁷

All 10 of the copyright trials considered were initiated by the plaintiffs after the commencement of the 1995 Civil Code, and some after the 2005 Civil Code and the 2005 Intellectual Property Law. Because of the time when the alleged infringements took place, the 1994 Copyright Ordinance was applied in two of the 10 cases. The 1995 Civil Code was used for all of the rest. Relevant regulations were applied together with the Ordinance and the Code. No case applies the 2005 Intellectual Property Law.

After considering the application of legislation prior to and after the 1995 Civil Code, this sub-section considers the hearing of disputes over written works, musical works, other categories of works, and the prevention of other infringements.

(a) The Application of Legislation Prior to the 1995 Civil Code

The regulation of copyright in Vietnam was initially made in Decree 142/HĐBT of 14 November 1986. Its underlying language and policies reflects Article 72 of the 1980 Constitution emphasizing the centrally-planned economy rather than the ownership of the intangible intellectual creations by individuals. This emphasis changed in the 1994

⁷⁷ This principle is promulgated by Resolution of 28 October 1995 of the National Assembly on the Implementation of the 1995 Civil Code, Resolution 45/2005/QH11 of 14 June 2005 on the Implementation of the 2005 Civil Code, and other relevant laws implementing the 2005 Intellectual Property Law.

Copyright Ordinance. Not only were the rights of authors of literary and artistic works, including written and musical works and derivative works, protected but also those of performers, producers of phonograms, and broadcasting organizations, were mentioned for the first time in the Ordinance.

The Copyright Ordinance was applied in *Trần Tiến v Saigon Video*.⁷⁸ The cassette, *Trần Tiến's Romance Songs: Saying Goodbye to Swallows* (*Tình Khúc Trần Tiến: Tạm Biệt Chim Én*), published by Saigon Video was alleged to use 10 of Trần Tiến's songs without his permission in breach of Article 10 of the Ordinance which gave him the right to refuse permission to others to reproduce his work and other rights recognized by the Ordinance. The cassette was published before 1 July 1996, the commencement date of the 1995 Civil Code. Therefore, the Trial Panel relied on Section 3:d of Resolution of 28 October 1995 of the National Assembly on the Implementation of the 1995 Civil Code for its application of the 1994 Copyright Ordinance to this case.⁷⁹

The defendant, Saigon Video, argued that the 10 of Trần Tiến's songs produced in the cassette had been already published so it was allowed to use these songs without his permission under Article 33:2 of the Ordinance relating to rights and obligations of organizations producing audio-video tapes and disks.⁸⁰ In response to Trần Tiến's request for Saigon Video to apologize publicly for violating the integrity of his works, it was argued that Saigon Video was allowed to alter the works used, under Article 15 of the

⁷⁸ Case No. 32/DSST (15 April 1997).

⁷⁹ Ibid, 5: In particular, Section 3(d) of the Resolution provides that where disputes over civil transactions which are entered and carried out before the commencement date of the Civil Code, laws and regulations prior to the Civil Code are applied. (A civil transaction is defined under Article 130 of the 1995 Civil Code as a unilateral legal act or a contract entered into between individuals, legal entities, or other entities which gives rise to, changes, or terminates civil rights or obligations).

⁸⁰ Ibid, 6: Specifically, Article 33 of the 1994 Copyright Ordinance provides that:

An organization producing audio or video tapes and disks must carry out the following provisions when using a work of other people to produce programs:

1. To sign a contract with the author or copyright owner and pay royalties if the work not having been published;
2. To acknowledge the author and/or performer by name, ensure the integrity of the works and pay remuneration if the work having been published to have no obligation of having authorization from the author or copyright owner of the work; and
3. To sign a contract with performers and pay them remuneration.

Ordinance relating to rights and obligations of persons translating, adapting, compiling, and transforming pre-existing works into derivative works.⁸¹

Rejecting these arguments, the Trial Panel ruled that Saigon Video had had a commercial purpose in republishing the songs so that Article 16 of the Ordinance did not apply.⁸² It had reproduced up to 10 of Trần Tiến's songs, and not a selection from a single song, which also breached Article 16 of the Ordinance on exceptions to copyright infringement.⁸³

The Panel went on to cite Article 25 of the Ordinance obliging users to sign a contract for using authors' works, except in cases covered by Article 16.⁸⁴ It concluded that the use of

⁸¹ Ibid, 9: In particular, Article 15 of the 1994 Copyright Ordinance states that:

A person translating, adapting, compiling, altering, or transforming a work shall enjoy the rights [of the author of the work] set out in Articles 10, 11, 12, 13, and 14 of this Ordinance, provided that the following provisions are performed:

1. To obtain authorization of the author or copyright owner of the original work;
2. Not to change the contents of the original work without authorization of the author;
3. To acknowledge the author's name and the title of the original work; and
4. To pay remuneration to the author or copyright owner [of the original work].

⁸² Ibid, 6: Specifically, Article 16 of the 1994 Copyright Ordinance provides that:

In the following cases an individual or organization may use a work having been published or diffused of another person without permission of, and payment to, the author or copyright owner of the work but must acknowledge the author's name and the origin of the work, provided that such use is not for commercial purposes, does not affect the normal exploitation of the work, and is not prejudicial to other interests of the author:

1. Duplicating the work for personal use;
2. Quoting the work in order to make a commentary or illustration;
3. Quoting the work for newspaper writing or for use in periodicals, sound or television broadcasts, or documentary films;
4. Quoting the work for school teaching or examining;
5. Duplicating the work for archival purposes or for use in a library;
6. Translating, disseminating the work from Vietnamese into esthetic minority languages;
7. Performing a theatrical work, song, piece of music in cultural gatherings or propagandizing activities in public places;
8. Audibly or visually recording directly a performance for reporting current news or teaching;
9. Photographing or televising sculptural, architectural, photographic, or applied-art works displayed in public places for introductory purposes; and
10. Making transcription of a work into Braille for the blind.

The above stipulations shall not apply to the duplication of architectural works, sculptural works, or computer software.

⁸³ Ibid.

⁸⁴ Ibid, 7: In particular, Article 25 of the 1994 Copyright Ordinance stipulates that:

An individuals or organization to use a work must sign a contract in writing with the author or copyright owner of the work unless it falls into the following circumstances:

1. Using the work in periodicals or sound or television broadcasts; or

Trần Tiến's songs by Saigon Video was not excluded from the requirement for entering into a contract with the author, and that it, in fact, had been done without such a contract.⁸⁵

The Trial Panel further found that Saigon Video had infringed Trần Tiến's rights to refuse permission to others to use his works and to enjoy material benefits from allowing the use of his works under Article 10 of the Ordinance.⁸⁶ It acknowledged that almost immediately after receiving the complaint from Trần Tiến, Saigon Video's representatives had gone to Trần Tiến's address to pay him money or to negotiate the amount of royalties being paid but was not able to reach an agreement with him.⁸⁷ It accepted that Saigon Video had wanted to carry out the obligation of paying royalties but had had difficulty in finding a way, satisfactory to Trần Tiến and itself, to do that.⁸⁸

As the parties were unable to reach agreement about the amount of royalties to be paid, the Panel decided on the amount, relying on a joint circular.⁸⁹ The Circular gave courts some flexibility in fixing royalty amounts. The rate of payment for authors whose musical works were recorded in cassettes or disks was set at 6 to 12 percent of the turnover.⁹⁰ The highest rate of 12 percent was used, in ordering Saigon Video to pay royalties for Trần Tiến.⁹¹ The reason for the highest rate was that Trần Tiến was a talented artist whose songs were

2. Using the work under Article 16 of this Ordinance.

⁸⁵ Ibid.

⁸⁶ Ibid, 7-8: Specifically, Article 10 of the 1994 Copyright Ordinance states that:

An author (of a work) is entitled to have the following rights:

1. To own the work created by him or her;
2. To put his or her name or pseudonym to the work and to have such name or pseudonym cited when the work is used;
3. To protect the integrity of the work, and to permit, or not permit, other persons to alter the work;
4. To publish and disseminate the work, or to authorize other persons to do so;
5. To receive royalties or remuneration when the work is used; and
6. To permit, or not permit, other persons to use the work and receive material benefits from permitting the use of the work.

⁸⁷ Ibid, 9.

⁸⁸ Ibid.

⁸⁹ Ibid, 8: It was Joint Circular 28/TTLB of 16 April 1990 of the Ministry of Culture and Information, the Ministry of Finance, and the Ministry of Labour, Invalids, and Social Affairs Guiding the Implementation of Royalty Regime to Cultural and Artistic Works under Decree 59/HĐBT of 5 June 1989 of the Ministers Council on Royalty Regime to Political-Social, Cultural-Educational, Literary-Artistic, and Scientific-Technological Works.

⁹⁰ Ibid.

⁹¹ Ibid.

extensively-admired by the public.⁹² A total of 8,000 cassettes had been produced and sold for VND 7,600 each. Saigon Video was ordered to pay to Trần Tiến VND 7,296,000.⁹³

In respect to Trần Tiến's request for a public apology from Saigon Video for violating the integrity of his works, Saigon Video had argued that it was allowed to alter the works when creating derivative works under Article 15 of the Ordinance.⁹⁴ The Panel ruled that as Saigon Video had altered some musical notes and words of the songs without permission from the author it did not fall within the provision.⁹⁵ It held that Saigon Video had violated Trần Tiến's rights, in Article 10:3, to have the integrity of his work protected.⁹⁶ Following Article 42:1 of the Ordinance, which permits authors to require infringers of their copyright to make public apologies to them, the Panel ordered Saigon Video to apologize to Trần Tiến in one newspaper, Liberation Saigon, and through two other media, Ho Chi Minh City People's Radio and Ho Chi Minh City Television.⁹⁷

In addition to this case, the 1994 Copyright Ordinance was applied to the application made by Lê Văn Hùng against Ben Thanh Audio-Video.⁹⁸ The court found, for the same reasons as those given in this case, that the Ordinance was applied. The case is considered below in the sub-section on the protection of musical works.

(b) The Application of the 1995 Civil Code, Amended 2005

The 1995 Civil Code was applied in eight of the 10 selected cases. This indicates that one of the purposes of the Code, to assist the holders of intellectual property rights to protect those rights, has been partly fulfilled. The Code provides for copyright, including related

⁹² Ibid.

⁹³ Ibid, 8-9.

⁹⁴ Ibid, 9.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid, 9-11.

⁹⁸ Case No. 1293/DSST (7 August 2002).

rights, in Articles 745-779. Governmental and ministerial regulations guide the implementation of these provisions by the judicial system.

The 2005 Civil Code was enacted in June and the Intellectual Property Law in November 2005. Reflecting Vietnam's socialist legality, their implementation was guided by further directions from the National Assembly and the Government.⁹⁹ Amongst other things, the further directions stipulated the application of the general principle of no retroactive application of legislation.¹⁰⁰ Based on the time of the events which created potential civil liability between the parties, the remaining eight cases were referred to the 1995 Civil Code's provisions and other relevant regulations guiding its implementation.¹⁰¹

The effect of these regulations and their significance can be seen in the judicial resolution of the cases considered below.

(c) The Protection of Written Works

Disputes over copyright in written works were involved in three of the 10 selected cases. There were various alleged infringements in these three cases but the use or publication of writings without the knowledge and permission of their authors was the most common. This often led to other alleged infringements including altering or changing the works used. Alongside other requests, including handing over or deleting those infringing publications, the plaintiffs often required the defendants to pay royalties and personal damages.

⁹⁹ These include Resolution 45/2005/QH11 of 14 June 2005 of the National Assembly on the Implementation of the 2005 Civil Code and Government Decree 100/2006/NĐ-CP of 21 September 2006 Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights.

¹⁰⁰ Ibid.

¹⁰¹ They include Decree 76/CP of 29 November 1996 Guiding the Implementation of Some Copyright Provisions under the 1995 Civil Code; Decree 61/NĐ-CP of 11 June 2002 on Royalty Regime; Joint Circular 01/2001/TTLT of 5 December 2001 of the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Culture and Information on Hearing Disputes over Copyright in People's Courts; and Resolution 01/2004/NQ-HĐTP of 28 April 2004 of the Supreme People's Court on Compensation for Damages outside Contracts.

In *Lê Phước Vinh v Ho Chi Minh City Van Nghe Publishing House*,¹⁰² the Publishing House was alleged to have reproduced *Amateur Music - Culture in the Waterway Region* (*Nhạc Tài Tử Văn Hóa Miền Sông Nước*) in a book, *The Mekong Delta Waits for and Welcomes the 21st Century* (*Đồng Bằng Sông Cửu Long Đón Chào Thế Kỷ 21*),¹⁰³ without Mr. Vinh, the author, being aware of it. It was also alleged that seventeen words had been removed from the end of the work and that there was no attribution of authorship to his exact name.¹⁰⁴ Mr. Vinh requested the defendant to stop using his work; apologize to him at the trial; make a correction to the alleged infringement in *Quốc Tế* (International), a weekly newspaper published by the Ministry of Foreign Affairs which had previously published his writing, and a daily newspaper, *Ho Chi Minh City Legislation* three consecutive times; and, to compensate for his physical and non-physical damages by paying him VND 33,150,000.¹⁰⁵ This included VND 1,000,000 as royalties and VND 6,000,000 as costs, including his travel from Cần Thơ to Hanoi and Cần Thơ – Ho Chi Minh City for collecting the infringement evidence and carrying out necessary procedures in the litigation.¹⁰⁶

The defendant admitted three wrongful actions in using Mr. Vinh's work: publishing without seeking his consent as the author and concurrent owner of the copyright, omitting some letters in the spelling of his name, and removing 17 words from the end of his work.¹⁰⁷ It proposed to the Trial Panel that it would apologize to Mr. Vinh before the Panel, make correction of the errors once in the mentioned newspapers, and pay him royalties of VND 200,000 and another VND 150,000 from his purchase of the book to both proof the infringement and compare with his previously-published article.¹⁰⁸

The Panel ruled that the royalty payment of Mr. Vinh, calculated under Decree 61/CP of 11 June 2001, would have been less than VND 200,000 and that the amount proposed by the

¹⁰² Case No. 706/DSST (14 April 2005).

¹⁰³ Literally the title of the book may be translated as *The Nine Dragon River Delta Waits for and Welcomes the 21st Century*.

¹⁰⁴ See above n 102, 2.

¹⁰⁵ Ibid, 2-3.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, 3-4.

¹⁰⁸ Ibid.

defendant should be accepted.¹⁰⁹ He was also awarded the price VND 150,000 of the book.¹¹⁰ In respect of his request for the payment of VND 20,000,000 for his non-property damages, the Panel agreed that he was lawfully-entitled to such damages as the defendant had intentionally-violated his rights under Article 751:1:b-c-d-đ of the Civil Code but the amount was too highly requested.¹¹¹ The Panel followed the Supreme People's Court's guideline, applying for the maximum damages outside of contract an amount of 10 minimal monthly-paid salaries, that a total of VND 2,900,000 was calculated.¹¹² The Panel also found that Mr. Vinh's travel expenses between Hanoi and Cần Thơ for collecting the evidence were genuinely-incurred and the defendant was ordered the payment of VND 3,000,000.¹¹³ Another amount of VND 3,000,000 for his travels from Cần Thơ to Ho Chi Minh City to attend court was recognized genuinely-incurring but denied for that the law did not provide for the award of such out of pocket expenses.¹¹⁴

Besides, Ho Chi Minh City Van Nghe Publishing House was ordered for correcting its infringement of Mr. Vinh's personal rights in *Quốc Tế* and *Ho Chi Minh City Legislation* newspapers three consecutive times.¹¹⁵

In *Phạm Thị Hà v Culture-Information Publishing House*, Ms. Hà alleged Culture-Information Publishing House, when publishing the book *Successful Businesspeople and Business Experiences (Doanh Nhân Thành Đạt và Kinh Nghiệm Thương Trường)* had used eight of her published articles without permission.¹¹⁶ According to her, the titles and page numbers of the infringing alleged articles in the book were:

¹⁰⁹ Ibid, 6-8.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Case No. 27/2006/DSST (26 June 2006).

- (i) ‘Being Full of Ambition in Spite of not Being Successful’ (*Dẫu Là Ai Vẫn Luôn Trần Đây Tham Vọng*) (223-229);¹¹⁷
- (ii) ‘Claude Bébébar and the AXA Assurance Corporation’ (*Claude Bébébar và Tập Đoàn Bảo Hiểm AXA*) (247-252);¹¹⁸
- (iii) ‘Becoming A Billionaire From Bankrupt Companies’ (*Trở Thành Tỷ Phú Nhờ Các Công Ty Phá Sản*) (296-302);¹¹⁹
- (iv) ‘Jochen Zeitz - the Person Who Awoke the PUMA Leopard’ (*Jochen Zeitz - Người Đánh Thức Con Báo PUMA*) (315-321);¹²⁰
- (v) ‘The King of Reducing Costs’ (*Ông Vua Giảm Chi Phí*) (321-327);¹²¹
- (vi) ‘The Manager With a Monthly Salary of a Million-Dollar’ (*Nhà Quản Lý Có Mức Lương Một Triệu Đô La/Tháng*) (345-351);¹²²
- (vii) ‘The King of Swiss Watches’ (*Ông Vua Đồng Hồ Thụy Sĩ*) (354-359);¹²³ and
- (viii) ‘Jack Welch - the Talented Manager of General Electric’ (*Jack Welch - Nhà Quản Lý Tài Ba Của General Electric*) (359-364).¹²⁴

Unlike other similar cases, Ms. Hà did not request the defendant to pay her royalties or compensate for her monetary damages. She required public apologies to be made three consecutive times in newspapers, *Nhân Dân* (The People), *Quân Đội Nhân Dân* (The People’s Army), *Hà Nội Mới* (New Hanoi), the handing-over of the published books, and the seeking of her consent when re-publishing the book.¹²⁵

After examining the evidence, the Trial Panel made a comparison between the articles reproduced and the original articles in the Vietnamese language:

¹¹⁷ Ibid, 2-3.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

- in (i), *Dầu Là Ai Vẫn Luôn Trần Đầy Tham Vọng*: the changes were made in the title and in one paragraph from the original article published as ‘The Rockefeller Oil King: The Man with the Ambition to Rule America’ (*Vua Dầu Lửa Rockefeller, Người Có Tham Vọng Chi Phối Cả Nước Mỹ*);¹²⁶
- in (ii), *Claude Bébébar và Tập Đoàn Bảo Hiểm AXA*: the title was changed and some sentences were deleted from the article originally published as ‘Claude Bébébar - Powerful President of the AXA Assurance Corporation’ (*Claude Bébébar - Vị Chủ Tịch Quyền Uy Của Tập Đoàn Bảo Hiểm AXA*);¹²⁷
- in (iii), *Trở Thành Tỷ Phú Nhờ Các Công Ty Phá Sản*: the words ‘Wilbur Ross’ were deleted from the title of the article originally-published as ‘Wilbur Ross Becomes a Billionaire from Bankrupt Companies’ (*Wilbur Ross Trở Thành Tỷ Phú Nhờ Các Công Ty Phá Sản*);¹²⁸
- in (iv), *Jochen Zeitz - Người Đánh Thức Con Báo PUMA*: the word ‘Prodigy’ (‘Thần Đồng’ in Vietnamese) was deleted from the title of the article originally-published as ‘The Person Who Awoke the PUMA Leopard: Prodigy Jochen Zeitz’ (*Người Đánh Thức Con Báo Puma: Thần Đồng Jochen Zeitz*) while one paragraph was moved to another position;¹²⁹
- in (v), *Ông Vua Giảm Chi Phí*: the words ‘Carlos Ghosn’ were deleted from the title of the article originally-published as ‘Carlos Ghosn: The King of Reducing Costs’ (*Carlos Ghosn, Ông Vua Giảm Chi Phí*);¹³⁰
- in (vi), *Nhà Quản Lý Có Mức Lương Một Triệu Đô La/Tháng*: the words ‘The General-Director’ (‘Vị Tổng Giám Đốc’ in Vietnamese) in the title of the article originally-published as ‘The General-Director With a Monthly Salary of a Million-Dollar’ (*Vị Tổng Giám Đốc Có Mức Lương Một Triệu Đô La/Tháng*) were changed into ‘The Manager’ (‘Nhà Quản Lý’ in Vietnamese);¹³¹

¹²⁶ Ibid, 5-7.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

- in (vii), *Ông Vua Đồng Hồ Thụy Sĩ*: the word ‘Bucherer’ was deleted from the title of the article originally-published as ‘Bucherer: The “King” of the Swiss Watches’ (*Bucherer “Ông Vua” Của Đồng Hồ Thụy Sĩ*);¹³² and
- in the last, (viii) *Jack Welch - Nhà Quản Lý Tài Ba Của General Electric*, the original title ‘Jack Welch: Talented President of the General Electric’ (*Jack Welch, Vị Chủ Tịch Tài Ba Của General Electric*) was changed, some sentences were cut, a paragraph was moved from where it had appeared in the original article, and an extra title was added (‘The Person Who Succeeded in Making the Profit of the Corporation Increase 15 Times’: *Người Có Công Tăng Lợi Nhuận Của Tập Đoàn Lên 15 Lần*).¹³³

The Panel, not surprisingly, found the defendant had breached the plaintiff’s copyright as a result of this evidence. However, the book in which the articles infringed the author’s copyright, *Successful Businesspeople and Business Experiences*, was a joint production by the defendant, Culture-Information Publishing House, and the North Culture Company Ltd. or Hương Thủy Bookshop.¹³⁴ The Company had a contract with Trần Thị Nga for preparing a manuscript and Ms. Nga made an agreement with Phạm Thị Lan to write it for her.¹³⁵

The Court found that the determination of the infringer in these circumstances was complicated so that the Copyright Office was consulted.¹³⁶ Culture-Information Publishing House was eventually found to be negligent in entering into a contract with the North Culture Company without taking necessary measures to verify the origin of the work and the legal rights attached to it.¹³⁷ At the same time, the Panel made clear that as all the published books had been sold out, the plaintiff’s request for them to be delivered up to her was unrealistic.¹³⁸ Except for this, all of Ms. Hà’s other requests were accepted but the

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid, 7-8.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid, 8-10.

