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Bringing Developing Countries' Intellectual Property Laws to TRIPS Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime

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**BRINGING DEVELOPING COUNTRIES' INTELLECTUAL PROPERTY
LAWS TO TRIPS STANDARDS:
HURDLES AND PITFALLS FACING VIETNAM'S EFFORTS TO
NORMALIZE AN INTELLECTUAL PROPERTY REGIME**

*Michael W. Smith**

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I. INTRODUCTION

While creating new knowledge is fundamental to economic development,¹ intellectual property is becoming a principle source of wealth and wealth generation in developed countries like the United States.² In fact, since the 1980s, the United States has experienced a "gradual but fundamental transformation from a manufacturing to an information-based economy."³ Unfortunately, due to the intangible nature of ideas and the relative ease of appropriating them without the knowledge of the author/owner, intellectual property is "vulnerable to plunder."⁴ Thus, The United States and other developed countries be-

¹ See Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243, 243-44 (1989).

² See Francis Gurry, *The Evolution of Technology and Markets and the Management of Intellectual Property Rights*, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 25, 26 (Frederick M. Abbott & David J. Gerber eds., 1997). Cf. J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT'L LAW 345, 381-82 (1995) (asserting that intellectual property creations are "the most important source of wealth for the twenty-first century economic development . . .").

³ Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 741 (1996). Cf. Gurry, *supra* note 2, at 25-26 (noting increases in investment in intellectual capital on the part of major industrialized nations).

⁴ R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 233 (1989).

The United States economy has moved steadily into areas where the value of its products is tied to intellectual and artistic creativity. If these assets are as vulnerable to plunder as the slow-moving merchant ships of the 1700s were to

gan to use trade sanctions, treaties, and agreements to encourage countries with markets for these ideas, but with less developed intellectual property laws to enact, implement, and enforce prohibitions against the misappropriation of intellectual property.⁵ Eventually, corporations were able to urge the U.S. government to "use the leverage inherent in access to the United States market as a means of stimulating countries to upgrade their level of protection."⁶ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is a culmination of these efforts requiring less developed countries to im-

the Barbary pirates, the United States' ability to trade with countries that harbor such pirates could be seriously hampered.

Id. at 233. See also Frederick M. Abbot, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 691, 697 (1989).

⁵ See Doris Estelle Long, *The Protection of Information in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER & INFO. L. 129, 133-36 (1996) (reviewing developed countries' incentives for encouraging the development of intellectual property law abroad); ELISABETH UPHOFF, *INTELLECTUAL PROPERTY AND U.S. RELATIONS WITH INDONESIA, MALAYSIA, SINGAPORE, AND THAILAND* 12 (1991) (reviewing the use by the United States of Section 301 sanctions against certain Southeast Asian governments to protect its intellectual property rights abroad, pointing out that "the Trade and Tariff Act of 1984 . . . linked intellectual property protection with trade policy for the first time). See generally Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 285, 286-302 (1989) (providing an outline of intellectual property's inclusion in international trade talks and the resultant implications); see also generally A. Samuel Oddi, *TRIPs — Natural Rights and a "Polite Form of Economic Imperialism"* 29 VAND. J. TRANSNAT'L L. 415, 423-27 (1996) (summarizing the events that explain why the General Agreement of Tariffs and Trade (GATT) was chosen as a more effective venue for enforcing intellectual property than the World Intellectual Property Organization (WIPO)); Gurry reviews the new developments of intellectual property to exploit it on a worldwide level. He describes the variety of efforts to protect and exploit intellectual property through legislation and treaty. He writes:

The rise of intellectual property has been, as one might expect, accompanied by a push for greater protection of intellectual property as countries, industries and enterprises with the greatest resources of intellectual capital seek to turn these resources to their advantage. We are on the crest of the wave of a movement for stronger protection.

Gurry, *supra* note 2, at 34-35.

⁶ Gadbow, *supra* note 4, at 228.

plement certain basic intellectual property laws in order to enjoy membership in the World Trade Organization (WTO).⁷

The implementation of the intellectual property protection standards mandated by TRIPs appears simply to be a matter of enacting conforming law. However, an effective structure of laws and enforcement procedures that will offer intellectual property the level of protection anticipated by the West, while simultaneously encouraging domestic innovation, is a rather multidimensional process facing many potential pitfalls. A general review of intellectual property, the TRIPs Agreement, and the difficulties facing countries as they upgrade their intellectual property regimes will lay the groundwork for an examination of the complex process of attaining TRIPs-mandated intellectual property protection. This Note will focus on the political, cultural, and economic difficulties facing a developing country as it attempts to adopt and enforce Western intellectual property standards. For example, this Note will explore how adopting dictated intellectual property laws puts developing countries in a subordinate position that challenges their sovereignty and creates further resentment toward the West. Additional problems arise from forcing a country's citizens to change their conception of property value to accept that intangible ideas have owners that must be compensated. In the process, this Note will attempt to answer the question: what economic, legal, and social issues are involved when a non-Western, developing nation like Vietnam adopts Western-style intellectual property protection in order to encourage foreign investment and involvement in world trade?

II. BASICS OF INTELLECTUAL PROPERTY RIGHTS

The notion of a property right residing in an individual's writings, creations, or inventions came into existence within the last few hundred years.⁸ As patronage became less available for artisans, the cost of developing innovations increased. "Inventors and authors needed incentives to expend the time, energy, and capital required to keep the progress of science and the arts moving forward. These incentives were most often provided in the guise of protection for the intangible property rights in which such advances were embodied . . .

⁷ See generally Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement]; Annex 1C, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1197-99 (1994) [hereinafter TRIPs Agreement] (providing the premise, nature, and scope of the obligations of WTO members in the preamble and art.1 of the TRIPs Agreement).

⁸ See Long, *supra* note 5, at 133.

.⁹ The United States Constitution grants Congress the power to give authors and inventors exclusive rights to their "Writings and Discoveries" in order to "promote the Progress of Science and Useful Arts."¹⁰ Therefore, the traditional justification for granting intellectual property rights is to encourage artistic creation and innovation that would remain unrealized without such protection. Later, the right of an individual to be rewarded for his or her investment of effort and capital was added as a justification for the granting of rights.¹¹ Most recently, it has been argued that the innovative or creative idea is property and the owner has the right to protect it and benefit from it as with ordinary property.¹²

The concept of intellectual property incorporates two elements. First, the ideas, inventions, and creations that result from private activity, and second, the property status bestowed on those expressions and ideas by the public.¹³ Intellectual property has five basic forms: copyright, patent, trademark, trade secrets, and mask works (to which may be added industrial designs and utility models).¹⁴ Briefly, copyright is the author's temporary right, usually lasting for his or her lifetime, to prevent others from making and distributing commercial copies of his or her creative work.¹⁵ The copyrighted material must exhibit some degree of originality.¹⁶ The author's exclusive right is limited by the fair use exception that allows some copying for personal

⁹ *Id.*

¹⁰ U.S. CONST. art. I, § 8, cl. 8.

¹¹ See ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* 37 (1990). (discussing three justifications that seem to be three parts of a whole: reward theory, recovery theory, and risk theory). Sherwood's justifications essentially state that the person who invests the time and money and endures the risk associated with generating new ideas deserves to be rewarded or reimbursed for his or her efforts. *See id.* at 37-39.

¹² See Abbot, *supra* note 4, at 699 (stating that developed countries should argue for support of increased intellectual property protection on the notion that they are merely protecting "an increasingly important component of their national wealth").

¹³ *See id.* at 711.

¹⁴ *See id.* at 712; *see also* Long, *supra* note 5, at 138-47 (providing a detailed review of the traditional forms of and rights associated with intellectual property); *Basic Notions of Intellectual Property*, WIPO Academy Geneva Oct. 4-15, 1993 (offering a summary of intellectual property, particularly in nations with developed intellectual property systems).

¹⁵ See SHERWOOD, *supra* note 11, at 12.

¹⁶ *See id.*; *see also* Long, *supra* note 5, at 139-40.

use, critical reviews, and educational purposes.¹⁷ Some countries, such as The United States, protect software under copyright law.¹⁸ Similarly, patents provide a temporary right to prevent others from using a new invention.¹⁹ Generally, to be patentable, the innovation or invention must be "new, useful, and non-obvious."²⁰ A trademark is a word or design used to designate a product and its source.²¹ Finally, a mask work is a layout design for a semiconductor chip.²² This last category falls between copyright and patent.²³

Robert Sherwood identifies eight elements common to the five forms of intellectual property that are "elements of a normative [or highly developed intellectual property] regime."²⁴ This break-down of intellectual property into common elements is particularly useful to the discussion of what steps developing countries like Vietnam will need to take to satisfy TRIPs levels of protection. The eight elements are:

[1] the concept of an exclusive right; [2] the mechanism for creation of the exclusive right; [3] the duration of the exclusive right; [4] the supervening public interest; [5] the negotiability of the exclusive right; [6] trans-border comity and accommodation; [7] enforcement of the exclusive right; and [8] transition arrangements for marketplace effect.²⁵

First, at the core of intellectual property is the notion that the artist or inventor has a conditional right to exclude others from using or copying her work.²⁶ Second, normative intellectual property regimes will have in place mechanisms such as registration or some other course of action before the government will enforce the right.²⁷ Third, the duration of the right may be an arbitrary number of years be it seventeen to twenty years for patents, the life of the author for copy-

¹⁷ See Long, *supra* note 5, at 139-40.

¹⁸ See *id.* at 140 & n.39.

¹⁹ See SHERWOOD, *supra* note 11, at 12.

²⁰ See Long, *supra* note 5, at 141.

²¹ See SHERWOOD, *supra* note 11, at 12.

²² See *id.*

²³ See *id.*

²⁴ *Id.* at 28.

²⁵ *Id.*

²⁶ See SHERWOOD, *supra* note 11, at 28.

²⁷ See *id.* at 30.

rights, or as long as the mark is used for trademarks.²⁸ Fourth, interests of public morality or a government's right of eminent domain will supersede and circumscribe the rights of exclusivity, but these are usually narrowly defined.²⁹ Fifth, often it is implicit that these rights are property rights and are therefore subject to transfer to others for a price.³⁰ Sixth, more recently, international agreements require the recognition of these rights across national borders.³¹ Seventh, mature intellectual property regimes will have the means of enforcing these rights.³² Enforcement is practiced under three forms: private action, criminal action, and national border monitoring.³³ Finally, transition arrangements allow for the protection of an idea before it is fully commercialized.³⁴

III. BACKGROUND OF THE TRIPS AGREEMENT

With the basic elements of intellectual property and a mature intellectual property regime in mind, we turn to the global situation that gave rise to TRIPs.³⁵ According to Hansen's categorizations, countries of the world may be divided into three groups in relation to their "production and consumption of intellectual property products."³⁶ First, are the net sellers and exporters of intellectual property.³⁷ These are developed countries such as the United States who want to obtain

²⁸ *See id.* at 31.

