



Dialogue on
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David Kinley & Hai Nguyen

Viet Nam, Human Rights and Trade

Implications of Viet Nam's Accession
to the WTO



Dialogue on Globalization

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Table of Contents:

1. Preface	3
2. Executive Summary	4
3. Introduction	5
4. Viet Nam in a global context	6
4.1 The Vietnamese economic tiger	6
4.2 Viet Nam and global integration	7
4.3 Economic and social challenges	7
5. Human rights in Viet Nam	9
5.1 Domestic provisions	9
5.2 International obligations	11
5.3 Viet Nam’s human rights record	13
6. Viet Nam, human rights and the WTO	18
6.1 Which rights are of concern?	18
6.1.1 Right to food	19
6.1.2 Right to health and TRIPS	20
6.1.3 Rights of ethnic minorities	21
6.1.4 The rights of children and the Right to Education	22
6.1.5 Labour & workplace rights	22
6.2 The special case of human rights in the agricultural sector	25
6.2.1 Challenges	25
6.2.2 Opportunities	28
7. Addressing human rights concerns through trade	30
8. Conclusions	41

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1. Preface

Viet Nam is one of the most recent members of the World Trade Organization. The country that was for a long time known in Europe for its communist rule and its “boat people” as a result of human rights violations has become its 150th member state in January 2007. Viet Nam joined the multilateral trading system in a time when the negotiations on the DOHA Development round were de facto suspended. Many developing countries continue claiming that the international trading system does not cater enough for their specific needs. And yet, Viet Nam has been able to engender economic gains since engaging in global trade by way of liberalizing its economy and has shown how trade can in fact spur economic and social development.

The study at hand looks into the question whether trade liberalization has had an effect on the enjoyment of human rights in Viet Nam. It comes in a time when we witness unprecedented increases in food prices on a global scale. Massive protests by the poor in dozens of countries have led governments to try to counterbalance market mechanisms. While subsidies for rice and grains may alleviate to some extent the present situation we have good reason to be very concerned about the possible long term effects: if food prices remain high, most of the achievements that were made in combating poverty worldwide will be turned obsolete. With the right to food at stake we will most certainly fail to achieve the UN Millennium Development Goals.

The findings of the authors of the present study, Ms. Hai Nguyen and Mr. David Kinley, raise these concerns, too. They point out that since the accession process to WTO started in 1995 GDP in Viet Nam has grown constantly, reaching an annual rate of 7.8. per cent growth between the years 2001 to 2006. They give account of a set of impressive statistics all of which are verifying the positive effects trade liberalization had on the Vietnamese economy, including the fact that the purchasing power has doubled from 1995 to 2004. On the other hand, they argue that the gains have not been equally shared by the whole population of Viet Nam. They claim that poverty remains a crucial problem, especially for rural and vulnerable population groups, as well as for women and children.

The Friedrich-Ebert-Stiftung is an institution committed to social justice and equality. We therefore welcome the authors attempt to look beyond the detectable positive developments and make visible the plight of the poor and vulnerable. We embrace their notion of human rights that encompasses not only individual and political rights but economic, social and cultural rights as well: the right to education, to food, to health, to shelter, the right to non discrimination and freedom of association and expression, all these rights are integral part of a rights based approach that we favor and have been authorized through internationally binding conventions and treaties. And yet, we have to admit that it is not always possible to empirically prove that people may under certain circumstances be deprived of their human rights as a direct result of trade liberalization. An immediate “cause and effect” link is difficult to attain since a conceptual framework that would provide analytical methods to do so in a way that not only human rights advocate but also trade specialists would agree has yet to be developed. The publication at hand should therefore be understood as a contribution to fill this gap.

The global concern over the increase in food prices lends a specific relevance to the questions raised and the challenges the authors put to governments: that they have a role to play by providing economic and political strategies to ensure that trade does not endanger the enjoyment of human rights but contributes to their realization.

Türkan Karakurt
Director, FES Geneva

2. Executive Summary

Viet Nam has taken enormous strides over the past decade. It has re-engaged with the international community; its economy is well and truly emerging; its cities are vibrant; and its people are generally much better fed, healthier and more prosperous. International trade has increased significantly since the US lifted its trade embargo in the mid 1990s, and is now set to be further increased and liberalized following Viet Nam's accession to the WTO in January 2007. But not everyone in the country has benefited, and not everyone equally. The rural poor – of which there are still millions – women and children working in the burgeoning industrial sectors, and ethnic minority groups are all fairing less well. The connection between trade, economic development and human rights is nowhere more clearly demonstrated than with the plight of these groups. To varying extents, their fundamental human rights such as the rights to food, work, education, housing, adequate standards of living, non-discrimination, and cultural and religious freedoms are as yet inadequately protected, largely because the economic and political circumstances of these groups are less favourably affected by Viet Nam's transformation from a centrally-planned economy into a "market economy with a socialist orientation". This paper analyses the interrelations of these various factors from the perspective of their impact on the protection and promotion of human rights in Viet Nam in the post-WTO accession era. In the paper we stress that trade liberalization under the WTO is a means to an end, not an end in itself, and as such we outline legal, business and political strategies that are essential, in our view, for ensuring that trade is exploited for the benefit of the comprehensive realization of all human rights, not the other way around.

3. Introduction

The global economy and human rights interact in many fundamental and important ways. This is a paper about the human rights experiences and prospects of one country's embracing of a particular aspect of the global economy, namely, trade liberalisation. Upon Viet Nam's recent accession to the World Trade Organization, we ask what are, and will likely be, the consequences for the enjoyment, protection and promotion of human rights for the people of Viet Nam.

In addressing these questions we seek to draw out the links between the economy, trade, development and human rights, at both a state and individual level, and to highlight the benefits, problems and potential that those links offer in terms of the future prospects of human rights protection in Viet Nam.

The paper is comprised of four substantive sections following this introduction; these are:

1. Viet Nam in a global context
2. Human rights in Viet Nam
3. Viet Nam, human rights and the WTO
4. Addressing human rights concerns through trade.

The paper also has a brief concluding section.

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4. Viet Nam in a global context

4.1 The Vietnamese economic tiger

On 11 January 2007, Viet Nam became the 150th member of the WTO.

On 11 January 2007, Viet Nam became the 150th member of the WTO. The process of accession had formally begun 11 years earlier in 1995 and had entailed no less than 14 rounds of multilateral and over 40 rounds of bilateral negotiations. The economic changes undergone by the country in the final three years of this period, when negotiations were at their most intense, have been described as being “quite remarkable, involving not only hard external negotiations, but equally, if not more difficult internal consensus building around which areas to liberalize or protect, and to what extent”,¹ where “one side wonders whether they should join the world economy, and the other side wonders how they should join the world economy”.²

Viet Nam’s economic achievements over the past decade or so are indeed impressive: GDP has grown at an annual average rate of 7.8 per cent for the past 6 years (2001–2006), which translates into 6.7 percent in per capita terms;³ the economy has more than doubled in net worth (in real terms, measured by GDP) between 1995 and 2005; both aggregate exports and imports are expanding at over 20% per annum; domestic consumption is also raging at about 20% year on year increases; foreign direct investment (FDI) which has been growing steadily, exploded in 2006, increasing 50% on the year before (in apparent anticipation of WTO accession) and is expected to increase again in 2007;⁴ and the country’s trade and current account balances both registered surpluses in 2006 after 4 years of deficits. In perhaps the most poignant indication of how far Doi Moi⁵ has brought the economy of the Socialist Republic of Viet Nam, the newly established Hanoi and Ho Chi Minh Stock Exchanges have recorded enormous increases over the past year (albeit from very most bases) – the stock price index increasing 144% in 2006, and then by another 40% up to 15 May 2007.⁶ The Government has itself been venturing into the international capital market to raise funds by issuing sovereign bonds to finance the expanding activities of its state owned enterprises which do not themselves have any independent creditworthiness.⁷

At the level of individuals and households all this has led to a sharp increase in Viet Nam’s per capita GDP between 1995 (US\$289) and 2002 (US\$439), and a

1 World Bank, *Taking Stock: An Update on Viet Nam’s Economic Developments*, 2006, p.14

2 This was in fact said about the equally difficult process of concluding the US/Viet Nam Bilateral Trade Agreement in 2000; see Justin Pearson “The US/Viet Nam Bilateral Trade Agreement: Another Step in the Right Direction” (2002) 10 *University of Miami Business Law Review*, 431, at footnote 127.

3 World Bank, *Taking Stock: An Update on Viet Nam’s Economic Developments*, 2007, p.1; and see further, Ministry of Foreign Affairs of Viet Nam, White Paper on Human Rights (2005), pp.25-7, at <http://www.vietnamembassy-usa.org/news/story.php?d=20050826150541>.

4 World Bank, *Taking Stock*, 2007, p. 4

5 “Doi Moi” (renovation) is the process of economic opening of Viet Nam which started in 1986. As a result, more private enterprises were permitted by the Communist Party, and collectivisation of industrial and agricultural operations was essentially abandoned. This economic reformation from central planning to a market economy was further reflected in Viet Nam’s membership of ASEAN and its Bilateral Trade Agreement with the USA.

6 World Bank, *Taking Stock*, 2007, p.15.

7 See WTO, *Viet Nam Trade Profile*, April 2007, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=VN>

more than doubling of 'purchasing power parity' (PPP) from \$1,236 per annum in 1995 to \$2,745 in 2004.⁸ Over the eleven-year period from 1993 to 2004, some twenty four million people were lifted out of poverty, with the poverty rate dropping from 58.1% in 1993 to only 19.5% in 2004.⁹

It is of course the relative changes in all these statistics that are impressive. On account rapid economic growth, Viet Nam is now no longer officially classified as a 'Least Developed Country', but still it sits only marginally above the threshold, and a substantial percentage of its people remain poor.¹⁰ Thus, for example, despite the minimum monthly wage for government employees has increased by no less than 214% between 2003 and 2006, it is still only US\$28.¹¹ The incidence of poverty presents a fundamental systemic challenge to the better protection of human rights in Viet Nam, to be added to the structural challenge that single-party governance poses for human rights, especially for civil and political liberties.

4.2 Viet Nam and global integration

Alongside the expansion and integration of Viet Nam's economy into the global economy, a parallel process of globalisation has been pursued in respect of Viet Nam's formal relations with the international community. From the dark days of the country's relative international isolation during much of the 1980s, it began in the early 1990s to open its doors to international engagement with, first, the resumption of normal relations with the IMF and the World Bank in 1992, to be followed, in relatively quick succession over the next 6 years, by membership of ASEAN, AFTA, APEC and ASEM.¹² Bilateral relations – diplomatic and trade – were also expanded over this period with a number of Western states, including, most significantly, formal re-engagement with the US. This latter process began with the lifting of the US trade embargo against Viet Nam in 1994 and the re-establishment of diplomatic relations between the two countries a year later, and reached something of an apotheosis in January 2007 when, shortly before Viet Nam's accession to the WTO, the Bush Administration signed into law Permanent Normal Trade Relations (PNTR) with Viet Nam.

4.3 Economic and social challenges

Viet Nam's economic growth and global integration go hand-in-hand, and clearly their relative successes have fed off each other. However, the two phenomena have also brought challenges for Viet Nam which are not only economic and diplomatic, but social, political and legal as well, and membership of the WTO will

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⁸ UNDP, *Human Development Report 2006*, at http://hdr.undp.org/hdr2006/statistics/countries/data_sheets/cty_ds_VNM.html

⁹ Vietnamese Academy of Social Sciences, *Viet Nam Poverty Update Report 2006: Poverty and Poverty Reduction in Viet Nam 1993-2004*, Hanoi, December 2006, p.11

¹⁰ See text at note 65 below.

¹¹ See World Bank, *Taking Stock*, 2006 pp.8-9

¹² Respectively: the Association of South East Asian States; Asia Free Trade Agreement; Asia-Pacific Economic Cooperation; and the Asia Europe Meeting. For discussion see United Nations' Economic and Social Commission for Asia and Pacific, *The Doha Development Agenda: Perspectives from the ESCAP Region* (2003), p.306

surely exacerbate both the potential for further development and growth, as well as the level and incidence of associated challenges.

While economic development can certainly provide the means by which human rights can be better protected so too it can distort, deny or even destroy human rights protections already existing.

Human rights concerns in Viet Nam are inextricably linked to the country's fortunes in dealing with these challenges. Thus, the foremost challenge of how, within the WTO's insistent framework of trade liberalisation, to consolidate the economic gains already made by securing long term sustainable economic growth is key to how human rights will be protected and promoted in Viet Nam in the coming years. This is because both economic consolidation and sustainability will be, to some significant degree, dependant upon improving the breadth and depth of distribution of wealth gains, and minimising the debilitating shock effects suffered by certain economic sectors and social groups. For while economic development can certainly provide the means by which human rights can be better protected and more fully realised, so too it can distort, deny or even destroy human rights protections already existing, or the potential for them to be so protected.

Free trade protagonists are not always aware of such consequences, and even when they are, they either do not appreciate their impact, or they remove them from their frame of reference by characterising them as ignorable externalities. This explains, for example, how one of the WTO's earlier Annual Reports could declare, without apparent irony, that "[e]mpirical evidence tends to show that trade liberalization may entail non-trivial adjustment costs for certain groups".¹³ "Adjustment costs" are especially prevalent and often grave in the agrarian sectors of developing countries such as Viet Nam, where the sudden exposure of many small farmers to the market forces of larger farmers and agri-businesses can be devastating. As John Hilary points out, "market changes and household poverty has been well demonstrated in agricultural communities".¹⁴

Much, in fact, depends on the governance capacities of states whose economies are being driven by fast-growing export markets.

