## IV. The Vietnamese Government Maintains Ownership and Control of the Means of Production in Vietnam

### A. Summary of Comment

The control of the Vietnamese economy by the Communist Government of Vietnam continues to be extensive, both in terms of the numbers of enterprises it owns and the breadth of its ownership across sectors of the economy. It has failed to restructure and reform the economy to reduce the pervasiveness of state-owned enterprises and to strengthen the private sector. Finally, the government owns all land in Vietnam and does not recognize private property rights.

### B. The Department's Standard

The Department is required to examine the extent of government ownership or control of the means of production in its analysis of whether to graduate Vietnam to market economy status, according to Section 771(18)(B)(iv). In its two most recent determinations to revoke NME status involving Kazakhstan and Russia, the Department explained that the right to own private property is "fundamental" to a market economy, and the extent of private sector involvement in the economy is an indicator of the extent to which the economy operates on market principles.[1] For both countries, the Department identified privatization of industrial enterprises and land reform as the two key elements in its assessment of this factor.[2] In its decision to graduate Latvia, the Department noted that the government "aimed to undo what had been done during the Soviet era" and embarked on a concerted privatization program from the time it gained its independence from the Soviet Union.[3] The government felt a particular "moral and legal imperative" to restore private property to its previous owners and, although the process

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[1] See Kazakhstan NME Memo at Sec. 4; Russia NME Memo at Sec. 4.

[2] See id.

[3] Latvia NME Memo at 11.

proved to be more difficult than anticipated, the government gave individual use priority over collective use of land, with the result that virtually all non-forested land was in private use by the end of 1999.[4]

In its previous inquiries regarding NME status, the Department has considered the nature and success of the privatization programs undertaken by the transitioning governments.[5] The Department has also focused on the passage of laws to ensure private property rights,[6] the active commitment by the government to privatization as a fundamental aspect of a market economy and means to distribute wealth,[7] and the continuing effort to reduce government enterprise holdings, especially in profitable large-scale enterprises.[8] Thus, even though the Department found that progress toward privatization was by no means equally steady and swift in all these countries, nevertheless significant progress had been made in each country and it was clear that their commonly-shared goal was to significantly reduce government control and transfer assets to private ownership.[9] This is not the case in Vietnam.

### C. Analysis

The situation in Vietnam is markedly different from all previously graduated NME countries. Not only does the Vietnamese Government currently overwhelmingly control production by holding a "tight rein over major sectors of the economy, such as the banking system, state-owned enterprises, and areas of foreign trade,"[10] but, as outlined during the 9th

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[4] Id. at 13-14.

[5] See, e.g., Czech NME Memo at 8-11; Hungary NME Memo at 10-13; and Russia NME Memo at Section 4.

[6] See, e.g., Czech NME Memo at 9.

[7] See, e.g., Slovakia NME Memo at 10.

[8] See, e.g., Hungary NME Memo at 12.

[9] See, e.g., Hungary NME Memo at 12; Latvia NME Memo at 11 and 13.

[10] U.S. Department of State, Background Note: Vietnam (July 2001), at http://www.state.gov/r/pa/ei/bgn/4130.htm.

Party Congress in April 2001, "the leading role of the State economic sector is to be enhanced, governing key domains of the economy."[11] In light of this very clear pronouncement, it appears highly unlikely that Vietnam's progress toward market reform will advance substantially in the near term in the two key areas of concern to the Department under this provision, namely privatization and land reform.

### 1. The Government of Vietnam Retains Significant Ownership of Enterprises and Controls Key Industries

The Vietnamese government maintains pervasive control over the means of production, both in terms of the number of state-owned enterprises and the breadth of its ownership across all sectors of the economy. There are currently approximately 5,000 to 5,500 SOEs, down from approximately 12,000 SOEs in the early 1990s.[12] Of those 12,000, however, fewer than 900 have been privatized.[13] Most of the reduction is due to mergers of SOEs;[14] in other words, the government did not privatize these enterprises, but merely combined state-owned assets to form fewer state-owned enterprises. Ambassador Chien states in his letter to Secretary Evans that there are presently "more than 82,000 non-state enterprises,"[15] although according to the Department, there are only "over 35,000" registered domestic enterprises.[16] Thus, SOEs account for, at a minimum, nearly 7 percent, and perhaps as much as 15 percent, of the total number of enterprises in Vietnam. (The percent of the economy involved, as discussed below, is much

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[11] Strategy for Socio-Economic Development 2001-2010 at 7 (Apr. 20, 2001), http://www.vietnamembassy-usa.org/news/newsitemprint.php3?datestamp=20010420010319.