²⁹ *See id.* at 32.

³⁰ *See id.*

³¹ *See* SHERWOOD, *supra* note 11, at 33.

³² *See id.* at 34-35.

³³ *See id.* at 35.

³⁴ *See id.* at 36.

³⁵ The varied motivations that directed the path to the TRIPs Agreement are thoroughly documented. *See generally* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) Ch. 2 (Terence P. Stewart ed., 1993) (discussing the negotiating background of the Uruguay Round and the TRIPs Agreement); *see* Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989) (the papers and articles presented at this symposium provide a thorough discussion of the historical background, intellectual property development, economic climate, and motivations that laid the foundation for the TRIPs Agreement).

³⁶ Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 VAND. J. TRANSNAT'L L. 579, 582 (1996).

³⁷ *See id.*

increased value for their exported technology,³⁸ while at the same time broadening worldwide protection.³⁹ The second group are those developed or newly developed countries “with the resources and industries to become net sellers and exporters.”⁴⁰ These countries seek broad worldwide protection in addition to increased domestic protection as an incentive for local industry to develop intellectual property and to compete better at home and abroad. The final group are net users and importers of intellectual property.⁴¹ These countries are developing or newly developed and seek to provide protection, at least within their own borders.⁴²

The economies of developed countries are transforming into information-based economies. Greater amounts of innovation and investment are tied up in and represented by intellectual property.⁴³ This has created an impetus for obtaining greater value for these creative

³⁸ See Long, *supra* note 5, at 135.

³⁹ See Hansen, *supra* note 36, at 582.

⁴⁰ See *id.* at 582.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Abbott, *supra* note 4, at 692 (stating that “intellectual property has become an increasingly important component of national wealth”). The increasing world focus on intellectual property which gave rise to TRIPs is a “single response to economic and industrial change.” Gurry, *supra* note 2, at 25. This change is bringing about an economy whose main source of income is intellectual rather than physical capital. *Id.* Thus,

[I]nvestment in the generation of intellectual capital through research and development (R&D) has steadily increased across the industrialized countries. . . . [F]rom 1972 to 1991, the amount of research invested in R&D by the G7 countries increased from an average of 1.8% of GDP to an average of 2.25% of GDP.

Id. at 25-26 (citing NAT. SCIENCE BD., SCIENCE AND ENGINEERING INDICATORS at appendix table 4-35 (1993)). In response to this phenomenon, Reichman provides two rational bases for why the standards for intellectual property protection need to be stepped up:

First, the growing capacity of manufacturers in developing countries to penetrate distant markets for traditional industrial products has forced the developed countries to rely more heavily on their comparative advantages in the production of intellectual goods Second, the rise of knowledge-based industries radically altered the nature of competition [T]he resulting innovation embodied in today's high-tech products has increasingly become vulnerable to free-riding appropriators.

Reichman, *supra* note 2, at 346.

endeavors. In other words, corporations, having invested heavily in research, design, technology development, and other creative products (such as movies and music), desire to send these products into the burgeoning global market and reap a wealthy return on their investment.⁴⁴ However, sending products into areas without laws and administrative structures to protect property interests will expose these products to piracy. Profits will be siphoned off to third parties.⁴⁵ Indeed, given the highly exploitable nature of intangible intellectual property⁴⁶ and the ease of copying it, such products, once introduced into world markets, face the threat of unauthorized copying and use, regardless of national boundaries.⁴⁷

Beginning in the 1980s, the value of unrealized sales lost to piracy provided enough attention-getting data to inspire developed countries to seek more stringent protection abroad. Companies in developed countries never realized these billions of potential dollars in sales due to piracy.⁴⁸ For example, the International Intellectual Prop-

⁴⁴ See generally Gurry, *supra* note 2, at 26 (noting that when intellectual capital becomes a primary source of income, "intellectual property assumes critical significance as a means of control of the . . . potentially most commercially attractive elements of intellectual capital").

⁴⁵ It was just such an exposure to pirating and huge losses in unrealized sales that led developed nations to seek stronger protection. See Uphoff, *supra* note 5, at 6-7. See also Eric H. Smith *Worldwide Copyright Protection Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 560 (1996) (stating that, in the past, certain areas of the world provided essentially no protection for intellectual property, and consequently, piracy in those areas resulted in trade losses).

⁴⁶ "Intellectual property is peculiarly adapted to exploitation within global markets. Being the intangible expression of . . . information, it may, unlike physical property, be used simultaneously in different physical markets." Smith, *supra* note 45, at 560; see also UPHOFF, *supra* note 5 (describing the establishment by the United States of a uniform policy against the piracy of Western products by a number of Southeast Asian countries).

⁴⁷ Uphoff points out that "advances in reproduction technology have made it much easier to copy books, audio/videotapes, movies, etc." Uphoff, *supra* note 5, at 7. Additionally, "the intangible nature of intellectual property complicates detection of its unlawful appropriation, particularly given modern technology, and the public, even in countries considered vigilant about protecting rights in such property, remains more tolerant of its infringement than of virtually any other form of illegal activity." WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 6 (1995). Losses to piracy in both developed and lesser developed countries exceed hundreds of millions of dollars. See generally Smith, *supra* note 45, at 560-65.

⁴⁸ See generally Smith, *supra* note 45, at 568 (providing U.S. trade loss figures for the piracy of intellectual property products for 1994). See also Kastenmeier & Beier,

erty Alliance (IIPA) reported that, in 1994, The United States suffered over \$11.6 billion in lost potential income to piracy outside the United States.⁴⁹ Other estimates claimed losses of up to \$40 billion a year due to unauthorized copying.⁵⁰ Interestingly, U.S. domestic piracy is the biggest offender in dollar terms. In 1994, losses to domestic U.S. piracy amounts to \$2.9 billion compared to \$866 million in China in that same year.⁵¹ Developed countries usually have higher dollar losses from piracy than less developed countries.⁵² Smith points out that this is because as countries become more developed, their markets expand in size accompanied by a greater proliferation of copying technology like VCRs. Thus, while the level of piracy as a percentage of the overall market drops, the dollar amount lost to piracy rises. This is offset, however, by the overall increase in sales resulting from the expanded market.⁵³

supra note 5, at 286 (reviewing how the increasing concern for protecting intellectual property led to using trade talks to encourage greater intellectual property protection abroad.)

⁴⁹ See Smith, *supra* note 45, at 568. According to the data compiled by the IIPA for 1994, U.S. companies lost a staggering \$1.265 billion to piracy in Japan and \$866 million in China while experiencing a more modest loss of \$103 million in Malaysia and a relatively minor sum of \$5.2 million in Vietnam. *Id.* at 562. However, quantifying the actual dollar amounts is highly problematic. This is so because one must consider not only the degree of unauthorized appropriation, but also the level of lost revenue opportunities, both of which are unknown factors. See Abbot, *supra* note 4, at 699-700.

⁵⁰ See Kastenmeier & Beier, *supra* note 5, at 286.

⁵¹ See Smith, *supra* note 45, at 562-65.

⁵² The biggest offenders, outside the U.S. itself, are Japan at \$1.3 billion, Germany at \$1.2 billion, China at \$866 million, and Russia at \$805 million. See *id.*

⁵³ See *id.* at 563. To illustrate, take two hypothetical countries of approximately equal population; country A and country B. Country A is less developed, and only a small ratio of homes, one in fifty, has a VCR. Assume that the potential market for video tapes of the movie *Star Wars* in country A is quite small, totaling 10,000 copies. Assume further that, given country A's low level of copyright enforcement, the piracy rate is 75%. Therefore, potentially 7,500 copies of *Star Wars* in country A will be pirated. Country B, on the other hand, is highly developed, and a large number of homes, one in two, have VCRs. Assume that the market for *Star Wars* videos in country B is quite large, totaling over 250,000 copies. Assume further that, given country B's high level of copyright enforcement, the piracy rate is a low 10%. Therefore, potentially over 25,000 copies of *Star Wars* in country B will be pirated. Thus, even though the piracy rate is considerably lower in country B, the total number of pirated copies, and therefore revenue losses, are considerably higher in country B than in country A.

These increasing losses to piracy combined with a widening trade deficit and a perceived faltering of The United States' worldwide economic dominance opened the ear of the U.S. government to the complaints of U.S. companies. Uphoff states that

The sudden emergence of intellectual property protection as a major goal of U.S. foreign economic policy in the mid-1980s was a result both of an objective change in the value of intellectual property, and of the domestic political debate over how to respond to the trade deficit and the relative decline of American economic power. The policy was formed with considerable participation by the private sector in defining issues and problems, identifying countries, and supplying information. The result was an active — perhaps interventionist — foreign policy that tended to be inward looking and inflexible because of its role in the broader debate over trade.⁵⁴

Uphoff's statement indicates that from this point on, intellectual property protection and trade are linked. Companies saw that the U.S. government — and governments of other developed countries — could make access to their markets conditional upon implementing stronger levels of protection.⁵⁵ Eventually, industry groups convinced the government to act.⁵⁶ The U.S. government initially demanded that countries where piracy was occurring enforce intellectual property protection or face trade sanctions.⁵⁷ Later, as these industry groups convinced their governments that the reason for the piracy problem was inadequate intellectual property protection, the governments in turn sought higher levels of protection through multinational accords.⁵⁸ It was hoped that, through economic pressure and resulting agreements, countries with inadequate protection would pass stronger laws and enact stronger enforcement procedures. By so doing, profits would be transferred from the hands of pirating citizens to the companies that developed the original product.⁵⁹

⁵⁴ UPHOFF, *supra* note 5, at 12.

⁵⁵ See Gadbow, *supra* note 4, at 228. See also Oddi, *supra* note 5, at 415, 424. Oddi writes: “[i]ndustry groups (lobbyists) in developed countries, particularly in the United States, found a receptive government ear to their plea that their intellectual property was being ‘counterfeited,’ ‘pirated,’ ‘stolen,’ and ‘infringed’ to their detriment and to the detriment of intellectual property-exporting countries by a generally bad lot in certain countries.”

⁵⁶ See Oddi, *supra* note 5 at 424.

⁵⁷ See UPHOFF, *supra* note 5.

⁵⁸ See *id.* at 6-12; see Long, *supra* note 5, at 135; Oddi, *supra* note 5, at 425.

⁵⁹ See Oddi, *supra* note 5, at 425; see also Long, *supra* note 5, at 135.

This illustrates, to some degree, the problem of intellectual property protection on the international level. Sufficient protection requires sovereign nations to rewrite their own laws at the behest of a foreign state in order to protect the intangible property of that foreign state's nationals. By providing such protection, the developing country forgoes a "potential economic windfall,"⁶⁰ since cheaply distributed copies would be replaced by more expensive, authorized products protected by an expensive intellectual property regime. This tension explains, in part, the inadequacy of intellectual property protection features both locally and internationally before TRIPs.

