COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL OBLIGATIONS IN VIET NAM

THE CASE OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Hoang Ly Anh

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THE CASE OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Submitted by

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ABSTRACT

Domestic compliance with international environmental obligations may be achieved through many different methods, specifically through implementation. This thesis presents an in-depth analysis of implementation to comply with international environmental obligations in the situation of Viet Nam, as an Asian country in transition, through the case of the Convention on Biological Diversity. It examines the complex process of the Vietnamese implementation of international environmental obligations, involving different elements such as policy and legal instruments, and other relevant actors and factors. This thesis argues that while a rather comprehensive legal and policy framework and other facilitating mechanisms have been set up to meet the treaty’s obligations, the treaty’s features and implementation requirements and the Vietnamese context are the major aspects affecting the implementation to comply with international environmental obligations. Revealing the limitations of the Vietnamese implementation of international environmental obligations, the thesis also offers several solutions for improving the implementation to comply with international environmental obligations in the Vietnamese context.
TABLE OF ABBREVIATIONS

The following abbreviations appear in the main text and/or footnotes of this thesis. Most are spelled out in full or otherwise explained when they are first mentioned.

1. STATES AND ORGANISATIONS

ASEAN  Association of Southeast Asian Nations
CPV    Communist Party of Viet Nam
DONRE  Department of Natural Resources and Environment
        (So Tai Nguyen Va Moi Truong, Viet Nam)
DRV    Democratic Republic of Vietnam
IMF    International Monetary Fund
IUCN   International Union for Conservation of Nature
MARD   Ministry of Agriculture and Rural Development
        (Bo Nong Nghiep Va Phat Trien Nong Thon, Viet Nam)
MONRE  Ministry of Natural Resources and Environment
        (Bo Tai Nguyen Va Moi Truong, Viet Nam)
NSW    New South Wales (Australia)
NSWPD  New South Wales Parliamentary Debate
SRV    Socialist Republic of Viet Nam
UNCED  United Nations Conference on Environment and Development
UNDP   United Nations Development Programme
UNEP   United Nations Environment Programme
UNESCO United Nations Educational, Scientific and Cultural Organisation
VEA    Viet Nam Environmental Administration
        (Tong Cuc Bao Ve Moi Truong, Viet Nam)
WTO    World Trade Organisation

2. LEGISLATION

Bonn Convention  Convention on the Conservation of Migratory of Wild Animals
CBD    Convention on Biological Diversity
CITES  Convention on International Trade in Endangered Species of Wild
        Fauna and Flora
EPBC Act  Environment Protection and Biodiversity Conservation Act 1999
        (Cth)
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>LBD</td>
<td>Law on Biological Diversity</td>
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<tr>
<td>LEP</td>
<td>Law on Environmental Protection</td>
</tr>
<tr>
<td>NBAP</td>
<td>National Biodiversity Action Plan to 2010 and Orientation towards 2020</td>
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<td>Ramsar Convention</td>
<td>Convention on Wetlands of International Importance Especially as Waterfowl Habitat</td>
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<tr>
<td>VBAP</td>
<td>Viet Nam Biodiversity Action Plan</td>
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<td>World Heritage</td>
<td>Convention Concerning the Protection of the World Cultural and Natural Heritage</td>
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3. TECHNICAL TERMS

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<tbody>
<tr>
<td>COP</td>
<td>Conference of the Parties</td>
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<tr>
<td>IAS</td>
<td>Invasive Alien Species</td>
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<tr>
<td>MPA</td>
<td>Marine Protected Area</td>
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<td>PA</td>
<td>Protected Area</td>
</tr>
<tr>
<td>PWPA</td>
<td>Programme of Work on Protected Areas</td>
</tr>
<tr>
<td>SUF</td>
<td>Special-Use Forests (Rung Dac Dung)</td>
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<tr>
<td>TBPA</td>
<td>Trans-Boundary Protected Areas</td>
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STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person’s work has been used without due acknowledgement in the main text of the thesis.

This thesis has not been submitted for award of any degree or diploma in other institution.

Signed:

Date: 22\textsuperscript{nd} May 2013
CHAPTER ONE

INTRODUCTION

1. THE ISSUE

1.1. International Environmental Treaties and the Participation of Viet Nam

International environmental treaties, as a main source of international environmental law, impose international environmental obligations on States and other subjects of international law. The use of international environmental treaties to address international environmental problems started in the early 20th century. Since then, until the first environmental Conference on Human Environment, known as the 1972 Stockholm Conference, the primary objective of international environmental concern was conservation of natural resources. Most international environmental treaties were clearly aimed at species protection. The 1972 Stockholm Conference on the Human Environment, with the aim of the protection of the environment for human beings, introduced a new era in using international environmental treaties as instruments to solve international environmental problems. Individual states also became more aware of the significance of international environmental treaties for environmental protection. As a result, numerous global and regional environmental treaties were concluded. Nevertheless, many of these international environmental treaties, for example the Convention on Wetlands of International Importance Especially as Waterfowl Habitat or the Convention on International Trade in Endangered Species of Wild Fauna and Flora, only attracted a modest number of parties. The narrow scope of international

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1 The very first international environmental treaties were the London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa That Are Useful to Man or Inoffensive (1900) and the Paris Convention to Protect Birds Useful to Agriculture. See Peter Sand, ‘The Evolution of International Environmental Law’ in Daniel Bodansky et al (eds), The Oxford Handbook of International Environmental Law (Oxford University Press, 2006) 29, 32-3.

2 For more information on the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (the Ramsar Convention), see Chapter Four, n 16.

3 For more information on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), see Chapter Four, n 18.

4 For example, initially only 18 States were signatory parties to the Ramsar Convention.
environmental treaties and limited number of parties affected the effectiveness of these international environmental treaties for environmental protection.

In the year of the 20th anniversary of the 1972 Stockholm Conference and Declaration on Human Environment, the United Nations Conference on the Environment and Development was convened in Rio de Janeiro. The United Nations Conference on the Environment and Development was a landmark in the history of international environmental law development. The Conference adopted several concepts and principles for securing the environment while assuring economic development, including the concept of sustainable development. With the awareness of contemporary environmental issues such as biodiversity loss, climate change and desertification, and the significance of sustainable development, States were encouraged to create new global environmental treaties during the Conference time. As a result, three global environmental treaties, the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and the United Nations Convention to Combat Desertification, were concluded with the aim of addressing the newly emerging environmental problems. These international environmental treaties are truly global, as their scope covers issues which must be solved by global cooperation, and major States are parties to these international environmental treaties.

The outline of the history of the development of international environmental treaties clearly illustrates the tendency to increase the use of international environmental treaties to address environmental issues. Moreover, contemporary international environmental treaties attempt to cover broader issues and to attract as many parties as possible. The increase in the number of international environmental treaties, the features of the obligations, and the complexity of the issues regulated have created many challenges for States in securing compliance with these international environmental treaties at both global and national levels.

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5 For detailed information on the 1992 UNCED, see Chapter Four, n 10.
8 For information on the membership status of, for example the Ramsar Convention or the CITES, see Chapter Four, n 16, 18.
Viet Nam joined international efforts to combat international environmental problems in the latter half of the 1980s. Since Renovation was introduced in Viet Nam in 1986, the open-door policy, the multi-faceted development of Viet Nam and the changes in perception of the access to natural resources and environmental protection have led Viet Nam to active participation in approximately twenty major global and regional environmental treaties, including the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and others.¹⁰

The scope of the issues that the international environmental treaties to which Viet Nam is a party address covers different fields of the environment, such as atmosphere and air protection, nature and biodiversity conservation, heritage conservation, and protection of the environment of the sea and watercourses, to the control of hazardous waste and nuclear power.¹¹ Several international environmental treaties have been concluded in the form of a framework treaty,¹² which has allowed parties to negotiate further protocols, annexes, and related agreements to amend or revise the initial treaty. Consequently, it has led to an increase in obligations imposed on the parties.¹³ Moreover, in order to secure the effectiveness of international environmental treaties in addressing environmental issues, many international environmental treaties set out domestic implementation requirements. The increased number of international environmental obligations and the demanding requirements for domestic implementation of the obligations have certainly influenced the implementation of international environmental obligations in Viet Nam.

¹⁰ For the list of Viet Nam’s international environmental treaties, see http://vea.gov.vn/en/icorporation/ConventionsandAgrees/Pages/default.aspx, last accessed on 16 May 2013.


¹³ United Nations Framework Convention on Climate Change acknowledges itself as a framework international environmental treaty, while the Convention on Biological Diversity and others can be inferred as frameworks by the nature of international environmental treaties.
1.2. Compliance with International Environmental Obligations in Viet Nam: Problems and the Case of the Convention on Biological Diversity

As noted, Viet Nam has shown a strong intention to join international efforts to solve the international environmental problems at both international and domestic levels. This is evident in Viet Nam’s ratification and accession to major global and regional environmental treaties. Despite the fact that Viet Nam has attempted to fully translate international environmental rules into Vietnamese law, the compliance with environmental obligations in Viet Nam is still facing many challenges.

Theoretically, it is difficult to define which doctrine, dualism or monism, Viet Nam has followed so far. The debate amongst Vietnamese legal scholars and lawmakers about whether Viet Nam should follow the incorporation or transformation doctrine has not reached a final conclusion yet. This can be seen in the 1989 Ordinance on the Conclusion and Implementation of International Treaties of the Social Republic of Viet Nam, the 1998 Ordinance on the Conclusion and Implementation of International Treaties and the 2005 Law on the Conclusion, Accession and Implementation of International Treaties. Consequently, there is an urgent need to evaluate the above doctrines and to make some proposals relating to the current debate on ‘incorporation and transformation’ in the context of Viet Nam.

Viet Nam has not been resistant to formally implementing the international environmental treaties within its jurisdiction. However, Viet Nam has faced numerous challenges, such as an uncertain and an ‘unsustainable’ implementation of legal and policy frameworks, the lack of efficient coordination between central administrative agencies and between central and local governments in managing the environment, and low public awareness of the need for obedience to the environmental law.

Like any other developing country, Viet Nam has found many difficulties in dealing with these problems. For the purpose of environmental protection and sustainable development, working out these difficulties, investigating the reasons and searching for feasible solutions, is therefore a common concern of many people, including legal scholars, lawmakers and administrators. A thorough analysis of how Viet Nam implements international environmental obligations is needed. 

14 For a detailed discussion, see Chapter Two, part 2.
environmental obligations based on a theoretical framework and in the Vietnamese context shaped by its distinctive features of socio-political and legal environment is important. This analysis could offer several ideas relating to policy, the legal framework and facilitating mechanisms to improve Viet Nam’s compliance with international environmental obligations.

The Convention on Biodiversity is one of the global environmental treaties which illustrate the compromise between North and South states in biodiversity conservation and the sustainable use and sharing of genetic benefits. As a country which is rich in biodiversity, Viet Nam is clearly very interested in concluding and complying with obligations under the Convention, but although Viet Nam has made strong attempts to comply with the Convention, the degree to which it has been effectively implemented and complied with still remains modest. All the typical challenges that Viet Nam is facing in the course of domestic implementation to comply with international environmental obligations can be seen via the case of the Convention on Biological Diversity. Thus, this case study might suggest common solutions to problems that Viet Nam is confronting in the course of the implementation to comply with international environmental obligations from both theoretical and practical perspectives.

2. METHODOLOGY

The thesis aims to study compliance with international environmental obligations in Viet Nam. Compliance can be interpreted as fulfilment of international environmental obligations or conformity with an international legal rule. To this end, a review of the theories of international law and related scholarship regarding compliance with international environmental obligations, and specifically with domestic implementation as the specific method to achieve compliance is useful. It should be noted that while none of these theories provide a sufficient framework for analysis, each theory can partly contribute to drawing up an analytical framework for examining Vietnamese implementation to comply with international environmental obligations. The theories of compliance, implementation to

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15 Viet Nam is ranked the 16th richest country in the world in biodiversity. See Viet Nam Environmental Administration (Tong Cuc Bao Ve Moi Truong), Report on the National State of Environment in Viet Nam 2005: Special Issue on Biodiversity (Bao Cao Hien Trang Moi Truong Quoc Gia: Chuyen De Da Dang Sinh Hoc) (Viet Nam Environmental Administration, 2005), 9.
comply and the implications for Vietnamese implementation are closely examined in
Chapter Two.

The framework drawn from the theories can be used for analysis of the implementation of international environmental obligations in different countries. These theories are, however, an open-ended framework for including socio-political, legal and other factors as the context for the domestic implementation of international environmental obligations by any party to a convention. Hence the law-in-context approach may be useful for suggesting an adequate analytical framework for the domestic implementation of international environmental obligations. In fact, Viet Nam, as an Asian country in transition, has numerous distinctive features which influence the implementation of international environmental obligations. These include, for example, the community values of Vietnamese society, the role of customs and customary law, the Confucian influence, the political context of a socialist rule of law State, and the distinctive features of contemporary Vietnamese law. Viet Nam’s socio-political and legal context for implementation of international environmental obligations in Viet Nam is extensively discussed in Chapter Three.

For an in-depth analysis of the issue of implementation to comply with international environmental obligations, the case study approach is a useful and appropriate method. For the purpose of this thesis, the Convention on Biological Diversity is taken to be the case study. As noted, the implementation engages complicated and complex processes and mechanisms, involving numerous interwoven factors and actors. While the Convention on Biological Diversity covers wide-ranging scope and complicated obligations, the choice of selected issues for intensive analysis of the implementation of international environmental obligations in Viet Nam appears to be an appropriate method.

The thesis also aims to suggest solutions to problems that Viet Nam faces in the course of implementing international environmental obligations. To fulfil this aim, ‘comparative law’ is considered a useful tool to help the researcher to identify possible solutions to the problems through studying the legal experiences of other countries. Thus, to some extent, ‘comparative law’ is used in the thesis for certain ideas in regard to how Viet Nam should

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reform its laws and legal institutions towards better compliance with international environmental obligations.

3. MAIN ARGUMENT AND THESIS STRUCTURE

This thesis provides an in-depth analysis of domestic compliance with international environmental obligations through the case of the Convention on Biological Diversity in Viet Nam as an Asian country in transition. Analysing the policy and law framework, institutional mechanisms and other related issues for implementing international environmental obligations required by the Convention on Biological Diversity in Viet Nam, the thesis reveals typical challenges facing the Vietnamese implementation of international environmental treaties.

It is argued in the thesis that while rather comprehensive Vietnamese legal, policy and facilitating mechanisms have already been constructed to meet the obligations of the Convention on Biological Diversity and other treaties, the ambitious and general features of the obligations and implementation requirements on the one hand, and domestic legal and extra-legal elements, factors, and actors, on the other hand, are impediments to effective compliance with international environmental obligations in Viet Nam. The thesis also offers several suggestions towards better compliance with international environmental obligations in the Vietnamese context. In pursuing the above research tasks, the following issues are discussed in the thesis.

This chapter (Chapter One) of the thesis mainly introduces the contextual and methodological issues, on the basis of which related analyses of the thesis are made.

Chapter Two provides a discussion of the concept of compliance with international environmental obligations and the issue of implementation to comply with international environmental obligation in Viet Nam. The chapter aims at drawing up a theoretical framework which is suitable for an analysis of Vietnamese compliance with international environmental treaties. Using this framework as a backdrop for analysis, the chapter discusses the Vietnamese approaches and their limitations to complying with international environmental obligations.
Chapter Three offers an analysis of the socio-political and legal environment for the implementation of international environmental obligations in Viet Nam. The chapter discusses the implications of the cultural and traditional features of Vietnamese society, and the socio-political features of contemporary Viet Nam for the formation and implementation of contemporary Vietnamese law. It also examines the main features of Viet Nam’s legal system, which create the legal environment for the implementation of international environmental obligations. Thus the analysis in this chapter establishes the basis for later analyses in the thesis.

Chapter Four analyses the main features, major obligations and required implementation mechanisms of the Convention on Biological Diversity as the treaty’s context affecting the implementation of its obligations. The analysis in this chapter applies to the broader context of Viet Nam’s international environmental obligations.

Chapter Five offers an analysis of the major legislative approaches to the implementation of the Convention on Biological Diversity in Viet Nam, with the focus on the examination of the Law on Biological Diversity of Viet Nam as the key law for dealing with biodiversity. Through a close analysis of the Vietnamese legal framework corresponding to the implementation of international environmental obligations in general, and those required by the Convention on Biological Diversity in particular, this chapter addresses the extent to which international environmental obligations have been legislatively implemented in Viet Nam.

Chapter Six reviews the Vietnamese implementation of some selected obligations under the Convention on Biological Diversity, including the establishment and management of protected areas, conservation and sustainable use of species. By analysing the implementation of the two specific obligations under the Convention on Biological Diversity through laws, policies and other institutional mechanisms, the chapter aims to identify typical problems that Viet Nam encounters during the course of implementing international environmental obligations. These problems are the basis for several suggestions that are addressed in Chapter Seven of the thesis.

Chapter Seven draws several conclusions based on the findings of the previous chapters of the thesis, in which proposals towards a better compliance with international environmental
obligations in Viet Nam are offered. This chapter first summarises the Vietnamese implementation of the Convention on Biological Diversity’s obligations and related problems, and the challenges facing Viet Nam. It then offers some suggestions regarding effective implementation in order to comply with international environmental obligations in Viet Nam, taking into account its special socio-political and legal features. Contending that law enforcement is pivotal to compliance with international environmental obligations in Viet Nam, the chapter provides an analysis of compensation mechanisms for environmental damage and the possibility of adopting a model of environmental courts in Viet Nam.
CHAPTER TWO
COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

INTRODUCTION
The issue of compliance with international environmental obligations is an active topic for legal theorists, empirical scholars and commentators. The issue of compliance with international environmental treaties was a high priority during the United Nations Conference on Environment and Development, and hence, since then there have been a number of studies published on this topic. These studies approach implementation of and compliance with international environmental obligations from different perspectives.

Theories about compliance supply insights into how and why actors comply or do not comply with laws and regulations. Moreover, these theories provide different approaches to understanding compliance-related behaviours.

This chapter begins with discussion of the concept of ‘compliance’ and the distinction between compliance and the related concept of implementation. It then examines different theories and approaches to explaining compliance and finally describes an approach which might work for an analysis of Vietnamese compliance with international environmental treaties. The second part of the chapter examines Vietnamese law and literature in relation to compliance with international environmental obligations.

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1. CONCEPT OF ‘COMPLIANCE’
1.1. Notion of ‘Compliance’

Linguistically, ‘compliance’ is defined as ‘action in accordance with a request or command; obedience’ or ‘tendency to agree’ or ‘obedience to a request or command.’ It is also used technically in fields such as physics, mechanics, medicine, business, information technology and law, where the meaning has specific contextual implications. One website dedicated to Data Management, for example, defines compliance as ‘either a state of being in accordance with established guidelines, specifications, or legislation or the process of becoming so’.

‘Fulfilment’ is a linguistically related term which can be connoted as obeying a command or law, complying with conditions or bringing to completion. From a linguistic perspective, compliance and fulfilment have several common features. Nevertheless, while the notion of compliance is much more concerned with the process or instance of meeting a requirement, fulfilment is more about the result, the end of action.

A closely-related term ‘implementation’ is explained as putting a decision or plan into effect, fulfilling an undertaking, or completing a contract etc. Hence implementation is about the process of translating something into reality. Nevertheless, ‘implementation’ is not about the effect or the end product or the instance of meeting the demand, it is about process and method.

In summary, in some fields the term ‘compliance’ can encompass the process of meeting obligations, but it is common for legal purposes to use the term to refer to the outcome of action that results in such obligations being met. Hence, compliance is obedience or conformity with commands or requirements, and that is how the term will be used in this

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7 Ibid.
thesis. In some instances fulfilment can also be used, while implementation will be used to cover the process and methods through which compliance is achieved.

1.2. Implementation, Enforcement and Facilitating-Compliance Mechanisms

i. The Concept of Implementation and Implementation Mechanisms

Implementation of treaties is a complex concept. As has been noted, ‘[i]t is accomplished by different means in different countries according to differing constitutional requirements and differing legal traditions’.  

Implementation can have a functional meaning, involving instruments or approaches by which international law becomes part of domestic law. Consequently, implementation may be interpreted within a transformation and incorporation framework. The term can be used interchangeably with ‘transformation’, which may be understood as a ‘positive act by which an international norm is made part of the legal domestic order in a dualist regime’. This interpretation of the term is applied in accordance with the doctrine of ‘transformation’ and is used in numerous legal systems, especially those having federation status and taking a dualist approach to the relationship between international treaties and domestic law, such as Australia or Canada. This analysis of implementation is related to the doctrine of the separation of powers in some jurisdictions, and accordingly the Executive has the power to negotiate and ratify international treaties as an administrative act, while the Legislature has the power to legislate laws to implement international treaties. This ‘strong transformation’

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10 In a dualist legal system, treaties, commonly ratified by the Executive, cannot automatically become part of domestic law. Hence, the Legislature must adopt legislations or regulations to ‘transform’ or implement treaties into domestic law; or in other words to be given legal domestic effect. See Gillian Doreen Triggs, *International Law: Contemporary Principles and Practice* (LexisNexis Butterworths, 2006) 104, 111.


Implementation can also be understood as ‘incorporation’, which means a method by which international law, mostly customary law, becomes part of domestic law without any action of the legislature and executive.\footnote{See Elisabeth Eid and Hoori Hamboyan, above n 9.}

In short, ‘transformation’ and ‘incorporation’ etc describe process about determining when an international obligation is also a domestic obligation. Transformation or incorporation is about specific methods for implementation in different jurisdictions.

In other cases, implementation has been interpreted in a more practical way. For example, implementation is defined as ‘measures that states take to make international [treaties] effective in their domestic law’.\footnote{See Harold K Jacobson and Edith Brown Weiss, ‘A Framework for Analysis’ in Edith Brown Weiss and Harold K Jacobson (eds), Engaging Countries: Strengthening Compliance with International Environmental Accords (The MIT Press, 1998) 1, 4; See Edith Brown Weiss, ‘Understanding Compliance With International Environmental Agreements: the Baker’s Dozen Myths’ (1999) 32 University of Richmond Law Review 1555, 1556.} This term is likely to be interpreted within the doctrinal framework as falling within the two doctrines of self-executing and non-self-executing international treaties in the United States jurisdiction.\footnote{See Yuji Iwasawa, ‘Doctrine of Self-Executing Treaties in the United States: A Critical Analysis’ (1985-1986) Virginia Journal of International Law 627, 627-92.} This point of view shares some features of the view under which implementation is referred as ‘the process of introducing programmes, policies and laws after treaty obligations have been adopted to give effect to and fulfil the obligations within the treaty.’\footnote{See Tannetje Bryant and Brad Jessup, ‘The Status of International Environmental Treaties in Viet Nam’ (2002) 10(1) Asia Pacific Law Review 117, n 1.}

In all cases implementation itself can be understood as the measures taken by a party to carry out international environmental obligations and as the means of giving effect to international legal rules within domestic jurisdiction. This can be done automatically or through legislative means, and the method depends on the political, constitutional and legal
arrangements in each State. Nevertheless, in the first instance implementation should be understood as developing formal laws and policies in order to realise international environmental obligations within the domestic order.

**ii. Enforcement and Facilitating-Compliance Mechanisms**

‘Enforcement’ is a concept closely related to compliance and implementation. Enforcement can be approached from both international and domestic perspectives. At the international level, enforcement can involve sanctions being used against those parties which do not comply with international environmental obligations.

At the domestic level, enforcement normally refers to the compulsory measures imposed by competent central and local agencies on individuals and organisations, in order to secure their compliance with laws and policies that implement international environmental obligations. The Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements of the United Nations of Environment Programme (UNEP),\(^\text{17}\) for example, clearly define enforcement as:

> the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws and regulations implementing multilateral environmental agreements, can be brought or returned into compliance and/or punished through civil, administrative and criminal action\(^\text{18}\)

Hence, enforcement can be performed by law enforcers and domestic enforcement measures can be administrative measures such as monitoring or inspection, or judicial such as using the courts and compensation mechanisms.

A gentler approach than enforcement alone is a ‘carrot and stick’ policy which involves compliance-facilitating mechanisms to securing compliance, in collaboration with enforcement mechanisms. These facilitating mechanisms include information provision, report systems, economic measures such as quota-trading or eco-service and financial

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\(^{18}\) Ibid, Chapter II, para 38 (d).

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resources. While such mechanisms do not have sanctions, they can positively affect the extent of compliance.

In summary, while compliance and interrelated concepts may occasionally be used interchangeably, the common legal usage is to refer to the result of appropriate action, while implementation relates to legal, policy and other facilitating mechanisms to achieve compliance. This is the interpretation used in this thesis.

1.3. The Issue of Compliance with International Environmental Obligations

The previous section has discussed the broad interpretations of the term ‘compliance’. This section more closely examines the issue of ‘compliance’ in legal and interdisciplinary literature. In general, scholars may be divided into three groups, namely international law scholars, international relations scholars and political economy scholars, and institutional and liberal scholars who can have different interpretations of the term as well as of why and how treaty obligations should be met.

i. International Law Scholars

Traditional international law scholars such as the prominent scholar Louis Henkin, who believe in the force of norms, including the norms of respect for law and the principle of *pacta sunt servanda*, suggest that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.’19 While his study rationalises the extent of compliance, his remark has been criticised by international relations scholars for ambiguousness, since he does not deal with reasons for compliance.20 International law scholars have tended to use the term ‘compliance’ and ‘fulfilment’ interchangeably, noting that international environmental treaties are sources of international environmental rules and create obligations imposed on States.

Phillippe Sands is a representative of the international law school. He uses the term compliance in both broad and narrow senses. In his work, compliance can be approached

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from both international law and domestic law perspectives.\textsuperscript{21} In its broad meaning, compliance refers to ‘the behaviour of a state, [...]’, which conforms to a treaty’s primary rule.’\textsuperscript{22} It involves three interrelated but separate steps and mechanisms, namely implementation of international obligations into or by domestic law and policies and informal measures, ensuring domestic compliance by individuals and organisations which are under the State’s jurisdiction, and finally a complicated system of measures, both international and domestic, and with both enforcement and assistance features, to secure a States’ compliance with international environmental obligations.\textsuperscript{23}

Sands focuses on the influence of international environmental treaties, which are the sources of international environmental obligations, on the compliance of parties with international environmental treaties. His study does not investigate the contexts of individual States, where the issue of compliance requires deep consideration of domestic factors.

The UNEP Guidelines similarly describe compliance as the “fulfilment by the contracting parties of the obligations under a multilateral environmental agreement and any amendment to the multilateral environmental agreement”.\textsuperscript{24} Additionally, however, the UNEP Guidelines describe implementation as a step toward compliance and interprets implementation as developing national acts such as legal and policy frameworks or other initiatives and measures.\textsuperscript{25} Moreover, the UNEP Manual on Compliance with and Enforcement of International Environmental Agreements gives detailed domestic measures, steps and mechanisms that a party should consider in order to secure compliance with international environmental obligations arising from a treaty. While the UNEP Manual is the


\textsuperscript{22} See Philippe Sands, ‘Compliance with International Environmental Obligations: Existing International Legal Arrangements’, above n 21, 49.

\textsuperscript{23} Ibid, 54-80.

\textsuperscript{24} See UNEP, \textit{Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements}, above n 17, C 9 (a).

\textsuperscript{25} Ibid, C 9 (b).
product of the experience of nearly 90 countries, little Vietnamese experience is referred to in this UNEP Manual.26

ii. International Relation and Political Economy Scholars

International relation scholars such as Kal Raustiala and Anne-Marie Slaughter describe compliance as ‘a state of conformity or identity between an actor’s behaviour and a specific rule’.27 Here compliance includes the idea of action (behaviour), not just outcome. While maintaining a rationalist theory, they believe in the role of politics or powers and structures, and moreover, consider the calculation of costs and benefits in determination of compliant or non-compliant behaviour. Kal Raustiala, for example, argues that ‘rationalist theories explain compliance in instrumental terms that link actor behaviour to the nature of the problem, the structure of the chosen solution, and the cost and benefits associated with different behaviours.’28

International relations scholars share a common approach with the international law school in focusing on the international perspective of compliance, referring to the role of ‘international institutions and international order’. International relation and political economy scholars, in contrast with international law scholars, are of the opinion that international law, rules and norms have little influence on compliance or non-compliance with international environmental treaties, and deterrence or enforcement is the most appropriate approach to non-compliance prevention. George Downs, for example, argues that ‘enforcement is playing a larger role in maintaining compliance both in connection with particular agreements and in the international system as a whole.’29

27 See Kal Raustiala and Anne-Marie Slaughter, above n 20, 539.
In summary, like the international law school, international relations and political economy scholars have paid little direct attention to the domestic factors in compliance determination, but are open to the inclusion of such factors.

iii. Institutional and Liberal Scholars

Numerous scholars, for example, Ronald Mitchell, Abram Chayes and Antona Handler Chayes, Durwood Zaelke, Matthew Stilwell, Oran Young, describe compliance as ‘an actor’s behaviour that conforms to a treaty’s explicit rules’.30 Harold Jacobson, Edith Brown Weiss, Durwood Zaelke, Matthew Stilwell, Oran Young represent the liberal and institutions approaches to compliance. Jacobson and Weiss use the broad meaning of compliance to include implementation. In their opinion ‘compliance goes beyond implementation. It refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have constituted’.31 This, then, broadens the definition to include what can be referred to as fulfilment. However this approach is not adequate for the purpose of establishing a framework for analysis, since there are a number of different points of view about the concept. While Jacobson and Weiss widen the scope of the concept of compliance to also include both the obligations and objectives of environmental treaties, Mitchell narrows down the concept to encompass only ‘explicit rules’ or in other words, the formal obligations of treaties.

Durwood Zaelke, Matthew Stilwell, and Oran Young, also define compliance as ‘a state of conformity or identity between an actor’s behaviour and a specified rule’ regardless of any factors leading to conformity or of circumstances affecting this conformity.32 These three scholars have explicitly called for removing the division between international and domestic compliance, considering domestic compliance as part of international compliance and include the mixed features of a managerial or cooperation and enforcement approaches as the best compliance model. They also examine the instruments and mechanisms, assisting


and enforcing compliance with international environmental obligations at both international and domestic levels.

Jacobson and Weiss examine the influence of many factors at the international level, such as the international context, the nature of activities involved and the features of international environmental treaties on compliance. While arguing that ‘the characteristics of an accord make a difference’, the scholars mainly focus on the linkage between the extent of compliance and the preciseness and the fairness of the obligations. Jacobson and Weiss are open for discussion on the issue of the influence of the nature of the obligations and required methods for implementation or the priority of obligations to be complied with. While the obligations are of different natures, they significantly influence of the choice of the implementation methods and the extent that environmental requirements are internalised into domestic law. The text edited by Jacobson and Weiss emphasises the significant influence of domestic factors with focus on administrative and bureaucratic capacity and others such as the domestic environment and the roles of non-governmental organisations.

Thus, while there is a divergence of opinion among scholars and commentators on the details of the compliance concept, there are two common themes which are applicable in this thesis. Compliance is accepted to mean the fulfilment or full implementation of a treaty’s international environmental obligations, and it often also covers behaviour which conforms to the rule of international environmental treaties. In addition, the studies of scholars of liberal and institutions are highly relevant. While international environmental treaties themselves are clearly the source of obligations, the issue of social, institutional and other domestic factors and instruments are of paramount importance in understanding the extent and effectiveness of compliance by a Party such as Viet Nam.

2. IMPLEMENTATION TO COMPLY WITH INTERNATIONAL ENVIRONMENTAL TREATIES IN VIETNAMESE LAW

Viet Nam does not have a long legal tradition of studying mechanisms for effective implementation to comply with international environmental obligations. One reason may be

34 See Ronald Michell, above n 30, 6-11.
the lack of interest among legal scholars because of the late participation by Viet Nam in international environmental treaties. It was only after the introduction of Renovation policy in 1986 that Viet Nam became active in joining international environmental treaties. Not surprisingly, there was a lack of literature on implementation and compliance with international environmental treaties at that time. At that time Vietnamese law also remained silent on mechanisms for the implementation of international environmental treaties.

Since Renovation, the open-door policy has led to an increase in the number of international environmental treaties and treaties in other fields that have been signed by Viet Nam. This practice and a rising awareness of the requirements for fulfilment of treaty obligations led to the enactment of the first ‘law’ on the subject, setting up the mechanisms for fulfilment of obligations of all international treaties, in 1989. Following this Ordinance, in order to ensure compliance with international treaties, the State has enacted two further statutes regulating the process of Viet Nam’s joining and implementing international treaties. This has attracted the attention of many Vietnamese legal scholars, law-makers and other commentators and launched debates on the regime’s effectiveness in fulfilling the obligations arising from international treaties to which Viet Nam is a party. Unfortunately,

36 For more details of the Renovation and its influence on the participation of Viet Nam in international environmental treaties, see the discussion in the Chapter Three of the thesis. See also Le Minh Tam, ‘The State and Law in the Renovation Period (Nha Nuoc Va Phap Luat Thoi Ky Doi Moi)’ in Le Minh Tam and Vu Thi Nga (eds), Hanoi Law University Textbook on Viet Nam’ History of State and Law (Truong Dai hoc Luat Ha Noi - Giao Trinh Lich Su Nha Nuoc Va Phap Luat Viet Nam) (People’s Police Publishing House, 2002) 725.

37 The first enactment was the Ordinance on the Conclusion and Implementation of International Treaties of the Socialist Republic of Viet Nam enacted in 1989.

38 The 1989 Ordinance on the Conclusion and Implementation of International Treaties of the Socialist Republic of Viet Nam was replaced by the Ordinance of the Standing Committee of the National Assembly Number 07/1998/PL-UBTVQH 10 dated 20 August 1998 on the Conclusion and Implementation of International Treaties. In 2005 the National Assembly passed the Law Number 41/2005/QH11 on Conclusion, Accession and Implementation of International Treaties. The Law became effective on 1 January 2006.

during those discussions there were only some modest studies on implementation and compliance with international environmental treaties.

The following discussion provides an overview of the Vietnamese approach to compliance with international environmental obligations which have been discussed in legal literature from a historical perspective. It focuses on an examination of the evolution of the Vietnamese legal regimes for implementation of international treaties as a procedural framework shaping the effective implementation of international environmental treaties. The notion of implementation which was discussed in the previous part is used as a backdrop for the examination of Vietnamese approaches to compliance. It is argued that, although each legal regime for the implementation of international treaties has been an improvement in comparison with the previous one, each regime has dilemmas within itself, and consequently none may ensure the fulfilment of Viet Nam’s international environmental obligations.

2.1. Implementation of International Environmental Obligations prior to the Adoption of the 1989 Ordinance

In 1986, when the Communist Party of Viet Nam (CPV) launched the Renovation Policy focusing on economic reform and the open-door policy, the Party’s Resolution also called for the regulation of society by law, shifting from the long-established legal culture of regulating the society by moral rules. Thus legal regulation could now be introduced for implementing international obligations. Viet Nam was supposedly an active subject in international environmental conservation and environmental protection and participated in the first international environmental treaty in the early days of the establishment of the Democratic Republic of Viet Nam. However, the State did not consistently fulfil these

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41 Ibid, 120.

42 It should be noted that there are different records on the first of Viet Nam’s international environmental treaties. According to some authors, for example, Truong Manh Tien, the former Director of the Environmental Department under the Ministry of Natural Resources and Environment (MONRE), the first Convention that Viet Nam participated in was the Convention concerning the Protection of the World Cultural and Natural Heritage. See Truong Manh Tien, ‘Overview of International Environmental Law (Tong Quan Ve Phap Luat Moi Truong Quoc Te)’ in Hoang The Lien (ed), *The Current Status of Vietnamese Environmental Law and*
international environmental treaties because of the lack of clear legal mechanisms for implementation and compliance.

Before the adoption of the 1989 Ordinance on Viet Nam’s Treaties, there had been no compulsory mechanisms for fulfilment of international environmental treaties. The only sources were the rules of the 1980 Constitution. The powers of implementation of international environmental obligations were distributed amongst the legislature, the executive and the judiciary.

The 1980 Constitution assigned powers in relation to ratification and implementation of international treaties to the State Council and the Council of Ministers. While the State Council decided on the ratification of international environmental obligations as the first step to effect international environmental obligations in Viet Nam, the powers to organise the implementation of the treaties was vested in the Council of Ministers as an aspect of foreign affairs. However, by its nature, the Constitution, as the basic Law of Viet Nam, sets out only general principles for the organisation of State bodies and provides the major duties and powers of the State organs. Hence, the Constitution hardly provides clear and powerful mechanisms for the fulfilment of international environmental obligations.

The different records of the Viet Nam’s international environmental treaties may result from different conceptions of international environmental treaties. Mr. Tien listed only global international environmental treaties. However, in accordance with some Viet Nam’s Ordinances relating to international treaties enacted before the 2005 Law on Conclusion, Accession and Implementation of International Treaties, international treaties include all international arrangements made in the name of the State, the Government, Ministries and People’s Supreme Court, People’s Supreme Procuracy. Another reason for the differences in the records may be because of the insufficient registration of international environmental treaties in Viet Nam. Therefore some information about Viet Nam’s international environmental treaties may not be accessible. The author’s research found that there had been only three environmental treaties prior to the year 1986. The first reported treaty was the Agreement for the Establishment of the Asia-Pacific Fishery Commission to which Viet Nam became a party on 3 January 1951. See for more details Asia-Pacific Fishery Commission, http://www.apfic.org/modules/tinycontent/index.php?id=27, last accessed on 16 May 2013. The second one was the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. In fact, Viet Nam was one of the first signatories of the Convention on 10 April 1972. And 8 years later the Convention came into force for Viet Nam on 20 June 1980. The third one was the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, to which Viet Nam acceded on 26 August 1980.

43 Article 107 of the 1980 Constitution of the Socialist Republic of Viet Nam stipulated that:

The Council of Ministers shall have powers and duties as follows:

16. To organise and govern the foreign affairs of the State; to guide the implementation of concluded treaties and agreements.
Because the laws remained silent on how treaty obligations should be implemented at that time, there was thus a lack of compulsory mechanisms, resulting in limited implementation of international environmental obligations. This was recognised by some Vietnamese environmental scholars:

> [t]he content of the rules of the environmental law during that period did not reflect and respond to the requirements of international cooperation in environmental protection. The conformity of the enacted rules by the [Vietnamese] Government with the international conventions was limited.\(^4\)

The lack of implementing legislation meant the implementation of international environmental obligations occurred on an *ad hoc* basis. Hence, under Constitutional rules, the most powerful legal institution which would have had any major impacts on the implementation of international environmental obligations was the Council of Ministers.

The reliance on the Executive Government, without clear formal legal mechanisms for implementation of treaty obligations by legislation was largely responsible for the case-by-case approach to implementation. More importantly, such fragmented implementation due to the *ad hoc* mechanisms consequently resulted in unintentional failures to fulfil certain of these obligations. In conclusion, the constitutional rules vesting the power of implementation of international environmental obligations in the Government could hardly secure the consistent fulfilment of these treaties.

The case of the implementation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction is an example illustrating the modest implementation of the treaty due to limited actions taken by the State.\(^5\) Despite the fact that Viet Nam was one of the first States to sign the Convention, it did not immediately take action to implement the substantive obligations of the Convention. There was neither any existing legislation in place to implement the Convention’s obligations, nor any plan to adopt new legislation to destroy prohibited

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45 See above n 42.
biological and toxic substances. At that time, the major action taken by Viet Nam to implement the Convention’s obligations was to establish an institution for partial implementation of the treaty’s obligations, namely the National Committee on Investigating the Consequences of American Chemical Warfare in Viet Nam (Committee 10-80) in 1980. The establishment of the Committee seemed to implement the obligations in Article 5. The Committee was responsible for investigation of the consequences of the use of chemical toxins by the Americans in Viet Nam, and the result of the investigation was to be a basis for compensation from the US Army.

It should be noted that at that time international law in Viet Nam was considerably under-researched. The most comprehensive book reflecting Vietnamese scholars’ views on international law was the two-volume Law Textbook on International Law for law students at Ha Noi University of Legal Studies. Written by scholars, most of whom used to study in the former Soviet Union, the Law Textbook shared many common views and approaches to interpreting international law with Soviet scholarship on international law. For example, both Vietnamese and Soviet scholars interpreted the system of fundamental principles of international law in a similar manner, including the principle of peaceful co-existence.

While international law in general was under-researched at that time, it is understandable that Vietnamese legal scholars did not pay much attention to the implementation of

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46 The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction has 15 Articles and 10 of these contain substantive obligations. Article 1, for example, clearly provides that:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.

