

Liability for Pollution Damage in Vedan Vietnam Case

Alexandre Nikolaevich Chitov
Faculty of Law, Chiang Mai University
239 Huay Kaew Road, Muang District,
Chiang Mai, Thailand, 50200
E-mail: shytov@yahoo.com

Abstract

The article examines the landmark Vietnamese case of environmental pollution caused by a foreign investor: Vedan Vietnam. The author examines various regimes of environmental liability in Vietnamese law in the context of this case: criminal law regime, administrative law regime, and civil law regime. Criminal law has a very limited applicability to environmental crimes. This case suggests that Vietnam authorities prefer to use administrative mechanisms even in the most serious instances of environmental crime.

Keywords: Vietnam, environmental law, pollution, criminal law, administrative law, civil law, culture.

1. Introduction

Regulation of liability for environmental damage caused by pollution is the core of environmental law. Vietnam as well as other developing countries attempt to achieve the goals of environmental justice by means of a greater role of the governmental bodies than in the developed countries where a large proportion of the legal processes of imposing environmental liability is initiated by individuals and public interest groups.¹ In the developed countries, civil liability remains the major form of making

1 Quitzow, Rainer, Holger Bär, and Klaus Jacob. "Asia at a crossroads: new trends in environmental governance in India, China, Vietnam and Indonesia." *9th International Conference of the European Society for Ecological Economics*. 2011.

the polluter responsible for the damage. In Vietnam, it is different. Administrative liability by far is the most common way to deal with the polluters. This fact has been reflected in this article by considering the civil regime of liability only very briefly.

The issues of liability for pollution damage are global issues. Vietnam, similarly to other developing countries, faces massive environment problems.² At the same time, Vietnam has become well integrated into the world economy by joining the WTO in 2007. Joining the WTO resulted in a significant rise of foreign investments. \$16 billion of U.S. dollars of foreign investments were reported for 2007. The contribution of foreign direct investments (FDI) to national GDP of Vietnam increased dramatically from 2 percent in 1991 to 17.4 percent in 2007.³ As the condition of joining the WTO, Vietnam had to reform significantly many areas of law.

As a part of this process, Vietnam has created a modern system of environmental law. In 2005, Vietnam enacted new Environmental Protection Law which imposes a better control mechanism on investment activities.⁴ The Environmental Protection Law 2005 has been rewritten significantly in 2014.⁵ Vietnam has a complex system of liability for environmental pollution which can be channeled in three different ways: criminal law liability, administrative law liability, and civil law liability. This article will look at one particular case of environmental pollution in the context of different regimes of liability in pollution cases available in Vietnamese law.

Vedan Vietnam case attracted much of Vietnamese public attention at the time

-
- 2 **Vietnam Ecology & Nature Protection Handbook** - World Strategic and Business Information Library- Int'l Business Publications, 2007
 - 3 Vu Xuan Nguyet Hong et al. **Sustainable Development Impacts of Investment Incentives: A Case Study of the Mining Industry in Vietnam** - International Institute for Sustainable Development, 2009. – P. 4. Available on line: http://www.tradeknowledgenetwork.net/pdf/sd_incentives_vietnam.pdf (Accessed on 21.10.2010)
 - 4 English translation of the statute is available on line: <http://www.dpi.hochiminhcity.gov.vn/invest/html/Law-on-Environment.html> (Accessed on 21.10.2010)
 - 5 **Law on Environmental Protection** 2014, No. 55/2014/HQ13 English translation available at http://www.ilo.org/dyn/legosh/en/f?p=14100:503:15284832653628::NO:503:P503_REFERENCE_FILE_ID:172934:NO For a summary see: Environmental Protection Law 2014: Improving Sustainability of Environment Protection, **Vietnam Chamber of Commerce and Industry**, March 16, 2015, http://vccinews.com/news_detail.asp?news_id=31850

of the major environmental legislation reform in the years from 2005 to 2014. It is of interest not only to gain a better understanding of the current state of legislation on environmental protection in Vietnam, but also to observe the ways how an intentional act of polluting the environment on a larger scale has been addressed in this developing country.

2. Vedan Vietnam Case: the facts and significance

Vedan Vietnam case involved a 100% owned Taiwanese company, “Vedan Vietnam” which produced glutamate, starch, and soda. The company started its operation in Vietnam in 1993. It employed almost 2.000 people. It attained ISO 9001:2000 certification, and it was proud of being awarded on several occasions by the Vietnamese government in recognition of the company’s contribution to the economy, “for its outstanding achievement of product export and its contribution to the Vietnamese government’s revenue,” “for their important contribution to agriculture and rural development in Vietnam,” and as a “Distinguished Tax Payer”. The company was “dedicated to the building of schools, reduce poverty and sponsor charitable events.”⁶

This bright image of the company was seriously tarnished by the fact that in 2008, the personal of the company was caught at the very moment of illegal discharge of significant amount of untreated waste water in Thi Vai River in the South of Vietnam.⁷ On the 13th of September 2008, Vietnamese environmental police and inspectors from the Ministry of Natural Resources and Environment discovered that the company had installed a pumping system which allowed it to discharge secretly untreated waste water into the river. It was discovered that this had been done largely at night and in a regular manner. Three provinces were seriously affected. A report of one department of natural resources and environment in the worst affected province (Dong Nai) stated: “Thanks to assistance of the Institute for Environment and

6 Information obtained at the official website of the company: www.vedan.com.vn/en/ab_vedanvn.htm (Accessed on 21.10.2010)

7 The summary of the facts are at Hoang, Van Hai, et al. “Current Issues of Environmental Management in Vietnam: The Case of VEDAN Vietnam (特集 モノづくりと環境のマネジメント (2)).” 日本情報経営学会誌 33.1 (2012): 199-209.