The basic causes are two-fold: (I) the undermining of local markets (by way of the combined effects of their relative uncompetitiveness and the drive to export) robs local households of their primary sources of income, and (II) the practical failure of the theory of comparative advantage which assumes that increases in the incidence of poverty will only be temporary because substitute jobs or income sources will replace those recently lost, whereas "in reality there may be no prospect of substitute opportunities for those groups ... even in the long term".¹⁵ Much, in fact, depends on the governance capacities of states whose economies are being driven by fast-growing export markets. Thus, for example, as Chantal Thomas has pointed out, a number of sub-Saharan countries with very high export earnings relative to GDP, nevertheless languish at the bottom of the UNDP's Human Development Index on account that they typically suffer from entrenched intra-state inequality, political instability, rampant corruption, poor to non-existent infrastructure, minimal regional integration and an over-reliance on agricultural exports which are subject to high volatility and fierce competition.¹⁶

¹³ WTO, *Annual Report* 1998, p.47

¹⁴ John Hilary, 'Trade Liberalization, Poverty and the WTO: Assessing the Realities', in Homi Katrek & Roger Strange (eds) *The WTO and Developing Countries* (2004), pp.38-62, p.41

¹⁵ John Hilary, *op cit* p.42

¹⁶ Chantal Thomas, "Poverty Reduction Trade and Human Rights" 18 (2003) *American University Law Review* 1399, 1407

5. Human rights in Viet Nam

5.1 Domestic provisions

Human rights have become an issue of interest for the Communist Party of Viet Nam, as it has turned the country's face towards international integration. For the first time, the viewpoint of the Party on human rights was officially expressed in the instruments of the IXth Congress in 2001. It promoted the interrelated objectives "to take care of the people, to protect rights and legitimate interest of everyone; to respect and implement international treaties on human rights that Viet Nam has ratified or acceded to."¹⁷ These human rights objectives have been further reaffirmed in the recent Xth Congress in 2006. The Political Report of the Party Central Committee expressly recognised the obligation of the state to institutionalise and implement citizen's rights and human rights effectively. It also reflects the policy of the Party to be open to human rights dialogue with other countries, and related international and regional organisations.¹⁸

Further, it should be noted that Viet Nam's 2005 White Paper on Human Rights – which, despite its propagandist overtones, is itself a significant feature of the country's willingness to engage with the international community on the subject – proclaims that "it is Vietnam's ultimate goal to build a strong country with wealthy people in an equal, democratic and civilized society for the benefit of the people."

As a result, in formal legal terms at least, Viet Nam is relatively well served in respect of human rights guarantees. The current (1992) Constitution expressly states that "all human rights in the political, civil, economic, cultural and social fields are respected. They are embodied in citizens' rights and are determined by the Constitution and the law."¹⁹ A number of rights were introduced for the first time or supplemented by the 1992 Constitution. For example, Article 57 on the right to free enterprise was introduced; Article 68 on freedom of movement and residence was supplemented by the right to freely travel abroad and to return in accordance with the law; Article 69 on freedom of opinion and speech and freedom of the press was supplemented with the right to be informed; Article 70 on freedom of religion was supplemented with 'all religions are equal before the law'; and Article 72 now provides for the presumption of innocence and freedom from punishment before the sentence of a Court has acquired full legal effect.

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17 Political Report of the Communist Party in the IX Congress in 2001, available in Vietnamese at the Communist Party website: http://www.dangcongsan.vn/tiengviet/tulieuvankien/vankiendang/details.asp?topic=191&subtopic=8&leader_topic=226&id=BT25110530192.

18 Political Report of the Communist Party in the IX Congress in 2006, available in Vietnamese at the website of the Communist Party: http://www.dangcongsan.vn/tiengviet/tulieuvankien/vankiendang/details.asp?topic=191&subtopic=8&leader_topic=699&id=BT1960657802.

19 Constitution 1992 (Art 50), as translated in Viet Nam's Report to the Human Rights Committee, 2001, UN Doc. CCPR/C/VNM/2001/2, p.6

These fundamental guarantees have provided the grounds for the enactment of a number of key laws and ordinances in the field of human rights.²⁰ Since 1986, Viet Nam has promulgated over 40 codes and laws, over 120 ordinances, approximately 850 Government documents and more than 3,000 regulatory documents issued by Ministries and agencies.²¹ Most human rights are recognised in these various laws. Voting rights, for example, are regulated by the Law on the Election of Deputies of the National Assembly, the Law on the Organisation of the Government, the Law on the Election of Members of the People's Council, and the Law on the Organisation of the People's Council and People's Committee.²²

The Press Law, revised on 12 June 1999, and the Law on Publication recognise the right of all citizens to exercise their freedom of speech through the press, and provide for freedom of the press and freedom of information. Freedom of religion and belief is regulated by the Ordinance on Religion and Belief, which was adopted in 2004.

The 2003 Criminal Procedure Code provides that "citizens, agencies, and organisations shall have the right to file a complaint; citizens shall have the right to file a denunciation against unlawful actions in criminal proceedings made by bodies or persons conducting criminal proceedings or any other persons of these bodies" (Article 31). This Code recognises the right of everyone who participates in criminal proceedings, such as persons in detention, custody, and accused persons, to lodge a complaint against decisions of bodies or individuals who are involved in the conduct of criminal proceedings. The right to redress and fair compensation is also specified in different legal documents, including Resolution 388 (2003) on compensation or restitution for damages caused by the authorities in the process of criminal proceedings,²³ and by a Circular of the National Assembly's Standing Committee on the restitution for damage caused by an official of the Ministry of Public Security in the process of criminal proceedings.²⁴ The recognition of these rights has contributed to the protection of civil and political rights, such as the right to a fair trial.

Other rights, such as freedom of association, freedom of movement, the right to education, the right to health, and the right to form trade unions, as well as additional aspects of the right to a fair trial, are provided in the Civil Code 2005, Civil Procedure Code 2004, Criminal Code 1999, Criminal Procedure Code 2003, and the Law on the Protection, Care and Education of Children 2004. The Law on Gender Equality, adopted on 29 November 2006, has incorporated many international human rights standards to protect the rights of women including the principles of equality and non-discrimination (Article 6) and the promotion of gender equality in different aspects of social and family life (Articles 11-18).

The Law on HIV Prevention and Control adopted in 2006 provides regulation to eliminate stigma and discrimination and to protect the rights of people living with

20 See generally, Viet Nam's *White Paper on Human Rights*, op cit, p.6

21 *Ibid*, p.5

22 Though, in practice, the choices of candidates to vote (despite apparent expansion in recent years) remains strictly limited.

23 Resolution 388/2003/NQ.UBTVQH11, dated 17 March 2003.

24 Circular No. 18/2004/TT-BCA, dated 9 November 2004

HIV. The Law on Domestic Violence, which was recently adopted at the 12th National Assembly and came into force from 1 July 2007, is another effort to protect the human rights and dignity of women in Viet Nam. For the first time a law on social insurance was adopted in 2006. The Law on Social Insurance seeks to implement a system of social welfare for issues such as sickness, maternity benefits, pensions, unemployment insurance, social security funds, and social security organizations, and to this end the Law provides regulations, policies, rights and obligations applicable to employers, employees and other administrative bodies. To provide a better social security net for farmers, especially with regard to access to health insurance, the Ministry of Labour, Invalids and Social Affairs (MoLISA) is also developing a proposal on a National Policy on Voluntary Social Insurance for Farmers.²⁵

Considerable effort, therefore, has been invested in providing the legal framework through which human rights concerns across the board – civil and political, as well as economic and social rights – might be addressed. The acid test, however, for these rights guarantees, is how well they are respected and enforced in practice. The Government's program of ratification of the principal international human rights instruments provides important international standards against which progress in this regard can be measured.

5.2 International obligations²⁶

The following is a list of the main human rights instruments to which Viet Nam is a party; analysis of the state's compliance with the obligations therein is provided in section 3, below.

United Nations instruments

Viet Nam is a party to most of the important UN conventions on human rights:

- It has acceded to both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* on 24 September 1982. However, Viet Nam has not made a declaration under Article 41 of the ICCPR recognising the competence of the Committee to receive communications from other States, and it is not a party to the First Optional Protocol, which provides for individual communications. Neither is Viet Nam a party to the Second Optional Protocol to the ICCPR on the death penalty.
- Viet Nam acceded to the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD) on 9 June 1982, though it has not made a declaration under Article 14 recognising the competence of the CERD Committee to receive individual communications.

²⁵ See Viet Nam's Combined 5th & 6th Reports to CEDAW, 2005, UN Doc. CEDAW/C/VNM/5-6, p.57 (in Vietnamese)

²⁶ According to The Law on Signing, Accession and Implementation of International Treaties, adopted in 2005, Viet Nam's international treaty obligations must be given priority to national laws where there is conflict; see Article 6 entitled *International treaties and regulations of domestic law*.

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- Viet Nam ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* on 17 February 1982, but is not a party to the Optional Protocol governing individual communications.
- On 29 February 1990, it ratified the *Convention on the Rights of the Child* and on 20 December 2001 it ratified the two *Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography*.²⁷
- Viet Nam is also a party to the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, to which it acceded on 9 June 1981, and the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, to which it acceded on 6 May 1983.
- Viet Nam signed the *Convention on the Rights of Persons with Disabilities* on 22 October 2007.

Viet Nam is not a party to three of the core UN human rights instruments:

- the *Convention Against Torture*,
- the *International Convention on the Protection of the Rights of All Migrant Workers*; and
- the *International Convention for the Protection of All Persons from Enforced Disappearance* (the latter two conventions are not yet in force).

International Labour Organisation (ILO) instruments

Of the eight fundamental human rights conventions of the ILO, Viet Nam has ratified five, namely:

- *Convention No. 29 concerning Forced or Compulsory Labour* ratified on 5 March 2007;
- *Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, ratified on 7 October 1997;
- *Convention No. 111 concerning Discrimination in Respect of Employment and Occupation*, ratified on 7 October 1997;
- *Convention No. 138 concerning Minimum Age for Admission to Employment* ratified on 24 June 2003; and
- *Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* ratified on 19 December 2000.

However, Viet Nam has not ratified:

- *Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise*;
- *Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*; and
- *Convention No. 105 concerning the Abolition of Forced Labour*.

²⁷ Viet Nam has made reservations to Article 5 (1), (2), (3) and (4) of the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, concerning certain extraditable offences. Subsequently, Viet Nam amended article 343 of its Criminal Procedure Code, bringing it in line with the provisions of Article 5 of the Optional Protocol and as such the Government has indicated that the reservation will be withdrawn.

5.3 Viet Nam's human rights record

As with all countries, assessing the levels of protection of human rights in Viet Nam depends upon who you ask and which rights are you talking about. Thus, in the eyes of the Government of Viet Nam, economic, social and cultural rights are undoubtedly its immediate, priority concerns as they are seen to be associated with economic development. As such, therefore, the Government proclaims in its White Paper on Human Rights, that among its greatest achievements “in the protection of human rights [has been its] great success in poverty reduction, human development and life quality improvement”.²⁸ There is also some independent, international support for the Government, with the UN Committee on the Elimination of Racial Discrimination commending Viet Nam on its efforts to rebuild and renew the social and economic structure of Vietnamese society through its Strategy Plan for Social Economic Stabilization and Development, noting that it be fairly expected that the growing economy will contribute to the easing of racial and ethnic tensions.²⁹

As with all countries, assessing the levels of protection of human rights in Viet Nam depends upon who you ask and which rights are you talking about.

There can be no doubt that poverty alleviation is a foundation to any serious attempts to protect and promote human rights – civil and political, as well as economic and social. However, it is not itself a guarantor of such protection, especially if its impact is uneven, as for example is the case in Viet Nam where urban communities have generally fared much better than rural ones.³⁰ Further government action is necessary if the rights to housing, health, education, and an adequate standard of living are to be attained, let alone rights to a fair trial, privacy, expression, association, movement and political thought secured.

Advances and achievements

Despite the focus on economic and social rights in recent years there have been some positive steps taken towards better protecting certain civil and political rights. Though they may be limited and as yet inadequate, they are nonetheless notable given the fact that the state has been consistently criticised for neglecting such rights. Thus, for example:

Right to life – further to the current practice of the death penalty being imposed only in the most serious offences, the government has pursued a policy of narrowing the scope of capital punishment, gearing towards its abolishment in the future.³¹

²⁸ White Paper on Human Rights, op cit, pp.25-6

²⁹ Concluding Observations of the CERD, 2001, UN Doc. A/56/18, at para.411

³⁰ For example, the urban poverty rate in 2004 was 3.6%, compared to a poverty rate of 25% in rural areas. Vietnamese Academy of Social Sciences, Viet Nam Poverty Update Report 2006, op cit, p.18

³¹ The *White Paper on Human Rights* notes that the number of offences subject to capital punishment under the Penal Code 1999 has been reduced from 44 to 29 (at p.23), and a proposal to reduce the number still further to 20 has been made by the Central Judicial Reform Commission to the Ministry of Public Security. The offences to be dropped are mainly economic ones such as fraud, embezzlement, bribery and counterfeiting. For criticism, see for example, Amnesty International, “Death Penalty News” May 2006, available at: <http://web.amnesty.org/library/Index/ENGACT530022006?open&of=ENG-VNM>

Prohibition of torture – the issue of torture has been discussed, principally among academic circles. A number of workshops, seminars and studies on the possibility of accession to the UN Convention Against Torture have been conducted with recommendations for Viet Nam to prepare a roadmap for becoming a state party to the Convention. For example, in December 2003 an international seminar on the Torture Convention was held in Hanoi by the Vietnamese Research Center for Human Rights and the Ministry of Foreign Affairs.³²

Freedom of association – a Law on Associations (which is in fact a constitutionally protected right) has been in development since 1993, and a draft was reviewed by the National Assembly in 2006, but, due to the inability of the Government and the National Assembly to agree on certain important provisions, the law was removed from the agenda.³³ Conflicting opinions persist on such fundamental points as state management of associations, and the scope of application of the law.

