

II. Vietnamese Wage Rates Are Not Determined by Free Bargaining Between Labor and Management.

A. Summary of Comment

De facto conditions in the Socialist Republic of Vietnam preclude free bargaining between labor and management over wage rates. The Vietnamese government, in conjunction with the Communist Party, controls labor-management relations such that market forces do not set wage rates in Vietnam.

B. The Department's Standard

An important element in the Department's consideration of whether a country has a market economy is the status of the legal right of workers to freely bargain for their wages, as well as the de facto ability of workers to meaningfully exercise such rights.¹ In past determinations of a country's market or nonmarket economy status, the Department has considered how labor and management negotiate wage rates, as well as other indicia of meaningful labor rights, such as whether unions are subject to government control or influence.²

Section 771(18)(b)(ii) of the Act requires the Department to analyze whether wages are market-based to determine whether a particular country has a nonmarket economy. Free bargaining over wage rates is important to a nonmarket economy analysis because wage rates constitute a large component of producers' costs and prices and serve as an "important indicator of a country's overall approach to setting prices and costs in the economy."³ Particularly, the Department looks to "free bargaining between labor and management" to determine whether

¹ See, e.g., Russia NME Memo at 10; Kazakhstan NME Memo at 7-8.

² See Russia NME Memo at 10; Kazakhstan NME Memo at 7; Poland NME Memo at 30; Slovakia NME Memo at 6; Czech NME Memo at 6; Hungary NME Memo at 2, 7; Latvia NME Memo at 7.

³ Russia NME Memo at 9; Kazakhstan NME Memo at 7.

there exists a “market for labor in which workers and employers are free to bargain over the terms and conditions of employment.”⁴

C. Analysis

Vietnamese wage rates are not based on free bargaining between labor and management. They therefore cannot be relied upon to calculate market-based costs or prices.

1. The Vietnamese Government Restricts Public Information Regarding Vietnamese Labor Conditions.

In analyzing the lack of free bargaining over wage rates in Vietnam, it is first important for the Department to recognize that the extensive reports on which it has relied in past nonmarket economy analyses is not available with regard to labor conditions or rights in the Socialist Republic of Vietnam. Public materials regarding this issue are scarce, as noted by the Congressional Research Service:

Comprehensive analysis and detailed information about labor rights in Vietnam are difficult to obtain . . . News reports about labor activism are scarce, and the Vietnamese government has only recently begun to compile comprehensive information about labor conditions across the country. As the ILO has noted, one of the major problems in Vietnam is a lack of statistical and systematically collected information on labor relations. Correspondingly, the English information that exists is scarce, tends to be anecdotal, and tends to focus on conditions at factories owned by or linked to Western multinationals. In contrast to larger countries like China and India, Vietnam has slipped under the radar screen as far as country-wide studies of worker rights are concerned; the most comprehensive, up-to-date reports that are available are in the State Department’s annual human rights report on Vietnam. Even these documents, however, rely heavily on anecdotal evidence and incomplete information that often are compiled by the Vietnamese government.⁵

⁴ Russia NME Memo at 9. See also Kazakhstan NME Memo at 7.

⁵ Mark Manyin et al., “Vietnam’s Labor Rights Regime: An Assessment,” CRS Report for Congress, Mar. 23, 2001, at 3 {hereinafter CRS Labor Rights Report}, attached as **Exhibit 2**.

The Department and Petitioners are therefore handicapped in their analysis of the Vietnamese economy by a predominance of materials supplied by the Vietnamese Government. An impartial analysis of Vietnam's labor market is, as a result, a difficult task. The absence of unbiased analytical materials on the status of labor-management bargaining, itself, evidences the absence of free market forces in the Vietnamese labor market.

2. De Facto Conditions Surrounding Labor-Management Negotiations in Vietnam Do Not Reflect Free Bargaining over Wage Rates.

Ambassador Chien's letter to Secretary Evans states that Vietnam's Labor Code provides for workers to be "paid on the basis of agreement between them and their employers."⁶ This statement belies the control the Vietnamese government retains over worker-employer relations and overstates the extent to which Vietnamese workers exercise their rights. The de facto status of labor-management negotiations supercedes de jure conditions for purposes of the Department's analysis. Although Vietnamese legislation may indicate on the surface that the state has granted workers the right to negotiate freely with employers over wage rates, the Department's practice is to look at de facto conditions.⁷

The Vietnamese labor situation is distinctly different from that in Kazakhstan and Russia, which the Department recently determined have sufficiently transitioned from nonmarket to market economy status to be considered market economy countries under U.S. trade law. The Department found that workers in Kazakhstan "largely negotiate their own wages" and that such rights were established in the Law on Labor.⁸ Similarly, in its determination granting Russia

⁶ Letter from Ambassador of the Socialist Republic of Vietnam Nguyen Tam Chien, to Secretary of Commerce Donald L. Evans (Aug. 1, 2002), at <http://www.vietnamembassy-usa.org/news/newsitemprint.php3?datestamp=20020821140647>.

⁷ See, e.g., Russia NME Memo at 10; Kazakhstan NME Memo at 7-8.