Natural Resources, the department has defined the total number of farmer households affected by Vedan's polluting activities at 4,770 and the total area of aquatic breeding damaged by Vedan as 1754 hectares. Previously, the figures were fixed at 5064 families and 10,454 hectares." The figures for other two provinces (one of them is Ho Chi Minh City) were significantly less. One official report stated that 1255 families were victims in Ba Ria-Vung Tau Province.⁸ Another official report from Ho Chi Minh City spoke about 875 victims eligible for compensation.⁹

This case received high publicity in Vietnam. There was a mass condemnation of the company. Farmers, NGOs, politicians, a local catholic bishop, and even business partners such as BigC and Sai Gon Co.op denounced the company. The business partners refused to conduct commercial transactions with the company until the due restitution is made. The Prime Minister Nguyen Tang Dung demanded the closure of the factory and severe punishment of the offenders according to criminal law. One report mentioned hundreds of lawyers being ready to give legal assistance to the potential claimants only in one affected province.¹⁰ The legal outcome of this public outcry was surprisingly negligible.

Vedan Vietnam case is outstanding by the amount of publicity and public condemnation it has received, and at the same time of no significant legal output in terms of the courts decisions. Despite the seriousness of the environmental offence, the company avoided any criminal and civil law proceedings simply by paying 267.5million VND of administrative fine.¹¹ It is a precedent which will likely be followed by other similar cases. There is a general perception among experts in waste management, that

8 "Environment Dept. asks Vedan to compensate over 1,200 households" – Official News Release on 25.03.2010. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=81876&Code=R4HII81876> (Accessed on 13.04.2011).

9 "875 Can Gio households to get Vedan compensation" – Official News Release on 19.01.2011. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=95276&Code=A8TUZ95276> (Accessed on 13.04.2011)

10 "Southern farmers will meet Taiwanese polluter in court" – News Report 09/08/2010 – At: <http://vea.gov.vn/en/news/news/Pages/SouthernfarmerswillmeetTaiwanesePolluterincourt.aspx> (Accessed on 07.04.2011).

11 Hoang, Van Hai, et al. "Current Issues of Environmental Management in Vietnam: The Case of VEDAN Vietnam (特集 モノづくりと環境のマネジメント (2))." 日本情報経営学会誌 33.1 (2012): 199-209. P. 206.

generation of waste is widespread in the range of industries such as electrical mechanics, chemicals, metallurgy and food processing as in the present case.¹² However, despite the availability of legal remedies, lawyers, and strong public opinion, no polluters have been brought to trial.

3. Criminal liability issues in Vedan Vietnam Case

There were calls from many sides, including the Prime Minister of Vietnam, to apply criminal law sanctions against the responsible persons for the act of pollution considering the immense harm of the crime. No criminal charges were brought against any person. One possible explanation would be that rich businesses can exert tremendous influence on the process of justice by means of political or personal connections.¹³ Whatever the case might be, there are some serious institutional limitations on initiating criminal procedures against polluters in Vietnamese law. There are several provisions of criminal law which can be used against environmental polluters, their scope is rather limited. The key legal provision is contained in Section 183 of Penal Code which states the following:

“1. Those who discharge into water sources oil, grease, toxic chemicals, radioactive substances in excess of prescribed criteria, wastes, animal and plant residues, bacteria, micro bacteria, harmful and epidemical parasites or other harmful elements, have already been administratively sanctioned but deliberately refuse to apply remedial measures under decisions of the competent agencies, thus causing serious consequences, shall be subject to a fine of between ten million dong and one hundred million dong, non-custodial reform for up to three years or a prison term of between six months and three years.

2. Committing the crime and causing very serious consequences, the offenders shall be sentenced to between two years and seven years of imprisonment.

12 Nguyen Thi Kim Thai “Hazardous industrial waste management in Vietnam: current status and future direction” in: *J Mater Cycles Waste Manag* (2009) 11:258-262.

13 Gillespie J. et al. *Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes* Taylor & Francis, 2010. P. 20.

3. Committing the crime and causing particularly serious consequences, the offenders shall be sentenced to between five years and ten years of imprisonment.

4. The offenders may also be subject to a fine of between five million dong and fifty million dong, a ban from holding certain posts, practicing certain occupations or doing certain jobs for one to five years.”¹⁴

The text of Section 183 quoted above suggests that criminal sanction can be applied to polluters only in cases where there has been a failure to comply with specific administrative decisions. The applicability of criminal law to environmental offences is very restricted. In order to apply criminal law, the offender must first of all be already administratively sanctioned, and secondly, deliberately refuse to apply remedial measures under decisions of the competent agencies.

There are may be reasons to limit the applicability of criminal law in pollution cases since there is a risk that criminal penalties can be extended to the polluters who should be dealt with administratively rather than by means of punishment. There has already been a significant discussion on this issue in academic literature.¹⁵ The general consensus is that criminalizing severe acts of pollution is necessary to prevent future pollution accidents. Vietnam has chosen, perhaps, the most restrictive approach to the use of criminal penalties against gross polluters.

Similarly to other Asian countries, Vietnam displays the tendency of not allowing judges to use criminal law often in the cases of environmental pollution.¹⁶ Nevertheless, there is a strong pressure to expand the applicability of criminal law to punish polluters. In 2015, Vietnam adopted a new criminal law which was expected to become effective in July, 2016. However, its implementation was postponed and there is now a heated debate on additional amendments.¹⁷ According to the new law, legal

14 English translation of the Code is available on line: <http://www.worldlii.org/vn/legis/pc66.txt> (Accessed on 21.10.2010)

15 Brickey K. “Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory” in: **71 Tul. L. Rev.** 487 (1996-1997)

16 Shytov, Alexander. “Environmental Crime and Communication to the Public in China.” **Journal of Chinese Political Science** (2016): 1-19.

17 “NA discuss changes to Penal Code 2015.” **Vietnam News**. October, 27/2016 <http://vietnamnews.vn/>

entities will be held liable for environmental crimes.¹⁸ It is, however, unlikely that the legislative fetters on judicial activist in dealing with polluters will be completely removed. There can be economic reasons for limiting the criminal law jurisdiction. The political success in those countries is measured by the growth of GDP rather than by addressing vital environmental or ethical issues. There, however, can be another deeper reason for limiting the discretion of judges to use their discretion to apply criminal law. The Eastern Asian approach to law is distinguished by perceiving it largely as a type of technology which can be adopted from the West and be effectively used to reach local political and economic goals.¹⁹ Within this type of law vision, which is to some extent shared by the legal positivists in the Western cultural tradition,²⁰ judges are given a rather passive role to apply strictly legal rules in a machine like manner. Therefore, there is a natural reluctance to grant judges a significant leeway in choosing to apply criminal law provisions to polluters.