Fair trial rights – among the judicial and legal sector reforms instituted in recent years, advances have been made towards safeguarding the right to fair trial generally and access to courts and to remedies in particular. As already noted above, the Law on Complaint and Denunciation and Resolution 388 have together provided new rights and remedies aimed at enhancing the fairness and probity of criminal proceedings.³⁴ But the capacities of both the judiciary and the legal profession are still very limited,³⁵ and in consequence there remains a sizeable gap between the rights provided in law and the mechanism for their actual implementation.

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There have also been developments in the recognition of the rights of women, such as the adoption of the Law on Gender Equality of November 2006, which entered into force on 1 July 2007, and amendments to the Land Law and the Law on Marriage and Family in 2003, which aim at eliminating discrimination against women and promoting gender equality.³⁶ The 2001 Law on the Election of National Assembly Deputies and the 2003 Law on the Election of Members of the People's Council established a quota system for female deputies and set targets for women's representation in public bodies at different levels.³⁷

Viet Nam has also made progress regarding the rights of children, achieving a commendably high rate of immunisation coverage,³⁸ and engaging in efforts to achieve universal enrolment at primary school level.³⁹ Amendments to the Criminal Code in 1997 and 1999 introduced new offences and more severe penalties for crimes related to the sexual exploitation of children.⁴⁰

32 See Ministry of Foreign Affairs, "International Cooperation in Protection of Human Rights", at http://www.mofa.gov.vn/en/ctc_quocte/ptklk/nr040819162124/ns070731133056/view

33 Irene Norlund, "Filling the Gap: The Emerging Civil Society in Viet Nam", UNDP, Hanoi, January 2007, p.9

34 Following the adoption of Resolution 388 in 2003, a number of miscarriage of justice cases have been handled with adequate compensation, and for the first time, law enforcement officials have apologised publicly.

35 Inter-Agency Steering Committee/Ministry of Justice, *Comprehensive Needs Assessment For the Development of Viet Nam's Legal System to the year 2010*, Hanoi, 2002, p.16-17.

36 Concluding Observations of the CEDAW, 2007, UN Doc. CEDAW/C/VNM/CO/6

37 *Ibid.*, at para 14.

38 Concluding Observations of the CRC, 2003, UN Doc. CRC/C/15/Add.200 at para 39.

39 Concluding Observations of the CEDAW, 2007, UN Doc. CEDAW/C/VNM/CO/6

40 Concluding Observations of the CRC – OP2, 2006, UN Doc. CRC/C/OPSC/VNM/CO/1 at para 10.

Problems and challenges

Nonetheless, there are, however, continuing human rights problems in respect of other civil and political freedoms – especially free speech, and political and religious freedoms.

At first glance, freedom of the press has made considerable advances. For example, in 1990 there were only 258 newspapers and journals in Viet Nam, but now there are 553 printed newspapers, nearly 700 publications and 200 electronic newspapers;⁴¹ today more than 80% of households have access to radio, and 70% have access to television; all provinces and cities have radio and television stations with increasing broadcasting time; and foreign TV channels such as CNN, BBC, TV5, DW, RAI, and HBO are widely broadcast.⁴² However, despite the much vaunted 1999 revision of the Press Law which brought about many of these changes, it remains the case that there is no non-state, independent media operating inside Viet Nam,⁴³ outspoken dissent is suppressed,⁴⁴ and web-based censorship of political content is still tight and has been recently strengthened.⁴⁵

In its Concluding Observations in 2002, the UN Human Rights Committee⁴⁶ was concerned about the large number of crimes for which the death penalty may still be imposed, despite the above-mentioned reduction in crimes which carry the death penalty. The definition of certain acts such as opposition to order and national security violations, for which the death penalty may be imposed, were considered excessively vague and therefore inconsistent with Article 6(2) of the ICCPR.⁴⁷ The Committee was also concerned about the continued use of administrative detention, and the ability of persons to be kept under house arrest without the intervention of a judge or judicial officer.⁴⁸

Viet Nam has a weak judicial system, owing to decades of neglect and the current lack of qualified, professionally trained lawyers, and a lack of resources for the judiciary. Certain government practices seriously compromise the independence of the judiciary, such as the fact that the judiciary seeks the opinion of the National Assembly's Standing Committee with respect to the interpretation of laws; that the Standing Committee sets criteria and instructions binding on the judiciary; and that the appointment of judges is only for 4 years, which prevents security of tenure.⁴⁹

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41 *White Paper on Human Rights, op cit*, pp.10-11

42 Ministry of Foreign Affairs, *Viet Nam's Achievements in the Protection of Human Rights*, available at: http://www.mofa.gov.vn/en/ctc_quocte/ptklk/nr040819162124/ns070731133814/view.

43 See Decree 37/2006/CT-TTg of the Prime Minister dated 29 November 2006 on the Implementation of the conclusion of the Politburo relating to strengthening the leadership and management of the press.

44 See Human Rights Watch, "Vietnam: Crackdown of Dissent in the Wake of WTO and APEC", 9 March 2007, at <http://hrw.org/english/docs/2007/03/09/vietna15466.htm>.

45 By the enactment of Decree No. 56/2006/ND-CP on punishment for administrative violations in the culture and information sector, which entered into force on 1 July 2006; see further Amnesty International, "Socialist Republic of Vietnam. A Tightening Net: Web-based Censorship and Repression" 22 October 2006, at <http://web.amnesty.org/library/Index/ENGASA410082006?open&of=ENG-VNM>.

46 The UN Human Rights Committee is the monitoring body for the International Covenant on Civil and Political Rights.

47 The UN Human Rights Committee is the monitoring body for the International Covenant on Civil and Political Rights.

48 *Ibid*, para 8.

49 *Ibid*, paras 9 & 10.

The Human Rights Committee has also expressed concern about freedom of religion in Viet Nam, particularly in respect of the repression of certain religious practices.⁵⁰ It noted, for example, the ‘abundance of information’ regarding the treatment of the indigenous Degar (Montagnard), and their right to enjoy their cultural traditions, including their religion, language, and agricultural activities.⁵¹ The Government’s restrictions on the freedom of association, especially in respect of political parties, civil society and other activist groups, and its resistance to international NGOs and UN Special Rapporteurs trying to investigate allegations of human rights violations in Viet Nam, were seen by the Committee to be at odds with the State’s obligations under the Covenant.⁵²

Despite progress, there are still significant impediments to the full enjoyment of human rights by women and children. For example, in respect of gender equality, the UN Committee on the Elimination of Discrimination against Women in its 2007 Concluding Observations expressed concern about the concentration of women in the informal economy, which negatively affects their eligibility for social security and other benefits, including health care.⁵³ Occupational segregation between women and men in the labour market, and the persistent high gap in wages between women and men, were also of concern. The Committee noted the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the family and society at large.⁵⁴ The rates of prosecution and conviction of traffickers and persons who exploit the prostitution of women remain alarmingly low and there are inadequate mechanisms in place for the rehabilitation and reintegration of victims. Further, a high proportion of girls drop out of school, and girls in rural and remote areas do not have full access to education. Generally speaking, women in rural and remote areas, and ethnic minority women, are the worst off, typically lacking sufficient access to health services, education, and employment.⁵⁵

With respect to children, the UN Committee on the Rights of the Child (CRC) has expressed concern that insufficient resources have been allocated to the development of health infrastructure and education in remote and mountainous areas, and that a lower level of development indicators for ethnic minorities suggests the existence of societal or institutional discrimination regarding their access to health care and education.⁵⁶ There are problems with birth registration in rural or mountainous areas, and a high number of inter-country adoptions, suggesting that inter-country adoption is not a measure of last resort, but a decision often taken on economic grounds and inadequately regulated by the state.⁵⁷ Concerns have also been expressed over the persistently high rates of maternal mortality, infant mortality, and malnutrition among children, and the widespread incidence of

⁵⁰ *Ibid*, para 16.

⁵¹ *Ibid*, para 19.

⁵² *Ibid*, para 20.

⁵³ Concluding Observations of the CEDAW, 2007, op cit; at para.22.

⁵⁴ *Ibid*, para 12.

⁵⁵ *Ibid*, paras 20 & 28.

⁵⁶ Concluding Observations of the CRC, 2003, op cit; paras 14 & 22.

⁵⁷ *Ibid*, paras 31 & 37.

economic exploitation of children in the agricultural sector, as well as in gold mines, timber operations, the service sector and private sector enterprises.⁵⁸ There are economic grounds to believe that some of these concerns, in respect, especially, of the general levels of the health and welfare of children, have improved since this CRC report in 2003, but in large measure, the particular problems it highlighted remain today.

⁵⁸ *Ibid.*, paras 31-51.

6 Viet Nam, human rights and the WTO

The government must balance its trade and human rights obligations under both international and domestic law.

There are at least three broad avenues of human rights opportunity. The opening up of the economy will help Viet Nam to take further steps in human rights integration.

Becoming a member of the WTO brings both human rights opportunities and challenges for Viet Nam. In terms of law and policy, this flows directly from the fact that now the government must balance its trade and human rights obligations under both international and domestic law. Thus, for example, its constitutionally protected human rights obligations must temper the State's economic policy, also enshrined in the Constitution, "to make the people rich and the country strong" by various means including "expanding intercourse with world markets."⁵⁹ However, it seems that Viet Nam is especially sensitive to the degree to which international pressure might be brought to bear on this equation, proclaiming in its White Paper on Human Rights that "no country has the right to use human rights as a means or pretext to interfere into another country's internal affairs, create confrontation and political pressures, even use force or impose conditionalities in economic and trade relations with others."⁶⁰

All that said, there are at least three broad avenues of human rights opportunity. First, it is an opportunity for Viet Nam to integrate in to the global economy by accessing international goods and services equally and gaining reliable access to export markets. Economic development, in the view of the government, shall create conditions for the promotion of human rights, including the right to development, right to adequate standard of living and others. Secondly, the improvement of the domestic legal system and institutions as a requirement of joining the WTO shall foster a more favourable environment for Viet Nam when instituting legislative, administrative and judicial measures to improve human rights. And thirdly, the opening up of the economy will help Viet Nam to take further steps in human rights integration, especially through the greater breadth and depth of opportunities for interaction and dialogue with the international community that WTO membership will bring.

6.1 Which rights are of concern?

However, there are also certain human rights concerns that are associated with rapid trade expansion and economic development. First, the harsh realities of international commercial competition that Viet Nam's businesses will now be exposed to by way of WTO-imposed liberalised trade rules will inevitably lead to business failures as well as successes. The learning curve may be very steep for Vietnamese businesses (big, small, or tiny), at least initially, as they lack experience of such competitive practices on the global scale.⁶¹ Business failures, of course,

⁵⁹ Article 16 of the Constitution (1992)

⁶⁰ White Paper on Human Rights, op cit. pp. 4-5

⁶¹ The effects of increased competition and the drive for efficiency have already been felt in the equitisation (privatisation) of State Owned Enterprises (SOEs), which collectively shed more than 100,000 workers between 2000 and 2005. World Bank et al, *Viet Nam Development Report 2006: Business, Joint Donor Report to The Viet Nam Consultative Group Meeting*, Hanoi, December 2005, p.159. Further, in their conversations with the authors, participants at the workshop on "Human Rights Implications of Viet Nam's Accession to the WTO", held in Hanoi in May 2007, stressed their particular concerns as to the ability of local Vietnamese businesses to compete with their more efficient foreign counterparts.

will have a direct effect on employment and the litany of rights that directly and substantially rely on employment for their achievement – adequate standard of living, housing, sustenance and health care. Secondly, the social impacts of joining the WTO can operate as a barrier to the enjoyment of, and access to, many human rights, particularly through the unequal distribution of benefits and the widening gap between rich and poor, both within Viet Nam and between Viet Nam and the rest of the world.⁶² These challenges put certain sectors including agriculture, manufacturing, and private business at risk, and render certain groups of people including women, children, and ethnic minorities more vulnerable.

In addition, there are concerns associated with a number of specific rights and groups of rights-holders.

6.1.1 Right to food

The combination of state poverty reduction and hunger elimination programs, radical shifts in land policy that effected the distribution of agricultural land to rural households, and the general health of the national economy have brought significant improvements for Viet Nam in the guarantee of the right to food. Viet Nam has now moved from a country with a chronic lack of food to the second largest exporter of rice. Though food poverty has dramatically decreased from 24.9% in 1993 to 10.9% in 2002,⁶³ and 7.8% in 2004, there are still issues of concern which need to be addressed in the context of joining the WTO.