47 The Committee (shortly provided as the Committee 10-80) was established in accordance with the Decision 288-TTg dated 15 October 1980. In 1987, the Committee renamed as the National Committee on Investigation of the Consequences of the Chemical Substances Used in Viet Nam War. However, the Committee was still called as the Committee 10-80. The Committee then was organised at provincial levels in according to the Decision 209-CT of the Council of Ministers dated 24 June 1985.

48 Article 5 provides that ‘[t]he State Parties undertake to consult one another and to co-operate in solving the problems, which may arise in relation to the objectives of and in application of the Convention...’

49 Hanoi Law University, Textbook on International Law (Giao Trinh Luat Quoc Te) (Legal Science Publishing House, 1984), vol 1-2.

international environmental treaties. Only in the early 1980s were there some paragraphs in the Law Textbook referring to issues related to implementation of environmental treaties. However, the Vietnamese school of international law at that time focused on the settlement of the relationship of international law and domestic law rather than on the methods, instruments and means of implementation of international treaties.\(^{51}\) As environmental matters at that time did not greatly concern Viet Nam, there was no scholarship on the topic of international environmental law.

In short, while the Government was fully vested with the power to implement international environmental obligations by the Constitution, there was no effective mechanism for development of national acts in order to comply with international environmental obligations. This legal practice in Viet Nam led to the possibility of unintentional failure to fulfil international environmental treaties’ obligations and was no doubt responsible for the initial fragmentation and delay in the fulfilment of the international environmental obligations.

2.2. Implementation of International Environmental Obligations after the Enactment of the 1989 Ordinance

This section examines the extent to which the establishment and changes in the ‘unified’ mechanisms affected the fulfilment of international environmental treaties. It analyses the implications of these mechanisms from both theoretical and practical perspectives and in historical development.

Viet Nam is likely to continue to pursue a dualist approach in regard to the relation between international law and domestic law;\(^{52}\) hence domestic legal implementation is very important

\(^{51}\) Tunkin, a prominent international law theorist, argues that ‘[a]nalysing the relation between international law and domestic law, socialist doctrine of international law based on the sovereign principle treats international law and domestic law as separate and independent, however, they are closely interrelated legal systems.’ See Grigori Ivanovich Tunkin, *International Law (Mezdunarodnoe Pravo)* (Moscow International Relations Publishing House, 1974), 64. See also Hanoi Law University, *Textbook on International Law (Giao Trinh Luat Quoc Te)* (Legal Science Publishing House, 1984), vol. 2, 26-7.

\(^{52}\) In accordance with the dualist theory, international law and domestic law are two separate legal systems. While Vietnamese law has never clearly recognised the ‘dualist’ approach toward the relationship between international law and domestic law, there is a great deal of evidence in support of the argument for this dualist approach. For example, the Decision of the Prime Minister Number 34/2005/QĐ-TTg requires the ‘internalisation’ of all ratified international treaties on environmental protection. See the Decision of the Prime Minister Number 34/2005/QĐ-TTg, below n 61. Another example is that the title of Article 6 of the 2005 Law
for ensuring the effectiveness of fulfilment with international environmental treaties. Viet Nam has in fact attempted to improve the fulfilment of its international environmental obligations by developing a regulatory framework, including both legal and policy rules. As a result, the scope of national law and policies has been broadened to attempt to create a sufficient legal and policy environment to ensure the fulfilment of international environmental obligations. Despite this effort, the State is still challenged regarding compliance in terms of an adequate approach to environmental management and of implementing domestic laws.

i. The Concept of Implementation of Treaties in Vietnamese Literature

There have been numerous debates amongst Vietnamese academics, law-drafters and other commentators on the approach to and meaning of implementation, especially before the enactment of the new Law on Conclusion, Accession and Implementation of International Treaties in 2005. While some literature uses the term ‘implementation’ (thuc hien), and

53 Legal framework is a term used to refer to the complex of legal norms or legal rules adopted by States organs, whether they are central governmental organs such as the National Assembly or its organs (legislature), the President or Government as executive and administration or People’s courts and procuracies. Unlike in a common law system such as in Australia, where the law comes from legislation and judgement, in the Vietnamese legal system, law consists of legal norms, which are embedded in the complex hierarchy formally known as legal normative documents.


the term has a long history of use,\textsuperscript{56} it has never been defined. Indeed, ‘implementation’ is used to refer to various actions of the State. In an ‘international’ context, ‘implementation’ is used for making a treaty and implementing specific framework treaty rules. In a ‘domestic’ meaning, implementation seems to be understood as a comprehensive process that includes creating a legal framework to perform international treaties and involving State agencies as main figures to ‘organise the implementation of international treaties.’\textsuperscript{57}

The term ‘implementation’ may be used to mean internalisation, or sometimes transformation or integration of an international treaty into domestic law. In criticising the view that the interpretation of transformation is making a comprehensive law to ‘give legal effect to a treaty within Vietnamese territory’, Le Thanh Long argues that transformation or domestication of international law should be understood in Vietnamese legal scholarship as ‘concretisation’ of international treaties by domestic law in the case of framework treaties.\textsuperscript{58} However, with the practical aim of making it possible for treaties to be complied with quickly, he calls for a doctrine of ‘direct legal effect’ of international environmental treaties in the Vietnamese legal system in cases where the treaties have no conflicting provisions, or have provisions which have not been prescribed in Vietnamese law. This is because, as he has observed, environmental treaty provisions are usually drawn up in the manner of a framework. The concept that Dr. Long has proposed is a new look at treaties, and it may be practical. He appears to share the same point of view as those who advocate the doctrines of self-executing and non-self-executing treaties.

Additionally, while there are two terms ‘internalisation’ (noi luat hoa) and ‘implementation’ (thuc hien) used in Vietnamese laws and they appear to be understood without any official interpretation. However, when interpreting the uses of the two terms, it could be claimed that they have different meanings. The term ‘internalisation’ was first officially used without any explanation in a Decision of the Prime Minister, which required the ‘internalisation of all

\textsuperscript{56} The three respective laws regarding treaties’ management in Viet Nam which were adopted in 1989, 1998 and 2005 regulate the management of the making and implementation of treaties; however, none of them gives a definition of the term ‘implementation’. In addition, neither of the Laws on Environmental Protection enacted in 1993 or 2005 has any interpretation of the term.

\textsuperscript{57} The 2005 Law on Conclusion, Accession and Implementation of International Treaties, art 17 (2, a).

\textsuperscript{58} Le Thanh Long, above n 54, 100.
ratified international treaties on environmental protection.’\(^{59}\) ‘Internalisation’, therefore, can be understood as making laws, regulations and policies to give domestic effect to international environmental treaties.

In summary, finding methods for giving effect to international environmental obligations within the Vietnamese legal system is a main theme amongst Vietnamese scholars and practitioners. However, this approach is hardly enough to secure the compliance with international environmental obligations in Viet Nam as compliance requires a number of elements, actors and factors involved in the process of implementation to comply.

ii. The 2005 Law on Conclusion, Accession and Implementation of International Treaties and the Concept of Implementation

The 2005 Law on Conclusion, Accession and Implementation of International Treaties illustrates the stronger commitment of Viet Nam to ensure compliance with international treaties, than was the case with the two previous Ordinances,\(^{60}\) enacted in 1989 and 1998. This is because a complex set of concepts and mechanisms had now been built up to create an effective legal environment to ensure compliance with international treaties.

Indeed, the first legislation on Viet Nam’s Treaties, the 1989 Ordinance on the Conclusion and Implementation of International Treaties of the Socialist Republic of Viet Nam, provided in Article 11 (6) that:

[i]n case the performance of international treaties requires revision, amendment, or enactment of a legal normative document of the Socialist Republic of Viet Nam, the ministerial-line agencies concerned shall take responsibility for collaborating with the Ministry of Justice to submit a proposal on the revision, amendment, or enactment of the legal document[s]


\(^{60}\) In regard to the status of the ordinance in Vietnamese legal system, see the discussion in the Chapter Three of the thesis.
Although the 1989 Ordinance does not use the term internalisation or transformation, these terms are used in legal literature and refer to a method to implement international treaties.\textsuperscript{61}

Nine years later, Viet Nam enacted a new 1998 Ordinance on the Conclusion and Implementation of International Treaties, which replaced the 1989 Ordinance on the Conclusion and Implementation of International Treaties of the Socialist Republic of Viet Nam. While the 1998 Ordinance seemed to make a few changes concerning the concept of implementation, in fact it only added the requirement for the revocation of legal normative documents to ensure compliance with treaties.\textsuperscript{62}

Significantly, the adoption of the 2005 Law on Conclusion, Accession and Implementation of International Treaties is an attempt to reform the Vietnamese law on the making and the performance of international treaties, as a new means to incorporate treaty obligations into Vietnamese law in order to facilitate Viet Nam’s compliance with international treaties. The concept of transformation of treaties was discussed during the drafting of the Law and most opinions called for compulsory transformation of treaties into Vietnamese law.\textsuperscript{63} However, the final draft resisted the importation of the doctrine of transformation. Instead, it shifted to a ‘direct application’ doctrine.

The concept of direct application under the new Law does not appear to affect the performance of the already acceded environmental treaties a great deal. This is because, firstly, the 2005 Law only applies to treaties that would be acceded to by Viet Nam after the 2005 Law came into force. Secondly, the existing international environmental treaties were made in the name of the State and ratified by the Head of State; hence, they do not fall within the scope of the treaties made by Ministries, which are subject to ‘reconsideration’ under the new 2005 Law on Conclusion, Accession and Implementation of International Treaties.\textsuperscript{64} Thirdly, for the first time, a doctrine of the direct application of international

\textsuperscript{61} See Doan Nang, above n 29, 23.

\textsuperscript{62} See the 1998 Ordinance on the Conclusion and Implementation of International Treaties, art 24 (4).


\textsuperscript{64} The new definition of the term ‘treaty’ in Article 2(1) of the 2005 Law on Conclusion, Accession and Implementation of International Treaties has considerably changed the notion of ‘treaty’ in the Vietnamese legal system. Since the Law became effective on 1 January 2006, Viet Nam’s international treaties only comprise the two categories of those which are concluded in the name of the State and of the Government;
treaties has been imported into Vietnamese law with conditions for application; for example, obligations must be precise and concrete. As most of Viet Nam’s existing international environmental treaties, including the Convention on Biological Diversity (CBD) and its Protocol, contain general obligations, and provide for obligations only on States, they may be difficult to be directly applied. More importantly, the tendency to make framework or/and ‘package deal’ environmental treaties requires the parties to elaborate the treaties’ obligations in detail at the national level.

Generally speaking, the concept of implementation or incorporation of international environmental treaties into Vietnamese law has been discussed widely both in Vietnamese laws and legal literature. The dominant point of view is to secure compliance with international environmental treaties by developing a system of domestic rules internalising the treaty’s rules and covering the whole scope of the treaty. If this concept is used, different mechanisms are required to give domestic effect to international treaties after ratification or accession.

It seems that Viet Nam is resistant to complying with treaties when making new statutes. While some mechanisms of the law require rule conformity at the moment of consent to be bound by a treaty, 65 both the 2005 Law on Conclusion, Accession and Implementation of International Treaties and the 2008 Law on Enactment of Legal Normative Documents have no compulsory mechanism for rule conformity to a newly enacted statute. These Laws, while being appraised as ‘going further’ than the principle of ‘consideration of international treaties’ because it imposes a responsibility of law-drafters to weigh the extent of internalisation of international treaty obligations into Vietnamese law, 66 still does not require law-makers to fully comply with international environmental treaties. More significantly, while the national laws do not comply with international environmental treaties, there is no

65 On ratification of some Viet Nam’s treaties, for example, the 1982 United Nations Convention on the Law of the Seas or the 2000 Bilateral Trade Agreement between Viet Nam and the United States, the resolutions of the National Assembly ratifying these treaties require the enactment of legal normative documents to implement the treaties’ obligations.

commitment that treaties are complied with by local governments. Hence, Viet Nam may unintentionally fail to comply with international environmental treaties.

With the existing framework for treaty implementation, which is unlikely to be changed in the near future, it is important that the implementing legislation and regulation should provide a ‘good’ legal and regulatory framework in order to be operational in reality. The most significant objective is the obedience to those laws by regulated subjects of Vietnamese law and enforcement by means of implementing laws and enforcement mechanisms, which are also significantly related to the efficiency and therefore the quality of the law.

CONCLUSION

In legal theories, compliance may be understood as fulfilment of international environmental obligations or conformity with an international legal rule. While a party has to comply with international environmental obligations, compliance may be achieved through different methods. Implementation to comply with international environmental obligations is the process of engaging domestic elements, such as law and policy instruments, the socio-factors and actors, to go through the two main stages including developing the implementing policy and legal framework and enforcing of the implementing legal and policy framework. Enforcement is processed by managing the domestic legal requirements, compliance with these domestic legal requirements by other actors such as individuals and businesses, and using both enforcement and assisting mechanisms such as court and other authorities for compulsion to comply. Successful implementation to comply with international environmental obligations effectively integrates both institutional and normative factors, including the relevant State agencies and legal and policy framework. This is the case for Viet Nam as serious consideration of these factors has not been taken, with the result that the mechanisms are not strong enough to secure the implementation of international environmental obligations.
CHAPTER THREE

VIET NAM'S SOCIO-POLITICAL AND LEGAL ENVIRONMENT FOR IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

INTRODUCTION

As discussed in Chapter Two, current thinking in relation to compliance with international environmental obligations examines the causes for a party’s compliance as well as barriers to compliance with international environmental obligations. These theories, while focusing on either the role of international legal norms and international institutions, national interests or the power balance as sources of (non-) compliance, also include socio-political and legal environment factors. Therefore an examination of Viet Nam’s socio-political and legal environment shaped by distinctive features as the context for the implementation of international environmental obligations is of importance.

It should be noted that the topic of implementation to comply with international environmental obligations has increasingly been attracting Vietnamese legal scholars. Research works in this area, however, are still modest. Also, while these research works in Viet Nam mainly concern legal analyses, they do not pay much attention to the extent to which the national socio-political environment can influence the law making and implementation of international environmental obligations.

The aim of this chapter is to examine the extent to which the socio-political and legal environment influences compliance with international environmental obligations in Viet Nam. The chapter begins with a brief discussion of socio-political features and their interface with traditional Vietnamese law. This discussion will provide an understanding of cultural and traditional influences on contemporary law implementation in Viet Nam. The chapter then considers several contemporary socio-political factors, specifically the launch of the Renovation policy in 1986, for implementation of international environmental obligations. The chapter finally focuses on the analysis of major features of the contemporary Vietnamese legal environment which influence related principles, approaches, mechanisms and content of laws for the implementation of international environmental obligations.
1. TRADITIONAL VIETNAMESE SOCIETY AND THE IMPLICATIONS FOR THE CONTEMPORARY LEGAL SYSTEM OF VIET NAM

1.1. Main Features of Vietnamese Traditional Society and Law

The implications of the socio-political and legal environment for the character of traditional and contemporary law in Asian countries have been emphasised in law-in-context scholarship.¹ In an in-depth law-in-context study of law in China, Chen emphasises the influences of legal culture and tradition on contemporary law as follows:

‘[t]he features of law in a given society and at a particular historical stage are shaped not only by the prevailing environment of that time, but also by the cultural heritage of that society, though the role of culture and tradition in shaping the law may be muted, implicit and even unconscious.’²

Foreign scholars have increasingly engaged in the study of Vietnamese legal culture and the implications of legal culture for Vietnamese contemporary law since the late 1990s.³ However, such studies of Vietnamese legal culture and its influence on contemporary Vietnamese law are limited in Vietnamese scholarship.⁴ Specifically, there has not been any research on the implications of traditional legal values for the implementation of international environmental obligations in Viet Nam.

¹ For example, the books edited by Veronica Taylor and Poh-Ling Tan are exemplary studies on Asian legal systems, including the two chapters relating to Viet Nam and Vietnamese law by Mark Sidel and John Gillespie. See, Veronica Taylor (ed), Asian Laws Through Australian Eyes, (LBC Information Service, 1997); Poh-Ling Tan (ed), Asian Legal Systems: Law, Society and Pluralism in East Asia, (Butterworths, 1997); and Andrew Harding, ‘Comparative Law and Legal Transplantation in South East Asia’ in David Nelken and Johannes Feest (eds), Adapting Legal Cultures, (Hart Publishing, 2001) 199, 199-222.


Viet Nam has a long history of the establishment and development of its legal system. According to many historians, Vietnamese law was first formally created under the ancient Van Lang - Au Lac (208-179 BC). The recognition by Ma Yuan of differences between Viet laws and Han laws is a good indicator of the existence of traditional Vietnamese law. Reporting on the legal reform in Au Lac to the Han Emperor (206 BC-220 AD), Ma Yuan showed that the Viet law differed from the Han law in more than ten points. Altogether, based on historical factors and characteristics, the development of the traditional Vietnamese legal system is divided into four continuing periods, namely the Van Lang-Au Lac era (208-179 BC), the Chinese domination time (179 BC-938), the Dai Viet period (939-1884) and the period of French colonisation (1884-1945).

Traditional Viet Nam was characterised by a strong community culture as a result of the need for collaboration against floods and self-protection against invaders. In this community culture the people within a village were closely connected. The people living within a village formed rules to regulate relationships within a village or a community. These village customary rules created the village’s customary law, which was automatically recognised and enforced by the King as part of traditional Vietnamese law. It is clear that in a country strongly influenced by village culture such as traditional Viet Nam, both formal law (official law of the State) and village customary rules existed concurrently to regulate

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6 See Chen, above n 2, 17.


9 See Vu Thi Nga, above n 5, 32.

10 There is a Vietnamese proverb saying that: “A next-door neighbor is better than a distant relative” (Ban anh em xa, mua lang gieng gan).

11 See Le Minh Thong, ‘State Law and Covenant, Village Customs in the Legal Life of Village Communities of Viet Nam (Luat Nuoc va Hung Uoc, Le Lang Trong Doi Song Phap Ly Cua Cong Dong Lang Xa Viet Nam), *Proceedings of the 3th Conference on Vietnamese Studies, Vietnamese Law Panel*, (Ha Noi, 2008) 705, 705-11, [http://tainguyenso.vnu.edu.vn/xmlui/handle/123456789/6169](http://tainguyenso.vnu.edu.vn/xmlui/handle/123456789/6169). Some scholars such as Pham Duy Nghia use the term ‘village customary law’ for referencing the body of customary rules created by villages of traditional Vietnam. This is because, in their opinion, village customary rules were automatically recognised by the King as part of the State legal system. See Pham Duy Nghia above n 6, 27.
social relationships. The village customary law, which advanced with appropriate rules and a system of fair sanctions and rewards, had wide influences amongst Vietnamese villagers and gained effective regulation by the villagers’ voluntary obedience. Even if, compared to the King’s law, the creation of village customary rules would have taken a longer time, the village customary law formed a special supplementary instrument to State’s law in regulating the traditional Vietnamese society.

Besides the village rules and community culture, traditional Vietnamese society was strongly influenced by several ideologies. In current legal scholarship, Buddhism, Confucianism, and Legalism are examined as major schools of thought influencing traditional Vietnamese law.\(^\text{12}\) Indeed, each school of thought had different influences on Vietnamese traditional law; for example, Buddhism became the most influential legal ideology in the Ly Dynasty, while Confucianism became the State politico-legal orthodoxy from the Le dynasty.

Originally, Confucianism came to Viet Nam from China.\(^\text{13}\) The philosophy of Confucianism focuses on self-perfection, the role of education and the organisation of society as a family.\(^\text{14}\) In regard to the State government, Chen explains that ‘a good government was seen as a government that was based on virtue (de) and morality (li).’\(^\text{15}\) The recognition of Confucianism by Vietnamese rulers was demonstrated by belief in the self-perfection of Emperors and the ruling class, and the education of people to act in conformity to the moral rules of the ruling class, and in the raising of people’s awareness to voluntarily perform their duties.\(^\text{16}\) Additionally, Confucianism was accepted by the Vietnamese because the original idea of Confucianism underwent many changes in Vietnamese traditional society, as the

\(^\text{12}\) See Trung Anh ‘Legal Thought of Viet Nam Feudalist Class’ (1995) 2(13) Vietnam Law & Legal Forum 24, 24. It should be noted that Taoism, unlike the other two schools of thought coming from China (Confucianism and Legalism), could be peacefully accepted by the Vietnamese people. However, Taoism could not really find a position as State orthodoxy in Vietnamese feudal dynasties. While raising the value of natural control against man-power, Taoism’s philosophy was contradictory to the interests of the feudal ruling classes in their attempt of the centralisation of power.

\(^\text{13}\) See Pham Duy Nghia, above n 4, 79.

\(^\text{14}\) For detailed study of nature and tenets of Confucianism, see Chen, above note 2, 10-14.

\(^\text{15}\) Ibid, 10.

\(^\text{16}\) Ibid, 25.
ideology adopted the values of Vietnamese traditional society and became Vietnamese Confucianism.\textsuperscript{17}

The recognition of Confucianism in the 15\textsuperscript{th} century as the politico-legal ideology of the Vietnamese feudal Dynasties was at least partly the result of the reduced role of competing Buddhism in shaping ideology and practice during the Tran Dynasty. Buddhism, based on a humanitarian philosophy, did not consolidate the power of rulers.

The two underpinnings of Confucianism in managing a state (governing a state by morality and organising a state as an extended family),\textsuperscript{18} met the requirements of Vietnamese feudal rulers by strengthening their power as well as in administering society. Vietnamese rulers also wanted to conduct a policy of being close to the grassroots.\textsuperscript{19} Therefore, governing people by education rather than by punishments was able to contribute to the strength of the Vietnamese feudal State.\textsuperscript{20} In addition, the organisation of the State as a family could be used to explain the different status of people in feudal society, as well as initiating the principle of Emperor-respect, under which the Emperor was given God’s duty to manage the ordinary people. This notion assisted the Vietnamese absolute monarchy in consolidating vested power in the Emperor and enhanced the relationship between the Emperor, ministers and ordinary people in Vietnamese society as members of one family.\textsuperscript{21}

\textsuperscript{17} For extensive discussion on Vietnamese Confucianism, see Pham Duy Nghia, above n 4, 80-1.

\textsuperscript{18} For a detailed study of the nature and tenets of Confucianism, see Chen, above note 2, 7-10.

\textsuperscript{19} See Vu Thi Nga, ‘Chapter IV: State and Law of Ly-Tran-Ho in the Period of Strengthening and Development of the Centralisation State (Nha Nuoc Va Phap Luat Cac Trieu Dai Ly-Tran-Ho Trong Giai Doan Cung Co Va Phat Trien Nha Nuoc Trung Uong Tap Quyen)’ in Le Minh Tam and Vu Thi Nga (eds), Hanoi Law University Textbook on Vietnam’s History of State and Law (Truong Dai Hoc Luat Ha Noi - Giao Trinh Lich su Nha Nuoc Va Phap Luat Viet Nam) (People’s Police Publishing House, 2002) 101, 110-2. Moreover, there is a very well-known saying of Nguyen Trai (1380-1442) – a well-known Confucian scholar and principal advisor of King Le Thai To (Le Loi)- amongst Vietnamese people: ‘It is the grassroots people who row the boat and upturn the boat’ (Cheo thuyen la dan, lat thuyen cung la dan)

\textsuperscript{20} The contradictory methods of Confucianism and Legalism in governing a state could be found in the most cited Confucian message: ‘Lead the people by regulations and keep them in order by punishments, and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality, and they will keep their self-respect and come to you’, cited in Chen, above n 2, 10.

\textsuperscript{21} It should be noted that, in the traditional culture of many Asian states such as Viet Nam or China, the relationship amongst the members of a family has been highly respected and therefore the members of a family have usually lived together generation by generation.
The Confucianisation of Vietnamese traditional law is clear and undisputed; however, the question of the influence of Legalism is ambiguous. In fact, the Confucianism which was accepted and applied by Vietnamese rulers was Neo-Confucianism, that is to say, it was somewhat influenced by the philosophy of Legalism. Legalism could not apparently be ideologically accepted by either Vietnamese rulers or Vietnamese people because of its original idea of law as consisting of harsh and severe penalties, which contradicted the humanitarian philosophy of influential Buddhism. However, certain other tenets of Legalism, such as a need for ruling by detailed regulations, the idea of equality of people before the law, and the control of government officials, were considered appropriate for the governance of a state and the development of law. Therefore many historians and legal scholars have assessed the influence of Confucianism and Legalism on Law in Viet Nam as Confucianism in form and Legalism within.

1.2. The Implication of Vietnamese Traditional Society and Law for Contemporary Law

Formally, customs are recognised as a source of the current Vietnamese law, which are applied in the case of a lack of enacted laws. However, the role and influence of customs in current law are debated in literature. Some scholars argue that the customs have lost their

22 See Per Bergling, ‘Legal Reform and Private Enterprise: The Vietnamese Experience’, 1 Umea Studies in Law (Department of Law, Umea University, 1999), 46. For further study of Confucianisation of Vietnamese traditional law, see Pham Duy Nghia, above n 7, 25-7.

23 In China, Legalism became predominant in the Qin Dynasty (221B.C.-207B.C.) to help the Emperor to make China uniform. See Chen, above note 2, 16. The ruthlessness of the Qin Emperor could be a reason for the lack of acceptance of Legalism as an influential legal thought under later Dynasties.

24 These tenets are mentioned in detail in Chen, ibid, 12.

25 For further an in-depth analysis of the Confucianisation of law, see Chen, ibid, 16-19. See also Vu Thi Nga, ‘The Centralised Monarchical State of Later Le Dynasties (From Early 15th Century to Early 16th Century)’ (Nha Nuoc Phong Kien Quan Chu Tap Quyen Thi Le So (Dau The Ky XV-Dau The Ky XVI)) in Le Minh Tam and Vu Thi Nga (eds), Hanoi Law University Textbook on Viet Nam’s History of State and Law (Truong Dai Hoc Luat Ha Noi - Giao Trinh Lich Su Nha Nuoc Va Phap Luat Viet Nam) (People’s Police Publishing House, 2002) 151, 157.

26 In some of Viet Nam’s laws, for example the Civil Code (Article 3) or Commercial Law (Article 13), it is provided that customs can be applied in the case of a lack of legal norms, legal principles or agreement between and amongst parties. The provisions also set out the conditions of the application of customs, such that those customs must not contradict the principles provided in the Civil Code and the Commercial Law. See Civil Code of the National Assembly of the Socialist Republic of Viet Nam Number 33/2005/QH 11 Dated 14 June 2005 (Bo Luat Dan Su Cua Quoc Hoi Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam So 33/2005/QH11 Ngay 14 Thang 6 Nam 2005), Commercial Law of the National Assembly of the Socialist Republic of Viet Nam Number 36/2005/QH 11 Dated 14 June 2005 (Luat Thuong Mai Cua Quoc Hoi Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam So 36/2005/QH11 Ngay 14 Thang 6 Nam 2005).
significance as a main source of law because many customs cannot meet the requirements of Viet Nam’s contemporary social relations due to their old-fashioned, local and ambiguous features.\textsuperscript{27} Several customs, for example the custom of shifting cultivation and the habit of a wandering life of some ethnic minorities, may need to be changed because these lead to deforestation.\textsuperscript{28} Additionally, many customs have been incorporated into legislation and subordinate legislation as a result of the tendency of formalisation of Vietnamese law.

In contrast, from the viewpoint of other scholars, customs reflecting Vietnamese legal culture have significant implications for contemporary Vietnamese law. Le Minh Thong, for example, in his recent research points to the link between covenants, Vietnamese law reform and grassroots democracy.\textsuperscript{29} Indeed, customs continue to contribute to the current law formation and development, creating a soft environment for the formation and implementation of Vietnamese law, specifically in the field of environmental law. In fact, customs can widen their legal force in practice in the context of a lack of legal rules. While environmental activities are diverse and cover a wide scope, Vietnamese environmental legal rules are ambiguous and general, and they need detailed regulations to be fully implemented.\textsuperscript{30} In this case the delayed issuance of detailed regulations creates an inadequate legal framework, and hence customs can be applied.

Moreover, village rules and customs are preferably used within the communities in remote areas while conducting activities in environmental protection, including biodiversity conservation. This is because in ethnic communities customary rules have a higher validity than any legal rules. Consequently there are many opportunities for customs to be applied in practice. Additionally, the village covenants embodying many environmental protection customs and rules are accepted and widely used in practice. For example the Village Covenant of the H’mong in Hua Rom Village, Na Tau Ward, Dien Bien District, Dien Bien


\textsuperscript{28} See Hoang Huu Binh, The Issue of Environmental Protection in the Course of Implementation of the Programmes of Socio-Economic Development in Ethnic Minority and Mountainous Areas (Van De Bao Ve Moi Truong Trong Qua Trinh Thuc Hien Cac Chuong Trinh Phat Trien Kinh Te - Xa Hoi O Vung Dan Toc Va Mien Nui), (Political Theories Publishing House, 2005) 55.

\textsuperscript{29} See Le Minh Thong, above n 11, 711-14.

\textsuperscript{30} See Chapter Five and Six for a more detailed analysis.
Province set out monetary fines for the infringement of protection the forest and wildlife species.\textsuperscript{31} Hence, law-makers and administrators should take into account the role of village covenants in the implementation of Vietnamese law, including environmental law.

The influence of Confucianism on current Vietnamese law can be found in several studies of both Vietnamese and foreign scholars, although the literature seems to be limited. Examining the influence of Confucianism on law in some other Asian countries such as Japan, Korea, Singapore and China, Pham Duy Nghia argues for a Confucian State with culturally specific institutions and a focus on individual interests.\textsuperscript{32} Specifically, Buhmann has pointed out the implications of Confucianism for Viet Nam’s administrative law reform. In his opinion, the morality, self-discipline and service by officials as reflecting Confucian or Neo-Confucian influence can assist in achieving good governance.\textsuperscript{33} The Confucian influence on contemporary Viet Nam can also be seen in socio-psychological barriers existing in Viet Nam among individuals, businesses and organisations, such as not wanting to be involved in judicial matters, or the preference for informal or less judicial resolutions for disputes such as through negotiations, mediation or conciliation.\textsuperscript{34}

In short, with a long history of establishment and development, traditional Vietnamese law was shaped by two main phenomena: the dualism of village rules and the King’s rules as integrated parts of the law, and the interaction of Confucianism and Legalism on the law in terms of both ideology and regulation. These two major features of Vietnamese traditional law have created a social environment where traditional values, especially those of community morality, are emphasised, and these are deeply rooted in contemporary legal development.

\textsuperscript{31} See Hoang Huu Binh, above n 28, 171.
\textsuperscript{32} See Pham Duy Nghia, above n 4, 86-8.
\textsuperscript{34} For more details, see Nguyen Van Quang, ‘A Model of Administrative Tribunals for Vietnam?’ in Clauspeter Hill and Jochen Hoerth (eds), Administrative Law and Practice from South to East Asia, (Singapore: Konrad Adenauer Foundation, 2008) 249, 284-99.
2. THE SOCIO-POLITICAL CONTEXT OF THE CONTEMPORARY VIETNAMESE SYSTEM FOR THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

In 1945, after a long period of French colonisation, Viet Nam became an independent state with the birth of the Democratic Republic of Viet Nam. Since then Viet Nam has experienced numerous socio-political changes, particularly the North-South division of Viet Nam, the war with America for the country’s unification, and the goal of building a socialist state for the unified Viet Nam. The 30 years of wars against the French and the United States were the main barriers to the country’s independence after the establishment of the Democratic Republic of Viet Nam in 1945. In war time the fight for independence became the first goal and priority of Viet Nam and its peoples; hence economic development and environmental protection were not key goals of the State. After the country’s unification in 1975, Viet Nam aimed to develop the economy for the country’s development; hence there was not much attention paid to environmental protection until Renovation in 1986.

Prior to Renovation, environmental degradation was not seen as an issue in Viet Nam. This is because the exploitation of natural resources for economic development was still acceptable, and environmental pollution was not high, due to low development in the command-controlled and subsidised economy. Additionally, the Vietnamese legal system prior to Renovation was under-developed. A reason for the limited role of law in environmental protection could be seen in the economic context of Viet Nam. Viet Nam had been conducting a centralised command-controlled and subsidised economy since the establishment of the Democratic Republic of Viet Nam. This strictly planned economy created barriers to the development of the Vietnamese legal system. Even significant fields of law such as banking and financial laws had not been developed.

It should be noted that in a socialist country like Viet Nam the communist party plays a special role in the socio-political system, and the leadership of the Communist Party of Viet Nam (CPV) has been constitutionalised since 1980. Thus any study of legal development


36 For a detailed discussion of the leadership of the Communist Party of Viet Nam, see Le Minh Tam ‘The Political Regime of the SR of Viet Nam (Che Do Chinh Tri Nuoc CHXHCN Viet Nam)’ in Thai Vinh Thang
in contemporary Viet Nam must take into account this leadership role of the CPV. In this context, the launch of the Renovation policy (originally *doi moi* in Vietnamese) must be seen as crucial to any legal development of the contemporary Vietnamese legal system.

In 1986 the Sixth National Party Congress adopted the concept of Renovation and its tenets as the guiding policy for the country’s future. Briefly speaking, the Renovation policy of Viet Nam has the following goals:

1. Shifting from a highly centralised planned economy, based chiefly on public ownership of the means of production, to a multi-sector economy operating under a market mechanism with state management and a socialist orientation;

2. Democratising social life with the aim of developing the rule of law in a state which is of the people, by the people, and for the people;

3. Implementing an open-door policy, and promoting cooperation and relations between Vietnam and all other countries in the world community in the spirit of developing amiable relations for peace, independence, and development.

Serving as the guiding policy for the national future, unarguably the Renovation policy has had a large impact on the legal development of Viet Nam in general, and the development of policies, laws and legal institutions and for the implementation of international environmental obligations in particular.

First, following the Renovation policy, Viet Nam has reformed its economy by developing a socialist-oriented market economy. This economic reform has brought about impressive

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achievements in economic development, but also has presented many challenges for environmental protection in Viet Nam. The economic development has caused environmental degradation. Indeed, the economy which has shifted from command-controlled and planned to a multi-sectoral commodity economy requires a large volume of natural resources, which leads to the overuse of natural resources, both biological and mineral. In addition, Viet Nam has developed many industries and opened its doors for foreign businesses, which have become sources of pollution. The depletion of natural resources and environmental degradation require the regulation of the use of environmental components by law. Thus in this context there is no doubt that the development of policies and laws for the implementation of international environmental obligations in Viet Nam must meet the requirement of balancing economic development and environmental protection.

Secondly, the Renovation policy has called for a socialist rule of law state in Viet Nam. Generally speaking, legal reform under the Renovation policy requires a comprehensive legal system which can effectively adjust social relationships and bring about an improvement in legal institutions for law making, implementation and enforcement. Thus in this context laws and legal institutions for environmental protection to meet international environmental obligations in Viet Nam must be developed on the basis of several requirements. In general, laws and regulations for environmental protection need to be made in a comprehensive and consistent manner, which effectively regulate the protection of environmental components, thereby meeting international environmental obligations. In addition, legal institutions for environmental protection including state management

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42 Inter-agency Steering Committee for Viet Nam’s Legal System Development Need Assessment, Report on Comprehensive Needs Assessment for Development of Viet Nam’s Legal System to the Year 2010, (on file with the author).

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agencies and bodies for law enforcement must be improved towards creating better mechanisms for compliance with laws and regulations in the field.

Thirdly, the Renovation policy has put out a call for the multi-lateralisation and diversification of international relations. In this context it is understandable that Viet Nam has become a party to more and more international treaties, including environment protection related treaties. Acceding to these international treaties means that Viet Nam needs to improve its national policy and legal framework and all related actors and factors for fulfilling such international obligations. This is certainly the case for environmental protection, where Viet Nam has been active in negotiating, concluding and implementing a number of international treaties since the Renovation policy was launched.

3. LEGAL ENVIRONMENT FOR IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS IN VIET NAM – SOME DISTINCTIVE FEATURES

The previous section examines several socio-political influences on the implementation of international environmental obligations, mainly on the formation and implementation of environmental law. This part offers an analysis of the main features of contemporary Vietnamese legal system as legal context for implementation of international environmental obligations. It first discusses the system of legal normative documents with implications for Vietnamese environmental law. Viet Nam is attempting to improve its system of legal normative documents for the enhancement of the Vietnamese legal framework. In order to understand the context of law it is necessary to understand the system of legal normative documents and the interrelationship between them. This part then provides a short discussion of state management of environmental protection and the judiciary system in Viet Nam as major factors influencing the Vietnamese implementation of international environmental obligations.

3.1. Legal Normative Documents and the Vietnamese Environmental Law

In the Vietnamese legal system legal normative documents are the major legal sources embodying the legal normative rules. These rules are common rules which are adopted by the competent agencies subject to legislative procedures and can be enforced by the
government. All legal normative documents, while being enacted by different authorities, are unified in a system which is called the hierarchy of legal normative documents. Within the hierarchy, legal normative documents are intertwined horizontally and vertically. Horizontally, legal normative documents can be classified in accordance with their scope of regulation; they form a source of a branch of law. For example, the Civil Code and the Commercial Law are sources of commercial law. Vertically, legal normative documents are located in accordance with the law-making powers of State bodies in a pyramid with the Constitution at the top, followed by those enacted by the National Assembly and then by the Standing Committee of the National Assembly, and other central and local State bodies respectively. In terms of validity, legal normative documents enacted by lower State authorities must not contradict those enacted by higher State bodies.

The Constitution of Vietnam is positioned at the top of the hierarchy of Vietnamese legal normative documents, as it is in every other legal system. The Constitution is ‘the fundamental law and has the highest legal effect’, and therefore, ‘other legal normative documents must be enacted in conformity with it’. Accordingly, the Constitution of Viet Nam aims to set out the principles of ‘political, economic, cultural and social regimes;


44 Ibid, art 3. This Article requires the consistency of hierarchy of legal normative documents as a principle of legal drafting and enactment of legal normative documents.

45 Ibid, art 2. This Article set out the hierarchy of Viet Nam’s legal normative documents. According to some research, legislative activities are exercised not only by the National Assembly but also by its Standing Committee, see, Ngo Duc Manh, 'Legislative process in Vietnam' in Graham Hume Hassall and Truong Phuoc Truong (eds), Infrastructural Development and Legal Change in Vietnam (Centre for Comparative Constitutional Studies, The University of Melbourne, 1994) 21, 21.

46 Above n 43, art 3. Article 3 provides the principle of legality in making and implementing Viet Nam’s legal normative documents.

national defence and securities; fundamental rights and obligations of citizens; and the structure, principle of organisation and operation of the State bodies.'\(^{48}\) It also institutionalises ‘the relationship between the Party as the leader, the People as the master, and the State as the manager’.\(^{49}\)

In the environment field, the Constitution sets out several fundamental principles orienting the development of environmental law in Viet Nam. For example, three important principles for conservation and sustainable development of biodiversity have been determined by the 1992 Constitution. The first and the most significant rule is prescribed in Article 17 of the 1992 Constitution which recognises the ownership by all Vietnamese people, with the State as the representative, of natural resources, including land, forests, rivers, lakes, water resources, subsoil resources, marine resources, and resources in the continental shelf and in the air.\(^{50}\) The establishment of the regime of the ownership by the entire people, according to some authors, has created favourable conditions for the conservation of biodiversity in Viet Nam. This is because the State as the representative of ownership by the entire people can use various legal, policy or financial instruments to ensure the conservation of biodiversity in Viet Nam.\(^{51}\) In regard to the implementation of the CBD’s obligations, on the one hand Viet Nam’s Constitutional rule is evidence of the ‘legal internalisation’ of the principle of the CBD, which recognises the State’s sovereignty over its natural resources.\(^{52}\) The significant rule of ownership by the entire people, further, becomes the foundation for setting up the mechanisms for regulating access and benefit sharing while using the genetic resources of Viet Nam.

Secondly, the 1992 Constitution obligates all the State agencies, army organizations, socio-economic organizations and individuals to observe the rules issued by the State regulating

\(^{48}\) Ibid, the *1992 Constitution*, Preamble.

\(^{49}\) Ibid.

\(^{50}\) Article 17 of the 1992 Constitution provides that ‘land, forests, rivers, lakes, water resources, subsoil resources, marine resources, resources in the continental shelf and in the air which belong to the State, belong to the ownership of the entire people.’


\(^{52}\) The *CBD*, art 3, see also Chapter Four of this thesis.
the rational use of natural resources and environmental protection.\textsuperscript{53} This principle of the Constitution clearly on the one hand requires the State to make rules in order to regulate the use of natural resources in a rational manner, and on the other hand has set down principles for strict obedience of the rules enacted by the State in regard to conservation of natural resources.

Thirdly, the 1992 Constitution also prohibits all activities leading to depletion of natural resources and the deterioration of the environment.\textsuperscript{54} The Constitution, indeed, goes further to create strict rule to regulate those behaviours, which may cause serious harms to environment and natural resources.