Vietnamese criminal law on environmental offences in this respect is not much different from Chinese criminal law.²¹ In Article 338 of the *Criminal Law of the People's Republic of China*, amended in 2011, the crime of pollution is described as following:

“Whoever releases, dumps, or disposes of radioactive wastes, wastes containing pathogen of contagious diseases, and toxic materials or other harmful substances in violation of state stipulations, causing serious environment pollution shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention, and

politics-laws/345157/na-discuss-changes-to-penal-code-2015.html#zdsKA97UdLEqE6aM.97 (Accessed on 01.12.2016)

18 Nguyen Cong Long. “Penal liability of legal entities under revised Penal Code: an initial analysis” **Vietnam Law and Legal Forum Magazine**. 25/12/2015 <http://vietnamlawmagazine.vn/penal-liability-of-legal-entities-under-revised-penal-code-an-initial-analysis-5150.html> (Accessed on 01.12.2016)

19 He, Peng. “Communicative Lawmaking in China.” **Chinese Lawmaking: From Non-communicative to Communicative**. Springer Berlin Heidelberg, 2014. 141-156.

20 Bankowski, Z. “Law, love and computers” in: 1 **Edinburgh L. Rev.** 25 (1996-1997); Riles, A. “New agenda for the cultural study of law: taking on the technicalities” in: 53 **Buff. L. Rev.** 973 (2005-2006)

21 Criminal Law of the People's Republic of China 1979, 1997, 2011 English translation is available at: <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> (Accessed on 29.04.2016)

may in addition or exclusively be sentenced to a fine; and in exceptionally serious consequences, not less than three years and not more than seven years of fixed-term imprisonment, and a fine.”

The binding interpretations of the Supreme Court of the PRC imposed further limitations on Chinese courts to implement effectively criminal law against polluters.²² It is interesting to observe that limitations on the judicial use of discretion in the Western penal codes are less restrictive. For example, German Criminal Code formulates pollution offences very broadly:

Section 324 Water Pollution: (1) Whoever, without authorization, pollutes a body of water or otherwise detrimentally alters its qualities, shall be punished with imprisonment for not more than five years or a fine. (2) An attempt shall be punishable. (3) If the perpetrator acts negligently, then the punishment shall be imprisonment for not more than three years or a fine.²³

French law has similar broad provisions although they are contained in the Environmental Code rather than Penal Code:

Article L216-6 (Order no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force on 1st January 2002) The act of disposing of, discharging or letting flow into surface, underground or seawater within the limits of territorial boundaries, directly or indirectly, one or more substances of any kind whose actions or reactions cause, even if only temporarily, harmful effects on health, fauna and flora, with the exception of damage referred to in Articles 218-73 and L. 432-2, or significant modifications to the normal regimen of water supply or limitations in the use of bathing waters, is punishable by two years of imprisonment and a fine of 75 000 euros. When the discharge is authorised by decree, the provisions of this paragraph are applicable only if the prescriptions of the aforementioned decree are not respected.²⁴

22 Shytov, Alexander. “Environmental Crime and Communication to the Public in China.” *Journal of Chinese Political Science* (2016): 1-19.

23 English translation of German Criminal Code is found at: <http://www.iuscomp.org/gla/statutes/StGB.htm#324> (Accessed on 08.04.2011)

24 English translation of French Environmental Code is found at: http://195.83.177.9/upl/pdf/code_40.pdf (Accessed on 08.04.2011)

In the end, both German and French legislators rely on the judges' ability to determine that pollution "detrimentally alters" the environment, or that it causes "harmful effects on health, fauna, and flora." Even though German and French judges have to rely on the expert's opinion in making such determinations, it is still in their judicial power to accept or reject a particular piece of scientific evidence. Attempt is also punishable. In environmental cases, the role of judges rises up to the level of political decisions.²⁵

Vietnamese law differs significantly from the Western systems of law despite the fact that Vietnam increasingly adopts the Western structure of law, its style as well as its literal expressions, particularly those found in the Continental system of law, such as in Germany and France. Unlike in those countries, Vietnamese judges are very limited in applying criminal law to polluters. Any judicial action against industrial polluters risks to confront the policy makers. Only politically independent judges can dare to challenge the governmental policies to tolerate pollution for the sake of economic development. Vietnamese judges are not among them. There are also normative constraints. Vietnamese court can impose a penalty on a polluter only if the polluter has ignored or disobeyed an administrative sanction already used against him. Only if this condition is met, can Vietnamese judges inquire in the seriousness of environmental harm in order to determine whether the offender deserves a criminal law sanction such as imprisonment or fine.

In other words, criminal law in Vietnam is given a role of the last remedy against a stubborn offender. In Vedan Vietnam case, the polluter complied with administrative orders following the discovery of the offence, although there was one report of its poor compliance.²⁶ It is up to the administrative organ to determine whether an act of compliance has taken place or not. In the present case, no criminal law penalty was imposed on the persons guilty in causing the environmental disaster.

4. Administrative liability issues in Vedan Vietnam Case

25 Oakes, J. "The judicial role in environmental law" in: **52 N.Y.U. L. Rev.** 498 (1977)

26 "Dong Nai polluter still discharging wastewater" – Official News Release on 30/10/2008. Available on line: <http://www.monre.gov.vn/monrenet/default.aspx?tabid=259&idmid=&ItemID=53686> (Accessed on 08.04.2011)

Even though Vedan Vietnam managed to avoid criminal prosecution, it could not escape from administrative fines and other administrative measures. A Vietnamese governmental website stated that the company “paid Government fines of 267.5 million dong (\$15,030) for its illegal acts, and 127 billion dong (\$7.14 million) in overdue environmental fees”.²⁷ The administrative sanctions applied against the company were taken under the Decree No 81/2006/ND-CP which was issued on the 9th of August, 2006.²⁸ As the case unfolded, the old decree was repealed and replaced by another Decree No 117/2009/ND-CP, dated 31st December 2009 which came into force on the 1st of March 2010.²⁹ Subsequently, in 2013, it was again replaced by the Decree No. 179/2013/ND-CP. The latter raised administrative fines up to 1 billion VND for individuals and 2 billion VND for organizations.³⁰