¹³⁸ Ibid.

apology to her three consecutive times was ordered to be carried out in a *Nhân Dân* newspaper only.¹³⁹

The judgment was appealed by Ms. Hà.¹⁴⁰ She insisted that all the published books be delivered up to her.¹⁴¹ The Court of Appeal of the Supreme People's Court upheld the decisions made at first instance.¹⁴²

The next case arose out of a long running academic debate about *The Tale of Kieu*, used in Chapter 2 to illustrate the uncertainty of the meaning of words in Vietnamese. In *Nguyễn Quảng Tuân v Đào Thái Tôn*, Mr. Tuân alleged Mr. Tôn had used four of his published writings without permission in the book, *The Text of "The Tale of Kieu": Studies and Discussions*, (*Văn Bản Truyện Kiều: Nghiên Cứu và Thảo Luận*).¹⁴³ This book was authored by Đào Thái Tôn and published by the Publishing House of Vietnam Writers Association, Nguyen Du Vestiges Management Council (Ban Quản Lý Di Tích Nguyễn Du) under the Department of Culture and Information of Hà Tĩnh, and the West-East Culture-Language Centre.¹⁴⁴ The four infringing alleged writings were:

- (i) 'Some Opinions about Studies of "The Tale of Kieu" of the Late Professor Hoàng Xuân Hãn' (*Một Vài Nhận Xét Về Nghiên Cứu Truyện Kiều Của Cố Giáo Sư Hoàng Xuân Hãn*);¹⁴⁵
- (ii) 'A Reply to Mr. Đào Thái Tôn's Article "On an Article about Studies of "The Tale of Kieu"' (*Trả Lời Ông Đào Thái Tôn Về Bài "Nhìn Một Bài Nhận Xét Về Việc Nghiên Cứu Truyện Kiều"*);¹⁴⁶
- (iii) 'Putting Right Issues Raised in Opinions on Studies of "The Tale of Kieu"' (*Hãy Trở Lại Đúng Vấn Đề Nhận Xét Việc Nghiên Cứu Truyện Kiều*);¹⁴⁷ and

¹³⁹ Ibid.

¹⁴⁰ Case No. 237/2006/DSPT (17 November 2006).

¹⁴¹ Ibid, 5.

¹⁴² Ibid, 7-8.

¹⁴³ Case No. 68/2006/DSST (25-26 December 2006).

¹⁴⁴ Ibid, 4, 9.

¹⁴⁵ Ibid. 2-3, 7.

¹⁴⁶ Ibid.

- (iv) ‘On the Literature about Hoàng Xuân Hãn and the Recovery of the Original Text of “The Tale of Kieu”’ (*Về Bài Hoàng Xuân Hãn và Việc Khôi Phục Nguyên Tác Truyện Kiều*).¹⁴⁸

After examining the evidence, the Trial Panel at first instance found Mr. Tôn had infringed Mr. Tuân’s copyright.¹⁴⁹ He was ordered to make apology to Mr. Tuân at Mr. Tuân’s home and pay royalties of VND 1,040,400, as well as compensation of VND 25,000,000 for Mr. Tuân’s property and non-property damages.¹⁵⁰

Mr. Tôn filed an appeal to the Court of Appeal against the judgment.¹⁵¹ The Appellate Panel came to a completely different opinion to the trial court and found against Mr. Tuân. Mr. Tôn was found to have had no legal obligations to Mr. Tuân.

The Appeal Panel ruled that the Trial Panel’s application of the 1995 Civil Code in this case was correct.¹⁵² However, it found that the Trial Panel had misapplied the relevant Articles on the property and personal rights of an author who is simultaneously the owner of the copyright in a work and also on the civil sanctions available in such case.¹⁵³ It ruled that Articles 760-761 of the Code, providing for exceptions to copyright infringement, should have been relied on instead.¹⁵⁴

The Appeal Panel stated that to decide whether or not Mr. Tôn had violated copyright in citing the whole four writings of Mr. Tuân, their use in this way had to be seen in the

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid, 7-12.

¹⁵⁰ Ibid: In the Court’s Decision, Articles 27, 609-610, 615, 750-751, 754, and 759 of the 1995 Civil Code were the main provisions applied.

¹⁵¹ Case No. 127/2007/DSPT (14 June 2007).

¹⁵² Ibid, 7-9.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

context of the creation of his entire book.¹⁵⁵ Once this was done it was clear that there had been a wrong application of law by the Trial Panel.¹⁵⁶

The Appellate Panel stated that:

Because these four writings by Mr. Tuân appeared in the work *The Text of “The Tale of Kieu”: Studies and Discussions* by Mr. Tôn, without seeking the permission of Mr. Tuân, Mr. Tuân petitioned against Mr. Tôn for copyright infringement and for compensation for non-physical damages. However, Mr. Tôn agreed that he had used these articles by Mr. Tuân in his book but he objected to the claim that he needed the consent of Mr. Tuân. He argued that these four writings were all published and incorporated into his work to re-describe previous discussions of the issues in a faithful and honest manner as possible so that his use fell into the permitted exceptions, of where a work is used for research purposes only.

It is found that both Mr. Đào Thái Tôn and Mr. Nguyễn Quảng Tuân are long-established Kieu studies scholars (Những Nhà Kiều Học), particularly in carrying out specific scientific researches into the text of The Tale of Kieu. Therefore, both of them have published many articles debating with each other over these studies for many years. As a result, in order to examine and assess whether or not incorporating the four articles of Mr. Tuân into Part II: Discussions in Mr. Tôn’s book, with a total of ten articles in this Part, was an infringement of copyright, can only be determined from the context in which the book was created.

It is seen that the ten articles, including the four articles by Mr. Nguyễn Quảng Tuân, are collected in Part II of the book, reflect very clearly that they are all discussions of the methodologies for studying the text of The Tale of Kieu, which had been initiated by Professor Hoàng Xuân Hãn before his death. This has been a robust discussion lasting over many years, especially in 1997-1999. When discussing the four writings by Mr. Tuân, Mr. Tôn had to reproduce them in their totality so that he could point out the 82 inaccuracies in them (the total words in the four articles are 16,545 with up to 82 errors). This was done together with comments and connotations within which Mr. Tôn criticized Mr. Tuân for dishonesty and weakness in his professional knowledge. While Mr. Tuân could have replied or responded to such arguments, he did nothing but brought the dispute to Court.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

It is concluded that in order to reflect honestly and faithfully the whole course of discussions for the purposes of researching and diffusing information, Mr. Tôn clearly had to use the four writings in their entirety so that the readers could understand all of the issues which needed to be argued. He did this by faithfully ensuring that the copied articles were the same as the originals, without any truncation, modification, or distortion and the name of the author and the origins of the articles clearly mentioned. Therefore, although the whole articles were copied, Mr. Tôn in fact only did so to assist the discussion, especially in making his comments and connotations so that it was easier for the readers to compare them with the originals and realize the inaccuracies in Mr. Tuân's writings. This needs to be recognized as scientific research work or an independent and unique creation by Mr. Tôn, not his mere selection and collection of other authors' writings to publish a book for commercial purpose. Besides, Mr. Tôn received VND 7,000,000 as royalties on the ground of his authorship in accordance with the royalty regime specified by the law, not as a commercial share of profits from publishing the book as a publisher or a businessperson.¹⁵⁷

The Appellate Panel ruled that the reproduction of the four articles by Mr. Tuân in the book, *The Text of 'The Tale of Kieu': Studies and Discussions*, created by Mr. Tôn for the purpose of criticism of the discussion in the book, fell within the exception to copyright infringement under Article 760 of the 1995 Civil Code.¹⁵⁸

The Court of Appeal's decision emphasizes the importance of context to the way in which the Appeal Panel approached the application of the legislation. Four of the author's articles were published in their entirety and without the consent of the author but were not found to have infringed the author's intellectual property rights. Its approach, in revising the decision of the trial court, is reminiscent of Llewellyn's observation that the language of the law is contextualized to the circumstances of each case,¹⁵⁹ and of the adjusting of tension to

¹⁵⁷ Ibid.

¹⁵⁸ Ibid: In particular, Article 760 of the 1995 Civil Code reads:

An individual or organization may use a work of another person having been published or disseminated provided that such work is not prohibited from being copied and such use is not for commercial purposes as well as does not affect the normal exploitation of the work and is not prejudicial to other interests of the author or the owner of copyright. The individual or organization using the work is required neither to obtain permission from, nor to pay remuneration to, the author or the owner of copyright, but to acknowledge or cite the author's name and the origin of the work.

¹⁵⁹ See Sub-section 1.2 *Law May Have Conflicting Rules for Interpreting Law* in Chapter 2 on conceptualizing law's flexibility for more in detail.

the variant needs of ‘the sense of the situation as the court sees that sense’.¹⁶⁰ There is also a reflection of the situation sense and leeway of discussion in the Court’s observation that ‘While Mr. Tuấn could have replied or responded to such arguments, he did nothing but brought the dispute to Court’. This suggests that the Appeal Panel saw that justice for Mr. Tuấn lay in publications in academic journals rather than in the judicial system. This also fits with ‘*lý và tình*’ and the idea held by some judges that judgments should be based, in part, on moral reasons and sentiment rather than legal arguments, although such approaches are rarer in the Court of Appeal than they are in local courts.¹⁶¹

(d) The Protection of Musical Works

Three of the ten selected cases dealt with the allegations of infringement of copyright in musical works. The alleged infringements vary. They include not only exploiting or recording songs without permission but also making changes to the music and the lyrics. In *Trần Tiến v Saigon Video*, Saigon Video was alleged to have used 10 of Trần Tiến’s songs without permission in a cassette: *Trần Tiến’s Romance Songs: Saying Goodbye to the Swallows* (*Tình Khúc Trần Tiến: Tạm Biệt Chim Én*).¹⁶² These songs were:

- (i) ‘You are Like a Little Sun’ (*Mặt Trời Bé Con*);¹⁶³
- (ii) ‘The Fire of the Highlands’ (*Ngọn Lửa Cao Nguyên*);¹⁶⁴
- (iii) ‘Inspired when Crossing a Bridge’ (*Tùy Hứng Lý Qua Cầu*);¹⁶⁵
- (iv) ‘Why did You Get Married So Young’ (*Sao Em Nữ Vội Lấy Chồng*);¹⁶⁶
- (v) ‘The Imprint of a Foot on Sand’ (*Vết Chân Tròn Trên Cát*);¹⁶⁷
- (vi) ‘Saying Goodbye to the Swallows’ (*Tạm Biệt Chim Én*);¹⁶⁸

¹⁶⁰ Karl N Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed’ (1950) 3 *Vanderbilt Law Review* 395, 396.

¹⁶¹ See above n 29 Gillespie 202-11; Nicholson, 225, 267.

¹⁶² Case No. 32/DSST (15 April 1997).

¹⁶³ *Ibid.*, 6.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

- (vii) ‘Wrist Rings for My Fiancé’ (*Vòng Tay Cầu Hôn*);¹⁶⁹
- (viii) ‘The Story of the Five People’ (*Chuyện Năm Người*);¹⁷⁰
- (ix) ‘I Don’t Want To Grow Up’ (*Cô Bé Vô Tư*);¹⁷¹ and
- (x) ‘Inspired by Black Horses’ (*Tùy Hứng Lý Ngựa Ô*).¹⁷²

Trần Tiến also alleged Saigon Video breached the artist’s integrity in the songs by:

- cutting the third paragraph from the sixth song;¹⁷³
- removing the last sentence from the ninth song;¹⁷⁴
- permitting the singers to sing the second and seventh songs with three incorrect sentences in each song;¹⁷⁵
- using an incorrect music note in the third song;¹⁷⁶
- altering the rhythm in the fifth song;¹⁷⁷ and
- printing on the back cover of the cassette a picture of a scantily-dressed young girl that could lead the public and purchasers to having a distorted sense of his songs.¹⁷⁸

Trần Tiến requested that he receive a public apology and be compensated for VND 50,000,000.¹⁷⁹ The evidence was overwhelmingly for the plaintiff. After examining it, the Trial Panel found that Saigon Video had committed almost all of the infringements alleged by Trần Tiến.¹⁸⁰

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid, 2, 9.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, 3, 9.

¹⁸⁰ See Subsection 2.2 (a) on the application of legislation prior to the 1995 Civil Code for the judgment of the Trial Panel in this case.

In *Lê Vinh v Ho Chi Minh City Tre Film Production Studio (Youth Film Production Studio) and Music Publishing House Vietnam (DIHAVNA)*, Lê Vinh alleged that a song in which he held copyright, *Hanoi and I*, had been used without his consent as one of 10 in a cassette, in a music video, in a karaoke video, and in a CD entitled *Hanoi the Season without Rains (Hà Nội Mùa Vắng Những Con Mưa)*, jointly produced by Youth Film Production Studio and DIHAVINA.¹⁸¹ He also alleged that the covers of the products wrongly-acknowledged Hoàng Phủ Ngọc Tường as the lyrics' author and that the singer who performed the song sang some musical notes incorrectly.¹⁸²

This was a complex case that lasted for some considerable time, from 1998 to 2001. It is discussed below in the context of correcting procedural mistakes.

In *Lê Văn Hùng v Ben Thanh Audio-Video*,¹⁸³ the complexity resulted from the ideas of attribution, authorship, reputation, and creativity amongst Vietnamese people employed in State-owned enterprises.

The intricacies of the case can be traced back to May in 1995 when Ben Thanh Audio-Video published a cassette: *How Can I Forget My Former Romance (Tình Xưa Sao Quên)*; to November 1994 when another cassette, *Missing Passed Happy Days (Thương Nhớ Những Ngày Xanh)*, and, to June 1996 when *Album of Đỗ Hữu Tài's Songs: Pleasant Memories (Những Hoài Niệm Đẹp)*, were published.¹⁸⁴

The song *Returning to Saigon (Về Lại Sài Gòn)* was contained in *How Can I Forget My Former Romance* with the lyrics' authorship attributed to Trần Quốc Dũng and the music's composition to Nguyễn Hữu Tài.¹⁸⁵ Meanwhile, two other songs *The Portrait of Summer (Chân Dung Hạ)* and *The Line of Time (Dòng Thời Gian)* were used in *Missing Passed*

¹⁸¹ Case No. 23/DSST (19 May 2000) 2.

¹⁸² Ibid.

¹⁸³ Case No. 1293/DSST (7 August 2002).

¹⁸⁴ Ibid, 1-6.

¹⁸⁵ Ibid, 1-10.

Happy Days in which the former attributed to Trần Quốc Dũng as the music composer and Đỗ Hữu Tài as the lyrics author and the latter specified Đỗ Hữu Tài as the author of both music and lyrics.¹⁸⁶ These two songs were also used in *Album of Đỗ Hữu Tài's Songs: Pleasant Memories* but in this *The Portrait of Summer* attributed Trần Quốc Dũng to the music composer without mention of the lyrics authorship and *The Line of Time* mentioned neither music, nor lyrics authorships.¹⁸⁷

All the three cassettes were produced under three contracts signed with the Education and Training Department of Đồng Nai, represented by Mr. Đỗ Hữu Tài who then served as a deputy head of the department.¹⁸⁸ However, he privately paid Ben Thanh Audio-Video an amount to have the songs published, to enjoy the fame and reputation associated with such publications.¹⁸⁹ The Department claimed that it was unaware of this transaction and the Court accepted this.¹⁹⁰

Mr. Lê Văn Hùng, who was formerly an official of the same Education and Training Department, claimed that the song, *Returning to Saigon*, on the cassette *How Can I Forget My Former Romance* was the same song *Returning to Saigon in the Middle of the Season of Red Jacaranda* created by him in 1995 under the pseudonym Trần Quốc Dũng based on poetic ideas of Đỗ Hữu Tài.¹⁹¹ He requested its title be corrected to reflect the latter title and it be attributed to him, as Trần Quốc Dũng, as the music composer and to Đỗ Hữu Tài, as the lyrics author.¹⁹² He also requested public apology for the breaches of copyright.¹⁹³

Mr. Hùng also requested royalty payments for the use of his song *The Portrait of Summer* in the cassette, *Album of Đỗ Hữu Tài's Songs: Pleasant Memories*,¹⁹⁴ as well as requested

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

be recognized as a lyrics joint-author of the song *The Line of Time* and be paid royalties for this song as used in both this cassette and another one *Missing Passed Happy Days*.¹⁹⁵

At the trial, the Panel agreed with Mr. Hùng that *Returning to Saigon in the Middle of the Season of Red Jacaranda* was actually created by him under the pseudonym Trần Quốc Dũng in 1995, based on poetic ideas of Đỗ Hữu Tài, and that he had the right to have his name or the pseudonym acknowledged in accordance with Article 10:2 of the 1994 Copyright Ordinance.¹⁹⁶ It concluded that Ben Thanh Audio-Video had breached his copyright when it named the song *Returning to Saigon* and contributed the lyrics to Trần Quốc Dũng and the music to Nguyễn Hữu Tài.¹⁹⁷ It ordered that these mistakes should be publicly corrected, under Article 42:1 of the Copyright Ordinance, in a way appropriate to the distribution of the cassette containing the song.¹⁹⁸ Consequently, Ben Thanh Audio-Video was ordered to carry out the correction and apology to Mr. Hùng with a single advertisement in two newspapers, *Thanh Niên* (The Youth) and *Đồng Nai*.¹⁹⁹ The apology confirmed that *Returning to Saigon* was *Returning to Saigon in the Middle of the Season of Red Jacaranda* composed by Trần Quốc Dũng, based on the poetic ideas of Đỗ Hữu Tài.²⁰⁰

In relation to the authorship of *The Line of Time*, the Panel found that it was first published in a bulletin of the Department of Education and Training of Đồng Nai in July 1995 and that the bulletin attributed the music to Đỗ Hữu Tài and the lyrics to Đỗ Hữu Tài and Hoa Cúc Vàng (Yellow Michaelmas Daisy), another pseudonym of Mr. Hùng.²⁰¹ Then Mr. Hùng was a staff member and Mr. Tài was one of the department managers.²⁰² The Panel noted that Mr. Tài refused to recognize Mr. Hùng or Hoa Cúc Vàng as a joint author of the song with the evidence, recognized by both Mr. Hùng and Mr. Tài, that in 1994 when the song was close to the completion, Mr. Tài passed it to Mr. Hùng for comments and advice

¹⁹⁵ Ibid.

¹⁹⁶ Ibid, 11-14.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid, 14-16

²⁰⁰ Ibid.

