I. The Vietnamese Dong is Not Sufficiently Convertible for Market Economy Status

The Government of Vietnam and VASEP assert in their October 2, 2002 submissions that the Vietnamese dong is sufficiently convertible for market economy status, but their claims are incorrect, based on optimistic projections of future compliance with international standards, or simply misleading. Petitioners have previously discussed extensively the significant shortcomings in Vietnam's currency regime that demonstrate that Vietnam does not meet the Department's standards for designation as a market economy under this statutory criterion.[1] The comments below, therefore, focus on several key issues that clarify the restrictions on Vietnam's currency convertibility, which prevent Vietnam's full integration into the world market.

First, contrary to the GOV's claim, the State Bank of Vietnam (SBV) is not an independent central bank.[2] In previous NME inquiries, in determining whether a central bank is independent, the Department has analyzed whether the functions and obligations of the state and the central bank regarding monetary policy are separate.[3] Without this separation, foreign currency availability can be used, for example, to manipulate the volume and composition of imports or reduce the integration of a country's internal fiscal and monetary policies, external balance, and exchange rates.[4] This is precisely the case in Vietnam, as SBV officials have themselves conceded. For example, the head of the SBV's foreign exchange department stated in August 2002 that "Vietnam's hard-currency strapped economy is still very much dependent on exports and foreign

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[1] See Akin Gump Oct. 2, 2002 Submission at I-1 to I-8.
[2] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 12.
[3] See, e.g., Russia NME Memo at Sec.1; Kazakhstan NME Memo at Sec. 1.
[4] See Akin Gump Oct. 2, 2002 Submission at I-4 to I-5 and n.16.

investment and so any policy affecting foreign exchange rates must be carefully considered and have 100% backing by the central government."[5] In addition, in September of this year the SBV's standing deputy governor stated that current laws governing the SBV and credit institutions "have exposed irregularities that need to be amended in line with international rules."[6] The head of the SBV's Strategy Department at the same time complained that the SBV needs to be more independent, specifically noting that it "can hardly bring out any monetary policy, as considerations from the Government, the National Assembly or the Politburo are required in advance in most cases." He insisted that "[t]he central bank at least must have its full power in matters related to draining back or pumping more money into the economy."[7] Further, the GOV's assertion that the SBV is the "central monetary institution with responsibilities similar to those in other market economies"[8] does not prove that the SBV is an independent central bank. Rather, these recent statements by senior SBV officials make it clear that, despite laws that the GOV claims establish the independence of the SBV,[9] Vietnamese monetary policy continues to be directed by the central government and the ruling Communist Party.

[5] "Central Bank Sits Firm on Dollar-Dong Trading Band," (Aug. 29, 2002), attached at Exhibit 1 of Akin Gump Oct. 2, 2002 Submission (emphasis added).

[6] "SBV Wants Higher Stance in New Draft Laws," Vietnam Economic Times (Sept. 23, 2002) attached as **Exhibit 2**.

[7] Id.

[8] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 13 (emphasis added), citing the IMF Second Review at 14, 16. While the IMF recognized actions taken by the SBV, it did not attest to the SBV's independence from government control.

[9] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 12.

Second, while Vietnam may be in the process of amending its currency regime to satisfy IMF Article VIII requirements,[10] it is not yet in compliance with and has not yet accepted Article VIII obligations. As noted in Petitioners' October 2, 2002 submission, the Department considers compliance with Article VIII of the IMF Articles of Agreement, which defines fundamental guidelines for currency convertibility, an important indicator of current account convertibility.[11] According to the IMF, however, Vietnam will not be in a position to accept Article VIII obligations until the end of the current Three-Year Arrangement Under the Poverty Reduction and Growth Facility, scheduled for early 2004.[12] This assumes, of course, that Vietnam removes all existing restrictions on schedule, although the IMF has noted that the GOV has missed the March 2002 deadline to submit a recommendation to the National Assembly to eliminate the tax on profit remittances for foreign invested enterprises,[13] which the IMF regards as a "multiple currency practice" and an impediment to exchange rate liberalization.[14]

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[10] See White & Case Oct. 2, 2002 Submission at 27-30; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 19.

[11] See Akin Gump Oct. 2, 2002 Submission at I-3.

[12] See Vietnam: Second Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility, International Monetary Fund (July 2002), IMF Country Report No. 02/151, at 63, at http:www.imf.org/external/pubs/cat/longres.ctm?sk-15961.0.

[13] See id. at 36.

[14] See id. at 41, 75. Although the GOV claims that it has lifted approval requirements for purchasing foreign currencies to pay for imports (see Willkie Farr & Gallagher Oct. 2, 2002 Submission at 23), Petitioners have noted that there is no guarantee of availability of foreign currency and that the SBV allocates foreign currency reserves. See Akin Gump Oct. 2, 2002 Submission at I-4 and n.12. As noted in Petitioners' October 2, 2002 Submission (at VI-5 to VI-8), Vietnam also maintains numerous tariff and non-tariff barriers, which limit the impact of market forces on the exchange rate and protect enterprises operating in Vietnam. Companies such as Unilever and American Standard, which support granting Vietnam market-economy status, manufacture products such as detergents, shampoo, and toilets that are protected from competition from imports by tariffs ranging from 20 percent to 50 percent. See Vietnam Tariff Schedule 3402.20, 3305.10, 6912.00, available at http://www.us-asean.org/afta.htm.

Finally, although VASEP claims that Vietnam's currency regime compares favorably to that of Kazakhstan at the time the Department revoked its NME status,[15] this comparison is misleading. As discussed above, Vietnam's central bank does not operate independently of the government and foreign exchange rates are influenced by the government. In contrast, the Department found that the National Bank of Kazakhstan (NBK) was independent and that foreign exchange rates were market-based.[16] In addition, Kazakhstan had adopted Article VIII of the IMF's Articles of Agreement, although Vietnam has yet to do so.

As the discussion above and in Petitioners' October 2, 2002 Submission make clear, the GOV continues to restrict the convertibility of its currency so that domestic prices are not yet sufficiently linked to world market prices. The Department should, therefore, determine that Vietnam remains a non-market economy country for purposes of U.S. trade laws.

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[15] See White & Case Oct. 2, 2002 Submission at 26-31.

[16] See Kazakhstan NME Memo at Sec. 1.