The 2006 decree gave Vietnamese officials in disposal a variety of other measures which could be taken against Vedan Vietnam: revocation of environmental permits, confiscation of material evidence and means used for committing administrative offences, “forcible application of measures to remedy the environmental pollution caused by their administrative violations,” “forcible taking out of the Vietnamese territory or forcible re-export of polluting goods or articles which have been brought into the country.”³¹ In cases of water pollution, the additional following measures could be applied: suspension of operation until all necessary environmental protection mea-

27 “Vedan capitulates, will compensate aqua-culturists in full” – Official News Release on 11/08/2010. Available on line: <http://vea.gov.vn/en/news/news/Pages/Vedancapitulates,willcompensateaqua-culturistsinfull.aspx> (Accessed on 06.02.2011)

28 **Rapport de la Cour populaire suprême du Vietnam sur le droit pénal de l’environnement** 2008. – Available on line: <http://www.ahjucaf.org/spip.php?article6787> (Accessed on 21.10.2010)

The English translation of the decree can be found at: <http://vea.gov.vn/en/laws/LegalDocument/Pages/DecreeNo812006ND-CP.aspx> (Accessed on 21.10.2010)

29 English translation is available on line: <http://faolex.fao.org/docs/pdf/vie96530.pdf>

30 **Ministry of Industry and Trade of the Socialist Republic of Vietnam**. “A fine up to 2 billion VND for administrative violations in the field of environment protection” 01/16/2014.

<http://www.moit.gov.vn/en/News/494/a-fine-up-to-2-billion-vnd-for-administrative-violations-in-the-field-of-environment-protection.aspx> (Accessed on 21.11.2016)

31 Article 7 of the Decree NO 81/2006/ND-CP (9th of August, 2006)

asures are applied, “ban from operation or forcible relocation of violating establishments to places far from residential areas and with a suitable environmental loadability.”³²

The official report on the case said that apart from imposing administrative fines, the company had been ordered to suspend its operations until ensuring the full compliance with environmental regulations. The wastewater discharge license was suspended, although not revoked completely by the Ministry of Natural Resources and Environment.³³ The company closed two plants and cut almost twice the volume of water used in its production, but did not stop its operation completely despite the suspension of the license. According to the same report, the company promised that wastewater would be exported to Taiwan by sea.

From the official reports it follows that the company was not required to conduct clean up operations or pay any future cleanup costs. The environmental fee of 127 billion dong (\$7.14 million) mentioned above can hardly be considered as the cost of cleaning up. The sum of fee was calculated less than in a month after the act of pollution was discovered.³⁴ It is hardly possible to calculate in such a short period of time the cost of cleaning up pollution carried out since 1993. Further, the official report was speaking about the “overdue environmental fees.” It is apparent that *overdue* fees do not relate to the future cleanup costs. Finally, it appears from reading the Vietnamese legislation that the environmental fee is distinguished from the environmental tax. The tax is applied against a range of products, while the fee is imposed for a specific type of activity: discharging waste into the environment or engaging in “activities causing adverse impact on the environment.”³⁵

The Law on Protection of Environment 2005 did not follow the polluter pay principle. It did not bind the amount of fee with the costs of cleaning up (Article 35).

32 Article 10 Article 7 of the Decree NO 81/2006/ND-CP (9th of August, 2006)

33 “Dong Nai polluter still discharging wastewater” – Official News Release on 30/10/2008. Available on line: <http://www.monre.gov.vn/monrenet/default.aspx?tabid=259&idmid=&ItemID=53686> (Accessed on 08.04.2011)

34 “Vedan sees no material impact on operations from Vietnam fine” – Official News Release on 10/10/2008. Available on line: http://www.itpc.gov.vn/investors/news/2008/10/2008-10-10.830056/MISNews_view?b_start:int=20&set_language=en (Accessed on 11.04.2011)

35 Law on Protection of the Environment, 2005. No. 52/2005-QH11. Article 113.

Accordingly, the same statute stated in Article 113 the following:

“Environmental protection charges. 1. Organizations and individuals discharging wastes into the environment or engaged in activities causing adverse impacts on the environment shall have to pay environmental protection charges. 2. Environmental protection charge rates shall be determined on the following grounds: a/ Volume of waste discharged into the environment and scale of adverse impacts on the environment; b/ Degree of toxicity of waste and hazard caused to the environment; c/ Load capacity of the environment that receives the wastes. 3. Environmental protection charge rates shall be adjusted to suit socio-economic conditions and environmental protection requirements of each period of national development. 4. All revenues from environmental protection charges shall be used for direct investment in environmental protection activities. 5. The Ministry of Finance shall assume the prime responsibility for, and coordinate with the Ministry of Natural Resources and Environment in, formulating and submitting to the Government regulations on environmental protection charges.”

Thus, there was no duty for the polluter to conduct cleanup operations. The new 2014 statute follows the same concept of environmental protection charges.³⁶ The environmental fee appears more as a charge imposed on a legitimate (authorized) act of pollution collected with the purpose of general enhancement of environmental quality without necessarily addressing the specific tasks of cleaning up a particular area affected by the polluting activities. In other words, the overdue fee imposed on Vedan Vietnam can hardly be classified as the cost of cleaning up.

The reason why the administrative fines and general charges (fees) do not address specific tasks of cleaning up the polluted areas can be of purely fiscal nature: the government always lacks revenues. It can also explain the unwillingness of the government to use criminal law measures against polluters discussed above. The active use of administrative sanctions appears to be in a sharp contrast with the lack of effective prosecution of environmental polluters under the Vietnamese criminal law. One explanation of this abnormality is that the small criminal law fines (not more than

36 Law on Protection of the Environment. 2014. No. 55/2014/QH13. Article 148.

100 million dong) cannot be compared with the amount of revenues obtained from environmental fees and administrative fines.

