III. Vietnam Maintains Significant Restrictions on Joint Ventures and Other Foreign Investment

A. Summary of Comment

The Government of Vietnam retains significant restrictions on joint ventures and foreign investment, thereby shielding domestic enterprises from market-based competition. The process for obtaining approval for foreign investment projects is cumbersome and frequently subject to political interference. Finally, Vietnam is a very difficult business environment for foreign investors because the Vietnamese government has failed to reform its legal and economic infrastructure.

B. The Department's Standard

Pursuant to Section 771(18)(b)(iii) of the Act, the Department must consider the extent to which joint ventures or other investments by firms from other countries are permitted in Vietnam. As the Department noted in its Russia determination, foreign investment "tends to expose domestic industry to competition from market-based suppliers and the management, production and sales practices that they bring. It also tends to limit the scope and extent of government control over the market, since foreign investors, as a general rule, demand a certain degree of autonomous control over their investments."[1]

The Department's evaluation in previous NME inquiries of the laws and regulations governing joint ventures and other foreign investment and, importantly, the climate affecting foreign investors sets the standard for evaluating Vietnam. In general, those countries that the Department has found to have successfully transitioned to a market economy have permitted virtually all forms of foreign investment (joint ventures, wholly-foreign owned companies, etc.)

[1] See Russia NME Memo at Section 3.

and in almost all economic sectors, and have allowed repatriation of 100 percent of post-tax profits in hard currency.[2] Foreign-owned enterprises were guaranteed treatment equal to domestic enterprises in virtually all respects and were protected from uncompensated expropriations.[3] While foreign investors in these countries may have encountered some difficulties, such as an inefficient judicial system or complex tax code,[4] the Department found that the governments were fundamentally committed to policies designed to promote foreign investment and complete the transition to a market economy.[5] Such is not the case in the Socialist Republic of Vietnam.

C. Analysis

In contrast to the governments of the countries that have graduated to market economy status, the Government of Vietnam has not embraced foreign investment as an element of an overall policy to reform the economy along market principles. Rather, judging by the government's actions and pronouncements, Vietnam wishes to attract foreign investment in order to develop its economy, but at the same time seeks to limit the influence of foreign investors and does not intend to permit competition throughout all sectors of the economy. In fact, the government has been quite clear about its intentions. For example, the preamble to the "Commercial Law," passed in 1997, states that "{t}he Commercial Law shall serve as the legal framework for the development of a socialist oriented market driven multi-sector commodity economy under State administration in which the State owned sector plays the leading role and,

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[2] Investment restrictions were limited to only a few sensitive or strategic sectors. See Poland NME Memo at 13-14; Slovakia NME Memo at 7; Czech NME Memo at 7; Hungary NME Memo at 8-9; Latvia NME Memo at 8-10; Kazakhstan NME Memo at Sec. 3; Russia NME Memo at Sec. 3.

[3] See, e.g., Czech NME Memo at 7; Hungary NME Memo at 8-9; Russia NME Memo at Sec. 3.

[4] See, e.g., Czech NME Memo at 8; Russia NME Memo at Sec. 3.

[5] See, e.g., Latvia NME Memo at 8; Kazakh NME Memo at Sec. 3.

together with the co-operative economic sector, forms the cornerstone of the national economy . . . ."[6] (emphasis added) This attitude is significantly different from the attitude toward foreign investment that prevailed in former NMEs. In those countries, foreign investment was seen not only as an economic development tool, but also as an integral part of the process of privatization and withdrawal of heavy government intervention and control in the economy.[7] Vietnam's attitude toward permitting foreign investment only to the extent necessary to further its internal development goals while maintaining a state-controlled economy is evidenced in a number of critical areas, as discussed below.