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

A. De Facto Conditions in Vietnam Do Not Support VASEP's and the GOV's Claims of Freely Bargained Wage Rates.

As support for their claim that wage rates in Vietnam are the result of free bargaining, both VASEP and the GOV refer to recent amendments to Vietnam's Labor Law.[17] The GOV, for example, cites to amended Labor Law Articles 37, 41, 57, 61, 64, 69, 96, 107, 111, 132, 134, and 144[18] as all contributing to a framework that supports workers' rights. The GOV, however, neglects to inform the Department that none of these amended articles are actually in effect at the present time. These provisions are not even scheduled to become effective until 2003.[19]

As in past determinations, the Department's analysis in the present case must go beyond the claimed "legal framework" and must analyze the de facto economic circumstances of wage formation in Vietnam.[20] In this regard, the reliance of VASEP and the GOV on laws that are not even yet in effect is clearly insufficient to show that wage rates in Vietnam are in fact determined by free bargaining.

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[17] See White & Case Oct. 2, 2002 Submission at 33-36; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 28-31.

[18] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 29 n.87, 30 n.88, 30 n.91, 31 n.92, 33, 33 n.105.

[19] See Law on Amendments of and Additions to a Number of Articles of the Labor Code, Art. 2, at http://www.usvtc .org/Labor/LwAmndgLabourCode.pdf. The GOV did not provide the text of this Law to the Department. The aforementioned website provides an unofficial copy of the Law, translated by the law firm Phillips Fox. Although these amendments are currently scheduled to come into effect in 2003, it is unclear when they will actually become effective in practice. For example, Virginia Foote of the U.S.-Vietnam Trade Council, has noted that additional implementing regulations are required before the amendments to the Labor Law can take effect. See Virginia Foote, President, U.S.-Vietnam Trade Council, "Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means, Hearing on the Renewal of President's Waiver for Vietnam from the Jackson-Vanik Freedom of Emigration Requirements," July 18, 2002, at http://waysandmeans.house.gov/trade/ 107cong/7-18-02/7-18foote.htm.

[20] See, e.g., Russia NME Memo at 9-10; Kazakhstan NME Memo at 7-8.

Moreover, even when these amendments do take effect, Vietnam's Labor Law will not provide an adequate framework for workers' rights. For example, the Vietnamese government will still maintain control over the wage rates of private companies and foreign-invested enterprises. Specifically, under amended Article 132, private companies and foreign-invested enterprises will be required to establish and publicize a wage scale system, and to register their wage rate systems with the Vietnamese Labor Department, thereby ensuring that the government remains involved in the setting of wage rates.[21] In addition, their recruitment of employees must be in accordance with unspecified government regulations.[22] Such anticipated government involvement clearly creates barriers to the free bargaining of wage rates. Additionally, amendments to the Labor Code do not amend the Vietnamese government's requirement that foreign enterprises pay a higher minimum wage than domestic enterprises,[23] thereby insulating domestic enterprises from foreign competition.[24]

Additionally, it is evident that VASEP ignores the de facto economic circumstances of wage formation in Vietnam when it claims that "Vietnam's economy, like the Kazakhstan economy, benefits from a relatively liberalized labor system

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[21] See Law on Amendments of and Additions to a Number of Articles of the Labor Code, Art. 132.1, at http://www. usvtc.org/Labor/LwAmndgLabourCode.pdf.

[22] See id. Art. 132.2.

[23] MOLISA Decision Concerning the Minimum Salary Rate and Salary of Vietnamese Labourers Working in Foreign-Invested Enterprises, No. 708/QD-BLDTBXH, June 15, 1999, at http://asemconnectvietnam.gov.vn/laws/law.asp?idlaw=114.

[24] Although VASEP identifies the monthly foreign-enterprise minimum wage rates established by the Ministry of Labor, War Invalids and Social Affairs ("MOLISA") in its October 2, 2002 submission to the Department, White & Case Oct. 2, 2002 Submission at 37, it fails to inform the Department that MOLISA establishes, separate, lower minimum wage rates for domestic enterprises. MOLISA Decision Concerning the Minimum Salary Rate and Salary of Vietnamese Labourers Working in Foreign-Invested Enterprises, No. 708/QD-BLDTBXH, June 15, 1999, at http://asemconnectvietnam.gov.vn/laws/law.asp?idlaw=114.

functioning largely outside of government control."[25] As discussed as well in Petitioners' Oct. 2, 2002 submission, de facto conditions in Vietnam are drastically different from those in Kazakhstan, which, at the time of its graduation to market economy status, had no laws prescribing that the government administer wages except in SOEs and through the establishment of a minimum wage.[26]

Moreover, the GOV's claim that the government's involvement in farming is "extremely limited"[27] significantly understates the de facto control the government has over the farming sector. For example, the government requires farm employers to register their employees with local labor offices.[28] Additionally, the Vietnamese government requires local government-run labor offices to coordinate with laborers associations and "People's Committees at the commune level" to implement wage policy in the farming sector.[29] Through these restraints, the Vietnamese government continues to retain control over the employer-employee relationship at the farm level, contrary to the GOV's claims.

B. Vietnamese Labor Unions Are Controlled by the Government and Their Activities Are Not Indicative of Freely Bargained Wage Rates.

Both VASEP and the GOV refer to the alleged role of labor unions in Vietnam as their sole example of a de facto condition demonstrating the free bargaining between labor and management. However, contrary to their claims that "the structure and

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[25] White & Case Oct. 2, 2002 Submission at 32.

[26] See Kazakhstan Memo at 7.

[27] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 34.

[28] Circular No. 23/2000/TT-BLDTBXH of Sept. 28, 2000, Guiding the Application of a Number of Regimes for Laborers Working in Farms, Ch. III(3), at http://www.vietnamembassy-usa.org/news/newsitemprint.php3?datestamp=20021003141111.

[29] Id. Petitioners did not have access to this Circular until the Vietnamese government posted it on the website of the Vietnamese Embassy in Washington, D.C. on October 2, 2002.

activities of labor unions" in Vietnam evidences the principles of supply and demand in the Vietnamese labor market[30] and that the presence of labor unions indicates that wage rates in Vietnam result from free bargaining,[31] Vietnamese labor unions are clearly controlled by the government through the Communist Party of Vietnam.[32] Even the GOV concedes that "the VGCL may receive financial support from the state," but inexplicably argues that this "does not necessarily imply government control."[33] Financial support from the state, particularly in the context of a Communist state, is highly indicative of government control and cannot be brushed away as irrelevant.