There are some facts which illustrate this general tendency. One report, without specifying the dates, says that sanctions had been applied to hundreds of companies, and more than 2.000 companies had to pay compensation.³⁷ Another report stated³⁸ that in the period of 2000 – 2005, 26.540 environmental offences including criminal offences have been discovered by the police. Out of them, 25.314 cases were dealt with administrative fines. The total size of the fines reached 49.644 billion Vietnamese dong. The second report indicates clearly that administrative sanctions are preferred to criminal law proceedings. The official figures also indicate a dramatic increase of administrative sanctions under administrative legislation after Vedan Vietnam case: “According to a statistical report of the Environmental Police Department under the Ministry of Public Security, in 2009, the domestic authorities disclosed and punished around 4,500 cases of environmental violations, up four times against 2008.”³⁹ The tendency continued in the following years.⁴⁰

The administrative law on environmental offences⁴¹ referred above display the increased willingness of the Vietnamese government to deal with polluters by means of administrative fines. The 2009 increase in the amount of fines by an administrative decree can be considered as the direct response to Vedan Vietnam case. It imposed

37 Giang Phuong. **Pollution : Vedan Vietnam sera punie** - 18/09/2008 <http://lecourrier.vnagency.com.vn/default.asp?xt=xt36&page=newsdetail&newsid=45655> (Accessed on 21.10.2010)

38 **Rapport de la Cour populaire suprême du Vietnam sur le droit pénal de l’environnement 2008.** – Available on line: <http://www.ahjucaf.org/spip.php?article6787> (Accessed on 21.10.2010)

39 “Tougher punishments for environmental violations” – **Socialist Republic of Vietnam: Government Web Portal** – 08.01.2010 - <http://news.gov.vn/Home/Tougher-punishments-for-environmental-violations/20101/5941.vgp>

40 *Viet Nam News*. “3,000 pollution cases end in fines” June, 12/2010 <http://vietnamnews.vn/politics-laws/law-justice/200493/3000-pollution-cases-end-in-fines.html#7wfERsR4xW8Tc2Ru.97>

For the administrative fines in the high profile case of Taiwan’s Formosa Plastics Group see: Chabba S. “Formosa Fined \$500 Million For Vietnam’s Environmental Disaster” **International Business Times**. 06/30/2016 <http://www.ibtimes.com/formosa-fined-500-million-vietnams-environmental-disaster-2388515> (Accessed on 21.11.2016)

41 See the Decree No 117/2009/ND-CP and the Decree No. 179/2013/ND-CP.

much heavier fines than the previous decree. The highest administrative penalty rose up to VND 500 million (over US\$27,000) per single offence. It was over seven times higher than the previous rate of VND 70 million. It was also five times higher than the highest rate prescribed by the Vietnamese Penal Code in relation to the crime of pollution.⁴² 2013 Decree raised the administrative fines even higher.

The fact that administrative measures are heavier in financial terms than criminal law penalties is noteworthy from several points of view. The administrative fines are set up by an administrative regulation which is considered of a less legal weight than a statutory penalty. These administrative regulations can be easily changed and do not receive the same publicity as the legislative acts. The administrative fines depend largely on administrative discretion, and they can be easily misused. The case of Vedan Vietnam indicates that a fine can be accompanied by a significant amount of environmental fees as discussed above. Further, Vedan was found of guilty of 12 administrative offences each of them involved a separate fine. The method of determining those offences remains unclear from the reading of official reports on this case.⁴³

Even though the Vietnamese law provides judicial remedies against unauthorized imposition of fines, Vietnam is still in the process of establishing genuinely independent judiciary.⁴⁴ Historically, the only effective institutional force which can control the exercise of administrative powers in Vietnam is the Communist Party. Its reasoning, however, is not framed within the concepts of legality. It is political expediency rather than abstract notions of “environmental justice” which play the key role in making the Party decisions.

The efficient control over the complex system of enforcement of environmental regulations is still to be developed in Vietnam. The *Law on Protection of the Envi-*

42 Article 183 of Penal Code. English translation of the Code is available on line: <http://www.worldlii.org/vn/legis/pc66.txt> (Accessed on 21.10.2010)

43 “Government slaps \$7.72m fine on MSG maker Vedan” - Official News Release on 08/10/2008. Available on line <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=52106&Code=IJSIT52106> (Accessed on 12.04.2011)

44 Suiwah Leung et al. **Globalization and Development in the Mekong Economies** - Edward Elgar Publishing, 2010. P. 184.

ronment sets up a complex regime of checks and inspection of environmental protection.⁴⁵ The power to inspect is first of all granted to the local government: the people's committee of the locality. Further, the regulatory organ which conducted EIA has the responsibility to direct and organize inspection of the implementation of the items in the approved environmental impact assessment report. Finally, the Ministry of Natural Resources and Environment has the broad administrative powers of inspection.

In the *Vedan Vietnam* case, none of the mentioned organs above managed to uncover the fact of massive pollution carried out during many years by the foreign investor by means of official inspections. In the end, it was a police operation conducted at night which provided evidence of the gross violation of the environmental law. The case casts doubt on the efficiency of environmental inspections mechanism set up by the law. Even though *the Law of Protection of the Environment* 2014 grants the Ministry of Natural Resources and Environment broad powers, the law itself contains hardly any guarantees against the abuse of powers, or remedies against the failure to perform its functions. The legislative rules tend to be vague, open to various interpretations, give almost unlimited discretion to the administrative organs, and not stable. The Vietnamese mechanism of imposing administrative sanctions for environmental offences is comparatively new and very dynamic. Potentially, it can meet the interests of environmental justice, but much will depend on the educational level and moral integrity of Vietnamese administrators.