Other legal normative documents enacted by the National Assembly are Laws (Codes and other Laws) and Resolutions. Under Vietnamese law, Codes seem to be little different from the so-called ‘other Laws’ of the National Assembly. This is because the 1992 Constitution and the 2008 Law on Enactment of Legal Normative Documents do not distinguish Codes from ‘other Laws’ as the two different categories of legal normative documents. Therefore, both Codes and ‘other Laws’ may regulate similar issues, as those named in Article 11(2) of 2008 Law on Enactment of Legal Normative Documents as follows:

- fundamental and important issues in domestic and foreign affairs, the country’s socio-economic tasks [as well as] tasks in national defence and securities; fundamental principle of organisation and operation of the State bodies; social relations and activities of citizens.\textsuperscript{55}

In practice, a Code regulates almost all social relationships arising in certain legal field, such as civil, labour or criminal law fields.\textsuperscript{56}

While the Laws of the National Assembly always embody legal norms, Resolutions of the National Assembly are enacted mostly for policy-making aims, except some, which set out the common rules and have similar effect as Laws. It is noted that Laws made by the National Assembly normally are categorised as ‘general laws’ (\textit{luat chung} in Vietnamese) or special laws (\textit{luat chuyen nganh} in Vietnamese). While ‘general laws’ mainly set out the

\textsuperscript{53} The \textit{1992 Constitution}, art 29 (1).
\textsuperscript{54} Ibid, art 29(2).
\textsuperscript{55} The \textit{2008 Law on Enactment of Legal Normative Documents}, above n 43, art 3.
\textsuperscript{56} Currently, there are six Viet Nam’s Codes including Civil Code, Penal Code, Civil Procedural Code, Penal Procedural Code, Labour Code and Maritime Code.
principles, general rules and policy, and cover a broad scope of regulation, ‘special laws’ normally lay down detailed rules for regulation in certain areas. In the course of the improvement of the Vietnamese legal system, law-makers have paid attention to the development of both general and special laws. This can be seen in the development of Vietnamese environmental law. In the environment field, the 2005 Law on Environmental Protection (the 2005 LEP) is treated as a general law, while the Law on Biological Diversity is classified as a special law. However, in the course of implementation of the Laws, the question still remains as to which one should prevail in the case where there are differences between the two Laws.

In Vietnam the Ordinances passed by the Standing Committee of the National Assembly are used as an alternative to Laws in many cases in order to facilitate the National Assembly in exercising legislative powers. Although it has made progress in law-making, the National Assembly still faces many problems due to insufficient capacity. Currently the National Assembly convenes twice a year. In addition, the fact that only approximately one fourth of Deputies of the National Assembly work on a full-time basis also has negatively influenced the efficiency of making law. In this situation, Ordinances made by the Standing Committee of the National Assembly consisting of the Chairman, Vice Chairmen and other members of the National Assembly may be the best alternative legal instrument for the Laws of the National Assembly.

In the past, Ordinances were commonly used to quickly meet the demands of regulation at that time. For example the 1972 Ordinance on Forest Protection had been used for nearly twenty years before the first Law on Forest Protection and Development was passed by the National Assembly in 1991. Currently, the Ordinances enacted by the National Assembly are still contributing to Vietnam’s development of the legal framework as an effective legal instrument. However as pointed out by Nguyen ‘in the long-term, the entire legislative

57 The number of the Laws passed by the Eleventh Congress of the National Assembly was 84 Laws, making more than twice as many as the number of laws adopted by the preceded Congresses, namely 31 Laws at the Eighth Congress, 42 Laws at the Ninth Congress and 35 Laws at the Tenth Congress respectively. Centre for Information, Library and Research (Office of National Assembly) (Trung Tam Thong Tin, Thu Vien Va Nghien Cuu, Participation of the Deputies in Making Laws and Ordinances (Su Tham Gia Cua Dai Bieu Quoc Hoi Vao Quy Trinh Xay Dung Luat, Phap Lenh) (unpublished material, on file with the author, 2010), 26.

58 The 1992 Constitution, the above n 47, 86.

59 For the number of permanent Deputies to the National Assembly, see http://dbqh.na.gov.vn/thong-tin-bau-cu/XIII.aspx, last accessed 9 May 2013.
powers must be exercised by the National Assembly, and enactment of Ordinances by the
Standing Committee should be a transitional step in a few years.\(^60\)

Since the State President functions as the Representative of the State in both internal and
external affairs, not many documents enacted by him embody legal rules.\(^61\) Therefore the
legal documents enacted by the Presidents do not contribute much to the regulation of social
relations in Viet Nam. Furthermore, legal normative documents enacted by other competent
State bodies at central level include Decrees of the Government, Decisions of the Prime
Minister and Circulars of Ministries.

Amongst laws enacted by the other central State bodies, Decrees of the Government play a
significant role. These types of Decrees regulate highly necessary issues for State
administration as well as administering the economy and society; however they do not meet
the requirements for being made Laws or Ordinances. In order to prevent the Government
from acting *ultra vires* in exercising its special law-making powers, the enactment of these
types of Decrees must be approved by the Standing Committee.\(^62\) It should be noted that in
the past the Prime Minister used Instructions as effective instruments to implement the
obligations of international environmental treaties, such as Instruction 845/TTg approving
the Viet Nam Biodiversity Action Plan in 1995.\(^63\)

Apart from laws and regulations made by central State bodies, legal normative documents
are also enacted by local State bodies, which are People’s Councils and People’s
Committees at all levels. The making of these legal normative documents is regulated by
both the 2008 Law on Enactment of Legal Normative Documents and the 2004 Law on
Enactment of Legal Normative Documents of People’s Councils and People’s Committees.\(^64\)

\(^{60}\) See Nguyen Van Yeu, ‘Reform of Legislative Activities as an Important Issue of Reform of the National
Assembly (Cai Cach Hoat Dong Lap Phap Mot Van De Quan Trong Cua Cai Cach Quoc Hoi)’ in Vu Mao (ed)
*The 1946 Constitution and Inheritance, Development in the Constitutions of Viet Nam (Hien Phap Nam 1946
Va Su Ke Thua, Phat Trien Trong Cac Hien Phap Viet Nam)* (National Political Publishing House, 1998) 265,
265.

\(^{61}\) Le Minh Tam, above note 27, 356.


\(^{63}\) Further discussion on the role of specific instruction of the Prime Minister such as the Instruction 845/TTg,
see Chapter Five, 1.2 (iii).

\(^{64}\) *Law Number 31/2004/QH11 dated 3rd December 2004 of the National Assembly on Enactment of Legal
Normative Documents of People’s Councils and People’s Committees (Luat So 31/2004/QH11 Ngay 3 Thang
Both Laws require that local legal normative documents are made only on the basis of local needs. In practice, many local governments use the power to make local normative documents improperly by either making local rules inconsistent with laws or regulations of their superiors, or repeating what laws or regulations of their superiors have already provided.\(^{65}\)

The above analysis has indicated that Vietnam has a complicated system of statutory laws, ranging from those of bodies at the central level to those of bodies at the local level, with different legal effects. The comprehensive system of legal normative documents in Viet Nam aims to address numerous issues within Vietnamese society. However, this rather complicated system of legal normative documents covering a range of legal normative documents passed by both central and local state agencies potentially causes fragmentation, inconsistency and overlapping within the system. To address these potential limitations, the 2008 Law on Legal Normative Documents sets out several principles, such as the principles of constitutionality, transparency, legality and consistency, in enacting legal normative documents.\(^{66}\) However, the overlapping competence amongst state agencies at central and local levels may cause inconsistency within the system of legal normative documents. Moreover, the inadequate interpretation of many concepts and rules can also cause ineffective implementation of the law. In this context the implementation of international environmental obligations can also be challenged by these common problems.

### 3.2. State Management of Environmental Protection in Viet Nam

As noted, for state management of environmental protection the National Assembly of Viet Nam is vested with the power to enact laws to regulate all issues related to environmental protection. State administrative agencies, in turn are responsible for implementing these laws in practice. Basically speaking, state administrative agencies in Viet Nam are categorised as

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\(^{12}\) Nam 2004 Cua Quoc Hoi Ban Hanh Van Ban Quy Pham Phap Luat Cua Hoi Dong Nhan Dan, Uy Ban Nhan Dan).


\(^{66}\) The 2008 Law on Enactment of Legal Normative Documents, above n 43, art 3.
central state administrative agencies and local state administrative agencies, which have different competencies in regard to management of environment protection.

At the central level the Government is ‘the executive body of the National Assembly, and is the highest State administrative agency of the Socialist Republic of Viet Nam.’ As such, the Government which is responsible to the National Assembly is in charge of implementing policies and laws in Viet Nam in general. In the field of environmental protection, the Government has powers and duties to ‘decide on specific policies for the protection, improvement and preservation of the environment, direct the concentration of efforts on handling the problem of environmental degradation in key areas; control pollution, resolve and overcome environmental incidents.’

At the central level, Ministries and other authorities at ministerial level are responsible to the Government for managing certain area(s) according to the law as ‘the Government’s agencies, which perform the function of State management of branches or working domain throughout the country, exercise State management of public services of different branches and domains.’ In the field of environmental protection, the Ministry of Natural Resources and the Environment (MONRE) is the special central administrative agency which is specifically assigned to implement policies and laws for management of environmental protection. Apart from the MONRE, other Ministries such as Ministry of Agriculture and Rural Development (MARD) at the central level are to some extent also given jurisdiction to manage environmental protection.

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68 Ibid, art 10.

69 Ibid, art 22.

70 MONRE was established by the Resolution Number 02/2002/QH11 of the National Assembly dated 5 August 2002 Providing the List of Ministries and Ministerial Authorities of the Government (Nghi Quyet So 02/2002/QH11 Cua Quoc Hoi Ngay 5 thang 8 Nam 2002 Quy Dinh Danh Sach Cac Bo Va Co Quan Ngang Bo Cua Chinh Phu).

71 Powers and duties of the MONRE in regard to environmental protection are prescribed in the 2005 Law on Environmental Protection Law, art 122.

72 The 2004 Law on Forest Protection and Development, art 8(2).
At the local level, people’s committees at the provincial, district and commune levels are State administrative agencies, and their powers and duties in general and those regarding environment protection in particular are prescribed in the 2003 Law on the Organisation and Operation of Local People’s Councils and People’s Committees,73 the 2005 Law on Environmental Protection, and other related laws and regulations. It should be noted that for assisting the provincial and district people’s committees in managing environmental protection, Departments of Natural Resources and the Environment (DONRE) have been established with specific functions and duties relating to environmental protection.

In the context of a socialist country, like other state bodies of other branches (legislative and judicial branches), state administrative agencies are organised on the basis of several constitutional or fundamental principles,74 such as ‘the leadership of Communist Party of Viet Nam’,75 ‘participation of the people in state management’,76 ‘socialist legality’,77 and especially the ‘democratic centralism’ principle.78

Following the democratic centralism principle, on the one hand all state administrative agencies are required to be responsible to their corresponding representative bodies at the same level (for example, the Government is responsible to the National Assembly; provincial people’s committees are responsible to their corresponding people’s councils); on the other hand, state administrative agencies are required to be vertically responsible to administrative agencies at the next higher level. Additionally, state management by local state administrative agencies is also required to follow the principle of dual responsibility, according to which state management in a special field by a local government is subject not

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74 For a detailed account of these principles in state management, see Nguyen Van Quang, ‘Fundamental Principles in State Administrative Management’ (Cac Nguyen Tac Co Ban Trong Quan Ly Hanh Chinh Nha Nuoc) Hanoi Law University Textbook on Administrative Law (Truong Dai Hoc Luat Ha Noi – Giao Trinh Luat Hanh Chinh) (People's Police Publishing House, 2007) 75,75-108.


76 Ibid, art 2.

77 Ibid, art 12.

78 Ibid, art 6.
only to the control of the corresponding people’s committee, but also to that of the central state administrative agency in the field (the Ministry in the field).\textsuperscript{79}

Apart from the fact that jurisdictions over environmental protection have been assigned to not only MONRE but also to other Ministries, the overlapping responsibilities due to inadequacies of the implementation of the ‘democratic centralism’ principle in practice\textsuperscript{80} have easily led to an unclear division of management of environmental protection among state administrative agencies. This obviously negatively affects the implementation of laws and policies in the field under the requirements of international environmental obligations.

3.3. Vietnamese Judiciary for Law Enforcement

In Viet Nam the people’s court system is the centre of the judiciary.\textsuperscript{81} The people’s court system is organised and functions within the legal framework created by the 1992 Constitution and several other related statutes.\textsuperscript{82} Generally, people’s courts in Viet Nam are structured by a three-level hierarchy, with the Supreme People’s Court as the head of the system, and the local people’s courts, which are organised and operate within the territories of provinces and districts. It should be noted that people’s courts in Viet Nam are courts of general jurisdiction. In other words, the people’s courts have been given the jurisdiction to hear various types of cases, amongst which, though the law does not specifically prescribe this, are environmental law related cases.\textsuperscript{83} Currently, Vietnamese people’s courts hear

\textsuperscript{79} Ibid, art 116.

\textsuperscript{80} For a detailed discussion of this problem see Nguyen Phuoc Tho, ‘The Issue of Specifying Democratic Centralism in the Organisation and Operation of State Administrative Agencies’ (Van De Cu The Hoa Nguyen Tac Tap Trung Dan Chu Trong To Chuc Va Hoat Dong Cua Bo May Hanh Chinh Nha Nuoc), (2006) 11 State and Law Journal 20, 26-8.

\textsuperscript{81} It should be noted that the Vietnamese court system also includes military courts and other special courts. Military courts are established for hearing military related cases involving the military or persons serving the military, while special courts which function as ‘ad hoc’ courts may be established under special circumstances required by the law.

\textsuperscript{82} Chapter X of the 1992 Constitution titled ‘Courts and Procuracies’ consists of provisions which set out the legal basis for the organisation and operation of the Vietnamese court system. There are various statutes dealing with the organisation of the court system, which are mainly the 2002 Law on the Organisation of the People’s Court (Luat To chac Toa an Nhan dan), the 2002 Ordinance on Judges and People’s Assessors of the People’s Courts (Phap Lenh Tham Phan va Hoi tham Nhan Dan Toa An Nhan Dan), the 2002 Ordinance on the Organisation of the Military Courts (Phap Lenh To chac Toa An Quan Su).

\textsuperscript{83} The 2002 Law on the Organisation of People’s Courts, art 1.
several typical environmental law related cases, including environmental crimes, environment related administrative law disputes, and cases relating to compensation for environmental damage.

To hear different cases, special divisions have been established within the Supreme People’s Courts and people’s courts at the provincial level. No such special division has been created within people’s courts at the district level, and but in theory each judge of a district people’s court is assigned to hear certain kind(s) of cases. The current organisation of the Vietnamese people’s courts can be illustrated by the diagram below.84

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Although special divisions have been established within Vietnamese people’s courts, the question of expertise of judges to hear cases still remains.
First, in theory, judges of special divisions of the Supreme People’s Courts and people’s courts at the provincial level, and even judges of district people’s courts are supposed to specialise in hearing special cases. However, in practice, due to the huge caseload, there are in fact no specialised judges, as normally they are assigned to hear various law cases. This fact, in practice, certainly negatively affects the quality of hearing cases.

Secondly, while judges of Vietnamese people’s courts are familiar with hearing typical criminal and civil law cases (the two most common types of cases heard by courts) and thus may be experienced in resolving criminal and civil cases, they normally lack professional knowledge and skills to deal with other types of cases, especially those involving special expertise such as the environment and environmental management. Those who resolve these cases are required to have not only legal knowledge in the special field, but also skills and knowledge relating to expertise in the field. Normally, experts in the field with their own skills and expertise should be closely involved in the reaching of fair decisions resolving these special cases. This requires Viet Nam to seek relevant models of courts for resolving special cases like environmental law related cases.

CONCLUSION

This chapter has provided a discussion of some of Viet Nam’s socio-political and legal environment, underpinning the implementation of international environmental obligations. By briefly discussing traditional Vietnamese society, the chapter has indicated the two main characteristics of the traditional Vietnamese legal system which have significantly moulded the Vietnamese legal culture. In fact, the contemporary legal development of Viet Nam is deeply rooted in this legal culture, and thus policy and law makers as well as administrators in general, and those who work in the environment field in particular, should be well aware of this feature. The chapter has also stressed the importance of the socio-political context of contemporary Viet Nam, where the leadership of the Communist Party has been

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85 It was reported by the Chief Justice Truong Hoa Binh at the session of the National Assembly on October 22nd 2012, that the number of cases heard by Vietnamese people’s courts was 332,868 while the whole court sector had more than 5000 judges. See Quoc Huy, ‘The Court Sector Has Made Big Efforts and Achievements to Hear Cases (Nganh Toa An Da Co Nhieu No Luc Va Thanh Tich Trong Cong Tac Xet Xu)’ (2012), Baomoi.com, <http://www.baomoi.com/Home/ThoiSu/congly.com.vn/Nganh-Toa-an-da-co-nhieu-no-luc-va-thanh-tich-trong-cong-tac-xet-xu/9607261.epi>, last accessed on 11 April 2013.
constitutionalised, and the major effects of the launch of the Renovation policy by the Communist Party of Viet Nam on the making and implementation of policies and laws relating to international environmental obligations. Overall, this chapter has discussed the legal environment of Viet Nam, which has been shaped by the distinctive features of a transitional legal system, reflected in the system of legal normative documents, the state management of the environment and the judiciary bodies. The discussion in the chapter has established the basis for later analyses in the thesis, those relating to suggestions for better compliance with international environmental treaties in Viet Nam.
CHAPTER FOUR

CONVENTION ON BIOLOGICAL DIVERSITY AND ITS IMPLICATIONS FOR VIET NAM’S IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

INTRODUCTION

As noted in Chapter Two, the international environmental treaties themselves have different implementation requirements as each treaty is made to solve its own distinctive problems and has different approaches to deal with environmental requirements. To understand the extent to which Viet Nam implements its obligations of conservation under the Convention on Biological Diversity (CBD), there is a need to examine the CBD’s approaches to deal with biodiversity issues by a short discussion of the main feature and major obligations of the CBD which essentially influence on the implementation of Viet Nam’s obligations under the CBD.

1. THE CONVENTION ON BIOLOGICAL DIVERSITY - AN OVERVIEW

1.1. The Context

It is universally recognised that it is important to conserve and use biodiversity in a sustainable manner because of its intrinsic ecological, economical, social and cultural values, and the significance for evolution and life maintenance.\(^1\) However, despite the existing international framework on biodiversity conservation established in the 1980s, the world community was critically concerned with the loss of both plant and animal species diversity.\(^2\)


The call for negotiating a new global biodiversity Convention was formally launched by the Governing Council of the United Nations Environment Programme (UNEP) through its Resolution 14/26 in 1987. With the endeavours of the Executive Director Mostafa Tolba, the assistance of two significant ad-hoc working groups of experts, and most importantly the participation of the negotiating parties, after tense negotiations, the CBD was finally adopted at the Nairobi Conference on 22 May 1992.

The conclusion, and more importantly, the entry into force of the CBD, considerably improved the international legal framework on biodiversity through its wide-ranging scope of regulations and a comprehensive approach addressing biological diversity. Notably, the CBD encompasses the most significant biodiversity issues, aiming at biodiversity conservation, sustainable use of biodiversity and equitable benefit sharing of genetic resources. Moreover, having been concluded within the framework of the United Nations Conference on the Environment and Development (UNCED), the CBD, inspired by the

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4 The two groups, namely the Ad-Hoc Working Group of Experts on Biological Diversity and the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, were established to assist States to negotiate a new Convention.

5 McGraw notes a number of negotiating ‘obstacles’, which would have postponed the conclusion of the CBD. Some facts were ‘internal’ but others were external. For example, the negotiating parties arrived at the last meeting with disagreement on more than half of the draft articles (27 of 42 articles). In addition, the US intended to extend the negotiations by proposing 16 nonnegotiable points. See Désiré M. McGraw, The Story of the Biodiversity Convention: From Negotiation to Implementation in Philippe G. Le Prestre (ed), Governing Global Biodiversity: the Evolution and Implementation of the Convention on Biological Diversity (Ashgate, 2002) 7, 13-17.

6 The agreed text of the Convention on Biological Diversity (CBD) was adopted at the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity at UNEP Headquarter (Nairobi, Kenya) on 22 May 1992.

7 The CBD was concluded on 5 June 1992 at Rio de Janeiro, and approximately 18 months later, on 29 December 1993, the CBD entered into force.

8 The term ‘biological diversity’ is used throughout the CBD’s text; nevertheless, it is commonly used as ‘biodiversity’ as the short form of the term. Hence, in this dissertation, the term ‘biodiversity’ and ‘biological diversity’ are used interchangeably.

9 The CBD, art 1.

10 United Nations Conference on the Environment and Development (UNCED or Earth Summit) was convened in Rio de Janeiro (Brazil) from 3-14 June 1992. There were 172 Governments, of which 108 were Heads of the
spirit of UNCED, became ‘the first truly and … the foremost sustainable development treaty.’

1.2. The Role of the CBD

The important role of the CBD lies in its significance in filling a gap in the existing international legal framework in response to new biodiversity issues.

i. Complement to Existing International Legal Framework on Biodiversity

The CBD supplemented the existing biodiversity conventions to address biodiversity and collaborated with these conventions to build up a major international framework on biodiversity. However, the CBD did not consolidate the existing biodiversity conventions in an umbrella CBD as was intended. Instead, it was concluded in the form of a ‘framework’ convention to cover biodiversity at the global level. However, the CBD’s wide-ranging

State or the Government, present at the Conference. The Conference was seeking a new approach to environmental protection, which then was reflected in the concept ‘sustainable development’, http://www.un.org/geninfo/bp/enviro.html, last accessed on 17 May 2013.


13 Some scholars argue about the distinction between framework and umbrella conventions. McGraw, for example, indicates two major differences between the two types of treaties in relation to the treaties’ validity and further developed instruments. Firstly, an umbrella overrides the legal effect of relevant existing treaties, while a framework co-exists with those treaties. Secondly, an umbrella convention usually requires the development of one or more regional agreements within the frame of the treaty, while a framework treaty may need a further protocol to cover the issues in question in more detail. In this regard, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) was made in a form of umbrella conventions. (See McGraw, above n 5, 20). However, for some scholars there is no distinction between the two types of conventions. Patricia Birnie and Alan Boyle, for example, regard a framework treaty as a treaty allowing the parties to negotiate further protocols, annexes, and related agreements to amend, and to revise the initial treaty. Hence they consider UNCLOS as the first framework convention (See Patricia W.Birnie and Alan Boyle. E. Boyle, International Law and the Environment (Oxford University Press, 2nd ed, 2002), 10). In the case of the CBD, it may also be worth understanding the differences between a framework convention and umbrella conventions. This is because UNEP’s initiative to make an umbrella convention on biodiversity, which would consolidate the existing biodiversity conventions, was rejected due to a series of legal and technical obstacles found in the process of investigation of the possibility of its making (See Lyle Glowka et al, A Guide to the Convention on Biological Diversity (IUCN Publication Services Unit, 1994), 2). Most scholars share the view that the CBD is a framework convention, despite the lack of a formal claim by the CBD itself, unlike some other conventions, such as the United Nations Framework Convention on Climate Change (UNFCCC). McGraw shares the view with Glowka et al, that the three fundamentals of the CBD as a framework convention are co-ordination with
coverage and comprehensive approach make it a landmark treaty in terms of the comprehensive scope of regulation and treaty making techniques. For the first time the biodiversity issue was recognised and addressed in such a comprehensive way by a global convention, with ecosystems, species, and particularly genetic levels.

It is widely admitted that before the CBD was concluded the international framework on biodiversity which had focused mainly on protection of species and their habitats appeared to be fragmented and insufficient. Burhenne, who helped draft the CBD’s obligations on conservation and sustainable use, claimed that ‘the picture at international level until then can be compared to an incomplete jigsaw puzzle’. Sharing this view, Halley expresses the situation as follows:

[t]hese legal instruments do not form a coherent whole: they are basically a series of measures developed in response to specific problems relating to […] species and habitat loss. Since they were developed for a distinct purpose, they were not all inspired by the desire to gradually construct an international environmental law. They therefore only provided limited answers to environmental problems.

In terms of quantity, only a few global biodiversity-related conventions had been concluded by that time. The major conventions were the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (the Ramsar Convention), the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention on other agreements, further development of relevant legally binding or non-binding instruments and national implementation. They both insist that the generality of the CBD’s obligations makes the CBD’s main feature an emphasis on national implementation and further negotiation of legally binding instruments. See, McGraw, above n 5, 20-4.


16 The Ramsar Convention was adopted on 2 February 1971 in Ramsar, an Iranian city. The Convention entered into force on 21 December 1975 after Greece, as the 7th State, took action to be bound by the Convention. The Ramsar Convention at first was signed only by 18 States. However, as of 3 May 2013, the number of parties has reached 167 States. The Convention initially dealt with conservation and wise use of wetlands, its fauna and flora with the major focus on those which are of international importance for waterbirds. See Ramsar Convention Manual (Ramsar Convention Secretariat, 6th ed, 2013), http://www.ramsar.org/pdf/lib/manual6-2013-e.pdf, last accessed on 17 May 2013. Viet Nam became a party to the Ramsar Convention on 20 January 1989. Since the first Ramsar site namely Xuan Thuy Nature Reserve (currently Xuan Thuy National Park) was designated, as of 3 May 2013, Viet Nam has in total five Ramsar sites, http://www.ramsar.org/cda/en/ramsar-about-parties-parties/main/ramsar/1-36-123%5E23808_4000_0, last accessed on 15 May 2013.

17 The Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) was adopted at the General Conference of the United Nations Educational, Scientific and Cultural
International Trade in Endangered Species of Wild Fauna and Flora,\textsuperscript{18} and the Convention on the Conservation of Migratory of Wild Animals.\textsuperscript{19} Most biodiversity conventions at that time were regional. McGraw, for example, points out that, approximately 100 conventions concluded in the 1950s and 1970s were wholly or partly related to biodiversity, of which only a few were global in nature.\textsuperscript{20}

As the major global conventions on biodiversity were concluded around the 1972 Stockholm Convention on Human Environment, when biodiversity preservation became the concern of the international community at a global level, most regional and global treaties set their aims as the protection of one or more endangered species or threatened sites, habitats, and even ecosystems. For example, during the Wetlands Convention’s evolution and implementation it supported specific ecosystem conservation when it shifted the emphasis from being primarily on the preservation and wise use of the wetlands as habitats for waterfowl, to conservation and wise use of all types of wetlands.\textsuperscript{21} Two other conventions, the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory of Wild Animals deal with species conservation, that of endangered and migratory species respectively. The World Heritage Convention, by contrast, prioritised the preservation of the world’s natural sites. Notably, there had not been any mechanisms to co-ordinate global biodiversity international treaties.\textsuperscript{22} These global conventions, emphasising the separate subject-matters of internationally significant species and ecosystems, endangered wild species, or wetlands of international importance, illustrate


\textsuperscript{19} The Convention on the Conservation of Migratory Species of Wild Animals (also known as CMS or Bonn Convention) was concluded at Bonn on 23 June 1979 with the aim to conserve terrestrial, aquatic and avian migratory species. \url{http://www.cms.int/documents/convtxt/cms_convtxt.htm}, last accessed on 13 May 2013.

\textsuperscript{20} See Désirée M. McGraw, above n 5, 9.

\textsuperscript{21} The initial purpose to emphasize ‘wetlands of international importance’ as natural sites for waterbirds is even reflected in the title of the Convention, see above n 16.

\textsuperscript{22} The disconnection among global international conventions themselves and between them and the regional treaties would be a reason for the call by UNEP to make an umbrella biodiversity convention. Resolution 14/26 (1987), above n 3.
the piecemeal approach to biodiversity protection. Some conventions, nevertheless, more comprehensively addressed biodiversity issues. Unfortunately, they were only regional; for example, the Regional Convention for the Conservations of the Red Sea and the Gulf of the Aden Environment (Jeddah, 1982) or the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985).  

Hence their scope of regulation was limited only to the biodiversity within each region.

Moreover, the international legal framework on biodiversity appeared to be insufficient to deal with global biodiversity issues. While biodiversity, as a ‘web of life’, encompasses the variety among and within genes, species and ecosystems, the global biodiversity conventions by that time only focused on protection of the most important and critical species and ecosystems. Not surprisingly, as Glowka has pointed out, ‘[e]ven taken together, these international accords could not ensure the global conservation of biodiversity.’ The existing global biodiversity conventions, even in the case of collaboration with regional conventions, still left behind many other biodiversity issues. There were no legally binding conventions which included the issues of access or benefit sharing of genetic resources, or farmers’ rights.

In short, the then existing international legal framework appeared to be fragmented and had difficulty addressing the newly occurring problems, which resulted from the complicated and interlinked nature of biodiversity at a global level. Hence, the CBD was negotiated on the one hand to overcome the inadequacies of, and on the other hand to supplement, the existing international legal framework on biodiversity in order to regulate biodiversity issues in a more effective manner.

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26 Before the CBD was negotiated, the Food and Agriculture Organisation of the United Nations had adopted a non-binding document to deal with genetic resources, which was the International Undertaking on Plant Genetic Resources. See International Undertaking on Plant Genetic Resources, FAO Res 3/83, 22nd sess Annex (1983), http://www.fao.org/ag//CGRFA/iu.htm, last accessed on 17 May 2013.
ii. The CBD - Sustainable Development Convention

The CBD immediately adopted a new approach to environmental protection, to integrate the environment and development. Since the idea of integration of the environment and development was initiated in the course of preparation for the Declaration of the United Nations Conference on the Human Environment,\(^{27}\) the concept of sustainable development was noticeably developed;\(^ {28}\) as a result, the concept provided a new approach to deal with biodiversity issues. However, the international legal framework was challenged to respond to the integration of development and environment within its framework because of a largely dominant preservation approach to fight against species loss and the devastation of habitats.\(^ {29}\) While the CBD explicitly includes the objective of sustainable use of biodiversity components among the CBD’s objectives, most previous conventions either overlook or minimally address the issue of sustainable use within their framework. Among the global biodiversity conventions, the Ramsar Convention was the first global biodiversity treaty in the early 70s, requiring parties to undertake the obligation ‘to formulate and implement their planning so as to promote the conservation and of wetlands including in the List [of Wetlands of International Importance] and as far as possible the wise use of wetlands in their territory.’\(^ {30}\)

1.3. The CBD’s Objectives and Principles, Concepts and Approaches

i. The CBD’s Objectives and Principles

A treaty’s objectives are significant for domestic implementation because they determine the extent of its obligations. They also represent the spirit of the treaty.


\(^{29}\) Most conventions on natural resources set strict measures and lists of species or habitats to be preserved by the convention’s parties. For example, CITES created a global list of endangered species which were categorised into three groups, and accordingly, would be subject to different control requirements in international trade. In addition, some international non-governmental organisation such as the International Conservation Union (IUCN) strongly supported preservation of species, and the Union, at that time, even was working on the draft of a new global preservation of biodiversity. See Lyle Glowka et al., above n 13, 2.

\(^{30}\) The *Ramsar Convention*, art 3.
The CBD’s comprehensive obligations are elaborated in its objectives. These encompass conservation, the sustainable use of biodiversity, and fair and equitable benefit sharing of the use of genetic resources. While the developed countries argued for the separation of the three objectives, the G 77 gained success in their counter-argument that the three objectives are interrelated. Hence the objectives of the CBD are interwoven as three underpinnings to guide the further development of decisions of the Conference of the Parties (COP), or of other institutions, and the actions of the CBD’s parties.

The CBD’s obligations also support the significant principle of sovereignty over natural resources, of which genetic resources are a part. In accordance with Article 3 of the CBD, a party to the CBD has ‘the sovereign right to exploit their own resources pursuant to their own environmental policies.’

Although the principle has some limits, the reaffirmation of the principle in the CBD is extremely significant for dealing fairly with biological resources, especially with genetic resources. This is because the CBD rejects the controversial concept of mankind’s heritage of genetic resources initiated by the FAO’s International Undertaking on Plant Genetic Resources. Article 1 of the Undertaking claimed that the access to plant genetic resources should not be restricted as they were mankind’s heritage and that these plant genetic resources were the heritage of mankind was a universally accepted principle. Unambiguously, despite the non-binding characteristics of the Undertaking, this agreement attempted to deny the long standing principle of permanent national sovereignty over natural resources. Unsurprisingly, the concept was not widely accepted. While the developed countries insisted that developing countries conserve and utilise the biodiversity components

31 The CBD, art 1.
33 The Conference of Parties as the governing body was established under the Article 23 of the CBD and COP is responsible for Parties’ implementation of the Convention.
34 The CBD, art 3, art 15 (1).
35 Ibid.
36 The Party which exercises their sovereign right over natural resources is also responsible for not causing damage to other States’ environment, and to areas beyond the limits of national jurisdiction. See the CBD, art 3.
in a sustainable manner, they clearly showed their desire to access genetic biodiversity of the developing countries at the ‘lowest price’ if not for ‘nothing’. This doubtful inequitable concept critically concerns developing countries with the richest biodiversity in the world, particularly, in cases where most of a biological resource is located within their national jurisdiction.

The recognition of the principle of sovereign right of the State to exploit their own natural resources according to their environmental policy in Article 3 of the CBD provides a critical legal basis for the parties, especially in developing countries, to claim and to manage in accordance with their policies, equitable benefit sharing from the use of the genetic resources under their jurisdiction. Thus Lesser concluded that ‘the common heritage’ approach to the sharing of the world’s genetic resources without compensation or even control from the sources is approaching an end.

**ii. The CBD’s Approach to Biodiversity**

(a) The Concept of Biodiversity

The cornerstone concept in the CBD is the concept of biodiversity. As the CBD regulates the biodiversity issues of conservation and the sustainable use of biodiversity components, as well as fair and equitable access to genetic resources, biodiversity is a fundamental concept that shapes the interpretation and the scope of obligations, and consequently, determines a party’s implementation.

For the first time biodiversity is legally defined in a clear manner in Article 2 of the CBD as:

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38 Developing countries have given concessions to developed countries by commitments for conservation and sustainable use of biodiversity, and also access to biological diversity. See Désirée M. McGraw, above n 5, 29-32.

39 The G 77 or the non-aligned group of developing countries sought a more reasonable mechanism for the use of genetic resources that prevents the pressure of the developed countries on the developing countries for international use of their genetic resources without any benefit sharing. For example, Lesser illustrates the concern of the G 77 that the CBD mechanism [what mechanism exactly?] would be applied ‘to compel developing countries to conserve, at national expense, biodiversity for international benefit’. See William Lesser, *Sustainable Use of Genetic Resources under the Convention on Biological Diversity: Exploring Access and Benefit Sharing Issues* (CAB International, 1998), 40.


41 See William Lesser, above n 39, 40.
the variability among living organisms from all sources including, *inter alia* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.\(^{42}\)

The term biodiversity in the CBD is obviously defined in the scientific sense, as it shares many common features with the definition suggested by the well-known biologist Edward O. Wilson in his famous book ‘The Diversity of Life’. According to Wilson, biodiversity can be understood as:

> [t]he variety of organisms considered at all levels from genetic variants belonging to the same species through arrays of species to arrays of genera, families, and still higher taxonomic levels; includes the variety of ecosystems, which comprise both the communities of organisms within particular habitats and the physical conditions under which they live.\(^{43}\)

The final definition of biodiversity in the CBD gives a much clearer explanation of biodiversity than the definition in previous drafts. For example, Fifth Draft Convention on Biological Diversity (1992) defines biodiversity as ‘the variety of and variability among living organisms the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.’\(^{44}\)

Ecosystem in the CBD is interpreted as ‘*a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit*’.\(^{45}\)

An ecosystem comprises both biotic and non-biotic components which interact. Additionally, as defined by the CBD, an ecosystem needs to have a ‘boundary’ to carry out its function and operate the interactions between the ecosystem components. For conservation purposes the CBD tends to concentrate on the conservation of large ecosystems rather than small ones. The CBD also recognises that an ecosystem can exist within a larger ecosystem, which is referred to as an ecological complex. It also names the three types of ecosystem, namely terrestrial, marine and aquatic ecosystems, within which biodiversity should be conserved.

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\(^{42}\) The *CBD*, art 2.


\(^{45}\) The *CBD*, art 2.
The value of the CBD on an ecosystem approach to conserve biodiversity can be seen in the lack of definition of two other types of biodiversity components, namely species and genes. While the concept of genes does not cause much discussion amongst scientists, the concept of species is widely debated, since species can also include sub-species, population and both scientific and local names can be used to define the protected species.\[46\] This point of view is presented in the CITES which defines species as ‘any species, sub-species, or geographically separate population thereof.’\[47\] For many scientists, species refers to any population of organisms, which has distinctive feature, living within a unique area and interbreeding.\[48\] However, this concept of the species is not defined in the CBD.

Ecosystems, species and genes are taken as the three levels of biodiversity. In some CBD contexts they also can be used as the broad meanings of biodiversity components. These are broken down further in Article 7, which requires parties to use the indicative list of categories in its Annex 1, which is divided into three main categories, namely ecosystems and habitats, species and communities, and genes and genomes, in identifying the important components of biological diversity for conservation and sustainable use.

The CBD also makes a distinction between biodiversity and biological resources. While biodiversity reflect intangible features of living forms, biological resources are said to be a tangible reflection of the biotic components of biodiversity, which have real or potential use or value for humanity. Biological resources, therefore, include those ‘genetic resources, organisms or their parts, populations, or any other biotic components of ecosystems with actual or potential use or value for humanity.’\[49\] While there are difficulties in assessing the potential use of biological resources, the unambiguousness of the concept ‘biological resources’ is intrinsic to the relation between biodiversity and biological resources, as to some extent biological resources are biotic components of biodiversity.

(b) Perception of Conservation under the CBD

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\[47\] The *CITES*, art 1(a).

\[48\] See Lyle Glowka et al, above n 13, 17.

\[49\] The *CBD*, art 2.
This section aims to examine how the CBD interprets the concept of conservation. The examination of the concept of conservation is significant for at least two reasons. First, from interpretive point of view, the interpretation of the scope and substantive content of obligations of conservation relies on how conservation is perceived in the CBD as a basic concept. Conservation can be interpreted differently depending on the legal context. Secondly, beyond being guidance for a party’s implementation, it also becomes a criterion for assessment of a party’s fulfilment of the CBD’s obligations in regard to conservation.

While conservation of biodiversity is the primary objective in negotiations of the CBD, and clear interpretation is significant, there is, unfortunately, no clear definition given in the text, neither in Article 2 which gives an interpretation of many terms, nor in other Articles of the CBD. According to Glowka and others, the term was intentionally overlooked by the negotiating parties. Neither the references to in-situ or ex-situ conservation in the CBD’s definition Article define the meaning of the term. For this reason conservation may be applied both with the narrow meaning of preservation, or with a broad meaning, including sustainable use of biodiversity components.

Nevertheless, the records of negotiations illustrate the attempt of parties to define conservation at the beginning and during the negotiating process of the CBD. The initial attempts to clarify the concept of conservation were clearly because the maximum conservation of biodiversity was the foremost CBD objective. In successive drafts the term ‘conservation’ was interpreted with a very broad meaning, including not only preservation, maintenance, recovery, and enhancement of biodiversity components, but also the use of those components in a sustainable manner. Clearly, the

50 See above n 3.
51 See Lyle Glowka et al, above n 13, 25.
52 The CBD, art 2. Article 2 of the CBD is titled ‘[u]se of terms’.
53 See for example, Third Revised Draft Convention on Biological Diversity: Explanatory Note, art 2; and Fifth Revised Draft Convention on Biological Diversity Explanatory Note, art 2.
54 Ibid.
55 Rational use of biodiversity is a concept reflecting an approach to use of biodiversity components, which is perceived and defined as ‘the use of components of biological diversity in a way and at a rate that does not lead to their long-term decline’ in early drafts of the CBD. See Ibid. Going further, the concept of ‘sustainable use’ illustrates the use of biodiversity not only from the perspective of the present generation but also from the perspective of future generations. Accordingly, ‘sustainable use’ was adopted in Article 2 of the CBD as ‘the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of
intention of parties was to make sustainable use of biodiversity components a part of conservation. This is understandable as sustainable use of biodiversity components in the beginning stages of negotiations had not been considered to be an objective in itself of the CBD. Sustainable use was initially intended only to serve as a means to achieve conservation.\textsuperscript{56}

This approach to understanding ‘conservation’ followed that of the World Conservation Strategy or Global Biodiversity Strategy, which reads:

> the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of the future generation. Thus conservation […] embrac[es] preservation, maintenance, rational utilisation, restoration and enhancement of natural environment.\textsuperscript{57}

However, this was seen as inappropriate in the context of changing attitudes toward sustainable development at the time when the CBD was being negotiated and adopted.\textsuperscript{58} The extreme emphasis on conservation by some of the negotiating parties was criticised by others, mainly in the developing countries. These developing countries argued in favour of an equal and independent emphasis on the sustainable use of biodiversity components as an objective of the CBD in parallel with the conservation objective.\textsuperscript{59}

Hence, there was a need to recognise the parallel existence of the sustainable use with conservation of biodiversity components. Finally, a definition of sustainable use of biodiversity was adopted in the CBD text, based on the initial explanation of the term ‘rational use’ of biodiversity in the CBD drafts.\textsuperscript{60} There was consequently a compromise, leading to the recognition of sustainable use as an objective equal to conservation, leaving biodiversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’.