Despite claims of independence put forth by the GOV and VASEP, Vietnamese labor unions are controlled by the Vietnamese government in part through their mandate to "represent and organize the State's workers in order to establish and carry out economic and social development programmes, policy, economic management and objectives, and policy concerning the rights, obligations, and interests of workers."[34] The independence of labor unions in Vietnam is also restricted by their legal duty to "promote the Constitution and laws, educate workers to follow and uphold the law, participate in the building of socialism, protect the fatherland, protect socialist property, and work with discipline, productivity, quality, and efficiency."[35] Such duties clearly contradict the GOV's claim of "substantial evidence" indicating that unions represent the interests of workers with "no meaningful role of the Government in the formation or management of

[30] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 28.
[31] See White & Case Oct. 2, 2002 Submission at 33, 37.
[32] See Akin Gump Oct. 2, 2002 Submission at II-7 to II-8.
[33] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 33.
[34] Law on Trade Unions (July 7, 1990), at http://www.vietnamembassy-usa.org/news/newsitemprint.php3?datestamp=20021—2232223, Art. 4(1).
[35] Id. Art. 4(2).

labor unions."[36] On the contrary, Vietnamese labor unions function as an extension of the Vietnamese government.

Furthermore, Vietnamese labor unions and the Labor Law restrict the manner in which Vietnamese workers may dispute the conditions of their employment. In an effort to indicate that workers are independent of government influence, VASEP and the GOV note that in 2000 and 2001, 72 strikes were held in Vietnam each year.[37] It is important to note, however, as the U.S. Department of State has recognized, that many of the strikes held in Vietnam since 1993 "were supported unofficially at the local and provincial levels of the VGCL" and that most "are symbolic and last 1 or 2 days."[38] In addition, strikes in 2001 were "primarily against foreign-owned or joint venture companies,"[39] which further suggests that the Vietnamese government, through the VGCL, plays a significant role in protecting the domestic industry. Moreover, despite GOV suggestions to the contrary,[40] the Labor Law bars strikes against enterprises deemed by the Government to "serve the public" or "be important to the national economy and defense," including those industries involved in: electricity production; post and telecommunications; railway, maritime, and air transportation; banking; public works; and the oil and gas industry."[41] The State

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[36] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 32, 33.

[37] See White & Case Oct. 2, 2002 Submission at 37 (noting that in 2000, "72 labor strikes occurred, compared to a total of 63 in 1999"); Willkie Farr & Gallagher Oct. 2, 2002 Submission at 32 (stating that 72 strikes also took place in Vietnam in 2001).

[38] See State Department Human Rights Report 2000, at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/819.htm.

[39] See id.; Human Rights Watch, World Report 2002, at 261 (stating that strikes in Vietnam during 2001 were "mostly directed against foreign and private companies").

[40] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 29.

[41] See State Department Human Rights Report 2000, at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/819.htm.

Department notes, in fact, that strikes are prohibited in 54 Vietnamese occupational sectors and businesses.[42]

Contrary to VASEP's intimation,[43] the Vietnamese government also severely restricts the activities of Vietnamese workers by not recognizing the freedom of association.[44] Workers may be less willing to violate government policy in an environment in which the government has "conducted a systematic campaign of intimidation and surveillance of perceived political opponents," including the arrest of a number of prominent political dissidents and religious figures.[45] These actions no doubt deter workers from protesting and from asserting their demands regarding wage rates.

C. Vietnam's Ratification of Only Three Core ILO Conventions Reflects Its Poor Recognition of Workers' Rights.

VASEP cites Vietnam's participation in the ILO to indicate that free bargaining between labor and management over wage rates is the norm in Vietnam.[46] Vietnam, however, still has not ratified five of the eight core ILO conventions, including the ILO Freedom of Association and Protection of the Right to Organize Convention or the ILO Right to Organize and Collective Bargaining Convention.[47] This reflects Vietnam's poor human rights record, including "several major steps backward during 2001."[48] In

[42] See id.
[43] White & Case Oct. 2, 2002 Submission at 36.
[44] See State Department Human Rights Report 2000, at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/819.htm.
[45] See Human Rights Watch, World Report 2002, at 260.
[46] See White & Case Oct. 2, 2002 Submission at 35-36.
[47] See Ratifications of the Fundamental ILO Conventions, at http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN. Vietnam also has not ratified the Forced Labor Convention, the Abolition of Forced Labor Convention, and the Minimum Age Convention. Id.
[48] Human Rights Watch, World Report 2002, at 258.

contrast, Kazakhstan had ratified seven of the eight core ILO Conventions, as had Russia, at the time of their respective graduations to market economy status, including the two ILO conventions regarding labor organization.[49]

[49] See Ratifications of the Fundamental ILO Conventions, at http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN. Neither Kazakhstan nor Russia has ratified the Worst Forms of Child Labor Convention. Id.

III. Vietnam Is Not Sufficiently Open to Foreign Investment to Merit Market Economy Status

In order to determine whether Vietnam has, in fact, sufficiently opened its economy to foreign investment and competition, it is critical to separate reality from one-time increases inherently associated with even a limited new market or from promises of future improvements in the foreign investment climate. As noted in Petitioners' October 2, 2002 submission, "economies that have been relatively isolated from international capital flows and have recently opened up may. . . get a substantial wave of FDI,"[50] and "the large inflows [of FDI into Vietnam] of the mid-1990s must not be understood as normal."[51] Indeed, as discussed below, a close examination of the conditions faced by foreign investors in Vietnam and of the patterns of foreign investment reveals that foreign investment is still significantly restricted in Vietnam. This substantially limits the introduction of foreign competition, thereby insulating domestic enterprises and preventing their integration into the global economy.

As an initial matter, the Department should approach with some caution the proffered statistical data regarding foreign investment flows into Vietnam. Several international agencies have identified problems with the data released by the Government of Vietnam that must be taken into account when attempting to assess the true level of foreign investment in Vietnam. For example, the International Monetary Fund recently admonished that, while Vietnamese government transparency has improved, "continued efforts should be made to provide to the public a better and broader range of statistics and

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[50] Akin Gump Strauss Hauer & Feld Oct. 2, 2002 Submission (hereinafter "Akin Gump Submission") at III-8, quoting The World Investment Report, UNCTAD (Sept. 17, 2002) at 23.