5. Civil liability issues in Vedan Vietnam Case

The influence of administrative organs does not end with the regime of environmental inspections and possible administrative sanctions for violations of the ever increasing number of environmental regulations. One noteworthy feature of Vietnamese law is that the company can be ordered by the government to compensate the victims of pollution within the framework of civil law. That is what exactly happened with Vedan Vietnam. The company was told to compensate the farmers affected by

45 Law on Protection of the Environment. 2014. No. 55/2014/QH13.

the illegal discharges in civil law proceedings.⁴⁶

General principles of Vietnamese civil law pertaining to non-contractual civil liability for damage are not different from other countries of the Continental legal system.⁴⁷ The victims in *Vedan Vietnam* case could sue the company either on the ground of suffering “damage caused by infringement upon property,”⁴⁸ or “damage caused by infringement upon health.”⁴⁹ Both grounds allow the plaintiff recover economic losses. Further, Article 624 of Civil Code specifically addresses damage caused by pollution: “Individuals, legal persons or other subjects who pollute the environment and thereby cause damage shall have to compensate as provided for by law, even in cases where the environment polluters are not at fault.”

Vedan Vietnam case is also remarkable by the fact that despite alleged massive pollution and thousands of affected people, there was no any court decision both in criminal or civil jurisdictions. Criminal charges were not filed. Administrative sanctions were imposed by administrative organs themselves, and civil law disputes were ordered by the government to be settled by means of private negotiations. Those negotiations were protracted. The government pressed the case of the farmers affected by the pollution. The process of negotiations was complicated by the reason that the company had to negotiate compensation deals with the representatives of the affected provinces separately.

One compensation agreement was signed in August, 2010 with the farmers from Ba Ria-Vung Tau province. The company promised to compensate farmers for the losses it caused at the amount of VND53.6 billion (US\$2.8 million). It also agreed to

46 “Pollution report ordered to push Vedan to compensate” – Official News Release on 18. 06. 2009 Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelD=58&ID=67218&Code=FA39F67218> (Accessed on 13.04.2011)

“Polluter Vedan offers lower compensation, ministry asks for PM’s instruction” – Official News Release on 11.06. 2010. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelD=58&ID=86209&Code=3Y3LE86209> (Accessed on 13.04.2011)

47 Chapter XXI of Vietnamese Civil Code 2005. Unofficial English translation is available on line: [http://mirrors.creativecommons.org/international/vn/civil-code-2005-\(English\).pdf](http://mirrors.creativecommons.org/international/vn/civil-code-2005-(English).pdf) (Accessed on 16.04.2011)

48 Article 608 of Civil Code 2005.

49 Article 209 of Civil Code 2005.

pay the province People's Committee VND500 million (\$26,300) to cover their cost of calculating the losses.

At the same time, Ho Chi Minh City has also negotiated a separate agreement with the company who promised to pay VND45.7 billion (\$2.3 million) to the victims of the City. The negotiations with the representatives from Dong Nai Province were the most difficult since this province has been affected the most severely. The company, under the pressure of the government, offered to the victims of the province VND120 billion (\$6.2 million) of compensation. At first, Dong Nai authorities and farmers rejected the offer as insufficient. Most victims were farmers growing shrimp who claimed that the offer will not cover their economic losses. One official report, however, stated that the overwhelming majority of Dong Nai farmers eventually accepted the offer. The report said that there were still a small number of farmers who had decided to pursue their legal claims for full compensation. At the time of writing, there has been no news report that a Vietnamese court has made any decision in the case. News reports indicated that Vedan generally fulfilled its promises and continued to pay agreed compensation to those victims who accepted the settlement agreement.

These agreements, however, are something different from private law settlements in which the defendant and the plaintiffs freely negotiate the terms of the settlement. First of all, the local officials had to negotiate with the company on behalf of the victims with the active involvement of the central government. The governmental agencies, particularly the Ministry of Natural Resources and Environment, were actively lobbying the interests of the farmers. Second, the evidence of pollution, and the assessment of the affected area as well as the number of victims were provided by Ho Chi Minh City Institute for Environment and Resources. It was established by a decision of the Ministry of Education and Training in 1996 as a member of the Vietnam National University - Ho Chi Minh City. It is now considered as one of the top research institutions of the country within the state educational system. In other words, the presentation of the evidence was assigned to the institution which would likely be a final scientific authority for all Vietnamese judges who would have decide on the case. Third, the amount of compensation was set rather

arbitrarily without making assessment of actual and economic losses suffered by the victims. What was the most striking in this case is that the consent of the victims to stop legal action and to receive compensation was obtained with the active assistance of governmental officials before informing the victims of the actual size of compensation each family should receive.⁵⁰ Finally, the distribution of compensation was arranged by means of special funds administered by local officials.

Considering Vietnamese culture, reaching an out-of-court settlement is a preferred model of dispute resolution.⁵¹ Vietnamese people are reluctant to go to courts perceiving them as non-reliable to solve private disputes. At the same time, local authorities took a proactive role in exerting a pressure on the company to pay some compensation to the people affected by the act of pollution. The local authorities managed to persuade the victims to accept whatever compensation from the company.

The reason for the unusual role of local government officials in settling a civil law dispute may lie in the Vietnamese culture which lacks the important element of the rule of law as it is understood in the West. Historically, Vietnamese culture was influenced by Confucianism with its emphasis of personal relationships based on seniority and gratitude. Vietnam used to be a French colony for almost a hundred years, but the French law was not instilled in the national culture. It was used only among French people. The Vietnamese were governed by their own law.⁵² After the French period, Vietnamese law was largely influenced by communist ideas, which emphasized the superiority of ideology over legal norms. The reform towards the rule of law began in 1992 with the revision of the constitution. It is apparent, that the short historical period of the advancement of the rule of law is not sufficient to bring about the legal environment where people are used to abide by legal norms.

50 “Most Dong Nai farmers accept Vedan’s compensation” – Official News Release on 31/08/2010. Available on line: <http://vea.gov.vn/en/news/news/Pages/MostDongNaifarmeracceptVedan%E2%80%99scompensation.aspx> (Accessed on 13.04.2011)

51 Moon, Don. “Neither Reluctant nor Aggressive Legalism: East Asian Countries under the World Trade Organization Dispute Settlement Mechanism.” *Pacific Focus* 28.1 (2013): 62-98.

52 Odell A., Castillo M. “Vietnam in a Nutshell: An Historical, Political and Commercial Overview” in: *International Law Practicum* Autumn, 2008. P. 82.

6. Conclusion:

Vedan Vietnam is a landmark case in Vietnamese environmental law. The way how the government handled the case is controversial. A clear result of this case is that general perception of the developing countries as neglecting environmental issues and offering “pollution haven”⁵³ cannot be unequivocally applied to Vietnam any more.