²⁰¹ Ibid, 11-14.

²⁰² Ibid.

on how to improve it.²⁰³ The Panel also found a book written by Mr. Lê Văn Hùng and published in December 1994, after the mentioned-bulletin issued the Department, by the Publishing House of Đồng Nai.²⁰⁴ According to the Panel, in this book, *The Art of Conquering Hearts (Nghệ Thuật Chinh Phục Trái Tim)*, Đỗ Hữu Tài was recognized as the sole creator of both the music and lyrics of *The Line of Time*.²⁰⁵ Based on such evidence, the Panel ruled that there was no ground to accept that Mr. Hùng was the lyrics author of *The Line of Time* that his request to be paid royalties for the use of this song in *Missing Passed Happy Days* and *Album of Đỗ Hữu Tài's Songs: Pleasant Memories* was refused.²⁰⁶

An appeal from the judgment was filed in the Court of Appeal of the Supreme People's Court in Ho Chi Minh City. One ground of appeal might be that Mr. Tài had not requested the first instance Panel to order Ben Thanh Audio-Video to publicly correct his joint authorship of the song *Returning to Saigon in the Middle of the Season of Red Jacaranda*. No copy of the appellate judgment is available to the author.

(e) The Protection of Other Categories of Works

The cases also reflect the protection of some creative works apart from the authorship of writings and lyrics and the composition of music.

- **Photographic Works**

As noted earlier, when filing a petition against Cultural-Ethnic Publishing House, Mr. Nguyễn Văn Bảo sought the protection of his photographic work *From Supersonic Jet Plane to Hand-Made Cart*.²⁰⁷ His personal and property rights as an author who was not also the owner of the photo under Article 752 of the 1995 Civil Code were confirmed.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid, 14-16.

²⁰⁷ Case No. 25/DSST (26 August 2003).

However, the use of the photo in *Vietnam: The War 1858-1975* by Cultural-Ethnic Publishing House came from another source originated in the relationship between Vietnam and another socialist country that the Panel was unable to agree to his other requests.

- **Derivative Works**

As also noted earlier, in *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi I*²⁰⁸ director Phạm Lộc and Film Production Studio Hanoi I were sued for making changes when adapting or transforming a written work, the screenplay by Mr. Ánh, *Marriage without Registration*, into a cinematographic work or a movie. The Trial Panel found evidence of such changes having been made.²⁰⁹ However, Mr. Ánh signed a contract with Film Production Studio Hanoi I prior to the filming commencement. The relevant points in the contract were:

- (i) Film Production Studio Hanoi I agreed to turn *Marriage without Registration* from Mr. Ánh into a film in 1997;²¹⁰
- (ii) The specified royalty to Mr. Ánh, and paid once only, was VND 10,000,000;²¹¹
- (iii) During the film production, Mr. Ánh had the responsibility, also the directors designated, to participate in the screenplay alteration or modification;²¹² and
- (iv) When necessary, to protect the investment Film Production Studio Hanoi I had the right to modify and add to the screenplay.²¹³

²⁰⁸ Case No. 41/DSST (16-17-19 October 1998).

²⁰⁹ See Subsection 2.1 *Literary and Artistic Works as Cultural and Social Products*.

²¹⁰ See above n 208, 5 & 15: The signing and contents of the contract were later analyzed again by another Trial Panel at Hanoi People's Court (Case No. 09/DSST, 24 March 2003, 5). According to this Panel, Mr. Ánh had, on 1 September 1999, filed an appeal to the Court of Appeal to the judgment heard by the Trial Panel. In its Decision No. 117/DSPT of 7 October 1999, the Appellate Court did not accept his appeal as it was made too late to be accepted, an out of time application. Mr. Ánh had after that filed a complaint requiring the Trial Panel's judgment to be heard following a cassation procedure. In Decision No. 123/GĐT-DS of 26 June 2002, the Civil Court within the Supreme People's Court rescinded the Trial Panel's assessment fee to transfer the case to the first instance court (Hanoi People's Court) for rehearing (Case No. 09/DSST, 24 March 2003, 6-8).

²¹¹ Case No. 41/DSST (16-17-19 October 1998) 5, 15; Case No. 09/DSST (24 March 2003) 5.

²¹² Ibid.

²¹³ Ibid.

That was why though it was found neither Mr. Ánh nor director Phạm Lộc had well performed the third clause,²¹⁴ the Trial Panel found it unable to accept the requests of Mr. Ánh, including not publicizing the movie and a public apology from the Film Studio.²¹⁵

(f) Other Infringements of Copyright

Other issues are seen in the cases, including the protection of investment in authorship and the prevention of procedural mistakes.

- **Investment in Authorship**

In *Trần Khoan Dũng v Nguyễn Ngọc Tuấn*²¹⁶ the court dealt with a very difficult relationship between citizens and local governments over the content of copyright. It was decided that the plaintiff sued the wrong person as defendant, an individual, and not the responsible local government body.²¹⁷

The plaintiff, Mr. Trần Khoan Dũng, alleged that, as an expert consultant in developing and writing up investment projects, he had written *Building and Organizing the Bến Thành Cuisine Night Market*.²¹⁸ At the end of 2001 he sent this document to the Bến Thành Market Management Board, giving it directly to Mr. Nguyễn Ngọc Tuấn, the Chairperson of the Board, that he could have comments before publishing it.²¹⁹ Mr. Dũng claimed that Mr. Tuấn had told him he wanted to be a joint author of the document but Mr. Dũng refused.²²⁰ Later he was spoken and advised by Mr. Tuấn that the project had been rejected

²¹⁴ Case No. 41/DSST (16-17-19 October 1998) 15-18.

²¹⁵ Ibid, 28-29.

²¹⁶ Case No. 787/DSST (22 April 2005).

²¹⁷ Ibid, 1-4.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

by Ho Chi Minh City First District People's Committee, which was authorized to decide on the organization and operation of the night market.²²¹

After the 2002 Lunar Tet, Mr. Tuấn requested Mr. Dũng to make about 30 copies of the document and give them to him.²²² On 2 March 2003 Mr. Dũng read in *Liberation Saigon* newspaper an article written by Thúy Hải, stating that the Bến Thành Night Market project had been accepted by Ho Chi Minh City People's Committee.²²³ He wrote to the newspaper requiring it to add to the other information that he was the author of the project so that another article, 'Addition to the Project' (Nói Thêm Về Đề Án), by the same journalist was published stating that Mr. Tuấn claimed that he had received the project from Mr. Dũng in a contest.²²⁴ Mr. Dũng claimed that this was dishonest as there was no such contest and that when Ms. Huỳnh Thị Nhân, a deputy president of Ho Chi Minh City People's Committee, visited the Bến Thành Market on the 5th Lunar Tet, Mr. Tuấn took the opportunity to present the project directly to her.²²⁵ Sometime later Ho Chi Minh City People's Committee held an official meeting to discuss the night market formation and Mr. Dũng alleged that Mr. Tuấn intended to appropriate his creative labour by presenting it to higher officials as his creation while concealing him as the project consultant.²²⁶ He alleged that the appropriation extended to his financial analyses and that Mr. Tuấn was artificially telling journalists about such a thing and that the First District People's Committee had entirely relied on the project as conceived by him.²²⁷

Mr. Dũng also claimed that when the project proposal was initially accepted, the First District People's Committee and the Bến Thành Market Management Board, as the organizers, said nothing about his authorship, including the costs incurred in his

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

photocopying and enlarging the photographs for the presentation.²²⁸ He claimed that when meetings or seminars on the project were organized by Ho Chi Minh City People's Committee, the First District People's Committee, and the Bến Thành Market Management Board, he was not invited despite his authoring it.²²⁹ Irrespective of this, he kept taking part in it, through his Company CDE, to complete 40 shops therefore helped have the opening ceremony of the Night Market two days earlier than the planned date.²³⁰

During the procedures collecting evidence and holding mediation by the Court, Mr. Dũng insisted that his legal action was against only Mr. Tuấn and that he was neither against the Bến Thành Market Management Board, nor Ho Chi Minh City First District People's Committee.²³¹ He requested Mr. Tuấn recognize him as the project author, make such recognition in newspapers, and sign a contract with him for the project's development.²³²

The defendant, Mr. Nguyễn Ngọc Tuấn, concurrently on behalf of himself and the Bến Thành Market Management Board, argued that he had no legal authority to recognize Mr. Dũng as the project author and that this could be done only by the government.²³³ He claimed that he had not undertaken the project of developing the Bến Thành Night Market but only signed a contract with CDE Company for creating and writing up a night market project which could be revised as required.²³⁴ He also claimed that the Night Market had been built and operated under the authority of Ho Chi Minh City First District People's Committee and that it had to be accepted by Ho Chi Minh City People's Committee as its operation was also on some streets in other districts or beyond the First District People's Committee.²³⁵ He denied making remarks reflected in articles by Thúy Hải.²³⁶ He did not agree with the requests made by Mr. Dũng of both him and the Bến Thành Market

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

Management Board.²³⁷ On the contrary, he spoke that if Mr. Dũng continued to sue him, he might sue Mr. Dũng for compensation for suing him without any cause.²³⁸ In response, Mr. Dũng did not withdraw his petition but indicated that he wanted to reach to an agreement.²³⁹ However, Mr. Tuấn refused to conciliate.²⁴⁰

The Trial Panel mainly relied on Articles 754 and 759 of the 1995 Civil Code, Article 4:1 of Government Decree 76/CP of 29 November 1996 on Copyright, and Joint Circular 01/2001/TTLT-TANDTC-VKSNDTC-BVHTT of 5 December 2001 in concluding that copyright arose at the moment a work was created in a particular material form regardless of its content, presentation, language, and whether it was published or registered that the copyright in the document created by Mr. Dũng was protected.²⁴¹ Therefore, the Panel continued, Mr. Dũng was granted the rights set out in Article 751 of the 1995 Civil Code and that where these rights were infringed he had the right to sue those who infringed them in court under Article 759 of the Code.²⁴²

The Panel decided that Mr. Tuấn acted as the chairperson of the Bến Thành Market Management Board which was a member of both the Bến Thành Night Market Management Sub-Commission and the Night Market Organization Leading Panel of Ho Chi Minh City's First District People's Committee.²⁴³ Reviewing the Decisions made by Ho Chi Minh City First District People's Committee,²⁴⁴ the Panel concluded that it was the responsibility of the local government, or the First District People's Committee, which had the authority to organize and manage the Bến Thành Night Market, not Mr. Tuấn, if Mr. Dũng's project had been developed for organizing and managing it.²⁴⁵

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid, 5-7.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Decision No. 1544/QĐ-UB of 29 July 2002 and Decision No. 1085/QĐ-UB of 5 April 2002.

²⁴⁵ See above n 241.

As Mr. Dũng insisted on suing Mr. Tuấn only and not other individuals or organizations, his petition was held not being directed to the right person.²⁴⁶ Consequently, apart from the conclusion that there was no dispute over Mr. Dũng's authorship of the project document, the Panel found it impossible to accept any of the requests made of Mr. Tuấn.²⁴⁷

- **Non-Protectability**

In *Đào Quang Triệu v Phạm Văn Lang*,²⁴⁸ Dr. Đào Quang Triệu initiated a legal action against Dr. Phạm Văn Lang relating to the book authored by Dr. Lang published by Hanoi Agriculture Publishing House, *The Basis of Experiment Planning Theories and Their Application in Agriculture Technology* (*Cơ Sở Lý Thuyết Kế Hoạch Hóa Thực Nghiệm và Việc Ứng Dụng Trong Kỹ Thuật Nông Nghiệp*). He claimed that Dr. Lang reproduced, on pages 116 and 123, some mathematic formulas which had been created by him and therefore breached his authorship, requesting the Court to require Dr. Lang to attribute the authorship of the formulas to him.²⁴⁹

After examining the evidence, the Trial Panel found that the cited mathematic formulas were published by not only Dr. Triệu but also by two Russian authors, E. C. Baxôi and Đ. N. Baradin, who were his PhD supervisors in the late 1970s in Russia.²⁵⁰ According to the Panel, the formulas were presented in an article published in a journal of a Russian University in 1978 and cited in the PhD thesis of Mr. Triệu in 1979.²⁵¹ The Panel also found that Dr. Lang had based his book on the published research of other scientists.²⁵² All these were referenced in the book in which the disputed mathematic formulas on page 116 were referenced to E. C. Bozanôp (Bulgaria) and those on page 123 to the PhD thesis of Dr.

²⁴⁶ Ibid.

²⁴⁷ Ibid: An appeal against the judgment was filed in the Appeal Court of the Supreme People's Court in Ho Chi Minh City. However, as in the case *Lê Văn Hùng v Ben Thanh Audio-Video* no copy of the appellate judgment is available to the author.

²⁴⁸ Case No. 07/DSST (27-28 March 1998).

²⁴⁹ Ibid, 2-6.

²⁵⁰ Ibid, 8-10.

²⁵¹ Ibid.

²⁵² Ibid, 11-14.

Nguyễn Xuân Ái.²⁵³ When asked for his opinion, Dr. Ái recognized the reference to his PhD thesis by Dr. Lang was legitimate and reasonable and did not affect his copyright.²⁵⁴

The Panel also found that before bringing his petition to the Court, Dr. Triệu had informed some newspapers of his allegation.²⁵⁵ This led the Institute of Agricultural Engineering, where Dr. Lang was working, to convene a scientific council on 19 and 30 May 1997 to respond to the newspaper stories and to propose an official response for being used by the Ministry of Agriculture and Rural Development.²⁵⁶ Dr. Triệu also made a complaint to the Minister of Agriculture and Rural Development.²⁵⁷ A ministerial scientific council was formed by the Ministry of Agriculture and Rural Development.²⁵⁸ At the meeting on 14 July 1997, the Council concluded:

- Foreign authors, including Box and Hunter, had made available generalizations of mathematic formulas relevant to those used by both Dr. Triệu and Dr. Lang. In many cases, these generalizations possessed a great effort making them easy and convenient when being used by others;²⁵⁹
- Those formulas used by Dr. Triệu and Dr. Lang was only a shortened and simplified form of those deriving from such foreign authors, not invented;²⁶⁰
- The book by Dr. Lang, *The Basis of Experiment Planning Theories and Their Application in Agriculture Technology*, was based on internal and external scientific documents with information about, and instruction in the use of, mathematic formulas in experimental planning measures applying in agriculture technology.

²⁵³ Ibid.

²⁵⁴ Ibid,

²⁵⁵ Ibid, 3-4.

²⁵⁶ Ibid, 4-7.

²⁵⁷ Ibid, 6: That was because the Institute of Agricultural Engineering, for which Dr. Lang worked, and the Agricultural University of Hanoi I, where Dr. Triệu was working for, are both directly under the Ministry of Agriculture and Rural Development.

²⁵⁸ Ibid, 6-7.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

The citation of examples and references in the book was acceptable and reasonable without prejudicing copyright of the referenced authors;²⁶¹ and

- The Council appreciated the work of both Associate Professor Đào Quang Triệu and Professor Phạm Văn Lang in disseminating and promoting experiment planning measures based on the use of available mathematic formulas, in agriculture generally and in agricultural engineering particularly.²⁶²

Dr. Triệu disagreed with this conclusion.²⁶³ To assist in evaluating Dr. Triệu's allegations the Panel sought advice from both the Copyright Office and a learned society.²⁶⁴ In an official letter the Copyright Office advised that mathematic formulas went beyond the scope of copyrightable subject matter in accordance with the contemporary legislation.²⁶⁵ The Institute of Mathematics of Vietnam, consulted by the Panel, formed another scientific council. In their meeting with the Court on 20 March 1998, Members of that council, consisting of mathematic experts, indicated that they had reached similar conclusions to the Scientific Council of the Ministry of Agriculture and Rural Development and that there were no grounds for Dr. Triệu's claim to be the author of those mathematical formulas.²⁶⁶

The Trial Panel ruled that under the copyright provisions in the 1995 Civil Code guided by Government Decree 76/CP of 29 November 1996, mathematical formulas do not fall within the scope of the protection of copyright.²⁶⁷ Consequently, anyone may reproduce those formulas in their works, just as Dr. Đào Quang Triệu had cited, in his PhD, his two supervisors, who were recognized as joint authors in the jointly-written article.²⁶⁸ In other words, the citation of those mathematic formulas by Dr. Phạm Văn Lang in his book did not infringe copyright for the subject matter went beyond copyright protection.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid, 11-15.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid, 16-17.

²⁶⁸ Ibid.

- **Correcting Procedural Mistakes**

As indicated above, in *Lê Vinh v Ho Chi Minh City Tre Film Production Studio (Youth Film Production Studio) and Music Publishing House Vietnam (DIHAVINA)*²⁶⁹ Lê Vinh discovered his song *Hanoi and I* was one of 10 used in a cassette, in a music video, in a karaoke video, and in a CD entitled *Hanoi the Season without Rains* jointly produced by DIHAVINA and Youth Music Centre (Trung tâm Băng nhạc Trẻ) of Youth Film Production Studio (Hãng Phim Trẻ) that named them as three defendants in his first petition on 4 May 1995.²⁷⁰ As the two latter were located in Ho Chi Minh City, the case was transferred to Ho Chi Minh City People's Court.²⁷¹ When Lê Vinh was given notice of this, he filed another petition on 19 December 1997 naming only DIHAVINA with its headquarters in Hanoi, as the sole defendant.²⁷² The case dossier was sent back to Hanoi People's Court on 26 February 1998.²⁷³

The first trial was held on 21 July 1998.²⁷⁴ Lê Vinh filed an appeal on 3 August 1998.²⁷⁵ The case was also protested for containing a serious procedural fault of not requiring Youth Film Production Studio attending the court as a joint defendant.²⁷⁶ The Court of Appeal revoked the judgment of 21 July 1998.²⁷⁷

Based on Lê Vinh's new petition, the case was heard at first instance on 19 May 2000.²⁷⁸ At the trial, alongside the royalty requirement Lê Vinh requested DIHAVINA and Youth Film Production Studio publicize their apologies for reproducing incorrect information attributed to Hoàng Phủ Ngọc Tường the authorship of the song's lyrics.²⁷⁹ He also

²⁶⁹ Case No. 23/DSST (19 May 2000).

²⁷⁰ The first trial document: Case No. 31/STDS (21 July 1998) 1.

²⁷¹ Ibid, 1-2.

²⁷² Ibid, 2.

²⁷³ Ibid.

²⁷⁴ The first appellate trial document: Case No. 33/PTDS (9 April 1999) 3.

²⁷⁵ Ibid, 6-7.

²⁷⁶ Ibid.

²⁷⁷ Case No. 33/PTDS (19 April 1999).

²⁷⁸ Case No. 23/DSST (19 May 2000).

²⁷⁹ Ibid, 1-3.

requested he be compensated for damages to his reputation through making him appear to be, to the public, a literary thief.²⁸⁰

Both defendants admitted their wrong doing, including the use of the song without Lê Vinh's permission and the attribution to Hoàng Phủ Ngọc Tường of authorship of his song's lyrics.²⁸¹ They offered to pay royalties to him using a commonly-accepted standard of VND 300,000 for a song recorded on a cassette and VND 500,000 for each song used in music video, karaoke video, or CD.²⁸² He disagreed on this. His objection, accepted by the Trial Panel, was that such standards were built into the practices preceding the 1995 Civil Code but that they had not survived the coming into effect of the Code.²⁸³

The Trial Panel ordered DIHAVINA and Youth Film Production Studio to cease their use of *Hanoi and I* and to make apologies to Lê Vinh in the media, especially for wrongly suggesting that his song had a joint author.²⁸⁴ They were also ordered to pay compensation of VND 5,000,000 for this mistake impugning the plaintiff's honour.²⁸⁵

As there were no regulations guiding the payment of royalties in this case other than a 1990 joint circular, this was applied.²⁸⁶ In Trần Tiến's case, the Trial Panel applied the highest rate of primary royalty, 12 percent per turnover. The Trial Panel in Lê Vinh's case demonstrated the flexibility in considering appropriate compensation. It judged that *Hanoi and I* was not a great historical musical work and the 6-percent lowest rate was used with another extra rate of 1 percent of the primary royalty for each 1,000 copies sold in excess of

²⁸⁰ Ibid.

²⁸¹ Ibid, 3-5.

²⁸² Ibid.