[51] Id., quoting 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.

more comprehensive information on policy objectives and performance."[52] The IMF identified a number of "important shortcomings" in Vietnam's statistical base, including inconsistencies in economic statistics and the reporting of provisional statistics before the end of a reporting period, with the "most acute" weaknesses found in national accounts and foreign direct investment statistics.[53] The United Nations Development Programme has also pointed out that Vietnamese government data on FDI must be adjusted to "make it more reflective of the actual level of foreign direct investment entering Viet Nam."[54] According to the UNDP, GOV FDI commitment totals include the Vietnamese share in joint ventures, which must be deducted, while another 12 percent must be deducted to account for the overvaluation of the foreign contribution.[55] Finally, care must be taken to determine whether FDI data reflects commitments or actual disbursements. The UNDP noted that FDI disbursements in Vietnam typically lag behind commitments, such that only 30 percent of FDI commitments made from 1988 through 1996 were actually disbursed during that period.[56] Therefore, Vietnamese government statistics regarding the levels of FDI cannot be taken at face value because they do not conform to international standards in data gathering and reporting, inflate the level of foreign investment actually entering the Vietnamese economy each year, and cannot be properly

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[52] Vietnam: Second Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility, IMF Country Report No. 02/151 (July 2002) at 21 (hereinafter "IMF Second Review).

[53] Id. at 21-22.

[54] Viet Nam in ASEAN: Regional Integration Process and Challenges, UNDP – Viet Nam (Nov. 2001) at 147 (hereinafter "Vietnam Regional Integration"), at http://www.undp.org.vn/undp/docs/2001/VNinASEAN/VNASEAN.pdf.

[55] See id. The UNDP report also notes that the only detailed foreign direct investment data in Vietnam is for "total commitments" and "legal capital." Total commitments data includes all debt in projects with foreign investors, regardless of whether it was raised and guaranteed domestically or abroad, and the Vietnamese equity share, typically land use rights, in joint venture projects. Legal capital is the minimum investment required by a joint venture. See id. at n.103.

[56] See id. at 149.

verified because the government is not fully forthcoming with statistical or policy information.

Against this backdrop, it becomes clear that information provided by the GOV and VASEP likely overstates the extent of foreign investment in Vietnam, to the extent that it relies on Vietnamese government data. For example, it must be assumed that the statistics that the Government of Vietnam has provided on FDI inflows into Vietnam from 1994 through 2000, the total capital invested in FDI enterprises, or the proportion of total investment in the Vietnamese economy accounted for by FDI[57] are distorted by at least some of the problems noted by the IMF and UNDP. Vietnam, therefore, has likely not attracted the level of foreign investment claimed by supporters of market economy status for Vietnam.

In addition to these serious problems with Vietnam's statistics, several other claims made by those urging market economy status for Vietnam merit further examination. First, the GOV asserts in its submission that there has been growth in foreign investment and claims, as evidence of this growth, that "the IMF predicts that FDI <u>disbursements</u> in 2002-2003 will exceed 2001 levels."[58] In fact, the report does not predict increased investment <u>commitments</u> but, rather, explains that FDI <u>disbursements</u> "are expected to peak in 2002-2003" due to the completion of three large, <u>earlier</u> foreign-invested projects.[59] This is not evidence of increasing investment. Furthermore, the IMF's projections of FDI levels in Vietnam in the medium term are based on a number of assumptions, including an improvement in the investment climate, recovery in East Asia,

[57] <u>See</u> Willkie Farr & Gallagher Oct. 2, 2002 Submission at 47.
[58] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 48 (emphasis added).
[59] IMF Second Review at 47-48.

and the pace of Vietnamese structural reform.[60] Thus, improvement in near-term FDI disbursements, i.e., the maturation of past commitments, is due to a very particular and limited set of circumstances, and any longer-term growth in FDI is conditional, at least in part, on future, yet unrealized Vietnamese government action to further reform the economy to make it more attractive to foreign investors.

Second, the Vietnamese parties cite various laws and government decrees to support their view that Vietnam qualifies as a market economy under this statutory criterion,[61] but fail to address the very real obstacles that foreign investors face in Vietnam. Petitioners ' October 2, 2002 Submission extensively discussed these anti-competitive restrictions and difficult business conditions,[62] but Petitioners reiterate that Vietnam's lack of progress in reforming its economy has caused many foreign investors to look elsewhere.[63]

For example, the legal environment for foreign investors is undeniably problematic. UNDP states that "serious obstacles" remain that give joint venture minority partners, which are often SOEs or government entities, veto power.[64] Moreover, the approval process for foreign investment projects is "lengthy, arbitrary and tedious," and the approval of local authorities, as well as that of central agencies, is required.[65] In a separate recent report, UNDP notes that Vietnam's legal system "still has many

[60] See id.

[61] See, e.g., Willkie Farr & Gallagher Submission at 39-43; White & Case Submission at 40.

[62] See Akin Gump Submission at III-3 to III-10.

[63] Although a few foreign corporations, such as Cargill and American Standard, submitted comments to the Department in support of designating Vietnam a market economy, their experiences in Vietnam are not universal, given that other foreign investors have pulled out of Vietnam and perceptions of Vietnam as an attractive market have dimmed. See Akin Gump Submission at III-9 to III-10.

[64] Viet Nam Regional Integration at 150.

[65] Id.

shortcomings," including uncoordinated and inadequate law making and implementation, untimely publication of laws and regulations, and an unreformed bureaucracy.[66] The report also describes Vietnam's state administration as one "still characterized by features. . . designed for a centrally planned and bureaucratic mechanism."[67] This lack of reform is not directed exclusively at foreign investors, of course, but it is a serious disincentive for investing in Vietnam. Recitation of laws and regulations that ostensibly demonstrate that Vietnam is open to foreign investment is insufficient when the reality is, in fact, quite different. The laws that exist have not succeeded in overcoming the barriers, both legal and administrative, to foreign investment and, thus, the introduction of market competition in the Vietnamese economy through foreign investment has been limited.