Before TRIPs, countries had at least rudimentary forms of intellectual property laws that went unenforced.⁶¹ The Berne and Paris Conventions, which cover patent and copyright enforcement among member nations, were criticized for their lack of enforcement procedures and failure to cover certain important subject matter areas, such as trade secrets.⁶² Later, the World Intellectual Property Organization (WIPO) also failed to effectively deal with the problem of intellectual property infringement. Under WIPO, developing countries exerted enough power as a group to create a stalemate with developed countries over revision of the Paris Convention.⁶³ However, the General Agreement on Tariffs and Trade (GATT) provided a much more effective means for developed countries to exert pressure on other countries to modify their intellectual property systems. Developed countries could use trade and access to their markets to encourage adoption of stronger intellectual property enforcement.⁶⁴ This shift from WIPO to GATT and the use of trade as a means for encouraging stiffer intellectual property protection gave worldwide intellectual property protection a fundamental trade aspect.⁶⁵ By so doing, "developed coun-

⁶⁰ See Abbot, *supra* note 4, at 697.

⁶¹ See Smith, *supra* note 45, at 572. See generally UPHOFF, *supra* note 5 (Singapore, Malaysia, Indonesia, and Thailand all had intellectual property laws enacted while these countries were still colonies of European countries but they were ineffectually enforced and not well developed.)

⁶² See Abbot, *supra* note 4, at 703-07. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, July 14, 1967, 21 U.S.T. 1583 (last reviewed at Stockholm, July 14, 1967) [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁶³ See Oddi, *supra* note 5, at 424.

⁶⁴ Reichman, *supra* note 2, at 385.

⁶⁵ See Oddi, *supra* note 5, at 425. Otten and Wager assert that, "due to the place of the TRIPs Agreement within the trading system it can be expected that over the

tries have implicitly acknowledged that compensation has become the new master principle."⁶⁶ TRIPs then emerged as a prerequisite to membership in the newly organized World Trade Organization which arose from GATT.⁶⁷

IV. APPLYING INTELLECTUAL PROPERTY STANDARDS ACROSS BORDERS

Before turning to the TRIPs Agreement specifically, it is important to look at the difficulties and problems faced in creating transnational intellectual property standards and convincing other countries to adopt these standards. These major problems are (1) the suitability of applying standards derived in one culture across others,⁶⁸ (2) the socioeconomic cost and resulting dependency associated with higher levels of protection,⁶⁹ and, to a lesser degree, (3) public discontent

coming years there will be something close to universal acceptance of its obligations." Adrien Otten & Hannu Wager, *Compliance with TRIPs: The Emerging World View* 29 VAND. J. TRANSNAT'L L. 391, 394 (1996). Additionally, they claim that, "[u]nder the WTO, the failure of a country to meet its TRIPs obligations can put its market access rights and other benefits in jeopardy." *Id.*

⁶⁶ Reichman, *supra* note 2, at 385 & n. 309.

⁶⁷ Ghana provides an excellent theoretical basis for the TRIPs Agreement:

The impetus behind the TRIPs Agreement is a combination of two inextricable objectives: (1) to secure global economic rewards of an intellectual property grant, and (2) to facilitate the enforcement of these rights as a means to accomplish the first objective. By situating the TRIPs Agreement in the framework of multilateral trade relations, the Agreement benefits from the increased incentive for nations to enforce intellectual property rights through the threat of trade sanctions. Like a wheel, the TRIPs Agreement envisages that the threat of trade sanctions will propel the forward motion of respect and protection of copyrights worldwide.

Ghana, *supra* note 3, at 759.

⁶⁸ See Long, *supra* note 5, at 154.

⁶⁹ See generally Reichman, *supra* note 2, at 354, 382-83 (noting that a patent system may cause greater dependence on foreign patents and that "integrating intellectual property law into greater economic law necessarily imposes short and medium-term social costs on the developing countries"). See also Braga, *supra* note 1, at 256-57 (indicating that stiffer intellectual property protection will result in greater costs due to increased "royalty payments to foreigners," displacement of domestic firms "devoted to piracy," the "opportunity cost of additional domestic R&D," and increased costs due to monopolization); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE TRIPs AGREEMENT AND DEVELOPING COUNTRIES, PREPARED BY THE U.N. CTAD SECRETARIAT, UNITED NATIONS NEW YORK AND GENEVA ¶ 14, at 2-3 (1996). [hereinafter U.N. CONFERENCE] (reviewing briefly the economic implications of adopting higher intellectual property standards).

over perceived challenges to national pride and autonomy.⁷⁰ Attempts to adopt TRIPs standards in Vietnam will come up against these problems, although the trade incentive should be a strong motivator to encourage Vietnam to accommodate higher protection.

A. Culture and Social Attitudes

Trade is one means of getting around the divisiveness that exists between competing types of intellectual property protection. In fact, since the Berne and Paris Conventions first met in the late nineteenth century, debate has continued over the type and scope of protection that should be offered to intellectual property.⁷¹ Doris Long points out that “[t]he positions taken by various nations in these debates reflect their differing (and often irreconcilable) philosophical, cultural, historical, economic, and political points of view regarding the need for strong protection of technology and other products of the mind.”⁷²

Two competing systems emerged among the developed nations that reflect differing cultural backgrounds: the Anglo-American economic system with its notions of the free exchange of property,⁷³ and the “Continental ‘author’s rights’ system with its concomitant fascination with [the author’s] ‘moral rights.’”⁷⁴ Countries in either of these two systems created and enforced “regimes of protection that were economically and philosophically compatible with their cultures.”⁷⁵ Thus, France, with its emphasis on moral rights, grants artist’s rights

⁷⁰ Braga points out that “[n]o government likes to be perceived as submitting to foreign threats. Once retaliation is implemented, domestic support for stronger intellectual property rights protection may be negatively affected.” Braga, *supra* note 1, at 263. Public support for changes to intellectual property laws often falters or becomes assertively negative when it appears that a government is bowing to the demands of the West. For example, critics of the government at Taipei called Taiwan’s commitment to pass laws concerning intellectual property a “national humiliation” because the United States had dictated new laws to its elected officials. See ALFORD, *supra* note 47, at 106. Similarly, a Thailand faction balked at what it felt was U.S. “trade harassment” and dissuaded its government from enacting revised intellectual property laws that could be regarded by the public as concessionary. See UPHOFF, *supra* note 5, at 44.

⁷¹ See Long, *supra* note 5, at 154 & n.96.

⁷² *Id.*

⁷³ See Hansen, *supra* note 36, at 580.

⁷⁴ *Id.*

⁷⁵ *Id.*

in paintings even after the painting is sold.⁷⁶ An artist may prohibit a buyer two or three transactions later from altering or destroying the work even though the artist no longer owns the actual piece.⁷⁷ This is presumably in accord with French notions of artistic creation. Once produced by the creative forces acting upon the artist, the artwork should remain unchanged from its original form. This also protects the interest the artist has in his body of work and the public's interest in preserving culture through unsullied works of art.⁷⁸ In contrast, U.S. artists have no such rights once a painting is sold. The artist's rights in the original work generally end with remuneration.⁷⁹ The work becomes a commodity to be sold or manipulated according to the interests of the current owner.⁸⁰ The U.S. approach follows a tradition of "crass mercantilism" which allows the person who pays for the work absolute rights over it as a commodity or commercial item.⁸¹

This brief example demonstrates that intellectual property rights are rooted in the culture, philosophy, and national character of the individual country. France's concern for art and culture and the U.S.' concern for free markets have given rise to two distinct approaches to the rights of artists in their works. Western developed countries have for a century debated and worked out the competing demands of their respective intellectual property systems as they relate to international trade. However, Western countries have ignored the same potential for difference among less developed nations. Long advises that:

The problem with enforcement of intellectual property rights in many Third World and underdeveloped countries arises in large part from the disalignment of western views of intellectual property rights with culture, history, and legal traditions of developing and emerging marketplace countries. This disalignment can only be overcome if cultural differences are absorbed into international standards.⁸²

⁷⁶ See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 99-100 (Jan. 1997) (describing how French artist Bernard Buffet retained rights to a refrigerator door he had painted after its sale to a third party).

⁷⁷ See *id.*

⁷⁸ See *id.* at 102-06. ("... great works of art often become important elements in a community's culture: other works of art are created in response to them, and they become common reference points or icons that are widely shared in social communication").

⁷⁹ See *id.* at 106.

⁸⁰ See *id.* at 103.

⁸¹ See *id.* at 96.

⁸² See Long, *supra* note 5, at 166.

Unfortunately, international standards are dictated by a few developed countries. It is unclear what form intellectual property rights or what variety of rights may have developed in individual countries, but it appears that if these countries wish to benefit from open trade, they will need to conform to a variation of the two themes propounded by Europe and the United States. Given the peculiar social, political, and cultural forms that gave rise to Western intellectual property, the disalignment Long mentions can only serve to disrupt and complicate the process of establishing world-wide intellectual property protection standards given the wide variety of cultural norms.

Because the TRIPs Agreement partakes heavily of Western attitudes and conceptions towards individuality, human value, rights, reward, invention, and discovery and imposes them upon non-Western countries, TRIPs has been criticized as a modern vehicle of Western imperialism.⁸³ According to Hamilton, belief in Western style copyright law requires acceptance of the canon of individualism, reward, and commodification.⁸⁴ Western copyright — or particularly Anglo-American copyright — values individual creative effort, singles out

⁸³ See Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996). "TRIPs attempts to remake international copyright law in the image of Western copyright law. If TRIPs is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history." *Id.* Rosemary J. Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STAN. L. REV. 1357, 1360 (1996). Coombe adds:

The very tropes of discovery, invention, naming, and originality that animate modern intellectual property laws emerge from a historical era in which Europeans mapped the world in their own image — ignoring the human ecologies of others and denying any value to the preexisting worlds of meaning in which such phenomena figured ontologically and spiritually.

Id. See also Long, *supra* note 5, at 166 (noting that "the problem with enforcement of intellectual property rights in many Third World and underdeveloped countries arises in large part from the disalignment of western views of intellectual property rights with the culture, history, and legal traditions of developing and emerging marketplace countries"). The fact that the policy being advanced by governments is driven by industry groups does "smack of economic imperialism against uppity 'pirate' states who deign to compete by 'imitation' . . ." Oddi, *supra* note 5, at 470. Hamilton notes that the "United States is . . . endorsing the imposition of a revolution-tending construct of the person. Individualism, as captured in the Western intellectual property system, is the sine qua non for a society to recognize and honor personal liberty." *Id.* And goes so far as to state: "TRIPs is nothing less than freedom imperialism." Hamilton, *supra* note 83, at 617.