One must also reject the view suggested in some writings about Vietnamese environmental law that “the legal system on environmental protection is lacking.”⁵⁴ Such view is largely brought about by the expectations that environmental law can provide clear technical standards and procedures to deal with pollution. Instead, the environmental law task is not so ambitious: it is about creating the mechanism of environmental control over polluting industries and the way environmental harm is addressed. In this respect, Vietnam has a developed environmental law despite the ambiguity of many legal provisions. Having concluded so, we must not overlook the facts that those legal mechanisms do not work effectively. In *Vedan Vietnam* case, criminal law measures were not applied despite the scale of pollution and the gross fault of the company. Administrative fines and environmental protection fees were imposed on the company in a rather arbitrary way without assessing the full scale of actual environmental damage and without offering any measures to clean up the pollution. Civil law mechanisms were seriously affected by political interventions of the Vietnamese Government.

In this context, the public reaction to *Vedan Vietnam* case is very significant. It shows that Vietnamese society has realized the importance of protecting the environment and that it is not prepared any more to tolerate extensive pollution as the cost of economic development. The case creates the precedent for the future civil law litigation. It has stimulated the reform of criminal law which is on the way, and what is more significant in the Vietnamese cultural and political context, it will

53 **Unraveling the Worldwide Pollution Haven Effect.** World Bank Publications, 2006. Siebert H. **Economics of the Environment: Theory and Policy.** Springer, 2008. P. 185.

54 Thai, Nguyen Thi Kim. “Hazardous industrial waste management in Vietnam: current status and future direction.” **Journal of material cycles and waste management** 11.3 (2009): 258-262.

motivate a better implementation of the various administrative mechanisms of environmental protection. Even though a recent increase in the amount of administrative fines is reported as not effective in many cases,⁵⁵ it is perceived as one of the expressions of the growing public awareness in Vietnam in dealing with the effects of environmental pollution.

55 VietNamNet Bridge “Firms continue to pollute despite fines and penalties” 29/12/2014 <http://english.vietnamnet.vn/fms/environment/119015/firms-continue-to-pollute-despite-fines-and-penalties.html> (Accessed on 21.11.2016)

References

- “875 Can Gio households to get Vedan compensation” - Official News Release on 19.01.2011. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=95276&Code=A8TUZ95276> (Accessed on 13.04.2011)
- Article 10 Article 7 of the Decree N0 81/2006/ND-CP (9th of August, 2006)
- Article 183 of Penal Code. English translation of the Code is available on line: <http://www.worldlii.org/vn/legis/pc66.txt> (Accessed on 21.10.2010)
- Bankowski, Z. “Law, love and computers” in: **1 Edinburgh L. Rev.** 25 (1996-1997); Riles, A. “New agenda for the cultural study of law: taking on the technicalities” in: **53 Buff. L. Rev.** 973 (2005-2006)
- Brickey K. “Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory” in: **71 Tul. L. Rev.** 487 (1996-1997)
- Chapter XXI of Vietnamese Civil Code 2005. Unofficial English translation is available on line: [http://mirrors.creativecommons.org/international/vn/civil-code-2005-\(English\).pdf](http://mirrors.creativecommons.org/international/vn/civil-code-2005-(English).pdf) (Accessed on 16.04.2011)
- Criminal Law of the People’s Republic of China 1979, 1997, 2011 English translation is available at: <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> (Accessed on 29.04.2016)
- “Dong Nai polluter still discharging wastewater” – Official News Release on 30/10/2008. Available on line: <http://www.monre.gov.vn/monrenet/default.aspx?tabid=259&idmid=&ItemID=53686> (Accessed on 08.04.2011)
- “Dong Nai polluter still discharging wastewater” – Official News Release on 30/10/2008. Available on line: <http://www.monre.gov.vn/monrenet/default.aspx?tabid=259&idmid=&ItemID=53686> (Accessed on 08.04.2011)
- “Environment Dept. asks Vedan to compensate over 1,200 households” – Official News Release on 25.03.2010. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=81876&Code=R4HII81876> (Accessed on 13.04.2011).

For the administrative fines in the high profile case of Taiwan's Formosa Plastics Group see: Chabba S. "Formosa Fined \$500 Million For Vietnam's Environmental Disaster" **International Business Times**. 06/30/2016 <http://www.ibtimes.com/formosa-fined-500-million-vietnams-environmental-disaster-2388515> (Accessed on 21.11.2016)

Giang Phuong. **Pollution : Vedan Vietnam sera punie** - 18/09/2008 <http://lecourrier.vnagency.com.vn/default.asp?xt=xt36&page=newsdetail&newsid=45655> (Accessed on 21.10.2010)

Gillespie J. et al. **Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes** Taylor & Francis, 2010. P. 20.

"Government slaps \$7.72m fine on MSG maker Vedan" - Official News Release on 08/10/2008. Available on line <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=52106&Code=IJSIT52106> (Accessed on 12.04.2011)

He, Peng. "Communicative Lawmaking in China." **Chinese Lawmaking: From Non-communicative to Communicative**. Springer Berlin Heidelberg, 2014. 141-156.

Hoang, Van Hai, et al. "Current Issues of Environmental Management in Vietnam: The Case of VEDAN Vietnam (特集 モノづくりと環境のマネジメント (2))." *日本情報経営学会誌* 33.1 (2012): 199-209. P. 206.

Law on Environmental Protection 2014, No. 55/2014/HQ13 English translation available at http://www.ilo.org/dyn/legosh/en/f?p=14100:503:15284832653628::NO:503:P503_REFERENCE_FILE_ID:172934:NO

Law on Protection of the Environment, 2005. No. 52/2005-QH11.

Law on Protection of the Environment. 2014. No. 55/2014/QH13.

Law on Protection of the Environment. 2014. No. 55/2014/QH13.

Ministry of Industry and Trade of the Socialist Republic of Vietnam. "A fine up to 2 billion VND for administrative violations in the field of environment protection" 01/16/2014.

