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Beyond TPP: Legal Reform for Financing Intellectual Property and Innovation in Vietnam

*Xuan-Thao Nguyen**

Chapter 18 of the Trans-Pacific Partnership (TPP) trade agreement dictates a robust regime of intellectual property rights, protection, and enforcement beyond the existing Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and the bilateral agreement signed between Vietnam and the United States.¹ Other scholars have focused on the specific types of intellectual property, such as trademarks, patents, copyrights, trade secrets, and biologics, along with recommendations for implementation of compliance by Vietnam. No scholars have discussed the legal reform necessary to encourage financing for innovation in Vietnam. This essay posits that in order for Vietnam to become a creator of new ideas, intellectual property, and innovation, the country urgently needs legal reform relating to financing innovation. Startups, entrepreneurs, and small businesses cannot develop new ideas and technology without access to credit for business operation and growth.

Legal reform in the area of financing innovation requires additional revisions of Vietnam's newly revised secured transactions law and the newly adopted insolvency law, along with an amendment to the existing intellectual property law.

I. RECOMMENDATION TO REVISE SECURED TRANSACTIONS LAW AND INSOLVENCY LAW

The idea that good laws and regulations enhance economic growth is not novel. Good laws and regulations set the standards and rules of conduct which participants (businesses and individuals) adhere to while engaging in their respective economic transactions and activities. Consequently, productivity outcomes from businesses and individuals have a direct impact on economic growth. Laws and regulations affect all stages of a business, from its creation and operations to insolvency. Likewise, they affect all stages of individual growth and development. The government, as the creator of laws and regulations, can remove barriers, improve efficiency, and overall create an environment that fosters entrepreneurship and innovation for both businesses and individuals.

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1. See Trans-Pacific Partnership, OFFICE OF THE U.S. TRADE REP. arts. 18.2–.3, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>; see also Carlos A. Primo Braga, *TPP: The New Gold Standard for Intellectual Property Protection in Trade Agreements?*, HUFFINGTON POST (Mar. 24, 2016, 10:35 P.M.), http://www.huffingtonpost.com/eastwest-center/tpp-the-new-gold-standard_b_9544428.html.

It is now well established that legal reforms in a combination of areas relating to business entry, contract enforcement, secured transactions, and bankruptcy or insolvency laws have been shown to be most effective for economic growth in developing countries.² With respect to secured transactions law, Vietnam recently revised its enormous Civil Code, which covers, *inter alia*, property law, torts law, contract law, family law, employment law, wills and trusts law, and secured transactions law.³ Vietnam has embedded secured transactions law structurally deep within the complex layers of its Civil Code due to the mistaken, dated belief that secured transactions are merely *civil* and should belong in *Civil Code*.⁴ According to the international community, as seen in the United Nations Commission on International Trade Law (UNCITRAL),⁵ secured transactions law primarily focuses on enhancing credit availability to companies.⁶ By that same logic, secured transactions should not be thought of as simply *civil*. By trapping secured transactions in the Civil Code, any revision to secured transactions law must have to wait until the other laws in the Civil Code also need revision.⁷

In addition, Vietnam did not revise its secured transactions law in accordance with the model UNCITRAL Legislative Guide adopted by the international community.⁸ The Legislative Guide for Secured Transactions provides

2. See, e.g., Katharina Pistor, *The Standardization of Law and Its Effect on Developing Countries*, 50 AM. J. OF COMP. L. 97 (1964); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1 (1998).
3. The new Civil Code became effective January 1, 2017. *Civil Transactions Under the New Civil Code 2015*, VIET. L. INSIGHT (Dec. 31, 2015), <https://vietnamlawinsight.com/2015/12/31/civil-transactions-under-the-new-civil-code-2015-vietnam-law-insight/>. The Vietnam government has an English copy of the Civil Code; see VIETNAM CIVIL CODE, Law No. 91/2015/QH13 (Viet.), <http://hethongphapluatvietnam.com/law-no-91-2015-qh13-dated-november-24-2015-the-civil-code.html>.
4. See Xuan-Thao Nguyen & Bich Thao Nguyen, *Transplanting Secured Transactions: Trapped in the Civil Code for Emerging Economy Countries*, 40 N.C. J. INT'L L. 1, 5–6 (2014) (a comprehensive critique of Vietnam's secured transactions law).
5. See Comm'n on Int'l Trade Law, Rep. on the Work of Its First Session, at 2–3, U.N. Doc. A/7216 (1968) (United Nations established UNCITRAL through G.A. Res. 2205 (XXI) (Dec. 17, 1966) to promote the progressive harmonization and unification of international trade law.).
6. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2010), http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf [hereinafter UNCITRAL LEGISLATIVE GUIDE].
7. Nguyen & Nguyen, *supra* note 4, at 23.
8. Compare UNCITRAL LEGISLATIVE GUIDE, *supra* note 6, with VIETNAM CIVIL CODE, *supra* note 3, art. 293–376.

a clear and concise unitary approach to encourage credit availability to businesses through the use of movable, tangible, and intangible property as collateral to secure repayments of loans and credit.⁹ The Legislative Guide replaces all antiquated security devices with a unitary system that, in pertinent part, includes logical steps for the creation of security interests, attachment of security interests, methods of perfection of security interests against a third party, and priority of conflicting security interests.¹⁰