²⁸³ Ibid, 11-15.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid: It is Joint Circular 28/TTLB of 16 April 1990 on the Royalty Regime to Cultural and Artistic Works, adopted by the Ministry of Culture and Information, the Ministry of Finance, and the Ministry of Labour, Invalids, and Social Affairs. It preceded the 1995 Civil Code. One the other of substituting it in implementing the 1995 Civil Code was enacted on 11 June 2002 (Decree 61/NĐ-CP on the Royalty Regime).

the first 20,000 copies.²⁸⁷ With a total of 101,613 copies for an entire turnover of VND 2,745,200,700 Lê Vinh was awarded a total royalty of VND 29,812,879.²⁸⁸

The decision was appealed by both parties.²⁸⁹ The defendants complained that the amount to be paid for was too high.²⁹⁰ The plaintiff requested that the primary rate of royalties for the uses of his song should be 8 to 10 percent.²⁹¹

The Appeal Panel found that the rate of 6 percent applied by the Trial Panel was unreasonable, that there was no exact way to determine the royalty payable from the four kinds of the production involved, and that any of those products which had exceeded 20,000 copies should enjoy the higher rate of royalties, but not all the items.²⁹²

According to the Appeal Panel, *Hanoi and I* was loved by a great number of the public so that a primary rate of 8 percent was chosen.²⁹³ The total copies produced were determined as 26,533 of the music video, 38,859 of the cassette, 25,025 of the CD, and 11,196 of the karaoke video *Hanoi the Season without Rains*.²⁹⁴ In these products *Hanoi and I* was one of ten songs used and the total primary and additional royalties ordered to be paid to Lê Vinh was VND 23,302,378.²⁹⁵

Although this amount was lower than awarded by the first instance judgment, after the appellate trial Lê Vinh stated that the only thing concerned him throughout his 4-year pursuing the lawsuit was a judicial recognition of his song's authorship and the protection of his honour as not being a thief who had stolen from Hoàng Phủ Ngọc Tường.²⁹⁶ At the

²⁸⁷ See above n 283.

²⁸⁸ Ibid.

²⁸⁹ Case No. 129/DSPT (9 August 2001).

²⁹⁰ Ibid, 4

²⁹¹ Ibid.

²⁹² Ibid, 5-7.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ 'Nhạc sỹ Lê Vinh thắng kiện' [Composer Lê Vinh Won the Lawsuit] *Việt Báo* and *Thế Thao Văn Hóa* (10 August 2001) <<http://vietbao.vn>> (visited 22 April 2009).

same time, the representative of DIHAVINA, who had been involved in the four-year litigation told journalists that his organization would never use Lê Vinh's songs again as 'If something unfortunately should go wrongly again, it would tie us up like this time'.²⁹⁷

3. Conclusions

It has been over one and a half decades since Vietnam introduced the 1995 Civil Code providing, for the first time, for intellectual property rights. The significance of this is better appreciated for it is recognized that a legal code has a status just below that of the Constitution itself in the national legislative system. This achievement was continued and enlarged 10 years later in the adoption of the 2005 Civil Code and the 2005 Intellectual Property Law. There are many other policy statements and administrative manuals adopted by the Government and relevant ministries for the implementation of these Codes and Law.

The use and enforcement of the law, required to bring it alive, is another matter, of course. Procedural legislation was gradually harmonized with the substantive legislation. The Civil Procedure Code was approved in 2004, along with other guidelines for its implementation. The judicial system has been both partly rebuilt and reformed, among other reasons, to settle disputes over intellectual property rights, including copyright. A set of procedures for hearing these disputes in courts of first instance and in courts of appeal, as with other civil or commercial or other cases, was adopted. Procedures were also stipulated so that enforceable judgments or decisions may be appealed or protested, ensuring that procedural law complements substantive law.

This chapter deals with a selection of only 10 copyright disputes during the 10-year period from 1996 to 2006. This period commenced with the coming into force of the 1995 Civil Code (1 July 1996) and also of the 2005 Intellectual Property Law (1 July 2006). There are obvious limitations in such a study. The alleged infringements occurred before the major legal reform in 2005 and related to earlier laws. They also involved rights relating to state-

²⁹⁷ Ibid.

owned enterprises created with state funds. In spite of these limitations much can be learnt from the trials of these cases.

At the level of relevant legislation, the complexity of law and regulations means that careful consideration needs to be given to the selection of the appropriate law. In this respect, the general principle of no retrospective application of the Civil Codes 1995 and 2005 is significant. In the initial period dealing with these cases, the Courts were required to trace back to the legislation which applied at the time. They usually used the 1987 Ordinance on the Procedures for Settlement of Civil Cases, the 1994 Copyright Ordinance, and Joint Circular 28/TTLB of 16 April 1990 guiding Decree 59/HĐBT of 5 June 1989 on Royalties. This is seen in *Trần Tiến v Saigon Video*²⁹⁸ and *Lê Văn Hùng v Ben Thanh Audio-Video*,²⁹⁹ both heard by Ho Chi Minh City People's Court. None of the other eight cases were able to apply the 2005 Civil Code and the 2005 Intellectual Property Law as the applicable law was the 1995 Civil Code and relevant regulations.³⁰⁰

At the level of implementing the legislation, the trial panels in both the courts of first instance and the Court of Appeal have been challenged by the complexity of the facts and the law relating to intellectual property. They have also been challenged by the novelty of this kind of dispute in the political and economic context of Vietnam. It is inevitable that this has led to some uncertainty about how the law would be applied. In *Lê Văn Hùng v Ben Thanh Audio-Video*, for example, Mr. Đỗ Hữu Tài had not requested, but the first instance Panel ordered, that Ben Thanh Audio-Video publicly correct his joint authorship of the song *Returning to Saigon in the Middle of the Season of Red Jacaranda*.³⁰¹ Also, the first

²⁹⁸ Case No. 32/DSST (15 April 1997).

²⁹⁹ Case No. 1293/DSST (7 August 2002).

³⁰⁰ The regulations include: Decree 70/CP of 29 November 1996 on Copyright; Decree 61/NĐ-CP of 11 June 2002 on Royalties; Joint Circular 01/2001/TTLT of 5 December 2001 Providing Guidelines for Hearing Copyright Disputes in Court; and, Solution 01/2004/NQ-HĐTP of 28 April 2004 on Compensation for Damages outside Contracts.

³⁰¹ For more in detail see Subsection 2.2 (d) *The Protection of Musical Works*.

instance Panel in *Nguyễn Quảng Tuân v Đào Thái Tôn* was criticized by the Appellate Panel for hesitating to apply provisions for copyright exceptions to the case.³⁰²

The hearings have covered some of the diversity, the complexity, and the novelty of disputes over copyright. This involved not only the resolution of alleged violations of copyright of different kinds of works including written, musical, pre-existing, and derivative works but also the resolution of the appropriate compensation to be paid for both property and non-property, or personal, damages. This is challenging. For instance, some plaintiffs claimed that their musical works had been performed using incorrect notation or incorrect rendering of the origin. To make a more fully informed conclusion about this, the assistance of professional agencies was sought. This happened in *Lê Vinh v Ho Chi Minh City Youth Film Production Studio and Music Publishing House Vietnam (DIHAVINA)*.³⁰³ This is similar to other cases in which the Copyright Office³⁰⁴ or the Institute of Mathematics of Vietnam³⁰⁵ was consulted by the Panels. This reflects a common practice in Vietnamese courts.³⁰⁶ The opinions of those professional bodies were not determinative of the judgments or decisions produced, but their advice appears to be considered both necessary and important in informing the Panels in the disputes arising from the creation and the use of cultural and social products such as copyright works.³⁰⁷

The courts are not empowered to interpret laws in Vietnam that the Trial Panels in these copyright cases interestingly demonstrated some flexibility in applying the law. But they frequently turned to the application of regulations or guidelines, in determining the

³⁰² For details see Subsection 2.2 (c) *The Protection of Written Works*.

³⁰³ In this case the Court twice sought assistance from the Culture-Sports-Tourism Ministry's Department of Performing Art for examining and assessing whether the singer was wrong when performing Lê Vinh's song.

³⁰⁴ This is seen in many cases, including *Lê Vinh v Youth Film Production Studio and DIHAVINA* (Case No. 23/DSST, 19 May 2000); *Đào Quang Triệu v Phạm Văn Lang* (Case No. 07/DSST, 27-28 March 1998); and, *Phạm Thị Hà v Cultere-Information Publishing House* (Case No. 27/2006/DSST, 26 June 2006).

³⁰⁵ This is seen in *Đào Quang Triệu v Phạm Văn Lang*, *ibid*.

³⁰⁶ In his book (above n 29, 207) Gillespie argues that this indicates the previous relationship between the courts and these government agencies in which courts are seen as just another branch of government.

³⁰⁷ But this seems uneasy elsewhere when the very Copyright Office might be the defendant in a lawsuit for innocently infringing copyright: 'Cục Bản quyền bị kiện vi phạm... tác quyền' [The Copyright Office is litigated for... copyright infringement] (*Ho Chi Minh City Legislation Newspaper* 28 March 2007) *Vietnamese Law Consultants* <<http://vietnamese-law-consultancy.com>> (visited 14 September 2011).

royalties to be paid to authors, for example. In a particular case, a trial panel has discretion in choosing, among those specified by law, an appropriate rate between a maximum and minimum percentage. For authors of musical works which are recorded in cassettes or disks, a varying rate of 6-12 percent per turnover is provided under Joint Circular 28/TTLB of 16 April 1990 on Royalties to Cultural and Artistic Works. The Court must determine the suitable rate to apply within these limits. The highest rate was judged to be appropriate in case *Trần Tiến v Saigon Video* while the lowest rate was used in *Lê Vinh v Youth Film Production Studio and DIHAVINA*.³⁰⁸ The Appellate Panel, in the latter case, justified the use of a mid rate of 8 percent.

Nevertheless, this flexibility is difficult to apply where a work might fall into different types of work to which different royalties apply. This is specified in *Lê Phước Vinh v Ho Chi Minh City Van Nghe Publishing House*. The article *Amateur Music – Culture in the Waterway Region* by Mr. Vinh was used without his permission in the book *The Mekong Delta Waits for and Welcomes the 21st Century* by Ho Chi Minh City Van Nghe Publishing House. As it could fall into two different classes with different rates of royalties under Article 9 of Government Decree 61/ND-CP of 11 June 2002 on Royalties, the issue was which class with which rate could be applicable: either literary articles or articles relating to political, cultural, social-educational, scientific-technological, or technical knowledge? The first has a royalty rate of 6-15 percent per turnover while the second has a rate of 6-10 percent. Both are to be multiplied by the retail price and by the number of publications produced. The first instance judgment did not deal with these issues.³⁰⁹

In terms of the Vietnamese context of a socialist economy in transition, the Trial Panels are seen having demonstrated their flexibility in relation to state-owned agencies. This is found in circumstances in which intellectual property was created in whole or part using state funds, and also in the promotion of Vietnamese or socialist morals. Such state agencies were invited to give their opinions, or to participate in the course of settling many of these

³⁰⁸ More in detail of these two cases see Subsections 2.2 (a) *The Application of Legislation Prior to the 1995 Civil Code*; 2.2 (d) *The Protection of Musical Works*; and, 2.2 (f) *Other Infringements of Copyright*.

³⁰⁹ More detail in this case see Subsection 2.2 (c) *The Protection of Written Works*.

cases.³¹⁰ It is also seen in *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi 1* in the Panel's views on the role of state agencies in assisting each other when creating intellectual property, increasing their obligations to protect state investment and to promote traditional social and moral values.³¹¹ The relationship between former socialist countries, or their state agencies, in using each other's copyright works is specified in *Nguyễn Văn Bảo v Cultural-Ethnic Publishing House*.³¹² Alongside the flexible approach taken by the Court when dealing with this case, there were other difficulties or complexities. There had been two photos: the original taken by Mr. Bảo as its author and the other, based on the original but taken again by a Hungarian author with the permission of the Vietnam News Agency as the copyright owner of the photo. Cultural-Ethnic Publishing House was found to have not infringed Mr. Bảo's rights as it used, in its publication, the derivative or the Hungarian photo, not the photo originally taken by Mr. Bảo.³¹³ An unresolved issue is that what could happen if the Hungarian photo continues to be exploited by foreign publishers? How would Vietnam protect the interests of its State agencies and citizens? This gap in the legislation requires consideration as it affects so many works created in wartime in Vietnam.

³¹⁰ See above nn 303-305.

³¹¹ Case No. 41/DSST (16-17-19 October 1998): For more detail of this case see Subsection 2.1 *Literary and Artistic Works as Cultural and Social Products*.

³¹² Case No. 25/DSST (26 August 2003): Details of this case see Subsection 2.1 *Literary and Artistic Works as Cultural and Social Products*.

³¹³ For details see Subsections 2.1 *Literary and Artistic Works as Cultural and Social Products* and 2.2 (e) *The Protection of Other Categories of Works*.

CHAPTER 9: CONCLUSION – IMPLEMENTATING THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS IN VIETNAM

In the context of its integration into the WTO, or the global multilateral trading system, one of the most significant changes in Vietnam's legal system has been its creation of a system of comprehensive laws protecting intellectual property. From some initial and brief regulations suitable for the protection of the interests of creative works and industrial property of state-owned enterprises in the centrally-planned socialist economy of the 1980s¹ the national legislation on intellectual property has been integrated into, and harmonized with, the protection of the international community's intellectual property, set out in the TRIPs Agreement. This legislative achievement is contained in the 2005 Intellectual Property Law and a large number of relevant provisions in the 2005 Civil Code and numerous regulations or sub-regulations for the implementation of the former law.

A long path led to the realization of this major body of law. At the start most policy and law makers and lawyers were unfamiliar with the concepts of intellectual property. The formulation of policies to implement TRIPs' complex and high standards, as well as the drafting of legislation was time-consuming and costly. In creating almost a completely new system of intellectual property Vietnam chose a flexible approach to the implementation of TRIPs. The three periods of this implementation have been described. The first 'warming-up' period took place from 1995 to 1998. The second 'removing impediments' period was lasting for 5 years, between 1999 and 2004. Lastly, the third 'full completion' period commenced in 2005 and was marked by the adoption of the Intellectual Property Law in November 2005. Each stage brought the local intellectual property law closer to that found in the national legal systems of the most developed nations.

Two milestones in terms of intellectual property are seen in 1995. In January 1995 Vietnam made its formal request for accession to the WTO. At the end of 1995, in October, the Civil

¹ The details are given in notes 14 in Chapter 1, 267 in Chapter 2, and 17 in Chapter 8.

Code was, for the first time, adopted, and also for the first time, included with provisions for the protection of intellectual property rights. The creation of the Code included the codification of the limited protection previously given to intellectual property, including the 1989 Industrial Property Ordinance and the 1994 Copyright Ordinance. It followed a review and consultation over international intellectual property treaties and conventions, including the TRIPs Agreement. The Code's provisions for intellectual property were implemented, following Vietnam's legal practice by other government or ministerial regulations and sub-regulations, including Decree 63/CP of 24 October 1996 on Industrial Property, Decree 79/CP of 29 November 1996 on Copyright, and Circular 3055/TT-SHCN of 31 December 1996 on the implementation of Decree 63/CP. This first step into the WTO's environment and implementation of TRIPs came to be seen as inconsistent with the Agreement's standards. The legislation was found to have, among other shortcomings, no provisions for the protection of compilations of data, as well as no provisions for the protection of layout designs and undisclosed information.² It also had no standards for the enforcement of intellectual property consistent with the requirements set out in TRIPs.³

Many of these shortcomings were addressed in the second period. Vietnamese legislative instruments on intellectual property rights proliferated and moved closer to international standards in this period.⁴ The statement in the Civil Code that artistic and literary works and other subject matters of industrial property were protected without need to amend or supplement its provisions made that process easier. Substantive laws and procedural laws increasingly began to align to the standards in TRIPs. They included Decree 54 made on 3 October 2000 on the protection of business secrets, geographical indications, trade names, and on rules against unfair competition relating to industrial property. They also included Decree 13, adopted on 20 April 2001, providing for new plant varieties, and Decree 42, dated 2 May 2003, on the protection of layout designs. They led to a series of government's

² For details see Subsection 3.1 *The Warming-up Period 1995-1998* in Chapter 3 on internalizing the WTO TRIPs Agreement in Vietnam.

³ Ibid.

⁴ See Subsection 3.2 *The Period of Covering Other TRIPs Subject Matters 1999-2004* in Chapter 3 on internalizing the WTO TRIPs Agreement in Vietnam for more in detail.

decrees which tackled a major gap, the enforcement of the new substantive laws. They initially showed Vietnam's characteristic preference for administrative remedies. They included Decree 12, adopted on 6 March 1999, on administrative violations of industrial property, and Decree 31, made on 26 June 2001, on dealing with administrative infringements in the cultural and information sector including copyright in literary and artistic works. They culminated in the Civil Procedure Code of 15 June 2004, which replaced the out-of-date Ordinance on Procedures for the Settlement of Civil Cases in 1989.

The final enactment of the Intellectual Property Law at the end of 2005 took considerable preparatory work and drew on the accumulating knowledge and experience of the earlier attempts at legislative reform. There were increasing numbers of reviews of, and consultations over, corresponding laws in other states and with international organizations during the drafting of the Law. Officially, the Law had over ten drafts before it became legislation. Unofficially, it was considered hundreds of times, mainly in processes controlled by the National Office of Intellectual Property.

Four years after the enactment of the 2005 Intellectual Property Law, many regulations and sub-regulations have been adopted to secure its implementation. They have occupied the time of the Vietnamese Government and its administrative agencies throughout 2006, 2007, and 2008.⁵ To date in 2009, the Ministry of Finance has issued Circular 22/2009/TT-BTC, created on 4 February 2009, making new regulations on fees and charges for industrial property.⁶ Also, Decree 47/2009/NĐ-CP is adopted on 13 May 2009 by the government supplementing existing regulations on administrative violations of copyright and related rights. On 19 June 2009, the 2005 Intellectual Property Law was amended by the National Assembly. The level of protection has been increased in some areas in this amendment and augmentation. The term of copyright protection, for example, increases from 50 years to 75

⁵ See Subsection 3.3 *The Full Completion of TRIPs Requirements 2005* - in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam for details.

⁶ This Circular replaced the three previous enactments: Circular 23 of 9 May 1997, Circular 132 of 30 December 2004, and Circular 115 of 29 December 2006. Among other reasons there had been complaints that some of them had treated foreigners differently from local applicants.

or 100 years depending on the kind of literary and artistic works involved.⁷ Also, the right of importing the originals or copies of phonograms is added to rights held by the producers of sound or visual recordings.⁸ This legislation comes into force on 1 January 2010.⁹

This ‘full completion’ period relates closely to the main theme of this thesis. This is to answer the question of how Vietnam has used the flexibilities found in international law in its implementation of the TRIPs Agreement so that its regime of intellectual property rights would not only be harmonized with the Agreement’s standards but would also be suitable for its status as a developing country with low per capita income, a low level of technological development, and lack of familiarity with intellectual property protection?

In finding the answers to this question, both the international standards of intellectual property rights and the flexibilities within TRIPs and other conventions or treaties incorporated into the Agreement are to be seen in the local law. The use of those flexibilities may be necessary and important for any developed or developing country members but they are likely to be more important and necessary for developing countries, including Vietnam. This is stated in TRIPs Preamble recognizing the special needs of the least-developed country members in terms of maximum flexibility in their domestic implementation of laws and regulations to enable them to create a sound and viable technological base. Non-governmental organizations and scholars generally advise developing countries to exploit TRIPs’ flexibilities because of their less-developed economic status and low levels of technological development.¹⁰

⁷ See *Intellectual Property Law 2005* art 27, as amended in 2009.

⁸ See *Intellectual Property Law 2005* art 30, as amended in 2009.

⁹ In accordance with this 2009 amended legislation, there have been a number of newly-created government degrees and ministerial circulars in supplementing or replacing the older ones for the implementation of the Law enacted in 2005. They include Decree 97/2010 and Decree 88/2010 replaced respectively Decree 106/2006 and Decree 104/2006; and Decree 119/2010 and Decree 122/2010 revised respectively Decree 105/2006 and Decree 103/2006. They also include Finance Ministry’s Circular 44/2011 stated to replace previous implementing regulations contrary to its contents. See note 206 in Chapter 3 for more details of this.

