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THE U.S./VIETNAM BILATERAL TRADE AGREEMENT: ANOTHER STEP IN THE RIGHT DIRECTION

JUSTIN M. PEARSON*

I.	INTRODUCTION	431
II.	RECENT HISTORY OF U.S./VIETNAM RELATIONS	432
III.	RATIFYING THE AGREEMENT	436
IV.	OVERVIEW OF THE BILATERAL TRADE AGREEMENT	438
	A. <i>Chapter 1- Market Access for Goods</i>	438
	B. <i>Chapter 2 – Intellectual Property Rights</i>	439
	C. <i>Chapter 3 – Trade in Services</i>	439
	D. <i>Chapter 4 – Investment</i>	441
	E. <i>Chapter 5 – Business Facilitation</i>	441
	F. <i>Chapter 6 – Transparency and Right to Appeal</i>	441
V.	WHAT THIS MEANS FOR VIETNAM	442
	A. <i>Why This Agreement is Necessary</i>	442
	B. <i>Can Vietnam Possibly Become Another Asian Tiger?</i>	443
	C. <i>Can the Socialist Government Coexist with a More Open Market?</i>	446
VI.	WHAT THIS MEANS FOR THE UNITED STATES	449
VII.	CONCLUSION	450

I. INTRODUCTION

Few Bilateral Trade Agreements (“BTAs”) have the historic and long-term implications of the recently signed U.S./Vietnam agreement.¹ In fact, this BTA constitutes not merely a trade agreement, but a statement that Vietnam is finally ready to enter the world economy. Although Vietnam will eventually reap substantial rewards from this action, Vietnam’s current regime may not be equipped to deal with the changes in store for it in the near future.

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¹ Cf. Ben Bradlee, Jr., *Market Leninism-The Global Economy is Forcing Hanoi to Tiptoe Down a Free Market Track. But Can an Aging, Calcified Politburo Control the Speed of Change and Keep Business From Reforming Itself Out of Business*, THE BOSTON GLOBE (Apr. 30, 2000), available at Westlaw, 2000 WL 3324745.

By way of background, it is good to note that BTAs are a relatively common occurrence in today's interdependent world economy.² For example, there are at least twenty-two BTAs currently in existence between Japan and the United States alone.³ There are numerous reasons why nations enter into these agreements with the United States.⁴ Many of the most developed nations want to market their products in the U.S., as well as strengthen bonds with the most powerful nation in the world.⁵ Less developed countries hope these agreements will lead to Foreign Direct Investment ("FDI") in their countries by providing investors with a sense of security.⁶ While Vietnam may have had these objectives in mind, it also knows that the BTA will bring Vietnam one giant step closer to being allowed to join the World Trade Organization ("WTO").⁷

BTAs are important to the U.S. as well. While in 1960, U.S. imports and exports only totaled about 9% of GDP, that amount is now about 30%, and should be around 40% by the year 2010.⁸ Additionally, 95% of the world's consumers live outside of the U.S.,⁹ and American businesses obviously would like to sell products in many of these foreign markets. In particular, emerging markets in Latin America and Asia are growing four times faster than our traditional export markets, making BTAs with countries such as Vietnam integral to the U.S.' long-term economic strategy.¹⁰

II. RECENT HISTORY OF U.S./VIETNAM RELATIONS

What makes this agreement most startling is how far apart these countries were just a few years ago. These two countries had almost no official relationship until only about twelve years ago, and did not even exchange ambassadors until 1997.¹¹ Although BTA negotiations occurred

² Alan P. Larson, Assistant Secretary of State for Economic & Business Affairs, *The Importance of International Trade*, Foreign Policy Town Meeting, Washington, DC (Nov. 15, 1996), available at <http://www.state.gov/www/issues/economic/961115.html>.

³ *Id.*

⁴ *Cf. id.*

⁵ *Id.*

⁶ See N.Y. TIMES, *U.S., Vietnam Reportedly Agree on Trade Accord; Analysts: Deal to Lower Tariffs Could Spur U.S. Investment in Asian Nation* (July 13, 2000).

⁷ *See id.*

⁸ *See Larson, supra* note 2.

⁹ *Id.*

¹⁰ *See id.*

¹¹ *See* White House Press Secretary, *Vietnam Bilateral Trade Agreement; Historic Strengthening of the U.S.-Vietnam Relationship* (July 13, 2000), available at http://www.state.gov/www/regions/cap/fs-us-vietnam_trade_000713.html.

relatively recently, to fully understand the significance of this agreement, we must begin our review about a quarter century ago.

It seems that no discussion of Vietnam can begin without mentioning the Vietnam War. In fact, the search for the remaining American MIAs in Vietnam was an issue in the BTA talks,¹² so the Vietnam War is where I shall start as well. In 1973, the Paris Peace Accords were signed, ending the hostilities between the U.S. and North Vietnam.¹³ With the American presence gone, Saigon fell in 1975, and the North Vietnamese communists overthrew the South Vietnamese government, effectively reunifying the country.¹⁴ The Socialist Republic of Vietnam was proclaimed on July 2, 1976.¹⁵

In 1977 and 1978, President Carter tried to open normalization talks with Vietnam, but the talks ended in failure as President Carter decided to give priority to normalization talks with China.¹⁶ In 1979, Vietnamese troops invaded Cambodia, leading Chinese troops to invade Vietnam.¹⁷ At first glance, some may find this to be surprising. Given the similar political ideology of China and Vietnam, one might expect the two Southeast Asian neighbors to be close allies. Instead, their proximity has led to numerous relatively minor disputes, the result being a Vietnamese view of China as a bully who will always be looking down upon the smaller country.¹⁸