[12] See U.S. Foreign Commercial Service, Vietnam Country Commercial Guide FY 2002 at 70, at http://www.usatrade.gov (hereinafter "Country Commercial Guide"); "Equitisation Brings More Tears Than Smiles," Thoi Bao Kinh Te Sai Gon (Sept. 5, 2002), collected in Development Vietnam at 18, attached at Exhibit 4-1.

[13] See "Equitisation Brings More Tears Than Smiles."

[14] See Country Commercial Guide at 70.

[15] Ambassador Chien letter at 2.

larger.) This level of state ownership compares highly unfavorably with the graduated NMEs. For example, in Slovakia fewer than 3 percent of enterprises were publicly owned at the end of 1997, and in Hungary the government held shares in only about 200 enterprises at the end of 1997.[17]

Equally revealing is the fact that the Vietnamese government is making virtually no progress in divesting itself of its controlling interest in the economy. According to the Vietnamese government's own statistics, the state sector accounted for 39 percent of GDP in 2001, a scant 1 percent less than in 1996.[18] Despite the repeated urgings of international bodies such as the World Bank and IMF to privatize and reform,[19] the government has proceeded with privatization only with "considerable foot dragging,"[20] and only 188 SOEs were privatized in 2001.[21] The government's reluctance to relinquish control of the marketplace is also evident from a plan that was released in late 2001, which calls for privatizing about 2,000 of the remaining SOEs but merely reorganizing another 2,000 SOEs as limited liability companies.[22] Meanwhile, as the government stalls on privatization, the non-state sector's share of GDP

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[16] See Country Commercial Guide at 23.

[17] See Slovakia NME Memo at 10; Hungary NME Memo at 12. The Department revoked Slovakia's NME status in October 1999 and that of Hungary in February 2000. The figures above thus represent the extent of privatization several years before the Department actually revoked their NME status, and it is reasonable to conclude that the extent of government ownership was even lower at the time of revocation.

[18] See Central Institute for Economic Management, Vietnam's Economy in 2001, at Table II.4, attached at Exhibit B. Petitioners note, moreover, that this figure includes only SOEs and not state-invested enterprises, for which data are unavailable.

[19] See, e.g., "World Bank Urges Vietnam to Pick Up Pace of Reforms," Inter Press Service (Dec. 12, 2001), attached at Exhibit 4-1; Vietnam: Selected Issues and Statistical Appendix, International Monetary Fund Country Report No. 02/5 (Jan. 2002) at 34-35.

[20] Country Commercial Guide at 70.

[21] See Economist Intelligence Unit, Country Commerce Vietnam (April 2002) at 13 (hereinafter "EIU Country Commerce Vietnam").

[22] See id.

actually has fallen from 52.7 percent in 1996 to 48 percent in 2001.[23] In contrast, the private sector in countries that have been found to be sufficiently transitioned was generally well over 60 percent at the time the Department revoked their NME status.[24]

In addition to the sheer number of SOEs, the structure and extent of the Vietnamese government's ownership and involvement in SOEs is extensive. Most SOEs are wholly owned by the state, and the state also continues to hold large shares of many nominally "privatized" enterprises.[25] Indeed, SOEs and partially privatized SOEs are found in virtually every sector of the economy, from agriculture and food to insurance to textiles and garments, and dominate economic activity, as the list attached at Exhibit 4-3 demonstrates.[26] Further, since the government continues to restrict which sectors are open to private enterprise,[27] many SOEs operate in an environment virtually devoid of competition. Indeed, in many key industries, such as electricity, aviation, and telecommunication, the SOEs have a market share of 80 percent or more, and many other industries are dominated by "oligopolies" of SOEs that hold market shares of 10 to 40 percent.[28] These sectors include cement, sugar, minerals, banking, and petroleum, where, in spite of the presence of some private and foreign-owned enterprises, "prices are high

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[23] See Central Institute for Economic Management, Vietnam's Economy in 2001, at Table II.4, attached at Exhibit B. See also graph attached at Exhibit 4-2. The statistics separately break out the foreign-invested sector's share of GDP, which went from 7.4 percent in 1996 to 13 percent in 2001. However, an estimated 70 percent of all foreign-invested projects are joint ventures, most involving a foreign firm partnering with an SOE. See EIU Country Commerce Vietnam at 23.

[24] For example, the Department found that the private sector share of GDP was 85 percent in Hungary, 75 percent in the Czech Republic, and 70 percent in Russia. See Hungary NME Memo at 12; Czech NME Memo at 10; Russia NME Memo at Sec. 4. While the private sector share of GDP in Kazakhstan was only 60 percent, the Department found that the SOEs operated in major sectors of the economy that were subject to competition from foreign invested and private enterprises. See Kazakhstan NME Memo at Sec. 4. In Vietnam, however, the government restricts the sectors in which foreign invested and private enterprises can operate, limiting competition for SOEs. See Section III and further discussion below.