⁸⁴ Hamilton, *supra* note 83, at 617.

the creative individual for reward, values original expression, and believes that products are capable of disassociation from the artist to be sent through commerce.⁸⁵ These ideals are fundamentally incompatible with some of the cultural and political underpinnings of non-Western countries — particularly Asian countries based upon Confucian ideals like Vietnam which value continuity with the past and group identities.⁸⁶ It has been argued that “[a] people must value individual achievement and believe in the appropriateness of change and originality if it is going to concede to and adopt a Western-style intellectual property regime.”⁸⁷ It will be interesting to see to what degree countries will adapt their own cultural and political ideologies in order to take advantage of the markets and trade access that is available with adherence to TRIPs. Some form of resistance from within these countries is inevitable.⁸⁸

Even in the United States, attitudes about intellectual property rights are less than uniform. The free and unhindered flow of ideas and culture are deeply ingrained even in the West.⁸⁹ Payment for expressions of ideas and cultural items (like music) are not necessarily universal ways of viewing intellectual property. Hansen wryly notes that “the U.S. consumer views intellectual property as a hindrance to immediate gratification and home-taping as something guaranteed by the Bill of Rights.”⁹⁰ Evidently, notions of property and ownership are

⁸⁵ See *id.* Although, as noted above, the idea of commodification differs between Western nations since moral rights countries give the creator rights over artwork even after it is sent into the stream of commerce. See Gana, *supra* note 3, at 730 (stating that “TRIPs asks “developing countries . . . to conform to a system and philosophy of laws and values which are alien, and in some cases, in direct conflict with frameworks which historically have sustained these societies”).

⁸⁶ See Gana, *supra* note 3, at 764-67 (describing at length China’s resistance to “modern intellectual property” concepts due to its traditionally Confucian values and norms).

⁸⁷ Hamilton, *supra* note 83, at 613.

⁸⁸ See Gana, *supra* note 3, at 770-71.

⁸⁹ See Hamilton, *supra* note 83, at 625-26 (discussing tension between views on dissemination of information espoused by the computer experts or “hackers” and owners of copyrightable works. The hackers espouse the motto: “Information wants to be free”). Hamilton states that “[s]ome go so far as to argue that barriers to information, including copyright, are outdated impediments to truth and exploration. They opine that copyright is an arcane phenomenon linked to the printing press that will be swept under the tide of the emerging on-line environment.” *Id.*

⁹⁰ Hansen, *supra* note 36, at 587.

rooted in tangible items. Intangible items are harder to assign a monetary value. Hansen notes that:

Everybody thinks that it [is] wrong to shoplift the videocassette from a store. On the other hand, almost everybody considers it appropriate to videotape that same forty dollar movie from a television set. Thus, it appears the inexpensive but tangible videocassette is valued more than the expensive but intangible intellectual property.⁹¹

However, Americans likely regard the expropriation of patents and trademarks as inappropriate.⁹² In terms of personal use, however, Americans appear to feel that intellectual property, particularly films and literature, may be freely expropriated.⁹³ Thus, even in the United States, intellectual property is not valued in the same way as tangible property. If the recording, film, or software industries wish to change this method of valuation, they must first educate Western and non-Western consumers alike as to the value of intangible intellectual property and the immorality of its free reproduction.⁹⁴

Cultural and social attitudes reflect the notion that intangible property is or should be freely distributed. Organizations and governments seeking to establish intellectual property protection will need to surmount individual intuitive notions of value and apply an appropriate valuation for intangible ideas. In Asia, this problem with intellectual property "stems from the Confucian view that information should be shared without concern for compensation."⁹⁵ Additionally, some tribal cultures "have a community view of property and information that does not readily translate to the individual proprietorship view of technology that underlies much of the Western European and United States approach to the protection of technology."⁹⁶ Inspiring non-

⁹¹ *Id.* at 588.

⁹² Especially in the case of trademarks, given the market confusion and harm that can result when manufacturers of poor quality goods adopt the trademark of a trusted manufacturer of quality items in order to deceive consumers. For example, "Chinese pharmaceutical manufacturers have found their marks infringed — at times with fatal consequences for consumers." ALFORD, *supra* note 47, at 87. Since the unauthorized manufacture of patented drugs (or airplane parts) under expropriated trade names may result in injury or death, trademarks and patents are going to be taken more seriously than are copyrights and recognized as rights important to assure public safety.

⁹³ This is true to the point that the fair use exception is granted. *See* Long, *supra* note 5, at 139.

⁹⁴ *Cf.* Hansen, *supra* note 36, at 582.

⁹⁵ Long, *supra* note 5, at 156-57 & n.106.

⁹⁶ *Id.* at 157.

Western developing nations to adopt and enforce a system that may be at odds with deeply held cultural and social practices will require something of a missionary effort to convert individuals to Western ways of thinking.⁹⁷

B. Protection and Economic Dependence

Another complicating feature of intellectual property law adoption is the desire of developing countries to permit free copying until that country's own inventors and economies have a chance to catch up to the level of development enjoyed by other countries.⁹⁸ Countries lacking that level of development desire free access to patented technology and copyrighted products in order to develop both their technical know-how and economies such that they can begin to develop their own intellectual property.⁹⁹ Conversely, countries that have expended a great deal of

⁹⁷ See Hansen, *supra* note 36, at 579-82. August & Buchenhorner note that:

It is important to remember that many of the countries where intellectual property protection is weak have a past of colonialism, protectionism, and Communism. Strong IP [intellectual property] protection has not been a part of those cultures. Thus, a large part of the enforcement effort in the hostile environments is education of the public to promote greater respect for IP rights. There are many vehicles, such as trade organizations, useful for educating the public.

Casey P. August & Michael J. Buchenhorner, *Strategies for Developing Intellectual Property Portfolios in the Global Environment: Protection of Intellectual Property in Hostile Environments*, 21 CAN.-U.S. L. J. 261, 274 (1995).

⁹⁸ See Uphoff, *supra* note 5, at 1 (stating that "many developing countries argue that they need free access to ideas and technology in order to 'catch up' with the industrialized countries"). Carter Mackley, Note, *The Role of the Patent System in Technology Transfer: The Japanese Experience*, 26 COLUM. J. TRANSNAT'L L. 131, 164 (1987) (describing how Japan allowed free copying "as a method of allowing domestic industry to develop"); Long, *supra* note 5, at 162-63 (stating that lesser developed countries see themselves as needing open access to intellectual property in order to develop economically); See generally Martin J. Adelman & Sonia Baldia, *Prospects and Limits of the Patent Protection in the TRIPs Agreement: The Case of India*, 29 VAND. J. TRANSNAT'L L. 507, 527-28 (1996) (pointing out that some countries, particularly India, have adopted a free-rider strategy whereby they take advantage of other countries' patented products by avoiding the cost of development through reengineering).

⁹⁹ For example, Chinese officials in the 1980s argued that China, as a developing nation, could not afford to pay royalties on works of science and technology that were needed for growth. Thus, state-owned bookstores became filled with pirated copies of technical books that were off-limits to all but Chinese citizens. However, non-technical books such as novels were also made available in these bookstores in

wealth developing advanced intellectual property wish to protect their investment.¹⁰⁰ Discoveries and inventions are all built upon the ideas and research of predecessors. Developing countries do not possess large amounts of protected data from which to draw on, nor do they enjoy nationally created technological basis for further innovation.¹⁰¹ Given this void, developing nations often use other nations' products to assist in their growth.¹⁰² Earlier in its history the United States, before it enjoyed its own cadre of writers and artists, published and pirated European writer's works without copyright protection thus providing greater access of these works to Americans.¹⁰³ Further, low standards of patent protection have helped countries like India and Brazil distribute and develop pharmaceuticals.¹⁰⁴ Before World War II Japan tolerated the copying of imports to help spur its economic development, and continued along such a path until the strict enforcement of patent rights of foreigners preconditioned its receipt of more advanced technologies.¹⁰⁵ Thus, "[a]ttempts to restrict a nation's internal access to technology through the enactment of international protection norms are seen by many developing countries as a direct threat to their ability to play a significant role in the world economy."¹⁰⁶

pirated form. See ALFORD, *supra* note 47, at 86. Additionally, Gana points out that low standards of patent protection have helped some developing countries build local industries, especially pharmaceuticals. See Gana, *supra* note 3, at 746. Thus, India's pharmaceutical manufacturing industry grew because it was able to reengineer products due to a lax patent system in that country and sell them more profitably than foreign companies because of a high tariff. See Adelman and Baldia, *supra* note 98, at 527. See also Mackley, *supra* note 98, at 144 (explaining that Japanese officials in 1899 worried that advanced technology from foreign countries would "dominate domestic markets with their patent monopolies and impede national industrial development").

¹⁰⁰ See Long, *supra* note 5, at 135.

¹⁰¹ See *id.* at 162.

¹⁰² See *id.*

¹⁰³ See *id.* at 162-63. Formal protection for foreign copyrighted materials was not granted in U.S. until 1891. See ALFORD, *supra* note 47, at 5. The Berne protections were originally formulated five years later in 1886. See Berne Convention, *supra* note 62.

¹⁰⁴ See Gana, *supra* note 3, at 746.

¹⁰⁵ See Mackley, *supra* note 98, at 164-65. The author of this note argues that given the Japanese success with loose intellectual property protection, other countries might similarly benefit early on in their economic development and only suffer a short term loss of international respect. See *id.* at 165.

¹⁰⁶ Long, *supra* note 5, at 163.

By imposing higher levels of protection in developing countries for intellectual property, TRIPs creates the potential problem of economic dependence on developed countries.¹⁰⁷ Because the value of patent systems to developing countries remains dubious, the stiffer laws could cause a growing dependence on foreign patents since a country would be unable to lay the technological ground-work sufficient to begin developing their own innovations.¹⁰⁸ The developing country would be forced into continued reliance on developed countries for technology, thus remaining a consumer rather than a participant in world innovation and trade.¹⁰⁹

V. THE UNITED STATES V. SOUTHEAST ASIA: LESSONS FOR TRIPs

Uphoff discusses in detail the battles over trade and intellectual property rights that four Southeast Asian countries had with the United States during the late 1980s. Her study provides interesting case studies that illustrate the struggles of enacting and enforcing heightened protection.¹¹⁰ The four countries, Singapore, Indonesia, Malaysia, and Thailand, each responded to U.S. pressure in unique ways. In 1985, Singapore was considered the world capital of piracy.¹¹¹ Foreigners found no clearly authorized place to register copyrights and convictions for copyright violations were "too low to be much of a deterrent."¹¹² In fact, companies complained that pirates just considered the small fines as part of doing business.¹¹³ But, factors were at work that would soon result in Singapore's adoption and enforcement of an intellectual property regime that would significantly reduce piracy.

Beginning in 1979, the Singaporean government announced a second industrial revolution that transformed Singapore into a high-

¹⁰⁷ See Reichman, *supra* note 2, at 354 (explaining this problem as it relates to the system of patents).