This period from the end of the American-Vietnam War until about 1985 is known in Vietnam as "the ten dark years," because it is thought of as a time of continual war and widespread hunger.¹⁹ Vietnam's government accidentally caused much of this hunger when it botched the buying and selling of rice, causing some stockpiles to waste or spoil.²⁰ This led to the

¹² See U.S. Department of State, Bureau of East Asian and Pacific Affairs, *U.S.-Vietnam Trade Relations: Jackson-Vanik Waiver, Fact Sheet* (June 17, 2000), available at http://www.state.gov/www/regions/cap/fs-vietnam_trade_990617.html. See also Stanley O. Roth, Assistant Secretary of State for East Asian and Pacific Affairs, Statement Before the House International Relations Committee, Subcommittees on Asia-Pacific Affairs and International Economic Policy and Trade, Washington, DC (Sept. 19, 2000), available at http://www.state.gov/www/policy_remarks/2000/000919_roth_hirc.html.

¹³ ASIA & PACIFIC REVIEW WORLD OF INFORMATION, *Vietnam: Country Profile* (Sept. 6, 2000), available at Westlaw, 2000 WL 26666831.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Agence France-Presse, *Key Dates in U.S.-Vietnamese Relations Since 1975* (Sept. 14, 2000), available at Westlaw, 2000 WL 24710706.

¹⁷ See Roth, *supra* note 12.

¹⁸ See THE ECONOMIST INTELLIGENCE UNIT LTD., *Country Forecast Vietnam October 2000 Updater* (Oct. 9, 2000), available at Westlaw, 2000 WL 28628065.

¹⁹ Bradlee, *supra* note 1.

²⁰ *Id.*

announcement in 1986 that running farms as a collective had failed.²¹ For the first time, the Politburo (Vietnamese government) allowed farmers to buy or lease the land they farmed, then keep and sell what they harvested.²² This new policy led to surprisingly positive results.

In December 1986, after recognizing the economic failure of the last ten years and believing its recent rice success could be applied to other economic problems, the Vietnamese government announced a new policy of Doi Moi, or renovation.²³ These reforms have also been referred to as *Market Leninism*, although experts point out that they were still more Lenin than market.²⁴

The reforms of 1986 were followed by the authorization of foreign investment in 1987.²⁵ By 1989, Vietnam withdrew from Cambodia and began seeking admission into regional organizations.²⁶ The U.S. government saw this as a signal that Vietnam intended to play a positive role in the regional security and economic liberalization of Southeast Asia.²⁷

Vietnam adopted a new constitution in 1992.²⁸ One extraordinary aspect of this constitution is an express guarantee that foreign investments shall not be nationalized.²⁹ In 1993, President Clinton authorized the United States to support international lending for Vietnam.³⁰ He also decided to allow U.S. firms to join in Vietnamese development projects.³¹ In 1994, Clinton lifted the economic embargo to allow U.S. firms to export to Vietnam and compete for business opportunities that had been closed.³²

Vietnam joined the Association of Southeast Asian Nations ("ASEAN") in 1995.³³ That same year, the United States opened normal diplomatic relations with Vietnam.³⁴ Bilateral Trade Agreement negotiations began in 1996, and ambassadors were exchanged in 1997.³⁵ Former Congressman and

²¹ *Id.*

²² *Id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See White House Press Secretary, supra* note 11.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See* Richard J. Rivard & Khanh Hoang Ta, *Investing in Vietnam*, BUS. & ECON. REVIEW OF THE UNIVERSITY OF SOUTH CAROLINA SCHOOL OF BUSINESS (Jan. 1, 2000), available at Westlaw, 2000 WL 10734666.

²⁹ *Id.*

³⁰ *White House Press Secretary, supra* note 11.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

POW Douglas "Pete" Peterson was chosen to be the U.S. Ambassador to Vietnam.³⁶

In 1998, Vietnam joined the Asia Pacific Economic Cooperation ("APEC") forum.³⁷ Also in 1998, the United States granted Vietnam its first waiver of the Jackson-Vanik amendment.³⁸ This waiver allowed expanded U.S. export promotion and investment support programs to Vietnam.³⁹ The prerequisite for this waiver is a certification of freedom of emigration.⁴⁰ The waiver was renewed in subsequent years.⁴¹

In 1999, the United States and Vietnam reached agreement on some key provisions of the BTA.⁴² In 2000, more provisions were agreed on, and a tentative agreement seemed to have been made.⁴³ Then Vietnam got cold feet. Fear of the domestic political implications resulted in heavy resistance from within the party, and there was a strong temptation to retreat from these risks and continue to hide behind its communist neighbor, China.⁴⁴ Ironically, it was China that convinced Vietnam to go through with the BTA.⁴⁵ The main way it did this was unintentional. Vietnam's view of China as a bully and a county that will always view Vietnam as a subordinate has caused Vietnam to feel a large amount of resentment towards China, pushing it away from China and towards the United States.⁴⁶

The second way China encouraged the BTA was intentional. Chinese advisors explained to Vietnamese officials that the party-state could survive the concessions to the Americans.⁴⁷ China's actions reinforced these words, as at the time, China too was in the process of signing a BTA with the U.S.⁴⁸ Vietnamese officials soon decided to follow suit, and on July 13, 2000 the BTA was signed.⁴⁹

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Charlene Barshefsky, Congressional Testimony on International Economic Policy and Trade; U.S.-Vietnam Trade (Sept. 19, 2000), available at Westlaw, 2000 WL 23832855.