¹⁰ The details are given in note 6 in Chapter 1 and note 251 in Chapter 3. See also note 56 in Chapter 4.

It can be said that the flexibilities in TRIPs and other intellectual property treaties embodied in the Agreement have been incorporated throughout Vietnam's intellectual property law. The flexibilities exploited are found in the ambiguities of language used, the legal gaps left, or in the references to the cultural, traditional, and social characteristics which distinguish Vietnamese society from developed non-socialist societies which are discussed in Chapter 2. This is seen in the protection for copyright and related rights and for industrial property comprising patents, trademarks, geographical indications, industrial designs, layout designs, and undisclosed information. As well it is seen in the protection for new varieties of plants and the enforcement of these categories of intellectual property rights.

In respect of copyright and related rights protection, among other uses of those flexibilities, the local law has, under Articles 2, 2*bis* of the Berne Convention and Article 9:2 of the TRIPs Agreement, included provisions excluding news of the day and legislative, administrative, judicial documents and their official translations, as well as processes, systems, methods of operation, definitions, concepts and data, from copyright protection.¹¹ The local law also has, following conditions set out mainly in Articles 13 and 14:6 of TRIPs, provisions for exceptions to copyright infringement or for exemptions of related rights. These exceptions and exemptions are provided for in Articles 25-26 and 32-33 of the 2005 Intellectual Property Law.¹² With the exception of architectural works, fine-art works, and computer programs, a person may, for example, duplicate a single copy of a literary or artistic work for that person's own non-commercial scientific research or teaching.¹³ This can also be done by a library for archival and research purposes with the prohibition on reproducing or distributing any other copies of the work to the public, including digital

¹¹ See *Intellectual Property Law 2005* art 15, as amended in 2009.

¹² Some of them are subject to guidance by Articles 24-25 and 32-33 of Decree 100/2006, as revised by Decree 85/2011.

¹³ See *Intellectual Property Law 2005* art 25, as amended in 2009.

copies.¹⁴ Some issues relating to these exceptions are discussed in Chapter 4 on copyright and related rights in Vietnam under TRIPs' flexibilities.¹⁵

Likewise, Vietnamese law is seen to have provisions taking advantage of the flexibilities within TRIPs' requirements for industrial property protection, including patents. The most important are seen in the 2005 Intellectual Property Law which contains exceptions to the exclusive rights of patent owners and establishes a compulsory licensing system of patented inventions, including for government use.¹⁶ These are stipulated primarily under conditions set out in TRIPs Articles 30 and 31. The exceptions may be employed by the government, for example, in an emergency case to grant or issue a non-voluntary licence for producing or importing cheaper HIV drugs apart from the use of patented inventions for scientific research or other non-commercial purposes. Regarding trademark and geographical protection, in exploiting discretions created by, respectively, TRIPs Articles 15:1 and 24:6 and 24:9 the Intellectual Property Law has, among other things, required signs to be visibly perceived for trademark registration¹⁷ and excluded from protection under geographical indications names which have become generic names of goods in Vietnam, or which have not been protected or are no longer used, in their countries of origin.¹⁸ The Intellectual Property Law also states as non-protectable, in its provisions for industrial designs, the appearance of a product which is dictated by the technical features of the product or which is not visible when being used¹⁹ following what is explicitly or implicitly stated in TRIPs Article 25:1. These exceptions appear alongside other applications of the flexibilities found

¹⁴ See *Intellectual Property Law 2005* art 25, as amended in 2009; *Decree 100/2006* art 25, as revised by Decree 85/2011.

¹⁵ For details see Subsection 4.4 *Exceptions to Copyright Protection in Vietnamese Law* in Chapter 4 on copyright and related rights in Vietnam under TRIPs' flexibilities.

¹⁶ See, eg, Articles 125(2), 131, 133-134, 136(1), 137, and 145-146 of the 2005 Intellectual Property Law, as amended in 2009.

¹⁷ See *Intellectual Property Law 2005* art 72(1), as amended in 2009.

¹⁸ See *Intellectual Property Law 2005* art 80(1)-(2), as amended in 2009.

¹⁹ See *Intellectual Property Law 2005* art 64(1), (3), as amended in 2009.

in TRIPs, the Paris Convention, and the IPIC Treaty for the protection of other categories of industrial property including layout designs and undisclosed information.²⁰

In terms of the protection of new varieties of plants, given a number of choices by TRIPs to use either patents or an effective sui generis system or any combination of both for the protection of that form of intellectual property rights,²¹ Vietnamese law has shown its preference for the middle way. The Agreement has no further explanation of what constitutes the ‘effectiveness’ of a sui generis system for plant varieties. WTO members may debate how and what makes a sui generis system for plant varieties ‘effective’. This ambiguous interpretation has permitted Vietnam to join the UPOV Convention, which has been commonly and widely recognized as a sui generis system being effective for the protection of plant varieties, in carrying out such obligation. Along with making domestic provisions for plant varieties under the standards set out in the UPOV Convention, the country may exploit the flexibilities within the Convention.²² This explains why Vietnamese farmers, for propagating purposes and on their own holdings, can use the product of the harvest obtained by planting, on their own holdings, a protected plant variety.²³ Other exceptions have been created in this way, including the use of the plant variety for personal and non-commercial or scientific research cross-breeding purposes.²⁴

With regard to the enforcement of intellectual property, like other WTO members, Vietnam finds in TRIPs one of the biggest gaps in this area of international law. As the Agreement states in Article 41:5:

It is understood that [TRIPs] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general,

²⁰ See respectively Section 4. *Layout Designs (Topographies) of Integrated Circuits* and Section 5. *Undisclosed Information* in Chapter 6 on other TRIPs categories of protection in Vietnam for the discussion of layout designs and business secrets in Vietnam under TRIPs requirements and flexibilities in detail.

²¹ See *TRIPs Agreement* art 27(3).

²² For details see Section 4. *The Protection of Plant Varieties in Vietnam under TRIPs* in Chapter 5 on patents and plant varieties in Vietnam under TRIPs’ flexibilities.

²³ See *Intellectual Property Law 2005* art 190(1), as amended in 2009.

²⁴ *Ibid.*

nor does it affect the capacity of Members to enforce their law in general. Nothing [in TRIPs] creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

So in fulfilling its obligation to enforce intellectual property rights Vietnam can rely on its existing legal system. The system in existence reflects Vietnam's distinctive approach to civil and criminal law enforcement as well as its widespread system of administrative enforcement of rights. In respect of intellectual property this is seen in the inspectorates specializing in industrial property, copyright and related rights, and new varieties of plants. In the law in practice, as opposed to the law in the books, the protection of intellectual property rights in Vietnam seems to have strong similarities with China.

Different from civil and common law jurisdictions, both Vietnam and China, as socialist legal systems, possess the so-called 'dual-track' procedure for enforcing intellectual property rights through both administrative and judicial proceedings.²⁵ The administrative procedure is widely used²⁶ while judicial proceedings have been generally weak or ineffective in both countries. Both have come under external pressure, especially from highly-industrialized members such as the United States, in establishing the levels for the protection of intellectual property seen in their domestic laws.²⁷ This is seen in their similar

²⁵ Peter Feng, *Intellectual Property in China* (Sweet & Maxwell Asia, 2nd ed, 2003) 16.

²⁶ See, eg, Natalie P Stoianoff, 'Convergence, Coercion and Counterfeiting: Intellectual Property Rights Enforcement in the People's Republic of China' (2007) 4 *Macquarie Journal of Business Law* 245, 259-60; BBC Monitoring Asia Pacific, 'US intellectual property envoy interviewed on China's IPR enforcement conundrum' (30 April 2006) <www.proquest.com> (visited 22 October 2011); The Supreme People's Court's Institute for Hearing Improvement, *Chuyên đề khoa học xét xử: Pháp luật về thủ tục giải quyết tranh chấp quyền sở hữu trí tuệ tại Tòa án nhân dân* [Special Issue: Legislation on Civil Procedures for Handling Disputes Over Intellectual Property Rights in the People's Courts] (Justice Publishing House, 2010) 47; Global Intellectual Property, *Infringement of Intellectual Property Rights in Vietnam* 1-3 GIP ASEAN <<http://gip-asean.com/information/newsletter201404vn.pdf>>.

²⁷ But Vietnam like China may have a tipping-point where it begins to benefit from recognition of intellectual property rights and this also raises an interesting question of when China (and Vietnam alike) is going to experience a 'crossover' to stronger intellectual property protection as being in its own 'self-interest': Peter K Yu, 'Intellectual Property, Economic Development, and the China Puzzle' in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPs Plus Era* (Oxford University Press, 2007) 173-220. Gradual attainment of a 'crossover point' is seen in the Chinese government's official policy on implementing intellectual property in making China 'an innovative country': *Outline of the National Intellectual Property Strategy* (5 June 2008), State Council of the People's Republic of China, I [4] <http://english.gov.cn/2008-06/21/content_1023471.htm>.

positions in the United States Special 301 Reports. In 2014 China was on a ‘priority watch list’ for the most recent nine years²⁸ and Vietnam was a ‘watch list country’ for the most recent 15 years.²⁹ Surveys of intellectual property enforcement regimes in both countries have also commonly used similar terms including ‘ineffectiveness’, ‘deficiency’, or ‘available in the law but not implemented.’³⁰

What are the reasons for this pattern of weak or ineffective enforcement? It has been argued that a major problem in China is local protectionism.³¹ This localism is not the same problem in Vietnam as in China. However, there are other shared socialist characteristics

²⁸ See USTR Special 301 Reports from 2006 to 2014 (in the case of China), *Knowledge Ecology International* (those from 1989-1999) <<http://keionline.org>> and *United States Trade Representative* (those from 2000-2014) <www.ustr.gov> (visited 16 July 2008, 17 June 2010, 22 September 2011 and 11 September 2014).

²⁹ See USTR Special 301 Reports from 2000 to 2014 (in the case of Vietnam), *ibid.*

³⁰ See respectively Questions 14 and 15, and Questions 13 and 14, of the European Commission Intellectual Property Enforcement Surveys 2006 and 2009 in the case of both Vietnam and China <<http://ec.europa.eu/trade>> (visited 30 August 2008 and 9 September 2011).

³¹ Focusing on movie piracy in China, Cornish discusses localism from the 1979 policy of decentralizing power from the federal government to local and provincial governments to facilitate China’s transition to a market economy, alongside other discussed reasons including cultural tradition of imitation and aversion to litigation; ideological problems of notorious censorship of information; and judiciary lack of adequate legal personnel, no familiarity with copyright laws, lack of independence, lack of transparency, and low damage awards (Jordana Cornish, ‘Cracks in the Great Wall: Why China’s Copyright Law Has Failed to Prevent Piracy of American Movies within Its Borders’ (2006) 9 *Vanderbilt Journal of Entertainment and Technology* 405, 421-31). Massey excerpts the saying ‘The mountains are high and the emperor is far away’ to describe the situation where local authorities can effectively ignore, or resist, laws and policies of the central government for benefiting the localities and to discuss the changes in China regarding intellectual property protection over the past 20 years, arguing that today’s Chinese central government is serious about intellectual property but the national government must implement its laws and international obligations over the resistance of regional and local authorities (Joseph A Massey, ‘The Emperor is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986-2006’ (2006) 7 *Chicago Journal of International Law* 231, 231-7) [The saying is transposed as ‘Heaven is high and the emperor is far away’ in discussing ‘The power of local officials varies greatly from province to province... The farther one is from Beijing, the greater the authority of local officials’: William O Hennessey, ‘Protection of Intellectual Property in China (30 Years and More): A Personal Reflection’ (2009) 46(4) *Houston Law Review* 1257, 1292]. Further, in discussing the problem of local protectionism in China Chow wrote that ‘China’s intellectual property system is still a “top down” enterprise, working its way along two trajectories. The first is geographic, from the policy-generating bureaucracy centered in Beijing - and, to a much lesser extent, Shanghai - beginning in the 1980s and continuing through the 1990s, to a few provincial capitals in wealthier regions near the seacoast in the last few years, with very little effective reach into the countryside or the hinterland of the interior. In the latter regions, the “blowback” is from “local protectionism” because government officials are hard pressed to promote any enterprise whatsoever (infringing or not) and there are few national organs or agencies that can challenge them’: Daniel C K Chow, *The Legal System of the People’s Republic of China in a Nutshell* (West Group, 2nd ed., 2009) 224. On the issue but more generally discussed see Andrew Mertha, *The Politics of Piracy: Intellectual Property on Contemporary China* (Cornell University Press, 2005).

which may explain that weak or ineffective enforcement. In both countries the constitutions do not have the principle of the separation of powers resulting in a lack of judicial independence.³² Also, both countries are one party states with the party acknowledged in their respective constitutions as playing the leading role in national life.³³ In China, the Chinese Communist Party (CCP) controls the courts' personnel and financial arrangements and oversees judicial decision making.³⁴ CCP policies also have priority over legislation.³⁵ These issues may only be dealt with by political reform and redefining the current relationships between the courts, the CCP, and national and local governments.³⁶ Both countries in developing the concept of 'rule of law' face further difficulties and problems.³⁷

³² David L Weller, 'The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action' (1998) 98(5) *Columbia Law Review* 1238, 1278 citing in Randal S Alexander, 'China's Struggle to Maintain Economic Viability While Enforcing International and Domestic Intellectual Property Rights' (2005) 4 *The John Marshall Review of Intellectual Property Law* 608, 618 nn 79-80.

³³ See, eg, *Vietnam Constitutions 1980, 1992 (as revised in 2001), 2013* arts 4; *China Constitution 1982* (as amended 2004) Preamble's the fifth, seventh, and tenth paragraphs: *Chinese Government's Official Web Portal*, 'Constitution of the People's Republic of China 1982, as amended in 2004' <http://english.gov.cn/2005-08/05/content_20813.htm>. See also note 21 in Chapter 7 on enforcement of intellectual property rights in Vietnam under TRIPs.

³⁴ Veron Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Political and Legal Reform' (2004) 52 *The American Journal of Comparative Law* 77, 82 [but see also 'China's WTO Commitment on Independent Judicial Review: An Opportunity for Political Review' (Working Papers) *Carnegie Endowment for International Peace* (No. 32 November 2002) Political and Legal Reform Project China Program 3, 3 <<http://www.carnegieendowment.org>> (visited 6 September 2011)]. See also Hennessey, above n 31; Jessica Wong, 'The Challenges Multinational Corporations Face in Protecting their Well-Known Trademarks' (2006) 31 *Brooklyn Journal of International Law* 937, 970 citing in Dina M Bronshtein, 'Counterfeit Pharmaceuticals in China: Could Changes Bring Stronger Protection for Intellectual Property Rights and Human Health' (2008) 17(2) *Pacific Rim Law & Policy Journal* 439, 460-1 nn 180, 182 (discussing local judicial officials only theoretically independent in China).

³⁵ Hung, *ibid*.

³⁶ Hung, *ibid*; Zhang Weiping (ed et al, 2003), Wang Liming (2000), Pi Chunxue and Deng Dandan (1998), and Guo Daohui (1999), citing in Hung, *ibid*, 122 n 222.

³⁷ See, eg, Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford University Press, 2007) [explaining some of the difficulties China faces in establishing a rule of law]; Randall Peerenboom and Weitseng Chen, 'Developing the Rule of Law' in Bruce Gilley and Larry Diamond (eds), *Political Change in China: Comparisons with Taiwan* (Lynne Rienner Publishers, 2008) [examining the ongoing reforms of China's legal system and domestic resistance thereto with 'the slow but steady progress in strengthening institutions and building a corps of professional judges, lawyers, prosecutors, and police' in China following the East Asian Model: 135-59]; Yahong Li, 'Pushing for Greater Protection: The Trend Toward Greater protection of Intellectual Property in the Chinese Software Industry and the Implications for Rule of Law in China' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 637-61 [considering the rule of law in the context of WTO and intellectual property rights with China's entry into the WTO to have profound implications for the Chinese industries in the field of intellectual property protection]. For discussions of the development of the rule of law in Vietnam see generally John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006).

There is considerable discussion in the case of China whether the weak or ineffective enforcement processes for intellectual property relate to the low enforcement rates.³⁸ This may also be applicable to Vietnam.³⁹

It has been demonstrated that when implementing TRIPs Vietnam has concurrently exploited the flexibilities found in the Agreement and in other treaties incorporated into TRIPs as well. But Vietnam's application of those flexibilities has been incomplete and its enforcement of these rights has been weak. However, the Vietnamese extensive system of intellectual property protection is only recently established, following the country's integration into the WTO which committed it to protect intellectual property under

³⁸ For example, it is pointed out that further efforts are necessary to strengthen enforcement and weak points in spite of the achievements already made from the establishment of a basic intellectual property system and an ongoing building-up of the enforcement infrastructure: Duan Ruichun, 'China's Intellectual Property Rights Protection Towards the 21st Century' (1998) 9 *Duke Journal of Comparative & International Law* 215, 216-7. Still, a 'low quality' or 'typically ineffective' enforcement of intellectual property is discussed down to the absence of state capacity: Martin K Dimitrov, *Piracy and the State: The Politics of Intellectual Property Rights in China* (Cambridge University Press, 2009) 24, 26. As well, it is discussed that weakness in the current enforcement system is 'from cultural predispositions held by the public at large to an incompetent judiciary and an administrative apparatus captured by local interests': Jordana Cornish, 'Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies within Its Borders' (2006) 9 *Vanderbilt Journal of Entertainment and Technology* 405, 421, 422-31. See also Jeffrey W Berkman, 'Intellectual Property Rights in the P.R.C: Impediments to Protection and the Need for the Rule of Law' (1996) 15 *UCLA Pacific Basin Law Journal* 1 (viewing that 'China's ineffective legal system remains the major impediment to protection of intellectual property rights' [16] and that 'Improved enforcement of all rights in China requires greater adherence to the rule of law - namely, uniform enforcement according to the spirit of the law rather than the will of the enforcer' [44]); Ronald C Brown, *Understanding Chinese Court and Legal Process: Law with Chinese Characteristics* (Kluwer International Law, 1997) (discussing China's ineffective judicial system with its lack of rule of law). Besides, it is pointed out that there are low enforcement rates for civil judgments in China with only 40% of High People's Courts, 50% of Intermediate People's Courts, and 60% of Local People's Courts and that failure to enforce them is endemic: Robert Slate, 'Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPs Compliance' (2006) 31 *North Carolina Journal of International Law and Commercial Regulation* 665, 686, 692-3.

³⁹ In Vietnam there were 285,482 civil cases to be left un-enforced up to 31 March 2011: Ministry of Justice, *Hiện trạng án dân sự tồn đọng* [The Existence of Civil Judgments Have Not Been Enforced] <<http://moj.gov.vn>>. The enforcement rate was: 48.4% in Bà Rịa-Vũng Tàu; 58% in Quảng Bình; 61% in Quảng Ninh; and, in some other provinces the rate was only 10% to all participate in the national average rate of lesser than 50%. See, respectively, *Báo cáo công tác thi hành án dân sự tỉnh Bà Rịa-Vũng Tàu năm 2003 tại Kỳ họp thứ 10 Hội đồng nhân dân tỉnh Khóa III* [Report on the Task of Civil Judgments Enforcement in Bà Rịa-Vũng Tàu in 2003] <<http://www.bariavungtau.gov.vn>>; *Tỷ lệ thi hành án đạt 58%* [The Enforcement Rate Reached 58%] (Quảng Bình Newspaper 73-2011) <<http://www.quangbinh.gov.vn>>; *Quảng Ninh: Triển khai quyết liệt việc thi hành án dân sự* [Quảng Ninh: Dramatically Deploying the Task of Civil Judgments Enforcement] (Justice Ministry) <<http://moj.gov.vn>>; *Tồn đọng gần 340,000 vụ thi hành án* [Still Existed Approximately 340,000 Cases of Enforcement] (Ho Chi Minh City Legislation Newspaper) <<http://www.vnlawfind.com.vn>> (visited 10 and 12 September 2011).

international standards.⁴⁰ As a pre-condition to be permitted re-engage in the international trade, a system of protection of intellectual property rights and procedures to enforce those rights had to be developed.⁴¹

There is a further question which needs to be asked and which requires further investigation as the investigation in this thesis. The thesis has concentrated on Vietnam's exploitation of the flexibilities in TRIPs and related agreements in international law. That appears to be desirable to meet the interests of local people given Vietnam's status as a developing country with low per capita income, a low level of technological development, and lack familiar with intellectual property protection. Is this compatible with the effective enforcement of TRIPs standards in Vietnam? It may be desirable for local and foreign holders of intellectual property rights but may not be compatible with the best interests of the local people generally.⁴²

Provisions of embodying TRIPs' flexibilities are seen in the local law but are often stated in ways which are very general or brief requiring greater detail for their effective implementation. In practice, the further regulations to provide those details have not been adopted or made so that it is difficult to act on the general or short statutory provisions. Vietnam, for example, has declared that it will avail itself of the Berne Convention Appendix for granting non-voluntary licences in order to translate or reproduce a literary or

⁴⁰ For details see Section 3. *Internalizing TRIPs Provisions in Vietnam* in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam.