\textsuperscript{56} See \textit{Fifth Revised Draft Convention on Biological Diversity Explanatory Note}, above n 55.


\textsuperscript{58} See Lyle Glowka et al, above n 13, 25.

\textsuperscript{59} See Cyrille Klemm and Clare Shine, above n 46, 18.

\textsuperscript{60} See \textit{Third Revised Draft Convention on Biological Diversity: Explanatory Note} and \textit{Fifth Revised Draft Convention on Biological Diversity Explanatory Note}, above n 53, art 2.
‘conservation’ undefined, withdrawal of the use of term ‘rational use’ and giving a full and clear expression of ‘sustainable use’ in the final adopted text of the CBD.

The CBD’s focus on the effectiveness of its implementation seems to have been the reason for the CBD keeping silent on the interpretation of the term ‘conservation’ in the final text of the CBD, instead of attempting to give a clear definition. With a more practical approach, the CBD focuses on prescribing detailed implementation obligations to achieve biodiversity obligations.

In-situ and ex-situ conservation, the components of conservation, are explicitly defined in the CBD instead. By dividing conservation into in-situ and ex-situ conservation to determine separate obligations in regard to each of this type of conservation, the CBD supports the scientific approach of conservationists to address biodiversity conservation. The CBD clearly requires parties to conserve biodiversity both on site (in-situ) and out of site (ex-situ) and emphasises the fundamental role of in-situ conservation while recognising ex-situ conservation as a supplementary tool.

‘In-situ conservation’ is defined in Article 2 of the CBD as:

> the conservation of ecosystems and natural habitats, maintenance and recovery of viable populations of species in their natural surroundings, and in the case of domesticated and cultivated species, in the surroundings where they have developed their distinctive properties.\(^{61}\)

Clearly in-situ conservation does not involve the broadest interpretation of conservation because it is limited to three actions: conservation, maintenance and recovery of biodiversity components. The actions of enhancement and sustainable use of components of biodiversity are excluded from the scope of in-situ conservation. Nevertheless, in-situ conservation also extends its scope to both wild and domesticated or cultivated species. Hence, in-situ conservation under CBD is very comprehensive.

Ex-situ conservation is significant especially where in-situ conservation cannot be applied. In contrast to the clear definition of in-situ conservation, ‘ex-situ conservation’ has a very simple and unclear definition. Functioning as a supplementary tool for in-situ conservation,

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\(^{61}\) The *CBD*, art 2.
ex-situ conservation is defined as ‘the conservation of components of biodiversity outside their natural habitats’. Apart from the term ‘components of biodiversity’ being ambiguous itself, being used without any interpretation, it can hardly be said that the concept of ex-situ conservation is adequately clear. Moreover, ex-situ conservation seems to refer only to wild species, as the definition keeps silent on domesticated and cultivated species.

In conclusion, it should be noted that while the term ‘conservation’ is used throughout the CBD, and the term was initially attempted to be defined, a definition was finally excluded from the final CBD text. The exclusion of a definition was no doubt intentional for the sake of flexibility in the use of the notion in different contexts so that parties can facilitate its implementation. Despite the fact that the notion of conservation can be indirectly interpreted through the closely interrelated notions of in-situ and ex-situ conservation, the lack of a clear definition of conservation in the CBD is a limitation, especially in the case of the ambiguous definition of ex-situ conservation.

Therefore, while the term conservation is repeated many times in the CBD text, the notion of conservation is ambiguous and can be flexibly interpreted to have both broad and narrow meanings or can be treated on a case-by-case basis depending on how it is used in the CBD provisions. On the one hand, leaving the fundamental term of the CBD undefined is a shortcoming of the CBD, which could lead to inappropriate or inadequate implementation. On the other hand, taking into account the different contexts of biodiversity as well as capacities of parties, this flexibility also leaves a space for parties to choose the most appropriate concept in the course of implementation of the CBD’s obligations.

(c) Concept of ‘Sustainable Use’

More significantly, the CBD integrates the concept of development into its objectives and obligations. In Article 2 of the CBD sustainable use of biodiversity and its components is defined as ‘the use of components of biodiversity in a way and at that rate that does not lead

\[\text{Ibid.}\]

\[\text{63 See for example, the concept of conservation under the Viet Nam’s Law on Biological Diversity which is discussed in the Chapter Five of this Thesis.}\]

\[\text{64 As mentioned earlier, Glowka et al indicate that during negotiations, the developing countries sought a clear definition of sustainable use of biodiversity components to secure the objective of sustainable use of biodiversity. Glowka et al, above n 13, 24.}\]
to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’. Thus the CBD’s obligations particularly emphasise the ecosystem approach to biodiversity conservation, specifying the conservation of terrestrial, marine and coastal ecosystems. Moreover, the CBD requires the parties to carry out environmental impact assessment as well as to minimise the adverse impact of human activities on the biological components.65

(d) Ecosystems and Integrated Approach to Conservation of Biodiversity

The perception of biodiversity in the CBD with the focus on an ecosystem approach toward comprehension of biodiversity is significant. This is because it changed the species/habitat approach towards conservation of biodiversity components, addressed by other conventions. For example, the Ramsar Convention focuses on the protection of habitats of waterfowls and extends to other wetlands, while CITES concentrates on the protection of endangered wild species. Those fragmented approaches toward conservation of biodiversity components are inadequate for overall biodiversity conservation.

Treating biodiversity in a comprehensive way with the focus on ecosystem approach which, indeed, interweaves all biodiversity levels, ecosystem, species and gene, to address biodiversity, the CBD hopes to be more effective to conserve biodiversity components. The comprehensiveness of the scope of biodiversity and the significant role of ecosystem under the CBD then lead to an integrated approach to conserve biodiversity.

At COP VII, parties again emphasised the significance of the ecosystem approach. Accordingly, the ecosystem approach is said to be ‘the primary framework under the CBD and its application will help reach a balance between the three objectives of the CBD’.66

By adoption of the biodiversity concept, the CBD again emphasises an ecosystem approach to conserve biodiversity. Even though biodiversity can be conserved at species and genetic levels, the adoption of the term ecosystem recognising species and gene as part of it, shows an integrated approach toward effective conservation of biodiversity. The integrated

65 The CBD, art 14.
conservation of biodiversity components assists conservation of biodiversity. And in the course of implementation of the CBD’s obligations, there is a need to take this ecosystem and integrated approach into account in making biodiversity laws as well as implementing those laws in practice.

iii. Characteristics of the CBD’s Obligations

(a) Generality and Softness

Other earlier biodiversity conventions usually contained precise obligations which created specific measures or standards, provided a list of species to be protected or required the designation of sites of international importance to be conserved. For example, CITES contains a global list of endangered species, which must be protected and controlled by the parties’ authorities concerned in international trade.

In contrast, most of the CBD’s obligations are general and ‘soft’ because they obligate the parties to do something but do not clearly indicate the object and the means to do so. Many obligations for benefit sharing have general characteristics. For example there is the obligation to ‘endeavour to create conditions to facilitate access to genetic resources…’ set down in Article 15 (2). Other sets of obligations for biodiversity conservation and sustainable use usually include both general and soft characteristics, which are presented in non-binding formulation, or in other words, are ‘soft’ obligations. In fact, the qualifiers such as ‘in accordance with its particular conditions and capability’ (Article 6), or ‘as far as possible and as appropriate’ (Articles 6, 7, 8, 9) or ‘taking into account the special needs of developing countries’ (Article 12) are commonly used in many Articles.

Some scholars have claimed that the qualified language in the CBD can negatively impact on the legal force of the obligations.67 However, the qualifiers may, on the other hand, ensure the CBD’s implementation, allowing the parties to perform the obligations in conformity with the State’s specific circumstances and capabilities. Glowka et al., assert that ‘[t]he purpose of most qualifiers is to make the level of implementation commensurate to the capacity of each party to meet the obligation at hand.’68 In this sense the common but

68 See Lyle Glowka et al, above n 13, 4.
differentiated responsibilities between the developing and developed countries have been recognised by the principle of international environmental law.

Therefore, the obligations on biodiversity under the CBD, on the one hand, necessitate further policy development at the international level to interpret the content and guide the implementation of the obligations. On the other hand, they need to be elaborated in detail at domestic level by the parties responsible for implementation.

(b) Consensus

The CBD is a ‘package deal’ treaty, which is made on the basis of consensus of the developing and developed countries and requires the implementation of obligations in toto, without any reservations. The final text of the CBD appears to be a series of compromises and concessions between developing and developed countries, reflected in the CBD objectives, in the existence of the principle of national sovereignty over national resources and the concept of biodiversity of ‘common concern’, or within and between Articles.

Indeed, the CBD as a whole and its obligations have been criticised by scholars and developed countries because of its political characteristics. For example, McGraw calls the CBD ‘a courageous political document but a rather clumsy and cumbersome legal text’.

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70 In accordance with the Vienna Convention on the Law of Treaties between the States, a reservation is a formal declaration of a party to the treaty, which frees the party from, or alters, the obligations arising from reserved provisions. A reservation must be clearly stated, made unilaterally and declared at the time the party take actions, such as ratification or accession, to be bound by the treaty. The right to make a reservation is protected in Article 19 of the Vienna Convention on the Law of the Treaties between the States. There are some explanations for this right. First of all, the right originates from the sovereignty of the State party. As a sovereign State, a party decides itself to be bound or not to be bound an international obligation. Secondly, the permission of reservation may secure broad participation in the treaty, as a result, it ensures the effectiveness of the treaty. However, to prevent the misuse of the right, which may cause ineffective implementation of the treaty, the Vienna Convention also does not allow the parties to make reservations in some cases. For example, the treaty itself, like the CBD, prohibits reservation or the reservations may contradict the objectives of the treaty.

71 See discussion in this Chapter, section 1.3.


73 Ibid.
and Le Prestre regards the CBD as ‘a deeply political CBD’. However, international environmental treaties themselves are ‘political’, as they are an outcome of the bargaining process among the negotiating parties. McGraw herself also realises that negotiating parties find their interests reflected in the treaty.

The compromise in interests between developing and developed countries reflected in the ‘package-deal’ set of obligations should contribute to nearly universal participation and national implementation of the CBD, leading to more effectively addressing global biodiversity. The CBD’s obligations, elaborating and reflecting within and between themselves the interweavement of the three objectives in the initial text, are dynamically developed through policy development by the Conference of the Parties and further negotiation of protocols or agreements such as the Cartagena Protocol on Biosafety.

(c) The CBD’s Required Implementation Mechanism

The focus and reliance of the CBD on national implementation in order for it to effectively address biodiversity issues distinguishes the CBD from other forms of biodiversity conservation that focus on international mechanisms to achieve biodiversity conservation. Significantly, the use of national mechanisms for implementation of the CBD may secure the achievement of its comprehensive objectives.

The CBD has set down a mechanism and means for national implementation. A clear example is Article 6 which requires the parties to plan biodiversity conservation and sustainable use and to:

[d]evelop national strategies, plans and programmes for the conservation and sustainable use of biodiversity or adapt for this purpose existing strategies, plans and programmes which shall reflect, inter alia, the measures set out in this CBD relevant to the Contracting Party concerned.

and to ‘[i]ntegrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies...’

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74 See Phillip G. Le Prestre, above n 32, 311.
75 See Désirée M. McGraw, above n 5, 32.
76 The Cartagena Protocol on Biosafety was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity. The aim of the Catagena Protocol on Biosafety focuses on the protection of biological diversity from the potential risk caused by living modified organisms. For further information, see http://bch.cbd.int/protocol/background/, last accessed 19 April 2013.
The Article itself aims to set down general measures for biodiversity conservation and sustainable use. More importantly, this Article also sets down a required mechanism for the parties for national implementation of the CBD’s obligations by adoption of national strategies, plans and programs as general measures to conserve and to use biodiversity in a sustainable manner. The obligations for national planning are very commonly set out in international environmental treaties, for example, the Ramsar Convention, or the United Nations Framework Convention on Climate Change, a ‘sister’ Rio Convention of the CBD, but the requirements for adoption of specific planning clearly distinguishes the CBD from other treaties. These obligations as determined by the developed countries impose an explicit policy mechanism for the CBD’s fulfilment. The CBD also requires the parties to implement the obligations through legislative and administrative as well as policy measures.

2. MAJOR OBLIGATIONS UNDER THE CBD

2.1. Obligations for Biodiversity Conservation and Sustainable Use

As conservation of biodiversity is the primary objective of the CBD, it pays most attention to conservation obligations. These are interwoven into many CBD provisions, particularly Articles 6, 7, 8, and 9. While Article 6 sets down the obligations for general measures for conservation, Article 7 serves as the basis for setting priorities in party’s conservation planning; the most significant substantive obligations of conservation are set out in Article 8 with regard to in-situ conservation and in Article 9 on ex-situ conservation. With the focus on in-situ conservation as the fundamental means towards conservation, the CBD sets down

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77 The CBD, art 6.

78 The United Nations Framework Convention on Climate Change (UNFCCC) was negotiated under the auspice of the United Nations (UN). As a result, the Convention text was adopted at UN Headquarters in New York on the 9 May 1992. UNFCCC, with the two other Rio Conventions, CBD and United Nations Convention to Combat Desertification (UNCCD), was opened for signature at the Rio Conference from 4 to 14 June 1992, and then at UN Headquarters from 20 June 1992 to 19 June 1993. The UNFCCC came into force on 21 March 1994. Viet Nam joined the Convention by signature on 11 June 1992 at the Rio Conference, it then ratified the Convention on 16 November 1994 and the Convention entered into force for Viet Nam 14 February 1995. More information about the UNFCCC is available on the UNFCCC website http://unfccc.int/2860.php. The UNFCCC text is available at http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf last accessed on 17 May 2013.. Article 4(1, b) specifies that the parties, are obligated to ‘formulate, implement, publish and regularly update national, […] regional programmes containing measures to mitigate climate change, […]’ and measures to facilitate adequate adaptation to climate change’ with consideration of its specifics.
the most comprehensive obligations to conserve biodiversity in its natural habitats or ecosystems.

To discuss the extent to which Viet Nam implements its obligations of conservation it is necessary to examine the CBD’s conservation obligations.

i. In-situ Conservation Obligations

Animals and plants can be conserved both in-situ and ex-situ. However, the CBD clearly emphasises in-situ conservation as the primary approach to conserving biodiversity. The Preamble of the CBD insists that:

the fundamental requirements for the conservation of biological diversity are the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.

Protected areas have a significant role not only because they conserve natural and cultural heritage, but because they can also offer goods and ecological services. More significantly, parties also recognise their contribution to poverty alleviation as they may provide employment opportunities and livelihoods to communities living within and adjacent to them. Recognising the fundamental role of protected areas for in-situ conservation of biodiversity, the CBD first obligates the parties to establish a system of protected areas or special conservation areas where special measures for biodiversity conservation need to be taken. Where necessary, guidelines for selection, establishment and management of this system of protected areas may be developed. The significance of the establishment and development of a system of protected areas was reconfirmed by COP VII as ‘essential for achieving the three objectives of the CBD’, of which conservation is part.

79 The CBD, art 8.
80 See PWPA, above n 66, I (1).
81 The CBD, art 8 (a).
82 Ibid, art 8(b).
Protected areas have been known in many countries by different names such as national park, nature reserve, wilderness area, or landscape protected areas. Regardless of the names, protected areas are the places where components of biodiversity can be conserved in the best way for the sake of themselves and human use. For many countries, for example, Australia and the United States, ‘enjoyment and inspiration for humans’ or recreation are the primary purpose for the creation of parks.

In Article 2 of the CBD a protected area is referred to ‘a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives’. The definition reflects an attempt by the parties to establish a unique concept or ‘single name’ for more than 140 different names of protected areas all over the world.

The first feature of a protected area is geographical definition. It is, however, not specified how the CBD perceives a geographically defined area. In the opinion of Glowka and others, areas are considered as ‘a geographically defined area’ if:

- their location, and more precisely their boundaries are clearly delineated or established. The boundaries are typically provided first in legislation and then, in many case, translated into something concrete on the ground signs, a fence or some other markings. Boundaries also typically depicted on maps.

It is reasonable to support the point of view that for the sake of conservation, a protected area should have very clear boundaries, both on paper (legislation and maps) and on the ground. The second feature of a protected area is that it must be ‘designed or regulated and managed’ for achieving ‘specific conservation objectives.’

It should be noted that a protected area need not be established subject to an act of competent agency. It can be simply designed to conserve biodiversity. Nevertheless, regardless of whether it is designed or regulated, a protected area must be managed to effectively conserve biodiversity. Clearly, the CBD does not require that all protected areas must be established

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86 See Lyle Glowka et al, above n 13, 23.
87 Ibid, 22-4.
on public land. Private protected areas are welcome to be included within a country’s system of protected areas.

Some have criticised the ambiguousness of the notion of protected area.\textsuperscript{88} Nevertheless, this perception of protected area in fact takes into account the different kinds of status of parties’ systems of protected areas. Therefore this definition can be considered acceptable for parties to implement their conservation obligations under the CBD.

As already pointed out, the CBD takes an integrated approach to the conservation of biodiversity. Instead of requiring parties to assign one or more habitats or ecosystems or species to be protected, as Ramsar or CITES do, the CBD acknowledges the inter-connection of biodiversity components, and hence to be conserved effectively, biodiversity components have to be protected systematically. In other words, this conservation areas system needs to form a network which represents the features of biodiversity components. Additionally, the CBD also requires parties to promote buffer zones in sustainable and environmentally sound ways.

As the CBD pays particular attention to the ecosystem approach and recognises ecosystems as the ‘primary framework for action under the CBD’, the implementation of CBD’s obligations in regard to building up and managing a network of protected areas must involve an ecosystem context.\textsuperscript{89}

Taking into account the difficulties of parties in regard to financial and technical resources, especially in developing countries, where biodiversity is rich, the CBD made the first priority for conservation the most important biodiversity components. Thus the CBD asked the parties to conserve and use in a sustainable manner those biological resources most important for the conservation of biological diversity, whether within or outside protected areas, either by regulation or management measures.\textsuperscript{90}

\textsuperscript{88} Ibid.

\textsuperscript{89} PWPA, above n 66, para 8.

\textsuperscript{90} The CBD obligates parties to ‘[r]egulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use’. See the CBD, art 8 (c).
For this purpose the CBD also obliges parties to identify and monitor the most important biodiversity resources according to their capacity. Article 7 focusing on identification and monitoring of significant biodiversity components clearly states:

Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex 1.

Annex I of Article 7 gives a range of categories for priority in the conservation of biodiversity, such as high diversity, distinctiveness, representative features, value, and threatened level. The issue of effective protection of endangered species, hence, is also one of the priorities for parties to comply with.

**ii. Ex-situ Conservation Obligations**

In order to secure in-situ conservation of biodiversity, parties are also required to take measures to maintain viable populations, and to restore degraded ecosystems and threatened species. More significantly, parties are asked to control and prevent introduction of alien species. Ex-situ conservation is also needed to be applied in cases where in-situ conservation appears to be unavailable. In addition to the Preamble, Article 9 explicitly recognises that the ex-situ conservation measures are regarded as supplementary to in-situ conservation.

The CBD imposes on the parties a number of obligations providing comprehensive measures and an integrated approach for in-situ biodiversity conservation and sustainable use. Apart from obligating the parties to establish and manage a system of protected areas, in recognising the critical role of buffer zones, i.e. adjacent areas to protected areas, the CBD also requires the promotion of sustainable use of their buffer zones.

The CBD requires parties to promote ecosystems and natural habitats, to control invasive alien species and anything which may threaten biodiversity. The CBD also includes

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91 The *CBD*, art 8 (e, f).
93 Ibid art 8(e).
obligations to ensure biosafety, which are then developed in the Cartagena Protocol on Biosafety,\textsuperscript{94} and obligations relating to traditional knowledge, etc.

Although the CBD clearly separates ‘conservation’ from ‘sustainable use’ of biodiversity as two distinctive CBD objectives, the obligations to conserve and to use biodiversity in a sustainable manner are interwoven in many the CBD’s Articles. For example, Article 6 of the CBD requires the parties to adopt and adapt national strategies, plans and programmes as general measures for both conservation and sustainable use of biodiversity within their national jurisdiction.

2.2. The Obligations for Equitable Benefit Sharing of the Use of Genetic Resources

In conjunction with the objectives of conservation and sustainable use of biodiversity, the CBD sets the third objective as fair and equitable benefit sharing of the use of genetic resources. This is the first time a convention includes equitable benefit sharing of genetic resources within its objectives, which make the CBD different from the previous biodiversity conventions.

The CBD’s obligations display an attempt by the parties to find an adequate mechanism for benefit sharing of the use of genetic resources in a fair and equitable manner within the CBD’s framework. The mechanism of the ‘fairness and equity of benefit sharing’ must be based on the three major ‘appropriate’ underpinnings, consisting of ‘appropriate access to genetic resources’, ‘appropriate transfer of relevant technologies’ and ‘appropriate funding’ as clearly set out in Article 1 of the CBD.

The scheme for ‘fair and equitable benefit sharing’ of genetic resources represents the trade-offs among the parties and appears to be moderated by the concept of ‘appropriateness’ in all three major elements. However, it seems to be the most far-reaching set of obligations and scheme for sharing genetic resources in a relatively equitable way. On the one hand, the CBD’s obligations provide the parties with the opportunities and a proper mechanism to access genetic resources. On the other hand, the parties may fairly receive funds and biotechnology access and transfer for the purpose of conservation and sustainable use of genetic resources.

\textsuperscript{94} The Cartagena Protocol on Biosafety, above n 76.
While acknowledging the sovereignty of the State over its natural resources, the CBD obligates the governments of the parties to establish a scheme for appropriate access to genetic resources by other parties and their stakeholders.\(^{95}\) Accordingly, a legislative scheme is required for access to genetic resources for either commercial or research, academic or other non-commercial purposes, which must be done on mutually agreed terms and subject to prior informed consent (PIC).\(^{96}\) Certainly, the legislation on access to genetic resources should not ‘impose restrictions that run counter to the objectives of this CBD’.\(^{97}\) In addition, the CBD also requests the parties benefiting from utilisation of genetic resources to give ‘full participation’ to the parties providing the genetic resources. In other words, the providers have a right to be fully involved in the research process or the post-access use of the genetic resources. This obligation is essential for equitable sharing of the use of genetic resources among the parties. The obligation is also important for the developing countries, especially, as they possess four fifths of the world’s biodiversity components,\(^{98}\) and may face the lack of funds and underdeveloped biotechnology, even as they become major providers of genetic resources.

Acknowledging the significance of access and transfer of technology as ‘essential elements for the gaining of the CBD’s objectives’,\(^{99}\) the CBD obligates the parties to provide or facilitate access to and transfer of relevant technology on mutual terms. In addition, it also requires the protection of intellectual property rights for the parties which receive technology transfer.\(^{100}\)

Financial resources are critically important for the CBD’s implementation. Therefore the CBD recognises that the developing countries need financial support from developed countries in order to successfully implement the CBD’s obligations as well as to fairly share the use of genetic biodiversity. As a result, the CBD’s obligations create a financial framework that includes financial resources and mechanisms in Articles 20 and 21.

\(^{95}\) *The CBD*, art 15 (1).
\(^{96}\) Ibid, art 15 (4, 5).
\(^{97}\) Ibid, art15 (2).
\(^{98}\) Laura Hood, above n 40.
\(^{99}\) *The CBD*, art 16(1)
\(^{100}\) Ibid, art 16( 2,3, 5)
Hence the fairness in benefit sharing can only be achieved through a well-created mechanism of not only access to genetic resources, but biotechnology access and transfer, as well as funding from relevant parties.

CONCLUSION

As shown in the above analysis, the conservation obligations under the CBD are complicated and wide-ranging, as the CBD takes a comprehensive approach to addressing biodiversity issues. The CBD obligations have at times been criticised for its softness and the ambiguousness of some concepts. However, the CBD has attempted to be comprehensive, and to fulfil the ambitious aim of addressing major biodiversity needs while dealing with a range of parties joined to the CBD. The CBD’s obligations were adopted with the general, soft and compromised characteristics with the focus on national implementation so that they would be feasible to implement, and more effectively address biodiversity.

In this context, setting a broad framework for conserving biodiversity as well as for using its elements in a sustainable manner, while leaving a space for parties to decide the extent of their implementation of the CBD is probably the best way in which the problems involved could have been dealt with.
CHAPTER FIVE

IMPLEMENTATION OF THE CONVENTION ON BIOLOGICAL DIVERSITY IN VIET NAM: THE LAW ON BIOLOGICAL DIVERSITY

INTRODUCTION

In 2008, the National Assembly of Viet Nam passed the Law on Biological Diversity (LBD) as part of its effort to implement the Convention on Biological Diversity (CBD) and biodiversity-related Conventions. The LBD, effective from 1 July 2009, coordinates measures for conservation and sustainable use of biodiversity which were previously incoherently provided in different statutes. Thus, the passage of the LBD marked a significant step for biodiversity conservation as well as for the implementation of the CBD.

For a better understanding of the Vietnamese implementation of the CBD, this chapter first examines the implementation of and compliance with the CBD in Viet Nam prior to the enactment of the LBD. This is followed by a discussion of the relevant issues of the LBD to examine the extent to which the current legal mechanisms under the LBD can serve well for the implementation of obligations in regard to conservation and sustainable use of biodiversity. The discussion in this chapter eventually answers the question whether or not the current legal framework established by the LBD is consistent and ‘sustainable’ enough to ensure the effective fulfillment of international environmental obligations in the field of biodiversity in Viet Nam.

1. IMPLEMENTATION OF BIODIVERSITY OBLIGATIONS BY VIETNAMESE LAW PRIOR TO THE ADOPTION OF THE LAW ON BIOLOGICAL DIVERSITY

1.1. Overview

Since becoming a party to the CBD in 1994, Viet Nam has built up many laws and regulations in order to implement the CBD’s obligations. These range from the Laws of the National Assembly, the Ordinances of its Standing Committee to subordinate
legislation such as Decrees of the Government.¹ Major related statutes include the 2005 Law on Environmental Protection (LEP),² the 2004 Law on Forest Protection and Development,³ and the 2003 Fisheries Law.⁴ Among the Laws relating to biodiversity, the 2005 LEP establishes fundamental legal principles and rules for biodiversity conversation, while the other ones deal with specific aspects of biodiversity.

On the surface, it seems that the current 2005 LEP and its predecessor – the 1993 LEP– have adequately responded to the CBD’s conservation obligations as they incorporate the definitions of biodiversity-related terms and set out many measures to respond to the CBD obligations. The 1993 LEP provided a range of measures to manage protected areas. Indeed, it imposed strict management measures over the natural reserves and natural landscapes. The 1993 LEP required any person or organisation using or exploiting natural reserves and natural landscapes to get permits from the relevant State management bodies on environmental protection. Additionally, the person or organisation was also required to register their use or exploitation of this natural reserve or natural landscape with the relevant local people’s Committees.⁵ By these


² The current 2005 Law on Environmental Protection (hereinafter referred as the 2005 LEP) replaced the 1993 Law on Environmental Protection (hereinafter referred as the 1993 LEP), which was passed by the National Assembly on 27 December 1993. The 2005 LEP consists of 15 Chapters, including 136 articles. Currently, the 2005 LEP is a key source of Vietnamese law in relation to environmental protection, which defines significant environment-related concepts such as environment, environment components, setting principles and State’s policies of environmental protection in Viet Nam. The 2005 LEP covers numerous issues within its regulation scope, including the rights and obligations of organisations, businesses and individuals in performance of environmental protection activities, legal responsibilities while breaking the rules etc.

³ The Law on Forest Protection and Development adopted by the National Assembly on 3 December 2004 (hereinafter referred to as the 2004 Law on Forest Protection and Development) replaced the Law on Forest Protection and Development, which was first promulgated on 19 August 1991 (hereinafter referred as the 1991 Law on Forest Protection and Development). The 2004 Law on Forest Protection and Development has 8 chapters and 88 articles with the focus on management, protection, use and development of the forest and also rights and obligations of forest tenants, including the State. The 2004 Law on Forest Protection and Development defines more clearly several notions including ‘forest’. Additionally, the 2004 Law on Forest Protection and Development set five principles of protection and development in Viet Nam, which include the sustainable development, balancing the interests between the State and non-state actors. The Law also creates legal mechanisms for settlement of disputes in relation to environmental protection or enforcement by forest rangers.

⁴ The Fisheries Law promulgated on 10 December 2003 (hereinafter referred as the 2003 Fisheries Law). Since the 2003 Fisheries Law entered into force, the Law replaced the Ordinance on the Protection and Development of Fishery Resources, which was promulgated on 5 May 1989. The 2003 Fisheries Law divides into 10 chapters and 62 articles providing legal bases for exploitation, protection and development of aquatic and marine activities which are performed within Viet Nam’s jurisdiction.

⁵ The 1993 LEP, art 13.
requirements, the 1993 LEP set out management measures for protected areas as a response to the internationally required measures for in-situ conservation. Furthermore, the 1993 LEP placed responsibility on organisations and individuals to protect wild plants and animals, biodiversity and forests, marine and ecosystems as a principle for biodiversity conservation. This responded to the obligations for in-situ conservation measures required by Article 8 (d) of the CBD to meet the need ‘to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings’. Moreover, the 1993 LEP particularly set down measures to reduce the adverse impact of human activities on biodiversity and ecological balance.

For the first time, the 1993 LEP and its related Decrees, such as the one on the Guidance of Implementation of the Law on Environmental Protection, required the appraisal of environmental impact assessments of joint venture projects and other socio-economic development projects, which may have potential impacts on the biological resource. In addition, the 1993 LEP also required organisations and individuals to use the prescribed methods, means and measures for exploitation of biological resources in order to ensure the restoration of density, varieties, and species against ecological imbalance, which responded to the obligations established by Article 8 (f) of the Convention. The Law also set out controls over the import and export of the genetic resources and micro-organisms by the permit system of the managerial State bodies.

The 2005 LEP further improves the implementation of the CBD obligations by attempting to balance conservation and sustainable use of biodiversity. Article 22(2) sets down the principle of planning for the sustainable use of biodiversity and of natural conservation. Accordingly, it creates categories and bases for establishing and managing a system of protected areas. The 2005 LEP also provides general measures for the protection of wild animals and plants in Article 30, which regulates biodiversity

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6 The CBD, art 8 (a-c).
7 The 1993 LEP, art 12.
10 The 1993 LEP, art 12, para 2
11 The 2005 LEP, art 29 (2).
protection. For the first time, the LEP also recognises the rights and interests of indigenous communities.

Viet Nam seemed to implement the CBD’s obligations in a timely fashion as it adopted many different domestic measures to implement the obligations. In fact, a number of related legal rules responding to the CBD obligations had been enacted even prior to the Viet Nam’s ratification of the CBD. However, the use of different means to respond to the CBD obligations caused several problems for the implementation of the CBD’s obligations. Despite the existence of a large number of legal rules and administrative measures to fulfil the CBD obligations, the piecemeal, overlapping and insufficient adoption of relevant measures into Laws and regulations revealed an ad hoc and pragmatic mechanism for the implementation of the CBD obligations.

1.2. Pre-2008 Laws: Inadequacy, Insufficiency and Fragmentation

Theoretically, a full national implementation of international environmental obligations by law requires a comprehensive, sufficient and consistent system of related legal rules. In the case of Viet Nam, as it has been shown in Chapter Three, this argument is appropriate as legal normative documents are meant to be the principal source of law in Viet Nam.

This section uses the three criteria of a legal framework (adequacy, sufficiency and consistency) to assess the Vietnamese implementation of conservation obligations of CBD prior to the adoption of the LBD.

i. Inadequate Implementation by the 1993 LEP and the 2005 LEP

The interpretations of certain key terms such as ‘biodiversity’ and ‘ecosystem’ were significant for the framing of regulations in regard to biodiversity conservation issues addressed by the 1993 LEP. For the first time, the 1993 LEP defined the terms ‘biodiversity’ and ‘ecosystem’ initiated by the CBD as the first international environmental treaty which legalises the scientific term ‘biodiversity’ and adopts the ecosystem approach for biodiversity conservation. Prior to the CBD, other biodiversity conventions addressed nature conservation only from a species approach.

12 These rules were embodied in several Laws including the 1991 Law on Forest Protection and Development, the 1993 LEP, the Ordinance on the Protection and Development of Fishery Resources which was adopted by the State Council on 25 April 1989. While the 1993 LEP set out relatively general rules on biodiversity conservation and use, the 1991 Law on Forest Protection and Development conserved forest biodiversity through the forest protection and development mechanisms and the 1989 Ordinance on the Protection and Development of Fishery Resources conserved the aquatic and marine biodiversity.
According to the 1993 LEP, ‘biodiversity’ can be understood as ‘the variety of the genetic resources, stocks, biological species and ecosystems in nature.’ At first glance, the term ‘biodiversity’ in the 1993 LEP was likely a repetition or reception of the biodiversity definition included in the CBD. The definition seemed to address biodiversity at three levels including genes, species and ecosystems. Nevertheless, the concept of biodiversity adopted in the LEP 1993 appeared to be inadequate.

In regard to genetic diversity, the term ‘biodiversity’ under the 1993 LEP referred only to variety of genetic resources but not to diversity of the genes themselves as they are recognised in the CBD. However, it is important to distinguish genes from genetic resources because genetic resources cannot be equated to genes. Although genes are not clearly defined in the CBD as a separate term, genes are interpreted through the term genetic material. Accordingly, genes are the ‘functional units of heredity’, genetic resources can be any valuable or potentially valuable material, such as a sample or a part, of a plant, animal, microbe or other organisms holding genes as functional units of heredity. As interpreted in the CBD, genes and genetic resources are different things. Genetic resources contain groups of genes with value or potential value. More importantly, confusing genes with genetic resources in the biodiversity legal terms creates a different scope for biodiversity conservation. Consequently, this incorrect interpretation narrowed the scope of the measures of the Vietnamese law to respond to the CBD obligations.

In the 1993 LEP, the term ‘ecosystem’ was defined as ‘the system of the biological community, which lives together and develops in a certain environment as well as the interrelation among them and with the environment.’ While the concept of ecosystem in the 1993 LEP seems to be similar to that of the CBD by acknowledging the interaction between biotic components and non-biotic components, it likely limited the ecosystem to a biologist point of view by ignoring the functional feature of ecosystem. Hence, ecosystem in the 1993 LEP referred to the small ecosystem only. The two inadequate definitions ‘biodiversity’ and ‘ecosystem’ led to the inappropriate implementation of the CBD in Viet Nam.

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13 The diversity of genes is interpreted in the CBD through the variety within species. For discussion of the concept ‘biodiversity’ see Chapter Four.

14 The CBD, art 2. The Article defines genetic material as ‘any material of plant, animal, microbial or other origin containing functional unit of heredity.’

15 The 1993 LEP, art 2 (9).
Since the ratification of the CBD, neither a comprehensive law nor subordinate legislation which fully responded to the CBD obligations of conservation was enacted in Viet Nam until the passage of the LBD. In fact, the Vietnamese law-makers intended to make ‘umbrella’ legislation to cover all environmental protection related issues including the biodiversity conservation. The making of the 2005 LEP was governed by a guiding principle that ‘the revision of the Law has to meet the requirements of the improvement of the enactment of legal normative documents and the reform of the State administration’.16 Accordingly, it was clearly admitted that:

In relation to the other laws on national resources, the [2005] LEP acts as a general law, while the other laws function as specific laws [on biodiversity]. [...] in order to secure ‘specifics’ in the process of legal adjustment and the unity of the system of [Vietnamese] law on the protection of natural resources..17

Unfortunately, even the 2005 LEP failed to provide a comprehensive legal framework to address the CBD obligations. It also unsuccessfully functioned as a general law relating to biodiversity. While the 2005 LEP and its predecessor, the 1993 LEP, illustrated the efforts of the Government of Viet Nam to implement the Convention’s obligations into Vietnamese law, particularly those for conservation and sustainable use of biodiversity, they both failed to either provide criteria to establish a system of protected areas or protection of threatened species.

**ii. Piecemeal and Insufficient Implementation by Other Legislation**

Although laws were made to protect biodiversity,18 in general, the whole framework was fragmented. Since each piece of legislation on natural resource protection had its own purposes, the issue of biodiversity did not appear to be the main interest of the legislation. Legislation responded separately to a certain set of CBD obligations and was not coordinated for sufficiently implementing the CBD obligations. The 2004 Law on

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16 See The Government, The Submission Paper Number 22/CP-XDPL dated 16 March 2005 of the Government to the National Assembly on the Draft of the (Revised Law) on Environmental Protection (To Trinh Quoc Hoi So Number 22/CP-XDPL Ngay 16 Thang 3 Nam 2005 Cua Chinh Phu Ve Du An Luat Bao Ve Moi Truong (Sua Doi)), www.na.gov.vn/OpenAttach.asp?idfile=278, last accessed on 17 May 2013. Phan Nguyen Toan also argues that in Viet Nam the 1993 LEP must function as the basic law on environmental protection, while each relevant special law has to deal with certain environmental aspects in each particular field. See Phan Nguyen Toan, Viet Nam in Terri Mottershaed (ed), Environmental Law and Enforcement of Asia-Pacific Rim (Sweet & Maxwell Asia, 2002) 547, 561.


18 Such rules, for example, can be found in the 2005 LEP, the 2004 Revised Law on Forestry Protection and Development, the 2003 Fisheries Law, some other Ordinances and their detailed regulations.
Forestry Protection and Development and the 2003 Fisheries Law are two obvious examples in this regard.

The 2004 Law on Forestry Protection and Development and its detailed regulations incorporating forest biodiversity conservation only set out rules on in-situ biodiversity conservation and the sustainable use of forests while ignoring other related rules. Notably, some legal provisions of this Law directly fulfilled separate obligations such as the obligation to establish a system of protected areas and the obligation relating to the use of biological resources as required by Article 8 (a-c) of the CBD. Indeed, the Law set up a network of protected areas by the provisions on planning, programming forestry protection and development by the State,\(^{19}\) including protected areas categorised as ‘special-use forests’.\(^{20}\) Also, unlike the 1991 Law on Forestry Protection and Development, which took a cross-cutting approach to forest protection,\(^{21}\) the 2004 Law on Forestry Protection and Development treats a forest as an ecosystem.\(^{22}\) Hence, Article 40 (2) of this Law set down measures to protect forestry ecosystems such as requiring environmental impact assessment and permission of the competent authority for construction projects.

The 2003 Fisheries Law as a related statute on biodiversity emphasises the exploitation of the marine and aquatic resources rather than their conservation. Nevertheless, the Law includes the planning and managing of coastal and marine protected areas, as well as fishery and aquatic resources, especially endangered, rare species or those with high economic value.

### iii. Limited Implementation by Viet Nam’s Biodiversity Action Plan

The Viet Nam’s Biodiversity Action Plan (VBAP), approved by the Prime Minister can be seen as the most comprehensive policy measure to implement the CBD obligations.\(^{23}\) In fact, the VBAP indirectly responded to Viet Nam’s commitments under the CBD

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\(^{19}\) The 2004 Law on Forestry Protection and Development, Chapter II, section 1.

\(^{20}\) Ibid, art 4.

\(^{21}\) The 1991 Law on Forestry Protection and Development referred to the natural forests and plantations on forestry land, including forest plants, animals and etc, in Article 1.

\(^{22}\) The 2004 Law on Forestry Protection and Development, art 3(1).

\(^{23}\) The Decision of the Prime Minister No 845/TTg of 22 December 1995 Approving Biodiversity Action Plan for Viet Nam (The Decision 845/TTg). Biodiversity Action Plan for Viet Nam (VBAP) implements a range of obligations of the CBD at an early stage of the CBD’s performance, and was drafted on the basis of the National Plan for the Environment and Sustainable Development (1991-2000) and the Tropical Forest Action Plan.
obligations in two senses. Firstly, it implemented the obligations for national adoption of a plan for biodiversity under Article 6 of the Convention. Secondly, the VBAP could be seen as a significant instrument for implementation of the CBD obligations as ‘it presents an important and timely step for Viet Nam in meeting the commitments of the Convention [on Biological Diversity].’  