[25] See EIU Country Commerce Vietnam at 10.

[26] See id. at 10-11.

[27] See id. at 11.

and most firms are inefficient and uncompetitive."[29] Thus, market dominance in these sectors does not derive from "competition and strength as is seen in a market economy where there is no room for weak players," but from "bureaucratic decision making."[30] The Vietnamese government has also reinforced state control by creating monopoly power in many sectors through its reorganization of approximately 2,000 SOEs into 17 "general corporations" (conglomerates) and 77 "special corporations." These general and special corporations operate in a broad range of industries, including energy (electricity, coal and petroleum), cement, gemstones and gold, steel, coffee, chemicals, rubber and glass, that account for approximately 80 percent of the productive capacity of the state sector.[31] These "mega-firms" were organized to ensure state control and it is unlikely that they will be privatized.[32] In addition, many provinces have "local monopolies," which limit products available for purchase to those produced by SOEs located in the province or restrict other sorts of economic activity, such as rice trading, to local state-run enterprises.[33]

Even Vietnam's fledgling stock market, which one would normally expect to be a bastion of free market principles, is hobbled by the government's "reluctance to surrender control."[34] So far, the government has permitted only 17 companies to list on the exchange, and government controls keep trading volumes low.[35] Further, all but one of the listed companies are former

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[28] Id. at 36.

[29] Id.

[30] "Reality and Solutions," Saigon Times Magazine, Sept. 20, 2001, attached at Exhibit 4-1.

[31] See Country Commercial Guide at 71.

[32] EIU Country Commerce Vietnam at 13-14.

[33] See "Reality and Solutions."

[34] "Communist Vietnam's Stock Market Experiment Slows After Roller Coaster First Two Years," Associated Press Worldstream, July 25, 2002, attached at Exhibit 4-1.

[35] See id.

SOEs, and none of them has used the market to issue new shares.[36] As noted above, foreign invested firms cannot participate in the stock market.[37]

### 2. The Vietnamese Government's Failure to Reform Maintains the State Sector's Dominance of the Economy

Notwithstanding some recent reforms that appear to guarantee private enterprise status that is equal to the state sector and make it easier to establish private enterprises,[38] the Vietnamese government's attitude toward the private sector is more aptly captured by its ten-year socio-economic plan for 2001 to 2010, which calls for a leading public sector role and continued state protection of and investment in certain key industries.[39] Vietnam clearly will not make significant progress toward a market economy without a fundamental shift in policy concerning government control of production. While the government's current rhetoric may tout the merits of economic liberalization, its actions are inconsistent and "suspicion of private enterprise remains entrenched in the bureaucracy, political circles and at many financial institutions" and "officials continue the tradition of state interference in business activity."[40] The government's entire approach to the economy is deeply embedded in the expectation of continued government dominance, as revealed by a recent order of the prime minister to the cabinet that investment in different economic sectors "must be reconsidered and recalculated so

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[36] See id.

[37] See Section III.1 above.

[38] See EIU, Country Report Vietnam at 16 (April 2002).

[39] See IMF, Vietnam: Selected Issues and Statistical Appendix at 34.

[40] EIU Country Commerce Vietnam at 11.

that the shift of the national economic structure is appropriate with demands of the domestic and export markets."[41]

In fact, there is very little practical incentive for SOEs to privatize. First, SOEs continue to receive the lion's share of available bank credit. Lending is seen as "an arm of government policy" and "many banks enjoy a cosy relationship with large state-owned enterprises."[42] It is hardly surprising, therefore, that 70 percent of bank lending went to SOEs in 2001,[43] thus severely restricting the credit available to private enterprises. The extent to which this situation is distortive becomes particularly clear when the high level of SOE insolvency is taken into account. It is estimated that 60 to 80 percent of SOEs are losing money, and total accumulated SOE debt is approximately $13 billion, more than 10 percent of which is non-performing.[44] Further, according to the head of the Enterprise Section of the Central Institute for Economic Management, the Vietnamese government "thinktank," an SOE can obtain a bank loan without collateral so effortlessly that it is a "routine matter."[45]

Second, the government provides many privileges to SOEs that are not available to private enterprise. For example, SOEs received subsidies totaling $520 million during 1997-99, as well as tax cuts, exemptions and write-offs worth $282 million since 1996.[46] Many SOEs receive discounts of up to 0.4 percent per month on bank loan interest rates,[47] with low-interest

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[41] "PM Demands Stricter Investment Planning," Thoi Bao Kinh Te Sai Gon (Sept. 5, 2002), collected in Development Vietnam at 21, attached at Exhibit 4-1.

[42] EIU Country Commerce Vietnam at 51.

[43] See id.

[44] See EIU Country Commerce Vietnam at 13; Country Commercial Guide at 70.