Considering that there are a large number of communities who survive just above the poverty line, the affordability of food is of fundamental importance. According to the World Bank, 53.4% of people in the country live on less than two dollars a day, and 10.6% on less than one dollar a day.⁶⁴

It is in rural areas that more than 90% of the poor population live and work, and such areas are especially sensitive to changes in economic, social and natural circumstances. The liberalisation of agriculture and the reduction of subsidies necessitated by Viet Nam's accession to the WTO⁶⁵ will likely seriously threaten food security in the countryside, given the absence of any welfare assistance for families to fall back on should jobs be lost or markets evaporate.⁶⁶ There is, fur-

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62 For example, see UNCTAD's analysis of the varied fortunes of LDCs who have embarked on extensive trade liberalisation, especially the difficulties they face in achieving inclusiveness in economic growth. UNCTAD, *Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction*, Geneva, 2004, Chapter 5.

63 World Bank et al, *Viet Nam Development Report 2004: Poverty, Joint Donor Report to The Viet Nam Consultative Group Meeting*, Hanoi, December 2003, p. 9

64 World Bank et al, *Viet Nam Development Report 2004*, op cit, p. 15

65 The Vietnamese government traditionally administered interest rate support, export bonuses and support to cover losses to enterprises exporting rice, pork, coffee and canned vegetables. Such measures are now prohibited by the terms of Viet Nam's accession agreement. In negotiating its accession, Viet Nam agreed that "upon accession, Viet Nam would bind its agricultural export subsidies at zero in its Schedule of Concessions and Commitments on Goods, and not maintain or apply any export subsidies for agricultural products." (WTO, Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48, 27 October 2006, p.93, paragraph 366). However, Viet Nam is permitted a measure of domestic support. Viet Nam is permitted to spend VND 3,961 billion (approx USD 246 million) on domestic support for agricultural products in any one year. See: WTO Working Party on the Accession of Viet Nam, Domestic Support and Export Subsidies in the Agricultural Sector: revision, WT/ACC/SPEC/VNM/3/Rev.7, 2 August 2006, p.7

66 John Hilary, 'Trade Liberalization, Poverty and the WTO: Assessing the Realities', op cit, pp.41-2, and see further below, under the heading "The special case of human rights in the agricultural sector".

ther, a particular risk in this regard for people living in the uplands and midlands, and ethnic minority families where 70–80% are poor and many are living in chronic poverty. (See further the paragraph on ethnic minorities, below.) In 2004, there were about 3.5 million members of ethnic minorities living in poverty.⁶⁷

The realisation of the right to food encompasses the right to adequate nutrition. It is therefore incumbent on the Government to regulate the market in essential foodstuffs such as to ensure the availability and provision of basic nutritional needs, particularly those of young children. Despite the relatively successful efforts of the government to combat malnutrition in recent years, infant and child malnutrition was still 25.7% overall, according to 2002 figures,⁶⁸ and nearly 50% in respect of ethnic minority groups in the midlands and Northern uplands of the country.⁶⁹ Certainly, any prospect of the elimination of subsidization for certain products and programs – such as the iodization of salt, or removal of advertising restrictions – such as in respect of infant milk formula products (as part of the ongoing program to promote breastfeeding) – would negatively impact on children’s rights to adequate nutrition.⁷⁰

6.1.2 Right to health and TRIPS

In the short term, the opening up of a hitherto highly centralized industry will be detrimental to overall provision of health services.

An essential feature of Viet Nam’s socio-economic development strategy is improving the standards of, and access to, health care for its people. On recent figures only 38% of households have health insurance or access to free health care.⁷¹ The liberalisation of the health sector⁷² will certainly affect the accessibility and affordability of health care services, but the question is will it necessarily be positive. The fear is that, at least in the short term, the opening up of a hitherto highly centralized industry will be detrimental to overall provision of health services, and especially for the rural poor. This fear is founded on Viet Nam’s earlier experience of legalizing private health services and introducing user charges at public hospitals. The result of this policy was that it shifted the burden of health care financing from the state to households, with health care costs, and especially hospital costs, constituting a serious burden on low-income families. It also exacerbated the gap between rich and poor regarding access to, and the quality of, health services. Those in the richest 20% of the population have contact with a provincial or central hospital 4.5 times more often than those in the poorest 20%. Low-income families are the largest users of Community Health Stations, where the quality of services is generally perceived to be of a poorer quality than that provided by public hospitals or private clinics.⁷³

67 Vietnamese Academy of Social Sciences, *Viet Nam Poverty Update Report 2006*, op cit, p. 27

68 Percentage of children under 5 who are wasted (low weight for age). World Bank et al, Viet Nam Development Report 2004, op cit, p. 28.

69 Christian Salazar Volkmann, *Viet Nam 30 years after the war: transition towards market economy and WTO Accession from a child rights perspective*, UNICEF, Vietnam; 2005, p.6.

70 *Ibid*, p.8-9.

71 Vietnamese Academy of Social Sciences, *Viet Nam Poverty Update Report 2006*, op cit, p. 24.

72 In its Schedule of Specific Commitments in Services, Viet Nam imposes no special limitations on market access or national treatment in the health and related social services sector (hospital, medical and dental services), and permits foreign service suppliers to establish 100% foreign-invested hospitals, provided that the minimum investment capital for a hospital is USD 20 million. See: WTO Working Party on the Accession of Viet Nam, Schedule of Specific Commitments in Services and List of Article II MFN Exemptions, WT/ACC/VNM/48/Add.2, 27 October 2006, p.43

73 United Nations Country Team Viet Nam, *User Fees, Financial Autonomy and Access to Social Services in Viet Nam*, Discussion Paper No.6, Ha Noi, August 2005, pp.3-9

Viet Nam, like all poor countries, faces inherent difficulties in ensuring affordable access to pharmaceuticals for its people. Viet Nam's obligations under the *Trade Related Agreement on Intellectual Property Rights* (TRIPS) to recognise and enforce patent rights may compound this struggle. The issue is of particular importance in respect of the protection of the right to health of people living with HIV/AIDS. HIV has now spread throughout 64 cities and provinces. Currently, more than 100 Vietnamese are infected by HIV every day. The estimated number of people living with HIV has more than doubled between 2000 and 2006, from approximately 122,000 to 280,000. There is also an increasing number of children infected and affected by HIV/AIDS. The overall prevalence rate among adults aged 15–49 is estimated to be 0.53% in 2006, which equates to one in 200 adults. Approximately one in 60 households has a person living with HIV and there were an estimated 14,000 AIDS-related deaths in 2005.⁷⁴ TRIPS may present an additional challenge to the implementation of the Millennium Development Goal on HIV prevention and also to the achievement of the Government's own target of ensuring that 70% of HIV/AIDS patients are receiving treatment by the year 2010. Thus, both for intellectual property and human rights reasons, particular attention must be paid to the establishment and operation of foreign pharmaceutical companies in Viet Nam, such as those granted preferential access under the 2004 Viet Nam-EC Market Access Agreement. Under the terms of its WTO Accession Protocol, Viet Nam has a transitional period up to 1 January 2009 before it must grant foreign-owned companies the right to import pharmaceuticals.⁷⁵

6.1.3 Rights of ethnic minorities

While economic liberalisation may bring benefits to the majority of the population, certain human rights of ethnic minorities such as the right to food, right to education, right to health, and right to adequate standard of living are under threat. Ethnic minority groups have not benefited from the advances Viet Nam has made over the past decade in combating poverty to the same degree enjoyed by the rest of the population. While the national poverty rate decreased significantly from 58% in 1993 to 20% in 2004, the poverty rate among ethnic minorities reduced respectively from 86 to 61%. Minority groups in Viet Nam make up 14% of the population (i.e. slightly over 10 million people), but constitute 39% of the poor.⁷⁶

It has become a major concern that ethnic minorities are participating less and benefiting inadequately from the growth process. Their opportunity of accessing rights is also lessened accordingly. As a consequence, for example, "the absolute difference in the poverty rate between the majority Kinh-Hoa and ethnic minorities has been increasing, from 32.5 percentage points in 1993 to 47.2 percentage points in 2004. In 2004, the poverty rate for ethnic minorities was 61%, which is approximately 4.5 times the poverty rate for the Kinh and Hoa".⁷⁷ Such figures signal systemic disadvantage and thereby grave, fundamental threats to the human rights of Viet Nam's ethnic peoples.

74 UNAIDS Viet Nam, "Summary of the HIV Epidemic in Viet Nam", September 2006, available at: http://www.unaids.org.vn/facts/docs/key_messages_sep_2006_e.pdf

75 WTO, Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48, 27 October 2006, p. 36, 155–157. See further note 150 below, and accompanying text.

76 World Bank et al, *Viet Nam Development Report 2007: Aiming High*, p.102, available at: http://siteresources.worldbank.org/VIETNAMEXTN/Images/vn_dr_2007_report.

77 *Ibid.*, p. 26

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“While the transition to a market economy has increased economic growth [in Viet Nam], it has also had a negative impact on the implementation of the economic, social and cultural rights of children.”

6.1.4 The rights of children and the Right to Education

The UN Committee on the Rights of the Child has acknowledged that, “while the transition to a market economy has increased economic growth [in Viet Nam], it has also had a negative impact on the implementation of the economic, social and cultural rights of children, for instance by increasing the financial burden on households for health and education services.”⁷⁸

Viet Nam has committed under GATS to liberalize 11 different service sectors, including education.⁷⁹ Viet Nam has already opened up its tertiary education sector, particularly in such areas as technical and natural sciences, business management, economics, accountancy, international law and languages. An international forum on joining the WTO and the renovation of Viet Nam’s tertiary education was organised by the National Educational Council and Ministry of Education from 11–12 December 2006, involving the Deputy Prime Minister Pham Gia Khiem and scholars from relevant sectors and agencies. The challenges that higher education may face when the country opens its education market is an issue of considerable debate among stakeholders. In the context of joining the WTO the gap in education is likely to increase among the rich and the poor. The higher fees of foreign education services that will now enter the local market will be beyond the reach of many. Such affordability will be a particular problem for the rural poor whose children will have to leave home to attend universities or schools, as these families will face added transport and daily living costs.⁸⁰ At base, access to education for children in rural areas – from both poor and even richer families – is fundamentally linked to the commercial viability of the agricultural sector; when agriculture suffers, household incomes drop, and so too the affordability of education.

6.1.5 Labour & workplace rights

The combination of the speed of growth of Viet Nam’s industrial sector⁸¹ and the low base in the 1980s from which it has developed, has placed pressure on the government and on corporations to attend to issues of labour and workplace relations, as well as health and safety standards for employees. Viet Nam substantially revised its Labour Code in 2002 to incorporate the various ILO standards it has signed up to, although problems and gaps remain, which will be exacerbated by the demands of further commercial expansion and trade liberalisation.⁸² Enforcement of many of these laws – in respect, for example, of forced and child labour and unsafe work practices – is inadequate, and certain rights such as union membership are somewhat Pyrrhic (trade unions do exist, but

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78 Concluding Observations of the CRC, 2003, *op cit*, at para.5.

79 Working Party on the Accession of Viet Nam, Schedule of Specific Commitments in Services and List of Article II MFN Exemptions, WT/ACC/VNM/48/Add.2, 27 October 2006.

80 On 4 September 2007, the Prime Minister signed a Decree to allow students from poor families to access loans with preferential interest rates from the bank to finance their study. For primary and lower secondary education, the government does provide school fee reductions or exemptions for the poor. However, these exemption mechanisms reach only 7.4% of the poorest and near poorest children in primary school (UN Country Team Viet Nam, *op cit*, pp.28-29).

81 Based on the period from 2000-2004, 20% of employed men and 13% of employed women worked in the industrial sector. World Bank, *World Development Indicators*, 2006, at: http://devdata.worldbank.org/wdi2006/contents/Table2_3.htm

82 As the Government itself notes “labor is a decisive factor of the competitiveness of each enterprise and each economy,” Ministry of Labor, Invalid and Social Affairs (MoLISA), *Labour and Social Issues Emerging from Viet Nam’s Accession to the Viet Nam to the WTO*, Paper 18 (2004), p.2.

they are not independent of Communist Party influence and control).⁸³ There is concern in particular with how to combat sweat-shop conditions, as evident, for example, in the relative prominence given to labour rights and working conditions in both the US/Viet Nam Bilateral Trade Agreement and the Trade and Investment Framework Agreement signed by both countries in June 2007.⁸⁴ Wildcat strikes in and around Ho Chi Minh City in 2006, involving thousands of workers protesting against poor pay and working conditions, requested from the Government a 40% increase in the minimum wage for workers in foreign owned corporations (to US\$54 per month), which was the first such rise since 1999.⁸⁵

There are particular human rights concerns regarding women in the workforce, as highlighted in the burgeoning garment industry, and regarding 'internal migrant' workers.

Rights of women working in the garment industry

Viet Nam's textile and garment industry accounted for 16% of all exports in 2004,⁸⁶ and the garment industry is expected to expand further, now that, following WTO accession, exports of garments to the EU and the US – the garment industry's two biggest markets – will be free from all quotas.⁸⁷

The export-oriented garment industry is labour intensive, and has been a significant source of new jobs, particularly for women, who make up approximately 78% of garment workers. Statistical analysis of female garment workers shows that they are often young (20–30 years), generally single and without children. The overwhelming majority of female garment workers have migrated to the city from rural areas, where levels of poverty, unemployment and underemployment are all high. Most are leaving agricultural work in rural areas to seek out wage employment in the city. However, labour conditions in the garment industry are not always satisfactory. Garment workers face long hours sitting in the same position, carrying out repetitive tasks, often in hot, noisy and dusty factories, and because of this, most do not stay more than a couple of years in the industry. Surveys among female workers demonstrate that they generally work overtime, often an additional 10 to 15 hours per week,⁸⁸ which puts pressure on their ability to visit their home town or participate in cultural activities.