⁸ See Kazakhstan NME Memo, at 7.

market economy status, the Department relied on de facto evidence of negotiation between employers and employees,⁹ noting that “[i]ndividually negotiated employment contracts are the norm and reflect the relative bargaining positions of labor and management.”¹⁰ Because de facto conditions do not support the assertion that workers in Vietnam “are paid on the basis of agreement between them and their employers,” the Department should not determine that Vietnamese workers may freely bargain for their wages. As noted below, they may not meaningfully exercise their rights.

a. Despite Codification of a Right to Free Bargaining Between Labor and Management, the Vietnamese Government Has Not Ensured that Workers Are Aware of and Exercise Their Rights.

Article 7 of the Labor Code of Vietnam states that “worker wages are in accordance with an agreement reached between the employee and the employers.”¹¹ On the surface, this suggests that Vietnamese workers have a right to bargain freely with their employers. In reality, however de facto market-based wage rates have not resulted from de jure recognition of the right to free bargaining over wage rates because implementation and enforcement of the Labor Code has been inconsistent.

First and foremost, the Labor Code does not impact all segments of the Vietnamese labor market. The Code explicitly removes “members of political and social institutions” from its reach.¹² For a communist country like Vietnam, this is a potentially enormous, undefined, category of workers to exclude from the process of free market bargaining over wage rates. As

⁹ See Russia NME Memo, at 10 n.19.

¹⁰ See id. at 12.

¹¹ See Labor Code of the Socialist Republic of Vietnam, Art. 7, ¶ 1.

¹² See CRS Labor Rights Report at 10, attached as **Exhibit 2** (citing Labor Code of the Socialist Republic of Vietnam, Arts. 2-4).

such, it indicates that the Labor Code may, on its face, not apply broadly to the Vietnamese labor market.

Secondly, the right to bargain over wage rates is not familiar to Vietnamese workers. Despite the language of the Code, “most Vietnamese workers and employers are unaware of the provisions of the Labor Code.”¹³ Implementation of the Labor Code, which is frequently left to local Communist Party organizations,¹⁴ has dragged due to a “large major backlog in drafting decrees and by-laws to support the Code.”¹⁵ Furthermore, Vietnam has recently produced a plethora of laws dealing with subjects such as labor law, further confusing the subject. According to the Congressional Research Service, “{m}any of those laws have been poorly drafted; they have already been amended several times because of their incompleteness or lack of enforcement provisions.”¹⁶ Rights that are easily granted and easily amended may be easily withdrawn. This is particularly the case in Vietnam, where the government’s approach to labor-management relations remains in a state of transition.¹⁷ As a result, the right to negotiate over wage rates, granted in the Labor Code, is unreliable.

b. Restrictions on Free Bargaining Between Labor and Management Particularly Affect Foreign-Invested Enterprises.

¹³ Id. at 10.

¹⁴ See, e.g., Ministry of Labor, War Invalids and Social Affairs, Decision Concerning the Minimum Salary Rate and Salary of Vietnamese Labourers Working in Foreign-Invested Enterprises (June 15, 1999), Art. 5, at <http://asemconnectvietnam.gov.vn/laws/law.asp?idlaw=114> (stating that the “chairmen of the Centrally controlled provincial and municipal People’s Committees, head of the Department of Salaries and Wages and (FIEs) employing Vietnamese labourers have a responsibility for implementing this Decision.”).

¹⁵ CRS Labor Rights Report at 10, attached as **Exhibit 2**.

¹⁶ Id. at 6.

¹⁷ See Central Institute for Economic Management, “Vietnam’s Economy in 2001,” Mar. 2002, § II.6.2, available at <http://www.ciem.org.vn/>, attached as **Exhibit B**.

Restrictions on free bargaining over wage rates specifically affect foreign-invested enterprises (“FIEs”). FIEs are severely limited in their ability to freely hire Vietnamese workers and they must pay a higher minimum wage than domestic enterprises.

By law, FIEs are required to hire employees selected or recommended by state-run job placement centers, and to pay a statutorily-mandated fee upon recruitment of the employees.¹⁸ The employment procedure is specified by the Ministry of Labor, War Invalids, and Social Affairs (“MOLISA”), which also issues the “working contract.”¹⁹ In fact, FIEs may only recruit Vietnamese workers directly if a job placement center “files a written statement that it cannot meet the requirements of the employers in selecting or recommending laborers.”²⁰ Even then, FIEs must keep MOLISA apprised of the situation.²¹ They must inform MOLISA after “each recruitment” of an employee.²² It is through these mechanisms that the Vietnamese government maintains control over the labor-management relationship.