⁴¹ *White House Press Secretary*, *supra* note 11.

⁴² *Id.*

⁴³ See THE ECONOMIST INTELLIGENCE UNIT LTD., *supra* note 18.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

III. RATIFYING THE AGREEMENT

Although the pact enjoyed widespread support, ratification involved the typical political hurdles. Vietnam publicly stated that it would not ratify the BTA until after the U.S. did.⁵⁰ This substantially delayed the process, especially considering that the U.S. Senate would not be able to address the BTA until well into 2001.⁵¹

The main argument against U.S. ratification of the act was based on humanitarian concerns. One of the most outspoken critics was Congresswoman Ileana Ros-Lehtinen (R-FL). Congresswoman Ros-Lehtinen pointed out that "Vietnam is still one of the most repressive countries in the world," and that "the Vietnam government continues to systematically violate the human rights, civil liberties and religious freedom of its people."⁵² While no one disputes these claims, the current Bush Administration, as well as the Clinton Administration that negotiated the deal, feels that a more proactive approach is the only way to achieve positive change in Vietnam.⁵³ Says U.S. Trade Representative Charlene Barshefsky, "Dealing with Vietnam will build international momentum . . . for reform within the country."⁵⁴ Some of this potential positive change has already occurred. Hopeful of improved relations with the U.S., Vietnam has allowed over 500,000 Vietnamese to emigrate as refugees or immigrants to the U.S.⁵⁵ Vietnam has also released some political prisoners to the U.S. as well as repatriated approximately 300 possible sets of American soldier remains since 1993.⁵⁶

Another argument in favor of the BTA is that we were alone in our sanctions against Vietnam.⁵⁷ It would be one thing if an international coalition had been applying pressure on the Vietnamese government, but that was not the case. At the time of the BTA negotiations between the U.S. and Vietnam, Vietnam had already signed BTAs with fifty-seven other countries

⁵⁰ *Id.*

⁵¹ *Cf. Senate Ok's Full Trade Ties with Vietnam . . .*, PITTSBURGH POST-GAZETTE, Oct. 4, 2001; *The Nation - Legislators Advance Bush Trade Agenda . . .*, L.A. TIMES, Oct. 4, 2001.

⁵² Ileana Ros-Lehtinen, International Economic Policy and Trade: U.S.-Vietnam Trade, Congressional Testimony (Sept. 19, 2000), available at Westlaw, 2000 WL 23832854.

⁵³ See Barshefsky, *supra* note 40.

⁵⁴ *Id.*

⁵⁵ Stanley Roth, *The U.S.-Vietnam Bilateral Trade Agreement and U.S. Policy in Vietnam* (Sept. 19, 2000), available at http://www.state.gov/www/policy_remarks/2000/000919_roth_hirc.html.

⁵⁶ *Id.*

⁵⁷ *Cf. ASIA PULSE, Vietnam Strives to Obtain Export Value of US \$38 BLN in 2010* (Sept. 7, 2000), available at Westlaw, 2000 WL 20947414.

and territories.⁵⁸ It had also achieved Most Favored Nation Status (what the U.S. now refers to as Normal Trade Relations) with seventy-two countries and territories.⁵⁹ While Vietnam would obviously still prefer to trade with the U.S. than not to, any punishment the U.S. dished out was not as effective as one backed by a coalition of countries would have been.

In the end, the United States Senate chose to pass the measure, by a vote of eighty-eight to twelve, on October 3, 2001.⁶⁰ This was partly due to its bipartisan support,⁶¹ including the influence exerted by President Bush⁶² and former President Clinton, but may largely be due to the efforts of the Vietnam veteran Congressmen. Senators Bob Kerrey (D-NE), Chuck Hagel (R-NE), and John McCain (R-AZ) have all been outspoken advocates of the BTA.⁶³ This group's influence was simply too much for the dissenters to overcome.⁶⁴

Vietnam's National Assembly ratified the agreement on November 28, 2001.⁶⁵ However, it garnered only 64.3% of the vote, enough for approval, but a clear indication that many members of "the old guard" are still very

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Senator Chuck Grassley, *Memorandum: Vietnam Trade Agreement* (Oct. 3, 2001), available at 2001 WL 5422507; Nick Anderson, *The Nation Legislators Advance Bush Trade Agenda Politics: Senate Passes U.S. - Vietnam Accord. A Bill to Give the President 'Fast Track' Negotiating Powers Faces Tougher Going in the House*, L.A. TIMES, Oct. 4, 2001; Leon Hadar, *U.S. Senate Approves Trade Accord with Vietnam*, BUSINESS TIMES (Singapore), Oct. 6, 2001.

⁶¹ See Matt Kelley, *House Panel Hears Testimony on Trade Pact With Vietnam*, OMAHA WORLD-HERALD, Sept. 20, 2000.

⁶² See The Associated Press, *Candidates on the Vietnam Trade* (Oct. 17, 2000), available at Westlaw, 2000 WL 28612849, for Bush's statement including, "I support the trade agreement with Vietnam. I believe expanded trade with Vietnam will help the forces of economic and political reform to take root and grow." This has added importance because it is totally within the President's discretion whether to sign the annual waiver of the Jackson-Vanik amendment. See *White House Press Secretary, supra* note 11.