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Garment workers receive lower levels of pay than other wage earners in the urban economy, and they are at particular risk of unemployment due to their low level

83 The single, umbrella trade union – the Viet Nam Confederation of Labour – oversees and controls various subsidiary labour organizations.

84 Michael Marine, the outgoing US Ambassador to Viet Nam nominated these issues as likely topics for the first working sessions to be held under the TIFA in late 2008; see http://www.bilaterals.org/article.php3?id_article=9337, posted 14/8/07

85 Human Rights Watch, World Report 2007 – Viet Nam, at <http://hrw.org/englishwr2k7/docs/2007/01/11/vietna14858.htm>.

86 Naila Kabeer and Tran Thi Van Anh, *Globalisation, Gender and Work in the Context of Economic Transition: The Case of Viet Nam*, UNDP Viet Nam Policy Dialogue Paper 2006/2, Ha Noi, May 2006, p.3. [NB. except where indicated otherwise all the statistics in this section and the following section have been drawn from this UNDP paper.]

87 While export quotas to the EU were abolished on 1 January 2005 pursuant to Viet Nam's market access agreement with the EC, US quotas continued to be applied under the Viet Nam-US Bilateral Trade Agreement, and only ceased on WTO accession.

88 Hai Ha, *Tại các khu công nghiệp: Lao động nữ luôn biến động, vì sao?*, 14 May 2007, available at <http://www.thuongtin.com.vn/?do=service&dtid=view&id=1041>

Export-oriented industries, and the people they employ, are vulnerable to fluctuations in the international market.

of professional qualifications. Increased competition in the garment and footwear industries could increase this risk of unemployment. For example, many workers were at risk of losing their jobs following the announcement by the EC on 23 February 2006 that it would apply an anti-dumping duty to leather shoes from Viet Nam and China.⁸⁹ Such events demonstrate that these export-oriented industries, and the people they employ, are vulnerable to fluctuations in the international market.

Women working in the informal economy lack access to social security and health care services.

Beyond the garment industry, female employment is disproportionately concentrated in casual work or the informal economy (26% of women compared to 19% of men), rather than wage-earning employment (26% women, and 41% men)⁹⁰. As noted by the Committee on the Elimination of Discrimination against Women in 2007, women working in the informal economy lack access to social security and health care services.⁹¹ The Committee called upon Viet Nam to enforce regulations of the Labour Code regarding access to social services for the benefit of women working in export processing zones.

Internal migrant workers' rights

As noted above in the case of female garment workers, there is increasing internal migration in Viet Nam, from rural to urban areas. High levels of unemployment and underemployment in the rural agricultural sector, and the promise of earning a wage in the city, have precipitated this trend. However, a particular difficulty faced by workers who migrate from rural to urban areas is that they lack formal rights to live in the city, under Viet Nam's household registration system. This can make it difficult to access municipal services, such that migrant workers may face higher housing, water and electricity costs, higher costs of medical treatment and education, and higher administrative costs. Temporary or unregistered migrants often face difficulties finding decent housing and live in more crowded accommodation.

Many who migrate to urban areas end up working in casual labour, and are especially vulnerable to abuse or violence, particularly sexual abuse which leads to a risk of HIV infection and other sexually transmitted diseases.⁹² Migrants are at a disadvantage when it comes to accessing social and health care services, including access to contraceptives, reproductive health, STDs and HIV/AIDS prevention. Most temporary migrants have no health insurance, and a fear of high medical costs often results in delays in seeking treatment.⁹³

Despite these risks and disadvantages, internal migration has allowed many people from rural areas to find work, especially in the manufacturing industries. Many internal migrants send remittances back to their families, and studies show that this has played a critical role in poverty reduction in many rural areas.⁹⁴

89 Đông Hieu, 'Lao động nữ chịu nhiều thiệt thòi trong kiện giày da', 2 March 2006, available at: <http://vietnamnet.vn/kinhte/vieclam/2006/03/548499/> (in Vietnamese)

90 World Bank et al, *Viet Nam Development Report 2007: Aiming High*, p. 121 (Vietnamese version).

91 CEDAW, Concluding Observations 2007, op cit, para 23.

92 Dang Nguyen Anh, 'Viet Nam Internal Migration: Opportunities and Challenges for Development', Country paper at Regional Conference on Migration and Development in Asia, Lanzhou, China 14-16 March 2005, p.10

93 *Ibid.*

94 See Vietnamese Academy for Social Sciences, *Viet Nam Poverty Update Report 2006*, op cit, p. 38-39

6.2 The special case of human rights in the agricultural sector

There is a coalition of economic, social and human rights reasons that warrant singling out the agriculture sector as a special case. Agriculture employs 60 per cent of Viet Nam's labour force,⁹⁵ and 45 per cent of the rural population live below the poverty line. Indeed, it is in rural areas that "more than 90 per cent of the country's poor people live and work".⁹⁶ The opening up of the sector to the forces of international trade will, at least in the short term, very likely compound this problem given the size and antiquated practices that predominate in the sector: farms are typically low yield, subsistence based and small – the average farm size being 0.7 hectare per household.⁹⁸ The World Bank predicts that, as land transactions become easier, the less productive (presumably poorer) households could be forced to sell some of their land to the more productive households, as market forces favour efficiency over egalitarianism.⁹⁹ It is envisaged that the size of rural sector employment will drop dramatically over the next five to ten years as people are 'pushed' out of the sector by competition, and 'pulled' out by the draw of alternative employment in the industrial and manufacturing sectors.⁹⁹ The human rights implications of these swift and significant shifts in circumstances of rural communities, and especially of the poor, will, at least in the short term, be profound, bearing out many of the specific human rights problems outlined above.

Agriculture employs 60 per cent of Viet Nam's labour force, and 45 per cent of the rural population live below the poverty line.

It is envisaged that the size of rural sector employment will drop dramatically over the next five to ten years as people are 'pushed' out of the sector by competition.

Certainly, there are now very significant human rights challenges facing the agricultural sector, but there are also some important opportunities that membership of the WTO will provide. We consider both the challenges and opportunities in turn.

6.2.1 Challenges

The competitiveness of Viet Nam's agricultural products is still low, largely due to low productivity, low quality and high cost, such as sugar, corn, soya bean, cotton, tobacco, milk and pork. Most of the processing factories are small and, as compared to their regional and global competitors, reliant on outdated technologies and equipment. Many of the commercial enterprises in rural communities are also relatively small and vulnerable to competition. It is estimated by the Ministry of Agriculture and Rural Development that about 70% of all enterprises operating in rural areas have a capital level less than 10 billion VND (US\$ 620,000). When import tax rates are reduced and non-tariff barriers are eliminated, local agriculture will have to face fiercer competition from imports. If efficiency and capacity are not increased, it is certain that enterprises will fail, jobs will be lost, and incomes and standards of living will decline.

95 Based on the period from 2000-2004, 58% of employed men and 62% of employed women worked in the agricultural sector. World Bank, *World Development Indicators*, 2006, at: http://devdata.worldbank.org/wdi2006/contents/Table2_3.htm.

96 Oxfam, *Extortion at the Gate: Will Viet Nam Join the WTO on Pro-development Terms?*, Briefing Paper 67 (October 2004), p. 11

97 *Ibid.*, p. 11

98 World Bank et al, *Vietnam Development Report 2006: Business*, op cit, p.150-151

99 World Bank, *Accelerating Viet Nam's Rural Development: Growth, Equity and Diversification*, Volume I: Overview, November 2005, p. 3, 13.

Vietnamese infrastructure, services and laws still suffer from a number of weaknesses and fail to meet international standards. Although the transportation system has been considerably improved, there are about 400 communes (or 6% of the total) that do not have vehicle-grade roads to their city centres, and 50% of all village roads are in poor condition. There is a lack of infrastructure in the agri-forest and aquatic products trade, including: a lack of specialised ports; high costs of goods loading and unloading (for example, the at-the-port cost per tonne of exported rice in Viet Nam is nearly twice that of Thailand); and a failure to ensure food sanitation standards and consumer protection.¹⁰⁰

The density of FDI is divided 34% in the industrial sector, 59% in the service sector, and 8% in the agriculture, forest and fisheries sector.¹⁰¹ Thus, a serious concern for the agricultural sector is that, in contrast to the manufacturing and textile industries, it has not attracted any significant FDI. According to the Ministry of Planning and Investment's 'Program to Attract FDI, 2006–2010', among the 94 target project requests for FDI for that period (collectively worth nearly US\$ 26 billion) there was only one successful project for agriculture-animal raising and forestry and four projects for aquaculture.¹⁰¹

The fact that the sector is dominated by small, family farmers and there is as yet a distinct lack of agri-businesses on the scale anything like that which exists in the West is a very significant contributory factor to this situation. It is being compounded by the marked increase in the conversion of farm lands into industrial zones. By 2005, land had been recovered from over 100,000 households for the development of more than 190 industrial zones and clusters.¹⁰³ It has been estimated that for around one third of displaced households such land conversion causes severe economic disruption, particularly when all productive land holdings are recovered in any given area. Residence is disrupted, typically insufficient notice is given by the local authorities and family members do not have the appropriate educational background or vocational skills to shift into new occupations.¹⁰⁴

Viet Nam is now being forced to liberalise its agricultural sector above and beyond the commitments of original WTO members.

On top of these inherent weaknesses, Oxfam has noted that as a consequence of its joining the WTO, Viet Nam is now being forced to liberalise its agricultural sector above and beyond the commitments of original WTO members. Of particular significance is the issue of export subsidies: while original members currently maintain export subsidies for agricultural products,¹⁰⁵ Viet Nam agreed to eliminate

100 Ministry of Agriculture and Rural Development, "Viet Nam's Agriculture: A Strategy Toward WTO", available at: http://epic.com.vn/resources/WTO_accession_agriculture_sector.pdf

101 Information from National Centre for Social Economic Information and Forecast, available in Vietnamese at: <http://thongtindubao.gov.vn/Default.aspx?mod=News&cat=12&nid=2810>

102 Bộ tài chính (Ministry of Finance), *Vì sao vốn FDI vào nông nghiệp quá ít?*, <http://www.mof.gov.vn/Default.aspx?tabid=612&ItemID=30907>

103 Vietnamese Academy for Social Sciences, *Viet Nam Poverty Update Report 2006*, *op cit*, p. 75

104 *Ibid.*

105 Export subsidies, up to a bound level, are permitted under the Agreement on Agriculture. While developed country WTO members have agreed to eliminate their agricultural export subsidies, the time frame for the elimination of export subsidies is the subject of ongoing negotiation in the Doha Round. In the most recent revision of the draft modalities on agriculture, circulated by the chairperson of the agriculture negotiations, Ambassador Crawford Falconer, on 8 February 2008, the deadline for export subsidy elimination by developed country members is 2013, while developing countries have until 2016. See WTO Committee on Agriculture Special Session, Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.1, (8 February 2008), p.26, paragraph 154-155, available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_feb08_e.pdf

all agricultural export subsidies immediately upon its accession, in response to pressure from developed country members of the Working Party.¹⁰⁶ Furthermore, under pressure from negotiating members, the average agricultural tariff which Viet Nam had to apply upon accession was 25.2 per cent, while its final bound tariff (following a phase-in period) will be 21 per cent¹⁰⁷ – a level that already threatens rural livelihoods and basic human rights standards, and which is more than 10 per cent lower than the average bound levels in neighbouring Thailand and the Philippines.¹⁰⁸

Certain key agriculture concessions have been gained that bear directly on human rights concerns. Thus, based on the rationale of food security, the right of foreign-owned enterprises to export rice remains restricted under the terms of Viet Nam's Accession Agreement, and it is not obliged to allow foreign-owned enterprises to export rice until 1 January 2011.¹⁰⁹ And while compliance with GATT required Viet Nam to lift its pre-accession import ban on tobacco products, the Government has responded, apparently based on protecting the right to health, by declaring that a single state-owned enterprise – the Viet Nam National Tobacco Corporation – shall be the sole importer of cigarettes.¹¹⁰

There are, further, two key agricultural sectors that remain especially vulnerable to post-accession competition – coffee and sugar production. In both cases this is because of their importance, not only within the country's economy, but also socially, in respect of the numbers of people who directly or indirectly depend on them in order to attain even the most minimal social and economic goods, and thereby secure such fundamental human rights as the rights to food, work, housing, education and an adequate standard of living.

Viet Nam is the world's second largest producer of coffee. As the cultivation and harvesting of coffee employs some 1.83% of the whole national labour force and 2.93% of the labour force in the agricultural sector,¹¹¹ the livelihoods of these rural households will be especially vulnerable as the market is quickly opened up to international competition. This has already been demonstrated very clearly in the case of coffee production. While a sharp price increase for most of the 1990s helped many coffee growers escape poverty, the price drop in the late 1990s and the early 2000s pulled them back into poverty. This was a major cause of sluggish reduction in poverty in the Central Highlands between 1998 and 2002. Many of the poor in the Central Highlands cannot participate in coffee production because they see it as "too risky".¹¹² As noted above, the export subsidies (including interest rate support, export bonuses, and financial support to cover losses in exportation) that Viet Nam traditionally provided to coffee producers had to be eliminated upon accession.¹¹³ Viet Nam's final bound *ad valorem* tariff on 'green' (un-roasted) coffee is 15%.