¹⁰⁸ See *id.*

¹⁰⁹ See S. K. Verma, *TRIPs — Development and Transfer of Technology*, 27 IIC 331, 364 (1996). See also Oddi, *supra* note 5, at 460 (stating that the lack of incentives to encourage technological development in lesser developed countries will cause them to remain consumer countries and not eventual intellectual property developers).

¹¹⁰ See generally UPHOFF, *supra* note 5.

¹¹¹ See *id.* at 13 & n.1.

¹¹² *Id.*

¹¹³ See *id.* at 14.

technology-oriented economy.¹¹⁴ "In 1981, the Singapore Government initiated a computerization plan that included making Singapore the software capital of Asia through a strategy of alliances with foreign computer companies."¹¹⁵ However, by 1984, Singapore's position on copyright protection was still lacking. The passage of the Trade and Tariff Act of that year made Singapore realize that intellectual property protection issues were factors that The United States would enforce through trade legislation. Additionally, American software companies refused to make the deals that Singapore sought in stating that the U.S. software industry wanted and would continue to push for complete protection for all industries using copyright.¹¹⁶

Following these developments, Singapore's attitude toward intellectual property changed dramatically. In 1987, it enacted a new copyright act that conformed to international law and met U.S. requests. The enactment protected computer programs and substantially raised the penalty for infringement to a maximum of \$5,100 in fines and up to five years in prison.¹¹⁷ Enforcement stepped up considerably as well.¹¹⁸ U.S. losses to piracy reportedly fell to \$10 million from \$358 million as a result of Singapore's pro-active enforcement efforts.¹¹⁹ Once Singapore decided to act, it moved decisively and piracy nearly vanished.

Singapore's new industrial revolution required joint ventures with software companies that considered copyright protection of paramount importance. Thus, for Singapore, copyright protection became part of its overall development strategy.¹²⁰ Once it made this decision, Singapore quickly and decisively implemented stringent intellectual property protection after a decade of near inaction.¹²¹

Malaysia's intellectual property protection was, by American standards, just as weak as that of Singapore. However, Malaysia's

¹¹⁴ See *id.* at 19.

¹¹⁵ *Id.* at 14 & n.5.

¹¹⁶ See UPHOFF, *supra* note 5, at 15.

¹¹⁷ See *id.* at 16.

¹¹⁸ Uphoff provides one effective example of Singapore's enforcement efforts, stating that the police "formed a special intellectual property unit and the High Courts made frequent use of Anton Pillar orders (which allow a plaintiff to search the defendant's premises for incriminating evidence if there is danger it might be destroyed). Under this onslaught, piracy vanished very quickly" *Id.* at 17.

¹¹⁹ See *Id.*

¹²⁰ See *id.* at 18-19.

¹²¹ See *id.* at 18-20.

adoption of an intellectual property regime was not due to trade pressure, but rather, out of admiration and envy of Singapore's successes. Following Singapore's lead, Malaysia adopted a plan to develop its own software and computer industry through joint ventures with foreign computer companies.¹²² Recognizing that this plan could not prevent piracy, Malaysia engaged in a race with Singapore to adopt stringent copyright laws and, hence, encourage Western cooperation.¹²³

Indonesia's road to strict intellectual property protection differed from the previously discussed countries. During the mid-1980s, pirated tapes from Indonesia were exported throughout the region. Much to the chagrin of the Indonesian pirates, these high quality tapes were later copied by pirates located in Singapore.¹²⁴ The Indonesian government responded with apparent disinterest, until late 1985, when Indonesian pirated copies of the Live Aid concert to benefit African famine victims appeared in Europe. Organizer Bob Geldof protested to the Indonesian government and eventually launched a campaign against Indonesia for accommodating piracy.¹²⁵

Moreover, an incident when an Indonesian businessman was caught bringing pirated tapes into The United States using a diplomatic bag, deeply embarrassed Indonesia.¹²⁶ This, coupled with a movement amongst Indonesian artists for stronger copyright protection, led Indonesia to adopt stronger protection of intellectual property.¹²⁷ Interestingly, during this entire enactment period the "theme of Indonesia's responsibility to the world community continually reappears in government statements and court judgments."¹²⁸ For example, in a foreign trademark case, the Supreme Court announced "the Republic of Indonesia is an independent state which participates in the society of nations and is obliged also to maintain international relations with honour and respect among others, marks (trademarks) of foreign citizens."¹²⁹

Thailand, on the other hand, felt that American pressure was an affront to its national sovereignty as well as a hindrance to its eco-

¹²² See UPHOFF, *supra* note 5, at 24-25.

¹²³ See *id.* at 25 & n.20.

¹²⁴ See *id.* at 27.

¹²⁵ See *id.* at 29.

¹²⁶ See *id.*

¹²⁷ See UPHOFF, *supra* note 5, at 30.

¹²⁸ *Id.* at 33.

¹²⁹ *Id.* at 33 (providing a quotation from an uncited Supreme Court case).

conomic development.¹³⁰ As American pressure to adopt more stringent standards continued, the Thai public became bitter about this "trade harassment."¹³¹ Later, factions within the Thai government dissuaded the government from giving in to U.S. demands and received great applause from the Thai public.

Presumably, those nations that have applied for WTO membership and have volunteered to adopt the TRIPs standards are following the lead of countries like Singapore and Malaysia, which have seen trade and technical development possibilities result from adopting intellectual property protection. However, countries like Vietnam have yet to take the bold strides forward like Singapore. Issues of national sovereignty and pride underlay these countries' standstill approach. Moreover, factions within the various governments may disrupt attempts to adopt rules that are seemingly dictated from the West.¹³² Sanctions, such as those imposed by the United States, have been met with mixed results. Singapore, Malaysia, and Indonesia adopted strong intellectual property protection under the promise of joint ventures and rising status among nations.¹³³ Thailand, on the other hand, was driven to further reticence by continuous U.S. pressure. Uphoff points out that while dollar losses to piracy dropped significantly in the region, the stature and reputation of the United States has steadily dropped. While all four governments admit to the benefits of stronger intellectual property protection, they perceive the policy of the United States as strictly benefiting U.S. business interests and illustrating its

¹³⁰ See *id.* at 38.

¹³¹ See *id.* at 45.

¹³² See Hansen, *supra* note 36, at 582.

¹³³ See Uphoff, *supra* note 5, at 12, 14-19 (illustrating that joint ventures and national pride proved to be greater motivators to stiffer intellectual property laws than trade sanctions).

inability to continue as a leader of free trade.¹³⁴ Thus, U.S. sanctions are generally ineffectual at abating piracy of intellectual property.¹³⁵

Fortunately, the TRIPs Agreement is equipped with some flexibility to account for the varying cultural and political backgrounds of different countries. This concession will hopefully be sufficient to avoid alienating developing countries. Although cultural differences may make consensus difficult, keeping them in mind may aid in the accomplishment of enacting effective intellectual property laws.¹³⁶ This concern for differing cultural heritage and philosophy may avoid the problems created by the West's dictated terms and "crass" intellectual property imperialism. National sovereignty would not be challenged and local feelings would not be offended by an intellectual property agreement that leaves room for the cultural realities and tastes of individual states. Despite this flexibility, TRIPs is perceived by developing countries as primarily benefiting the economic interests of developed nations.¹³⁷ Hopefully the flexibility and broad language

¹³⁴ According to Uphoff, U.S. policy is:

[W]idely perceived as a campaign to protect American business interests and to divert domestic attention from the U.S. budget deficit. The unilateralism and inconsistency of U.S. intellectual policy and other trade policies has been taken as proof of the United State's economic decline and of its unwillingness or inability to continue as a leader of international free trade [G]overnment officials in those countries have expressed the belief that the U.S. cannot be trusted to follow an equitable and consistent trade policy and have begun trying to decrease their dependence on the United States.

UPHOFF, *supra* note 5, at 22.

¹³⁵ *See id.*

¹³⁶ In the context of cultural diversity, Long points out that:

Uniformity . . . may be possible where nations work toward standards that balance the legitimate concerns of both owners and users. Those standards must also provide sufficient flexibility so that countries can select the philosophical foundations and procedures in keeping with their own culture and heritage, while still achieving the goal of uniform protection of technology. Such standards must be based on a realistic appraisal of the fundamental economic impact that any protection scheme has on both developed and developing nations.

Long, *supra* note 5, at 169-70.

¹³⁷ *See* Oddi, *supra* note 5, at 455. (stating "[t]he big winners under patent TRIPs would clearly be those enterprises (read multinational corporations) in developed countries that create inventions and are heavily engaged in international trade."); Gana, *supra* note 3, at 744 (agreeing with the "prevailing wisdom" that TRIPs is designed to benefit developed countries' economic interests).

of TRIPs will allow countries to turn TRIPs to their benefit in the end.¹³⁸

VI. TRIPs

“The TRIPs Agreement is . . . to date . . . the most comprehensive multilateral agreement on intellectual property.”¹³⁹ TRIPs incorporates the main provisions of WIPO, the Paris Convention, and the Berne Convention as well as a number of additional obligations in areas where the previous agreements were seen to be inadequate.¹⁴⁰ It covers copyright, trademarks, geographical indications, industrial designs, patents, integrated circuit layout, trade secrets, and test data.¹⁴¹ The minimum standards of protection to be provided in each area are set out along with definitions, the rights conferred, exceptions, and minimum duration. TRIPs provides for enforcement measures through its use of civil and administrative procedures and remedies.¹⁴² Provi-

¹³⁸ See Long, *supra* note 5, at 161 (providing that Article 10 of TRIPs, by virtue of its broad language, “allows for a wide diversity in the nature of the procedures utilized.”) “[T]he TRIPs Agreement is not intended to be a strict instrument, but one capable of development.” Otten & Wager, *supra* note 65, at 413.

¹³⁹ *An Overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)* (visited Mar. 16, 1998) <<http://www.wto.org/wto/intellec/intell2.html>> [hereinafter *TRIPs Overview*]; see Reichman, *supra* note 2, at 345 (providing a complete summation and analysis of the effectiveness of the various parts of the TRIPs Agreement).

¹⁴⁰ See *TRIPs Overview*, *supra* note 139. See also TRIPs Agreement, *supra* note 7, arts. 2 & 9 (stating that WTO Members shall comply with Articles 1 through 12 and 19 of the Paris Convention and Articles 1 through 21, excluding Article 6b, of the Berne Convention). TRIPs sought to add new obligations and make existing ones more effective. See Otten & Wager, *supra* note 65, at 397. The Berne and Paris Conventions have been criticized for their failure to provide for enforcement procedures and substantive norms by which to follow. See Abbot, *supra* note 4, at 702-07.

¹⁴¹ See generally TRIPs Agreement, *supra* note 7, arts. 9-40 (providing the standards concerning the availability, scope, and use of intellectual property rights under Part II of the TRIPs Agreement).