⁶³ While all three of the Senators have influence, only Senators McCain and Hagel voted on the BTA, as Senator Bob Kerrey retired before the current Congressional session began. *Id.*

⁶⁴ Although their efforts to block the ratification of the BTA were unsuccessful, the dissenters have forged on, introducing a separate measure, "The Vietnam Human Rights Bill," which links non-humanitarian aid to progress on human rights. See Michael Mathes, *Hanoi Attempts to Sway Human Rights Bill*, SOUTH CHINA MORNING POST, Sept. 19, 2001. The bill passed the United States House of Representatives on September 6, 2001, and as of the time of this comment, it is unclear whether it will be approved by the Senate. See *id.*; see also, *Vietnam: Radio Quotes Daily Report Against U.S. Vietnam Human Rights Act*, BBC MONITORING (Sept. 27, 2001), available at 2001 WL 28563563, as the Senate has already refused to vote on the Vietnam Human Rights Bill on at least one occasion. See *Vietnam: Government Welcomes U.S. Senate Approval of Bilateral Trade Agreement*, BBC MONITORING (Oct. 5, 2001), available at 2001 WL 28779203.

⁶⁵ ASIA PULSE, *Bilateral Trade Pact Expected to Boost US Investment in Vietnam* (Dec. 5, 2001), available at 2001 WL 26607919.

hesitant to embrace a free market economy.⁶⁶ On December 10, 2001, Vietnamese Trade Minister Vu Khoan and United States Trade Representative Robert Zoellick exchanged ratification documents, making the BTA effective from that point on.⁶⁷

IV. OVERVIEW OF THE BILATERAL TRADE AGREEMENT

The BTA is divided into six substantive chapters: 1) Market access for industrial goods and farm products; 2) Intellectual property; 3) Trade in services; 4) Investment; 5) Business facilitation; and 6) Transparency.⁶⁸

A. Chapter 1- Market Access for Goods

Vietnam committed to general trade principles consistent with WTO practices, including reducing tariffs and abolishing non-tariff restrictions such as quotas. These provisions will ensure trading rights for foreign and Vietnamese businesses.⁶⁹ The commitments include:

- **Trading Rights:** Vietnam will grant, for the first time, rights for both Vietnamese and foreign businesses to import and export, generally phased in over 3-6 years;⁷⁰
- **National Treatment:** Vietnam will apply national treatment for imports in areas including standards, taxes and commercial dispute settlement;⁷¹
- **Tariffs:** Vietnam guarantees Most Favored Nation level tariffs for U.S. goods, and cuts tariffs on many agricultural and manufactured goods of interest to American exporters by a third to a half, from current levels averaging approximately 20%;⁷²

⁶⁶ SOUTH CHINA MORNING POST, *Tough Task for Hanoi to Pry Economy Open...* (Dec. 1, 2001), available at 2001 WL 29886298.

⁶⁷ BBC MONITORING, *Vietnam-US Trade Pact Officially Takes Effect on 10 December* (Dec. 12, 2001), available at 2001 WL 31475036.

⁶⁸ See Barshefsky, *supra* note 40. The agreement actually has seven chapters. However, chapter seven deals merely with details such as the exact time when the BTA will go into effect. Cf. *Vietnam-US Trade Pact Officially Takes Effect on 10 December*, BBC MONITORING (Dec. 12, 2001), available at 2001 WL 31475036. This segment of the comment will only address the BTA's six substantive chapters.

⁶⁹ See Barshefsky, *supra* note 40.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

- Non-Tariff Measures: Vietnam agrees to eliminate all quantitative restrictions on a range of industrial and agricultural products over a period of 3-7 years, depending on the product;⁷³
- Import Licensing: Vietnam will eliminate all discretionary import licensing, in accordance with the WTO agreement;⁷⁴
- Customs Valuation and Customs Fees: Vietnam will comply with WTO rules within two years. These rules include using transactional value for customs valuation and limiting customs fees to the cost of services rendered;⁷⁵
- Technical Standards and Phytosanitary Measures: WTO standards will be met, including the application of technical regulations and sanitary and phytosanitary measures on a national treatment basis;⁷⁶
- State Trading: State trading will be carried out in accordance with WTO rules. This requires state trading enterprises to only make sales and purchases in accordance with commercial considerations.⁷⁷

B. Chapter 2 – Intellectual Property Rights

Vietnam will implement WTO-level patent and trademark protection within one year of ratification, and copyright and trade secret protection within eighteen months after the BTA is ratified.⁷⁸ It will also take further measures to strengthen intellectual property protection in other areas, including the protection of encrypted satellite signals.⁷⁹

C. Chapter 3 – Trade in Services

Vietnam accepts the rules of the WTO's General Agreement on Trade in Services.⁸⁰ Vietnam also guarantees protection for the existing rights of all

⁷³ *Id.*
⁷⁴ *Id.*
⁷⁵ *Id.*
⁷⁶ *Id.*
⁷⁷ *Id.*
⁷⁸ *Id.*
⁷⁹ *Id.*
⁸⁰ *Id.*

foreign service providers in Vietnam⁸¹ and makes specific commitments in numerous sectors, including:

- **Telecommunications:** Vietnam will accept the principles of the WTO's Basic Telecommunications Reference Paper, requiring a pro-competitive regulatory regime and cost-based interconnection fees.⁸² It will also make commitments to liberalize the basic and value-added telecommunications markets.⁸³
- **Financial Services:** Vietnam agrees to the General Agreement on Trade in Services financial annex, and made specific commitments in the insurance, banking, leasing comply provider, and securities sectors.⁸⁴
- **Professional:** Vietnam made specific commitments for the legal, accounting, architectural, and engineering professions.⁸⁵ Vietnam will allow 100% U.S. equity in firms relating to these four areas.⁸⁶ Law firms will be given five-year renewable licenses and will be permitted to consult on Vietnamese laws.⁸⁷ American accounting, architectural, and engineering firms will be allowed to provide services to foreign invested firms for the first two years, and to Vietnamese firms afterwards.⁸⁸
- **Audio Visual:** U.S. firms will be permitted to form joint ventures with Vietnamese firms in the film production and distribution industry, as well as provide motion picture projection services.⁸⁹
- **Distribution:** American wholesale distribution firms will be allowed to make joint ventures with Vietnamese firms for the first six years, after which time 100% U.S. equity will be permitted.⁹⁰ All U.S. retailers wishing to participate in the

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

Vietnamese market will be allowed to open one outlet, with further approvals on a case-by-case basis.⁹¹

D. *Chapter 4 – Investment*

Vietnam's commitments will ease investment, reduce paperwork and ensure national treatment for almost all foreign investors.⁹² These commitments include protections against expropriation of U.S. investments in Vietnam, and the right to repatriate profits and conduct other financial transfers on a national treatment basis.⁹³ Vietnam will also phase out local content requirements and export performance requirements within five years, as well as end almost all investment screening and discriminatory pricing.⁹⁴ Government controls and screening requirements for joint ventures will also be reduced.⁹⁵

E. *Chapter 5 – Business Facilitation*

Vietnam will guarantee the right for Americans to conduct routine business practices, such as setting up offices, advertising, and conducting market studies.⁹⁶

F. *Chapter 6 – Transparency and Right to Appeal*

This section may be the most important. For the first time, Vietnam will now provide advance notice of all laws, regulations and other administrative procedures relating to any matter covered in the agreement, publish all laws and regulations, and inform the public of effective dates and government contact points.⁹⁷ Specific commitments include:

- All laws governing issues covered in the agreement must be made public and readily available;⁹⁸

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

- Vietnam will designate an official journal in which all such measures will be published;⁹⁹
- Vietnam will commit to uniform, impartial and reasonable application of all laws, regulations and administrative procedures;¹⁰⁰
- Vietnam will form administrative or judicial tribunals for review and correction of all matters covered in the agreement, and afford the right to appeal relevant decisions.¹⁰¹ Notice of decisions upon appeal and reasons for appellate decisions will be provided in writing.¹⁰²

V. WHAT THIS MEANS FOR VIETNAM

A. *Why This Agreement is Necessary*

This agreement is one large step towards Vietnam joining the World Trade Organization (WTO),¹⁰³ and Vietnam is hopeful that the BTA's ratification will ensure Vietnam's admission into the WTO in the near future.¹⁰⁴ The WTO is a network of agreements between all of its members, currently 144 in number, that facilitates international trade.¹⁰⁵ The effect of joining the WTO is similar to simultaneously creating BTAs with 143 other countries.¹⁰⁶ This is expected to have a very positive effect on the Vietnamese economy, which has been growing at a very mediocre rate for the last fifteen years.¹⁰⁷

The BTA also formally indoctrinates Vietnam into the overwhelming number of countries to whom the U.S. has granted Normal Trade Relations (NTR).¹⁰⁸ NTR (formerly called Most Favored Nation treatment)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³

See Jim Lobe, *Trade-U.S./Vietnam: Landmark Trade Accord Signed*, INTER PRESS SERVICE (July 13, 2000), available at Westlaw, 2000 WL 4091990.

¹⁰⁴ BBC MONITORING, *Vietnamese Premier Hopes Visit by WTO Head to Help 'Quick' Accession* (Dec. 3, 2001), available at 2001 WL 31089068.

¹⁰⁵ See <http://www.wto.org>.

¹⁰⁶ *Id.*

¹⁰⁷ See Bradlee, *supra* note 1.

¹⁰⁸ SOUTH CHINA MORNING POST, *Tough Task for Hanoi to Pry Economy Open . . .* (Dec. 1, 2001), available at 2001 WL 29886298. Vietnam was one of only six countries that do not receive normal trade relations treatment from the U.S. The others are Laos, Cuba, North Korea, Afghanistan and Serbia. See Charlene Barshefsky's Congressional Testimony on International Economic Policy and Trade; U.S.-

substantially reduces the tariff on textiles imported from Vietnam to the U.S.,¹⁰⁹ giving American textile makers and retailers hope that American industry will soon have the same advantages as their European counterparts, who import an estimated \$100 million-plus worth of apparel annually from Vietnam.¹¹⁰ Vietnam's "large population, rock-bottom labor costs and a workforce that is skilled in the needle trade" have even led many retailers to refer to it as "the next China."¹¹¹ In fact, analysts have also said that Vietnam, with reduced tariffs and heavy foreign investment, could ship up to \$2 billion in apparel a year to the U.S., placing it among the so-called "Big Five" of Mexico, China, Hong Kong, Taiwan and South Korea.¹¹²

Vietnam also recognizes that NTR status with the U.S. will not only help Vietnam's textile industry, but other, more undeveloped areas of its economy as well.¹¹³ Vietnam expects technology and management skills to flow into Vietnam from the U.S., things which are necessary if Vietnam is to make a successful transition from an agricultural to an industrial economy.¹¹⁴

B. *Can Vietnam Possibly Become Another Asian Tiger?*

Many experts agree that with the help of increased U.S. trade, Vietnam's economy should improve dramatically.¹¹⁵ The main point of contention is how long it will take for this progress to take effect.¹¹⁶ Some experts, like Singapore's Senior Minister Lee, believe Vietnam will not truly become an Asian Tiger until the old guard leaders of the Politburo leave power, possibly many years from now.¹¹⁷ However, prominent financial experts disagree with Lee's analysis.¹¹⁸ These experts are not just from Wall Street. They are from Taiwan, South Korea, Hong Kong, Australia, France, even Singapore,

Vietnam Trade (Sept. 19, 2000), available at Westlaw, 2000 WL 1520568.