Additionally, FIEs must pay their employees a significantly higher minimum wage than domestic enterprises, as required by MOLISA.²³ Vietnamese enterprises pay their workers the

¹⁸ See Decree No. 72-CP of October 31st, 1995 of the Government Stipulating Detailed Provisions and Guidance for the Implementation of a Number of Article on Employment in the Labor Code, Art. 21, ¶ 1, at <http://www.hcminvest.gov.vn/html/reg-labor-de72.htm>; see also Circular of Labor, Invalids and Social Affairs Giving Instructions for Organization and Operation of a Center for Employment Service as Referred to in Decree No.72/CP Dated 31/10/1995 Elaborating and Giving Detailed Instructions for Implementation of Labor Code Provisions Concerning Employment, Mar. 10, 1997, Art. 1, ¶¶ 2-3, at <http://www.ivietnam.com/Eng/Laws/Content/Detail.asp?CatID=10&DocID=178>.

¹⁹ See Circular Providing Guidance for Implementing Some Articles of Government Decree 85/1998/ND-CP Dated October 20, 1998 Referring to Recruiting, Using, and Managing Vietnamese Working for Foreign Organisations and Individuals Operating in Vietnam, No. 09/1999/TT-BLDTBXH (Mar. 15, 1999), § II.4, at <http://asemconnectvietnam.gov.vn/laws/law.asp?idlaw=50>.

²⁰ See Decree No. 72-CP of October 31st, 1995 of the Government Stipulating Detailed Provisions and Guidance for the Implementation of a Number of Article on Employment in the Labor Code, Art. 21, ¶ 2, at <http://www.hcminvest.gov.vn/html/reg-labor-de72.htm>.

²¹ See *id.*

²² See *id.* ¶ 3.

²³ See MOLISA Decision Concerning the Minimum Salary Rate and Salary of Vietnamese Labourers Working in Foreign-Invested Enterprises, No. 708/1999/QD-BLDTBXH, June 15, 1999.

equivalent approximately of U.S.\$12 per month, whereas FIEs are required to pay employees between U.S.\$33 and U.S.\$43 per month.²⁴ Minimum wage rates vary depending on the geographical area in which a worker is employed.²⁵ Government-set dual wage rates cause FIEs to have higher input values and insulate domestic enterprises from competition with FIEs. Higher FIE minimum wage rates, combined with government control over the employees hired by higher-paying FIEs provides a basis for pervasive government control of labor and protection of domestic industries.

c. The Vietnamese Government Only Permits Collective Bargaining Under the Auspices of the Vietnamese Communist Party.

The Socialist Republic of Vietnam's limited progress in the labor rights arena is also demonstrated by its unwillingness to ratify International Labor Organization ("ILO") Conventions on collective bargaining, freedom of association, and protection of the right to organize.²⁶ In fact, Vietnamese labor relations fall far below ILO standards. Vietnam's ratification of only three of the eight fundamental ILO Conventions places it in the company of other developing nations such as Somalia, China, and Afghanistan.²⁷

Language in the Labor Code states that Vietnamese workers may establish and join trade unions,²⁸ but in reality, "{t}here is no true right of association in Vietnam."²⁹ Workers are only permitted to form unions to aid in wage rate bargaining under the auspices of a national trade

²⁴ See CRS Labor Rights Report at 16-17, attached as **Exhibit 2**.

²⁵ See MOLISA Decision Concerning the Minimum Salary Rate and Salary of Vietnamese Labourers Working in Foreign-Invested Enterprises, No. 708/1999/QD-BLDTBXH, June 15, 1999, Art. 1.

²⁶ See U.S. Commercial Service, Vietnam Country Commercial Guide, at 86.

²⁷ See Ratifications of the ILO Fundamental Conventions, at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>.

²⁸ See Labor Code of the Socialist Republic of Vietnam, Art. 7, ¶ 2.

²⁹ CRS Labor Rights Report at 11, attached as **Exhibit 2**.

union aligned directly with the Communist Party, the Communist Party Fatherland Front's Vietnam General Confederation of Labor ("VGCL").³⁰ VGCL trade unions "are controlled by the Party and have only nominal independence."³¹ As such, the VGCL does not provide an independent bargaining function or representative role that would aid in the creation of a market in which there is free bargaining over wage rates. Moreover, the Vietnamese Communist Party "has no wish to see unions grow too strong. It realizes that Vietnam's primary draw for foreign investors is an inexpensive, pliant, and relatively efficient workforce."³² Vietnamese law, by making unions formed under the auspices of the VGCL "extensions of the {Vietnamese Communist Party}, . . . effectively deputizes labor unions, assigning them the often contradictory responsibilities of representing the interests of both the workers and the state."³³ Here, as in other areas of the Vietnamese economy, a free market is precluded by State and Communist Party control.

³⁰ See *id.*

³¹ See U.S. Dept. of State, Vietnam Country Report on Human Rights Practices for 2001, at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8384.htm>.

³² Statement of Mark Levinson, Director of Research and Policy, Union of Needletrades, Industrial and Textile Employees (UNITE) on the United States-Vietnam Bilateral Trade Agreement before the U.S. Senate Finance Committee, June 26, 2001, at http://www.usvtc.org/BTA/statement_of_mark_levinson.htm (quoting Margot Cohen, "Vietnam: Please, No Rabble-Rousing," Far Eastern Economic Review, Apr. 26, 2001).

³³ CRS Labor Rights Report at 12, attached as **Exhibit 2**.