1. Vietnam's Foreign Investment Regulations Are Highly Restrictive

Regulations on foreign investment in Vietnam are highly restrictive and place "major limits on the industries in which foreign investors may operate, the structure of their investment vehicles, their ability to finance their operations and their capacity to respond to changes in economic circumstances."[8] Foreign investments are governed by the "Law on Foreign Investment in Vietnam," which was passed in 1996 as an entirely separate body of law from the laws governing state-owned enterprises or domestic private enterprises.[9] The law stipulates that foreign investments are limited to four major types: wholly foreign-owned companies, joint ventures, business cooperation contracts, and build-operate-transfer projects.[10] Joint ventures have been the most common form of foreign investment, in part due to Vietnam's restrictive land

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[6] Preamble to Commercial Law, quoted in Duc Trang, "The Practice of Law and Foreign Investment in Vietnam," 22 Whittier L. Rev. 1067, 1098 n.154 (2001) (hereinafter "The Practice of Law and Foreign Investment"), attached at Exhibit 3-1.

[7] See, e.g., Latvia NME Memo at 8-9; Kazakhstan NME Memo at Sec. 3.

[8] See Economist Intelligence Unit, Country Commerce Vietnam (April 2002) at 14 (hereinafter "EIU Country Commerce Vietnam").

[9] See "The Practice of Law and Foreign Investment" at 1098-99.

[10] See Law on Investments, Art. 4; EIU Country Commerce at 16.

policies.[11] Because the state owns all land in Vietnam, Vietnamese nationals can only buy and sell fixed-term land use rights.[12] Foreigners, however, may not own land use rights, but may only lease land from the government or form a joint venture with a Vietnamese partner that holds land use rights.[13] Because of difficulties in obtaining and preparing sites, foreign investors have largely opted to form joint ventures, most of which are with state-owned enterprises.[14] But whereas the foreign investor must contribute a minimum of 30 percent of the joint venture's equity (and is usually limited to a maximum of 70 percent), the Vietnamese partner's contribution almost always consists of land use rights that are valued at artificially high rates. The Vietnamese partner, therefore, does not actually contribute any capital, and the high land use cost places a financial burden on the newly-formed joint venture that cannot be easily overcome.[15] In addition, the state can reclaim the land at any time,[16] which leaves the foreign investor vulnerable to political interference.

Further, the Vietnamese government does not permit foreign-invested firms to raise capital through the issuance of shares, which domestic enterprises may do under the Law on Enterprises that came into effect in January 2000. Rather, the government is considering implementing a separate plan for FIEs that would permit "equitization" only for foreign firms that meet certain strict requirements. To qualify, an FIE must have been in Vietnam for at least five years and profitable for at least two consecutive years, the foreign investor must retain at

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[11] See EIU Country Commerce Vietnam at 20.

[12] See id.

[13] See id.

[14] See id. 23.

[15] See id.

[16] See id. at 20.

least a 30 percent share in the FIE, and the FIE must be planning to expand operations or invest in new technology.[17]

2. The Vietnamese Government Exerts Significant Control Over Foreign Investments

As noted above, the Vietnamese government has no intention of relinquishing its control over the economy, which extends to exerting political control over foreign investment. For example, Article 56 of the Law on Foreign Investment charges the Ministry of Planning and Investment (MPI) with managing foreign investment activities in Vietnam. Among its duties are to "preside over the evaluation of investment projects," "issue investment licenses," "evaluate social and economic effects of foreign investment activities," and "inspect and supervise the implementation of foreign investment activities."

The MPI is nominally in charge of approving foreign investment projects, but the reality is more complex.[18] The Prime Minister's office, for example, retains authority to approve larger or more "sensitive" projects.[19] Prime ministerial approval is also required for investment licenses for projects (a) with investment capital of over $40 million; (b) in the areas of culture, insurance, finance, auditing, press and publishing, sea and air transportation, and posts and telecommunications; (c) that use five hectares or more of urban land or 50 hectares or more of rural land; and (d) in industrial zones, export processing zones, and build-operate transfer projects.[20] In addition, foreign investors must obtain approval from ministries or other

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[17] See id. at 22-23.

[18] See id. at 16.

[19] U.S. Foreign Commercial Service, Vietnam Country Commercial Guide FY 2002 at 72, at http://www.usatrade.gov (hereinafter "Country Commercial Guide").