¹⁰⁹ See Jim Ostroff, *U.S.-Vietnam Accord Key to Low-Price Imports; Trade Agreement Between Former Enemies Will Open Borders to Goods, Services*, DAILY NEWS RECORD (July 14, 2000), available at Westlaw, 2000 WL 9062142.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Bradlec, *supra* note 1.

¹¹⁴ See *id.*

¹¹⁵ See Rivard & Ta, *supra* note 28.

¹¹⁶ See *id.*

¹¹⁷ See David Lamb, *Lee Kuan Yew Asia's 'Tight Ship' Weathers a Crisis and Critics of Harsh Rule*, L.A. TIMES, Dec. 5, 1999.

¹¹⁸ See Rivard & Ta, *supra* note 28.

and they believe an Asian Tiger economy is right around the corner for Vietnam.¹¹⁹

For years, Wall Street has been convinced that Vietnam has Asian Tiger potential.¹²⁰ This belief led to annual FDI of more than \$2 billion from the United States (and \$8.6 billion overall) during the mid-1990s.¹²¹ This number fell to only \$500 million in 1999 (and \$1.6 billion overall), as investors expressed frustration with the numerous bureaucratic and legal barriers imposed by the Vietnamese government.¹²² The new BTA should revitalize the fickle investors, leading to a potential explosion in FDI.¹²³ “The psychological pendulum is beginning to swing back. With the trade agreement, people are saying that now the fundamental direction is positive,” says Tony Foster, managing partner for Vietnam of the law firm Freshfields.¹²⁴

Despite the investors’ enthusiasm, there are signs that Vietnam’s transition to a more open economy could be a bumpy one. The Politburo’s schizophrenic actions in recent years are a cause of this concern. One example occurred in 1996, when after literally pleading for FDI, the Vietnamese government suddenly became paranoid of Westernization, and ordered all billboards advertising products such as Coca Cola and Heineken beer taken down.¹²⁵ It then decreed that English words on signs could not be larger than Vietnamese words.¹²⁶

This division within the Politburo was summed up by Thomas J. Vallely, director of the Vietnam programs at Harvard University’s Institute for International Development, shortly before the BTA was signed when he said:

Vietnam and the U.S. are not negotiating a trade agreement. Vietnam is negotiating a trade agreement with itself: One side wonders whether they should join the world economy, and the other side wonders how they should join the world economy.¹²⁷

¹¹⁹ See *id.*

¹²⁰ See Jim Lobe, *Trade-U.S./Vietnam: Landmark Trade Accord Signed*, INTER PRESS SERVICE (July 13, 2000), available at Westlaw, 2000 WL 4091990.

¹²¹ *Id.*

¹²² See Leon Hadar, *U.S., Vietnam Sign Historic Trade Accord*, BUSINESS TIMES (Singapore), July 15, 2000.

¹²³ See Bradlee, *supra* note 1.

¹²⁴ See Stan Sesser, *Vietnam – A trade pact with the U.S. is one of several signs that the pace of reform is picking up*, THE ASIAN WALL STREET JOURNAL (Oct. 23, 2000).

¹²⁵ See Bradlee, *supra* note 1.

¹²⁶ See *id.*

¹²⁷ See *id.*

Despite the mistakes made in the past, the signing of the BTA and its ratification by the Vietnamese legislature show that the pro-free market faction of the Politburo has prevailed. Public statements by prominent Vietnamese officials reinforce the view that the government is focused on entering the world economy.¹²⁸ Some of these statements are aimed at the Vietnamese people themselves, in an attempt to prepare them for the challenges to come.¹²⁹ Nguyen Dinh Luong, the head of Vietnam's Department of European and American Affairs as well as Vietnam's chief negotiator with the U.S., warned his fellow citizens that they must prepare to switch from an agricultural to an industrial based economy in order to compete internationally.¹³⁰ Says Luong, "The world will become a united playing field. No nation can stand outside of this playing field as ongoing globalization is rapidly realized."¹³¹

Like many countries, Vietnam has a problem with corruption.¹³² However, this has become another example of the Politburo's sincere efforts at change. The government has cracked down on corruption, and even proclaimed a mandatory death sentence for those caught stealing more than \$27,000 from the state.¹³³ So far, at least sixteen people have been sentenced to death under this new law.¹³⁴ The government has also allowed the press more freedom in reporting official corruption.¹³⁵ These news stories have become another deterrent to corrupt officials.¹³⁶

Vietnam's infrastructure is also a problem, although it is more of a nuisance to foreigners than a roadblock to economic progress.¹³⁷ In Ho Chi Minh City, for example, there are almost no stop lights, requiring a pedestrian wishing to cross the constantly busy streets to "plunge in and let them avoid you, rather than vice versa."¹³⁸ Hopefully, this type of problem will be remedied once more money starts flowing into Vietnam.