However, like the 1993 LEP and the 2005 LEP, the VBAP mainly emphasised the establishment and management of protected areas and other measures for in-situ and ex-situ conservation. It required the implementation of the CBD’s obligations of conservation and sustainable use of biodiversity components mainly by administrative measures elaborating the projects. The VBAP failed to give a system of protected areas representing the diversity of Viet Nam’s biodiversity.

iv. Lack of Cohesion of Biodiversity Legal Framework

A common problem of overlap and lack of cohesion among the pre-2008 statutes relating to biodiversity clearly illustrates the fragmented implementation of the CBD obligations by the Vietnamese law. The problem of overlap was recognised by the law-makers in the course of drafting of the 2005 LEP. Therefore, unsurprisingly, a major purpose of the making of the 2005 LEP was defined as ‘to overcome the overlap among the Laws.’ The lack of cohesion among Vietnamese legislation was reflected both horizontally, amongst the laws themselves, and vertically, between laws and their implementing regulations on certain issues. The issue of the management of the system of marine protected areas is a typical example in this regard.

Marine biodiversity reflects an aspect of biodiversity which is addressed by the CBD. In order to implement the obligations to establish and manage a system of protected areas under Article 8 of the Convention, Viet Nam as a party to the Convention, is obliged to either enact laws and regulations or to adopt administrative measures to regulate or to manage the system of marine protected areas. To fulfil these obligations, in 2001 the Ministry of Fisheries issued the Regulations on the Management of Viet Nam’s Marine

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24 The VBAP, ii.
26 The Decision 845/TTg, art 2.
27 See the Submission Paper Number 22/CP-XDPL, above n16.
28 The CBD, art 2. The definition Article clearly indicates that marine diversity is part of global biodiversity.
29 Ibid, art 8(b-c). Article 8 (b-c) requires the parties to the Convention to regulate or manage biological resources, and to develop guidelines for selection, establishment and management of protected areas to conserve biodiversity.
Protected Areas as the first step to manage a system of marine protected areas. More significantly, some later enacted Laws relating to biodiversity also included the management of marine protected areas in their scope of regulation. Article 29(1) of the 2005 LEP states that ‘[e]co-regions and ecosystems of international and national importance with high biodiversity values shall be investigated, assessed, and zoned for protection as marine protected areas…’ The 2003 Fisheries Law also provided the zoning and management of inland and marine protected areas in Article 9, which then elaborated in the Decree of the Government implementing the 2003 Fisheries Law. The 2004 Law on Forest Protection and Development also includes marine protected areas into its scope of regulation as a category of a special-use forest.

Unfortunately, there was still an ambiguous status of marine protected areas due to some overlaps and lack of logicality among the Laws relating to marine protected areas. First, while all the three Laws relating to marine protected areas - including the 2005 LEP, the 2004 Revised Law on Forest Protection and Development and 2003 Fisheries Law - regulate the categories of and the requirements for marine protected areas, each of them addresses these categories and requirements in its own way. For example, in accordance with the 2005 LEP, a marine protected area as a form of protected areas, goes beyond and could not be protected as a national park, a nature reserve, a biosphere, and a species/landscape protected area. Surprisingly, the 2003 Fisheries Law divided the marine protected areas into three categories including national parks, habitat/species sanctuaries and aquatic natural reserves. In addition, marine protected areas were also regulated by the 2004 Law on Forest Protection and Development as a form of ‘special use forests’, which are categorized as national parks, natural reserves, and species/landscape protected areas. Clearly, there were overlaps and inconsistencies among the three Laws, which caused the overlapping in management of a marine protected area. In fact, some proposed marine protected areas were managed under the status of special use forests by the Ministry for Agriculture and by Rural Development under the status of wetlands.

30 Those include the 2005 LEP, the 2004 Law on Forest Protection and Development and the 2003 Fisheries Law.
32 Article 29 (1) of the 2005 LEP states that ‘[e]co-regions and ecosystems of international and national importance with high biodiversity value shall be investigated, assessed, zoned for protection as marine protected areas, national parks, nature reserves, biospheres, and species/landscape protected areas’.
33 The 2003 Fisheries Law, art 9.
In short, there was no comprehensive legislation to implement the CBD obligations in Viet Nam. Even taking all related statutes together, it was hard to say that Viet Nam had a synchronous single legal framework to address the CBD obligations due to its insufficiency, overlap, lack of cohesion among enacted laws and regulations. This was a result of the cross-cutting in making laws to incorporate the Convention’s obligations. Hence, not surprisingly, the Management Strategy for a Protected Areas System in Viet Nam to 2010 called for the development of ‘a consistent legal framework for biodiversity and protected areas management.’

2. THE LAW ON BIOLOGICAL DIVERSITY FOR THE IMPLEMENTATION OF CBD’S OBLIGATIONS IN VIET NAM

The previous section examined the extent to which Viet Nam implemented its obligations under the CBD in regard to conservation and sustainable use of biodiversity. As noted, Viet Nam developed a number of biodiversity-related laws. While each law dealt with different aspects of biodiversity, the framework appeared to be inadequate to ensure the fulfillment of those obligations due to its inconsistency, fragmentation and ad-hoc manner. Those inadequacies limited the effectiveness and efficiency of the implementation of CBD’s obligations. Thus, there was the call for a Law to fill the loopholes of the existing Vietnamese legal framework on biodiversity.

After one and a half years of drafting, with many drafts and comments from scientists, experts, scholars, policy-makers from different Ministries and the public, and having experienced reviews of the Committee of Science, Technology and Environment of the National Assembly and discussions at two sections of XII National Assembly’s Congress, the Law on Biological Diversity (LBD) was finally approved by the Viet Nam’s National Assembly at the Fourth Session of XII Congress on 13 November 2008. The Law came into effect on 1 July 2009.

34 The Management Strategy for a Viet Nam’s Protected Areas System by the year 2010 enacted by Decision Number 192/2003/QD-TTg of the Prime Minister dated 17 September 2003 On Approval of the Management Strategy for a Protected Areas System in Viet Nam by the year 2010 (Quyet Dinh Cua Thu Tuong Chinh Phu Ngay 17 Thang 9 Nam 2003 Ve Viec Phe Duyet Chien Luoc Quan Ly Khu Bao Ton Thien Nhien Viet Nam Den Nam 2010).

35 To the author’s knowledge, at least 7 drafts were given for comments from national experts, well-known scientists and international consultants as well as the public. Some reviews and comments also were done by the Committee of Science, Technology and Environment of Viet Nam’s National Assembly.

36 The official launch of drafting of Viet Nam’s Law on Biological Diversity was marked by the approval of Resolution of the National Assembly Number 11/2007/QH12 dated 21 November 2007 on the Program on Making Laws and Ordinances for XII Congress of the National Assembly and for the year of 2008. The
2.1. The Law on Biological Diversity – Concepts and Principles

To understand the way Viet Nam implements international obligations on biodiversity, it is necessary to discuss the relevance of perception of biodiversity, biodiversity conservation and sustainable use of biodiversity as well as related principles and State polices in Vietnamese law. The above concepts are fundamental for Vietnamese law to implement CBD’s obligations.

i. Concept of Biodiversity

(a) The Term ‘Biodiversity’

Unarguably, biodiversity is a key concept for any biodiversity legislation and for conservation and sustainable use of biodiversity. More significantly, the concept has potential to define the extent to which a party to a Convention implements the Convention into domestic law. The consistency of the concept in domestic law with CBD’s comprehension of ‘biodiversity’ is a significant factor to assess the adequacy of a party’s implementation of the CBD’s obligations. As discussed in Chapter Four in regard to the concept of biodiversity in the CBD, there are many different interpretations of biodiversity and different approaches toward biodiversity conservation. For example, the most commonly accepted at the time when the CBD was concluded was a species-based approach which focused only on the protection of all species and its variety within an area or an ecosystem. Hence, different comprehensions of biodiversity will result in different measures for conserving biodiversity.

Parties to the CBD may have different definitions of biodiversity. In some cases, the definition is made in a general manner and is shortened without further reference to country’s biodiversity components. For example, the Biological Diversity Act 2002 of India defines ‘biological diversity as the variability among living organisms from all sources and the ecological complexes of which they are part and includes the diversity...

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within species or between species and ecosystems’. In general, this definition is likely a short version of CBD’s definition, as it apparently repeats the wordings of CBD’s definition. Australia, shares a similar view with that of India.

In contrast, in the case of Bangladesh, the definition of biodiversity is made in a detailed and clear manner, and moreover, the components of biodiversity are explicitly explained. Article 4 of Biodiversity and Community Knowledge Protection Act reads:

‘Biodiversity’ or ‘Biological Diversity’ ‘[b]oth meaning the same, indicate the variability among living organisms from all sources, including, inter alia, terrestrial, marine, and other aquatic ecosystem and the ecological complexes of which they are part; this includes diversity within species, between species and ecosystems. Examples of living organisms are plants, animals, fish and aquatic species and varieties and micro-organisms, the genes they contain and ecosystem of which they form a part. They are found in all the ecological zones within the boundaries of Bangladesh—whether naturally occurring or modified in any manner including genetically modified, whether wild or cultivated or domesticated—its parts, products, cell lines, genetic material, properties, and characteristics. For the implementation of this Act the Biodiversity may further be classified into agricultural biodiversity, animal and livestock biodiversity, medicinal plant biodiversity, aquatic biodiversity and other biodiversity’.

From the point of view of implementation of the law, the explicit and detailed definition is useful and less confusing for law implementation in practice. In that way it may improve law’s effectiveness and efficiency.

Despite the fact that parties may differ in the way of defining of biodiversity, nevertheless, they mainly adopt the approach of the CBD toward the definition of biodiversity. For the large part, biodiversity can be understood as the variability amongst living organisms of all sources and includes ecosystems, species and genetic diversity.

To analyse biodiversity as a fundamental concept for the perception of ‘biodiversity conservation’ and to understand the consistency in the Vietnamese implementation of the CBD’s obligations, it is useful to discuss the different understandings of biodiversity in the course of drafting of the Law on Biological Diversity.

38 The Biological Diversity Act, 2002 No. 18 of 2003 (India), Chapter I, 2 (b). The text is available at http://faolex.fao.org/docs/texts/ind40698.doc, last accessed on 17 May 2012.
39 The CBD, art 2. See also the analysis of the CBD’s definition in the Chapter Four of this Thesis.
40 Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (Australia) (Cth), art 528.
42 For more information of the definition of biodiversity in laws of the parties, ecolex is also useful database on environmental law, which is supported by UNEP, FAO and IUCN. http://www.ecolex.org/start.php
'Biological diversity’ or ‘biodiversity’ is the English translation of the Vietnamese term ‘đa dạng sinh học’ in the Law on Biological Diversity. Nevertheless, the term’s use, especially in the title of the Law, is subject to debate. In the course of drafting the Law on Biological Diversity, there were some comments on the adequacy in the use of the term biodiversity (‘đa dạng sinh học’ in Vietnamese) in the title of the Law. Accordingly, the term ‘diversity of biotic/living organisms’ (‘đa dạng sinh vật’) was suggested.43

Nevertheless, this point of view was challenged and rejected by the Committee of Science, Technology and Environment of the XII Congress of the National Assembly. In the Committee’s Report on Appraisal of Draft Law on Biological Diversity (Draft enclosed with the Submission Paper Number 49/TTr-CP dated 21 April 2008), the Committee argued to support the use of the term ‘biodiversity’ as it was commonly and sustainably used in Vietnamese enactments. According to the Committee, the term biodiversity (‘đa dạng sinh học’) was more appropriate because it would cover diversity of not only species but also genetic and ecosystem diversity, whereas, ‘đa dạng sinh vật’ (diversity of biotic organisms) seemed to mention only species diversity, leaving out diversity of genes and ecosystems. More significantly, the LBD would aim to regulate biodiversity-related issues and would not only focus on conservation but also on sustainable use of biodiversity and access and benefit sharing in the use of genetic resources. Hence, the term biodiversity (‘đa dạng sinh học’) would be more proper as it could cover adequate and wide-ranging biodiversity-related issues.44

Nevertheless, there were different approaches toward interpretation of the term ‘biodiversity’ in the course of drafting the Law on Biological Diversity. The Draft Law Number I-9, for example, took a view that biodiversity refers to ‘all living forms in the nature, including genetic resources, species and ecological systems.’45 As suggested by the Draft Law Number I-9, ‘biodiversity’ here referred to the total amount of all species, genetic resources and biotic components of ecosystems rather on its diversity. An advantage of this approach to ‘biodiversity’ is that biodiversity is examined not only from commonly accepted species perspective, but also from genetic, and the most importantly, from ecosystem perspectives.46 This advantage of such an interpretation of biodiversity was, to some extent, supported by some related authoritative institutions including the Department of Biodiversity Conservation – a main figure in charge of state

44 Ibid.
45 Draft Law on Biological Diversity Number I-9, art 3(1) (the material on file with the author).
46 For more detailed discussion of different definitions of biodiversity, see Chapter Four of the Thesis.
management over biodiversity conservation in Viet Nam. Consensus of this view, however, was hard to reach.

There were not many direct comments of the experts on the term of ‘biodiversity’ during the course of discussion of the Draft. The IUCN’s expert, however, suggested that that the definition of ‘biodiversity’ should follow the CBD’s definition. This suggestion finally was included into the final Draft Law.

It should be noted that the different understandings of the term have also been addressed in foreign literature. Glowka and his team, for example, comment:

[biodiversity] is not the sum of all ecosystems, species and genetic material. Rather, it represents the variability within and among them. It is, therefore, an attribute of life, contrasting ‘biological resources’, which are tangible biotic components of ecosystems.

Additionally, there are also some problems of translation that may cause confusion in the comprehension of the term. For example, ‘phong phu’ (literally, variety and richness) is translated in many un-official English versions as ‘abundance’. The term ‘abundance’ may be correct as a scientific term. Indeed, ‘relative abundance’ can serve as a scientific indicator to show the differences in quantity of species within an area or ecosystem. The term ‘abundance’, however, might not be adequate English translation of ‘phong phu’ from the linguistic point of view. ‘Phong phu’ in Vietnamese language means both the richness in quantity and variety of a thing, while abundance may refer to ‘a large quantity more than enough.” The term ‘phong phu’ might be a Vietnamese translation of ‘biodiversity’ from CBD.

It is noted that the 1993 LEP is the first enactment which includes a legal definition of biodiversity. The rules of the 1993 LEP addressing biodiversity conservation, however, are still modest. The term ‘biological diversity’ or ‘biodiversity’, in accordance with the

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47 See http://vea.gov.vn/VN/quanlymt/baotondadangsh/Gioithieu/Pages/Khainiemdadangsinhhoc.aspx, last accessed on 18 May 2013. Department of Biodiversity Conservation is a department of the Viet Nam Environment Administration (VEA) under the Ministry of Natural Resources and Environment (MONRE) of Viet Nam, which exercises the state management over biodiversity conservation in Viet Nam.

48 Comment of Patti Moore on whole I-6 Draft Law on Biological Diversity (on file with the author).


50 See, for example, an unofficial English version of the 1993 LEP, the 2005 LEP or the LBD (all materials on file with author).


1993 LEP, is understood as ‘the richness and variety [phong phu] of genetic resources, stocks, biological species and ecosystems in nature.’\(^{53}\) This definition is largely repeated in full in the 2005 Law on Environmental Protection,\(^{54}\) and in the 2008 Law on Biological Diversity.\(^{55}\) A small modification in the definitions given in the 2005 LEP and the LBD is the exclusion of ‘stocks’ from the definition, which apparently does not affect the substantive features of the notions. The definition of biodiversity under the 2005 LEP, however, does not include domesticated animals and cultivated plants within the scope of biodiversity. Pursuing the same approach to define the biodiversity, the definitions of in-situ and ex-situ conservation and other provisions of the LBD regulating the protection of cultivated plants and domesticated animals clearly shows that the LBD covers conservation of those plants and animals as part of biodiversity.

In general, the most significant perception of the biodiversity in Vietnamese law is that biodiversity refers to both richness and variety of living organisms. As living organisms can be organised in different combinations such as species or interact with other non-biotic components to form an ecosystem. Hence, biodiversity must be examined at three levels including genetic, species and ecosystem diversity. Conservation of biodiversity must include all three ‘components’.

(b) Biodiversity-Related Notions

To understand the concept of biodiversity, an analysis of the definitions given by the law is not adequate. The comprehension of other related notions such as ecosystem, species and genes are significant to understand the consistency between the CBD and Vietnamese law.

With the emphasis on the ecosystem and the ecosystem approach in conserving biodiversity, especially since the adoption of the CBD, the concept of biodiversity is further clarified by the notion of ecosystem. The 2005 LEP and its predecessor – the 1993 LEP as a ‘fundamental law on environment’ - are the first statutes which dealt with the notion of ecosystem. The term ‘ecosystem’ was first defined in the 1993 LEP as ‘a system of community of living organisms living together and evolving within a defined

\(^{53}\) The 1993 LEP, art 2 (10) (originally in Vietnamese it reads as ‘Da dang sinh hoc la su phong phu ve nguong gen, ve giong, loai sinh vat va he sinh thai trong tu nhien’).

\(^{54}\) The 2005 LEP, art 3 (16).

\(^{55}\) The LBD, art 3 (5).
environment which interact with each other and with the environment." This definition of ecosystem to a large extent addressed the most significant feature of an ecosystem from the natural science perspective. First, ecosystem refers to the combination of both living and non-living components. Secondly, it underlines the interaction amongst those living and non-living components. Taking the CBD’s concept of ecosystem as a criterion for assessment, it can be seen that the 1993 LEP’s definition omitted the reference to the function of an ecosystem which is an important factor for deciding eco-service of an ecosystem.

While expected to be a better law to regulate environment and environmental components, the 2005 LEP was, in fact, a backward step from the 1993 LEP in regard to the making of a clear and consistent definition of ecosystem. The 2005 LEP defines ecosystem as ‘a system of community of living organisms, which are existed and evolved, and interacted with each other within a naturally geographic area.’ It is likely that the 2005 LEP attempts to follow the notion of ecosystem in the 1993 LEP as the 1993 LEP’s definition reflects a scientifically consistent interpretation of ecosystem. Nevertheless, from the scientific point of view, the notion given in the 2005 LEP seems inaccurate. There is no information given as to the reason for the exclusion of a very important non-living component of ecosystem in the definition of ecosystem given in the 2005 LEP. Regardless of the reason, this perception of ecosystem is inadequate. An ecosystem must be created not only from biotic components such as fauna and flora, but also from the non-living environment such as water, soil etc, which are indispensable for biotic components.

As a very significant concept of biodiversity, ecosystem is redefined in the LBD. An ecosystem in this Law is understood as ‘a biotic community and other abiotic factors of a certain geographic area, which are interacted and are having material exchange.’ Even though the LBD set an objective to be consistent with the current 2005 LEP, the notion of ecosystem in the LBD is a step forward to the perception of ecosystem and toward the consistency with the notion given by the CBD. In short, ecosystem in the

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56 The 1993 LEP, art 2 (9).
57 The 2005 LEP, art 3 (15).
58 For further details, see comments of Patti Moore from IUCN on the Draft Law on Biological Diversity made on 16 September 2008) (on file with the author).
59 The LBD, art 3 (9).
LBD likely reflected the view of conservationists, which seems to refer to big ecosystems such as forests, rivers, rather than small ones.

Like the 1993 LEP, the LBD focuses on the scientific notion of ecosystem, omitting a very significant feature of ecosystems that makes them valuable. This important feature that CBD addresses is the close relationship between living organisms and non-living components so that they can operate as a ‘functional unit’.

Species is a very significant ‘component’ of biodiversity. Like the CBD, the LBD of Viet Nam does not define what a species is. Law-makers claim that the reason is very simple; the popularity of the term will make it understood in Viet Nam. This point of view is, however, inaccurate. Indeed, species is understood quite differently between biologists and taxonomists. Biologists believe that species can be defined as a group of living organisms which can interbreed freely in natural conditions. Taxonomists divide living forms into different ranks as a kingdom hierarchy.

It should be noted that in early Drafts, there were some attempts to give an understanding of the term in Vietnamese law. The Draft Law on Conservation of Biological Diversity (Draft Number 0), for example, defined biological species as a ‘group of individuals/organisms which have the same morphological characteristics, and which can also interbreed’. Draft I-9 more clearly defined species as ‘the basic unit of classification, referring to a group of individuals that have the same morphological characteristics and that can copulate or pollinate with each other to produce offspring with similar morphological and genetic characteristics, which is able to reproduce’.

Gene is another concept that should be defined. It was included in the Draft Law Number I-6 and I-9 and was defined as ‘a genetic unit, a component of genetic specimen that defines specific characteristics of living organisms’. The definition of gene, as of species, was first suggested to be excluded from the final Draft of the LBD with the explanation that, as it is ‘commonly used’ in practice, there is no need to define it.

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60 See Lyle Glowka, above n 49, 16.
61 Ibid.
62 It should be noted that the title of the first Draft Law, namely Draft Law Number 0, was Law on Conservation of Biological Diversity not Law on Biological Diversity. The Draft Law on Conservation of Biological Diversity (Du Thao Luat Bao Ton Da Dang Sinh Hoc) (Draft Law Number 0, March 2007).
63 Ibid, art 3 (22) (on file with the author).
64 The Draft Law Number I-9, art 3(12).
65 The Draft Law on Biological Diversity of 29 August 2008, art 3(6).
However, finally, to make a comprehensive Law on biological diversity, a definition of gene was included in the LBD in Article 3, which entirely incorporates the definition provided in the above-mentioned Drafts.66

While species, for example, is scientifically complicated and can have different meanings, there is a need to clarify the notion of species for clarity in use of term and other related rules in practice.

In short, analysing the notion given in the 1993 LEP, the 2005 LEP and 2008 LBD, the perception of biodiversity in Vietnamese law is largely consistent with the CBD’s perception. This is because the concept accepts that biological diversity of living form exists not only at species level but also at genetic and ecosystems levels. Hence, biodiversity should be assessed at the level of ecosystems diversity, species diversity and ecosystems diversity.

ii. The Concept of Biodiversity Conservation

There has been much debate on what should be included in the scope of the LBD since the first draft. Initially, the first Draft Law (Draft Number 0) was limited to regulation on biodiversity conservation. It was clearly set in the title of the Draft Law as the ‘Draft Law on Conservation of Biological Diversity’. Article 1 of Draft Number 0 also explicitly reads:

The Law regulates the conservation of the ecological regions with high biodiversity, of endangered species, of precious, endemic genetic resources, sharing of benefit arising from genetic resources and bio-safety and the responsibility of the State, organisations and individuals in biodiversity conservation.67

Draft Law Number 0 followed the approach of the CBD in not defining ‘conservation’. Instead, it defined ‘conservation of nature’ as ‘protection, maintenance and development of the valuable features of nature’ and listed the matters which are conserved and regulated by future Law.

Unfortunately, there was no literature explaining the reason for giving definition of ‘conservation of nature’ while leaving ‘conservation of biodiversity’ undefined in the

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66 The LBD, art 3(7).

67 Draft Law Number 0, above n 62.
law. This might be explained by an attempt to secure consistency with the ‘fundamental environmental law’ – the 2005 LEP, as it was admitted by law-makers that:

In relation to the other laws on national resources, the [2005] LEP acts as fundamental law, while the other laws function as specific laws [on biodiversity]. […] in order to secure ‘specifics’ in the process of legal adjustment and the unity of the system of [Vietnamese] law on the protection of natural resources.”

In fact, the 2005 LEP leaves its Chapter IV for the regulation of conservation and rational use of natural resources, and biodiversity conservation is likely to be considered as part of conservation of natural resources. Articles 29 and 30 of the 2005 LEP explicitly set measures and regulate biodiversity conservation. Accordingly, regions and ecosystems with biodiversity values of national and international importance are to be protected as planned in the form of different types of ‘nature conservation areas’ including ‘marine protected areas, national parks, nature reserves, biosphere reserves and species and habitat conservation areas.’ Endangered rare and precious species and genetic resources are required to be protected by the 2005 LEP as the objects of biodiversity protection.

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68 The 2005 LEP includes biodiversity conservations as an activity of environment protection. Art 3(3) of 2005 LEP defines environmental protection as ‘all activities undertaken to preserve the environment for its health, cleanness and beauty; … and to protect biodiversity.’


70 Article 30 of the 2005 LEP with the title ‘Protection of Biodiversity’ reads:

1. The protection of biodiversity must be implemented based on the assurance of the rights and legitimate benefits of local residential communities and other categories concerned. The State shall have the responsibility to establish genetic banks in order to protect and develop indigenous, rare and precious genetic resources; and encourage the importation of genetic resources of high values.

Endangered, rare and precious species of fauna and flora shall be protected in accordance with following provisions:

a) Listing and categorizing species for the management according to the endangered, rare and precious levels;

b) Developing plans for their protection and taking measures to prevent hunting, exploitation, trade in, and use;

c) Implementing programmes for their rearing, nurturing, and protection according to special regimes appropriate to each specific species; and developing wild animal rescue centres.

3. The Ministry of Natural Resources and the Environment shall, in collaboration with relevant ministries, ministerial level agencies, Government bodies and provincial level People’s Committees, have the primary responsibility to implement the protection of biodiversity resources according to the provisions of the law on biodiversity.

71 Article 31 of 2005 LEP with the title ‘Protection and Development of Natural Landscapes’ reads:
The Draft Law Number 0 did not include clearly the sustainable use of biodiversity into its scope; aspects of sustainable use are included into different provisions. For example, Article 25 of the Draft requires an environmental impact assessment of project which might cause negative impact on entire ecosystem. More importantly, it should be pointed out that the first principle to be included into the Draft Law is ‘Coordinating conservation and utilisation and sustainable use of biological resources’.\textsuperscript{72}

\textit{iii. Principles of Biodiversity Conservation and Sustainable Development}

The Constitution of any State sets forth fundamental rules for any domestic legal regime. Hence, not surprisingly, the first requirement in the process of making Law on Biological Diversity is ‘concretisation’ of the Constitutional rules into the Law on Biological Diversity.\textsuperscript{73} In other words, the Constitutional rules are fundamental for making substantive rules of the Law on Biological Diversity. The law of Viet Nam for conservation and sustainable use of natural resources becomes more significant especially in the period of strengthening industrialisation and modernisation of the country, when there is an increase of intensive use of natural resources. In accordance with the party’s Resolution No41/NQTW, conservation of natural resources is one of three pillars for sustainable development of the country.\textsuperscript{74}

The major Constitutional rules found the bases for creating the principles of conservation and sustainable development of biodiversity. These include the rule of the ownership of entire people of natural resources,\textsuperscript{75} which gives the State as the representative of

\begin{enumerate}
\item The State shall encourage the development of ecological models in hamlets, villages, residential areas, industrial parks, resorts, tourist centres, and of other types of natural landscapes to create the harmony between man and nature.
\item Organizations and individuals engaged in the planning, construction, production, business, service and living activities, must comply with the requirements for natural landscape preservation and conservation.
\item Ministries, ministerial level agencies, Government bodies and the People’s Committees at all levels shall, within the extent of their duties and powers, have the responsibility for planning and organizing the management, protection and development of environmental landscapes in accordance with this Law and the other provisions of the relevant law.
\end{enumerate}

\textsuperscript{72} Draft Law Number 0, above n 62, art 4.

\textsuperscript{73} The Government, \textit{The Submission Paper of the Government Number 49/TT-Tr-CP}, above n 36.

\textsuperscript{74} Political Bureau, \textit{The Resolution Number 41/NQ-TW of the Politburo dated 15 November 2004 on Environmental Protection in the Period of Strengthening Country’s Industrialisation and Modernisation (Nghi Quyet So 41/NQ-TW Ngay 15 Thang 11 Nam 2004 Cua Bo Chinh Tri Ve Bao Ve Moi Truong Trong Thoi Ky Day Manh Cong Nghep Hoa, Hien Dai Hoa Dat Nuoc)}.

\textsuperscript{75} The 1992 Constitution, art 17 reads as ‘land, forests, rivers, lakes, water resources, subsoil resources, marine resources, resources in continental shelf and in air which belong to the State, are belong to the ownership of entire people’
ownership of the entire people the right to use relevant legal, policy or financial means to ensure conservation and sustainable use of biodiversity in Viet Nam. Additionally, this Constitutional rule legally internalises the principle of the CBD that recognises a State’s sovereignty over its natural resources.

As already mentioned, those key concepts, for example, biodiversity, conservation of biodiversity or types of conservation such as in-situ and ex-situ conservation or ecosystem, habitat etc. are defined in the LBD. For the first time, the Law establishes legal principles and State’s policies for the effective conservation and sustainable use of biodiversity in Viet Nam. Article 4, for example, sets principles of conservation and sustainable use of biodiversity, which can be divided into three main parts.

First, the State, organisations and individuals within Viet Nam on the one hand have rights and benefits from the exploitation and use of biodiversity in a harmonised manner. On the other hand, they also have responsibilities in regard to conservation and sustainable development of biodiversity. The responsibilities are vested in the State, organisations and individuals and are provided by law.

Secondly, there is a required harmonisation between conservation, sustainable development, and poverty alleviation. Further, according to Article 5 of the LBD, the State commits to promote the ecotourism which engages the participation of legitimate habitants within the protected areas in order to ensure their sustainable life.

Thirdly, the Law also emphasises in-situ conservation as the primary method for conservation but requires ex-situ conservation as a supplementary means. Indeed, this principle which reflects clearly the approach of CBD facilitates Viet Nam to fulfil the CBD obligations.

It should be noted that the principles set forth in the LBD, although mentioning the three underpinnings of sustainable development (conservation, sustainable use and social justice), appear to be inadequate. This is because the principles do not include environmental impact assessment as one of the most significant means to achieve

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77 For a detailed discussion see Chapter Three of this Thesis.

78 The *LBD*, art 3.
sustainable development. Secondly, as the CBD pursues the ecosystem approach, the need to secure whole ecosystem is also significant. However, while the LBD recognises the significance of the in-situ conservation in a principle, no principle addresses the ecosystem approach to conserve biodiversity in its content.

In general, the adoption of the principle of conservation and sustainable development is significant, as it will assist Viet Nam to secure biodiversity. With the focus on the State management of biodiversity, the State polices contribute much to the biodiversity conservation. The Government puts the priority on selective conservation, focusing on significant, outstanding or endemic ecosystems, species and genes.\textsuperscript{79} The Government also commits to provide finance for inventory and monitoring or other biodiversity-conservation related. More significantly, in order to assist the local people, the Government also issues the policies of ecotourism.

2.2. Problems of Implementation: the Issue of Comprehensiveness, Consistency and Harmonisation of the Law on Biological Diversity

\textit{i. The Comprehensiveness and Consistency of the Law}

Biodiversity is a field concerned with many issues. It has to some extent been regulated by Laws enacted prior to the LBD.\textsuperscript{80} For a country like Viet Nam, where the likely sole sources of law are enactments when customary law is not officially recognised,\textsuperscript{81} the multi-layered legal normative documents may cause lack of cohesion in the legal framework on biodiversity.

Indeed, as it has been pointed out in Section 1.2, the pre-2008 legal framework on biodiversity suffered from insufficiency, fragmentation and overlap caused by piecemeal laws. The 2005 LEP, while being considered as a ‘fundamental’ environmental law, appears to be coping badly with biodiversity conservation. Other ‘specific laws’ such as the 2004 Law on Forest Protection and Development or the 2003 Fisheries Law only deal with separate aspects of biodiversity; for example, management of the system of special-use forests or marine protected areas. Consequently, they became reasons for the

\textsuperscript{79} Ibid, art 5(1).

\textsuperscript{80} See the discussion in Section 1.2 of this chapter.

\textsuperscript{81} For discussion of the sources of Vietnamese law, see Chapter Three of this Thesis, and see also See Le Minh Tam, ‘Form of Socialist Law (Hinh Thuc Phap Luat xa hoi chu Nghia)’ in Le Minh Tam (ed), \textit{Hanoi Law University Textbook on Theory of State and Law} (Truong Dai Hoc Luat Ha Noi - Giao Trinh Ly Luan Nha Nuoc Va Phap Luat) (People’s Police Publishing House, 2004) 347, 347- 68.
inadequacies of the pre-existing legal framework on biodiversity in combating against biodiversity loss as well as maintaining and developing biological resources in Viet Nam.

This situation is clearly and frankly admitted by the Government as follows:

“There has been a legal system on biodiversity in Viet Nam as a relatively independent and specific legal field. Despite the fact that the Law on Environmental Protection stipulates provisions of principled, covered and general characteristics on conservation of biodiversity and nature ... the legal norms on biodiversity are scattered in many legal documents of different legal forces and each document mentions one or some aspects of biodiversity. This limits the effectiveness and efficiency in application of law [on biodiversity] in practice. In addition to it, numerous important contents of biodiversity have never been regulated by law or are provided in by-laws such as ... conservation and sustainable development of wetland ecosystems, natural ecosystems in limestone mountains, mound, hills of un-exploited lands; access to natural resources and benefit sharing; bio-safety management of genetically modified organism; control of invasive alien species v.v. These contents are needed to be legalised.”

Hence, the first Viet Nam Law on Biological Diversity aims to become a comprehensive, complete system of legal rules, harmonised with other related laws, while at the same time taking into account the reform of the future system of laws on environment. It should be noted that the LBD is categorised as a special Law (or Luat chuyen nganh in Vietnamese) and it will prevail over any biodiversity related legal rules mentioned in the previous Laws which are contradictory to the LBD.

The LBD has to cover all biodiversity related issues, including those requirements of obligations arising from the CBD and other biodiversity-related Conventions, such as CITES, Ramsar, and World Heritage Convention. Prior to the enactment of the LBD, there were a number of statutes for the implementation of international obligations on biodiversity. Nevertheless, the Vietnamese implementation of some international environmental obligations arising from those biodiversity treaties was challenged by the insufficiency of domestic legal mechanisms. An example is the legal mechanisms in regard to access to and benefit sharing of genetic resources. The obligations in regard to access and benefit sharing of genetic resources constitute one of major three blocks of obligations of the CBD, which is regulated in detail by mechanisms under the Nagoya

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83 Ibid.
84 Law Number 17/2008/QH12 dated 3rd June 2008 of the National Assembly on Enactment of Legal Normative Documents (Luat So 17/2008/QH12 Ngay 3 Thang 6 Nam 2008 Cua Quoc Hoi Ban Hanh Van Ban Quy Pham Phap Luat), art 83 (3).
85 The CBD, art 1.
Article 15 of the CBD and the Nagoya Protocol require national legislation as the first legal basis for implementation. Hence, the resistance to enacting legislation due to the Vietnamese Government’s interest in ‘safeguarding the country’s long-term economic potential’ causes much inconsistency in Vietnamese law implementing CBD’s obligations. Other related issues such as problems of invasive alien species have been addressed in very ad hoc manner whenever they occurred. Hence, insufficiency and fragmentation of biodiversity-related legal framework should be regulated by the new Biodiversity Law.

The Law is structured in 8 Chapters, which consist of 78 Articles. The Law is divided into two parts related to general issues and substantive issues on biodiversity. While the first Chapter (Chapter I) and the last Chapter (Chapter VIII) deal with general issues, the rest focus on those substantive issues of biodiversity.

Chapter I starts with setting the governing scope of the Law, including, firstly, measures for conservation and sustainable development of biodiversity, and secondly, rights and obligations of regulated organizations, households and individuals in regard to conservation and sustainable development. The Law provides numerous State policies and responsibilities of the State management and regulates the behaviours of businesses, households and individuals in regard to conservation and sustainable use of biodiversity. The Law, thus, shows the mixed approaches, both of public law and private law, towards regulation of conservation and sustainable development in Viet Nam. In addition to setting the limits to the law by pointing out the issues falling within its scope of regulation, the Law is also limited to regulation of direct or indirect behaviours by Vietnamese organisations, households, and individuals which reside in Viet Nam, and overseas Vietnamese, foreign organisations, and foreigners, in regard to conservation and sustainable development in Viet Nam.


87 VBAP, above n 23.

88 The LBD, art 1.

89 Ibid, art 2.
With the purpose of making clear comprehension of the measures/standards and rules/norms set in the Law, the Law provides the interpretations of a numerous legal terms relating to biodiversity such as the biodiversity itself, conservation of biodiversity, sustainable development of biodiversity, and other related. In addition to the function of clarifying the measures and rules, the explanation of the terms also serves as standard measuring the legality of behaviours performed by those regulated.

Moreover, the Chapter sets a range of principles for conservation and sustainable development of biodiversity in Viet Nam. Additionally, the Law, as a regulatory instrument for biodiversity conservation and sustainable development provides a set of State policies and also the responsibility for State management over biodiversity. Significantly, in order to effectively conserve biodiversity, the Law prohibits certain behaviours. The last Chapter deals with implementation provisions, including the transitional provisions in regard to review of existing system of protected areas and permits for biodiversity conservation facilities, as well as the provision for delegation of regulation enactment of the Law.

In regard to the implementation of concrete obligations relating to biodiversity, the Law also creates a legal basis for implementation of conservation and sustainable development of biodiversity for both long-term and short-term visions. While Chapter II, for the first time, requires adoption of unique and comprehensive national biodiversity conservation planning, other Chapters set legal mechanisms for conservation and sustainable use of biodiversity’s components. Chapter III focuses on both in-situ and ex-situ conservation and sustainable use of ecosystems, of which the large part of rules deals with unification and grading of system of protected areas throughout the country. Chapter IV regulates conservation and sustainable development of species, which emphasises the protection of Listed species, controls over invasive alien species and develops those Listed species. Chapter V provides mechanisms for conservation and sustainable use of genetic resources, including the legal mechanisms for controlling and facilitating access and benefit sharing of genetic resources, controlling the risk of genetic modified

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90 Ibid, art 3.
91 Ibid, art 4.
92 Ibid, arts 5, 6.
93 Ibid, art 7.
94 ‘Listed species’ refers to species which are included in the List of Endangered, Precious and Rare Species, the List of Wild Species of Prohibited Use and List of Wild Species of Conditional Use, hence, the capital ‘L’ in the term ‘Listed species’ is intentionally used.
organisms. Chapter VI relates to international cooperation in the field of conservation and sustainable development, Chapter VII provides financial resources and other mechanisms for conservation and sustainable use of biodiversity.

With the aim to effectively conserve Viet Nam’s biodiversity, the Law is also expected to be an effective legal instrument for ‘internalisation’ of international environmental obligations into Vietnamese law for their fulfilment. Consequently, the LBD is the first comprehensive Law to deal with both in-situ and ex-situ conservation in Viet Nam. The Law becomes a significant legal tool for biodiversity conservation in the course of country’s industrialisation and modernisation, when there is an increase need in the use of biological resources. In addition to the function of being an effective legal instrument for combating against biodiversity loss and for protecting biodiversity in Viet Nam, the Law also aims to harmonise conservation with sustainable development of biodiversity and contributes to poverty alleviation.

ii. The Harmonisation of the Law on Biological Diversity and other Related Laws

To avoid overlap, fragmentation and insufficiency on the one hand, and to make the more feasible and implementable law on the other hand, the Law not only inherits the appropriate existing rules, which have been tested in the practice of implementation of law, but also revises rules and makes new legal rules. Laws relating to biodiversity such as the 2004 Law on Forest Protection and Development or the 2003 Fisheries Law are inconsistent. In order to harmonise them, the Draft Law at first included Article 3 on the application of laws to solve this problem. Nevertheless, the question of how to avoid inconsistency amongst those Laws was a much debated issue during the course of making the Law.

In regard to the means for application of law in a consistent manner, some agreed with the principle of the application of the rules set forth in Article 3, Section 1 and 2, of the Draft in case of inconsistency of the Laws in the course of implementation.97

95 The Government of Viet Nam, The Submission Paper of the Government Number 49/TTr-CP, above n 36. It should be noted that Viet Nam has never officially recognised in any laws or regulations that ‘internalisation’ is compulsory for fulfillment of international obligations or given any explanation of the term. Nevertheless, the term is used by scholars and policy-makers in some cases, for example, in the above-mentioned Submission Paper.

96 See Political Bureau, above n 74.

97 The Committee of Science, Technology and Environment of the Viet Nam's XII National Assembly Congress, above n 43. See Draft Law dated 10 January 2008, art 3. This Article stipulated that:
Accordingly, they supported the rule that where inconsistency existed amongst the Laws, the Law on Biological Diversity should be applied if the issue related to conservation of biodiversity, otherwise, in case of inconsistency amongst the rules in regard to sustainable development of biodiversity, other Laws namely the Law on Environmental Protection, the Law on Forest Protection and Development, and Fishery Law should be applied.