Finally, VASEP's claim that Vietnam's openness to foreign investment compares favorably with that of Kazakhstan is entirely misplaced, as is VASEP's reliance on the U.S.-Vietnam Bilateral Trade Agreement as evidence of Vietnam's openness to foreign investment.[68] For example, Vietnam continues to limit the industries that are open to foreign investment and the structure of foreign-invested enterprises, and foreign-invested enterprises are not permitted to raise capital through issuance of stock.[69] The Government of Vietnam retains control over approval of foreign investment projects, requiring licenses for certain types of projects from the Ministry of Planning and Investment or even the Prime Minister.[70] In addition, the Government of Vietnam has

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[66] Modernizing Government in Viet Nam, United Nations Development Programme (Dec. 2001) at 10.
[67] Id. at 14.
[68] See discussion in Section VI of this submission.
[69] See EIU, Country Commerce: Vietnam (Apr. 2002) at 14, 16, 22-23.
[70] See Akin Gump Oct. 2, 2002 Submission at III-5 to III-6 for a more complete discussion.

imposed export requirements on foreign-invested enterprises in a wide variety of sectors, including construction steel, fertilizer, and manufactured goods such as motorbikes, video and audio products, and bicycles.[71] FIEs in these sectors may further Vietnam's development goals by providing jobs and bringing tax revenues, but the export requirements also ensure that this investment will happen without subjecting domestic enterprises to competition in the Vietnamese market. The Department simply did not note foreign investment restrictions of this breadth or magnitude in its decision to revoke Kazakhstan's non-market economy status.

In sum, the influx of foreign investment into Vietnam has served the Government of Vietnam's development plans for the country, but the GOV's continuing restrictions on FIEs have minimized the operation of market principles in the Vietnamese economy as a whole. These restrictions also protect domestic enterprises by limiting competition from foreign investment to an extent incompatible with market economy status. For all the reasons discussed above and in Petitioner's October 2, 2002 submission, therefore, the Department cannot find that Vietnam has made sufficient progress under this statutory criterion to merit market economy status.

[71] See Akin Gump Oct. 2, 2002 Submission at III-6 and "Vietnam: Export Requirements for Investors" at http://ita.doc.gov/ticwebsite/apweb.nsf/795c3ca6e24078cd85256bb1006b330e/41ef5e9a9de219cb85256bc00060834d!OpenDocument.

IV. The Vietnamese Economy Has Not Yet Privatized Sufficiently to Merit Market Economy Status

The Government of Vietnam's claim that Vietnam "has transformed its economy from a state-controlled command economy to a market-based system"[72] is a rather startling one for a country in which the ruling Communist Party has declared that "public ownership of the principal means of production" is one of the tenets of its political program[73] and "the leading role of the State economic sector is to be enhanced, governing key domains of the economy."[74] Although the parties that advocate market economy status for Vietnam assert that government reform efforts have "transformed" the Vietnamese state sector,[75] the evidence points overwhelmingly to the conclusion that, while the state will tolerate some private ownership, it has not relinquished, nor does it intend to relinquish, its own significant role in the Vietnamese economy. Indeed, SOEs are "more than just an apparatus of the state, they are key actors in the economy," accounting for "less than ten percent of total employment, despite absorbing about eighty percent of total investment."[76]

One of the clearest indications of the Vietnamese government's unwillingness to relinquish control of the economy is the sluggish pace of state-owned enterprise reform. In fact, as little as 2 percent of state capital has been equitized since 1995, and those

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[72] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 52.

[73] Communist Party of Vietnam website at http://www.cpv.org.vn.cpv.politicalprogram/contents.htm.

[74] Strategy for Socio-Economic Development 2001-2010, 9th Party Congress (Apr. 20, 2001), at 7, at http://www.vietnamembassy-usa.org/news/newsitemprint.php3?datestamp=20010420010319.

[75] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 52; see also White & Case Oct. 2, 2002 Submission at 50.

[76] Martin Painter, "State Capacity, Institutional Reform and Changing Asian Governance," Presentation to the Asia Development Forum, Governance and Decentralization Workshops (June 2001), at http://www.worldbank.org/html/extdr/offrep/eap/eapprem/govpaperpainter.pdf

SOEs that have been privatized are all small.[77] Agencies such as the International Monetary Fund, the World Bank, the United Nations Development Programme, and the Department itself have expressed serious concerns about the lack of progress in reforming the massive public sector and the effect that the lack of reform is having on the economy as a whole. For example, the IMF noted that, in the face of continued delays in SOE reform, the GOV issued an action plan during the second half of 2001 to "jump-start" the process. Even so, "problems persisted" and "the number of SOEs subject to reform measures in 2001 fell well short of the target under the original three-year reform framework."[78] Similarly, the UNDP recently described a "commitment problem" within the GOV, which is split between recognition of the importance of private sector development and "a continuing policy and administrative bias against the private sector and a lack of practical commitment to private sector development."[79] The UNDP has pointed out that a "more coherent and consistent approach to the relative roles of the state and the market in the Vietnamese economy will have to be adopted" in order to resolve the "commitment problem," but also observed that "many leaders strongly argue for a leading role of the State sector, [which was] emphasized in the latest draft of the new ten-year socio-economic strategy."[80]

Further, the World Bank called SOEs in their current form a "serious threat to the growth perspectives of Vietnam" and stated that "comprehensive reforms are necessary

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[77] See David Dapice, "Economic Policy for Vietnam in a Period of Economic Turbulence," (2001), at 11, at http://www.fetp.edu.vn/shortcourse/0102/Eco_Management/English/7-Wed-Jan16/Dapice-Economic%20Policy%20for%20Vietnam-English.pdf.

[78] IMF Second Review at 11.

[79] Non-State Business Sector Development and Job Creation, United Nations Development Programme, at 20, at http://www.undp.org.vn/projects/vie99002/busines.pdf. The report is undated, but refers to events in late 2000.