Surprisingly, another reason for economic optimism is actually Vietnam's current monumental *inefficiency*.¹³⁹ The 6,000 current state-owned

¹²⁸ See Tu Hoang, *Negotiator Puts U.S. Pact in Perspective*, VIETNAM INVESTMENT REVIEW (Sept. 4, 2000), available at Westlaw, 2000 WL 9576452.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ *Id.*

¹³² See Bradlee, *supra* note 1.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ See *id.*

enterprises employ less than 5% of the workforce, yet control 70% of Vietnam's financial and natural resources.¹⁴⁰ They also have access to a disproportionate share of investment capital, even though only a third make a profit.¹⁴¹ As the BTA reforms take hold, these resources will be freed up so that they can be used much more efficiently, leading to a substantially stronger Vietnamese economy.¹⁴² This progression will be accelerated by an amendment to Vietnam's constitution that was passed in December 2001.¹⁴³ This amendment calls for the private sector to be treated equally to the state sector, and it is hoped that this will alleviate the preferential treatment banks have given to state-run enterprises over private-sector businesses.¹⁴⁴

C. *Can the Socialist Government Coexist with a More Open Market?*

Singapore provides an indication that it is possible for a socialist regime to survive the liberalization of its country's market.¹⁴⁵ If one person can be most credited for Singapore's success, it is Senior Minister Lee Kuan Yew.¹⁴⁶ Lee Kuan Yew has played a critical role in Singapore's changes, first as an independence leader forty years ago, then as prime minister, and now as senior minister, a powerful Cabinet post created just for him.¹⁴⁷ Senior Minister Lee has long argued that the rule of law is more important than democracy in a free market.¹⁴⁸ Lee also believes people are willing to forego a large degree of Western-style democracy as long as they are provided with economic opportunity and political stability.¹⁴⁹ So far, in Singapore at least, this view appears to be correct.¹⁵⁰ However, Lee also believes that individual

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ Amy Kazmin, *Vietnam's Constitution Amended to Aid Private Sector*, FINANCIAL TIMES (Dec. 12, 2001), available at 2001 WL 31428769.

¹⁴⁴ *Id.*

¹⁴⁵ *See* Lamb, *supra* note 117.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See* BUSINESS TIMES (Singapore), *Rule of Law More Important : SM Lee Quak Hiang Whai in Hongkong* (Oct. 29, 1999), available at Westlaw, 1999 WL 27552488; *see also* THE STRAITS TIMES (Singapore), *Rule of Law Above Democracy, Says SM Chua Lee Haong in Hong Kong* (Oct. 29, 1999), available at Westlaw, 1999 WL 8265761; *But see* SOUTH CHINA MORNING POST, *Market Doubts Raised* (Oct. 31, 1999) (Senior Minister Lee Kuan Yew statement that a free market in a socialist system like China's is unlikely to succeed, including, "If you are going to have socialism, then as a matter of principle you can't have a free market.").

¹⁴⁹ *See* THE STRAITS TIMES, *supra* note 148.

¹⁵⁰ *Id.*

liberties are less important than the welfare of society as a whole.¹⁵¹ Of course, this view has drawn criticism from many human rights activists.¹⁵² Even Communist stalwarts such as China are now discussing the feasibility of the so-called *socialist market economy*.¹⁵³ Whether *Market Leninism* can truly succeed remains to be seen, but the willingness of a super power such as China to accept this plan of action is strong evidence that it may.¹⁵⁴ Senior Minister Lee thinks Vietnam will achieve major economic success someday, but not anytime soon. Says Lee:

I fear...Vietnam will have to wait, for a change in generations. The present leaders developed an expertise in fighting an overpowering enemy by guerrilla tactics. In other words, let their men ambush the enemy, harass them and wear them down, and they win. But to rebuild the modern economy, or to build a new one is more difficult and requires an understanding of the modern world.¹⁵⁵

Glaring statistics illustrate the generation gap Lee mentioned. Over half of the Vietnamese population is under age twenty-five.¹⁵⁶ Perhaps even more striking, 85% is under age forty.¹⁵⁷ As for the other 15%, says Ambassador Peterson, "Their whole lives were war. They had no clue that while they were under a rock, the world redefined independence to interdependence. But that 15% controls the government."¹⁵⁸

Senior Minister Lee also points to the stubbornness of the Vietnamese leaders as a cause for the delay.¹⁵⁹ In 1992, Lee advised Vietnam to take advantage of the Vietnamese living abroad, who could bring back their knowledge and connections.¹⁶⁰ However, Vietnam has not made a strong effort to do this.¹⁶¹ Lee suspects this is because the Vietnamese leaders fear these people will bring their "dangerous ideas" back with them.¹⁶²

¹⁵¹ *Id.*

¹⁵² See Lamb, *supra* note 117.

¹⁵³ See Ricardo Saludo, *Despite the Crisis, the Best Thing That Happened to Asia in the Last 25 Years is Still the Region's Economic Ascendancy*, ASIA WEEK (Aug. 18, 2000), available at Westlaw, 2000 WL 8937678.

¹⁵⁴ See *id.*

¹⁵⁵ Lamb, *supra* note 117.