⁴¹ This is generally discussed in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam especially focused on in Section 1. *Integration of Vietnam into the Global Multilateral Trading System* and Section 3. *Internalizing TRIPs Provisions in Vietnam*.

⁴² Here, it can be posed with a series of questions such as where should the balance be drawn between the interests of the holders of intellectual property rights and the interests of the public? How can the rights of the intellectual property holders be recognized to ensure that they also meet other social obligations? What can be done so that the monopoly of the holders of intellectual property rights does not become a barrier to the diffusion of knowledge and the advancement of technology? How it could be made easier for the public, especially the poor, to get access to educational materials and other items of cultural enjoyment? Etc. Dealing with these questions in the thesis, whether directly or indirectly, explicitly or implicitly, is often found, eg, in Subsection 1.2 *Exclusions from Protection* and Section 4. *Exceptions to Infringement* in Chapter 4 on copyright and related rights in Vietnam under TRIPs' flexibilities and in Section 2. *Patentable Exclusions* and Section 3. *Patent Exceptions and Compulsory Licences* in Chapter 5 on patents and plant varieties in Vietnam under TRIPs' flexibilities.

artistic work especially for use in education.⁴³ But it has incorporated no provisions for this in national law. Similarly, it has excluded from patentable subject matter discoveries, plant and animal varieties or species, essentially biological processes of the production of plants and animals other than microbiological processes⁴⁴ but has made no further provisions on them. In some cases, the opportunities presented by other flexibilities have not been taken. For instance, it has not exploited the permission given by TRIPs Article 11 that rental benefits in cinematographic works need be protected only when their rental has led to widespread copying with material impairment of the exclusive right of reproduction. Another example is that it has not used some exceptions relating to the rights of trademark owners open to it in TRIPs Article 17.

The use of TRIPs' flexibilities in Vietnamese law is also found to be increasingly limited by TRIPs-plus provisions. For example, the provisions in the 2000 United States-Vietnam Bilateral Trade Agreement granting authors the right to import or distribute the originals or copies of literary or artistic works⁴⁵ limit the possibility of Vietnam taking advantage of TRIPs Article 6 which gives members freedom to decide on the issue of exhaustion of intellectual property rights. This means that local business people or enterprises will face difficulties in importing cheaper cultural and educational materials or entertainment products subject to copyright protection. Still, the provisions in that free trade agreement confer five years of protection for data exclusivity relating to pharmaceutical and agrochemical products⁴⁶ that prevent generic drug manufacturers from using the submitted data for conducting subsequent and equivalent tests, requested by regulatory authorities, for the same products. This significantly prolongs the period before cheaper products can be placed in the market for the benefit of consumers. The significance of this is increased when it is considered that these are pharmaceutical products used to treat illness. In the

⁴³ Berne Notification No. 241, *Berne Convention for the Protection of Literary and Artistic Works: Accession by the Socialist Republic of Vietnam* (26 July 2004)

<http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_241.html>.

⁴⁴ See *Intellectual Property Law 2005* art 59, as amended in 2009.

⁴⁵ See *Intellectual Property Law 2005* art 20(1), as amended in 2009; *United States-Vietnam Bilateral Trade Agreement* art 4(2) ch II.

⁴⁶ See *Intellectual Property Law 2005* art 128, as amended in 2009; *United States-Vietnam Bilateral Trade Agreement* art 9(6) ch II.

context of Vietnam's less-development and the continuing dependency of many people on agriculture that restriction is also significant as it places on the prevention or treatment of disease in plants and animals.

This trend has expanded in the 2009 revised version of the 2005 Intellectual Property Law, most significantly in terms of provisions for copyright and related rights. The term of copyright protection in some kinds of works, including cinematographic works, photographic works, and works of applied-art, has been increased from 50 to 75 or 100 years from their first publication.⁴⁷ This makes the period in which photographic works and works of applied-art are to be protected in Vietnam at least three times longer than the minimum standard set out in Article 7:4 of the Berne Convention, repeated by TRIPs Article 12. The greater the time they are available in the public domain the more public interests will benefit. Also the right of importing the originals or copies of phonograms is added to the rights enjoyed by the producers of sound or visual recordings, which limits the competition in cheaper products benefitting consumers from parallel imports.⁴⁸

It can be concluded that in the course of integrating into the WTO, or the global multilateral trading system, Vietnam has not only implemented TRIPs' standards of protection of intellectual property but, where possible, also exploited a number of flexibilities within the relevant international provisions. Although this is sometimes limited by TRIPs-plus provisions, in undertaking such a task there is a question, as indicated above, of to both enforce TRIPs' standards and take advantage of the Agreement's flexibilities.

To some extent, this seems possible to be compared with what to have been presented in the case studies in Chapter 8 on the hearing of copyright disputes in Vietnam. On the one hand, the courts must deal with those litigated cases. On the other hand, the lack of experience and familiarity with intellectual property law and practices, among other things,

⁴⁷ See *Intellectual Property Law 2005* art 27, as amended in 2009; *United States-Vietnam Bilateral Trade Agreement* art 4(4) ch II.

⁴⁸ See *Intellectual Property Law 2005* art 30, as amended in 2009; *United States-Vietnam Bilateral Trade Agreement* art 4(6) ch II.

made the courts in many cases reliant on advice from other state agencies. In some other cases, the courts relied on their discourse in combining *lý* [legal rule] and *tình* [sentimental assessment, including social or moral elements].⁴⁹ This represents the idea and practices held by some judges that judgments should be based, in part, on moral reasons and sentiment rather than legal arguments.⁵⁰ This is seen in *Nguyễn Kim Ánh v Director Phạm Lộc and the Hanoi Film Studio I*⁵¹ with the Panel's findings that the changes made to the original screenplay did not violate the author's rights.⁵²

At a more general level, there could be further comparisons of China and Vietnam in the context of the call by other WTO members to have stronger protection and more effective enforcement of intellectual property rights under TRIPs in Vietnam, as well in China. The influence of China on the WTO has been argued to be crucial to the future negotiations and directions of the WTO, particularly regarding the TRIPs Agreement.⁵³ The influence is said to extend to the deliberations of the TRIPs Council in determining the future boundaries of international intellectual property law as negotiations make policy makers more aware of the Chinese perspective of TRIPs and other WTO-related issues.⁵⁴ As well it has been argued that China may employ TRIPs as a means of its own economic development and to redefine intellectual property-based foreign trade interests at the same time.⁵⁵ In the meantime, there is an increasing representation of developing countries in the further

⁴⁹ Gillespie, above n 37, 202-11; Pip Nicholson, *People Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007) 225, 267.

⁵⁰ Gillespie and Nicholson, *ibid.*

⁵¹ Case No. 41/DSST (16-17-19 October 1998).

⁵² For details see Sub-sections 2.1 *Literary and Artistic Works as Cultural and Social Products* and 2.2 (e) *The Protection of Other Categories of Works* in Chapter 8.

⁵³ This was, to some extent, anticipated by scholars such as Li. In discussing China's entry into the WTO in 2001 to usher in a new era of challenges and opportunities for intellectual property protection, Li evaluates problems facing the major Chinese industries involving intellectual property protection with an examination of the challenges raised by the WTO status, such as closer scrutiny of intellectual property infringement and fiercer foreign competition, and an exploration of the industries' strategies to cope with such matters. The article assesses what role China would play in the WTO in sharing and reforming the TRIPs Agreement and intellectual property policies. See Yahong Li, 'The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO' (2002) 20 *UCLA Pacific Basin Law Journal* 77-112.

⁵⁴ Daniel Stewart and Brett G Williams, 'The Impact of China's WTO Membership on the Review of the TRIPs Agreement' in Deborah Z Cass, Brett Williams and George Robert Barker (eds), *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, 2003), 363-83.

⁵⁵ Anthony S Taubman, 'TRIPs Goes East: China's Interests and International Trade in Intellectual Property', *ibid.*, 345-62.

developments of intellectual property protection regime in the global multilateral trading system. This may lead to greater flexibilities which benefits them being incorporated. An earlier example is the 2001 Doha Declaration on the TRIPs Agreement and Public Health. This may lead to a longer and deeper participation in, and integration of, Vietnam into the WTO. The greater flexibility there is in TRIPs and related international agreements on intellectual property the greater the possibility of the more effective enforcement of TRIPs' standards of intellectual property in Vietnam. This is clearly the context in which further investigations could be undertaken.

Appendix 1

The System of People's Courts in Vietnam

The present structure of courts in Vietnam originates in reforms in the 1950s which were influenced by Soviet Union ideas of judicial structures and which resulted in the creation of the Supreme People's Court as 'the highest judicial organ' with supervisory powers over lower courts in the 1959 Constitution.¹ The judicial system may have originated in Soviet Union models and had similarities but it also had differences because of variations in the political and legal cultures of the two societies.²

In the period of Doi Moi the court system was further reformed preparing for the transition to a socialist-oriented market economy which would have ownership by individuals of private property. Courts are required to ensure strict compliance with the law.³ Similarly to China, where the judiciary is seen to lack independence,⁴ there are indications of support for judicial autonomy in Vietnam although the supervisory powers of the Supreme People's Court and practices of collegial

¹ See *Vietnam Constitution 1959* art 103: The history and evolution of the court system are analysed by Pip Nicholson, *People Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2007).

² For an analysis of these differences see Nicholson, *ibid*, 230, 189-91.

³ Nicholson, *ibid*, 252-3; John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006) 199-200.

⁴ In investigating judicial review of administrative actions in China provided for through the Administrative Litigation Law of the People's Republic of China (ALL) Mei-Ying Hung argues that '[Nonetheless,] empirical research on China's entire ALL system since 1998 reveals that the system lacks independence because the judiciary is plagued with interference, inter-court and intra-court influence, and bribery.' 'The major reasons for interference,' the author continues, 'are the control of local governments and the Chinese Communist Party (CCP) over the courts' personnel and financial arrangements and the prevalence of CCP policies over law. Inadequate judicial competence, deficiencies in legislation, and the existence of a system under which judges can be punished for making erroneous decisions all contribute to the widespread practice of seeking instructions within the judiciary. This leads to serious inter-court and intra-court influence. Although judiciary bribery may not be a serious problem in administrative litigation, it does exist.' It is kept arguing that 'To reduce the magnitude of these problems in WTO-related AAL cases, the Chinese government has taken some remedial measures. It has bolstered judicial competence by providing more training to existing judges and reforming the selection system. Legislation and judicial interpretations have been repealed, revised, or enacted in accordance with WTO rules to provide a basis for judges' accurate application of law. To combat judicial corruption, the government set up a nationwide inspection mechanism and launched a plan for reducing the number of judges to create more room for raising the salaries of judges. China's efforts to bring its administrative litigation system in line with the WTO's "independent judicial review" standard are quite impressive. But as mentioned above the fundamental problem lies in local government and CCP control over key aspects of the courts and CCP policies taking precedence over law. To resolve these problems, political reform is needed to redefine the current relationships among courts, the CCP, and local governments.' See Veron Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: An Opportunity for Political Review' (Working Papers) *Carnegie Endowment for International Peace* (No. 32 November 2002) Political and Legal Reform Project China Program 3, 3 <<http://www.carnegieendowment.org>> (visited 6 September 2011)]. See also Veron Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Political and Legal Reform' (2004) 52 *The American Journal of Comparative Law* 77-132.

judicial councils to consider difficult legal questions may not be consistent with some concepts of the independency of the judiciary.⁵ There are also signs that the role of the Supreme People's Court is expanding, particularly in its responsibilities for the appointment of the judiciary as the power of the Ministry of Justice declines.⁶ Besides, attempts to improve the professional capacity of judges are on-going.⁷

Constitutionally, the judicial organs of Vietnam consist of the Supreme People's Court, the local People's Courts, the Military Tribunals, and other tribunals established by law.⁸ Besides the confirmation that military tribunals form part of the national judiciary and that the National Assembly can decide to establish other special tribunals in special circumstances,⁹ Article 2 of the 2002 Law on the Organization of People's Courts establishes the following courts in Vietnam:

- The Supreme People's Court;¹⁰
- The People's Courts of provinces and of cities directly under the central government;¹¹ and
- The People's Courts of districts, prefectures, or cities under provincial governments.¹²

1. The Supreme People's Court

The Supreme People's Court is the highest judicial organ.¹³ According to Article 18:2 of the 2002 Law on the Organization of People's Courts, the Supreme People's Court includes:

- the Judicial Council of the Supreme People's Court;¹⁴

⁵ Gillespie, above n 3, 209-10, 219.

⁶ Nicholson, above n 1, 273.

⁷ Gillespie, above n 3, 200-1.

⁸ *Vietnam Constitution 1992* art 127: Recently the Thirteenth National Assembly of Vietnam on 28 November 2013 adopted at the sixth session a new Constitution. This Constitution has come into force on 1 January 2014 under Solution 64/2013/QH13 of 28 November 2013 of the National Assembly Regulating Some Issues Regarding the Implementation the Constitution of Vietnam. The relevant provisions of the 1992 Constitution, as revised in 2001, are analyzed in this Appendix 1 in particular and in this thesis in general. This is done as the final revision of the thesis is being undertaken in late 2014.

⁹ *Law on the Organization of People's Courts 2002* art 2(4)-(5).

¹⁰ *Law on the Organization of People's Courts 2002* art 2(1).

¹¹ *Law on the Organization of People's Courts 2002* art 2(2).

¹² *Law on the Organization of People's Courts 2002* art 2(3).

¹³ *Law on the Organization of People's Courts 2002* art 18(1).

¹⁴ *Law on the Organization of People's Courts 2002* art 18(2)(a).

- the Central Military Tribunal, the Criminal Court, the Civil Court, the Economic Court, the Labour Court, the Administrative Court, and the Courts of Appeal of the Supreme People's Court;¹⁵ and
- supporting institutions.¹⁶

The Courts of Appeal of the Supreme People's Court are located in each of the three largest cities, Hanoi, Da Nang, and Ho Chi Minh City.¹⁷

The function and authority of the Supreme People's Court include:

- directing courts to ensure the consistent application of the law including the summarizing of trial experiences to provide guidance to the courts;¹⁸
- reviewing the trials in courts at every level, including special tribunals unless it is otherwise provided when these tribunals are established;¹⁹ and
- presenting projects on legislative laws to the National Assembly and on regulatory ordinance projects to the Standing Committee of the National Assembly as specified by law.²⁰

The jurisdiction of the Supreme People's Court comprises:

- reviewing enforceable judgments or decisions under a cassation procedure and a retrial procedure;²¹ and

¹⁵ *Law on the Organization of People's Courts 2002* art 18(2)(b) the first sentence.

¹⁶ *Law on the Organization of People's Courts 2002* art 18(2)(c): According to Decision 16/2003/TCCB of 17 February 2003 of the Chief Judge of the Supreme People's Court on the Supporting Institutions of the Supreme People's Court Approved by Resolution 532/2003/NQ-UBTVQH11 of 25 February 2003 of the National Assembly's Standing Committee on the Acceptance of the Supporting Institutions of the Supreme People's Court, the supporting institutions of the Supreme People's Court include the Secretariat, the Inspectorate, the Personnel Department, the Planning and Finance Department, the Office, the Institute of Judicial Sciences, the People's Court magazine, the Justice newspaper, and the Training School for Judges. See: *Sổ tay thẩm phán* [Judges' Notebook] <www.sotaythamphan.gov.vn> (visited 27 April 2009).

¹⁷ In addition, the Standing Committee of the National Assembly can decide to establish other specialized courts under the proposal of the Chief Judge of the Supreme People's Court: *Law on the Organization of People's Courts 2002* art 18(2)(b) the second sentence.

¹⁸ *Law on the Organization of People's Courts 2002* art 19(1).

¹⁹ *Law on the Organization of People's Courts 2002* art 19(2).

²⁰ *Law on the Organization of People's Courts 2002* art 19(3): Gillespie (above n 3, 209-10) notes that some might consider that these powers of the Supreme People's Court represent judicial interference with lower courts.

²¹ *Law on the Organization of People's Courts 2002* art 20(1).

- hearing appeals against first instance judgments or decisions of courts one level below.²²

The jurisdiction of the Supreme People's Court includes a procedure for cassation or quashing. This is a form of judicial review in which a judgment or decision is examined to determine whether it is null or void. A judgment or decision may be protested under this procedure by the Chief Judge of the Supreme People's Court or the Chief Procurator of the Supreme People's Procuracy because it is claimed that there are serious breaches of the law in the resolution of the case.²³ In addition, there is a procedure to retry matters on the application of the parties.²⁴

The Chief Judge of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy are empowered to bring up for review enforceable judgments or decisions of courts at every level except the decisions of the Judicial Council of the Supreme People's Court.²⁵ The chief judge of the people's courts and the chief procurator of the people's procuracies at the provincial level are empowered to bring up for review enforceable judgments or decisions of courts at the district or lowest level.²⁶

The cassation procedure can lead to a judgment or decision being quashed on one of the following grounds:

- the conclusion contained in the enforceable judgment or decision is inconsistent with an objective view of the evidence;²⁷
- there have been serious breaches of the procedure for hearing and determining cases;²⁸ or
- there have been serious mistakes in applying the law.²⁹

A case can be retried in the following circumstances:

²² *Law on the Organization of People's Courts 2002* art 20(2).

²³ *Civil Procedure Code 2004* art 282.

²⁴ *Civil Procedure Code 2004* art 304

²⁵ *Civil Procedure Code 2004* arts 285(1) & 307(1); Relating to this, the 2011 revised version of the 2004 Civil Procedure Code added to the Code Chapter XIXa - Special Procedures for Reviewing Decisions of the Judicial Council of the Supreme People's Court (Articles 310a- 310b).

²⁶ *Civil Procedure Code 2004* arts 285(2) & 307(2).

²⁷ *Civil Procedure Code 2004* art 283(1).

²⁸ *Civil Procedure Code 2004* art 283(2).

²⁹ *Civil Procedure Code 2004* art 283(3).

- where there is important evidence, newly discovered, which the litigants were not able to know when the case was heard;³⁰
- where experts conducted their examinations inconsistently with the facts or translators falsely translated evidence;³¹
- where case dossiers have been intentionally prepared wrongly or unlawfully by judges, assessors, or procurators or they have intentionally reached wrong conclusions;³² or
- where judges and assessors relied upon the decision of another court in criminal, administrative, civil, marriage-family, economic, and labour matters or the decision of other state agencies and that decision has been set aside or terminated.³³

Within the structure of the Supreme People's Court, the function and authority of the Judicial Council of the Supreme People's Court comprise:

- reviewing enforceable judgments or decisions under the cassation or retrial procedure;³⁴
- directing courts to apply the law consistently;³⁵ and
- summarizing trial experiences for the guidance of the courts;³⁶
- ratifying the reports of the Chief Judge of the Supreme People's Court on the work of courts for presentation to the National Assembly, the Standing Committee of the National Assembly, and the State President;³⁷ and
- preparing law projects for presenting to the National Assembly and ordinance projects for presenting to the Standing Committee of the National Assembly.³⁸

2. The People's Courts at Provincial Level

There are 58 provinces and five cities directly under the central government.³⁹ Each of these provinces and cities has a court at the same level that there are a total of 63 People's Courts at the

³⁰ *Civil Procedure Code 2004* art 305(1).

³¹ *Civil Procedure Code 2004* art 305(2).

³² *Civil Procedure Code 2004* art 305(3).

³³ *Civil Procedure Code 2004* art 305(4).

³⁴ *Law on the Organization of People's Courts 2002* art 22(1)(a).