¹⁴² Articles 42 through 48 of the TRIPs Agreement provide civil and administrative procedures and remedies. Specifically, Article 42 sets forth requirements for written notice, rights to counsel, and other procedures designed to ensure due process. Article 42 provides evidentiary rules and guidelines for their application. Articles 44 through 46 authorize courts to order injunctions, payment of damages, and the destruction of infringing goods, respectively. Article 48 entitles judicial authorities to order compensation from those who have abused the enforcement procedures. See TRIPs Agreement, *supra* note 7, arts. 42-48; see also *TRIPs Overview*, *supra* note

sions on criminal procedures are also included.¹⁴³ Additionally, TRIPs provides for dispute settlement between countries. Disputes arising between WTO members in relation to TRIPs are subject to the WTO's dispute settlement procedures.¹⁴⁴ The obligations in the treaty apply equally to all members while developing countries are given a grace period of between one to eleven years depending upon the country's economic status to phase in all of TRIPs' standards.¹⁴⁵ While TRIPs explicitly incorporates the Paris and Berne Conventions,¹⁴⁶ the moral rights obligations of the Berne convention are excluded.¹⁴⁷

The preamble sets out TRIPs' general goals. They are to "reduce distortions and impediments to international trade, . . . promote effective and adequate protection of intellectual property rights, and . . . ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."¹⁴⁸ The WTO points out that these goals should be understood in accordance with article 7, which delineates TRIPs' objectives.¹⁴⁹ The objectives state that

The protection and enforcement of intellectual property rights should . . . contribute to [1] the promotion of technological innovation, [. . . 2] the transfer and dissemination of technology, [. . . 3] the mutual advantage of producers and users of technological knowledge . . . in a manner conducive to social and economic welfare, and [. . . 4] a balance of rights and obligations.¹⁵⁰

Article 8 provides that appropriate measures consistent with TRIPs' provisions "may be needed to prevent the abuse of intellectual

139 (summarizing those aspects of TRIPs that focus on civil and administrative procedures and remedies such as due process, rules of evidence, judicial authority to order instructions, and disposals for infringed goods).

¹⁴³ See TRIPs Agreement, *supra* note 7, art. 61 (providing criminal procedures for willful violation of trademark and large-scale piracy).

¹⁴⁴ See *TRIPs Overview*, *supra* note 139.

¹⁴⁵ Articles 65 and 66 of the TRIPs Agreement provide transitional arrangements for developing and least developed countries. Article 65 permits developing countries, which have met certain minimum standards, to delay full implementation until January 1, 2000. Article 66 specifies that least developed countries have until January 1, 2005 to be in full compliance. See TRIPs Agreement, *supra* note 7, arts. 65-66.

¹⁴⁶ See *id.* arts. 2 & 9.

¹⁴⁷ See *id.* at art. 9.

¹⁴⁸ *Id.* at 1197.

¹⁴⁹ See *TRIPs Overview*, *supra* note 139.

¹⁵⁰ TRIPs Agreement, *supra* note 7, art. 7.

property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."¹⁵¹ However, TRIPs fails to explain how far a country may go to protect against the unfair restraint of trade or how to balance the protections of intellectual property rights with technology transfer.

TRIPs offers specific provisions on intellectual property rights protection but lists these goals without providing any guidance that would help developing countries realize the benefits of these objectives. While industries in developed nations would immediately benefit from the specifics of the TRIPs Agreement, it is unclear what immediate benefits would flow to the newly developed or developing country.¹⁵² It is as if these objectives are a rhetorical device to encourage the adoption of TRIPs. However, as was the case with Singapore, adoption of stricter intellectual property rules permitted joint ventures with computer companies who refused to do business in Singapore before stricter laws were enforced.¹⁵³

TRIPs not only includes the five traditional forms of intellectual property, but also adds some related provisions as well.¹⁵⁴

A. Copyright

First, TRIPs includes provisions for copyright protection.¹⁵⁵ From the Berne Convention, the term of protection for copyright is the life of the author plus fifty years.¹⁵⁶ The author is granted the right of making and authorizing translations and reproductions.¹⁵⁷ However, quotations and limited reproduction for press purposes are permissible without authorization.¹⁵⁸ Creators of literary and dramatic works enjoy the exclusive right of authorizing performances, broadcasts, and public recitations.¹⁵⁹ Infringing works and reproductions are subject to seizure provided that

¹⁵¹ *Id.* at art. 8.

¹⁵² See UPHOFF, *supra* note 5, at 15-19.

¹⁵³ See *id.* at 19.

¹⁵⁴ See *supra* note 15 and accompanying text.

¹⁵⁵ See generally TRIPs Agreement, *supra* note 7, arts. 9-14 (providing standards for copyright protection and related rights).

¹⁵⁶ See Berne Convention, *supra* note 62, at art. 7.

¹⁵⁷ See *id.* arts. 8 & 9.

¹⁵⁸ See *id.* arts. 10 & 10^{bis}.

¹⁵⁹ See *id.* arts. 11, 11^{bis}, 11^{ter}, 12, & 14^{bis}.

the work is protected by intellectual property laws.¹⁶⁰ TRIPs adds that computer programs and databases are protected as literary works under copyright and, therefore, all the same Berne provisions apply to computer programs and databases.¹⁶¹ Finally, authors of computer programs and cinematographic works have the right to authorize or prohibit commercial rental.¹⁶²

B. Patents

Under TRIPs, patents receive twenty years protection from the filing date.¹⁶³ “[P]atents 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.”¹⁶⁴ TRIPs provides three exceptions to this general rule: (1) inventions that are against or contrary to morality or *ordre public*,¹⁶⁵ (2) diagnostic, therapeutic, and surgical methods for humans and animals,¹⁶⁶ and (3) plants and animals.¹⁶⁷ Patents provide exclusive rights to prevent third

¹⁶⁰ See *id.* art. 16.

¹⁶¹ See TRIPs Agreement, *supra* note 7, art. 10.

¹⁶² See *id.*, art. 11. Related rights dealing with phonograms and broadcasting organizations is found in Article 14. *Id.*

¹⁶³ See *id.*, art. 33.

¹⁶⁴ *Id.* art 27.

¹⁶⁵ See *id.* See also Timothy G. Ackerman, *Disorderly Loopholes: TRIPs Patent Protection, GATT, and the ECJ*, 32 TEX. INT’L L. J. 489, 510 (1997) (stating that the exception may allow countries to restrict the appropriation of patents for economic reasons by declaring it to be for the *ordre public*). Ackerman further states that existing jurisprudence limits this loophole in the TRIPs Agreement:

If the limitations created by ECJ and GATT jurisprudence are applied to the TRIPs exclusion clause, the limitations effectively and appropriately constrain the parties to TRIPs. The guidance allows states to protect *ordre public* and morality without allowing those same states to derogate from the TRIPs agreement on economic grounds outside the intended scope of the agreement. The prohibitions on discrimination as to national origin and on the use of economic interests as a basis for derogation from fundamental principles provide the guidance necessary to limit TRIPs 27(2). Thus, while TRIPs does provide an escape hatch, it does not provide a wide-open door.

Id.

¹⁶⁶ See TRIPs Agreement, *supra* note 7, art. 27.

¹⁶⁷ See *id.*

parties from "making, using, offering for sale, selling, or importing" any patented product or process.¹⁶⁸

C. Trademarks

TRIPs covers trademark and its extension — geographical indications. "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark."¹⁶⁹ The registered trademark owner has the exclusive right to use the mark and prevent third parties from using similar marks to prevent consumer confusion.¹⁷⁰ A trademark is renewable every seven years indefinitely.¹⁷¹ However, the registration may be canceled after three uninterrupted years of non-use.¹⁷² Also, geographical indications can only be affixed to products that actually originated from the identified region.¹⁷³

D. Trade Secrets

Undisclosed information or trade secrets receive protection under TRIPs. To receive protection, the information must be secret, have commercial value because it is a secret, and reasonable steps must have been taken to keep it secret.¹⁷⁴ Additionally, TRIPs requires that signatory countries protect the layout design of integrated circuits according to the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC) negotiated in 1989 under WIPO.¹⁷⁵

VII. VIETNAM

Turning full attention to Vietnam, the above discussion should make clear the number of issues and factors relevant to the adoption of TRIPs. Implementation of TRIPs involves, on the most basic level, the adoption of the TRIPs' minimum standards and those enforcement measures summarized above. However, for the adoption of TRIPs' standards to be effective and beneficial, Vietnam must also consider its economic, cultural, and social needs and avoid a mere adoption of

¹⁶⁸ *Id.* art. 28.

¹⁶⁹ *Id.* art. 15.

¹⁷⁰ *See id.* art. 16.

¹⁷¹ *See* TRIPs Agreement, *supra* note 7, art. 18.

¹⁷² *See id.* art. 19.

¹⁷³ *See id.* art. 22.

¹⁷⁴ *See id.* art. 39.

¹⁷⁵ *See id.* art. 35.

terms dictated by the West, which may engender resentment.¹⁷⁶ Rather, the flexibility of TRIPs will allow Vietnam's intellectual property rights system to have a unique flavor in keeping with the special needs and desires of the country.¹⁷⁷ Further, Vietnam should adopt TRIPs in an atmosphere of free-trade and competition. This will encourage joint ventures with outside firms, spur innovation in Vietnam, and ensure copyright and patent protection.¹⁷⁸ Undoubtedly, Vietnam will have to consider the cost of implementing, administering, and providing the training for this system of protection and incentives.¹⁷⁹

Vietnam's intellectual property laws have been called "paper tigers" — laws that the public does not obey and the government does

¹⁷⁶ See Uphoff *supra*, note 70.

¹⁷⁷ See TRIPs Agreement, *supra* note 7, at preamble. The TRIPs Agreement claims that one of the goals of the agreement is to recognize "the special needs of the least-developed country Members in respect of maximum flexibility in then domestic implementation of laws and regulations" which presumably allows countries to incorporate their unique approaches to social structure into their intellectual property laws. However, the TRIPs Agreement goes on to state that the purpose of this flexibility is to only allow for the creation of a "sound and viable technological base." *Id.*

¹⁷⁸ Singapore successfully encouraged joint ventures with U.S. computer companies by enacting stricter intellectual property laws. See UPHOFF, *supra* note 5, at 15-17.