¹⁵⁶ See Bradlee, *supra* note 1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Lamb, *supra* note 117.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Although they agree with Lee's generation gap observation, some experts, including Ambassador Peterson, predict the change in attitudes will happen sooner rather than later.¹⁶³ U.S. Ambassador to Vietnam Peterson points to the "cybercafe phenomenon" as the epitome of the current changes underway, stating:¹⁶⁴

Thousands of young Vietnamese are accessing the internet at scores of cybercafes across the country. They are obtaining and exchanging information, and many are doing so by finding innovative ways to circumvent the layered firewalls conservative elements of Vietnam's government have placed on internet access. This story reflects the thirst of Vietnam's young people for a tangible connection to the world beyond their borders; I think it also underscores the tremendous future export and investment opportunities available to America's technology companies.¹⁶⁵

Another reason why these political changes could come soon is the political ideology, or lack thereof, of the general population. Only two million of the seventy-seven million Vietnamese are Communist party members.¹⁶⁶ Most of these members live in Hanoi.¹⁶⁷ In other places, like Ho Chi Minh City, less than 2% of the citizens belong to the party.¹⁶⁸ The overwhelming popularity of the Doi Moi reforms provides further evidence of the general population's appetite for freedom.¹⁶⁹

These statistics might lead someone to wonder how the Politburo stays in power at all. The answer is simply nationalism. The ruling party is tightly associated with the improbable victories over the French and the Americans, glorious victories the general population remembers with a large amount of pride.¹⁷⁰ However, as these victories fade further into the past, this source of political power will fade with them.

Thus, the question is not whether socialism can coexist with a free market economy. Singapore has already shown it to be possible. The question is whether this particular socialist government can coexist with a

¹⁶³ See Stanley O. Roth, *International Economic Policy and Trade; U.S. – Vietnam Trade*, Congressional Testimony (Sept. 19, 2000), available at Westlaw, 2000 WL 23832858.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Bradlee, *supra* note 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

free market economy, and the answer to that question is probably not for long.

VI. WHAT THIS MEANS FOR THE UNITED STATES

The most obvious benefit to the United States is the right to do business with the world's 14th most populous country,¹⁷¹ but selling goods and services to the eighty million Vietnamese consumers¹⁷² was not the only reason to ratify the BTA. One of the United States' major strategic goals in Asia is to encourage a "stable and cohesive Southeast Asia."¹⁷³ Strengthening ties with one of the few non-NTR nations is an excellent way for the U.S. to meet this goal.¹⁷⁴

As far as the economic benefits are concerned, many American businesses will be aided by the act. Obviously, those most effected will be the companies that choose to invest in Vietnam. As far as these businesses are concerned, the BTA chapter concerning judicial transparency is particularly important. In the 1990's many investors left Vietnam because of the unfair legal proceedings that took place.¹⁷⁵ Whenever a non-Vietnamese company had a legal dispute with a Vietnamese enterprise, the court would almost always decide in the Vietnamese entity's favor.¹⁷⁶ Worst, Vietnam's courts would not state a reason for deciding any particular case the way it did, and would not reduce any opinion to writing.¹⁷⁷ Now that the BTA has been ratified, those days are over. The BTA makes specific provisions for legal transparency that should soothe the fears of U.S. businesses burned by Vietnam's past legal chicanery.¹⁷⁸

¹⁷¹ *Id.*

¹⁷² Press Release, Robert Mallet, U.S. Deputy Secretary of Commerce (Aug. 21, 2000), available at http://www.state.gov/www/issues/economic/000821_docpr_vietnam.html.

¹⁷³ Barshefsky, *supra* note 40.

¹⁷⁴ *See id.* See note 108 for the list of non-NTR countries.

¹⁷⁵ Ahn Minh, *German Investors Speak Out Concerns*, SAIGON TIMES DAILY, Mar. 1, 2002; VIETNAM INVESTMENT REVIEW, *Striding Forth Into Integration* (Feb. 4, 2002), available at 2002 WL 7728943; Thai Thanh, *Legal FDI Documents Reviewed*, SAIGON TIMES DAILY (Jan. 23, 2002), available at 2002 WL 3332459.

¹⁷⁶ *See* Minh, *supra* note 175; VIETNAM INVESTMENT REVIEW, *supra* note 175; Thanh, *supra* note 175.

¹⁷⁷ *See* Minh, *supra* note 175; VIETNAM INVESTMENT REVIEW, *supra* note 175; Thanh, *supra* note 175.

¹⁷⁸ For a list of these provisions regarding transparency, see Part IV(F) "Transparency and Right to Appeal," *supra* notes 97-102.

VII. CONCLUSION

From a U.S. perspective, the question of whether Vietnam's socialist regime can survive a more free market presents a possible win-win situation. If the government stumbles after the economic reforms are already in place, there is a possibility of a democratic revolution, such as those seen in Eastern Europe at the end of the Cold War. Even if communism continues in Vietnam long after these reforms take place, the U.S. will have gained a valuable trading partner in a growing region. Additionally, the strengthened bond between the two countries will grant the U.S. more influence on the Vietnamese government than it otherwise would have.

From the Vietnamese point of view, they have come a long way in a short time. While Vietnam still has far to go, the groundwork has been laid for continued progress. The only question is whether Vietnam will advance so quickly as to leave behind the old guard of leaders who are currently setting this groundwork in place. For some members of the ruling party, this fear has caused hesitation. However, for the Vietnamese population as a whole, 97% of whom are not party members,¹⁷⁹ the possible eventual collapse of the socialist party and a chance for democracy to take root may be of even greater benefit to the people than the economic advancement that can be expected to occur in the very near future.

¹⁷⁹ See Bradlee, *supra* note 1.