[80] Id.

to stop the drain on public finances and prepare industry for the competition implied by the trade regime Vietnam has signed up to."[81] Finally, the Department noted that, even though the GOV committed to equitizing additional SOEs as part of a structural adjustment package with the World Bank and IMF, "many international observers expressed disappointment that the government did not agree to completely dismantle its SOE sector over time."[82] Vietnam also "continued to send mixed signals" to foreign investors when the Ninth Party Congress in May 2001 approved the Socio-Economic Strategy of 2001-2010, in which it confirmed the leading role of the state sector and instructed the government to "strengthen SOE operations in a broad range of sectors" such as telecommunications, banking, insurance and petroleum.[83]

Thus, absent a fundamental change in current Vietnamese government policies and philosophy, the state will continue to be significantly involved in Vietnam's economy. Vietnamese government privatization efforts to date confirm this view: the GOV equitized 52 SOEs in 1998, 151 in 1999, 185 in 2000, and 194 in 2001,[84] for a total of only 582 equitizations in four years, out of an estimated total of over 5,500 SOEs.[85] Moreover, the GOV continues to hold substantial shares in a sizable portion of these

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[81] Vietnam Economic Monitor, World. Bank (Spring 2002) at 31, at http://Inweb18.worldbank.org/eap/eap/nsf/Attachments/eapupdated0402/$File/vietnam.pdf.

[82] Vietnam Country Commercial Guide, Department of Commerce Foreign Commercial Service, at 70, at http://www.usatrade.gov.

[83] Id.

[84] See World Bank Vietnam Economic Monitor (Spring 2002) at 23. The latest GOV statistics also confirm the slow pace of privatization. See General Statistic Organization of Vietnam Official Letter No: 587/TCTK – TH (Sept. 4, 2002), which states that a total of 985 SOEs have been transformed "into Enterprises with private and other types of ownership" through August 31, 2002. Available at http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20021003153222.

[85] See Akin Gump Oct. 2, 2002 Submission at IV-3.

equitized SOEs.[86] In fact, while the parties seeking market economy status for Vietnam point to private sector growth as evidence that the state no longer controls the economy,[87] the relative sizes of the public and private sectors in the economy as a whole have remained fairly static in recent years. According to the GOV itself, the non-state sector was almost 60 percent of GDP in 1994 and 61 percent in 2001,[88] which means that the state sector was around 40 percent in 1994 and 39 percent in 2001. In other words, during a seven year period in which the Vietnamese government claims to have been privatizing its economy, according to Vietnam's own statistics the state sector's share of GDP changed by a mere 1 percent.[89] The percentages of the labor force employed by the state and private sectors are also virtually unchanged from 1997 to 1999.[90]

There are several other important indicators that demonstrate that, contrary to the GOV's claim that "the importance of SOEs in Vietnam's economy is dwindling,"[91] SOEs and government polices toward them continue to distort the economy.[92] First, as noted in Petitioners' October 2, 2002 submission, SOEs tend to be large, even dominant, in numerous and diverse sectors throughout the economy, such as food, textiles, banking,

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[86] See World Bank, Vietnam Economic Monitor at 17.

[87] See, e.g., Willkie Farr & Gallagher Oct. 2, 2002 Submission at 56-59; White & Case Oct. 2, 2002 Submission at 48-49.

[88] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 54, 57 for data on 1994-2000. See Central Institute for Economic Management, Vietnam's Economy in 2001, at Table II.4, attached as Exhibit B to Akin Gump Oct. 2, 2002 Submission, for 2001 data.

[89] The Economist Intelligence Unit has also recently noted the GOV's reluctance to privatize, observing that "the government is back-pedalling from the equitisation process and emphasising the benefits of simply restructuring SOEs to give them greater autonomy." EIU, Country Commerce Vietnam (Apr. 2002) at 13. See also Akin Gump Oct. 2, 2002 Submission at IV-4 to IV-5.

[90] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 58.

[91] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 65.

[92] See EIU Country Commerce Vietnam at 13 See also Akin Gump Oct. 2, 2002 Submission at IV-7 to IV-9 for a discussion of other government policies regarding SOEs that distort the economy, such as directing a disproportionate share of available credit to SOEs and providing subsidies and tax exemptions.

and insurance.[93] The SOEs do not merely occupy "roles similar to those held by SOEs in other developing countries such as monopolistic industries or those related to infrastructure and national security," as the GOV asserts.[94] As shown on the list attached at **Exhibit 3**, the GOV will continue to maintain monopoly ownership of, for example, explosive materials, toxic chemicals, and "enterprises operating in strategic locations and combining economic operations and national defense tasks in accordance with government decisions," as well as full or controlling interest of SOEs operating in sectors such as food wholesale trading, metal production, consumer goods production, insurance, publication of academic books, documentary films, and "production and supplies of other products and services as provided for by the government."[95] The breadth of government ownership of production in Vietnam, which the government can expand as it sees fit, is simply too great to characterize as somehow "normal" or "average" for developing countries.

Second, the government continues to prop up SOEs, even though only a very small proportion of them, perhaps as little at 20 percent, are profitable.[96] According to the World Bank, in 2001 the GOV increased the level of state investment in the economy by 23 percent over 2000, equal to 8 percent of GDP.[97] The fact that a significant portion of that investment went to SOEs is illustrated by the chart attached at **Exhibit 4**, which

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[93] Akin Gump Oct. 2, 2002 Submission at IV-5 to IV-6.

[94] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 65.

[95] Source: IMF Selected Issues and Statistical Appendix at 37. Decree 44 establishes that the government will retain majority or special shares in "public service enterprises" with equity over 10 billion VND. See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 63 n.233. At a conservative exchange rate of 15,000 VND = $1, however, the floor is only approximately $666,666, which guarantees that the GOV will maintain substantial ownership interest in the economy.

[96] See Akin Gump Oct. 2, 2002 Submission at 21.

[97] See Vietnam Economic Monitor at 8.

shows that the state sector's share of total investment in Vietnam increased from slightly less than 50 percent in 1997 to approximately 55 percent in 2001. However, as the UNDP noted, "[f]inancial resource allocation and utilization has been inappropriate and inefficient. [The] state budget capital expenditure program has stretched out across too many areas that limit its impact on structural adjustments of the economy."[98] In other words, rather than using resources in a more targeted fashion in order to advance reform toward market principles, it appears that the GOV is more interested in maintaining the operation of SOEs throughout the economy, regardless of their economic viability. This inappropriate resource allocation is evident from the list of 200 highly-indebted large SOEs included in the IMF-sponsored Debt Monitoring System, which is attached at **Exhibit 5**.[99] This list includes enterprises from sectors as diverse as foodstuffs, import/export, steel, construction, coal, textiles, tobacco, paper, fertilizer, beer, ceramics and glass, shipping, real estate development, and aquatic products, showing how the GOV continues to prop up SOEs that drain resources from other more productive uses across all sectors of the economy. This misallocation of resources distorts the supply/demand balances that would exist if the sectors were market-oriented, thereby also distorting costs and prices.