At the beginning, this point of view seemed to be reasonable and feasible. This is because it attempts to distinguish the conservation activities from activities for sustainable development. Moreover, it divides the Law on Biological Diversity as the law focusing on the conservation from other above-mentioned Laws. However, the actual practice is more complicated. This is because each Law being made at different time includes both conservation and sustainable use of biodiversity’s components. The Law on Forest Protection and Development is an example. It is clear that this Law not only focuses on the development of the forests but also protection of the forests. More significantly, the rules of the Law on Forest Protection and Development regulating the conservation of forest biodiversity are made in detailed manner, and hence, they apparently are easier to be understood and applied. What would happen if the rules of the Law on Biological Diversity must be applied although they are made in a more general manner?

Additionally, there was the view that the rule set in Section 2 of the Article 3 of the Draft Law contradicted the rule in Section 3 of Article 83 of the Law on Promulgation of the Legal Normative Documents. In accordance with Article 83, Section 3, the general rule of application in case of inconsistency of Laws ‘on the similar subject matter’ is that the Law which is enacted later should override. More significantly, there is a close interconnection between conservation and sustainable development. Hence, any attempt to separate them is questionable. This is because it is very difficult to define the issue which should be applied by the ‘conservation law’ or ‘sustainable development law’. In their opinion, the issue of conservation and sustainable development should be divided into those of general feature and those of specific feature. The former issues should be regulated by the Law on Biological Diversity, while the specific issues on conservation should be regulated by the Law on Biological Diversity.

1. In case there is a conflict between the provisions on conservation set forth in this Law and in other related Laws, the provision of this rule shall be applied.

2. In case there is a conflict between provisions on sustainable development set forth in this Law and in other related Laws, the provision of other Laws shall be applied.
and sustainable development should be regulated by Law on specific aspect of conservation and sustainable development if it has been provided in that Law.

This opinion at first seems to be reasonable as it is an attempt to avoid the problem of conflict between the rule of the Draft Law and the general principles of Vietnamese law on the order of laws’ application as the issue has been discussed above. In this case, the rule ‘lex specialis derogat legi generali’ is likely applied.98 This rule ignores the times when the rules were made.

The third group argued that Viet Nam has sufficient rules regulating the application of the rules amongst the system of Viet Nam’s legal normative documents.99 According to them, those rules are implicitly set forth in both the Law on Promulgation of the Legal Normative Documents and the Law on Conclusion and Performance of International Treaties in Viet Nam.100 Therefore, there is no need for the adoption of a new rule to solve the problem of the conflict between the Laws.

Finally, the Committee of Science, Technology and Environment of the Viet Nam's XII National Assembly Congress did not pursue entirely any of the above-mentioned points of view. Indeed, the Committee recognised the inconsistency of Laws, which may lead to conflict of rules in practical performance. To some extent, the Committee shared the view with the third group’s comments that there is no need to include a separate Article solving the problems of the conflict of Laws. More importantly, the Committee recommended a feasible and proper solution. In accordance with the Committee’s recommendation, with the purpose of creating a solid legal mechanism of high legal effectiveness for conservation and sustainable use of biodiversity, the Law on Biological Diversity should regulate the general and integrated issues on conservation and

98 ‘lex specialis derogat legi generali’ is a generally accepted technique/principle of interpretation and conflict resolution in International Law. In accordance with this principle, regardless of the time at which the norms are adopted on the same subject matter, the specific norms will be given priority. See International Law Commission, Conclusion of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006), section 2(5), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf, last accessed 18 May 2013.

99 The Committee of Science, Technology and Environment of the Viet Nam's XII National Assembly Congress, above n 43.

sustainable development. Nevertheless, the Law on Biological Diversity should use the technique of reference to solve the conflict in specific case. The general principle is that in the case of conflict of any rule, the implementation of the LBD must take into consideration of other specific legal rule(s).

With the suggestion of the Committee, which was then approved by the Deputies of the National Assembly, it is expected that the conflict between the LBD and other Laws would be reduced and the Law would be consistently implemented.

CONCLUSION

It is evident that much legislation has been passed since Viet Nam joined the CBD. The biodiversity legal framework represented by the density of laws and regulations to some extent implements the obligations of conservation under the CBD. However, the fragmented approach to implementation of the CBD obligations by the use of different means could only result in the implementation of the CBD obligations in an ad hoc manner. While this legislative mechanism could help Viet Nam to meet the CBD obligations immediately, the scheme was likely to cause piecemeal implementation due to the lack of cohesion among the laws and regulations.

To avoid the lack of cohesion among the laws, it is necessary to revise the relevant statutes and to revoke the overlapping provisions among the laws and regulations. This approach may save on the financial and human resources; however, it may still cause ineffective performance of the CBD obligations. This is because each piece of legislation or regulation has been enacted for a specific purpose rather then addressing biodiversity as such; hence these statutes may respond to only some parts of the CBD obligations.

Another solution is to enact a new comprehensive law on biodiversity as an ‘umbrella’ legislation to incorporate all the CBD obligations. However, such an apparently reasonable solution still may cause ad hoc legislative implementation if there continues to be a lack of good analysis and study of the existing relevant legislation and biodiversity status as well as of conformity of the existing statutes to the CBD obligations. In addition, newly adopted provisions should be made in a precise manner that can be implemented without enactment of many further detailed guiding rules, in order to avoid a lack of cohesion between the law and its implementing regulations.
Another reason for the inadequate implementation of the CBD obligations could be the lack of a master plan for the performance of the CBD in Viet Nam since its ratification. Although the law requires the state body in charge of organising the implementation of an international treaty to produce a master plan for the implementation, this requirement, unfortunately, has never been complied with in practice. In fact, the VBAP also showed an attempt to settle the problem by suggesting an improvement in the legal framework on biodiversity. However, the VBAP only set down some very general and ambiguous measures to implement the CBD obligations, such as the further issuance of regulations or the coordination of the laws and regulations on conservation, utilisation, exploitation and exchange of genetic resources and varieties. Moreover, the VBAP mainly focused on the promulgation of subordinate legislations, rather than on Laws by the National Assembly. As a result, there was still the lack a plan for comprehensive implementation of the CBD.

The above concerns were taken into consideration in the course of making the LBD as the first comprehensive statute on biodiversity in Viet Nam. The LBD is expected to be a legal tool, which is able to deal with existing problems in regard to the biodiversity conservation in Viet Nam as well as Viet Nam’s implementation of international obligations relating to biodiversity. The question of whether or not this Law can help Viet Nam fully overcome challenges facing the implementation of international obligations under the CBD and biodiversity-related conventions, however, still remains. But the serious commitment of Viet Nam to fulfil international agreements to which it has acceded in general and the effort of Vietnamese law makers for the passage of the LBD in particular is commendable.
CHAPTER SIX
IMPLEMENTATION OF CONVENTION ON BIOLOGICAL DIVERSITY IN VIET NAM: SELECTED ISSUES

INTRODUCTION

As discussed in Chapter Four, the Convention on Biological Diversity (CBD) is the first global Convention which focuses on the ecosystem approach and in-situ conservation to conserve biodiversity. Additionally, the CBD supports ex-situ conservation as a supplementary means for biodiversity conservation when in-situ conservation cannot be used.

The CBD, acknowledging the decisive role of national implementation of in-situ conservation, lays down a set of obligations in order to achieve in-situ conservation. Amongst several national obligations under the CBD, the ones relating to the conservation of protected areas and the species are of significant importance. The effectiveness of protected areas (PAs) in conservation of biodiversity as a means of integrating conservation of outstanding ecosystems, endemic species and valuable genes has been approved in the biodiversity conservation practice of many parties. Hence, the Convention requires parties to establish, regulate and effectively manage the system of protected areas while obligating in-situ conservation. While the CBD’s main focus is the ecosystem approach to more effectively conserve ecosystems, the Convention also focuses on species and genetic conservation and sustainable use within and outside protected areas. The implementation of these two sets of obligations, to a large extent, can address typical challenges that a party to the CBD such as Viet Nam faces during the course of implementing of the Convention.

This chapter reviews Vietnamese implementation of some selected obligations including the establishment and management of PAs, and conservation and sustainable use of species. The chapter considers how Viet Nam implements its obligations in regard to PAs and species by law, policy and other facilitating mechanisms. It first asks how Viet Nam has implemented the
CBD’s obligations relating to protected areas and species by such mechanisms and why Viet Nam has chosen those mechanisms for the implementation. It also identifies problems that Viet Nam has encountered during the course of applying those mechanisms.

1. VIETNAMESE IMPLEMENTATION OF THE OBLIGATIONS ON ESTABLISHMENT AND MANAGEMENT OF PROTECTED AREAS

Unlike many other biodiversity-related Conventions, which aim to conserve fragmented components of biodiversity, the CBD takes a comprehensive approach to conservation of biodiversity at all three levels - ecosystems, species and genetic. To achieve these priorities, parties are obligated to establish and manage the national PAs system at various levels. When Viet Nam became a party to the CBD, the State had already declared and developed a system of protected areas. Moreover, a continuously improved legal framework comprising of a system of laws, regulations and rules has developed in order to enable the implementation of CBD’s obligations regarding protected areas. The adoption of the Law on Biological Diversity by the Viet Nam’s Legislature takes a further step toward more effective implementation of the CBD’s obligations.

While the implementation practice shows that Viet Nam is using both policy and law as means for implementation of CBD’s obligations on PAs, the effectiveness of either law or policy or mixed thereof for implementation of international environmental obligations in literature has, rarely been addressed.

This part discusses the extent to which Viet Nam implements the Convention’s obligations on the establishment and management of the State’s PAs and international and national factors influencing the Vietnamese implementation. The part first introduces a brief context of planning a PAs system in Viet Nam and examines the history of development and management of Viet Nam’s PAs system to give a broader context for comprehension of the origin of and main features of the current PAs system. It then focuses on an analysis of the implementation of the CBD’s PAs-related obligations since Viet Nam ratified the CBD in 1994.

It should be noted that to assess the consistency of domestic implementation of the CBD’s PAs-related obligations, the Programme of Work on Protected Areas (PWPA) approved by
COP in 2004, is taken as the main analytical framework. This is because the interpretation of the CBD’s obligations relies on the subject-matter of the Programme of Work on Protected Areas, which then should be adopted by the Conference of Parties (COP). Also, some other models such as the models of the International Union for Conservation of Nature (IUCN) are examined during the course of assessment.

1.1. Planning a PAs System in Viet Nam

Foreign scholars and commentators praise the PAs system planning as a significant means for the effective establishment and management of national system of PAs.\footnote{See, for example, Adrian G. Davey, \textit{National System Planning for Protected Areas}, (IUCN Publications Services Unit, 1998), 10-12; See also Barbara Lausche, \textit{Guidelines for Protected Areas Legislations} (IUCN Environmental Law Centre, 2011), 138.} As discussed in Chapter Four, the CBD concerns the effectiveness of biodiversity conservation; hence, the Convention obligates parties to establish and manage a national system of protected areas to foster in-situ conservation of biodiversity.\footnote{The \textit{CBD}, art 8(a,b).} Additionally, the CBD, as a convention for biodiversity conservation and sustainable use, advocates the role of PAs system planning in effective management of PAs, setting the obligations of establishment and management of system of PAs rather than individual or group of PAs.\footnote{Ibid.} Nevertheless, the CBD neither explains clearly the concept nor addresses key features of a system of protected areas that a party should meet. Instead, the CBD takes a flexible approach - setting goals rather than requiring certain processes and procedures for controlling the establishment and management of a party’s system of protected areas. The PAs system planning is significant for biodiversity conservation and for meeting the requirement of the CBD’s obligations in regard to establishment and management of PAs system.

Theoretically, system planning can be understood as ‘an organized approach to macro-level planning’.\footnote{See Adrian G. Davey, above n 1, 9.} System planning is not a newly invented concept. System planning, as Davey notes, provides ‘a framework for understanding and using systems ideas’.\footnote{Ibid.} System planning of national PAs system has a number of advantages.
Firstly, system planning is relevant to the establishment and management of an adequate national system of PAs. This is because system planning takes into account the context of the individual country including environmental, social, historical, economical and political conditions.\(^6\) In this way, system planning maximizes the advantageous characteristics of the PAs system, and biodiversity conservation.

Secondly, system planning of PAs is an effective approach to both short-and long-term conservation of biodiversity providing a strategic view of PAs and the priority of PA as national concern while avoiding an ad-hoc approach to PAs management.\(^7\) Without system planning, PAs will be established in a fragmented fashion subject to the ad-hoc management needs of biodiversity conservation and/or use either by administrative agencies or provinces. In this model of fragmented management of national PAs, biodiversity will not be conserved nation-wide or in an integrated fashion. Hence, system planning of PAs is a more effective approach to biodiversity conservation and use in a sustainable manner.

Thirdly, PAs system planning can contribute to a more comprehensive, representative and well-managed PAs system in practice by identifying inadequacies in coverage of PAs system and management.\(^8\) The effective conservation of biodiversity, hence, depends largely on PAs planning.

Fourthly, PAs system planning assists to more effectively conserve PAs and prevent the negative impacts of human activities from outside the PAs. This is because PAs system planning provides a broader context of land use, buffer zones and also ecosystem approach to conservation of PAs. Lausche, for example, argues that:

> the establishment of protected areas should be in keeping with the ecosystem approach. The selection of proposed sites should take into account, to the extent possible, surrounding landscapes and seascapes, the need for the buffer zones and ecological corridors, and other connectivities consideration.\(^9\)

Currently, Viet Nam has a relatively comprehensive system of PAs which originated from the very first PAs in the form of prohibited forests. Since the first PAs were established, Viet Nam

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\(^6\) Ibid.

\(^7\) See Adrian G. Davey, above n 1, 9-10.

\(^8\) Ibid.

\(^9\) See Barbara Lausche, above n 1, 138.
has developed national strategies, plans, projects and actions programs relating to planning biodiversity in general and PAs in particular. Most of them were adopted prior to the enactment of LBD. For example, the Strategy to Manage the System of Protected Areas in Viet Nam to 2010, Strategy to Protect National Environment to 2010 and Orientation to 2020, Viet Nam Forestry Development Strategy 2006-2020, Planning the System of Interior Water Preserved Areas until 2020. More significantly, National Biodiversity Action Plan to 2010 and Orientation Towards 2020 (NBAP) was approved by the Decision 79/2007/QĐ-TTg on 31 May 2007, as a guiding strategy for implementation of CBD’s obligations.

The Law on Biological Diversity (LBD) is the first statute which regulates Viet Nam’s planning of a national system of PAs biodiversity as part of a master biodiversity planning. Although the LBD regulates and requires PAs planning as part of biodiversity planning, PAs planning can be challenged. This is because some PAs under forest legislation do not include national PAs as a basic requirement for forest PA planning. So there is inconsistency between the national PAs planning and a particular PAs planning. Additionally, under current Vietnamese law, the PAs planning does not need to be included into land planning which impacts on PAs management in practice.

1.2. Establishment and Management of Viet Nam’s Protected Areas prior to the ratification of the CBD: Some Historical Background

The establishment and management of the current PAs system should be examined in the context of its development. Hence, there is a need to study the historical and philosophical background that impacts on the creation and management of the existing system.

Since the introduction of the Renovation policy in 1986, there had been some debate in regard to the conservation of biodiversity. On the one hand, it was thought that biodiversity conservation could be improved since the State management of environment and natural resources had been enhanced. On the other hand, the introduction of a socialist-oriented market economy replacing the centralised and subsidised economy could cause harm to biodiversity conservation due to greater use of natural resources for economic development. Thus, the development of PAs in Viet Nam prior to the ratification of the CBD was divided into the two periods: prior to 1986 and after 1986 up to the ratification of the CBD by Viet Nam.
The responsibility for the establishment and management of protected areas in Viet Nam primarily vests in the Government and governmental authorities by statutes as part of their competence for natural resources management. The Decision No 72/TTg of the Prime Minister dated 7 July 1962 on Cuc Phuong Forest was the first of Viet Nam’s statutes on the establishment and management of a protected area.\(^{10}\) The Decision aimed at the establishment of Cuc Phuong Forest to preserve not only national representative bioregions, but also regional primitive tropical and sub-tropical forest ecosystems and wild fauna and flora. Cuc Phuong forest represents Viet Nam’s bioregions of the Center-North Region (Hoa Binh Province), the North-Delta Region (Ninh Binh Province) and the North-Center Region (Thanh Hoa Province). It is famous for the bioregion representativeness and fauna and flora diversity.\(^{11}\) Being situated in the two limestone ranges, the Forest is well-known for its landscape with ecosystem richness. As of international biodiversity significance, Cuc Phuong Forest represents primitive tropical and sub-tropical forest ecosystems.\(^{12}\) A regime for Cuc Phuong’s effective management was set up by Decision No 72/TTg of 1962. Acknowledging multifaceted biodiversity values, Cuc Phuong Forest was strictly protected as ‘prohibited forest’ with scientific purposes as the primary objective. The main conservation means was preservation of the forest’s biodiversity and prohibition of human exploitation was the key management means.\(^{13}\)

Since the establishment of Cuc Phuong Forest, significant statutes regulating the establishment and management of prohibited forests have been enacted. Besides the Constitution, the

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\(^{10}\) Cuc Phuong Forest was established in 1962 in accordance with the Decision No 72/TTg of the Prime Minister dated 7 July 1962 on Cuc Phuong Forest (Decision N72/TTg of 1962). In 1966, the Directorate of Forestry upgraded the Forest from a forestry farm to a national park. Hence, Cuc Phuong Forest was renamed to the Cuc Phuong National Park (Vuon Quoc Gia Cuc Phuong). Viet Nam’s first protected area initially covered an area of 25,000 ha, then, after some revisions, the area reduced to 22,200 ha, [http://www.cucphuongtourism.com/index.html](http://www.cucphuongtourism.com/index.html), last accessed on 15 August 2012.

\(^{11}\) See, Biodiversity Action Plan for Viet Nam (VBAP), 59, 61-2, an English version can be accessed at [http://www.cbd.int/nbsap/search/default.shtml](http://www.cbd.int/nbsap/search/default.shtml), last accessed 18 May 2013. It should be noted that the geographical division of the bioregions used in this Thesis is based on the information given by the Biodiversity Action Plan for Viet Nam, approved by the Decision No 845/TTg dated 22 December 1995. Despite the fact that in the Report on National Environment State: Special Issue on Biodiversity was later published and it provides a slightly different division of bioregions, the division of bioregions as provided in the VBAP is still used here because it appears to be more clear and accurate with the maps of the bioregions.

\(^{12}\) The Decision 72/TTg, art 1.

\(^{13}\) Ibid.
Ordinance Regulating Forest Protection, enacted in 1972,\textsuperscript{14} was the most significant legislation in this field, followed by the Decision 41/TTg of the Prime Minister dated 24 January 1977 on the Prohibited Forests as a regulatory instrument and the implementing regulation of the 1972 Ordinance on Forest Protection.\textsuperscript{15} Decision 41/TTg of 1977 created 10 prohibited forests, but most of them were of historical significance rather than representative of biodiversity values. The enactment of these key protected areas legislation, such as the 1972 Ordinance on Forest Protection and the Decision 41/TTg on Prohibited Forests, evidenced the support for the policy of expansion of prohibited forests and management.\textsuperscript{16} More significantly, they created fundamental rules for establishing and managing Viet Nam prohibited forests despite the fact that there was no clearly defined concept of prohibited forests in either piece of legislation.

An analysis of 1972 Ordinance on Forest Protection and the Decision 41/TTg on Prohibited Forests indicates some features for selection and management of a ‘prohibited forest’. First, a ‘prohibited forest’ was selected on its multiple biodiversity values ranging from intrinsic value for the sake of nature itself to the value of human beings such as protection for historical or research purpose. Secondly, a ‘prohibited forest’ had to be formally created, designated and managed by the authorities. While the Prime Minister was responsible for the decision on establishment of prohibited areas, the Ministry of Forestry and Provincial Authorities took responsibility for designation and management in prohibited forests. Thirdly, the main approach to conserve prohibited forests focuses on the ecosystem and strict preservation on site. A principle of non-modification of landscapes was applied to prohibited forests. Fourthly, a principle of strict protection and control was applied within prohibited forests. Some activities were prohibited; for example, logging, and hunting of forest birds and other animals, fire, pollution or any other activities affecting the habitats and evolution of species and plants.

Viet Nam pursued a policy of expansion of the system of forest protected areas and a prohibition approach toward management of these types of protected areas. Despite the fact that several domestic factors such as war had limited and slowed down the process of identification and designation of prohibited forests, research showed a relatively positive result.

\textsuperscript{14} Ordinance Regulating Forestry Protection (Phap Lenh Quy Dinh Viec Bao Ve Rung) promulgated by the President on 11 September 1972, which was adopted by the Standing Committee of the National Assembly of Viet Nam on 6 September 1972 (hereinafter referred as 1972 Ordinance on Forest Protection).

\textsuperscript{15} Decision 41/TTg of the Prime Minister dated 24 January 1977 on the Prohibited Forests (hereinafter referred as Decision 41/1977/TTg on Prohibited Forests)

\textsuperscript{16} The 1972 Ordinance on Forest Protection, art 5; the Decision 41/TTg on Prohibited Forests, art 3.
for prohibited forests creation in this period.\textsuperscript{17} For example, by 1977, 49 forests with high biological resources were identified to be designated and protected at State level despite the fact that there had not been any relevant policy formally declared.\textsuperscript{18} Moreover, a system of local prohibited forests had also been established, for example Huong Can and Xuan Son Forests (Phu tho Province), Thuong Tien Forest (Hoa Binh Province), and Ba Mum Island (Quang Ninh Province).\textsuperscript{19}

The increase of designated prohibited forests was a result of the efforts of the Government as key decision-maker, the Directorate of Forestry, as the key State forestry administration in charge of nationwide forests management, and close collaboration between the Directorate of Forestry and local authorities. Despite the establishment of new local prohibited forests as a result of close collaboration between the Directorate and the local governments, there were many challenges that caused ineffective management of those prohibited forests. For example, war caused a barrier to access worldwide conservation information and other countries’ experiences.\textsuperscript{20} In addition, insufficient financial resources and insufficiency in local technical staff and managers also caused difficulties in formulating management plans. These factors slowed the development of prohibited forest system.\textsuperscript{21}

In short, before 1986, several obstacles, mainly the national context such as war, limits of financial resources and/or incapacity of administrative authorities, local authorities and area-managers, impeded the development and management of Viet Nam’s prohibited forests. Despite these difficulties, the adoption of statutes and the work of both central and local administrative authorities in pursuing conservation policy were contributors to the creation and management of Viet Nam’s protected areas.

\textsuperscript{17} Due to the pre-1975 North-South division, the survey of forests was done in the North of Viet Nam only. See Nguyen Nhu Phuong and Vu Huu Dung, Assesment of Legal Documents and Policies Relating to Management of Special Use Forest in Viet Nam (Danhs Gia Cac Van Ban Phap Luat Va Chinh Sach Lien Quan Den Cong Tac Quan Ly Bac Khu Rung Duc Dung Tai Viet Nam) (FPD, WWF, 2001), 5, 8.

\textsuperscript{18} Ibid

\textsuperscript{19} Ibid, 5

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid, 8.
ii. Establishment and Management of Viet Nam’s Protected Areas since 1986 until the Ratification of the CBD - An Analysis of Special-Use Forests

The year 1986 marks a turning point in the history of the development of protected areas legislation. In 1986, more than twenty years after the first PA was established, a relatively comprehensive system of Viet Nam’s protected areas was developed for the first time pursuant to the Decision of the Ministry of Forestry Number 1171-QĐ dated 30 December 1986 Promulgating Regulations on Production Forests, Protection and Special-Use Forests. For the first time, forest biodiversity was legally covered within the framework of the Special-Use Forests (SUFs) system, which came to replace the concept of ‘prohibited forest’. The objective of the Special-Use Forests system is to conserve exemplary forest habitats, forest genetic resources, forest landscapes and other scientific, historic or educational values. In order to be conserved, the SUFs had to be ‘unmodified or slightly degraded’, representing different forest ecosystems or SUFs included habitats for species with high scientific and economic values. For the purpose of better management, the SUFs were classified into three ranks: National Parks, Nature Conservation Forests and Cultural and Environment Forests. While national parks contained representative and outstanding landscapes and were large, the other two types of SUFs were smaller. Nature Conservation Forests were established to protect valuable genetic resources and restrict the use for recreation or tourism or even cultural purposes. The other two, including national parks, were to be used for recreation, tourism and other cultural services. Moreover, within large SUFs, there were three functional zones including strictly protected zone, buffer and restoration zones, and service-administrative zones. According to some research, the classification of the SUFs largely followed the IUCN Protected Areas Management Categories, which integrated each type’s conservation with management objectives, as adjusted to Viet Nam’s context. As a result, 87 SUFs covering an area of

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22 Decision of the Ministry of Forestry Number 1171-QĐ dated 30 December 1986 Promulgating Regulations on Production Forests, Protection and Special-Use Forests (Quyet Dinh cua Bo Lam Nghiep So 1171-QD Ngay 30-12-1986 Ban Hanh Quy Che Rung San Xuat, Rung Phong Ho Va Rung Dac Dung), (1986 Regulation on Special-Use Forests Management).

23 1986 Regulation on Special-Use Forests Management, art 1.

24 Ibid, art 2.


26 Ibid, art 5.

1,079,937 hectares had been declared,\textsuperscript{28} including 7 national parks, 49 nature conservation forests and 31 cultural and environment forests.\textsuperscript{29} The introduction of the new concept of SUF reflected changes in perception of the significance of biodiversity conservation and a new management approach to SUFs, moving from strict prohibition of any forest use activities to the use of forests for different conservation including recreation and ecotourism.

Nevertheless, the categorization, establishment and management of these SUFs was criticised. First, the categorisation, which was much influenced by the 1978 IUCN categories were not very appropriate. This is because the IUCN categories used nomenclature rather than management objectives to classify protected areas.\textsuperscript{30} Secondly, the SUFs could not cover marine protected areas.\textsuperscript{31} Third, most of them were under-managed or suffered from lack of management despite the fact that they might have a significant importance for biodiversity conservation.\textsuperscript{32}

Also, the conservation of forests in this period reflected the point of view of sole biodiversity preservation and protection while not taking into consideration the biodiversity development and social aspects for the use of forest PAs. After 1986 when the Renovation of Viet Nam was launched, policies for establishment of PAs and approaches to PAs conservations were changed and to a certain extent dealt with problems that arose before. However, for an effective PAs system, much more work was required, especially when Viet Nam officially became a party to the CBD in 1994.

\section*{1.3. Vietnamese Implementation of the CBD’s obligations on Protected Areas}

\textit{i. Vietnamese Implementation of the CBD’s Obligations on Protected Areas: Mixed Policy and Legal Implementations}

While the CBD as a framework biodiversity Convention does not say much about the detailed measures which a party has to take to meet the obligations relating to PAs creation and

\begin{footnotesize}
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\item \textsuperscript{28} VBAP (English version), above n 11, 80, \url{http://www.cbd.int/doc/world/vn/vn-nbsap-01-p4-en.pdf}, last accessed on 18 May 2013.
\item \textsuperscript{29} Sue Stolton et al, above n 27, 24.
\item \textsuperscript{30} Ibid.
\item \textsuperscript{31} VBAP (English version), above n 11, 80.
\item \textsuperscript{32} Ibid.
\end{itemize}
\end{footnotesize}
management, the Programme of Work on Protected Areas (PWPA) adopted by COP gives detailed guidelines regarding the CBD’s obligations relating to the establishment and management of the PAs system.33 The PWPA sets a number of time-frames for meeting wide-ranging commitments for effective development and management of biodiversity protected areas systematically and individually. For example, a time-frame of 2010, 2012, and 2010/2012 was set for completion of the establishment of terrestrial PAs, marine protected areas and trans-boundary PAs respectively.34 Moreover, for better establishment and management of the parties’ PAs system, a time-frame of 2009 was also set by PWPA for completion of the gap analysis of national and regional PAs based on the ecological representativeness and comprehensiveness.35 Along with the requirement for parties to effectively manage the national system of PAs, the CBD’s PWPA also required effective management of separate areas by integration of the area into broader land for the purpose of ecosystem conservation.36

In the case of Vietnamese implementation of obligations relating to PAs, Viet Nam has built up a solid policy framework which includes both long-term and short-term measures and the integration of those measures at different national levels as required by the CBD’s as ‘general measures’.37

It should be noted that the CBD itself requires the effective implementation. Hence, the CBD obligates parties to adopt and develop a comprehensive policy framework for the creation and effective management of a comprehensive national system of protected areas.38 Some countries, for example India, Russia and Ukraine, have used policies as a means to implement CBD’s obligations in regard to the creation and management of PAs system. They use the categorisation of the PAs system such as that of IUCN in their national policies.39 This is perhaps because of diversity of policy functions. Policy not only guides

33 Programme of Work on Protected Areas (PWPA) adopted as the Annex to the Decision 28/VII of Conference of Parties (COP) at its seventh meeting.
34 Ibid.
35 Ibid.
36 Ibid.
37 The CBD, art 6.
38 Ibid, arts 6, 8 (a,b).
the selection and management of PAs but can also be used as foundation for new or revised legislation.\textsuperscript{40}

In general, Viet Nam PAs-related national strategies and plans form a relatively comprehensive policy base for the implementation of the CBD’s obligations and PWPA’s requirements relating to the establishment and management of the PAs system. Specifically, Viet Nam adopted the National Action Plan on Biodiversity for Viet Nam up to 2010 and Orientation towards 2020 for Implementation of the Convention on Biological Diversity and the Cartagena Protocol on Biosafety (NBAP) to more effectively implement the CBD’s obligations and PWPA’s requirements. The NBAP, indeed, encompasses within the scope the development of different types of PAs including terrestrial, wetlands, and marine protected areas. Moreover, a policy of expanding the size of each type of protected areas has been pursued in order to meet the CBD’s requirement to set up a comprehensive PAs system.\textsuperscript{41} In selection, planning and management of PAs, the primary focuses are on areas with rich biodiversity or/and more sensitive biodiversity components. More importantly, to effectively conserve biodiversity by a system of protected areas, the principle of sustainable development requires a balance between environmental protection, economic and social development. Using policy instruments for implementation of the CBD’s obligations regarding PAs system seems to be appropriate implementation means for PAs’ obligations.

Four Viet Nam National Reports to the CBD’s Secretariat have recorded a number of policies implementing Viet Nam’s obligations relating to PAs. For example VBAP and NBAP were submitted to the CBD’s Secretariat for implementation for policy obligations under Article 6 of CBD as the requirement for the implementation form.\textsuperscript{42} In addition, the Strategy for Management of Protected Areas System in Viet Nam to 2010 (2003 PAs Strategy) which was approved by the Prime Minister in 2003 directly dealt with the establishment and management of Viet Nam’s protected areas system. Apart from these plans and strategies, other sectoral strategies, plans, programmes or projects such as the National Action Plan on Wetland Conservation and Sustainable Development up to 2010

\textsuperscript{40} See Babara Lausche, above n 1, 116.

\textsuperscript{41} NBAP.


This policy framework creates a relatively solid policy basis for implementation. This is because, the adopted strategies, plans and programmes set up a number of positive policy principles and measures which largely contributed to implementation of PAs obligations. The 2003 PAs Strategy was a good example.

The Strategy clearly defined the objective as:

[to establish, organize and manage effectively a protected areas system located in different ecosystems (including terrestrial protected areas, wetland protected areas and marine protected areas) in order to contribute to protection the rich and unique biodiversity and landscape resources within a framework of sustainable development.]

In order to achieve this objective, the 2003 PAs Strategy described the principle of sustainable development as ‘fundamental’. A clear concept of sustainable development applied to PAs was also stated in the Strategy. The concept, indeed, brought short-term and long-term development and conservation together in conjunction with their effective management. It is declared in the Strategy that ‘[e]nsuring that present development must not cause harm to the future and will manage and protect the country’s natural resources and biodiversity.’ Moreover, the 2003 PAs Strategy also set out nine actions and four strategic priorities which include four major issues. First, there was a need to complete planning, categorization and classification of a comprehensive and representative PAs system based on the principle of priority biodiversity conservation and management of PAs. Second, a legal framework for effective PAs management had to be improved. Third, State management of biodiversity conservation from both substantive (conservation) and organizational perspectives had to be strengthened. And fourth, facilitating mechanisms for effective

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44 Ibid, art 1 (II, 1, para.1).

45 Ibid.
management of PAs such as financial mechanism, human resources, information-education-research-communication and international cooperation had to be improved.46

The 2003 PAs Strategy is the only strategy which concentrates solely on Viet Nam’s protected areas management. The Strategy adopted a contemporary approach towards PAs system management, focusing on the system planning of PAs and the concept of sustainable development which were relevant to the CBD’s requirements for PAs obligations. Moreover, the 2003 PAs Strategy contributes to more effective establishment and management of PAs system by working out categories and classification of Viet Nam’s PAs. Additionally, the Strategy has taken into account the significance of a solid legal framework including enforcement mechanisms and other facilitating implementation mechanisms for effective PAs management.

As mentioned in this section, in conjunction with the 2003 Strategy for Management of Protected Areas System, the VBAP and NBAP are of significance. Even though VBAP and NBAP function as the national plans implementing a set of the CBD’s obligations on conservation and sustainable use of biodiversity, these Plans main focuses are establishment and effective management of PAs system in Viet Nam via a policy of expanding the PAs system with ecologically representative selection of PAs on the basis of ecological comprehensiveness and representativeness. For example, while the VBAP concentrated mainly on SUFs with reference to wetland and marine PAs, the NBAP not only includes into Viet Nam’s PAs the marine and inland PAs but also expands their area into restoration of degraded ecosystems. Additionally, the NBAP asks for ‘[an] increase the total area of nationally and internationally important wetland and marine conservation areas more than 1.2 million hectares.’47 Moreover, NBAP requires the establishment of at least 3 PAs as World Natural Heritage or Biosphere Reserves, 5 as ASEAN Heritages and 5 as Ramsar sites.48

As a result of these strategies and plans, the number of designated PAs has increased dramatically. By 2006, Viet Nam established 128 SUFs including 28 National parks, 59

46 Ibid.
47 NBAP, art 1 (I,b).
48 Ibid, art 1 (I,a,b).
Nature Reserves, 39 Landscape Conservation Areas.\textsuperscript{49} As at 2010, 164 SUFs had been established including 30 National parks, 69 Nature Reserves, 45 Landscape Conservation Areas and 20 Research-Experimental Forests.\textsuperscript{50}

While these policies have many positive aspects as regards to PAs creation and management, some limitations still remain. Along with comprehensive policy framework, a relatively complex legal framework has been built up for the CBD’s implementation in Viet Nam.

In fact, the CBD obligates parties to create and manage a party’s biodiversity conservation areas at two levels: at national system level and site level. Hence, each party has to create either a system of national PAs system or system of areas for special biodiversity conservation. Additionally, parties to CBD should adopt guidelines for selection, establishment and management of these systems biodiversity conservation areas if it is necessary.\textsuperscript{51}

The need to implement CBD’s obligation in regard to establishment and management of a national PAs system through legal instruments has been suggested in research works and experiences of many countries. Glowka and colleagues believe that the implementation of the obligations on creation and management of parties PAs which is set forth in the Article 8 (a, b) of the CBD ‘requires a firm legal base under which government authorities can establish and manage protected areas.’\textsuperscript{52} Catherine Redgwell, looking at the advantages of national laws and regulation as national legislative implementation in comparison with administrative and judicial implementation in its transparency and clarity in application of legal principles, believes that ‘it is difficult to see how the in situ conservation obligations of Article 8, such as the requirement to establish a system of protected areas can be accomplished without legislative implementation (or the adoption of the existing legislative measures).’\textsuperscript{53}

\textsuperscript{49} See the 2009 Viet Nam’s Fourth Country Report, 15.

\textsuperscript{50} Viet Nam Environmental Administration (Tong Cuc Bao Ve Moi Truong), National Environmental Report of the Year 2010: Overview of Viet Nam Environment (Bao Cao Hien Trang Moi Truong Quoc Gia 2010: Tong Quan Moi Truong Viet Nam), (Viet Nam Environmental Administration, 2005), 136.

\textsuperscript{51} The CBD, art 8 (b).

\textsuperscript{52} See Lyle Glowka et al, A Guide to the Convention on Biological Diversity (IUCN Publication Services Unit, 1994), 40.

Dillon’s research shows that States have different legislation on the categorisation of protected areas. For example, Australia addresses the system of protected areas in the 1999 Environmental Protection and Biodiversity Conservation Act (EPBC) while other countries such as the Philippines have legislation known as the 1992 National Integrated Protected Areas System.\(^{54}\) Hence, there are arguments supporting the legal implementation of CBD’s in-situ conservation relating to establishment and management of PAs system.

As discussed in Chapter Five and the previous section, there were shortcomings in the legal regime on biodiversity in general and on PAs in particular. Before the Law on Biological Diversity was enacted, there was a need to overcome the limitations of the pre-existing legal regime by building up a ‘unique legal framework on management of protected areas system’.\(^{55}\) The need for adoption of new law regulating protected areas system was recognised in the 2003 PAs Strategy, which required Viet Nam:

> to develop a necessary legal framework for management of protected areas system [.], [t]o do research and draft a new Law on Nature Conservation in order to regulate social relations in the management of natural resources, biodiversity conservation and management of protected areas system.\(^{56}\)

As discussed in Chapter Five, in 2008, Viet Nam’s National Assembly adopted the Law on Biodiversity (LBD), which is now the fundamental and comprehensive law regulating biodiversity issues and legally internalising international rules relating to conservation and sustainable use of biodiversity. The LBD does not solely regulate solely Viet Nam’s PAs system, but extends its regulation to other subject-matter such as species and access to genetic resources. The LBD appears to provide a relatively comprehensive legal framework on establishment and management of single Viet Nam’s PAs system.

**ii. Problems of Vietnamese Implementation of the CBD’s Obligations on Protected Areas**

The above section has showed many positive aspects of the policy and law as regards to PAs creation and management in Viet Nam. However, the question to what extent the policy, law and facilitating mechanisms are adequate framework for effective development and management of the PAs system of Viet Nam still remains.

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\(^{54}\) See Benita Dillon, above n 39, 17-22.

\(^{55}\) 2003 PAs Strategy, above n 43, art 1 (III, 2).

\(^{56}\) Ibid, art 1 (III, 2; III, 9).
(a) Limited Representativeness of the Viet Nam’s PAs System

The current policy and law of Viet Nam does not sufficiently address transboundary and marine PAs. Thus, the issue of representativeness, as required by the PWPA, needs to be raised.

A trans-boundary PA (TBPA) is a type of PA, which is distinguished from other types of PAs firstly by its stretching between the two or more countries, which, in some cases, include areas beyond national jurisdiction; for example, the High Seas. Another distinctive feature of TBPA is that parts constituting this PA are managed cooperatively.\(^57\) Taking the ecosystem approach toward biodiversity conservation, the purpose for establishment of transboundary PAs is to conserve significant ecosystems, which are located in areas between different countries. For example, W Transboundary Biosphere Reserve (TBR) is situated within the territories of Benin, Burkina Faso and Niger which is being managed for common conservation objective in cooperative manner.\(^58\) Another type is a transborder area including existing and proposed protected areas such as the Pha Taem Protected Forest Complex in Thailand, Laos and Cambodia.\(^59\)

Even though the CBD does not directly mention TBPAs in the Convention’s text, the Programme of Work on Protected Areas, which was developed by the CBD COP VII as a framework for implementation of CBD obligations regarding PAs with an ecosystem approach states:

> the establishment and management of protected area systems in the context of the ecosystem approach should not simply be considered in national terms, but where the relevant ecosystem extends beyond national boundaries, in ecosystem or bioregional terms as well. This presents a strong argument for and adds complexity to the establishment of transboundary protected areas and protected areas in marine areas beyond the limits of national jurisdiction.\(^60\)

\(^{57}\) See Barbara Lausche, above n 1, 268-9.


\(^{60}\) PWPA, above n 33, annex, para 8.
Viet Nam neighbours China, Laos, Cambodia by land and China and several ASEAN countries by seas. Transboundary conservation was taken into account when Viet Nam ratified the CBD. According to the Summary Report: The Viet Nam Biodiversity Action Plan, Three Year Review Workshop (1996-1998), some discussions between Viet Nam and Laos occurred and there were recommendations on strengthening cooperation on biodiversity conservation between Viet Nam and its neighbours.\(^{61}\) In a global list of internationally adjoining protected areas, suggested by Dorothy Zbicz in 2001, some Viet Nam protected areas were recommended, for example, a complex of Chu Mom Ray National Park (Kon Tum Province)-Viet Nam- and some other protected areas such as Virachey National Park (Cambodia) and three other protected areas from Laos.\(^{62}\)

While ecosystems within transboundary protected areas of Viet Nam and other countries have distinctive features, there has been a clear need for cooperation between countries to secure ecosystem and biodiversity conservation. This distinctive feature is not included in the management plan of these PAs.