[20] See Country Commercial Guide at 74.

government bodies that regulate the pertinent economic sector,[21] and frequently must obtain licenses from provincial or municipal planning or investment agencies.[22] Indeed, foreign investors often must engage in protracted negotiations with numerous municipal, provincial, and state agencies to win approval for large projects, which may still be rejected by the highest levels of the central government or Communist party, thus demonstrating that "the intrusive role of the state in the foreign investment area necessarily means that foreign investors are subject to Vietnam's political dynamics."[23]

3. The Vietnamese Government Restricts Competition in the Market

The Vietnamese government has gone to considerable lengths to protect domestic producers from foreign competition. For example, foreign investors in certain sectors, including footwear, clothing, steel, cement, paper and paint, have sometimes been required to export a large percentage of their output as a condition of project approval.[24] In addition, although the U.S.-Vietnam Bilateral Trade Agreement lifted the 80 percent export requirement on FIEs in the protected sectors noted above, the Vietnamese government retained export requirements for some sectors ("commonly-used" construction steel, PVC, and certain fertilizer) and instituted new export requirements for additional sectors. These newly-affected sectors cover a broad array of manufactured goods, such as motorbikes, buses and certain trucks, water pumps, electrical and communication cable, video and audio products, shaped aluminum products, bicycles and accessories, distribution transformers, and diesel engines.[25] In addition, wholly-

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[21] See Country Commercial Guide at 72.

[22] See EIU Country Commerce Vietnam at 16.

[23] "The Practice of Law and Foreign Investment" at 1093-95.

[24] See Country Commercial Guide at 74.

[25] See Vietnam, Export Requirements for Investors, at http://web.ita.doc.gov/ticwebsite/apweb.nsf/795c3ca6e24078cd85256bb1006b330e/41ef5e9a9de219cb85256bc00060834d!OpenDocument.

foreign owned enterprises must export at least 80 percent of their production of certain types of cargo ships, fishing boats, river boats, motor boats; and barges.[26]

The Vietnamese government has also failed to enact basic legislation such as a law on competition. The draft Law on Competition is currently in its fifth iteration, which will be further modified before it is submitted to the government for approval in November 2002. Even if this version is approved, it will not be submitted to the National Assembly until April 2003 and not enacted until October 2003. The Deputy Minister of Commerce who is the chair of the drafting committee has indicated, however, that it "would take a long time for the law to make its presence felt after coming into effect."[27] Under the proposed law, the government would be able to exempt key industries from the law, including banking, mining, aviation, telecommunications, electricity and oil. The government would also be empowered to restrict competition in order to, for example, "reinforce the competitiveness of Vietnamese enterprises in the international market" or "raise the capacity of small and medium-sized enterprises."[28] The law penalizes price collusion, dumping, and market manipulation, and appears to define having a market share of over 50 percent as "abuse of market dominance."[29] It is particularly revealing that the draft legislation allows the government to prevent "excessive competition" by intervening in the market to set floor prices.[30] As these provisions make clear, the proposed "competition" law, while not yet enacted, is a feeble measure that is incapable of introducing true market-based competition to Vietnam.

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[26] See id.

[27] See "Law on Competition Set for 2003," Thanh Nien, Sept. 14, 2002, collected in Development Vietnam at 10 (Sept. 18, 2002), attached at Exhibit 3-2.

[28] See EIU Country Commerce Vietnam at 37.

[29] Id.

4. Foreign Investors Face Many Obstacles in Vietnam Due to the Government's Failure to Reform

Vietnam is simply a very difficult place to do business. Foreign investors must contend with numerous "deficiencies in the investment climate," such as weaknesses in the "protection of property rights and efficient regulation of markets, the supervision of the financial system, and the policy framework for infrastructure development."[31] The Central Institute for Economic Management, a Vietnamese government "thinktank," has pinpointed many obstacles to foreign investment in its March 2002 report on the Vietnamese economy, including cumbersome and unclear administrative procedures and widespread corruption.[32] Foreign investors themselves have identified numerous difficulties; the length of time required to negotiate contracts and delays in receiving project approvals from the government are some of the most "vociferous and frequent" of their complaints.[33]

Vietnam initially attracted a wave of foreign investment in the early and mid-1990s after it took the first steps to open its markets to investors, but, as the United National Conference on Trade and Development observed, "economies that have been relatively isolated from international capital flows and have recently opened up may . . . get a substantial wave of FDI."[34] Foreign investors, however, have since soured on Vietnam. According to the World Bank, Asian Development Bank, and United Nations Development Programme, "the large inflows of the mid-1990s must not be understood as normal," and "Vietnam's attractiveness has sunk in recent

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[30] Id.