Third, the GOV claims that it has "significantly decentralized authority to approve the valuation of SOEs for equitization."[100] A recent decree, however, permits pertinent agencies to approve the valuation only of enterprises valued at less than 500 million VND only, with central Ministry of Finance approval required for enterprises with higher

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[98] Modernizing Government in Viet Nam at 11. The UNDP also noted that "[n]on-state investment has been limited, unstable with low efficiency and does not encourage competitiveness." Id.

[99] See Vietnam: Second Review at 85, Attachment III, Annex II.

[100] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 64.

valuations. This threshold, which is barely over $30,000, suggests that the equitization of enterprises of any significant size will continue to be controlled by the central government and, thus, subject to greater political direction.

Finally, the GOV concedes that in Vietnam, "title to land officially remains under the Government."[101] As noted in Petitioners' October 2, 2002 Submission, in Vietnam persons have no right to own land but may hold only land use rights,[102] which the GOV does not dispute.[103] The GOV claims that the situation in Vietnam is the same as that in Kazakhstan, but in its determination concerning Kazakhstan's NME status, the Department noted that "Kazakhstan citizens may own plots of land for personal farming, gardening and dacha construction," and "[f]oreign citizens and legal entities may own land designated for industrial and residential construction."[104] Thus, the right to own land and not merely hold land use rights existed in Kazakhstan, which is not the situation in Vietnam.

Although the GOV and VASEP attempt to show that privatization in Vietnam has progressed to a point similar to that of Kazakhstan when the Department revoked its NME status,[105] it is clear that Vietnam's economy is still dominated by Vietnam's government. Unlike in Vietnam, where the GOV retains substantial monopoly or controlling ownership interests throughout the economy and restricts the sectors where private or foreign invested enterprises are permitted to operate, the Department noted that

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[101] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 71.

[102] See Akin Gump Oct. 2, 2002 Submission at IV-10.

[103] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 68-71.

[104] Kazakhstan NME Memo at Sec. 4.

[105] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 66; White & Case Oct. 2, 2002 Submission at 47-48.

in Kazakhstan, SOEs operated in sectors that were "subject to market forces in the form of foreign and domestic private competition," such that "the existence of SOEs in these sectors does not prevent their prices and costs from being reliable measures of value."[106] In contrast, because the private sector in Vietnam is "constrained,"[107] the market cannot operate such that prices and costs in Vietnam are meaningful measures of value for the Department's calculation of normal value. The Department cannot, therefore, find that Vietnam qualifies as a market economy under U.S. trade laws.

[106] Kazakhstan NME Memo at Sec. 4.
[107] Vietnam Economic Monitor at 33.

V. The Vietnamese Government Continues to Interfere with Market Allocation of Resources and the Pricing and Output Decisions of Enterprises.

Contrary to GOV and VASEP assertions, Vietnamese commercial transactions do not reflect market-based supply and demand forces because the government continues to maintain extensive control over pricing, the allocation of capital and non-capital resources, and the output decisions of Vietnamese and foreign enterprises.

A. The Vietnamese Government Maintains Price Controls Throughout the Vietnamese Economy Such That Transactions Are Not Valued Based on Considerations of Supply and Demand.

The GOV concedes that the Vietnamese government sets prices in the broad categories of petrol, metals, fertilizer, cement, newspaper, domestic freight of essential goods, international telecommunications, water, rice exports, crude oil exports, petrol imports, fertilizer imports, electricity, postal services, domestic telephone services, and land rent.[108] Government-set prices in these fundamental industries alone are sufficient to distort transaction prices throughout the Vietnamese economy and demonstrate that the Vietnamese government maintains pervasive price controls.[109]

Nevertheless, in an attempt to minimize the government's prominent role in price-setting, the GOV falsely states that prices of "all other products and services are set by the market without any intervention by state institutions."[110] However, even the GOV's own submission to the Department contains references to other government price

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[108] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 74-75.

[109] These are all major sectors in the Vietnamese economy. Oil exports, alone, reportedly account for 11.2 percent of Vietnam's GDP. See Ngoc Mai, "Oil Exports Shaky as World Price Falls," Vietnam Investment Review, Jan. 15, 2001.

[110] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 74-75.

controls. For example, the GOV cites the Ordinance on Price,[111] which became effective in July, 2002 and which provides that prices of land rental, water surface rental, important mineral resources, monopoly goods and services including electricity, postal services, seaport services, and domestic aviation and train fares are all regulated by the Vietnamese government.[112] Prices in these sectors affect prices throughout the Vietnamese economy, ensuring that, contrary to the GOV's allegation, transactions in Vietnam are not valued principally on considerations of supply and demand. In fact, as recently as October 8, 2002, the Vietnamese government prepared a draft decree on land-use prices, setting minimum and maximum price levels for land-use rights.[113] This decree exemplifies the government's plan to continue regulating prices in economic sectors other than those specified in the list that the GOV has submitted to the Department.[114]

Furthermore, under the new Ordinance on Price, the Vietnamese government will continue to control transaction prices in Vietnam, contrary to the GOV's claim that "[p]rices have been liberalized to a sufficient extent that transactions are now valued based on considerations of supply and demand."[115] While the GOV's submission to the Department concedes that "goods and services essential for the economy and the public" will all continue to be regulated by the Vietnamese government under the Ordinance on

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[111] Id. at 76.

[112] See Ordinance on Prices, Arts. 7(1), 39, at http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20021003151257.

[113] See "Decree on Land Price Schedule Drafted," Thanh Nien, Oct. 8, 2002, in Development Governance Vietnam, Oct. 9, 2002, at 8, attached as **Exhibit 6.**

[114] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 74-75.

[115] Id. at 74.