In addition to the insufficient treatment of transboundary PAs, Viet Nam also has limited management of marine PAs. As a long-coastal State, Viet Nam has rich marine ecosystems. Nevertheless, the process of establishment of marine protected areas (MPAs) has slowly progressed since the first MPA - Nha Trang Bay, Khanh Hoa Province- was established in 2001. Only 5 MPAs, including Nha Trang Bay, were established during the ten years from 2001 through 2010.\(^{63}\) A system of 16 MPAs including the 5 already established must be created by 2015, and the planning of the MPAs up to 2020 was also approved.\(^{64}\) In practice,


\(^{62}\) See Trevor Sandwith et al, *Transboundary Protected Areas for Peace and Cooperation*, (IUCN Publications Services Unit, 2001), 73.

\(^{63}\) Four other MPAs include Cu Lao Cham, Nui Chua, Con Co and Phu Quoc, *Decision of the Prime Minister Number 742/QĐ-TTg dated 26 May 2010 Approving the Planning of the Viet Nam System of Marine Protected Areas* (Quyet Dinh cua Thu Tuong Chinh Phu So 742/QĐ-TTg Ngay 26 Thang 5 Nam 2010 Ve Viec Phe Duyet Quy Hoach He Thong Khu Bao Ton Bien Viet Nam Den Nam 2020) (Decision 742/ QĐ-TTg on Marine Protected Areas), [http://www.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1\&_page=86\&mode=detail\&document_id=94876](http://www.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1\&_page=86\&mode=detail\&document_id=94876).

\(^{64}\) Ibid.
several coastal and marine ecosystems are conserved either in forest or wetland PAs, for example, the Xuan Thuy National Park was established as a Ramsar site.65

(b) Problem of Division of Management over Protected Areas

In the literature, PAs are divided into four types which are relevant to four types of management, including state-owned or state-controlled PAs, private-owned or private-controlled PAs, PAs managed by indigenous and local communities, and shared PAs.66 Like many countries in the world, Vietnamese government was first engaged in establishment and management of Viet Nam’s PAs. Unlike most countries in the world, land and the most significant natural resources in Viet Nam belong to the people, and the government is the people’s representative for the management of land and natural resources.67 Hence, while individuals and organizations have the rights to use the land and can ‘transfer’ this right to use the land, they do not have the right to own the land. Currently, despite the fact that LBD allows non-State organizations and individuals to be involved in management of PAs in some cases,68 and organizations can lease or can be granted the land or forests, the state-owned PAs is still the major type of PAs in Viet Nam.

Currently, the State management jurisdiction over PAs in Viet Nam is conferred on the Ministry of Natural Resources and Environment (MONRE), the Ministry of Agriculture and Rural Development (MARD) and provincial bodies. The management jurisdiction originated in the power of the General Forestry Department, which then became part of MARD. This is because, as has been discussed in this chapter, the first generation of Viet Nam PAs existed in the form of prohibited forests which came under the management jurisdiction of the General Forestry Department. When Viet Nam became a party to Ramsar Convention, the Viet Nam Environment Administration (VEA) of MONRE (formerly under Ministry of Sciences, Technology and Environment) began to manage wetland PAs and the PAs management shared between the two Ministries.

65 For more information, see http://vuonquocgiaxuantuy.org.vn/, last accessed on 18 May 2013.
68 The LBD, arts 27-28. The Articles determine the organisation of PAs management, the right and responsibilities of management boards or organizations.
Since the Decision of the Prime Minister Number 245/QĐ-TTg regulating State Management at all levels for Forests and Forest Lands was enacted, the management jurisdiction over forest PAs was delegated also to the provinces.\(^\text{69}\) Delegation of the jurisdiction of central bodies to the provincial bodies was implemented based on the perception that conservation would be more effectively carried out at lower levels of management. Currently, according to the LBD and its implementing Decree, Provinces are responsible for management of those PAs, the boundary of which is located within a Province while MONRE and MARD shares the management of inter-provincial PAs and the areas of these are expanded between two and more provinces.\(^\text{70}\) The first aim for the division of management between MONRE, MARD and provinces is to secure the state management on the basis of unambiguous and appropriate assignment and division between central and provincial administration and between central administrations.\(^\text{71}\)

In the field of protected areas management, decentralisation has many advantages in biodiversity conservation based on the ‘grassroot’ management principle. Indeed, the engagement of provincial government in the management of numerous significant natural parks situated within their provinces contributes to the effectiveness of PAs management at the provincial level. However, there is a problem of preference of economic interest over conservation where the province has also to foster provincial development. For example, Vinh Phuc province provided strong support for *Tam Dao 2 Project*, which aimed to build a recreation complex in a strictly protected zone of Tam Dao National Park.\(^\text{72}\) The arguments for the Project presented by the Project’s investor were in favour of economic development.

\(^{69}\) *Decision of 245/QĐ-TTg of the Prime Minister dated 21 December 1998 on Exercising the State Management Responsibilities of All Levels for Forests and Forest Lands* (Quyết Định Số 245/QĐ-TTg Ngay 21 Thang 12 Nam 1998 Của Thủ Tướng Chính Phủ Về Thực Hiện Trách Nhiệm Quản Lý Nhà Nước Của Các Cap Ve Rung Va Đat Lam Nghiep) (Decision of 245/QĐ-TTg).


\(^{71}\) Decision of 245/QĐ-TTg, above n 69.

The investor pointed out the relevance of historical aspect showing the plan by French for ecotourism and the development of Tam Dao for ecotourism was adopted by a Resolution of Vinh Phuc Province. The Project was of concern to environmentalists and the public due to the potential threat to the Tam Dao National Park biodiversity. Although, a leader of Vinh Phuc Province stated that the Province does not determine the performance of the Project, the Province also considered the suggestion of division of Tam Dao 2 Project into two smaller under- 200 ha projects, the operation of which could be subject to approval by the Province itself. This practice occurred prior to the enactment of the LBD. However, the LBD seems to hardly solve this problem of division of management jurisdiction over biodiversity between the central and provincial levels.

There is still an improper division of the jurisdictions over PAs between the MONRE and the MARD and between the central level and the provincial level. The LBD continues to divide the jurisdiction of the MONRE and the MARD in regard to management over PAs.\(^{73}\) Since the former Ministry of Fisheries was restructured into the Directorate of Fisheries under MARD in 2008,\(^ {74}\) the MONRE has been responsible for management of wetland and new ecosystems while the MARD continued to be in charge of management of both forest and marine PAs. The division of jurisdiction in State management of PAs subject to the types of PAs results in the overlapping jurisdiction between them. In several cases, it is hard to determine whether a PA is a wetland, marine or terrestrial PAs as wetland has mixed feature of coastal and terrestrial PAs.

Due to the fact that the Provincial Departments of Natural Resources and Environment (DONRE) were only established recently in order to enhance State’s management over natural resources and environment at provincial level, the capacity of DONRE in several provinces is limited. Hence, without the assistance and supervision of MONRE the provincial environmental management may cause ineffective management of PAs at the provincial level.

\(^{73}\) The Decree Number 65/2010/ND-CP, art 8 (1, b,c)

\(^{74}\) On 31 July 2007, the XII Congress of the National Assembly passed the Resolution on the Government Organisation deciding to merge the Ministry of Fisheries with MARD. In 2008, the Ministry of Fisheries officially became the Directorate of Fisheries under MARD subject to the Decree Number 1/2008/ND-CP dated 3\(^{rd}\) January 2008. For more information about MARD, see [http://www.agroviet.gov.vn/en/Pages/history.aspx?TabId=AboutMARD](http://www.agroviet.gov.vn/en/Pages/history.aspx?TabId=AboutMARD), last accessed on 18 May 2013.
(c) Problem of the Limited PAs Management by Communities

PAs management by communities has been discussed in literature as an aspect of the public participation concept. This concept has been included into laws and policy and has been evidenced in practice in many countries. The CBD also requires the parties to ‘promote …wider participation’ of indigenous and local communities in biodiversity conservation and the sustainable use.75 Similarly, the PWPA requests parties to

[e]stablish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goal of conserving biodiversity and the knowledge, innovations and practice of indigenous and local communities.76

As noted in Chapter Three, traditionally, Viet Nam has a long agricultural history and strong community values. Currently, about 80 percent of Vietnamese population is farmers and around 80 percent of PAs have inhabitants.77 Most of the forest PAs with high biodiversity value are located in remote areas, where these PAs have been managed informally by local peoples for centuries. As analysed in the previous section, Viet Nam has been pursuing the policy of preservation and protection for many years. The 2004 Law on Forest Protection and Development, on the one hand, prohibits the people living or settling in the strictly protected zone, and on the other hand offers the inhabitants the opportunity to relocate or to be concurrently involved in SUFs management under short-term contract with SUFs Board Management.78 Although, the 2004 Law on Forest Protection and Development does not strictly exclude inhabitants from strictly protected zones of SUFs, there is a clear message of the Law that they will be relocated. However, in practice, SUFs inhabitants do not generally move out. Traditionally, they have been living in the forest for generations.

The LBD is the first law recognising the right and obligations of households and individuals who live legally in the PAs.79 However, it appears that the implementation of these rights

75 The CBD, art 8(j).
76 PWPA, above n 33, para 3.2.3.
78 The 2004 Law on Forest Protection and Development, art 54.
79 The LBD, arts 30 - 31.
may be limited as the inhabitants living in PAs cannot be the ‘owner’ of the PAs under the LBD.

(d) Problems of the Concept of Protected Areas and PAs Categorisation

For the first time, the LBD describes a Viet Nam’s protected area in terms of ‘nature conservation area’ or ‘conservation area’ (khu bao ton hoac khu bao ton thien nhien). The LBD defines a ‘conservation area’ as ‘a geographical area which has defined boundaries and which is divided into functional zones for biodiversity conservation’. The LBD’s interpretation of ‘nature conservation areas’ extends to all Viet Nam’s PAs regardless of the division in the State administration jurisdictions over different types of PAs regulated by other special laws. Unlike the notion adopted in the LBD, ‘nature conservation area’ in forest legislation is treated as a PAs category of special-use forests. The broad scope of PAs definition can be explained by the intention of law-makers and policy-makers to make it the key legislation in biodiversity conservation and sustainable development. The LBD attempts to take a more comprehensive approach toward the regulation of Viet Nam’s PAs system in comparison with other biodiversity-related legislation such as the Law on Forest Protection and Development (amended 2004) or the 2003 Fishery Law and the 2005 LEP. This is because the LBD advances other related legislation which regulates several types of Viet Nam’s PAs. While Law on Forest Protection and Development (2004) aims to focus on management of forest protected areas, and the Fishery Law’s objective is to regulate a system of marine and inland protected areas, the 2005 LEP aggregates a number of forms of biodiversity protection into one category – the so-called nature conservation area.

Interpreting the LBD’s concept of ‘nature conservation area’ in the context of the Law and putting the definition of ‘conservation area’ in the context of CBD, it is clear that LBD pursues the same approach as the CBD’s concept of ‘protected areas’. The LBD’s definition incorporates three main features of the CBD’s concept of ‘protected area’. First, the objective of establishment and functional division of any conservation area is biodiversity conservation. Even though, the legal term ‘nature conservation area’ is likely to mention both types of nature conservation, including both biological conservation and conservation of other non-biological

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80 Ibid, art 3(12).
81 For discussion of the concept of protected area in CBD, see Chapter Four of the Thesis.
aspects, the definition, in fact, sets a very clear objective of a nature conservation area as ‘biodiversity conservation’. Hence, other non-biological aspects can be conserved if they form part of an ecosystem or landscapes. Secondly, a conservation area must be defined unambiguously as a geographical area. The LBD further requires statistics, an area inventory and designation on map to be completed for the purpose of PAs establishment. Moreover, the conservation area must be defined by a system of landmarks in its location so people can define the clear boundary of the conservation area. Thirdly, a conservation area is established formally which means the establishment of the conservation area must be approved by the State authorities. For example, the establishment of a Viet Nam’s nature conservation area has to be approved by a Vietnamese legal normative document such as the Decision of the Prime Minister in the case of establishment of national PA or by Decision of Provincial People’s Committee in the case of creation of provincial conservation area. Categorisation and management of Viet Nam’s conservation area are regulated by laws and subordinate legislation, which creates a legal regime for management of Viet Nam’s system of conservation areas.

Nevertheless, the LBD’s definition of a conservation area goes beyond the scope of the CBD’s definition. A distinctive point of Viet Nam’s concept of conservation area in comparison with that of CBD is that each nature conservation area must be divided into three functional zones: strictly protection zone(s), ecological restoration zone(s) and administrative-service zone(s). The location of any strictly protection zone has to be defined clearly by either demarcation in terrestrial conservation areas or by coordinates in the case of marine conservation areas. The objective of zoning in accordance to function is to provide more effective conservation of biodiversity within the conservation area.

Categorisation is used as a tool for selection and management of the whole PAs system and for single areas. Barbara Lausche believes that the framework provided by categories which range from strict conservation to multiple use can be applied to the whole national protected areas.

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82 The LBD, art 16 (3).
83 Ibid, art 23 (1).
84 Ibid, art 24 (1).
85 Ibid, art 26 (1).
system, regardless of the different legal status or classification of the protected area.\textsuperscript{86} And based on best practice, she further claims that ‘a protected areas system is best served and in-situ (on-site) conservation is most effective when categories are used’.\textsuperscript{87}

The LBD attempts to unify all Viet Nam’s PAs whether they are forest PAs, marine PAs or wetland PAs and whether or not they have been separately regulated by different legislation. The objective of unified classification of PAs including forests throughout Viet Nam is to enhance effective biodiversity management and effective biodiversity conservation. The Government argues that classification of PAs would assist biodiversity, State administrative assignment between Ministries, decentralisation of administration between central and provincial levels and conserve biodiversity.\textsuperscript{88}

To unify the classification of Viet Nam’s PAs, the LBD divides all Viet Nam’s PAs into four categories: national parks, nature reserves, species and habitats protected areas, and landscape protected areas.\textsuperscript{89} The significance of biodiversity components (for example having a natural ecosystem of international or national significance or representing a natural ecosystem or the permanent or seasonal habitat of a listed wild species),\textsuperscript{90} and different values of biodiversity such as scientific, educational or ecotourism, are the main factors for the classification of Viet Nam’s PAs.\textsuperscript{91}

Even though each classification has to meet certain criteria, the national park classification appears to be the most effective form to conserve biodiversity. This is because a national park is created with the purpose of protecting the most significant and wide-ranging biodiversity components such as natural ecosystem(s) of international or national significance, a permanent or seasonal natural habitat(s) of endangered, precious and rare species, and specifically scientific and educational or landscapes and outstanding natural beauty or having ecotourism

\textsuperscript{86} Barbara Lausche (2011), above n 1, 25.

\textsuperscript{87} Ibid.


\textsuperscript{89} The LBD, arts 17-20.

\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid.
value.92 While a national park can protect many biodiversity components within its space, each category of PAs focuses mainly on one criterion of ecosystem conservation or concentrates on habitat protection such as species and habitats conservation areas or conservation of beauty of landscape such as landscape protected area.93

More importantly, to achieve the goal of unification of State management of PAs system in practice, the LBD requires rearrangement of all existing types of Viet Nam’s PAs into a system within the scope of the LBD. Article 76 (1), functioning as a transitional Article, clearly states:

National Parks, nature reserves, habitat and species protection areas, protected landscapes areas, marine conservation areas, inland water conservation areas, aquatic resources reserves, which have been established in accordance with the Law on Forests Protection and Development, Fishery Law prior to the entry into force and has met the criteria for establishment of protected area subject to this Law, do not require a decision for re-establishment.94

Although, the LBD does not provide a deadline for rearrangement of Viet Nam’s PAs system, the LBD’s implementing Decree requires the review of Viet Nam’s PAs by 31 December 2012.95 However, the review has not yet been completed.

The history of the development of Viet Nam’s protected areas has shown that new PAs system under the LBD was largely influenced by the categorisation of special-use forests set out in the Law on Forest Protection and Development, its implementation regulations, and their practical management. Terrestrial PAs predominate in Viet Nam’s PAs system. This is because Viet Nam is rich in forest biodiversity and the Government is concerned with forest biodiversity protection. Moreover, Viet Nam has experience in forest protection by forest rangers prior to Renovation. Currently, Viet Nam has 164 protected areas.96 As forest ecosystems are the main components of terrestrial biodiversity and it has a long history of management, it is understandable that the current Viet Nam’s nature conservation areas are based on SUFs categorisation and management. Subject to Forest Legislation, Special-Use Forests (SUFs) are

92 Ibid, art 17.
93 Ibid, arts 18-20.
94 Ibid, art 76 (1).
95 Decree Number 65/2010/NĐ-CP, above n 70.
96 Viet Nam Environmental Administration (Tong Cuc Bao Ve Moi Truong), above n 50, 136.
classified into four categories: national parks, nature conservation areas, landscape protection areas and research-scientifically experimental forests. Amongst these categories, the nature conservation areas are divided into two sub-categories: nature reserves and species/habitat conservation areas. The categorization of SUFs system was much based on the IUCN categories with some changes to fit the Vietnamese context. For example, the first SUFs system established subject to the Decision 1171/QĐ used the 1978 IUCN Protected Areas Management Categories while current SUFs system was based on 1994 IUCN guidelines.

Comparing the classification set in the 2004 Law on Forest Protection and Development to that set in the LBD, several issues should be raised here. First, there is an inconsistency between the LBD’s classification of Viet Nam’s PAs, conservation areas system and SUFs systems under the 2004 Law on Forest Protection and Development that can cause confusion in application. The LBD is the key biodiversity legislation for management of Viet Nam’s PAs system. SUFs system must form part of a single Vietnamese nature conservation system. Nevertheless, the most recent legal regime on establishment and management of SUFs, which indeed has taken LBD into account as the legal basis for enactment, retains a similar categorisation to the former regime. In accordance with Article 4 (2), nature conservation areas form part of the SUFs system.

Secondly, as noted, the unified classification and zoning provided by LBD is expected to improve the establishment and management of Viet Nam’s PA’s system. Nevertheless, there are still barriers causing ineffective compliance with the LBD in relation to regulation of Viet Nam’s PAs system. The continuing division of management of Viet Nam’s conservation areas system between the Ministry of Agriculture and Rural Development (MARD) and MONRE causes difficulties in site management. The objective of LBD is to consolidate Viet Nam’s PAs system. However, LBD fails to do so by recognising the division of jurisdiction between MONRE and MARD over the national administration of Viet Nam’s PAs system.

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97 Regulation on Forest Management enacted by the Decision of the Prime Minister Number 1986/2006/QĐ/TTg of 14 August 2006 on the Enactment of the Regulation on Forest Management, art13. New legal regime on Organization and Management of Special-use Forests was introduced in accordance with the Decree of the Government Number 117/2010/NĐ-CP of 24 December 2010 on Organization and Management of Special-use Forests, which entered into force on 1 March 2011 subject to the Article 40 of the Decree. Nevertheless, the categorisation of PAs system remains unchanged. See art 4, Categorization of Special-use forests.

98 See Sue Stolton et al, above n 27.
2. IMPLEMENTATION OF OBLIGATIONS IN REGARD TO CONSERVATION AND SUSTAINABLE USE OF SPECIES

2.1 The CBD and Species-related Obligations: The Main Approaches to Species Conservation and Sustainable Use

In regard to species conservation, various special pre-CBD conservation or exploitation Conventions set objectives to conserve specific species. And, hence, each convention set explicit obligations for concrete conservation measures such as protection or control of listed species. For example, the Convention on the Conservation of Migratory of Wild Animals, the objective of which is to conserve migratory - including terrestrial, aquatic and avian, species - includes in its scope two Appendices of endangered species and those species which can be protected through agreements of Range States.\textsuperscript{99} Another example is the Convention on International Trade in Endangered Species and Wild Flora and Fauna,\textsuperscript{100} to which Viet Nam is a party. CITES requires parties to control the trans-frontier trade of listed wild fauna and flora affected by international trade through permitting and certifying systems which are integrated administrative and scientific requirements.\textsuperscript{101} These Conventions reflect a philosophy of species-focused conservation, which appears to be limited to address other non-biotic elements surrounding species and which influence species development. These Conventions appear to be fragmented, and ineffectively cope with the conservation of threatened species and communities.

Unlike the above-mentioned Conventions, the CBD takes a holistic approach to biodiversity conservation in general and species conservation in particular. The most important approaches to effective species conservation include both instrumental and substantive aspects, such as the implementation means as general measures, whose purpose is to effectively implement substantive obligations such as comprehensive subject-matters,


\textsuperscript{100} Convention on International Trade in Endangered Species and Wild Flora and Fauna (CITES), Convention text is available at \url{http://www.cites.org/eng/disc/text.php#II}.

\textsuperscript{101} The CITES, arts II - VI, \url{http://www.cites.org/eng/disc/text.php#II}. 

ecosystem-based focus, integration of conservation and sustainable use. Several issues require further discussion in regard to this approach.

Firstly, from a substantive perspective, CBD’s species-related obligations are wide-ranging and multi-level. As a technique, the CBD uses general obligations to deal with conservation of species as components of biodiversity and the Annex I dealing with the prioritised species. Moreover, CBD’s species-related obligations include different tools of conservation ranging from recovery to protection, prevention of invasive species, and control of other species-affected activities.\textsuperscript{102}

Secondly, the ecosystem-based approach to conserve species is one of the CBD’s approaches to conservation and sustainable use of all biodiversity components, including species. The ecosystem approach to conserve and use species in a sustainable manner presents a new philosophy for the regulation of species, which unlike the single-species conservation approach, protects not only species but also habitats and other non-biotic influencing factors. Article 8 (d), for example, imposes an obligation on the parties to promote the ecosystem approach to species conservation including the maintenance of population of species in in-situ conditions, natural habitats and ecosystems, of which species form a part. The complex approach to conserve species as ecosystem has been criticised by those who advocate a philosophy of single-species conservation and sustainable use. Cyrille de Klemm and Clare Shine, for example, criticise the limitations of CBD giving an insufficient focus on species conservation due to the few related provisions adopted, and, further, on the lack of the global list of species to be protected.\textsuperscript{103} Nevertheless, other ‘ecologists’ such as Glowka and his colleagues, who apparently support the philosophy of ecosystem towards species conservation, comment that:

\begin{quote}
[e]arly laws tended to protect individual plants or animals from impacts specific to them, […]. In some instance, however, such laws have proven to be insufficient since for many species, the greatest danger comes not from deliberate taking but from destruction of the habitats where they leave.\textsuperscript{104}
\end{quote}

\textsuperscript{102} The \textit{CBD}, arts 8(f, k, h), 10 (b), 14 (a).

\textsuperscript{103} See Cyrille de Klemm and Clare Shine \textit{Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems} (IUCN Publications Services Unit, 1993, 50).

\textsuperscript{104} See Glowka et al, above n 52, 49.
They point out the advantages of an ecosystem approach to conservation and sustainable use of species as reasons supporting their arguments:

recent laws have tended also to cover the protection of the sites where threatened species still occurs. An additional benefit from this is that protecting one threatened species by conserving its habitat often safeguards many other species and inevitably contributes to the conservation of ecosystem

Thirdly, CBD combines conservation and sustainable use of species within its scope reflecting the adoption of a philosophy integrating environmental and economic aspects. Unlike the philosophy of preservation, which, while focusing on maintaining the species, excludes the use of species, this new approach, on the one hand, requires protection and recovery of threatened and valuable species, and on the other hand, allows the use of these species with special consideration given to negatively affected factors. There are obligations requiring integration of conservation and sustainable use of species. For example, according to Article 8 (c) parties are obligated to ensure both conservation and use in sustainable manner in regulation or management of species as part of biological resources.105

Fourth, in regard to implementation mechanisms of species-related obligations, CBD requires both legal and policy implementation; nevertheless, the types of implementation mechanisms depend on the features of conservation measures required as substantive obligations. For example, the recovery of threatened species is obligated to be implemented through ‘development and implementation of plans or other management strategies’.106 The protection of threatened species is to be implemented by either legal or regulatory instruments.107

In summary, the four major approaches, which underline the CBD’s obligations on conservation and sustainable use of species, combine both instrumental and substantive elements. They include comprehensive scope of regulated species-related issues, ecosystem-focused approach, the combined conservation and sustainable use approach and implementation means. This holistic framework on species conservation and sustainable use aims to effectively conserve species, and in term of an implementation perspective, functions as indicators.

105 The CBD, art 8 (c).
106 Ibid, art 8 (f).
107 Ibid, art 8 (k).
2.2 Viet Nam and Implementation of the CBD’s Obligations Regarding the Conservation and Sustainable Use of Species

i. Viet Nam and Conservation of Threatened Species through Protected Species

In legal literature, a type of species conservation is species protection, which is traditionally the primary approach towards biodiversity conservation when compared the others such as the conservation area and habitat protection approaches. Commonly, based on the identification of the degree of threat, species to be protected are categorised and listed by legislation. Hence, listing or delisting is commonly used as a legal tool to protect threatened species.

(a) Vietnamese Policy and Legal Framework on Threatened Species

From a legal perspective, Viet Nam desires to protect threatened species at an early stage and primarily by forest legislation. The first legislation was the Instruction of the Prime Minister Number 134/CT-TTg dated of 21 June 1960 on the prohibition of shooting elephants. The first comprehensive legal document listing protected species and regulating the techniques and seasons of catching and hunting were dealt in Decree Number 39-CP dated 5 April 1963 promulgating the Temporary Regulation on Hunting and Catching Forest Birds and Mammals.

Viet Nam’s efforts to protect wild fauna and flora by legal instruments are evidenced by the rapid development of forest laws and regulations. In order to perform the CBD’s obligations, Viet Nam has created and developed a relatively comprehensive legal framework as the legal basis to protect threatened species. This legal framework consists of wide-ranging laws and regulations which either comprehensively or partly address the protection of threatened species. The former include laws such as the 2005 LEP, setting principles for species conservation and prohibited behaviours, or LBD which plays a role of key law on species conservation and sustainable use. Recent enactments focusing on forests species


\[109\] The 2005 LEP, arts 7, 30.
conservation and sustainable use include the 2004 Law on Forest Protection and Development and its implementing Decrees such as Decree 32/2006/NĐ-CP dated 30 March 2006 on the Management of Endangered, Rare and Precious Forest Animals and Plants, or Decision 186/2006/QĐ-TTg dated 14 August 2006 Promulgating the Regulation on Forest Management Wild Fauna and Flora in Viet Nam. Species are categorised into either strictly prohibited exploitation or restricted exploitation as listed in Annex I and II respectively. Historically, Viet Nam, as a country with rich forest resources, first focused on forest protection as part of State property. Apart from forest laws and regulations, the 2003 Fisheries Law is an important law protecting aquatic species.

More comprehensively, as a fundamental law for environmental protection, the 2005 LEP treats species and other biodiversity resources as ‘environment components to be protected.’¹¹⁰ Hence, the 2005 LEP prohibits any use of listed protected species by exploitation, trade or consumption.¹¹¹ The 2005 LEP also set out principles for species protection such as providing the listing and categorisation, preparation of protection plans or development of a system of secure centres as tools for endangered endemic, precious or rare fauna and flora.¹¹²

Unlike the 2005 LEP, which takes a general approach to species conservation, the LBD addresses the conservation and sustainable use of species in much more detail. Although the LBD’s objective is ‘to regulate conservation and sustainable use of biodiversity,’¹¹³ the Law limits itself to include the most valuable species as well as other important biodiversity components in its scope. This is because while the concept of conservation of biodiversity, of which species are part, includes both in-situ and ex-situ conservations, the conservation of species applies narrowly with the protection of the listed species with endangered, precious and rare species as needing prioritized protection.¹¹⁴ Additionally, the LBD explicitly recognizes the conservation of listed endangered, precious and rare species as a national prioritized policy.¹¹⁵ LBD also develops concrete rules on conservation and sustainable use

¹¹⁰ Ibid, art 3 (2, 3).
¹¹¹ Ibid, art 7 (3).
¹¹² Ibid, art 30 (3).
¹¹³ The LBD, art 1.
¹¹⁴ Ibid, art 3, (1, 2, 3).
¹¹⁵ Ibid, art 5 (1).
of species. Article 7, for example, does not allow some acts such as hunting, catching or exploiting wild species within the strictly protected zone. More importantly, Chapter IV of the LBD, focusing both on conservation and sustainable development of species uses listing to clearly identify species to be protected.

In summary, all these laws and regulations form a comprehensive legal framework for protection of threatened species in Viet Nam. Threatened species are listed to be protected subject to their endangered, rare and precious status. Protected measures such as prohibition or restriction of hunting, catching, exploitation or other uses are also regulated by current laws and regulations.

(b) Inadequacy of Vietnamese Legal Implementation of Threatened Species Protection

Despite the fact that Viet Nam has built up a relatively comprehensive legal framework, there are some shortcomings. First, there is the unclear concept of threatened species. The CBD does not give an explicit concept of species and threatened species, leaving parties to decide the list of protected species. Nevertheless, taking the ecosystem approach, the CBD also requires species protection in its broader context, namely, in the context of its population and community. The LBD is specific biodiversity legislation but does not include the interpretation of species as the basic concept for protection of threatened species despite the fact that the term was interpreted in several draft LBDs. The reason is very simple: the species is commonly used terminology. Theoretically, from the perspective of legal regulation, a clear definition is needed as it forms a legal foundation to justify the legality of individuals and organizations in species protection. Moreover, some terms are used without definition or indicators to realise such as ‘rare and precious’ species. The term ‘rare’ and ‘precious’ have some links to the concept of threaten species, but it appears that the concept of threatened species has a broader scope. In some cases, a native species, which may not be considered as either rare or precious, can be calculated as threatened.

Secondly, the current list of protected species is insufficient and inadequate in terms of number and scope. Fifty percent of globally threatened mammals including plants, reptiles, amphibian or fish lives in Viet Nam, but only ten percent of them are protected.116

116 Pilgrim John and Nguyen Duc Tu, Background Paper on Threatened and Alien Species in Viet Nam and Recommendations for the Content of the Biodiversity Law, Report to the Department of Environment, Ministry
In summary, incomplete legal and policy framework can cause the ineffective implementation of CBD’s obligation due to its legal and policy uncertainty, which leads to inefficient practical implementation of those laws and policies.

**ii. Vietnamese Implementation of the CBD’s Obligation to Combat Invasive Alien Species**

The CBD obligates parties to combat invasive alien species by preventing the introduction of, controlling, or eradicating invasive alien species (IAS) as a measure for in-situ conservation of biodiversity.\(^\text{117}\) Further, the Guiding Principles for Implementation of Articles 8 (h), adopted at the Sixth Conference of Parties (COP) noted the severe harm caused by IAS to biodiversity, as ‘one of the primary threats’ and that there is an increased risk of IAS due to ‘global trade, transportation, tourism or climate change’.\(^\text{118}\)

While the CBD contains an obligation to address IAS, there is no definition of IAS. The most common notion of IAS by scientists, rule-makers, researchers and scholars appears to come from the bio-geographical point of view despite the fact that the invasive feature is the most predominant aspect of the notion.\(^\text{119}\) An alien or non-native species may be referred to a species, which is introduced in an area or ecosystem, within which that species has not naturally originated or developed. Not all alien species are considered invasive. IAS form part of an alien species, which has spread through a new surrounding or population, occupying the habitat or competing for food of a native species and causing harm to the ecosystem, habitat or native species.\(^\text{120}\) In other words, IAS are those which are ‘invading’ the native biota.

With the purpose of facilitating parties to fully and effectively implement the obligation to combat IAS, COP 6 adopted The Guiding Principles for Implementation of Article 8 (h), which creates 15 principles for minimisation of IAS risks. Although the approved principles

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\(^\text{117}\) The *CBD*, art 8 (h).


\(^\text{119}\) *Status, Impacts and Trends that Threaten Ecosystems, Habitats and Species, a Note by Executive Secretary as Information for CBD’s Subsidiary Body on Scientific, Technical and Technological Advice at its six meeting of 12-16 March 2001* (UNEP/CBD/SBSTTA/6/INF/11 of 26 February 2001).

\(^\text{120}\) For information of the cause and impact of invasive alien species, see *Cause and Impact of Invasive Alien Species*, at [https://www.cbd.int/idb/2009/about/causes/](https://www.cbd.int/idb/2009/about/causes/), last accessed on 19 May 2013.
are not binding, they set a framework for parties to guide parties’ behaviours to address IAS. In addition to the Decision of the COP 6, the COP 7 and the COP 8 Decisions, particularly Decision VII/13 and VIII/27, urge parties to review and adjust relevant policies, legislation and institutions.

The first three principles are general approaches consisting of the precautionary principle, the three-stage approach (addressing prevention, introduction and establishment of IAS) and the ecosystem approach. These three principles are fundamental. The most significant principle is precaution, which does not consider the limited capacity of a party in implementation of this obligation as it clearly states that ‘(w)here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.

In addition, the Guiding Principles also take the economic aspect of management of IAS into account by encouraging the parties to take measures to prevent introduction of IAS into an ecosystem. Moreover, taking globlisation as a phenomenon that all parties are facing, the Guiding Principles also set down a responsibility of parties to preventing control the introduction of IAS into their country by appropriate means in border security by controlling and setting quarantine measures.

In summary, it is clear that the CBD’s obligation relating to combat IAS, like other CBD obligations, is not set in a precise manner. In this way, the CBD lets parties develop for themselves non-binding implementing policies and decide the measures to be taken for prevention and control.

It is well documented that IAS are mostly introduced into the Vietnamese environment by human beings and that they cause harm to Viet Nam’s biodiversity. It is admitted both in the 2010 National Environment State, prepared by the Ministry of Natural Resources and Environment (MONRE) of Viet Nam and the Fourth Country Report to CBD Secretariat that ‘the limited control and over-development of IAS have caused negative effects to

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122 Ibid.

123 Ibid.
environment and biodiversity as invaded and degraded species, broke structure or functions of ecosystem, damaged crops and even affected human health.\textsuperscript{124}

Prior to the adoption of LBD, there was a policy and legal framework to combat IAS, consisting of scattered provisions of some laws such as Resolution No 41 of 15 November 2004 of the Central Committee of Viet Nam’s Communist Party on the Environmental Protection in the Context of Strengthening Industrialisation and Modernisation, the 2003 Fisheries Law, the 2004 Law on Forest Protection and Development, the 2001 Ordinance on Plant Protection and Quarantine, the 2003 Decree on the Conservation and Sustainable Development of Wetlands, etc. The legal framework, deriving from different laws of distinctive legal force subject to Viet Nam’s hierarchy of legal normative documents, addresses different types of IAS. For example, the 2003 Fisheries Law, which aims to address aquatic IAS, seeks to control by issuing permits for growing new aquatic product breeds or those listed as prohibited.\textsuperscript{125} Distinguished from the 2003 Fisheries Law by the scope of regulation, the 2004 Law on Forest Protection and Development prohibits the act of keeping, planting or release of forest IAS without permission from competent authorities.\textsuperscript{126} To control the introduction of IAS across Viet Nam’s border, the 2001 Ordinance on Plant Protection and Quarantine requires strict prohibition of bringing harmful alien organisms into Viet Nam or of regional spread within the country.\textsuperscript{127}

Although the pre-LBD policy and legal framework are relatively diverse in scope, they did regulate different acts such as prohibition or controlling to address different categories of IAS including aquatic and terrestrial IAS in different areas within or across country. Nevertheless, there were many inadequacies in this policy and legal framework. Both government and commentators claim that the policy and legal framework addressed IAS in an ad hoc fashion.\textsuperscript{128} The government reports also note the lack of guiding documents that

\textsuperscript{124} See Viet Nam Environmental Administration, above n 50, 58; See also 2009 Viet Nam’s Fourth Country Report, 21.

\textsuperscript{125} The 2003 Fisheries Law, art 6(12).

\textsuperscript{126} The 2004 Law on Forest Protection and Development, art 12 (12).

\textsuperscript{127} The 2001 Ordinance on Plant Protection and Quarantine, art 27.

\textsuperscript{128} Pilgrim John and Nguyen Duc Tu, above n 116, 25.
may lead to uncertainty on application of laws, and consequently the efficiency of law implementation has been lower than expected.\textsuperscript{129}

First, there has not been any clear definition of IAS in Vietnamese laws and policies prior to the adoption of the LBD in 2008 neither by giving an interpretation of the term of IAS nor using enumerative/listing approach. Although, the Fishery Law intends to ‘define’ at least aquatic IAS by listing, there has not been any list of aquatic IAS issued. The lack of clear definition or a list of current IAS has caused difficulties in defining the act of breach of laws relating to IAS management.

Secondly, regulated acts mostly have been limited to prohibited acts of introduction of IAS into the country or an ecosystem. The regulated acts are narrow in scope; for example, the act of controlling marine IAS has been skipped and has not been addressed in any legal documents.

Thirdly, there has not been any risk assessment mechanisms provided within either policy or the legal framework. Risk assessment is important in cases of introduction and establishment of IAS. In some cases, it can take a period of time to assess the risk and identify harm caused by IAS and therefore the risk cannot be defined immediately; for example, the case of Golden Apple Snail (\textit{Pomacea canalicunata}). As recorded in 2010 National Environment State, Golden Apple Snail (\textit{Pomacea canalicunata}) was first imported into Viet Nam in limited numbers for ornamental purpose around 1975. At that time, the Golden Apple Snail presented far more as an alien species rather than IAS. However, several farms realised the economic benefit of breeding and export of Golden Apple Snail. Hence, the farmers imported a large number of Golden Apple Snails. The inappropriate assessment of harms caused by the Golden Apple Snail caused huge damage to agriculture, especially to rice crops. Due to the short circle of life, Golden Apple Snails quickly spread.

Fourthly, other facilitating mechanisms such as research, inventory, monitoring, information, was not set out by laws and polices. In the environmental field, taking the significance of scientific knowledge and precautionary approach to combat IAS, these mechanisms are of importance as they assist competent authorities to reach the right decision on how to treat IAS.

\textsuperscript{129} Ibid; Viet Nam Environmental Administration, above n 50, 25.
Finally, enforcement mechanisms such as any offset or penalties, or even offenses in case of their breach were not provided in law. Enforcement mechanisms are important to any legal system. There have not been any penalties for intentional or unintentional introduction of IAS into Viet Nam’s environment.

Additionally, while managing IAS in a flexible manner, institutions play relatively significant roles. From the institutional perspective, Pilgrim and Nguyen share the similar opinion of the government that there is a need to have a specific agency responsible for IAS management in Viet Nam. Nevertheless, such commentators do not mention the inefficiencies of those institutions. Apart from comment on overlapping of State administrative agencies in managing IAS, the ineffective implementation of obligation in regard to IAS may be caused by incapacity of State management agencies due to understaffing, insufficient financial mechanisms and so on.

In summary, prior to the approval of the LBD by the National Assembly, a fragmented legal and policy framework had been created to address IAS as a tool for CBD’s implementation in Viet Nam. There were inconsistencies within the framework such as lack of definition of IAS, limited scope of regulated acts, lack of risk assessment and other implementation facilitating mechanisms, etc. Additionally, the inadequate institutional system presented as a factor affecting the effective implementation of CBD’s obligation regarding IAS. There are several reasons for these failures. First, there had been limited perception of the significance of management and regulation of IAS. Secondly, few IAS had been introduced into Viet Nam. In addition, as a continental country, Viet Nam does not have a long tradition in preventing the introduction of IAS in comparison to isolated countries such as Australia. Thirdly, insufficient financial resources were another reason.

The adoption of the LBD aims to address biodiversity contemporary issues of which IAS combat forms part and with which the previous mechanisms failed to cope. Indeed, the LBD has provided rather comprehensive policy, institutional and legal mechanisms for combating IAS within Viet Nam.

First, in comparison with earlier legal, policy and institutional mechanisms, the LBD has advanced in giving a clear definition of IAS. The LBD follows the commonly accepted

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130 See Pilgrim John and Nguyen Duc Tu, above n 116, 25.
comprehension of both alien species and IAS, taking a bio-geographical point of view. Accordingly, an alien species is a species which is introduced and developed in an area which is not its indigenous place. IAS differs from other non-invasive alien species by the negative impact of the species to the ecosystem that the IAS would had been introduced and developed. IAS causes harm to an ecosystem and its biotic components by invasion of habitat or competing food of indigenous species or causes imbalance of an ecosystem. IAS includes both known and potential IAS.

Development of a clear definition is of significance. This is because a precise definition provides the legal certainty, which, leads to assurance of implementation of LBD obligations by Vietnamese citizens, businesses and other organisations. In addition, an unambiguous perception of IAS sets clear guidelines to measure a legitimacy of behaviour of introduction of an alien species.

Secondly, the Law takes ‘three-stage hierarchical approach’ towards addressing IAS, requiring the control of introduction of IAS across borders and inter regions, control of the breeding and planting potential IAS, and also the spread and development of IAS. In order to control the IAS, the LBD obligates responsible organs to investigate and create a List of IAS. In addition, LBD clearly obligates State management agencies both at central and provincial levels to combat IAS. The interweaving of legal and institutional mechanisms is expected to effectively combat IAS both horizontally and vertically.