Export subsidies that Viet Nam traditionally provided to coffee producers had to be eliminated upon accession.

106 See note 65 above.

107 World Bank, *Taking Stock*, 2006, p. 15.

108 Oxfam, *Do as I Say, Not as I do*, *op cit*, p. 11

109 Working Party on the Accession of Viet Nam, Notification on State Trading Enterprises: revision, WT/ACC/VNM/14/Rev.1, 6 October 2006, p. 36.

110 *Ibid*, pp. 15-18.

111 See Viet Nam Coffee and Coca Association, available at: <http://www.vicofa.org.vn/CautrucNganh.aspx?request=cautruc>.

112 Vietnamese Academy for Social Sciences, *Viet Nam Poverty Update Report 2006*, *op cit*, pp. 47-8

113 See: WTO Working Party on the Accession of Viet Nam, Domestic Support and Export Subsidies in the Agricultural Sector: revision, WT/ACC/SPEC/VNM/3/Rev.7, 2 August 2006, p.15-16, and further see note 65 above.

Viet Nam retains the right to apply tariff rate quotas on sugar, to help protect its domestic industry.

The sugar industry in Viet Nam is also a crucial part of the economy, not so much for its size – a modest yield of about 970 thousand tonnes – but for its importance in the lives of millions of rural farmers who cultivate sugarcane, often in the poorest and most remote areas of the country. The government reported during the accession process there are currently “policies supporting the sugar sector aimed at improving the economic conditions and job creation in these disadvantaged regions”¹¹⁴ These measures have largely amounted to a movement away from the traditional production of sugar by way of household sugar mills, to the building of refineries that serve a whole community or region.¹¹⁵ There are now 44 sugar factories located in different areas with the participation of more than 1 million labourers. On its own, this initiative will not off-set the advantages that other sugar-producing countries have established by way of subsidies (EU sugar farmers gain € 833m of hidden support annually on nominally unsubsidised exports),¹¹⁶ or by way of market access preferences (such as the EU’s Sugar Protocol which, until recently, guaranteed EU purchase prices for the produce of certain African, Caribbean and Pacific (ACP) states).¹¹⁷ The sugar industry – or more especially the sugar farmers – will in fact continue to be heavily supported by the Vietnamese Government through its allocation to the sugar industry of the vast bulk of domestic support¹¹⁸ permitted to Viet Nam for the whole of the agriculture sector under the terms of its WTO accession.¹¹⁸ Further, Viet Nam retains the right to apply tariff rate quotas on sugar, to help protect its domestic industry against a surge of competitive imports.¹¹⁹

6.2.2 Opportunities

Viet Nam’s accession to the WTO grants to it ‘Most Favoured Nation (MFN)’ status.

All that said, joining the WTO will also create potential opportunities for the agricultural sector in Viet Nam to expand its export markets; though the key word here is ‘potential’. As a non-WTO member, Viet Nam had to contend with significant import tariff rates imposed on its goods, as well as many other non-tariff barriers (such as importing-country subsidies for its competing companies in the same market). But, in theory at least, Viet Nam’s accession to the WTO grants to it ‘Most Favoured Nation (MFN)’ status, which should thereby not only dismantle these barriers, but also, on account of its developing country status, actually provide Vietnamese agricultural products with some degree of preferential treatment in the global market.¹²¹ The extent to which practice might follow theory in this

114 WTO, Report of the Working Party on the Accession of Viet Nam, *op cit*, p 93, para. 369, per representative of Viet Nam.

115 *Ibid.*

116 Oxfam, *Do as I Say, Not as I Do*, *op cit*, p. 2. As such, Oxfam argues that “Viet Nam must be allowed to maintain an adequate level of protection for sensitive products, including sugar, maize, and animal products, on which many poor farmers depend”, *ibid.*

117 The long-standing arrangement has recently been denounced (September 2007); see http://trade.ec.europa.eu/doclib/docs/2007/september/tradoc_135921.pdf.

118 In the form of administered minimum purchase prices that sugar plants must pay to farmers for their sugarcane; WTO Working Party on the Accession of Viet Nam, Domestic Support and Export Subsidies in the Agricultural Sector: revision, WT/ACC/SPEC/VNM/3/Rev.7, 2 August 2006, p.13

119 Under the terms of its accession, Viet Nam is entitled to provide ‘amber box’ (that is, trade-distorting) domestic support measures to agricultural producers up to a value of 3.96 trillion dong (US\$ 246 million).

120 The within quota tariff rate for raw sugar is 25 per cent, increasing to much higher tariff rates for imports exceeding the quota. World Bank, *Taking Stock*, 2006, *op cit*, p.18.

121 Under the Accession Agreement, the initial reductions in tariffs protecting domestic industries are not especially significant in overall terms, though the picture differs from sector to sector (rice and tobacco for instance remain protected, whereas textiles, processed meats and fisheries will be more exposed to international competition).

case, is largely dependant on whether the Doha Round is true to its developing-country orientation and the current state of endemic agricultural protectionism in the West (especially in the EU and the US) is addressed.¹²² To be sure, there are economic and social arguments both ways on this issue, namely, that livelihoods and ways of life are at stake: in the EU and US if protectionist policies are substantially altered; and in countries like Viet Nam, if access to such markets is heavily qualified. But, there can be no doubt that the potential scale and extent of hardship faced by agricultural sectors in agrarian-based, developing economies like Viet Nam will be such that basic human rights to an adequate standard of living, housing, welfare, health care and even to food will be threatened in a way incomparable to that which might be experienced in the West.

The stabilization of the domestic socio-economic environment and the promise of further global economic integration have the potential to impact positively on foreign investments in agriculture. Even the comparatively modest total allocated FDI of US\$2.86 billion¹²³ for projects in agriculture (numbering 558 to date) has already made significant contributions to the development of Viet Nam's agriculture. Capacity has been enhanced, not only in investment capital, technologies and equipment, and markets, but also in infrastructure development. Some countries have made significant investments in Viet Nam's agriculture sector, namely Taiwan, Hong Kong, France and China.

The Government's integration policy in the sector is intended not only to create an open and flexible environment for inducing more foreign investment, but also to try to capitalise on the scientific, technical and technological cooperation, transfer and capacity building that, parallel to market access benefits, are significant proclaimed benefits for developing economies upon joining the WTO. Through foreign investment in agriculture, Viet Nam expects to participate more in science and technology cooperation programs which, through technology transfer, will enhance the capacity of Vietnamese agriculture in terms of improving its productivity, competitiveness, and quality of its produce.

In terms of what this means for human rights, the challenge of this potential will be to minimise the likely problems such openness will cause in the short-term, while maximising the hope for long-term benefits for the agriculture sector and those who depend on it.

A vital aspect of how the trade opportunities existing in all of the sectors discussed above can be exploited such as to advance the human rights of the Vietnamese people is what the paper now turns to consider. That is the question of whether and how well the main players, both inside and outside the country, understand the interrelationship between human rights and trade, and seek thereby to address human rights concerns through trade.

The stabilization of the domestic socio-economic environment and the promise of further global economic integration have the potential to impact positively on foreign investments in agriculture.

The challenge will be to minimise the likely problems such openness will cause in the short-term, while maximising the hope for long-term benefits.

122 On which see Dani Rodrik *The Global Governance of Trade: As if Development Really Mattered*, (UNDP, October 2001), pp.27-33. For a detailed analysis of the stalemate in the Doha Round negotiations between developed and developing countries, see: UNCTAD Trade and Development Board, 'Developments and Issues in the Post-Doha Work Programme of Particular Concern to Developing Countries', UN Doc. TD/B/54/5 (6 August 2007).

123 Ministry of Agriculture and Rural Development, "Viet Nam's Agriculture: A Strategy Toward WTO", op cit, p.8

7. Addressing human rights concerns through trade

The proposition that trade liberalisation will lead directly and inevitably to economic growth is itself questionable.

Even if we cannot prove ‘cause and effect’ between trade liberalisation and human rights, it is nevertheless incumbent on Viet Nam to adopt a reasonable risk analysis.

‘The still poor Viet Nam of today could choose to sacrifice clean air and water and biodiversity to achieve faster growth, but the richer Viet Nam of tomorrow would regret that choice.’

As this paper has demonstrated thus far, there are evident interconnections between economic development, trade expansion and human rights protection. As a general principle, human rights will be promoted in the development context where the exploitation of potential economic benefits yielded by membership of the WTO is pursued in a way such that social benefits, including distribution, are maximised and not just viewed as a corollary to economic gain that will take care of itself. Of course, the proposition that trade liberalisation will lead directly and inevitably to economic growth is itself questionable. The UNCTAD has mapped out the significant problems faced by many least developed countries in not being able to translate increased trade into economic growth, and thereby not being able to combat poverty and address the human rights problems that flow therefrom.¹²⁴ Even if, as is the case, we cannot prove ‘cause and effect’ between trade liberalisation and human rights, it is nevertheless incumbent on Viet Nam to adopt a reasonable risk analysis, which requires it to take cognisance of the relevance of human rights and minimise harm thereto.

It was with this concern in mind that the World Bank’s 2007 Socio-Economic Development Program (SEDP) Report focuses on *four* trade-offs (business, social, environmental and governance) that face Viet Nam as its economy develops.

First, for business development, the tension is between ‘investing massively’ and ‘investing well’, where the former approach is spurred by Viet Nam’s extensive infrastructure needs, and the latter approach focuses on ‘achieving efficiency in public projects and not crowding out private investment through excessive taxes or excessive levels of public debt’.

Secondly, regarding social inclusion, the tension is between ‘rapidly raising incomes in the economic hubs of the country’ and ‘the prospect that specific population groups, and especially ethnic minorities, could be left behind’. This social tension reflects the underlying conundrum of full integration into the global economy: on one hand, integration brings an ability to maximize market opportunities, and on the other, it exposes the country to market fluctuations and sudden downturns.

Thirdly, the environmental tension, which, as the World Bank notes, is the most obvious: ‘The still poor Viet Nam of today could choose to sacrifice clean air and water and biodiversity to achieve faster growth, but the richer Viet Nam of tomorrow (or the children of those who decide today) would regret that choice.’

Finally, the tension for governance is between ‘the need to delegate more responsibilities to local levels, or to stakeholders outside government’, and the ‘prospect of rampant moral hazard’. The government’s move from control to oversight will

¹²⁴ UNCTAD, *Least Developed Countries Report 2004*, op cit.

require increased accountability and transparency, which should aid in the gradual containment, and eventual elimination, of corruption.¹²⁵

Each of these trade-offs reflect, to varying extents, wide-ranging human rights concerns, from economic, social and cultural rights, such as worker's rights, the rights to food, health, education, adequate housing and standards of living, to the classic civil and political rights such as the right to non-discrimination, privacy, fair trial, freedom of association and movement, and even rights to free speech and political belief. In short, such trade-offs represent the dilemma highlighted by the celebrated economist Amartya Sen in his powerful argument for a wider understanding of the notion of 'development': namely, that development means more than merely economic gain (including by virtue of trade liberalisation); it must also encompass gains in political and personal freedoms to be truly meaningful.¹²⁶

Development means more than merely economic gain, it must also encompass gains in political and personal freedoms.

Three strategic issues

Of all the many factors that are likely to play key roles in the interaction between the domestic consequences of Viet Nam's expanded trade relations and the protection and promotion of human rights in the country over the next few years, we believe that there are three issues of particular, strategic importance: legal reform; business and human rights; and linking trade and human rights.

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I. Legal reform

In the years immediately prior to accession, the National Assembly embarked on a enormous program of reform of the administrative and business regulatory frameworks in Viet Nam. Across a vast range of matters – including banking, securities and investment, business establishment and competition laws, telecommunications, manufacturing, transport, infrastructure and construction, energy, power, water and resources management – many old laws were revised and new ones enacted to establish the legal foundations for WTO compliance.¹²⁷ The necessity and urgency of such a radical overhaul of the statute book has been well recognised by the Vietnamese authorities if the country was to meet the demands of WTO accession and, equally, if it was to exploit the economic and commercial potential that accession afforded it.

The Government commissioned an Inter-Agency Comprehensive Legal System Needs Report¹²⁸ in 2001 to assess the present situation and chart a path to 2010 of further, necessary changes. It is a notably candid account of the present and anticipated shortcomings of the legal system, highlighting the unsystematic, less than comprehensive and somewhat superficial nature of the changes thus far effected. And it is in this assessment that much of the actual and potential human rights problems and opportunities associated with Viet Nam's legal system lie.

¹²⁵ World Bank et al, Viet Nam Development Report 2007, op cit, p.ii

¹²⁶ Amartya Sen, *Development as Freedom* (2001)

¹²⁷ George Russell, 'Vietnam's WTO Membership: Impact on Business', *Asialaw*, 1 February 2007, 1.

¹²⁸ Inter-Agency Steering Committee, *Comprehensive Needs Assessment*, op cit.

They are, in fact, implicitly discernable rather than explicitly stated, for the Report is wholly oriented towards what needs to be done in order to better prepare Viet Nam for further international economic integration; it is not on its face concerned at all with the social, still less human rights, needs of the legal system. That fact, however, does not make these needs any less significant, just less recognised.