¹⁷⁹ See Gana, *supra* note 3, at 774 (stating that the greatest obstacle to the TRIPs Agreement is the "costs of education, administration, and implementation"). See also U.N. CONFERENCE, *supra* note 69, at 1-2 (noting the implementation, economic costs, and administrative requirements of an effective intellectual property system). The problem of meeting these costs is mentioned, but solutions are not obvious. The U.N. Conference states that "[i]t would be unfortunate if implementing the required arrangements were to result in the diversion of excessive resources from basic social and economic programmes, particularly in the least developed countries." *Id.*, ¶13, at 2. However, the U.N. Conference steps over this concern by implying that the developed countries should finance the costs of implementation. "[T]he commitments made particularly in favour of the LDCs for technical assistance and financial support need to be translated into action and made effective without delay." *Id.* Kastenmeier & Beier recommend the use of user fees to force creators and inventors from the developed world to offset the cost of the "development of a registration and enforcement system." Kastenmeier & Beier, *supra* note 5, at 303. Abbot recommends that the "industrialized countries should provide trade concessions to the extent necessary to ameliorate short-term economic dislocations in the developing countries resulting from the adoption of new intellectual property rules." Abbot, *supra* note 4, at 695.

not enforce.¹⁸⁰ In an attempt to counter this appellation and jump-start its "bleak economic situation," the socialist government of Vietnam instituted *Doi Moi*, "a country-wide plan of economic renovation and improvement designed to attract foreign trade and investment. Under *Doi Moi*, one of the first priorities of the Vietnamese Government was to facilitate the influx of foreign trade and revenues into its borders and, eventually, to its impoverished people."¹⁸¹

Doi Moi prompted the Vietnamese government to apply for membership to the WTO.¹⁸² As of the writing of this Note, Vietnam's laws fell below the minimum TRIPs' standards for WTO membership. While *Doi Moi* resulted in a number of laws dealing with intellectual property rights including the rights of foreigners, these laws constituted "a patchwork of poorly coordinated individual regulations which . . . were vaguely drafted and lacked adequate implementing legislation . . ."¹⁸³ Nevertheless, Vietnam's efforts "represented a respectable attempt to create the country's first body of intellectual property law basically from scratch."¹⁸⁴

Vietnamese law specifies six areas of intellectual property protection: copyright, trademarks, inventions, utility solutions, industrial designs, and appellations of origin.¹⁸⁵

A. Copyright

Vietnam's current copyright law appears to be in a state of limbo. The Civil Code of Vietnam took effect on July 1, 1996, (Civil Code)¹⁸⁶ and repealed the Ordinance on Protection of Copyrights, which was

¹⁸⁰ See Than Nguyen Luu, Note, *To Slay a Paper Tiger: Closing the Loopholes in Vietnam's New Copyright Laws*, 47 HASTINGS L.J. 821, 822 (1996).

¹⁸¹ *Id.* at 824. *Doi Moi* has been credited for overcoming the recession and social crisis that beset Vietnam during the 70s and early 80s. From 1991 to 1993, GDP reportedly grew at a rate of 7.2% per year. "Gross productivity of industry" was increased an average of 12% per year. See TERENCE LIM & GUO LIH CHYI, VIETNAM: RISKS, REWARDS, AND REGULATIONS iv (1994).

¹⁸² See TRIPs Overview, *supra* note 139.

¹⁸³ Gregory Buhoff, *Changes to the Intellectual Property Framework*, VIETNAM BUS. J., Apr. 10, 1997, at 46.

¹⁸⁴ *Id.*

¹⁸⁵ See ANNE C. M. J. SCHOT, LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE SOCIALIST REPUBLIC OF VIETNAM 269, & n.2 (1996) (noting that Vietnam has not yet implemented any legislation for appellations of origin).

¹⁸⁶ See Buhoff, *supra* note 183, at 46.

passed in 1994, (Ordinance).¹⁸⁷ There is currently no copyright protection for foreign works in Vietnam. Under the Ordinance, copyright protection existed for a number of literary, scientific, and cultural works regardless of their form.¹⁸⁸ Duration of the protection generally lasted for the author's life plus fifty years. Television shows and movies enjoyed protection for fifty years.¹⁸⁹ Copyright infringement, under the Ordinance, excluded reproduction for private use, research, quotes, and translations and copying for non-profit purposes required neither permission nor payment of royalties.¹⁹⁰ Remedies included requesting the infringer to cease and publicly apologize, asking a state administrative body for resolution, and filing a claim with a people's court.¹⁹¹ Most notoriously, the Ordinance contained a thirty-day rule. While Vietnamese authors enjoyed the full protection provided by the law, foreign authors had to publish the work in Vietnam within thirty days of publishing the work elsewhere in order to receive protection in Vietnam.¹⁹² This law, the only one that pertained specifically to copyright protection of foreign works, was repealed by the Civil Code and nothing has replaced it.¹⁹³

Works which are contrary to Vietnamese politics, encourage violence or depravity, disclose state and Party secrets, or misinterpret Vietnamese history are denied protection under current Vietnamese law.¹⁹⁴ These and other laws essentially amount to censorship provisions.¹⁹⁵ Vietnamese law denies protection to "works that 'propagate violence or wars of aggression,' induce hatred, disseminate 'reactionary ideas,' 'prurient lifestyles,' 'inhumane acts,' 'social vices,' 'superstition,' or undermine 'traditions and customs.'"¹⁹⁶ Moreover, Vietnamese law, as of 1995, "denie[d] copyright protection to works that repudiate the achievements of the communist revolution, offend the honor of 'distinguished persons' or national heroes, or injure the

¹⁸⁷ See *id.* at 48.

¹⁸⁸ See Schot, *supra* note 185, at 285.

¹⁸⁹ See *id.* at 286.

¹⁹⁰ See *id.* at 287.

¹⁹¹ See *id.*

¹⁹² See Luu, *supra* note 157, at 838.

¹⁹³ See Buhyoff, *supra* note 183, at 48 (stating that Decree No. 76/CP delayed discussion over the subject of copyright protection for foreign IP products to "future legislation").

¹⁹⁴ See Schot, *supra* note 185, at 285.

¹⁹⁵ Cf. Luu, *supra* note 181, at 841-42 (identifying those subject matters that are not protected by the copyright provisions of the Vietnamese Civil Code).

¹⁹⁶ *Id.* at 842 (citing Vietnam's Civil Code art. 749(b)).

reputation of 'an organization.'"¹⁹⁷ Another feature of the Vietnamese law allows for "unlimited use of a theatrical work or other type of 'artistic performance,' without permission or remuneration, as long as the use occurs during a 'cultural entertainment event' or public political 'campaign activity.'"¹⁹⁸ Given the sparse enforcement provisions, the broad exceptions, and the vague wording, it is difficult to see how the author has any rights against government appropriation of his/her work.

B. Trademarks

Vietnamese law recognizes trademarks for goods, services, and marks and requires registration prior to their protection.¹⁹⁹ Since 1993, Vietnam has used a first-to-file rule, which gives trademark protection in Vietnam to whomever is the first to file there.²⁰⁰ An exception is made for "world-famous" marks.²⁰¹ Further, the trademark must not be insufficiently distinctive, widely used generically, considered contrary to public policy or "socialist morality," or identical to a previously registered mark.²⁰² The National Office of Industrial Property (NOIP) manages all registration, but the process is slow, due to its reliance on an inefficient computer system.²⁰³

Enforcement may be accomplished by obtaining an opinion from the NOIP determining whether the trademark has been violated.²⁰⁴ Because the Vietnamese are not familiar with the way brand-names work in a developed country, infringers are usually unaware that they are doing anything wrong. After obtaining a decision from the NOIP, an advisory warning letter to the party typically curbs further unauthorized usage.²⁰⁵ Criminal penalties, reserved for organized, repeat offenses, range from six months imprisonment to the death penalty.²⁰⁶

¹⁹⁷ *Id.* (citing Vietnam's Civil Code art. 749(d)).

¹⁹⁸ *Id.* at 845 (citing Vietnam's Civil Code art. 761(f)) (noting that the drafters excluded a definition for "cultural entertainment activity").

¹⁹⁹ *See* Schot, *supra* note 185, at 270.

²⁰⁰ *See id.* at 271.

²⁰¹ *Id.*; Buhloff, *supra* note 183 (while the new scheme preserves the first-to-file rule, it is not clear if it maintains the "world-famous" mark exception to the rule).

²⁰² *See* Schot, *supra* note 185, at 273.

²⁰³ *See id.* (noting that search procedures can take up to seven months).

²⁰⁴ *See id.* at 275.

²⁰⁵ *See id.*

²⁰⁶ *See id.* at 276.

Further, "it should be noted that courts in Vietnam are not very experienced in adjudicating disputes regarding industrial property."²⁰⁷

C. Inventions (Patents)

Under current Vietnamese law, inventions may be protected as patents for invention or certificates of innovation.²⁰⁸ After registration, the NOIP determines whether the invention is sufficiently novel, shows inventive creativity, and is practically applicable to receive protection.²⁰⁹ Patents are valid for twenty years.²¹⁰ Certain inventions "related to national defense and security, medicines, disease treatment, chemical substances and food products may not be eligible for patenting," but may receive a Certificate of Innovation.²¹¹ A Certificate of Innovation gives the government the exclusive right to exploit the invention while the author/creator enjoys remuneration.²¹² Inventions with a lesser degree of novelty are considered a utility solution and granted a lesser degree of protection.²¹³

D. Trade Secrets and Mask Works

Trade secrets are not specifically provided for under Vietnamese law. However, the current law expands industrial property rights to include "other objects stipulated by law"²¹⁴ and NOIP officials believe that this could include trade secrets.²¹⁵ Additionally, no mention is made of protection for chip design but this may ultimately fall under utility solutions.

VIII. UPGRADING VIETNAM'S INTELLECTUAL PROPERTY

The eight elements of a normative intellectual property regime²¹⁶ provide a general guideline for the adoption of TRIPs in Vietnam.

²⁰⁷ See Schot, *supra* note 185, at 276.

²⁰⁸ See *id.* at 277; see generally Rory J. Radding & H.T. Than, *Patent Protection in Vietnam: A Business Decision*, 8 *TRANSNAT'L LAW* 87, 89-93 (describing the current patent law system in Vietnam and the requirements for patentability) .

²⁰⁹ See Schot, *supra* note 185, at 278-9.

²¹⁰ See Buhyoff, *supra* note 183, at 48.

²¹¹ Schot, *supra* note 185, at 279-80.

²¹² See *id.* at 280.

²¹³ See *id.* at 281.

²¹⁴ Buhyoff, *supra* note 183.

²¹⁵ See *id.*

²¹⁶ See SHERWOOD, *supra* note 11, at 28.

Vietnam must consider and accommodate “the eight steps” and bring them to the levels required by TRIPs in order to achieve WTO membership.²¹⁷

A. *The Concept of an Exclusive Right*

The concept of an exclusive right requires the superiority of individual rights over the state, while the state functions as guarantor of those individual rights. It values individualism, individual creative effort, disassociation with the past, and constant innovation²¹⁸ — all ideals that are in conflict with a Confucian culture, like that of Vietnam.