Thirdly, the requirement of listing of IAS is important for the public as they realize clearly the species that they are prohibited to introduce in Viet Nam.

Despite many advantages of the current legal framework, there are still some limitations in addressing IAS. There is still a lack of requirement for long-term/strategic management of IAS. Additionally, although the decentralisation and delegation of powers to control IAS to

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131 The LBD, art 3 (18).
132 Ibid, art 3 (19).
133 Ibid, art 50 (1).
134 Ibid, art 51.
135 Ibid, art 52.
136 Ibid, art 53.
137 The LBD, art 3.
local government can be a good approach towards better management of IAS, the capacity of local government to deal with IAS control may be questioned as local environmental agencies were only recently established and are, therefore, inexperienced.

**CONCLUSION**

Examining the two cases, namely, the establishment and management of Viet Nam’s protected areas and conservation and sustainable use of species, this chapter indicates that Viet Nam is using both policy and law as means to implement the CBD’s obligations. In fact, both law and policy have their own advantages and disadvantages for implementation of the CBD’s obligations. While law, with the enforcement mechanisms, can be a factor determinant to the implementation of international environmental obligations, law lacks the flexibility and in many cases can be a barrier to effective implementation of international environmental obligations. In contrast, the major limitation of policy implementation is that policy cannot be enforced by the legal enforcement mechanisms. Policy implementation seems to be more appropriate in the context of high degree of voluntary compliance by individuals or organisations. Otherwise, those policies needed to be converted into legal rules.

The question is whether law, policy or a mixture thereof will be the best means for effective implementation of the CBD’s obligations The choice of means for implementation of international environmental obligations in Viet Nam depends on several elements including the requirements of the CBD itself and the national context. The analysis of the chapter demonstrates that Viet Nam has taken a right approach to implement the CBD’s obligations by using a mixture of law and policy.

This chapter also emphasises that Viet Nam has made major efforts to formulate and improve a policy and legal framework and other mechanisms for compliance with the CBD’s obligations. So far, Vietnamese law and policy have incorporated and pursued in practice the principle of sustainable development in conservation and sustainable use of biodiversity. In fact, law and policy instruments in Viet Nam emphasise the environmental, economic and social elements as three underpinnings of the principle of sustainable development. Although the social elements, emphasising the engagement of the communities in biodiversity conservation, have been incorporated in the course of formation and implementation of law
and policy for implementation of the CBD’s obligations, these significant social elements have been inadequately addressed. Together with this, other limitations of these framework and mechanisms still remain. Thus, much room is left for an improvement towards a better compliance with international environmental obligations in Viet Nam.
CHAPTER SEVEN
CONCLUSION

INTRODUCTION

The previous chapters have examined how international environmental obligations are implemented in Viet Nam through a close analysis of the implementation of obligations imposed by the Convention on Biological Diversity (CBD). The analysis is based on a theoretical framework relating to compliance with international environmental obligations. More importantly, it is placed in the distinctive socio-political and legal environment of Viet Nam, as specified in the practice of the making and implementation of law in Viet Nam. The analysis also has revealed a number of problems and challenges that Viet Nam faces during the course of implementing international environmental obligations.

As a country which is a party to numerous international conventions, Viet Nam has made its best efforts to commit to the implementation of international obligations. This is particularly true in the case of international environmental obligations where sustainable development – a global development principle - has been officially recognised in many important policy instruments and laws of Viet Nam. Thus building up mechanisms and momentum for more effective implementation of compliance with international environmental obligations is a significant task for Viet Nam in its current context.

This chapter draws several conclusions based on the findings of the previous chapters of the thesis in which the Vietnamese implementation of the CBD’s obligations, and related problems and challenges facing Viet Nam are summarised. It then offers some suggestions in regard to what might be done for effective implementation in order to comply with international environmental obligations in Viet Nam, taking into account socio-political and legal factors. This chapter emphasises that while it is important for Viet Nam to improve its policies, laws and all related factors and actors, attention to the issue of law enforcement is pivotal to compliance with international environmental obligations in Viet Nam. Thus a discussion of compensation mechanisms for environmental damage and the possibility of adopting a model of environmental courts in Viet Nam is analysed in this chapter.
1. VIETNAMESE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS - SUMMARY AND PROBLEMS

1.1. Viet Nam and the Inconsistent Approaches to Implementation of International Environmental Treaties

There is no clear point of view in Vietnamese legal scholarship as to how the international environmental obligations should be implemented in Viet Nam. Scholars, law-makers and other commentators continue to debate Vietnamese approaches to the relationship between international law and Vietnamese law and the modes of implementation, including how incorporation and transformation can be effective approaches to ensuring compliance with international environmental obligations. In fact, the current legal mechanism, which is prescribed in the 2005 Law on Conclusion, Accession and Implementation of International Treaties, does not provide a clear answer to the problem. Putting the question of incorporation and transformation aside, this Law does to some extent provide a mechanism for ensuring compliance with Viet Nam’s international environmental obligations. Under the compliance mechanism set out by the Law, the State agencies, in which the duties for the management of negotiation and implementation of Viet Nam’s international environmental treaties are vested, have some flexibility in the choice of implementation modes. They can either propose the development of a legal or policy framework or the direct application of international environmental treaties for ensuring Vietnamese compliance with international environmental obligations. More significantly, these State agencies are responsible for organising the implementation of the relevant laws and policies. Additionally, the 2005 Law on Conclusion Accession and Implementation of International Treaties sets out a ‘soft’ mechanism to secure the consistency of Vietnamese laws with international environmental treaties. The Law does not require a newly enacted law to fully ‘internalise’ all treaty obligations. Instead, the Law only requires newly enacted law not to become a barrier to implementation of international treaties in Viet Nam. Although, the recognition of priority of international treaty rules in cases of inconsistency with the rules of domestic law can be found in some Laws or other enactments, this practice cannot ensure that all international environmental obligations have firm legal and policy bases for being fully implemented in Viet Nam. Hence all current approaches to implementing international treaties in Viet Nam cannot fully secure compliance with international environmental obligations.
1.2. Implementation of the CBD’s Obligations in Viet Nam: the Implications of the CBD and the Inadequacy of Laws, Policies and Facilitating Mechanisms

The Convention on Biological Diversity (CBD) is a typical global environmental treaty for sustainable development. Taking a comprehensive approach to addressing wide-ranging biodiversity issues, the CBD’s objectives are stated as being to conserve and use biodiversity in a sustainable manner, and to share fairly and equitably the benefit of the use of genetic resources. In order to achieve the ambitious CBD objectives and secure compliance by the parties, the CBD’s obligations were adopted in the general and soft ‘package deal’ forms with required domestic implementation mechanisms. While these features of the CBD’s obligations have been criticised to some extent, the CBD attempts to secure compliance by taking into account the differences in parties’ socio-economic and other domestic contexts, leaving some space for parties, including Viet Nam, to choose the relevant approach to effective implementation of international environmental obligations.

After becoming a party to the CBD, Viet Nam developed a biodiversity legal framework in order to implement the obligations of conservation under the CBD. Nevertheless, the pragmatic approach to implementation of the CBD obligations by the use of different means resulted in an ad hoc implementation of the CBD’s obligations. While the enactment of different laws, rules and regulations did certainly support Viet Nam’s attempts to meet the CBD obligations immediately, this brought about piecemeal implementation due to the lack of cohesion among these related laws, rules and regulations. As a result, Viet Nam unintentionally failed to fulfil the CBD’s obligations.

This practice of implementation of the CBD’s obligations required Viet Nam to make a comprehensive law on biodiversity as ‘umbrella’ legislation to incorporate all the CBD obligations. Such a comprehensive law was believed to be an effective way to avoid the piecemeal and overlapping implementation.

Responding to the need to improve the law for implementation of the CBD obligations as mentioned, in 2008 Viet Nam passed the Law on Biological Diversity (LBD) as the first comprehensive statute on biodiversity. The LBD covers most biodiversity-related issues, including those requirements arising from the CBD and other biodiversity-related Conventions, such as CITES, Ramsar, and the World Heritage Convention. Thus the Law is
also expected to be an effective legal instrument for ‘legal internalisation’ of international environmental obligations into Vietnamese law.

While acknowledging efforts of Viet Nam to enact the LBD, it must be admitted that there still are several limitations in the current legal and policy framework for the implementation of the CBD’s obligations. Through an in-depth analysis of selected issues, including the conservation of protected areas and species conservation, related legal and policy and mechanism problems have been addressed in the thesis. These problems are also typical problems of the implementation of international environmental obligations required by the CBD and other environment related conventions in Viet Nam. The problems notably are the inconsistency of some specific biodiversity-related concepts and approaches under the Vietnamese law with those addressed in the CBD, and the lack of sufficient legal measures and management measures for the effective implementation of the CBD’s obligations.

In the thesis detailed discussions about such problems as the inconsistent perception and categorisation of protected areas, the limitations in laws and policies relating to conservation and sustainable use of species, and the problems of the division of state management of biodiversity amongst state agencies are specifically provided. Additionally, the inadequate provision of other facilitating mechanisms such as research, inventory, monitoring and information, and community participation in biodiversity management, or of enforcement mechanisms such as offset or penalties or financial resources in laws and policies, and the incapacity of State management agencies have been addressed.¹ Thus seeking proper resolutions for overcoming those problems becomes a significant task for Viet Nam.

2. TOWARDS MORE EFFECTIVE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL OBLIGATIONS IN VIET NAM - IMPROVEMENT OF POLICIES, LAWS AND RELATED ACTORS AND FACTORS

Overcoming the above mentioned problems towards a more effective implementation of international environmental obligations in Viet Nam requires a range of reforms in related policies, laws, actors and other factors. This appears to be particularly significant in the current context in which Viet Nam is pursuing the goal of sustainable development and

¹ See Chapter Six for more detailed discussion.
deeper international integration by actively participating in international treaties. On the one hand Viet Nam needs to develop an adequate policy and legal framework to comply with international environmental obligations which are consistent with the socio-political and legal conditions of Viet Nam. On the other hand, given the significant role of government institutions in implementing international treaties, capacity-building and management coordination of government institutions is of importance. Additionally, the active engagement of non-state actors, especially the communities in the case of biodiversity conservation, and the broader contribution of non-state factors to the effective implementation of international environmental obligations should be taken into consideration.

2.1. Improving the Legal and Policy Framework for Strengthening Compliance with International Environmental Obligations

A strong legal and policy framework is needed to be developed for securing compliance with international environmental obligations. While environmental treaty obligations are comprehensive and are made in the context of sustainable development, such a legal and policy framework for compliance with international environmental obligations must necessarily follow an appropriate approach to adopt international environmental rules into Vietnamese law and strengthen the legal force of the sustainable development principle.

First, Viet Nam should adopt an appropriate formula to implement the international environmental treaties. Since international environmental treaties normally set out the general obligations, which need further protocol or detailed policies, and require national implementation, these international environmental treaties are hard to be directly applied. Hence, Viet Nam should develop a detailed national legal and policy framework for full implementation of international environmental obligations. In other words, ‘transformation’ is the proper approach for Viet Nam to secure compliance with international environmental obligations.

Secondly, the principle of sustainable development should be incorporated into the Constitution of Viet Nam. Sustainable development fosters economic development while ensuring environmental protection and social development worldwide and nationwide. In Viet Nam the principle of sustainable development has been recognised as a legal principle
for environmental protection, conservation and the sustainable use of biodiversity in the 2005 LEP and LBD. In the field of biodiversity conservation and sustainable use the principle integrates biodiversity conservation and sustainable use and provides a strong basis for securing community interest. In this way the community can benefit from eco-service. Hence this principle can effectively support the life of communities, the public and the State. Taking into account the significant influence of the principle in maintaining the relationship between economic development and the use of natural resources and securing the quality of life, the principle should be fully respected in the entire legal system. The adoption of the principle in several environment-related laws and regulations cannot ensure the consistent application in other fields of law. Hence it is necessary to recognise ‘sustainable development’ as a constitutional rule to broaden the legal force of the principle and improve compliance with Viet Nam’s international environmental obligations.

2.2. Enhancing the Role of Governmental Agencies in the Implementation of International Environmental Obligations in Viet Nam

First, a more professional legislature in law-making for and supervision over implementation of international environmental obligations should be developed. In every State, the legislature is the highest representative State organ, which has the power to make laws. Hence, the quality of legislation depends on how the law is made. In the process of making law, many actors are involved, and the Legislature has the final decision on how the law looks after a long period of appraisal, assessment and discussion.

In Viet Nam, the National Assembly is the highest representative organ, which has the power to legislate and supervise legal implementation. Nevertheless, incorporating international rules, especially those relating to special fields like the environment, into domestic law and supervising the implementation of international obligations is not an easy task for Vietnamese legislators. In fact, the number of Deputies to the National Assembly who work on the full-time basis (known as professional Deputies to the National Assembly) is still modest,² and thus, it is very challenging for the National Assembly to complete the huge workload of law-making. Additionally, the mechanism for consulting the scientists

² Currently, there are 500 Deputies to the National Assembly, but only 155 of them are working as professional Deputies. For more details, see the official website of the National Assembly of Viet Nam at http://dbqh.na.gov.vn/XIII/Daibieu.aspx, last accessed on 29 April 2013.
whose expertise can largely affect the law’s quality does not work well in practice.³ Hence there is a need to increase the number of professional law-makers who have expertise in specific fields such as environmental science.

Secondly, there is a need for streamlining the work of authorities to improve implementation to of international environmental obligations. In the Vietnamese law on international treaties, administrative Agencies are vested with many powers. As administrative organs, Ministries are those which have the initiative in the concluding of, and then, are a key agency in the fulfillment of international environmental obligations arising from international treaties which fall within their jurisdiction.

In the field of biodiversity there are divisions and overlapping jurisdictions between the Ministry of Natural Resources and Environment (MONRE) and the Ministry of Agriculture and Rural Development in the management of numerous biodiversity components. Despite the jurisdiction of MONRE over environmental issues under Vietnamese law, and its role as Viet Nam’s focal point in connection with the CBD Secretariat, as well as being the main organisation taking responsibility for Viet Nam’s compliance with international biodiversity obligations, MONRE in fact has limited jurisdiction over the management of many protected areas. This is because, historically, most of Viet Nam’s protected areas are forests, the management of which falls within the jurisdiction of MARD. The LBD attempts to establish a unified system of protected areas, but nevertheless has not succeeded in solving the problem of overlap between MONRE and MARD. More importantly, inconsistencies in the Decrees of the Government in regard to management of Viet Nam’s protected areas under the LBD and the 2004 Law on Forest Protection and Development have caused numerous difficulties in the management of Viet Nam’s protected areas in practice. Consequently, the fulfillment of international environmental obligations under the CBD has been negatively impacted. To overcome these challenges there is a need to clarify the jurisdictions of

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³ For some detailed discussions about problems in regard to the participation of scientists in law-making activities in Viet Nam, see Nguyen Nhu Phat, ‘Conditions for attracting the participation of scientists in law-making activities (Dieu Kien Thu Hut Su Tham Gia Cua Cac Nha Khoa Hoc Vao Hoat Dong Xay Dung Phap Luat)’ (2006) 10 Legislative Studies Journal (Tap chi Nghien cuu Lap phap) 42; Tran The Vuong, ‘Attracting the participation of scientists in law - making activities of the National Assembly (Thu Hut Cac Nha Khoa Hoc Tham Gia Vao Hoat Dong Xay Dung Phap Luat Cua Quoc Hoi)’, (2006) 8 Legislative Studies Journal (Tap chi Nghien cuu Lap phap) 16.
MONRE and MARD regarding the State’s management of biodiversity. The unification of functions of state environmental management under MONRE is worth considering.

Thirdly, there should be closer coordination of Ministries and provincial governments in environment management. Provincial Governments play a critical role in the compliance with international environmental obligations in Viet Nam by engaging in the management of biodiversity components at provincial level, due to the principle of decentralization in State management. In the field of protected areas management, for example, after 1998 the Provincial Governments began to take over the management of numerous significant natural parks situated within their provinces. While decentralisation has many advantages in biodiversity conservation, there is also the problem of preference for economic interests over conservation, as the provinces also have to foster provincial development. Moreover, due to the fact that Provincial Department of Natural Resources and Environment (DONRE) is relatively newly established in order to enhance the State’s management at the provincial level, the capacity of DONRE in several provinces is limited. Hence there is a need for assistance from MONRE on the one hand, and the supervision of MONRE on the other hand, in order to improve provincial environmental management, and consequently compliance with international environmental obligations, primarily in the field of biodiversity at the provincial level.

2.3. Strengthening Non-State Actors and Factors

First, there is an emerging expansion of public participation in environmental law-making, environmental decision-making and environmental impact assessment. The role of non-State actors in the improvement of environmental protection is recognised both in theory and practice and in law. Viet Nam has adopted many rules to secure the right of the public in participation in environmental law making and environmental decision making, especially in environmental impact assessment. Nevertheless, public participation is still limited. Hence there is a need to expand the participation of those non-governmental environmental organizations which have sufficient scientific capacity to improve environmental protection, including biodiversity.

Secondly, the ‘rule of law’ awareness of bureaucrats, businesses, individuals and the community in Viet Nam needs to be raised. Bureaucrats, businesses, individuals and
communities play crucial but different roles in compliance with international environmental obligations. Raising the awareness of fulfillment of environmental rules is a mode for securing compliance with international environmental obligations at the grassroots level in Viet Nam.

Thirdly, the use of economic instruments in environmental protection should be widely used. Using economic instruments in conjunction with regulation has been encouraged since the 1980s when the OECD introduced such market-based instruments. The use of economic instruments has proved their advantage in practice. Hence the enhancement of the use of economic instruments such as subsidies, taxes, fees, charges or eco-service are promising incentives for securing domestic compliance.

3. COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL OBLIGATIONS IN VIET NAM: BETTER LAW ENFORCEMENT MECHANISMS

No law is better than its enforcement scheme. While it is hard to find centralised enforcement mechanisms for effectively implementing international environmental obligations, each State as a subject of international law will develop different national mechanisms of enforcement for compliance with international environmental obligations. Thus the issue of how to develop effective national mechanisms of enforcement for compliance with international environmental obligations becomes a common concern for many countries.

In the case of Viet Nam, besides a number of problems in regard to polices, laws, and related actors and factors as discussed above, law enforcement mechanisms in Viet Nam have shown limitations which negatively affect environmental law implementation. Until now details in regard to the compensation mechanism for environmental damage in general, and for biodiversity damage in particular, have not been adequately developed. Also, the people’s courts of Viet Nam as courts of general jurisdiction lack expertise in environmental law and environmental science; thus they are not able to effectively deal with environmental law cases. Given this situation, for a more effective compliance with international environment obligations in Viet Nam it is necessary to address the above-mentioned

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limitations of law enforcement mechanisms and make recommendations for an adequate compensation system for biodiversity damage and for the possibility of adopting a model of environmental courts in Viet Nam.

3.1. Developing an Adequate Compensation Mechanism for Biodiversity Damage

i. Overview of Compensation for Biodiversity Damage

Compensation for biodiversity damage is a relatively new concept in legal and policy scholarship. This is perhaps because the concept of biodiversity was only recently adopted in legal and policy literature and law.\(^5\) Further, the common compensation mechanism used for both general environmental damage and biodiversity conservation might have delayed the creation of separate legal mechanisms for compensation for biodiversity damage. Hence, not surprisingly, there has not been much literature on biodiversity compensation.

Despite the novelty of the concept, research on compensation for biodiversity conservation has commenced. There is an increased need to establish a separate compensation mechanism for biodiversity conservation in domestic law because of the distinctive features of biodiversity from other environmental aspects.\(^6\) Nevertheless, the compensation mechanism for environmental damage is still applied as a general compensation mechanism for biodiversity damage as the environment is a comprehensive and interrelated feature of which biodiversity components are a part.

The scholarship relating to compensation is divided into two schools - traditional and non-traditional. Legal scholars take the traditional approach to compensation for environmental and biodiversity damage, through the concept of civil liability as part of private law or tort law.\(^7\) Civil, together with administrative and criminal liabilities are the three legal

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\(^5\) For discussion of the concept of biodiversity, see Chapters Four and Five of the Thesis.


mechanisms for assuring compliance with environmental law, including biodiversity law. Other scholars, who take an interdisciplinary view (for example, socio-legal scholars or political economists), address compensation for biodiversity damage from a broader perspective.

Traditional legal scholars believe in the traditional function of civil liability to protect private rights when damage to private rights occurs, while scholars with an interdisciplinary approach believe that civil liability originates from the polluter-pays principle. Internationally, the principle of the polluter-pays principle (PPP) was incorporated into Principle 16 of the Rio Declaration requiring the polluter to ‘bear the cost of pollution’ while ‘internalising environmental cost and the use of economic instruments’ with appropriate consideration of public interest and the non-distortion of trade and investment internationally. Several Conventions, for example the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, also incorporate the principle of polluter pays into the text. The 1996 London Protocol develops the polluter-pays principle in specific cases of dumping waste as ‘polluter…in principle, bear[s] the cost of pollution, …those it has authorized to engage in dumping or incineration at sea bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest’. Scholars from an interdisciplinary approach such as Gunningham or Wibisana, share a common view of the role of civil liability as an economic incentive for environmental management and control. Unlike traditional legal scholars, who believe that an objective of

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9 EFTEC, IEEP et al, above n 6, 28-48.


13 See Gunningham, Darren Sinclair and Peter Grabosky, above n 8, 78; see Andri G. Wibisana, above n 7, 28.
Civil liability is to compensate injured persons for the damage caused to the environment, economists focus on sanctions on persons who cause such damage.

Foreign legal scholarship distinguishes two types of civil liabilities for environmental damage: strict liability and fault-based or negligence liability. Even though the two types of liability have the same objective, the main differences are the grounds for imposition of civil liability. Under the strict liability regime, infringers are liable to pay compensation whenever damage occurs even without fault; for example if a reservoir for a hydroelectric station breaks due to an accident, which causes the clearance of a nature reserve, the disappearance of endemic flora and the death of several endangered wild fauna. The business which operates the hydroelectric station in accordance with an approved plan is still liable for compensation for damage even in the case of non-fault. In contrast, under the fault-based regime, the infringers are liable only if there is a causal link between the damage and behavior.

Liabilities also can be divided into voluntary and mandatory liabilities. While offsetting for biodiversity damage due to the clearance of land is voluntary, mandatory liability is imposed by law and the person who causes damage is liable to pay compensation.

In summary, scholars have different views on compensation liability for environmental damage. All agree that the compensation liability mechanism - either under strict or fault-based liabilities - provided in domestic law exists in order to prevent damage and compensate for damage once the damage occurs. The best biodiversity compensation mechanism is probably a mixture of the two models offered by traditional legal scholars and interdisciplinary scholars, requiring an infringer to pay for biodiversity damage not only for the infringement of the interests of an individual but also of a community that is directly or non-directly affected by this infringement. In this case, there are may be two types of compensation: one, which can be negotiated between the infringer and the infringed, and another type of compensation which should be decided by a special environmental court, based on the legal rules for compensation.

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14 See Andri G. Wibisana, above n 7, 28.
Compensation is a popular legal remedy which is used to secure compliance with environmental law. Until recently, in Vietnamese legal scholarship studies of compensation and compensation liability in the environmental field were limited. Most research was conducted prior to the enactment of the 2005 LEP, except for the Project ‘Compensation Liability for Damage Caused by Behaviours Breaking the Environmental Law in Viet Nam’, which was finished in 2007. More importantly, there has not been any comprehensive study on liability for biodiversity damage and the effectiveness of compensation as a remedy provided by the Government in order to ensure compliance by Viet Nam with international environmental obligations.

There has not been any separate legal mechanism for compensation for biodiversity damage in Viet Nam. This may be because, biodiversity components including ecosystems/habitats, species or genes are considered to be part of the environment. Indeed, the 1993 LEP and its successive 2005 LEP include biodiversity components within their scope of regulation; hence all the legal principles and rules on compensation for environmental damage are applied to compensation for biodiversity loss.

Prior to the enactment of the 2005 Law on Environmental Protection, the only principle on compensation for environmental damage which also could be applied to cases of biodiversity damage, was set out in Article 52 of 1993 LEP. Clearly, the 1993 LEP followed the fault-based approach to compensation for environmental damage, including biodiversity damage. An organization or individual had to pay compensation for damage and restore the consequences only if they broke environmental rules and caused damage to any another

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15 See, for example, The Institute of Legal Research under Ministry of Justice, ‘Civil Liability in Environmental Field’ (Trach Nhiem Dan Su Trong Linh Vuc Moi Truong) - Ministry-level Project, 2002(unpublished material, on file with the author).

16 There are several studies conducted prior to enactment of the LBD in regard to compensation and compensation liability. For example, Vu, Thu Hanh et al, ‘Compensation Liability for Damage Caused by Behaviour Breaking the Environmental Law in Viet Nam’ (Trach Nhiem Boi Thuong Thiet Hai Do Hanh Vi Vi Pham Phap Luat Moi Truong O Viet Nam) (2007) (unpublished material, on file with the author).

17 The 1993 LEP, Article 2 (1) reads: ‘Components of the environment means factors that constitute the environment: air, water, soil, sound, light, subsoil, mountains, forests, rivers, lakes, sea, living organisms, ecosystems, population areas, production centres, nature reserves, natural landscapes, famous beauty spots, historical vestiges and other physical forms.’ The 2005 LEP, Article 3(2) reads ‘Environment components are those material factors which constitute the environment such as soil, water, air, sound, light, living organisms, ecosystems and other material forms’.
organization or individual. Hence the compensation mechanism set out in the 1993 LEP is an attempt of the 1993 LEP to enforce environmental law for effective environmental protection.

However, according to Article 52 of the 1993 LEP, the compensation mechanism for environmental damage functioned as a supplementary remedy for administrative offences and trials for criminal crimes, rather than as the application of a separate liability mechanism.

Currently there are three main legal bases for dealing with compensation for biodiversity damage in Viet Nam. First, Chapter XIV, Section 2 of the 2005 LEP creates rules for determination of damage categories, their level, scope and environmental component, which would assist in the assessment of damage and in claims for damage compensation. Secondly, Article 75 of the LBD directly regulates biodiversity compensation. Thirdly, the Decree of the Government Number 113/2010/ ND-CP dated 3 December 2010 providing Determination of Environmental Damage sets the principles, procedures and the methods for calculating damage. In comparison to the principle of compensation for environmental damage in the 1993 LEP, the current mechanism advances in the direct regulation of compensation for biodiversity component damage.

In Viet Nam, the concept of environmental damage has a broad meaning. Accordingly, the damage caused by pollution to and degradation of the environment includes both the damage caused by the degradation of environmental function and usefulness on the one hand, and damage to human health and life, and to property and legitimate benefits caused by the degradation of environmental function and usefulness. Hence the concept of damage includes both direct and indirect damage.

Indeed, this is the first time the current Vietnamese law creates a separate mechanism which directly addresses compensation for biodiversity component damage. Article 75 (1) requires individuals or/and organizations to be liable for compensating for biodiversity damage. Vietnamese law provides that if anyone causes damage to any form of biodiversity conservation such as protected areas, conservation facilities, or to biodiversity components such as wildlife or planted or domesticated fauna and flora, they must pay compensation.
Even though the law imposes a liability for biodiversity damage, the compensation mechanism does not take a merely legal approach towards compensation. This is because, beyond setting the criteria for categorising damage and their level and scope for biodiversity compensation, the 2005 LEP creates a mechanism for damage assessment or the modes for settling biodiversity compensation and insurance as alternative means to secure biodiversity conservation. More importantly, the compensation money which is paid to the State should be invested in activities for biodiversity conservation and sustainable development.\(^{18}\)

A detailed calculation and the procedures for determination of environmental damage, including biodiversity damage, are provided by the Government’s Decree on determination of environmental damage. However, the mechanism for determination of environmental damage in general and biodiversity damage in particular appears to be inconsistent for claiming compensation for biodiversity damage. This is because the mechanism within the Decrees is only applied to compensation claims by the State administrative agencies which are responsible for biodiversity management.\(^{19}\)

There has not been any explanation for compensation for biodiversity damage from the Government or in the scholarship discussion. It is likely that the Government takes the view that it considers the environment as a total ‘public good’ and takes responsibility for claiming compensation for damage as the representative of Vietnamese people. Also, the limited scope of the Decree’s mechanism for damage calculation in the governmental claims creates potential loopholes in the biodiversity compensation legal framework. For example, who could claim, and how should claims be made for damage to a listed fauna being bred in a conservation facility, or is this mechanism applicable to the calculation of compensation for biodiversity damage between non-State infringer and those infringed?

In summary, the compensation mechanism for biodiversity damage has not been sufficiently developed even after the enactment of the 2008 LBD. Hence further detailed rules should be made in order to ensure the effective operation of Vietnamese biodiversity law.

\(^{18}\) The \textit{LBD}, art 75

\(^{19}\) The \textit{Decree of the Government Number 113/2010/ ND-CP dated 3 December 2010 providing Determination of Environmental Damage}, art 3 (2).
3.2. Possibility of Adopting a Model of Specialist Environment Courts in Viet Nam

Compliance with international environmental obligations is of importance to the Vietnamese Government. Environmental issues have become a concern of the Vietnamese public in the context of economic development and increased public awareness of environmental protection. Hence a study of the environment court model has theoretical and practical significance. This section seeks to answer the question: should a specialist environment court be established in Viet Nam? It examines whether the model of an environmental court can be ‘transplanted’ into Viet Nam. In addition to giving an overview of the role of courts in dealing with environment matters, this section goes on to illustrate the particular role of an environmental court and the trend towards establishment of environmental courts in different jurisdictions. It then reviews in-depth both the advantages and disadvantages, arguments for the NSW Land and Environment Court as a successful model of an environment court and the rationale for a transplant of the Court’s model into Viet Nam.

i. Overview of Specialist Environment Courts

Domestic courts play key roles in the implementation, compliance and enforcement of international environmental obligations as they function as key domestic adjudicatory bodies to interpret, explain and enforce environmental law. The Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium in 2002, underlines that:

… the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised

Since the first ever environment court was established more than 30 years ago in New South Wales, Australia, there has been a trend to establish specialist environment courts in

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20 Several administrative law scholars have suggested establishing a specialist administrative tribunal for environmentally-related issues such as Land Tribunals in Viet Nam. See, Nguyen Van Quang, A model of administrative tribunals for Vietnam? in Clauspeter Hill/Jochen Hoerth (eds), Administrative Law and Practice from South to East Asia, (Konrad Adenauer Foundation, 2008), 249, 284-99.

different jurisdictions. This has been largely supported, especially in the last 5 years, despite
the fact that in many States, including the United States and Viet Nam, the major power for
enforcement of environmental law belongs to courts of general jurisdiction. As of 1 April
2011, at least 380 environment courts existed.

The environment court as a single specialist court is intended to make timely, fair and
consistent judgments. Hence, the emergence of specialist environmental courts was
described by the Chief Justice of Brazil, Antonio H. Benjamin as follows:

Courts are only now delineating the environmental dimensions to justice. Aspirations for
good governance and eco-sustainability depend on how courts enforce environmental
legislation and treaties. It is nothing short of remarkable that so many nations recently have
decided to establish environmental courts to do so.

In summary, since the establishment of the first environment court in 1980 in New South
Wales, Australia, there has been an expansion in the establishment of environment courts
focusing on enforcement and interpretation of environmental law.

ii. Environment Court Model: Land and Environment Court of New South Wales

The NSW Land and Environment Court was the first specialist environmental superior court
in Australia and the world. With more than 30 years of operation, NSW Land and
Environment Court is a good example of an environmental court for Viet Nam to emulate.

The NSW Land and Environment Court was established on 1 September 1980 under the
Land and Environment Court Act 1979 (NSW). The establishment of the Court was an
attempt to create a more effective mechanism to cover the review and appellate jurisdictions

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22 As of 1 April 2011, the Vermont Environment court was the only one in the United States. See ‘Giving Force
to Environmental Laws: Court Innovations around the World’, Brief Paper of 12th March 2011,
accessed on 25 April 2013.

23 Ibid.

24 Ibid.

25 Land and Environment Court Act 1979, (NSW)
2013.
of previous administrative tribunals and courts in the planning, land and environmental fields.

When establishing the Land and Environment Court, the late Hon Paul Landa, Minister for Planning and the Environment, argued that:

> [t]he judges of the new court will be equal in status to those of the Supreme Court. For the first time the jurisdiction of the new court will cover comprehensively the fields of planning, building, pollution, heritage, valuation and land tenure… Additionally, the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute resolving techniques, and it will utilize non-legal experts as technical and conciliation assessors.26

The argument for the establishment of the court was very clear. The creation of a specialised single environment and land court was designed to overcome the fragmentation caused by administrative tribunals and judicial mechanisms for hearing environmental, planning and land cases. In the past, many courts and tribunals had been involved in dealing with environmental and land matters. For example, the Land and Valuation Court, Valuation Boards of Review and the Supreme Court all had jurisdiction over matters of valuation, compulsory acquisition and land, while the Local Government Appeals Tribunal had dealt with building, subdivision and development matters. The enforcement of law was undertaken by different courts. While civil (equitable) enforcement was dealt with by the Supreme Court of New South Wales, the Local Court and other District Courts undertook criminal enforcement.27 This ad-hoc and irrational judicial mechanism for dealing with environmental law was inefficient,28 and needed to be replaced with a more effective mechanism.

The status of the Court as a specialist environment court made the court’s status equal to that of the Supreme Court. It was given exclusive jurisdiction in environmental, planning and land matters. According to Part 3 of the Land and Environment Court Act 1979, the Land

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and Environment Court has 8 classes of jurisdiction dealing with merits review, enforcement and appeals.\textsuperscript{29}

Substantively, environmental planning and protection matters dominate the Court’s work. In regard to biodiversity cases, the NSW Land and Environment Court has dealt with many cases of biodiversity matters, offences and crimes, such as clearance of an endangered ecological community, or actions likely to impact on threatened species or the adequacy of species impact statements, or biodiversity offsets.\textsuperscript{30}

The effectiveness of the Court was expected to be achieved with ‘the highest standard of competency and personal integrity of its judges, commissioners and support staff’.\textsuperscript{31} The personnel aspects of the court are important. Judges of the Court, including the Chief Judge and others are carefully selected.\textsuperscript{32} The appropriate personnel should have knowledge and expertise in environmental law and sciences.

The establishment and operation of the Land and Environment Court attracted criticism from local government, councils, mayors and the public. Councillor Peter Wood, the President of the Government Association, for example, questioned ‘if the court has a role, it should be to make determination according to law, not merit… they are far less qualified to be making decisions on merit than councillors and their community collectively.’\textsuperscript{33} The Sydney City Council and the Property Council suggested establishing an independent panel to hear development application cases.

While local governments and their officers argued for removing the powers of the Court for merit review of administrative actions, especially in regard to planning issues, several community organisations, such as the Environmental Defender’s Office (EDO), strongly

\textsuperscript{29} Land and Environment Court Act 1979, Part 3, Jurisdiction of the Court, arts 17-21.
\textsuperscript{30} For information of the biodiversity-related cases heard by the NSW Land and Environment Court, see http://www.lec.lawlink.nsw.gov.au/lec/issues_in_focus/biodiversity_cases.html, last accessed 19 May 2013.
\textsuperscript{31} See http://www.lec.lawlink.nsw.gov.au/lec/about.html#Purpose, last accessed on 11 April 2013.
\textsuperscript{32} See Land and Environment Court Act 1979, art 8(2).
disagreed with taking the merit appeal jurisdiction from the Environment Court. The EDO argued that merit review originated from the notion of natural justice. Accordingly, the reason for reviewing administrative decisions on the merits was that they might affect citizens’ interests, including legal, property, environmental interests or also legitimate expectations.34

In regard to the concern by local governments on merit reviews of their decisions because of the non-elected nature of the court, the Hon Justice Terry Sheahan, Judge of the Land and Environment Court, noted that in most cases councils opposed the decisions of higher levels of government rather than those by a court. Hence, from a historical perspective, their argument was unreasonable.35

The argument for supporting the operation of the Court was bolstered by the experience of the Court’s operation, the advantages of which were summarised by Hon Justice Brian J Preston, the Chief Judge of the NSW Land and Environment Court, as the so-called “desirable dozen” benefits of the Courts.36 The establishment of a specialist environmental superior Court with an integrated environmental jurisdiction exercised by judges and commissioners with special environmental and law knowledge and expertise, together with a broad range of both court personnel and dispute resolution mechanisms were the most important benefits.

In summary, the NSW Land and Environment Court was established as the first specialist environmental court in the world. It has shown its effectiveness as “a model of a successful environment court” dealing with environmental issues.37

iii. Viet Nam and the Possibility of Adopting a Model of Specialist Environment Courts

The legal literature and the practice of establishment and operation of environment courts in many jurisdictions, especially the NSW Land and Environment Court, illustrate the need for

34 Ibid.
36 See Preston BJ, above n 28, 405-9.
37 Ibid, 409.
establishment of environment courts as judicial bodies to deal with environmental matters. Nevertheless, until now, there has not been an environment court in Viet Nam. The question is whether Viet Nam should establish specialist environment courts?

There are several rationales for the establishment of specialist environment courts in Viet Nam. First, since Renovation was launched, the concept of rule of law has also been addressed and it also requires reform of State machinery. In the rule of law context, the role of the court in dispute resolution and enforcement of law must to be strengthened. Secondly, there is a possibility of an increase in environmental disputes because of the need for economic development and an increase in public awareness of environmental protection.38 Thirdly, in Viet Nam, people’s courts as courts of general jurisdiction are challenged when dealing with environmental matters due to their limited role, fragmented jurisdictions and lack of expertise in environmental law and environmental science.39 With these challenges, the courts of general jurisdiction are less able to address environmental issues.

How should the specialist environment court be established? As noted, there are approximately four hundred environment courts worldwide.40 They have different jurisdictions, organisations, etc. Nevertheless, the NSW Land and Environment Court, being the first environment court in the world, can be a model for successful environment courts worldwide.

Some may argue against the ‘transplanting’ of the NSW Land and Environment Court model into Viet Nam due to various differences between Viet Nam and New South Wales. There are distinctive features in each of the two jurisdictions; for example there is the status of an unitary State and a state within a federation; a developing and a developed economy; differences in environmental and legal contexts, including the government’s and the public’s approaches to the environment and the role of the judiciary in each jurisdiction.

38 See X. Hop, Solving the Problems in Regard to Disputes and Conflicts in Environmental Protection (Go Vuong Trong Tranh Chap, Xung Dot Ve Bao Ve Moi Triuong) (25th October 2011), Bo Tai Nguyen Moi Triuong http://www.monre.gov.vn/v35/default.aspx?tabid=428&CateID=24&ID=109572&Code=WDWA109572, last accessed 30 December 2012.

39 For a discussion of these problems of the people courts of Viet Nam, see Nguyen Van Quang, above n 20, 292.

However, there are also many arguments for supporting the transplanting of the NSW Land and Environment Court model into Viet Nam. First, the NSW Land and Environment Court, has been proven as a successful environment court. Following the establishment of the NSW Land and Environment Court, environment courts have been established in not only developed economies, but also developing countries such as in India. Secondly, the successes of the NSW Court model such as the special status of the court, coordinated and comprehensive environmental, including biodiversity, jurisdictions, combined courts and tribunal jurisdictions, the personnel and court self-reform, are matters that can be applied in any jurisdiction. With the special status of the court as a Supreme Court, the NSW Land and Environment Court has a special position in the NSW Court system, which assists the Court to deal with cases. As precaution and prevention are fundamental principles for solving environmental issues, environmental matters always require quick solutions.

CONCLUDING REMARKS

From theoretical perspective, compliance with international environmental obligations may be perceived as fulfillment of international environmental obligations. Implementation to comply with international environmental obligations is a process involving numerous elements, actors and factors including law and policy instruments, central-local context, legislators, bureaucrats, law enforcers, awareness, education, etc. Besides it, implementation to comply with environmental treaty obligations is also influenced by the treaty’s features and the domestic context. In fact, implementation to comply goes through two major stages. The first stage is to develop a proper law and policy framework setting out domestic legal requirements. The second stage is to enforce these legal requirements through managing and complying by individuals and businesses and assisting and compelling by different mechanisms such as financial resources, courts, tribunals or liabilities.

Viet Nam has developed a relatively comprehensive policy and legal framework and facilitating mechanisms to comply with international environmental obligations. However, the features of treaty itself and the context of a country in transition impede Viet Nam to comply with international environmental obligations. Overcoming these barriers by

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improving Vietnamese law and policy framework and other related actors and factors with the focus on establishment of environmental courts and developing a proper compensation mechanism can be an appropriate approach to the successful implementation to comply with international environmental obligations in Viet Nam.
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