[31] David Dollar, "Reform, Growth, and Poverty in Vietnam," World Bank (May 2002), at 18, http://econ.worldbank.org/files/15033_wps2837.pdf (hereinafter "Reform, Growth and Poverty in Vietnam").

[32] Central Institute for Economic Management, Vietnam's Economy in 2001 at Section IV.3 (Mar. 2002), attached at Exhibit B.

[33] Countrywatch Vietnam at "Foreign Investment Climate," attached at Exhibit 3-3.

years," in part because of "delays in approvals" and "perceived capricious shifts in the regulatory environment."[35] New foreign investment commitments "are running at an anaemic US$100m a month," mostly for small projects.[36] This demonstrates that Vietnam "has not followed its initial reforms with sufficient institutional upgrading" so that it can effectively compete for foreign investment.[37]

The lack of reform combined with the economic downturn in the region has made Vietnam a much less attractive location for foreign investors; one noted that "when Vietnam was growing at 9-10 percent a year, people were willing to come here and fight the battle . . . . But at 4 percent, it isn't enough."[38] Many foreign investors have, in fact, pulled out of Vietnam: in 2000, 69 joint ventures, with a total value of $1.62 billion, were dissolved.[39] According to the IMF, foreign direct investment dropped from 7.5 percent of GDP in 1996 to only 2.5 percent in 1999 and 2000.[40] Foreign direct investment fell 55.6 percent in the first six months of 2002.[41] The 2001 "Global Competitiveness Report" also reflects the realization that Vietnam is a less attractive destination for foreign investment than previously. Vietnam's rank on the Growth Competition Index dropped from 52 in 2000 to 60 in 2001 (out of 75 countries ranked), while its

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[34] The World Investment Report 2002, UNCTAD (Sept. 17, 2002), at 23; www.unctad.org/WIR/contents/wir02_dl.htm.

[35] Vietnam 2010: Entering the 21st Century; UN Development Report 2001, Joint Report of the World Bank, Asian Development Bank, and United Nations Development Programme, Overview at 9, at http://www.adb.org/Documents/Reports/VietNam_2010/Overview.pdf.

[36] EIU Country Report Vietnam (July 2002), at 29.

[37] "Reform, Growth and Poverty in Vietnam" at 20.

[38] "The Practice of Law and Foreign Investment in Vietnam" at 1069 n.12.

[39] Id.

[40] See Vietnam: Selected Issues and Statistical Appendix at 31, Country Report No. 02/5, International Monetary Fund (Jan. 2002), http://www.imf.org.

[41] "Vietnam to Prioritize WTO Membership," Agence France Presse (Aug. 12, 2002), attached at Exhibit 3-2.

rank on the Current Competition Index slipped from 53 in 2000 to 62 in 2001.[42] Thus, rather than showing "remarkable achievements" in opening its economy to foreign investment,[43] in reality the enthusiasm foreign investors exhibited for Vietnam in the early to mid- 1990s was, indeed, "overblown," "significant goodwill towards Vietnam has largely been frittered away," and Vietnam is now "off the radar screen."[44]

As the discussion above makes clear, the Government of Vietnam has limited the forms and sectors available to foreign investment in order to limit competition with domestic enterprises and retain government control over the economy. The government's continuing failure to reform the economy has eroded foreign investors' interest in Vietnam, thus further curtailing the Vietnamese economy's exposure to market forces. In short, the Department cannot find that the Communist government of Vietnam has made sufficient progress in opening its economy to foreign investment to merit market economy status.

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[42] See World Economic Forum, "Global Competitiveness Report," at http://www.weforum.org/site/homepublic.nsf/Content/Global+Competitiveness+Programme%5CReports%5CGlobal+Cometitiveness+Report+2001-2002.

[43] Letter from Ambassador Chien to Secretary Evans at 5.

[44] "The Practice of Law and Foreign Investment" at 1103.