Moon, Don. "Neither Reluctant nor Aggressive Legalism: East Asian Countries under the World Trade Organization Dispute Settlement Mechanism." **Pacific Focus** 28.1 (2013): 62-98.

- “Most Dong Nai farmers accept Vedan’s compensation” – Official News Release on 31/08/2010. Available on line: <http://vea.gov.vn/en/news/news/Pages/MostDongNaifarmeracceptVedan%E2%80%99scompensation.aspx> (Accessed on 13.04.2011)
- “NA discuss changes to Penal Code 2015.” **Vietnam News**. October, 27/2016 http://vietnamnews.vn/politics-laws/345157/na-discuss-changes-to-penal-code-2015.html#zdsKA97UdLE_qE6aM.97 (Accessed on 01.12.2016)
- Nguyen Cong Long. “Penal liability of legal entities under revised Penal Code: an initial analysis” **Vietnam Law and Legal Forum Magazine**. 25/12/2015 <http://vietnamlawmagazine.vn/penal-liability-of-legal-entities-under-revised-penal-code-an-initial-analysis-5150.html> (Accessed on 01.12.2016)
- Nguyen Thi Kim Thai “Hazardous industrial waste management in Vietnam: current status and future direction” in: **J Mater Cycles Waste Manag** (2009) 11:258-262.
- Oakes, J. “The judicial role in environmental law” in: **52 N.Y.U. L. Rev.** 498 (1977)
- Odell A., Castillo M. “Vietnam in a Nutshell: An Historical, Political and Commercial Overview” in: **International Law Practicum** Autumn, 2008. P. 82.
- “Polluter Vedan offers lower compensation, ministry asks for PM’s instruction” – Official News Release on 11.06. 2010. Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=86209&Code=3Y3LE86209> (Accessed on 13.04.2011)
- “Pollution report ordered to push Vedan to compensate” – Official News Release on 18. 06. 2009 Available on line: <http://www.monre.gov.vn/v35/default.aspx?tabid=675&CatelID=58&ID=67218&Code=FA39F67218> (Accessed on 13.04.2011)
- Quitow, Rainer, Holger Bär, and Klaus Jacob. “Asia at a crossroads: new trends in environmental governance in India, China, Vietnam and Indonesia.” **9th International Conference of the European Society for Ecological Economics**. 2011.
- Rapport de la Cour populaire suprême du Vietnam sur le droit pénal del’environnement** 2008. – Available on line: <http://www.ahjucaf.org/spip.php?article6787> (Accessed on 21.10.2010)

Rapport de la Cour populaire suprême du Vietnam sur le droit pénal de l'environnement 2008. – Available on line: <http://www.ahjucaf.org/spip.php?article6787> (Accessed on 21.10.2010)

See the Decree No 117/2009/ND-CP and the Decree No. 179/2013/ND-CP.

Shytov, Alexander. “Environmental Crime and Communication to the Public in China.” **Journal of Chinese Political Science** (2016): 1-19.

“Southern farmers will meet Taiwanese polluter in court” – News Report 09/08/2010 – At: <http://vea.gov.vn/en/news/news/Pages/SouthernfarmerswillmeetTaiwanese-polluterincourt.aspx> (Accessed on 07.04.2011).

Suiwah Leung et al. **Globalization and Development in the Mekong Economies** - Edward Elgar Publishing, 2010. P. 184.

Thai, Nguyen Thi Kim. “Hazardous industrial waste management in Vietnam: current status and future direction.” **Journal of material cycles and waste management** 11.3 (2009): 258-262.

The summary of the facts are at Hoang, Van Hai, et al. “Current Issues of Environmental Management in Vietnam: The Case of VEDAN Vietnam (特集 モノづくりと環境のマネジメント (2)).” **日本情報経営学会誌** 33.1 (2012): 199-209.

“Tougher punishments for environmental violations” – **Socialist Republic of Vietnam: Government Web Portal** – 08.01.2010 - <http://news.gov.vn/Home/Tougher-punishments-for-environmental-violations/20101/5941.vgp>

Unraveling the Worldwide Pollution Haven Effect. World Bank Publications, 2006. Siebert H. **Economics of the Environment: Theory and Policy.** Springer, 2008. P. 185.

“Vedan capitulates, will compensate aqua-culturists in full” – Official News Release on 11/08/2010. Available on line: <http://vea.gov.vn/en/news/news/Pages/Vedancapitulates,willcompensateaqua-culturistsinfull.aspx> (Accessed on 06.02.2011)

“Vedan sees no material impact on operations from Vietnam fine” – Official News Release on 10/10/2008. Available on line: http://www.itpc.gov.vn/investors/news/2008/10/2008-10-10.830056/MISNews_view?b_start:int=20&set_language=en (Accessed on 11.04.2011)

Viet Nam News. “3,000 pollution cases end in fines” June, 12/2010 <http://vietnam-news.vn/politics-laws/law-justice/200493/3000-pollution-cases-end-in-fines.html#7wfERsR4xW8Tc2Ru.97>

Vietnam Ecology & Nature Protection Handbook - World Strategic and Business Information Library- Int’l Business Publications, 2007

VietNamNet Bridge “Firms continue to pollute despite fines and penalties” 29/12/2014 <http://english.vietnamnet.vn/fms/environment/119015/firms-continue-to-pollute-despite-fines-and-penalties.html> (Accessed on 21.11.2016)

Vu Xuan Nguyet Hong et al. **Sustainable Development Impacts of Investment Incentives: A Case Study of the Mining Industry in Vietnam** - International Institute for Sustainable Development, 2009. – P. 4. Available on line: http://www.tradeknowledgenetwork.net/pdf/sd_incentives_vietnam.pdf (Accessed on 21.10.2010)

หน่วยงานผู้แต่ง: คณะนิติศาสตร์ มหาวิทยาลัยเชียงใหม่ ถ.ห้วยแก้ว ต.สุเทพ อ.เมือง จ.เชียงใหม่ 50200
เมลติดต่อ: shytov@yahoo.com

Affiliation: Faculty of Law, Chiang Mai University 239 Huay Kaew Road, Muang District, Chiang Mai, Thailand, 50200 E-mail: shytov@yahoo.com