The Vietnamese recognize Chinese culture “as the wellspring of their civilization.”²¹⁹ Thus, unlike other Southeast Asian countries that looked to India and Buddhism for cultural and social principles, Vietnam looked to China and Confucianism.²²⁰ In traditional Vietnam, scholar-officials called mandarins administered governmental affairs.²²¹ The mandarins, as well as the emperor, focused their efforts on the maintenance of social and cosmic order. They achieved this through ethical action based upon Confucian ideals.²²² The most important of these ideals included the promotion of the five fundamental relationships of society and the evincing of the five basic virtues.²²³ The five fundamental relationships are “the relationships between ruler and his subjects, between father and son, between husband and wife, between elder brother and younger brother, and between friend and friend.”²²⁴ Conceptions of individual and society are seen in terms of relationships. Not only does the individual define himself or herself in terms of kinship relationships at the family level, but also on broader political and social levels.²²⁵ Traditional Vietnamese society

²¹⁷ *Id.*

²¹⁸ See Hamilton, *supra* note 83, 616-20.

²¹⁹ CHARLES F. KEYES, *THE GOLDEN PENINSULA: CULTURE AND ADAPTATION IN MAINLAND SOUTHEAST ASIA* 183 (1995).

²²⁰ See *id.* at 181.

²²¹ See *id.* at 186.

²²² See *id.* at 195 (explaining that the five basic virtues are human heartedness, righteousness, proper ritual conduct, wisdom, and good faith).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ KEYES, *supra* note 219, at 195 Keyes observes that:

[t]he five relationships define a society based on personalistic connections rather than on universalistic premises. Fundamental to these personalistic connections was kinship and the kinship idiom was used in defining relation-

is based on ideals in terms of relationships rather than universalistic principles that accrue to each individual separate and apart from the group.²²⁶

Hence, the relationship between ruler and ruled takes on a paternalistic flavor.²²⁷ It is the ruler's duty to control the flow of information to the populace and carefully ensure that Confucian virtues and truth are promoted.²²⁸ Thus, the printing and dissemination of books, ideas, and art become of central concern to the government, not in order to protect individual rights of the author/inventor, but to ensure that only ennobling and acceptable material is made available to the family/country.

This is a key problem in implementing TRIPs in Vietnam because the concept of intellectual property rights is based on assumptions and notions alien to Vietnam. Vietnamese law grants the government broad exceptions especially in terms of the subject matter of a copy-right evidencing a lingering paternalistic concern for information presented to individuals. The strong notions of individualism are, hence, replaced by kinship notions in Vietnam.

B. Mechanism for Exclusive Rights

The mechanisms for exclusive rights, however, are not as problematic. Vietnam already has a government agency in place to register patents or trademarks. Additionally, Vietnam has thorough registration procedures.²²⁹ The primary concerns here are long processing times for trademark applications and other inefficiencies due to a lack of reliable

ships among those who were not actual kinsmen. In particular, the Emperor was conceived of and regarded as a superior father, whereas his subjects were viewed as children. As in China, no religious priesthood could appeal to general principles that were applicable to rulers as to the ruled.

Id.

²²⁶ *See id.*

²²⁷ *See* ALFORD, *supra* note 47, at 23 & n.99.

²²⁸ *See generally id.* at 19-22 (describing the ruler-subject relationship in Chinese society). "Chinese political philosophers . . . have . . . emphasized the human tendency to become deluded through the interplay of 'false' and 'correct' doctrine. In his role as fiduciary, the ruler had an affirmative obligation to filter out and destroy harmful knowledge." *Id.* at 23 & n.100.

²²⁹ *See* Schot, *supra* note 185, at 272, 278 (listing the registration requirements for patent and trademark, which generally includes a filing fee, translations, or description of product or mark).

computer technology or other innovations to help the NOIP run more efficiently.²³⁰

C. Duration

Duration simply involves specifying lengths of time within which exclusive intellectual property rights remain vested in the owner or creator. Under the 1996 Civil Code, Vietnam brought its protection duration into compliance with that required by TRIPs for patent, trademark, and domestic copyright.²³¹

D. Public Interest

The supervening public interest category is another problematic area. Protecting public morals is an area of governmental concern that justifies reducing the exclusivity of intellectual property rights.²³² However, this protection is applied on a limited basis. As previously discussed, the issue of promoting public morals takes a broader conception in Vietnam.²³³ TRIPs does restrict protection on plant and animal patents, but Vietnam's broad copyright exceptions concerning subject matter of a work may not fit within the confines of the *ordre public* or morality exceptions provided by the Berne convention.

Further, the intervening public interest of a developing country requires additional exceptions. A developing country must first lay the foundations for a viable technology infrastructure in order to promote innovation. As was the case with India and Japan, loose patent protection can promote technological developments in those countries.²³⁴

E. Negotiability

The concept of negotiability is neither addressed by Vietnamese law nor by TRIPs. However, as the Vietnamese become more accustomed to working with these types of rights, the negotiability of intellectual property rights is likely to develop and become an area seriously contemplated by the dictates of Vietnamese law.

²³⁰ See *id.*

²³¹ See *supra* note 183 and accompanying text.

²³² See SHERWOOD, *supra* note 11, at 32.

²³³ See *supra* note 194 and accompanying text.

²³⁴ See *supra* note 98 and accompanying text.

F. Trans-border Comity

Vietnam's application of TRIPs and, if successful, membership in the WTO will satisfy this element making intellectual property rights efficacious across its borders. Intellectual property created in Vietnam will then enjoy protection more generally abroad. The biggest gap thus far is the failure of Vietnam's laws to provide for copyright protection for foreigners. But that will be presumably remedied with future legislation.

G. Enforcement

While Vietnam has enforcement provisions in its laws, these rely almost exclusively on administrative or criminal avenues.²³⁵ Strong intellectual property enforcement presupposes a well-developed legal system with expertise in handling such difficulties. As mentioned, Vietnam's expertise in these areas is limited and its laws at times nonexistent. The TRIPs Agreement requires stringent enforcement, which may prove expensive.

The U.N. Conference on Trade and Development identified five areas that developing countries must address when creating enforcement and administrative mechanisms up to par and in line with those required by TRIPs.²³⁶ The first recommendation is "improving the relevant legal framework inline with the general obligations of . . . the Agreement"²³⁷ This may be difficult for Vietnam given the relatively undeveloped nature of its civil legal systems. However, Vietnam's more established criminal systems may be used to provide the commensurate enforcement.²³⁸ The second includes, "strengthening or establishing the relevant administrative offices."²³⁹ Such a strengthening could include setting up a network of patent offices and other offices equipped with the latest computer technology to ensure that intellectual property is efficiently administered.²⁴⁰ This type of adminis-

²³⁵ See Schot, *supra* note 185, at 275-76 (describing the available enforcement measures). See generally Luu, *supra* note 181, at 849-58 (reviewing the ineffectiveness of Vietnam's enforcement provisions under both the Ordinance and the Civil Code and proposing specific modifications to these laws that will bring Vietnam into conformity with the Berne Convention and GATT).

²³⁶ See U.N. CONFERENCE, *supra* note 69, ¶¶ 71-76, at 19-20.

²³⁷ *Id.* at 20.

²³⁸ See Long, *supra* note 5, at 169.

²³⁹ U.N. CONFERENCE, *supra* note 69, at 20.

²⁴⁰ In India, commentators indicated the country's need to modernize its patent office because manual searches were creating a backlog of applications for patent protection. India's modernization program included a computerized information system

trative development will be very expensive for Vietnam, but possibly the added efficiencies will help offset these expenses. The third recommendation suggests "enhancing enforcement mechanisms of the relevant laws and regulations."²⁴¹ This area may need to be closely watched by the West given that many developing countries will need to rely on police forces, unencumbered with concerns about human rights, to enforce intellectual property rights. The fourth recommendation is to increase the training of personnel to administer and enforce rights.²⁴² The last recommendation is that countries adopting TRIPs must increase their "capability to monitor transfer of technology arrangements within and between enterprises, along with ensuring that competition authorities are knowledgeable about potential [intellectual property rights] abuses."²⁴³ Again, this will be a very expensive undertaking for Vietnam requiring a drawing up of administrative procedures, creating well-equipped offices, training personnel, and training the general populace. Cost is a pervasive feature of these recommendations since most lesser developed countries like Vietnam lack administrative and judicial structures necessary to enforce intellectual property rights. Hopefully increased filing fees or other fees collected on patent or copyright applications may mitigate implementation and ongoing administrative costs.

H. Transition arrangements

Transition arrangements protect ideas before they are ready for the market. Under current Vietnamese law, transition arrangements are not available. This problem may be resolved by Vietnam through adopting TRIPs, which provides protection for trade secrets. However, as mentioned, trade secrets as yet do not receive official protection.

IX. CONCLUSION

Unfortunately, the discussion ends on an uncertain note. The goal of developing countries is presumably to improve standards of living for their citizens, an objective to be accomplished through legal enactments. Clearly, however, copying the legal structure or laws of developed countries will not accomplish this given the fundamental so-

that links patent offices. Similarly, Malaysia has computerized its administrative systems facilitating searches of trademark and patent files. See U.N. CONFERENCE, *supra* note 69, ¶¶ 97-98, at 24-25.

²⁴¹ *Id.*

²⁴² *See id.*

²⁴³ *Id.*

cial and cultural differences between the inhabitants of the West and lesser developed countries. The change must come from a more fundamental level. Ultimately, each country, given its unique system and culture, will need to cultivate notions of value and attitudes that will give rise to uniquely tailored laws that will engender greater individual economic well-being. Thus, while Vietnam may adopt intellectual property laws that mirror the requirements of TRIPs, the cultural and political assumptions behind Western conceptions of intellectual property rights may create resentment, lax enforcement, dependent technological systems, and other unforeseen problems that will undercut the promises of the WTO and TRIPs.

Advocates of the intellectual property rights system "assert that the main goal of such a system should be to create economic incentives that maximize the discounted present value of the difference between the social value and social costs of information creation and transfer."²⁴⁴ Though the promise of TRIPs is economic prosperity and technological development, the reality is that "strengthening the IPR system alone, while bearing some potential for expanding access to trade . . . and technology, is liable to be of little value unless done in a coherent framework of broader policies."²⁴⁵ The United Nations recommends that intellectual property rights "be implemented in such a way as to promote dynamic competition through the acquisition and local development of technology in an environment that is conducive to growth."²⁴⁶ This acknowledges that growth and economic prosperity will not come just from stiffer laws on patents and copyright, but it must be coupled with an economic system which is founded on free market principles. Strong intellectual property protection is only one factor that contributes to economic development and technological innovation.

With TRIPs, it is clear that developed countries will achieve greater protection for their companies' products and individual's innovation. However, if developing countries want to become technology producers, they must have in place "strong property systems, stable government, free market capitalism, and zealous protection of corporate interests,"²⁴⁷ all of which fall outside the purview of intellectual property law and cannot be dictated by treaty from the West.

²⁴⁴ *Id.* at 14.

²⁴⁵ U.N. CONFERENCE, *supra* note 69, at 22; ". . . [T]he role of patents has been found to be very insignificant in transfer of technology transactions." Verma *supra* note 109, at 353.

²⁴⁶ U.N. CONFERENCE, *supra* note 69, at 22.

²⁴⁷ Gana, *supra* note 3, at 738.