The Report notes the poor quality of the newly drafted laws (too often imprecise, open-ended and failing to implement the international standards they sought to incorporate); the constitutional inadequacies of how the organs or government (Executive, Assembly and Judiciary) interrelate in respect of devising and delivering legislative programs; how ill-trained are judges and ill-equipped are courts; how endemic is the lack of respect for the notion of the rule of law within nearly all levels of the public service; how inadequate are the provisions for legal aid; and how poor is the level and delivery of tertiary legal education (notwithstanding that there are now 12 institutions nationwide that have trained nearly 100,000 law graduates over the past 15 years or so). In combination, these shortcomings can lead to abuses of the key human rights of fair trial and equality before the law, without which, so many other rights – especially economic and social rights to housing, health, education, safe working conditions and adequate standard of living – are also infringed simply because of the inadequacies of the means of enforcement and redress. The systemic development of open, fair and robust legal institutions and processes is critical for Viet Nam, not only to attract and secure international trade and FDI, but also, at the same time, to ensure domestic compliance with its international human rights obligations.

The systemic development of open, fair and robust legal institutions and processes is critical for Viet Nam.

In respect of legal reform, trade and human rights are interlinked. This is evident, for example, in the steady growth of the private legal profession in the country and the increasing instance of foreign law firms establishing offices in Hanoi and Ho Chi Minh City.¹²⁹ Much of this growth has been in response to the greater need for legal services as commercial enterprise and international trade expands. Indeed the lengthy and complex negotiations that preceded both the US-Viet Nam BTA and accession to the WTO required significant legal input and thereby provided direct impetus to the development of local legal capacity as well as the importation of foreign legal expertise. Nevertheless, the number of Vietnamese lawyers in practice remains small (approximately 4,000)¹³⁰ and the number of those with any substantial understanding of international law miniscule (estimated to be around 50),¹³¹ although that is apparently set to change soon following the recent announcement by the Ministry of Justice that it will establish a special training program in international law and legal practice for an annual cohort of hand-picked young Vietnamese lawyers.¹³²

129 Mostly from Australia, Europe, Hong Kong and the US; see David Gantz, 'Doi Moi, the VBTA and WTO Accession: The Role of Lawyers in Vietnam's Cautious Embrace of Globalization' (2007) 41 *International Lawyer* 873, at 878.

130 Vào WTO, thiếu luật sư đồng hành với doanh nghiệp, available in Vietnamese at: <http://www.tbvtvn.org/default.asp?action=article&lD=734>

131 *Ibid.*

132 George Russell, *op cit.*

Irrespective of these changes, it cannot be said that the protection and promotion of human rights standards constitute the core business of foreign and local law firms working in Viet Nam today. However, there can be little doubt that their growing presence is an important factor in the strengthening of the concept and practice of the rule of law in a country which, twenty years ago, had no notion of what the rule of law entailed, had no functioning private legal profession and trained fewer than 500 lawyers per year.¹³³ It is through such a framework constructed by the increased recognition of, and respect for, the rule of law that human rights can be both better expressed and protected.

There is, by the Government's own estimation, much yet to be done to truly reform the legal system and the legal services sector such that they meet the demands of international trade and commerce, let alone those of international human rights laws. The approaches to be taken towards the building of Viet Nam's legal system and especially the education of its own lawyers need to be more integrated and more nuanced, such that the relationship between enhancing trade, economic development, poverty reduction and the protection of human rights are understood as part of a contiguous whole. As we discussed above, human rights issues are now acknowledged by the government as matters of concern, and to some extent their interrelationship with trade is recognised – a workshop that preceded this paper hosted by the Vietnamese Institute for Human Rights in the Ho Chi Minh National Political Academy on the human rights implications of accession to the WTO, and the recent publication by the same body of a university textbook on international human rights law which includes a chapter on the global economy and human rights,¹³⁴ being two examples of such recognition. But there is a patent need for more concerted efforts to be made by the Vietnamese Government itself, and by its international advisers or aid donors, to stress the interdependency of trade and human rights in the development of all aspects of the country's legal system, from the policy and legislative programs, through the implementation of policies and laws by the bureaucracy, to the operation of the courts and the training and education of judges and lawyers.

There is, by the Government's own estimation, much yet to be done to truly reform the legal system and the legal services sector.

II. Business and human rights

A crucial factor in the protection and promotion of human rights in Viet Nam at the broadest level is the degree to which the undoubted economic benefits yielded by the private sector can be harnessed for social ends; more specifically, but equally important, is the question of what the private sector can and should do directly to advance human rights standards. The first, broader contribution is secured largely through corporate taxation and the redistribution of wealth; the second, more particular question underpins the growing global movement towards making corporations socially (as well as economically) responsible for their actions, including in respect of human rights.

133 Gantz, *op cit*, 873.

134 Cao Đức Thái & David Kinley (eds) *International Human Rights Law* (The Publishing House of Political Theory, Hanoi; 2006), (in Vietnamese), chapter 10.

The private sector is the key driver of the country's integration into the international market economy, and its influence will only increase now that the Government itself is explicitly promoting private enterprise.

The World Bank counsels the Vietnamese Government not to prop up ailing enterprises, but rather to focus on the people affected.

The private sector is the key driver of the country's integration into the international market economy, and its influence will only increase now that the Government itself is explicitly promoting private enterprise.¹³⁵ Some 160,000 new corporations have been established since 1999 and the trend is set to continue in coming years, even if the vast majority of these businesses are small and vulnerable to competition, especially from international corporations.¹³⁶ At the same time, following accession to the WTO and the current flood of FDI into the country, the state's role in commerce is shifting from main player to regulator, as state monopolies and state owned enterprises are broken up and are increasingly exposed to domestic and international competition.¹³⁷ Increased integration into the world economy will both foster business activity and increase economic efficiency. But market forces will favour the productive over the less productive, the efficient over the inefficient, and this in turn will necessarily have social impacts. However, predicting which sectors or which regions will be hardest hit is difficult and imprecise.¹³⁸ In addressing the unforeseen consequences, the World Bank counsels the Vietnamese Government not to prop up ailing enterprises, but rather to focus on the people affected, though policies such as assistance to workers made redundant, and budget transfers, from the provinces benefiting the most from economic reforms to those who are adversely hit.¹³⁹ Thus, when corporations fail, the state is equipped to deliver on its social responsibilities. We ask now in this present section, what role must the private sector play in meeting its social responsibilities, and in preventing human rights abuses and promoting human rights protection.

Corporations, both foreign and local, are presently subject to an array of domestic regulations when operating in Viet Nam, and some of these embrace human rights matters, such as labour laws and workplace health and safety. Compliance with such mandatory laws forms part of the notion of corporate social responsibility (CSR). But CSR also includes going 'beyond compliance' to encompass corporations voluntarily promoting social (and human rights) goods within the realms of their respective spheres of activity and influence, such as supporting the local communities in which they work by providing education and health services, or infrastructure needs, or protecting cultural practices. It must be stressed that the primary responsibility for the guarantee of human rights still rests on the shoulders of the state, but, given the power and influence that corporations can have on the economic and social well-being of developing countries, political, legal and commercial pressures have grown such that corporations are now increasingly expected not just to desist from breaches of human rights, but actively to assist in their observance and fulfilment.

135 Instruments of the Xth Congress of the Communist Party of Viet Nam, April 2006; in Vietnamese.

136 Tấn Đức, 'Vi sao chưa có doanh nghiệp tư nhân lớn?', Information from the website of the Economic Fulbright in Viet Nam, available in Vietnamese at: http://www.fetp.edu.vn/inthenews/tbktsg190606_1.htm

137 As noted at note 61 above, the process of equitisation (privatisation) of former, often inefficient, State Owned Enterprises (SOEs) has resulted in job losses. However, uniquely in respect of SOEs, the Government operates a safety net for redundant SOE workers, providing severance pay packages. In 2002, the fund assisted just over 1000 workers at 34 SOEs; by 2005, the number of participating enterprises had risen to 868, with 46,815 workers receiving redundancy pay (World Bank et al, *Vietnam Development Report 2006: Business*, *op cit*, p.159).

138 Despite sophisticated attempts to predict the social impacts of WTO accession on sectors such as livestock, fisheries, rice, coffee and textiles, the bulk of assessments are inconclusive. World Bank et al, *Vietnam Development Report 2006: Business*, *op cit*, p.156

139 World Bank et al, *Vietnam Development Report 2006: Business*, *op cit*, p.150

The Government is, in fact, well aware of the phenomenon of CSR and of the need for it to be carefully promoted throughout the business community:

“For Vietnamese enterprises, good adoption of labor standards or CSR will certainly boost their competitiveness in the international markets. However, if improperly used, labor standards may turn to be a political issue or barrier to trade. Closely monitoring of the adoption of labor standards at national and enterprise levels is needed to work out appropriate responses.”¹⁴⁰

The rather euphemistically expressed concern about improper use of labour standards refers to the possibility that competitor businesses (and states) will be very quick to condemn Vietnamese enterprises should their standards of CSR overall, and labour standards especially, be considered inadequate. The MoLISA report goes on to stress the particular problem that local corporations “lack experience in keeping transparent records of CSR management and practice in their business.”¹⁴¹

There are already a number of CSR initiatives planned or in place in Viet Nam. Major transnational corporations (TNCs) operating in Viet Nam such as Adidas, Nike, GAP & Glaxo Smith Kline have their own codes of conduct and CSR programs; social audits using globally recognised social accountability standards such as SA8000 are undertaken by a number of international and local corporations; and the International Finance Corporation’s Mekong Private Sector Development Facility, promotes the ideas of social and environmentally sustainable business in its efforts to encourage and strengthen private enterprise in the region.¹⁴² There is also a joint Vietnamese-Danish CSR advisory firm operating out of Hanoi,¹⁴³ and the Swedish Government has recently sponsored a number of CSR workshops in the country.

These initiatives are in themselves of marginal significance given the scale of human rights problems facing the country. The vast majority of companies in Viet Nam are small enterprises which have no notion of CSR, focusing on bare survival. And while most large TNCs are avowed proponents of CSR, they routinely exercise their considerable market power by way of restrictive business practices to eliminate such local (and international) competition. Such practices, though permissible under WTO rules,¹⁴⁴ tend to have an especially detrimental effect on local business development in poorer countries.¹⁴⁵ Certainly, it cannot yet be said that the private sector, in either developed or developing economies, has greeted the prospect of enhancing the human rights component of CSR – through such initiatives as the UN’s Draft Human Rights Norms for Corporations – with enthusiasm; rather, corporate reactions have been almost universally sceptical, if not outright negative.¹⁴⁶

The vast majority of companies in Viet Nam are small enterprises which have no notion of CSR, focusing on bare survival.

140 MoLISA, Paper 18 (2004), *op cit*, pp.8-9

141 *Ibid*.

142 See <http://www.ifc.org/mpdf>.

143 CSR Vietnam Co. Ltd; see http://www.csvietnam.com/index.php?_MODULE=16&s=1

144 The Agreement on Trade Related Investment Measures (TRIMs) effectively sidesteps the question of restrictive trade practices.

145 See Oliver Morrissey and Yogesh Rai, ‘The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Transnational Corporations’ (1995) 31(5) *Journal of Development Studies* 702-724

146 See David Kinley and Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6(3) *Human Rights Law Review* 447-497

The task of promoting human rights observance through CSR in any developing country is enormously challenging.

Still, CSR is now a feature of the corporate landscape worldwide, and in Viet Nam, the idea has been introduced early in the country's development of the private sector, and to some extent it is being implemented in practice. The task of promoting human rights observance through CSR in any developing country is enormously challenging, but is one that is now considered essential if human rights are to be effectively protected in new and emerging market economies. Conspicuously successful initiatives such as the ILO-backed *Better Factories* program in Cambodia¹⁴⁷ which through systematic monitoring has demonstrably improved working conditions in hundreds of export garment factories, provide templates for what can be further achieved in Viet Nam.

III. Linking trade and human rights

Viet Nam's accession to the WTO opens up new opportunities and challenges in respect of promoting human rights goals through the WTO's formalised regulation of international trade relations. Broadly speaking, these fall into two categories: (a) through legal means, by defending its own actions or challenging those of other member countries, under the WTO's Dispute Settlement Mechanism (DSM); and (b) through political means, by way of negotiations on specific allowances and concessions, as well as on broader questions of the direction and emphasis of the WTO. It is strategically important for many reasons, including human rights, whether and how Viet Nam utilises these processes, as well as how others use it in respect of Viet Nam in the years to come.

(a) Legal means

It can be fairly said that the DSM is almost a 'human rights-free zone'. Human rights simply did not feature in the 1946-7 negotiations on the GATT; they were seen as irrelevant to question of the liberalisation of trade between states and were not, in any case, viewed as a problem for the democratic states that made up the original membership of the GATT.¹⁴⁸

There are various grounds under WTO treaties upon which the institution of protectionist measures by a country can be justified and some of these may bear on human rights concerns.

Although the term is absent from any WTO treaty provisions, there are various grounds under WTO treaties upon which the institution of protectionist measures by a country can be justified and some of these may bear on human rights concerns. These include so-called exceptions clauses, such as GATT Art XX which allows measures that are necessary to protect public morals, human life or health, items of cultural heritage, and the conservation of exhaustible natural resources, as well as restriction on products of prison labour,¹⁴⁹ and GATT Art XXI which exempts actions necessary for the protection of essential security interests. Under TRIPs (Art 31), there is also provision for the states to break patent restrictions (either by negotiated settlement or unilaterally) in circumstances of national emergency, for example to enable local manufacture of cheap generic medicines to counteract a health epidemic or emergency.¹⁵⁰

147 See <http://tr/www.betterfactories.org/>

148 Susan Aaronson & Jamie Zimmerman "Fair Trade?: How Oxfam Presented a Systemic Approach to Poverty, Development, Human Rights and Trade" 28(4) (2006) *Human Rights Quarterly* 998, at 1001.