³⁵ *Law on the Organization of People's Courts 2002* art 22(1)(b).

³⁶ *Law on the Organization of People's Courts 2002* art 22(1)(c).

³⁷ *Law on the Organization of People's Courts 2002* art 22(1)(d).

³⁸ *Law on the Organization of People's Courts 2002* art 22(1)(d).

³⁹ This follows a re-organization in 2008 (Resolution No. 15/2008/QH12 of 29 May 2008 of the National Assembly on Adjusting Geographical Areas of Hanoi City and Some Related Provinces) under which one of the former provincial territories, Hà Tây, is completely integrated into the Hanoi Capital. The five cities are

provincial level. These Courts are professionally organized with a judicial committee and specialized divisions of criminal courts, civil courts, economic courts, labour courts, and administrative courts.⁴⁰

Apart from other powers,⁴¹ People's Courts at the provincial level are authorized to try cases as courts at first instance as provided for by procedural legislation.⁴² These include intellectual property disputes⁴³ which are mostly referred to civil court divisions.

There are fewer supporting institutions, compared with the Supreme People's Court, within the provincial courts.⁴⁴

3. The People's Courts at District Level

There are 688 the District People's Courts or courts of districts, prefectures, or cities under provincial governments.⁴⁵ They are the lowest level of the judicial system, generally having the

Hà Nội, Hải Phòng, Đà Nẵng, Hồ Chí Minh, and Cần Thơ. The 58 provinces in alphabet are An Giang, Bắc Giang, Bắc Kạn, Bạc Liêu, Bắc Ninh, Bà Rịa-Vũng Tàu, Bến Tre, Bình Định, Bình Dương, Bình Phước, Bình Thuận, Cà Mau, Cao Bằng, Đắk Lắk, Đắk Nông, Điện Biên, Đồng Nai, Đồng Tháp, Gia Lai, Hà Giang, Hải Dương, Hà Nam, Hà Tĩnh, Hòa Bình, Hậu Giang, Hưng Yên, Khánh Hòa, Kiên Giang, Kon Tum, Lai Châu, Lâm Đồng, Lạng Sơn, Lào Cai, Long An, Nam Định, Nghệ An, Ninh Bình, Ninh Thuận, Phú Thọ, Phú Yên, Quảng Bình, Quảng Nam, Quảng Ngãi, Quảng Ninh, Quảng Trị, Sóc Trăng, Sơn La, Tây Ninh, Thái Bình, Thái Nguyên, Thanh Hóa, Thừa Thiên Huế, Tiền Giang, Trà Vinh, Tuyên Quang, Vĩnh Long, Vĩnh Phúc, and Yên Bái.

⁴⁰ *Law on the Organization of People's Courts 2002* art 27(1): Within the provincial courts, judicial committees are empowered: (i) to review enforceable judgments or decisions of lower courts under the cassation or retrial procedure; (ii) to ensure uniformity in the application of law from each of the provincial courts and the lower courts; (iii) to summarize trial experiences; and, (iv) to ratify the chief judge's report on the work of local courts for presentation to the assembly at the same level and the Supreme People's Court: *Law on the Organization of People's Courts 2002* art 29(2).

⁴¹ They are: hearing appeals against first instance judgments or decisions of lower courts, or courts at the district or lowest level; reviewing enforceable judgments or decisions of lower courts under the cassation procedure or the retrial procedure; and, deciding other matters as provided for by law: *Law on the Organization of People's Courts 2002* art 28(2)-(4).

⁴² *Law on the Organization of People's Courts 2002* art 28(1).

⁴³ Initially this is stipulated in Article 29 of the 1989 Industrial Property Ordinance and Articles 44-45 of the 1994 Copyright Ordinance which empower People's Courts at the provincial level for hearing intellectual property cases. In the 2004 Civil Procedure Code, the jurisdiction of courts relating to intellectual property disputes is set out in Articles 25(4) and 29(2) and guided for the implementation by Part I(1)(1.1)(a)-(b) of Resolution 01/2005/NQ-HĐTP of 31 March 2005 of the Supreme People's Court. In accordance with these provisions, People's Courts at the provincial level are authorized for hearing disputes over intellectual property as courts at first instance. See also note 46 below and note 190 in Chapter 3 on localizing the WTO TRIPs Agreement in Vietnam.

⁴⁴ They include the court office and a personnel management division according to the information provided from website of the Supreme People's Court, above n 16.

⁴⁵ The number is taken from website of the Supreme People's Court, above n 16.

jurisdiction to hear cases at first instance under Article 32 of the 2002 Law on the Organization of People's Courts in accordance with other relevant procedural provisions. District People's Courts do not have specialized divisions but assign judges to deal with particular kinds of cases. Their only supporting institution is the court office or registry. Under guidance from the Supreme People's Court intellectual property disputes are not determined in courts at the district level.⁴⁶ This reflects the lack of experience of judges in these courts as well as the novelty and complexity of the legal issues raised in intellectual property disputes.

4. Trial by Judges and People's Assessors

The Constitution of Vietnam provides for trial by judges with the participation of people's assessors who have the same powers in the conduct of a trial as the judges.⁴⁷

4.1 The Criteria for Judges and Assessors

There are general criteria for the selection and appointment of judges.⁴⁸ They relate to both professional competencies and skills as well as to specific moral and socialist legality values.⁴⁹

The assessors in the people's courts are required to be Vietnamese citizens who meet similar criteria to those of the judges but without the criterion of having administrative or legal experience.⁵⁰

⁴⁶ See Part I(1)(1.1)(a)-(b) of Resolution 01/2005/NQ-HĐTP of 31 March 2005 of the Supreme People's Court's Judicial Council Guiding the Implementation of Part I of the 2004 Civil Procedure Code. See also nn 43 and 83.

⁴⁷ *Vietnam Constitution 1992* art 129.

⁴⁸ See *Law on the Organization of People's Courts 2002* art 37(1); *Ordinance on Judges and Assessors of People's Courts 2002* art 5(1) (guiding by Joint Circular 01/2003 of 01/04/2003 of the Supreme People's Court, Defence Ministry, Interior-Affairs Ministry, and Vietnam Fatherland Front Central Committee).

⁴⁹ In particular, (see also Nicholson, above n 1, 256-7) to be selected and appointed as a judge a person must:

- be a Vietnamese citizen who is loyal to the Fatherland and the Constitution of the Socialist Republic of Vietnam, has good personality and morality, integrity and honesty, as well as has the resolute spirit to protect the socialist legality [observance of the Constitution and the law under Article 12 of the 1992 Constitution];
- hold a bachelor of laws degree from one of a recognized Vietnamese university or an overseas educational degree recognized by a relevant local authority and be trained, or have a certificate of being trained, in professional adjudication;
- possess practical experience or a period of working as a civil servant including court clerk, examiner, legal expert, researcher, investigator, notary, procurator, assessor, and lawyer, as well as possess capacity to carry out adjudicatory work; and
- have good health.

⁵⁰ See *Law on the Organization of People's Courts 2002* art 37(2); *Ordinance on Judges and Assessors of People's Courts 2002* art 5(2).

There are also specific criteria for the selection and appointment of judges of courts at each level.⁵¹ They are increasingly selected under processes controlled by the Supreme People's Court,⁵² although other political or administrative bodies may be involved. In the case of appointments to the Supreme People's Court, the Vietnam Fatherland Front Central Committee is involved.⁵³ Once selected, they are appointed by the State President.⁵⁴ Judges of people's courts at the provincial and district levels are appointed by the Chief Judge of the Supreme People's Court.⁵⁵ Some judges, appointed on the understanding that they would undergo legal training – but not necessarily obtain a law degree – have not undertaken that training.⁵⁶

Judges serve terms of five years.⁵⁷ They may resign⁵⁸ or be removed from office for violating the law.⁵⁹ The requirement that judges must reapply for their position every five years has been widely criticized as it is thought to compromise judicial independence.⁶⁰ As civil servants they are also not particularly well paid.⁶¹ Like other officials who have been educated before Doi Moi, they may also have less knowledge and experience of commercial law and property disputes than more recent graduates.⁶² Some continue to have no formal legal education.⁶³

⁵¹ The 2002 Ordinance on Judges and Assessors of People's Courts sets out specific criteria for judges of district courts and judges of military tribunals in an area in Article 20; judges of provincial courts in Article 21, and judges of the Supreme People's Court or Central Military Tribunal in Articles 22-23. Article 22:1 of the Ordinance, eg, specifies a Vietnamese citizen who satisfies the general criteria and has served as a judge of a court at the provincial level or of a regional military tribunal for no less than five years, as well as has the capacity for adjudicating cases or other matters belonging to the jurisdiction, can be selected and appointed as a judge of the Supreme People's Court or the Central Military Tribunal, if still serving in the armed forces.

⁵² Nicholson, above n 1, 256-7, 273.

⁵³ According to Article 26 of the 2002 Ordinance on Judges and Assessors of People's Courts, members of the Council for Selection of Judges of the Supreme People's Court and the Central Military Tribunal are led by the Supreme People's Court's Chief Judge with representatives of Defence Ministry, Interior-Affair Ministry, the Vietnam Fatherland Front Central Committee, and the Vietnam Law Association's Executive Board.

⁵⁴ *Ordinance on Judges and Assessors of People's Courts 2002* art 26.

⁵⁵ There are also councils for the selection of judges of People's Courts at the provincial level and district level: See *Ordinance on Judges and Assessors of People's Courts 2002* arts 27-28.

⁵⁶ Nicholson, above n 1, 258.

⁵⁷ *Ordinance on Judges and Assessors of People's Courts 2002* art 24.

⁵⁸ *Ordinance on Judges and Assessors of People's Courts 2002* art 29.

⁵⁹ *Ordinance on Judges and Assessors of People's Courts 2002* art 30.

⁶⁰ Nicholson, above n 1, 255-60.

⁶¹ *Ibid.*

⁶² See, eg, the Supreme's People Court's Annual Reports 2003 (18), 2004 (18), 2005 (19), and 2007 (19).

⁶³ Nicholson, above n 56.

4.2 Judicial Application of Law in Trying Cases

There are basic judicial principles in operation in Vietnam. They include: socialist legality;⁶⁴ the participation of assessors on an equal footing with judges;⁶⁵ judicial independence and application of the law by judges and assessors;⁶⁶ public hearings except in cases specified by law;⁶⁷ and, collegial and majority decisions.⁶⁸

The principle of socialist legality requires judges and assessors to obey the Constitution, laws, sub-laws, regulations, sub-regulations, and the like.⁶⁹ Guidelines given by the Supreme People's Court are among these.⁷⁰

In practice, resolutions or circulars from the Supreme People's Court regularly give lower courts professional guidance on adjudication of cases before them. Judges tend to give significant weight to this guidance.⁷¹ In respect of the hearing of intellectual property cases, there have been Joint Circular 01/2008 and Joint Circular 02/2008 issued with the authority of the Supreme People's Court. They assist courts in determining, amongst other things, disputes over intellectual property rights, issues of standing, and the application of relevant laws.⁷²

It is argued by some scholars that, in reality, there may be other factors which might directly or indirectly affect judicial decisions in Vietnam. They may be political or administrative, such as local government directives to courts or from the party leadership over the courts, or the reliance of courts upon competent governmental agencies for evidence.⁷³ They may also be cultural or social features, discussed in Chapter 2, relating to the justification of 'reason and sentiment' in carrying out the law (*lý và tình* trong việc chấp hành pháp luật) of judges,⁷⁴ such as the judges' own beliefs about morality, justice, and the conduct of the parties in a particular case. The cases discussed

⁶⁴ *Vietnam Constitution 1992* art 12 the first sentence.

⁶⁵ *Vietnam Constitution 1992* art 129; *Law on the Organization of People's Courts 2002* art 4.

⁶⁶ *Vietnam Constitution 1992* art 130; *Law on the Organization of People's Courts 2002* art 5.

⁶⁷ *Vietnam Constitution 1992* art 131; *Law on the Organization of People's Courts 2002* art 7.

⁶⁸ *Vietnam Constitution 1992* art 131; *Law on the Organization of People's Courts 2002* art 6.

⁶⁹ *Vietnam Constitution 1992* art 12 the second sentence.

⁷⁰ *Law on the Enactment of Laws 2008* art 2(6).

⁷¹ Gillespie, above n 3, 209, 212-3.

⁷² The key provisions of these Circulars and their use by the courts are indicated in the discussion of civil and criminal procedures for enforcement of intellectual property rights in Vietnam in Chapter 7 as well as in the discussion of the copyright cases in Chapter 8.

⁷³ See above Gillespie, n 3, 202-11; Nicholson, n 1, 255-60.

⁷⁴ Gillespie, *ibid*; Nicholson, *ibid*, 225, 267.

within Chapter 8 show that the courts do look to appropriate official agencies for guidance on technical issues relating to intellectual property. They also reveal that the judges' 'reason and sentiment' are informed by Vietnam's socialist legality and cultural morality. This is seen, for example, in *Nguyễn Văn Bảo v Cultural-Ethnic Publishing House*⁷⁵ or in *Nguyễn Kim Ánh v Director Phạm Lộc and Film Production Studio Hanoi I*.⁷⁶

Other factors may also include the role of the procuracy which may appear in almost any civil case and which is intended to represent the wider public interest which may be involved even in a civil case.⁷⁷ It represents the continuation of a socialist inspection function which privileges state interests over private commercial rights.⁷⁸ Procurators also supervise socialist legality in the courtroom and prosecute judges who deviate from the law.⁷⁹ Some private lawyers complain that as a result judges give greater weight to their arguments.⁸⁰ They also complain that the procuracy has too much influence in what are otherwise adversarial proceedings.⁸¹

5. Procedures for Civil Cases

5.1 Hearing at Courts of First Instance

The procedure for hearing civil cases, including intellectual property disputes, in courts of first instance in Vietnam is divided into three main stages: accepting the petition, preparing for the trial, and hearing the case.

(a) Accepting a Civil Case

In Vietnam, when litigants initiate a legal action or file their petition in court in person or by posting, the court is obligated to examine whether or not the case falls within the court's jurisdiction⁸² as set out in, for example, Articles 25, 27, 29, and 31 of the 2004 Civil Procedure Code. These provisions relate to disputes arising respectively from civil, marriage and family, commerce, and labour relations which courts are authorized to deal with. In the Code, Articles 25:4

⁷⁵ Case No. 25/DSST (26 August 2003) Hanoi People's Court.

⁷⁶ Case No. 41/DSST (16-17-19 October 1998) Hanoi People's Court.

⁷⁷ See *Law on the Organization of People's Procuracies 2002* arts 2, 3(4), 20 & 21(3)-(4), for example.

⁷⁸ Gillespie, above n 3, 214-6.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² See *Civil Procedure Code 2004* art 167.

and 29:2 provide for intellectual property disputes, which, under guidance from the Supreme People's Court, are heard at first instance by courts at the provincial level.⁸³

In addition, the petition must comply with requirements of form. Among other matters, it must request specific responses from any defendants or other related persons⁸⁴ and be submitted with relevant documents or evidence supporting the requests made.⁸⁵ Any subsequent steps in the proceedings may only address these requests.⁸⁶ These formal requirements apply to intellectual property cases, under the guidance on their adjudication, including the issue of standing to sue, provided jointly by the Supreme People's Court and relevant Ministries.⁸⁷

(b) Preparing for Hearing

Once the case is accepted, there are procedures for collecting evidence, organizing mediation, deciding the application of provisional measures, and the like. If a case is successfully mediated it does not, of course, proceed to hearing.

Collecting Evidence

Where judges find that the documents and evidence provided by the litigants are insufficient to decide the case, they can decide on necessary measures for adducing further evidence.⁸⁸ These measures include: taking testimonies of the litigants and witnesses;⁸⁹ conducting confrontations between the litigants and between the litigants and witnesses;⁹⁰ requesting expert opinions;⁹¹ deciding on valuation of properties or requesting appraisal of property price;⁹² carrying out on-site inspection and evaluations;⁹³ vesting the collection and verification of documents and evidence;⁹⁴

⁸³ See above nn 43 and 46.

⁸⁴ *Civil Procedure Code 2004* art 164(2)(g).

⁸⁵ *Civil Procedure Code 2004* art 164(2)(i).

⁸⁶ This is shown very clearly, eg, through the procedures for questioning at the trial under Articles 217-231 or for deliberating and pronouncing the judgment or decisions under Articles 236-238 of the 2004 Civil Procedure Code.

⁸⁷ Joint Circular 02/2008.

⁸⁸ *Civil Procedure Code 2004* art 85(1).

⁸⁹ *Civil Procedure Code 2004* art 85(2)(a).

⁹⁰ *Civil Procedure Code 2004* art 85(2)(b).

⁹¹ *Civil Procedure Code 2004* art 85(2)(c).

⁹² *Civil Procedure Code 2004* art 85(2)(d).

⁹³ *Civil Procedure Code 2004* art 85(2)(d).

⁹⁴ *Civil Procedure Code 2004* art 85(2)(e).

and, demanding individuals, agencies, or organizations to supply readable, audible, or visible materials and other exhibits relating to the resolution of the case.⁹⁵

Conducting Mediation

Except in cases specified by law, including those contrary to law or morals⁹⁶ or where the defendant remains intentionally absent although duly summoned for the second time,⁹⁷ the judge is required to conciliate the litigants facilitating them in reaching an agreement if possible.⁹⁸

The Supreme People's Court frequently emphasizes the importance of mediation in its annual reports.⁹⁹ It is represented as the desirable way of not only expediting the resolution of disputes but also reconciling litigants in particular and communities in general.¹⁰⁰

Applying Provisional Measures

At the request of the litigants or relevant parties or in circumstances indicated by law, courts can order provisional or interim measures,¹⁰¹ including listing and recording the disputed assets,¹⁰² prohibiting the transfer of the rights in disputed property,¹⁰³ forbidding changes to the status of the disputed assets,¹⁰⁴ and authorizing the blockage of accounts at banks or other credit organizations.¹⁰⁵ These provisional measures can be decided by a judge before trial or by the trial panel where a provisional measure is sought during the trial.¹⁰⁶

The application of provisional measures potentially plays a very important role in disputes over intellectual property, for example, to prevent infringing goods from being circulated or to preserve

⁹⁵ *Civil Procedure Code 2004* art 85(2)(g).

⁹⁶ *Civil Procedure Code 2004* art 181(2).

⁹⁷ *Civil Procedure Code 2004* art 182(1).

⁹⁸ *Civil Procedure Code 2004* art 180(1).

⁹⁹ In 2005 and 2006, eg, it was reported that on average over 40 percent of the total 129,926 and 143,580 civil cases filed in each year respectively were successfully mediated with some courts getting success in mediating up to 50-60 percent of the cases before them: *Annual Reports* 2005 (3, 5) and 2006 (4, 6) of the Supreme People's Court.

¹⁰⁰ *Ibid.*

¹⁰¹ *Civil Procedure Code 2004* art 99.

¹⁰² *Civil Procedure Code 2004* arts 102(6) & 108.

¹⁰³ *Civil Procedure Code 2004* arts 102(7) & 109.

¹⁰⁴ *Civil Procedure Code 2004* arts 102(8) & 110.

¹⁰⁵ *Civil Procedure Code 2004* arts 102(10) & 112.

¹⁰⁶ *Civil Procedure Code 2004* art 100.

relevant evidence of the alleged infringement, as required by Article 50 of TRIPs. Apart from provisional measures and procedures for applying them under the 2004 Civil Procedure Code, the 2005 Intellectual Property Law itself stipulates four provisional measures to goods suspected of infringing on intellectual property rights or to raw materials or implements, materials, means of production or trading of such goods, consisting of seizure, listing and recording, sealing-up, prohibiting the change of status or movement, and a ban on changes to ownership.¹⁰⁷

Those requesting the application of these provisional measures are required to provide security by depositing an amount of money equal to 20 percent of the value of the goods the subject to the application or at least VND 20 million where it is impossible to value such goods,¹⁰⁸ or submitting a guarantee document of the same value from a bank or other credit organization.¹⁰⁹ This is aimed at securing the payment of any damages caused to persons whose property is subject to such measures where they are found not to have infringed intellectual property rights.¹¹⁰ These generally represent Vietnam's response to the TRIPs requirement that litigants have the right to require the application of provisional measures, including measures against the property of other people, to protect their interests, may be done or taken with security or equivalent assurance.¹¹¹

Decisions in Preparing for Hearing

In the process of preparing for a hearing, the judge may make decisions, depending upon the context of a particular case, including:

- recognizing the agreement reached by the parties to the dispute where mediation has been successfully conducted;¹¹²
- suspending temporarily the settlement of the case;¹¹³
- suspending the settlement of the case;¹¹⁴ or

¹⁰⁷ *Intellectual Property Law 2005* art 207(1).