9. The Legislative Guide provides the following objective and framework:

The overall objective of the Guide, which was adopted by the General Assembly on 11 December 2008, is to promote low-cost credit by enhancing the availability of secured credit. To assist States in modernizing their secured transactions laws, the Guide contains commentary and legislative recommendations on all issues that need to be addressed in a modern law on security rights in all types of movable asset, tangible or intangible (including goods, equipment inventory, receivables, letters of credit, bank accounts, negotiable instruments, negotiable documents and intellectual property). The Guide follows a functional approach and integrated approach to secured transactions, relying on a concept of “security right” that includes all types of right in movable property created by agreement to secure payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, as well as on a public registry that provides notice of a security right to third parties. As a result, the Guide applies to secured transactions, retention-of-title sales, financial leases, transfers of goods and assignments of receivables for security purposes, as well as (for limited purposes) outright assignment of receivables.

U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS (2007), http://www.uncitral.org/uncitral/en/uncitral_texts/security/Guide_securedtrans.html (last visited May 16, 2017).

10. *See id.*; *see also* UNCITRAL LEGISLATIVE GUIDE, *supra* note 6, at 19–26. Also, in the early date of drafting the Legislative Guide, the drafters of the Legislative Guide observed, as reported by the Secretary-General on Security Interests:

[B]y treating all forms of security interest in one statute, it is easier to regulate conflicts in priority between different security interests in the same secured property which arise through different financing transactions. One such example is the conflict between the financier of book debts, sometimes called a factor, and the unpaid seller of goods who reserved title to the goods and claims an interest in the book debts which arose as a result of the resale of the goods. In a case such as this it is technically difficult to devise a satisfactory solution to the conflict in priorities so long as the rights of the financier of the book debts and the unpaid seller of the goods are governed by different statutes.

U.N. Secretary-General, *Security Interests, Issues to be Considered in the Preparation of Uniform Rules*, ¶ 9, U.N. Comm’n on Int’l Trade Law, U.N.

Unfortunately, Vietnam still clings to some of the antiquated security devices.¹¹

The Legislative Guide does not cover the use of land, buildings, and houses as collateral in secured transactions due to the reality that most businesses do not own such property, and nations have their own unique history and cultures with real property.¹² Unfortunately, Vietnam's secured transactions law covers both movable and immovable assets,¹³ which generates great confusion. Vietnam still mixes the use of buildings, houses, and real estate with movable assets as collateral in the same body of secured transactions law.¹⁴

It is time for Vietnam to consider joining the international community and adopt the UNCITRAL Legislative Guide for Secured Transactions. Vietnam may need to separate secured transactions law from the massive and complicated Civil Code, as advocated in *Transplanting Secured Transactions*.¹⁵

If it does adopt the UNCITRAL approach, Vietnam will essentially recognize that intangible property—such as patents, copyrights, trademarks, trade secrets, databases, and licenses—are today's valuable assets owned by businesses. Such a recognition would allow businesses to use these types of intangible assets as collateral in obtaining financing for business operations and growth. Recognizing that intellectual property assets represent valuable business assets, the international community prepared the *Supplement on Security Rights in Intellectual Property (Supplement)* to the UNCITRAL's *Legislative Guide for Secured Transactions*.¹⁶ Vietnam should consult the Supplement in its next revision of its secured transactions law.

Secured transactions law is intrinsically tied to bankruptcy law, as some businesses become insolvent and creditors subsequently clamor to salvage whatever assets remain.¹⁷ The orderly distribution of a bankruptcy estate is important to all creditors and society as a whole. Secured creditors have pri-

Doc. A/CN.9/186 (May 16, 1980), *reprinted in* [1980] 11 U.N. Comm'n on Int'l Trade Law Y.B. 89, 90, U.N. Doc. A/CN.9/SER.A/1980.

11. See Nguyen & Nguyen, *supra* note 4, at 3.
12. See UNCITRAL LEGISLATIVE GUIDE, *supra* note 6.
13. See Nguyen & Nguyen, *supra* note 4, at 33–34.
14. *Id.*
15. *Id.* at 52.
16. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS: SUPPLEMENT ON SECURITY RIGHTS IN INTELLECTUAL PROPERTY, U.N. Sales No. E.11.V.6 (2011), https://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf [hereinafter UNCITRAL SECURED TRANSACTIONS SUPPLEMENT].
17. See, e.g., 11 U.S.C. § 547(b) (2005).

ority over unsecured creditors in the distribution order.¹⁸ Bankruptcy law provides a legal framework to keep viable businesses operating, allow inefficient businesses to die and reallocate capital to efficient businesses.¹⁹ Again, Vietnam needs to join the international community in revising its new, yet inadequate, insolvency law. Vietnam should look to the UNCITRAL's *Legislative Guide on Insolvency Law* for guidance.²⁰ Further, Vietnam should recognize the intersection of bankruptcy and intellectual property laws, as it relates to various crucial questions. What if the bankruptcy estate includes intellectual property assets? What if the bankrupt debtor is a licensor or licensee of certain intellectual property? And, what are the rights of the non-debtor licensor or licensee?