149 These grounds are echoed in the Article 2.2 of the *Agreement on Technical Barriers to Trade* as legitimate objectives for the imposition of technical (ie product or process related) barriers to trade.

150 As successfully utilized by such countries as Brazil, India and Thailand.

In truth, however, there is not much in this list that provides substantial grounds for launching human rights based arguments in the WTO context. This is starkly demonstrated by the somewhat remarkable fact that the ‘product of prison labour’ exception mentioned above has never yet been invoked. More fundamentally, Ernst-Ulrich Petersmann has pointed out that few, if any, of the 220 WTO cases decided thus far have involved any significant arguments that might be characterised as having a human rights focus.¹⁵¹ There have been instances of heightened sensitivity to particular human health and environmental concerns in some cases, but overall the Dispute Panels and Appellate Body of the WTO have shown a marked disinclination to entertain human rights considerations in the cases before them.¹⁵² Some argue that this might change,¹⁵³ but whether or not this change occurs, it seems highly unlikely that the concerted push for raising human rights arguments in WTO disputes will come from developing countries such as Viet Nam.

When pursuing legal means to settle disputes or otherwise pressing for advantage under the rules of the WTO, developing countries are inherently disadvantaged as against developed states whose competitive edge regarding litigation & protoligation negotiations flows from their much greater familiarity with the system and their willingness and capacity to engage the best legal advice to advance their cause.¹⁵⁴ This is strikingly evident, for example, in the overwhelming statistics for the EC (86%) and the US (99%) as a party, or third party, to WTO dispute cases.¹⁵⁵ The Advisory Centre on WTO Law established by 8 European countries and Canada in 1999 to provide discounted-rate legal services to developing countries in pursuing (or defending) WTO disputes has done something to redress this imbalance,¹⁵⁶ and there is evidence, as Gregory Shaffer notes, that “many developing countries are learning to use the dispute settlement system more effectively”.¹⁵⁷

Viet Nam has already felt the harsh impact of the adept and concerted use by developed countries of legal avenues to promote their interests against those of Viet Nam. The designation of Viet Nam as a non-market economy¹⁵⁸ has made it especially vulnerable to US and EC anti-dumping duties, because the ‘normal value’ of products cannot be assessed against Viet Nam’s own distorted ‘market’, but is rather assessed against some other (inevitably much more expensive) mar-

151 Ernst-Ulrich Petersmann, “WTO Dispute Settlement, Developing Countries and Human Rights”, conference Paper, Prato, Italy, 21 June 2007, p.1.

152 See Robert Howse and Makau Mutua, ‘Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization’, (2000) International Center for Human Rights and Democratic Development, Montreal, at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>.

153 Lorand Bartels “Trade and Human Rights” in D. Bethlehem et al (eds) *Oxford Handbook of International Trade* (OUP, forthcoming, 2008).

154 Gregory Shaffer, “The Challenges of WTO Law: Strategies for Developing Country Adaptation” (2006) 5 *World Trade Review* 177.

155 *Ibid.*, p.186

156 The nine original signatories to the 1999 Agreement establishing the Advisory Centre on WTO Law were Canada, Denmark, Finland, Ireland, Italy, The Netherlands, Norway, Sweden and the United Kingdom. Switzerland acceded in 2004. The Centre became operational in 2001. See http://www.acwl.ch/e/index_e.aspx.

157 Shaffer, *op cit.*, p.197

158 Though not officially defined in any of the WTO agreements, a ‘non-market economy’ in the context of anti-dumping investigations, is one, like Viet Nam, which has a level of state intervention that prevents the market from operating freely.

The WTO's dispute settlement mechanism as presently configured has little capacity and still less inclination to operate as a vehicle for securing human rights objectives.

ket in the same products.¹⁵⁹ Three such disputes which were especially large and lengthy, have recently been concluded against Viet Nam: one regarding catfish and another involving shrimp brought by the US,¹⁶⁰ and the third regarding footwear with leather uppers brought by the EC.¹⁶¹ The consequent penalties levied against these industries in Viet Nam will adversely impact those who depend on these industries to make a living and thereby, necessarily, will impact on their levels of human rights fulfilment.

(b) Political means

The WTO's dispute settlement mechanism as presently configured has little capacity and still less inclination to operate as a vehicle for securing human rights objectives. Human rights concerns are hardly made more explicit in the 'political' realm of the WTO – that is, the realm in which competing interests are negotiated rather than litigated. But here at least, there is some latitude for developing countries to draw on a broader array of arguments to advance their positions, including those within the terms of the WTO that approximate to, or can accommodate more readily, human rights concerns. The Doha "Development" Round, begun in 2001, was intended to deliver on the promise of the WTO's Marrakesh Agreement, the Preamble of which provides that trade relations between members states

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

The Doha Round has yet to conclude and along the way it has encountered many problems principally focussed on conflicts between the Northern and Southern states over the continued high levels of agricultural subsidies and domestic support in the former. Undeniably, the mainly developing nations of the South have gained in political strength as, individually and collectively, they have honed their negotiating, analytical, networking and lobbying skills as the Round has progressed.

159 Though not officially defined in any of the WTO agreements, a 'non-market economy' in the context of anti-dumping investigations, is one, like Viet Nam, which has a level of state intervention that prevents the market from operating freely.

160 Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Federal Register 47909 (12 August 2003); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam, 70 Federal Register 5152 (1 February 2005). Also see: Joshua Startup, 'From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of "Free Trade" as a Non-Market Economy', 90 (2005) *Iowa Law Review* 1963.

161 Council Regulation (EC) No 1472/2006, 5 October 2006, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, OJ L 275/1 (6 October 2006). See also: UNDP, *Discretionary Rules: Anti-Dumping and Viet Nam's Non-Market Economy Status*, Policy Dialogue Paper 2006/4, Hanoi, November 2006, especially pp.20-29 for a discussion of the EC anti-dumping investigation on leather shoes.

Throughout all this, when human rights issues such as the right to health and an adequate standard of living, are raised (often by NGOs and commentators, rather than by states themselves), they have occupied more of a backstage role – at best, as important, but ancillary or derivative concerns to the front stage issues of increased trade and economic development. The successful promotion of human rights concerns, such as that which prompted the adoption of the 2001 Doha Declaration on the TRIPS Agreement and Public Health¹⁶² which essentially reiterated the pre-existing conditions under which compulsory licensing can occur, are the exceptions that prove this general rule.

In principle at least, the Doha Round provides the grounds upon which to pursue more development-oriented outcomes in trade, and thereby better realise human rights in developing countries such as Viet Nam. But for this to happen, trade has to be seen as a means to an end, not as an end itself. As Dani Rodrik argues “trade is useful only insofar as it serves broader developmental and social goals”.¹⁶³ Developing countries, he continues, “should not be obsessed with market access abroad, at the cost of overlooking more fundamental developmental challenges at home,”¹⁶⁴ and leeway should be accorded to countries who earnestly seek to address those challenges. Such an approach remains true to the ideals of the WTO as set out above, and clearly it opens up political space for countries such as Viet Nam to mount social arguments for the courses of economic action that they want to take. That said, such space can, and some argue¹⁶⁵ should, be limited where those arguments are themselves considered to act against democratic or human rights interests. This is in essence the rationale behind the Generalised System of Preferences (GSP) of the EU and US, both of which have arrangements that ‘reward’ developing and least developing countries that adhere to international labour standards and whose governments are non-communist (the US GSP) or who sign up to certain international human rights treaties (the EU’s so-called ‘GSP Plus’) with greater access to their domestic markets. Viet Nam however is not eligible for either of these on account of its Communist Party government (the disqualification for the US scheme) and not having ratified and implemented the required human rights treaties under the EU scheme.¹⁶⁶

“Trade is useful only insofar as it serves broader developmental and social goals”.

Evidently, the room to manoeuvre and seek advantage in the political realm of the WTO’s universe serves richer states as well as it does poorer states, and often better. Furthermore, there is a marked tendency for all states to descend to particularised, tit-for-tat bargaining, which, as illustrated by the current state of the WTO Agriculture negotiations, can lead to horrendously complex, compromised and highly technical settlements that overall favour the strongest developed na-

162 See http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

163 Dani Rodrik, op cit, pp.27-33.

164 Ibid

165 Rodrik, p.30.

166 Though Viet Nam is covered by the so-called ‘general arrangement’ component of the EU’s GSP scheme by virtue of being a developing country. To be eligible for GSP Plus, a developing country must have ratified and effectively implemented sixteen core human and labour rights conventions, and at least seven other conventions relating to the environment, narcotics, and governance principles, as listed in Annex III of Council Regulation No 980/2005 of 27 June 2005, [2005] OJ L169/1. The sixteen compulsory conventions are the ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, the Genocide Convention, the Apartheid Convention, and the eight fundamental human rights conventions of the ILO. Viet Nam has not ratified four of these compulsory conventions – namely, the CAT, and three of the eight core ILO Conventions – see Part 2 above (text accompanying note 26).

Bi-lateral trade agreements which inevitably favour the powerful over the weak and dilute the overall protective reach (albeit limited) of multi-lateral agreements such as the WTO.

tions (in this case the US and the countries of the EU).¹⁶⁷ It also can, and has, lead to an upsurge in the negotiation of bi-lateral trade agreements which inevitably favour the powerful over the weak and dilute the overall protective reach (albeit limited) of multi-lateral agreements such as the WTO.

The consequences for protection of human rights in this milieu are mixed. For on the one hand, their putative promotion through such trade conditionality as the GSPs of the US and EU may be welcomed, but on the other hand the same and other developed states may, through their relentless pursuit of trade liberalisation, be held responsible for the diminution or destruction of the livelihoods of millions of people in developing states, and the denial of human rights that flows there-from. It is a dilemma recognised by the WTO's Director-General himself when he talks of the need for a new "Geneva Consensus", even if he and all others who think like him have yet to devise the means to solve it, and even if the "costs of adjustment" in human rights terms are to be inferred rather than explicitly stated:

"We cannot ignore the costs of adjustment, particularly for the developing countries, and the problems that can arise with the opening up of markets. These adjustments must not be relegated to the future: they must be an integral part of the opening-up agenda. We must create a new "Geneva consensus": a new basis for the opening up of trade that takes into account the resultant cost of adjustment. Trade opening is necessary, but it is not sufficient in itself. It also implies assistance: to help the least-developed countries to build up their stocks and therefore adequate productive and logistical capacity; to increase their capacity to negotiate and to implement the commitments undertaken in the international trading system; and to deal with the imbalances created between winners and losers from trade opening — imbalances that are the more dangerous to the more fragile economies, societies or countries. Building the capacity they need to take advantage of open markets or helping developing countries to adjust is now part of our common global agenda."¹⁶⁸

All states – developed and developing alike – will need to participate in this broad-ranging, political exercise if any progress along these lines is to be made. And as such, questions of what can and cannot be achieved by using trade to better protect human rights generally, and specifically in respect of Viet Nam, will have to play a significant part.

167 Namely, the 2007 'Falconer text', available at http://www.wto.org/english/tratop_e/agric_e/chair_texts07_e.htm. See Brett Williams, 'The Falconer Draft Text for the Doha Round WTO Negotiations on Agriculture – A 'Ha'port of Tar' to Save the Vessel from Sinking or Just a Dab of Paint on an Irreparably Broken Hull?' (2007) 30(2) UNSW Law Journal 368-408

168 Pascal Lamy, "Humanising Globalization", 30 January 2006, at http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm.

8 Conclusions

A direct and inevitable consequence of Viet Nam's tigerish economy and its increasing international presence has been that greater attention is being paid to its non-trade as well as trade policies, actions and performances. In this paper, we have sought to demonstrate that, in respect of human rights and trade issues, this attention poses both challenges and opportunities for the country and its people, as well as for those countries with which it trades. In the modern context of seemingly inexorable globalisation, the tripartite concerns of trade, development and human rights are intimately intertwined. This much can be inferred from the declared *raison d'être* of the WTO itself; from instances in which various combinations of their interrelations are trumpeted as being of vital importance by civil society organisations, and by some states; and from the Vietnamese Government's own *White Paper on Human Rights* as to the nature and significance of human rights to the country's fortunes, domestically and internationally (albeit somewhat guardedly).¹⁶⁹

In the new post-WTO accession era, all stakeholders in Viet Nam's progress towards making trade work for the betterment of the human rights of its people have roles to play – namely, the WTO itself, trading partners, the private sector (both local and foreign), civil society and expert commentators, and 'social intergovernmental organisations' such as the UN and its agencies and the ILO. But above all, the principal responsibilities and opportunities lie with the Government of Viet Nam. It is the international negotiator; the regulator of trade and commerce within its borders; the guardian of human rights in the country; and, ultimately, the agent of social, economic and (especially) political change. Managing the tensions and complementarities between these tasks will be no easy feat for the Government, but it is one over which it now has no choice but to accept.

In the modern context of seemingly inexorable globalisation, the tripartite concerns of trade, development and human rights are intimately intertwined.

¹⁶⁹ *White Paper on Human Rights*, op cit, pp.4-5, wherein the Government stresses the principle of non-interference in a state's internal affairs at the same time as accepting the need for international cooperation, and its insistence on the interdependency of development and human rights.

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