¹⁰⁸ *Intellectual Property Law 2005* art 208(2)(a).

¹⁰⁹ *Intellectual Property Law 2005* art 208(2)(b); *Joint Circular 02/2008* Part B(II)(3)(3.2)(a)(a 1).

¹¹⁰ *Intellectual Property Law 2005* art 208(2) the first sentence.

¹¹¹ See *TRIPs Agreement* art 50.

¹¹² *Civil Procedure Code 2004* art 187.

¹¹³ *Civil Procedure Code 2004* art 189: Where a case is temporarily suspended the court can re-open it if the reasons specified for its suspension under Article 189 are at an end. These include circumstances in which litigants, as natural persons, die not having heirs or, as legal persons, merge, divide, partition, or dissolve without successors. However, except in cases specified by law the case generally cannot be reopened if there is the same plaintiff, defendant, and disputed issues: *Civil Procedure Code 2004* arts 189(1), 191 & 193(1).

¹¹⁴ *Civil Procedure Code 2004* art 192.

- deciding to bring the case to trial.¹¹⁵

A decision recognizing the agreement of litigants is valid immediately after promulgation by the court, without being heard again by courts of appeal except where it is reached by mistake, trick, duress, or is contrary to law or morals (*ordre public*).¹¹⁶ Future proceedings relating to it can only be heard under the cassation procedure.¹¹⁷

In practice, judges proceed carefully before they make a decision to suspend a case, notice of which is sent to the parties and the procuracy.¹¹⁸ As with the decision to temporarily suspend a case, this decision can be appealed or protested.¹¹⁹

Where it is decided to hear a case, the decision is sent to the litigants and the procuracy at the same level of the court so that the procuracy may decide whether or not to attend the trial.¹²⁰

(c) Trial at First Instance

A trial panel at first instance is composed of three members, one judge and two assessors in normal cases.¹²¹ In special cases it may be composed of five members, two judges and three assessors.¹²² There are procedures for commencing the trial,¹²³ questioning litigants and other relevant parties including witnesses,¹²⁴ and hearing oral arguments.¹²⁵

After the oral arguments, the trial panel deliberates on its judgment.¹²⁶ The judgment is reached by a majority of votes on an issue-by-issue basis following the principle that the assessors cast their votes first and the judge votes last.¹²⁷ The court must rely only on the evidence before it including the results of questioning, taking into account the views of the litigants and the procurator.¹²⁸ In

¹¹⁵ *Civil Procedure Code 2004* art 195(1).

¹¹⁶ *Civil Procedure Code 2004* art 188.

¹¹⁷ *Ibid.*

¹¹⁸ *Civil Procedure Code 2004* art 194(2).

¹¹⁹ *Civil Procedure Code 2004* arts 190(3) & 193(4).

¹²⁰ *Civil Procedure Code 2004* art 195(2).

¹²¹ *Civil Procedure Code 2004* art 52.

¹²² *Ibid.*

¹²³ See *Civil Procedure Code 2004* arts 213-216.

¹²⁴ See *Civil Procedure Code 2004* arts 217-231.

¹²⁵ See *Civil Procedure Code 2004* arts 232-235.

¹²⁶ *Civil Procedure Code 2004* art 236(1).

¹²⁷ *Civil Procedure Code 2004* art 236(2).

¹²⁸ *Civil Procedure Code 2004* art 236(3).

simple cases the judgment must be given immediately. Where the case is complex, the trial panel must give its judgment no longer than five working days from the date of the conclusion of the oral arguments.¹²⁹

In general, the litigants have 15 days from the date of judgment to file an appeal.¹³⁰ A 15-day period is also provided for the procuracy at the same level to file a protest, but up to 30 days for the procuracy at one-level-higher.¹³¹ In cases where the procuracy does not attend the trial such period is counted from the date that the procuracy at the same level receives the court's judgment.¹³²

5.2 Hearing at Courts of Appeal

An application for the appeal of a first instance judgment or decision must be filed in the court of first instance. Where a court of appeal receives the application it must transfer the application to the court of first instance.¹³³ The court of first instance must examine whether the appellant has the right to appeal.¹³⁴ Once this has been done, the case is transferred to the court of appeal for preparation of the appellate trial.

(a) Preparing for Appellate Hearing

A two tier court system, or a regime of a trial with one appeal, is provided for in the Vietnamese judicial system.¹³⁵ In principle, courts at the provincial level hear appeals from judgments or decisions of courts at the district level while the Courts of Appeal of the Supreme People's Court hear appeals from judgments or decisions of provincial courts.

On receiving the case file from the court of first instance, a trial panel of three judges, with one appointed as president, must be established by the relevant court of appeal.¹³⁶ After the case has been decided to hear appeal, the appeal court must forward the case file to the procuracy at the same level with a time limit of 15 days before the procuracy returns it to the court.¹³⁷

¹²⁹ *Civil Procedure Code 2004* art 236(5).

¹³⁰ *Civil Procedure Code 2004* art 245(1).

¹³¹ *Civil Procedure Code 2004* art 252(1) the first sentence.

¹³² *Civil Procedure Code 2004* art 252(1) the second sentence.

¹³³ *Civil Procedure Code 2004* art 244(2).

¹³⁴ *Civil Procedure Code 2004* art 246(1).

¹³⁵ *Law on the Organization of People's Courts 2002* art 11(1).

¹³⁶ *Civil Procedure Code 2004* arts 53 & 257.

¹³⁷ *Civil Procedure Code 2004* art 262.

In preparing for the appellate trial, the presiding judge can make one of the following decisions:

- to suspend temporarily the appellate hearing of the case;¹³⁸
- to suspend the appellate hearing of the case;¹³⁹ or
- to bring the case to trial.¹⁴⁰

As intellectual property cases are heard at first instance by courts at the provincial level, the Court of Appeal of the Supreme People's Court has jurisdiction to hear appeals in these cases.

(b) Appellate Trial and Proceedings

The Participants in the Appellate Trial

In an appellate trial, the appellant, other litigants, and other relevant individuals or organizations such as the legal representatives of the litigants must be summoned.¹⁴¹ It is compulsory for the procuracy at the same level to attend the trial.¹⁴² The appellate trial panel only considers the part(s) of the judgment or decision which is the subject of the appeal or the protest.¹⁴³

The Appellate Trial

At the trial, there is a brief presentation by one member of the appellate panel (often the presiding judge) of the contents of the case, including the decision at the first instance and the substance of the appeal or the protest.¹⁴⁴

The following issues must be raised:

- whether the petition may be withdrawn by the plaintiff¹⁴⁵ (who made the original petition to the court of first instance);¹⁴⁶

¹³⁸ *Civil Procedure Code 2004* arts 258(1)(a) & 259.

¹³⁹ *Civil Procedure Code 2004* arts 258(1)(b) & 260.

¹⁴⁰ *Civil Procedure Code 2004* art 258(1)(c).

¹⁴¹ *Civil Procedure Code 2004* art 264(1).

¹⁴² *Civil Procedure Code 2004* art 264(2).

¹⁴³ *Civil Procedure Code 2004* art 263.

¹⁴⁴ *Civil Procedure Code 2004* art 268(1).

¹⁴⁵ *Civil Procedure Code 2004* art 268(2)(a).

¹⁴⁶ *Civil Procedure Code 2004* art 56(2).

- whether the appeal or the protest may be changed, added to, or withdrawn by the appellant or the procuracy;¹⁴⁷ and
- whether an agreement may be reached by the litigants.¹⁴⁸

Where plaintiffs withdraw petitions defendants must be asked whether they agree to the withdrawal.¹⁴⁹ If they are not in agreement, the withdrawal by the plaintiff is not accepted.¹⁵⁰ If they are in agreement, the appellate panel may revoke the judgment at first instance and suspend the case.¹⁵¹ In this situation the plaintiff can only bring a new case in a court of first instance if the statute of limitations has not expired.¹⁵²

Where an agreement is reached by the parties, the appellate panel is required to make an appellate judgment correcting the judgment at first instance and recognizing the agreement of the litigants.¹⁵³

Where the appeal or the protest is maintained, the appellate trial follows procedures set out in Articles 271-274 of the 2004 Civil Procedure Code. The appellate panel may decide:

- to retain the judgment of the court at first instance;¹⁵⁴
- to correct the judgment of the court at first instance;¹⁵⁵
- to wholly or partly rescind the judgment at first instance and transfer the case file to the court of first instance for rehearing;¹⁵⁶
- to revoke the judgment at first instance and suspend the case.¹⁵⁷

These procedures can be seen to be applied in the cases presented in Chapter 8 on copyright case studies.

¹⁴⁷ *Civil Procedure Code 2004* art 268(2)(b).

¹⁴⁸ *Civil Procedure Code 2004* art 268(2)(c).

¹⁴⁹ *Civil Procedure Code 2004* art 269(1)(a).

¹⁵⁰ *Ibid.*

¹⁵¹ *Civil Procedure Code 2004* art 269(1)(b) the first and second sentences.

¹⁵² *Civil Procedure Code 2004* art 269(2).

¹⁵³ *Civil Procedure Code 2004* art 270(1).

¹⁵⁴ *Civil Procedure Code 2004* art 275(1).

¹⁵⁵ *Civil Procedure Code 2004* arts 275(2) & 276.

¹⁵⁶ *Civil Procedure Code 2004* arts 275(3) & 277.

¹⁵⁷ *Civil Procedure Code 2004* arts 275(4) & 278.

Appendix 2

Numbers of Applications and Patent Grants for Inventions in Vietnam from 1981 to 2008

Year	Vietnam Origin Applications	Foreign Origin Applications	All Origins Total	Vietnam Origin Invention Patent Grants	Foreign Origin Invention Patent Grants	All Origins Total
1981-1988	453	7	460	n.a	n.a	n.a
1984-1989	n.a	n.a	n.a	74	7	81
1989	53	18	71	n.a	n.a	n.a
1990	62	17	79	11	3	14
1991	39	25	64	14	13	27
1992	34	49	83	19	16	35
1993	33	194	227	3	13	16
1994	22	270	292	5	14	19
1995	23	659	682	3	53	56
1996	37	971	1008	4	58	62
1997	30	1234	1264	0	111	111
1998	25	1080	1105	5	343	348
1999	35	1107	1142	13	322	335
2000	34	1205	1239	10	620	630
2001	52	1234	1286	7	776	783
2002	69	1142	1211	9	734	743
2003	78	1072	1150	17	757	774
2004	103	1328	1431	22	676	698
2005	180	1767	1947	27	641	668
2006	196	1970	2166	44	625	669
2007	219	2641	2860	34	691	725
2008	All Invention and Utility Solution Applications: 3484			All Invention and Utility Solution Patent Grants: 741		

Source: *The National Office of Intellectual Property (NOIP)*¹⁵⁸

¹⁵⁸ See *Statistics: Inventions – Utility Solutions 1981-2007* and *The 2008 NOIP Report* <<http://www.noip.gov.vn>> (visited 23 April 2009).

Appendix 3

Numbers of Applications and Patent Grants for Utility Solutions in Vietnam from 1989 to 2008

Year	Vietnam Origin Applications	Foreign Origin Applications	All Origins Total	Vietnam Origin Utility Solution Patent Grants	Foreign Origin Utility Solution Patent Grants	All Origins Total
1989	25	0	25	n.a	n.a	n.a
1990	39	25	64	23	0	23
1991	52	01	53	44	1	45
1992	32	01	33	23	1	24
1993	38	20	58	9	1	10
1994	34	24	58	18	9	27
1995	26	39	65	8	16	24
1996	41	38	79	5	6	11
1997	24	42	66	8	12	20
1998	15	13	28	3	14	17
1999	28	14	42	6	12	18
2000	35	58	93	10	13	23
2001	35	47	82	17	9	26
2002	67	64	131	21	26	47
2003	76	51	127	28	27	55
2004	103	62	165	44	25	69
2005	182	66	248	41	33	74
2006	160	76	236	45	25	70
2007	120	100	220	49	36	85
2008	All Invention and Utility Solution Applications: 3484			All Invention and Utility Solution Patent Grants: 741		

Source: *As Above Appendix 2*

Appendix 4

Percent Shares of Foreign Origin Applications and Patent Grants for Inventions and Utility Solutions in Vietnam from 1981 to 2007

Year	All Origins Invention Patent Application Total	Foreign Origin Invention Patent Application Percent Share	All Origins Invention Patent Grants	Foreign Origin Invention Patent Percent Share	All Origins Utility Solution Patent Application Total	Foreign Origin Utility Solution Patent Application Percent Share	All Origins Utility Solution Patent Grants	Foreign Origin Utility Solution Patent Percent Share
1981-1988	460	7 = 1.52%	n.a	n.a	n.a	n.a	n.a	n.a
1984-1989	n.a	n.a	81	7 = 8.6%	n.a	n.a	n.a	n.a
1989	71	18 = 25.3%	n.a	n.a	25	0	n.a	n.a
1990	79	17 = 21.5%	14	3 = 21.4%	64	25 = 39%	23	0
1991	64	25 = 39%	27	13 = 48.1%	53	01 = 1.8%	45	01 = 2.2%
1992	83	49 = 59%	35	16 = 45.7%	33	01 = 3%	24	01 = 4.1%
1993	227	194 = 85%	16	13 = 80.2%	58	20 = 34.4%	10	01 = 10%
1994	292	270 = 92%	19	14 = 73.6%	58	24 = 41.3%	27	09 = 33.3%
1995	682	659 = 96.6%	56	53 = 94.6%	65	39 = 60%	24	16 = 66.6%
1996	1008	971 = 96.9%	62	58 = 93.5%	79	38 = 48.1%	11	06 = 54.5%
1997	1264	1234 = 97.4%	111	111 = 100%	66	42 = 63.6%	20	12 = 60%
1998	1105	1080 = 97.7%	348	343 = 98.5%	28	13 = 46.4%	17	14 = 82.3%
1999	1142	1107 = 96.9%	335	322 = 96.1%	42	14 = 33.3%	18	12 = 66.6%
2000	1239	1205 = 97.2%	630	620 = 98.4%	93	58 = 62.3%	23	13 = 56.5%
2001	1286	1234 = 95.9%	783	776 = 99.1%	82	47 = 57.3%	26	09 = 34.6%
2002	1211	1142 = 94.3%	743	734 = 98.7%	131	64 = 48.8%	47	26 = 55.3%
2003	1150	1072 = 93.2%	774	757 = 97.8%	127	51 = 40.1%	55	27 = 49.1%
2004	1431	1328 = 93.5%	698	676 = 96.8%	165	62 = 37.5%	69	25 = 36.2%
2005	1947	1767 = 90.8%	668	641 = 95.9%	248	66 = 26.6%	74	33 = 44.5%
2006	2166	1970 = 90.9%	669	625 = 93.4%	236	76 = 32.2%	70	25 = 35.7%
2007	2860	2641 = 92.3%	725	691 = 95.3%	220	100 = 45.4%	85	36 = 42.3%
2008	n.a							

Source: Count Based on Appendices 2 and 3

Appendix 5

Numbers of Patent International Applications under the WIPO Patent Cooperation Treaty between Other Members, which Joined the Treaty in 1994, and Vietnam, which Joined the Treaty in 1993, from 1994 to 2008

Country of Origin	Year														
	1	1	1	1	1	1	2	2	2	2	2	2	2	2	2
	9	9	9	9	9	9	0	0	0	0	0	0	0	0	0
	9	9	9	9	9	9	0	0	0	0	0	0	0	0	0
	4	5	6	7	8	9	0	1	2	3	4	5	6	7	8
Armenia	1	n.a	2	1	4	1	4	15	5	2	2	3	7	4	6
China	98	106	114	163	267	270	722	15	999	12	16	24	38	54	60
								69		73	60	75	82	70	89
Estonia	n.a	n.a	2	3	2	3	6	11	11	8	12	12	17	29	34
Georgia	1	1	1	4	2	6	4	4	9	1	3	4	8	8	10
Kenya	n.a	2	n.a	1	1	1	n.a	n.a	1	1	6	7	3	4	1
Kyrgyzstan	n.a	n.a	1	1	n.a	n.a	n.a	n.a	n.a	2	1	1	n.a	2	n.a
Lithuania	1	n.a	3	3	1	1	1	3	10	4	8	8	9	13	19
Republic of Moldova	n.a	2	4	n.a	3	n.a	3	1	1	2	3	5	7	4	5
Slovenia	20	32	32	32	19	39	37	37	41	63	60	80	76	86	106
Trinidad & Tobago	1	n.a	n.a	n.a	3	n.a	n.a	1	1	2	1	1	3	1	n.a
Vietnam	n.a	n.a	n.a	n.a	1	n.a	1	n.a	2	7	2	n.a	11	6	6

Source: WIPO:

- *PCT Yearly Reviews from 1994 to 1996;*
- *Statistical Data Query: PCT International Applications for Each Country in the Table from 1997 to 2006;*
- *The International Patent System: Developments and Performance in 2007; and*
- *The International Patent System: Developments and Performance in 2008.*¹⁵⁹

¹⁵⁹ All taken from WIPO <<http://www.wipo.int>> (visited 16 September 2008 and 27 July 2009).

Appendix 6

Top 20 Developing Countries with the Largest Numbers of Patent Cooperation Treaty International Applications in 2008 in Comparison with all Other Developing Countries, from 2004 to 2008

Countries of Origin among Selected Developing Countries	Year				
	2004	2005	2006	2007	2008
Republic of Korea	3,558	4,688	5,944	7,061	7,908
China	1,706	2,503	3,951	5,441	6,089
India	724	679	831	901	753
Singapore	431	443	476	528	568
Brazil	278	271	333	396	444
South Africa	411	358	423	406	376
Turkey	115	174	269	358	361
Mexico	118	141	180	187	207
Malaysia	45	38	60	108	174
Czech Republic	95	117	107	131	152
Ukraine	89	60	77	94	96
Egypt	53	51	41	40	46
Colombia	22	23	29	45	39
Estonia	12	13	17	30	34
Bulgaria	24	21	24	30	28
Argentina	11	20	20	32	23
Chile	6	9	12	17	23
Thailand	12	9	11	7	17
Philippines	11	26	23	17	14
Morocco	7	9	10	18	12
All Others	199	183	223	203	161
Total	7,927	9,836	13, 061	16,050	17,525

Source: WIPO Statistics Database¹⁶⁰

¹⁶⁰ *PCT: The International Patent System Yearly Review - Developments and Performance in 2008* 1, 13
<http://www.wipo.int/export/sites/www/ipstats/en/statistics/pct/pdf/yearly_review_09.pdf>.

Appendix 7

Top 15 Countries with the Largest Numbers of Patent Cooperation Treaty International Applications in 2008 in Comparison with All Others, from 2004 to 2008

Country of Origin	Year				
	2004	2005	2006	2007	2008
United States of America	43,350	46,803	50,941	54,086	53,521
Japan	20,264	24,869	27,033	27,744	28,744
Germany	15,214	15,984	16,732	17,818	18,428
Republic of Korea	3,558	4,688	5,944	7,061	7,908
France	5,184	5,748	6,242	6,568	6,867
China	1,706	2,503	3,951	5,441	6,089
United Kingdom	5,027	5,084	5,090	5,539	5,517
Netherlands	4,284	4,500	4,529	4,355	4,349
Sweden	2,851	2,883	3,316	3,657	4,114
Switzerland	2,898	3,290	3,577	3,778	3,832
Canada	2,104	2,318	2,566	2,847	2,966
Italy	2,189	2,349	2,716	2,946	2,939
Finland	1,672	1,893	1,845	1,995	2,119
Australia	1,837	1,996	2,001	2,053	2,028
Israel	1,227	1,454	1,589	1,746	1,882
All Others	9,245	10,326	11,084	12,252	12,297
Total	122,610	136,688	149,156	159,886	163,600

Source: WIPO Statistics Database¹⁶¹

¹⁶¹ See above n 160, 10.