II. RECOMMENDATION TO REVISE INTELLECTUAL PROPERTY LAW

Vietnam's legal system is already familiar with intellectual property assets. In 2016, *Forbes* identified the forty most valuable trademarks in Vietnam.²¹ These trademarks are household names concentrated in the consumer goods and banking finance sectors.²² Most of the valuable trademarks have garnered goodwill after Vietnam began to liberalize its economy.²³ Leading the pack is the Vinamilk trademark, with a staggering valuation of \$1.52 billion.²⁴

With respect to innovation, Vietnam is still very weak in comparison to other countries around the world.²⁵ Though the country has many favorable factors for innovation, including "substantial national education effort and good secondary education performance," "good reputation in science and technology (S&T) fields such as mathematics, and specialization in agricultural research and biology," "geographical location in one of the world's

18. GINSBERG & MARTIN ON BANKRUPTCY § 10.09(A) (5th ed. 2017).

19. Elena Cirmizi & Leora Klapper, *The Challenges of Bankruptcy Reform*, 27 WORLD BANK RES. OBSERVER 185, 185 (2011).

20. See U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2005), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

21. See Manh Thang, *Forbes Announces Vietnam's 40 Most Valuable Company Brands*, VIETNAMNET BRIDGE (June 29, 2016), <http://english.vietnamnet.vn/fms/business/159675/forbes-announces-vietnam-s-40-most-valuable-company-brands.html>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *A Review of Science, Technology and Innovation in Vietnam*, WORLD BANK (2017), <http://www.worldbank.org/en/country/vietnam/publication/a-review-of-science-technology-and-innovation-in-vietnam> (last visited Jan. 24, 2018).

most dynamic regions,” and “attractiveness for investment by multinational enterprises,” there are many weaknesses that first must be addressed in order for Vietnam to further develop a modern and innovative economy.²⁶ There are opportunities for Vietnam to develop into an innovative economy.²⁷ For instance, with respect to the legal framework necessary for its development into an innovative economy, Vietnam must consider revising its existing intellectual property law. Going forward, Vietnam can no longer draft or revise its intellectual property law without devoting some attention to the intersection of intellectual property with, *inter alia*, secured transactions law and bankruptcy law. As Vietnamese businesses are creating their own intellectual property assets, those businesses will inevitably seek financing through their most valuable assets: intellectual property. How should the lender’s or creditor’s respective security interests in trademarks, copyrights, and patents be perfected against a third party? Where will the registration of such security interests occur? Should the registration of security interests in trademarks’, copyrights’, and patents’ collateral be administered by the National Registration Agency for Secured Transactions under the Ministry of Justice of Vietnam? Or should the registration of security interests in trademarks’ and patents’ collateral be administered by the National Office of Intellectual Property? If copyrights are used as collateral in a secured transaction, where will registration to perfect the security interest against a third party take place? Is the court system competent and capable in addressing intellectual property-related disputes? Are court decisions transparent?²⁸

26. The World Bank identifies several weaknesses of Vietnam’s science, technology, and innovation system, including:

- Low levels of productivity and income
- Inadequate framework conditions and disincentives for innovation
- Limited access to finance for enterprises
- Inefficiencies in state-owned enterprises
- Infrastructure deficiencies
- Weak performance of the teaching and learning system
- Low level of sophistication of production and exports
- Little innovation and even less research and development capacity in the business sector
- Weak performance of public-sector research
- Weaknesses in the S&T infrastructure as regards laboratories and research equipment
- Seriously underdeveloped information base for innovation policy making
- Inadequate STI governance arrangements and policy implementation

Id. (formatting altered and bullet-points added).

27. *See id.*

28. Currently, Vietnamese courts avoid intellectual property disputes. Instead, administrative proceedings represent the dominant venue for solving intellectual property matters. *See* Oliver Massmann, *Intellectual Property Rights Enforcement in Vietnam*, DUANE MORRIS VIET. BLOG (Mar. 30, 2015) <https://blogs>

Furthermore, in the event that an intellectual property holder licenses a trademark or copyright, Vietnam should contemplate whether the licensees should be permitted to use the licensed intellectual property right as collateral for their own financing. This concern, and many others, should be addressed when Vietnam eventually revises its existing intellectual property laws. Vietnam should consult the *Supplement to the UNCITRAL's Legislative Guide for Secured Transactions* for guidance in revising its intellectual property law.²⁹

III. CONCLUSION

Implementing the TPP/IP Chapter requires Vietnam to think beyond the TPP for its long-term economic development—that is, if Vietnam seeks to become a nation focused on innovation, rather than simply acting as a source of cheap labor. Legal reform in the areas of secured transactions and bankruptcy law, in accordance with UNCITRAL and international best practices, is needed, with special attention to the revision of Vietnam's current intellectual property laws.

.duanemorris.com/vietnam/2015/03/30/intellectual-property-rights-enforcement-in-vietnam/.

29. See UNCITRAL SECURED TRANSACTIONS SUPPLEMENT, *supra* note 16.