[45] "Equitisation Brings More Tears Than Smiles."

[46] See EIU Country Report at 17 (July 2002).

[47] See EIU Country Commerce Vietnam at 51.

loans to SOEs totaling $626 million since 1996.[48] SOEs also receive preferential treatment in tenders for public projects.[49]

Third, SOEs that privatize are subject to difficulties they did not experience before privatization, as well as a loss of the "close network of contacts and relationships" that exists among bureaucrats, politicians and SOEs.[50] For example, wariness toward private enterprise has led to an "overly enthusiastic" government regime of monitoring and inspecting private enterprises, where some companies are visited weekly and most report 10-50 inspections annually.[51]

Finally, the private sector is simply not yet sufficiently developed to be inviting. Notwithstanding changes in laws and regulations at the national level that nominally encourage the private sector (e.g., the Enterprise Law), "there remain critical issues relating to regulation and control of both enterprises and factor markets that need to be addressed to facilitate the development of the private sector."[52] Specifically, acceptance of the spirit of deregulation that underpins the Enterprise Law is "patchy" at the ministry, provincial, district and commune levels, and restrictions on land rights and access to credit impedes private sector development.[53] Institutional constraints to private sector development also were cited in an August 2002 World Bank report:

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[48] See EIU Country Report at 17 (July 2002).

[49] See EIU Country Commerce Vietnam at 12.

[50] Id.

[51] Id. at 11.

[52] See John Gillespie, et al., Vietnam and Australia, AusAID (Apr. 2, 2002), at 9-10, at http://www.ausaid.gov.au/publications/pdf/vietnam_governance_review.pdf.

[53] Id.

> "Vietnam is in the process of a transition from a centrally planned to a market economy. At present, however, the institutional framework to support this newly emerging market economy does not exist, is incomplete, or ineffective. Regularly mentioned institutional barriers are complicated entry and exit procedures, tax regulations, trade barriers, and unequal treatment of SMEs (compared to SOEs)."[54]

### 3. The Government Retains Ownership of All Land in Vietnam

As noted in Section III above, Vietnamese law does not recognize private property rights and the government retains all ownership of land.[55] Persons may hold only "land use rights," which the government grants for a maximum period of 50 years, depending on the specific use of the land.[56] Although land-use rights may be bought, sold, inherited and mortgaged, banks generally will value land only at a maximum of 70 percent of the rent paid for it, rather than its appraised value,[57] and the government can reclaim land "at any time, often with derisory levels of compensation."[58]

Even though the government has granted long-term land-use rights for most of Vietnam's lowland farms, it has also "imposed tight restrictions on the right to build on farming land."[59] The government has imposed additional controls as well. For example, in the coffee industry, the government has organized state farms wherein groups of farmers lease government-owned land controlled by an SOE. However, the farmers have no input in decisions concerning the management of the state farms, and all profits and losses belong to the government. The SOE can act as a "conduit" for social objectives such as subsidizing production in remote areas, and

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[54] See Liesbet Steer and Markus Taussig, "A Little Engine that Could: Domestic Private Companies and Vietnam's Pressing Need for Wage Employment," World Bank Policy Research Working Paper 2873 (Aug. 2001), at http://econ.worldbank.org/files/16767_wps2873.pdf.

[55] See EIU Country Commerce Vietnam at 20; Country Commercial Guide at 80.

[56] See Country Commercial Guide at 80.

[57] See id.

[58] See EIU Country Commerce Vietnam at 20.

[59] "Land and Freedom," The Economist, June 13, 2002, attached at Exhibit 4-1 (hereinafter "Land and Freedom").

the government has assisted Vinacafe, the largest SOE, by freezing its social insurance contributions in 2001 when coffee prices were low.[60]

The government has not, however, granted even these limited property rights to urban land, which has led to the development of an "unregulated and easily manipulated 'informal' market – without the benefits of legal title."[61] Government policy is contradictory, veering between public auctions of land in Ho Chi Minh City and issuing a decree stating that officials who ignore conversion of agricultural land to residential use will be severely punished. Thus, the process of buying and selling rights to land is "complicated and corrupt" and Vietnam's "faltering transition from a centralized to a market economy has left the status of {so-called} landowners ambiguous."[62]

Clearly, the Vietnamese government's continuing ownership and control of the economy and the absence of private property rights is incompatible with a market economy. The Department cannot, therefore, determine that Vietnam is a market economy country for purposes of U.S. trade laws.

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[60] See Vietnam: Agricultural Price Risk Management, International Task Force on Commodity Risk Management in Developing Countries, at 51 (June 2002), at http://www.itf-commrisk.org/documents/documents_database/vietnam.pdf.

[61] "Land and Freedom."

[62] Id.