Price,[116] the GOV arbitrarily defines this broad category as "meaning bus fares within cities, towns, or industrial zones; printing paper for newspapers; text books for elementary and secondary schools; and gasoline."[117] The GOV, however, provides no indication of which regulation defines this term or limits its application to these sectors,[118] and with no evidence of legal limits provided by the GOV, the Department can only conclude that it is the Vietnamese government that may determine which goods and services "are essential for the economy and the public." Through this "catch-all" category, which the Vietnamese government is free to define or re-define at any time, the government retains substantial control over the setting of prices. The GOV's claim that prices are based on supply and demand is, therefore, not supported by the information before the Department.

Moreover, the GOV significantly understates the degree to which it controls prices in Vietnam. In its allegation that government price controls do not interfere with the establishment of market-based prices in the Vietnamese economy, the GOV states that its price controls are "natural monopoly controls" no more than those in existence in the United States and are comparable to price controls in effect in Russia and Kazakhstan at the time those countries were graduated to market economy status.[119] On the contrary, however, the Vietnamese government directly controls prices in the following sectors:

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[116] See Ordinance on Prices, Arts. 7(1), 39, at http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20021003151257.

[117] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 76.

[118] Id.

[119] See id. at 78-80. "Natural monopolies" and natural resources should not be confused. Natural monopolies occur where economies of scale justify the role of a single supplier as the most efficient utilization of resources and justify government intervention in regulating prices in order to avoid allowing a private entity to establish monopoly-power pricing. Natural resource production, on the other hand, is not necessarily a natural monopoly. For example, in the natural gas sector, only the transmission function is

- bus fares;
- cement;
- coal;
- crude oil exports;
- domestic aviation;
- domestic freight of essential goods;
- electricity;
- fertilizer;
- fertilizer imports;
- important mineral resources;
- international telecommunications;
- iron;
- land rental;
- metals;
- newspaper;
- petrol;
- petrol imports;
- postal services;
- rice exports;
- seaport services;
- steel;
- sugar;
- text books;
- train fares;
- water; and
- water surface rental.

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typically considered a natural monopoly. The extraction and sale of the natural gas itself is not. Therefore, the Vietnamese government's price decree regulating prices for "important mineral resources" is not justified based on "natural monopoly" theory. Furthermore, price controls of "important mineral resources" are particularly significant in the context of price distortions because mineral resources are generally critical inputs into a variety of types of downstream production. As noted in Petitioners' Oct. 2, 2002 submission to the Department, for example, the Vietnamese state-regulated price for coal is substantially lower than the market price. See Akin Gump Oct. 2, 2002 Submission at V-3, Exhibit 5-1.

Based on this extensive list of industries in which the Vietnamese government directly (and admittedly) sets prices, in addition to those other industries in which the Vietnamese government controls the pricing decisions of a SOE monopoly or oligopoly,[120] it is clear that the Vietnamese government's price controls far exceed those in Russia, Slovakia, the Czech Republic, Poland, Hungary, and Latvia, as described by the GOV.[121]

The GOV also cites Article 7 of the Law on Enterprises to conclude that businesses, including SOEs and FIEs, may set prices independently.[122] Nevertheless, press reports cited by Petitioners in their previous submission to the Department provide evidence that in many industries, the government maintains controls over price-setting, for SOEs as well as FIEs.[123]

Finally, the GOV notes that most price controls were lifted in 1992 through Decision No. 137. The GOV, however, has not provided the full text of this decision,[124] contrary to the Department's requirement that each party submitting comments in this investigation "fully document or support all assertions and claims,"[125] and Petitioners have been unable to find a complete version of this Decision elsewhere. As such, it has been impossible to assess whether Decision No. 137, as a de jure matter, lifts "most" of the Vietnamese government's price controls, as the GOV alleges, or whether there are

[120] See Akin Gump Oct. 2, 2002 Submission at V-4.
[121] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 79-80.
[122] See id. at 75-76.
[123] See Akin Gump Oct. 2, 2002 Submission at V-3 to V-5.
[124] The GOV has only provided a limited excerpt of this Decision. See http://www. vietnamembassy-usa.org/
[125] Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Opportunity to Comment on Petitioner's Allegation that Vietnam has a Non-Market Economy, 67 Fed. Reg. 52942, 52943 (Aug. 14, 2002).

other sectors of the Vietnamese economy that are subject to government price control, as news reports indicate.[126] All of these factors demonstrate that Vietnamese prices are significantly distorted and that they do not reflect market-based supply and demand considerations.

B. The Vietnamese Government Controls Capital Resource Allocation Through Its Control of the Vietnamese Banking Sector.

Contrary to the GOV's claims that the SBV and the SOCBs are independent of Vietnamese government control,[127] Vietnam's banking system is, in fact, "heavily controlled" by the Vietnamese government.[128] Vietnamese banks allocate capital based on government priorities, thereby sustaining businesses that would otherwise collapse in a market economy and withholding capital from private enterprises. In fact, in direct contrast with the GOV's assertions, the Economist Intelligence Unit concludes that Vietnamese bank lending is "often treated as an arm of government policy" because, for example, banks are "regularly directed to offer preferential interest rates and debt relief to farmers, and many banks enjoy a cosy relationship with large [SOEs]."[129] In this regard, a U.S. Department of Agriculture report on Vietnam's rice industry noted in April, 2002 that "[t]he State Bank and [the SOCB] Vietnam Commercial and Trade Bank . . . were assigned to give loans to exports loading rice for Indonesia."[130] The "assignment" was clearly made by the government.[131]

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[126] See Akin Gump Oct. 2, 2002 Submission at V-3 to V-5.
[127] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 83.
[128] EIU, Country Commerce Vietnam, Apr. 2002, at 50.
[129] Id. at 51.
[130] "Oryza Market Report – Vietnam: Rice Update," Apr. 18, 2002, at http://oryza.com/asia/vietnam/index.shtml, attached as **Exhibit 7.**
[131] Id.

Despite unsupported GOV allegations to the contrary, Vietnam's banking system is structured to ensure that SOEs receive the bulk of SOCB capital allocation, in accordance with the economic policy of the Vietnamese government.[132] SOEs are thus protected from competition with private enterprise, despite GOV claims of "increasing separation of government interest and private financing."[133]

In fact, the GOV inaccurately alleges that the SBV and the four SOCBs are independent of the Vietnamese government and that the government's attempts to change Vietnam's banking laws have resulted in an independent banking system.[134] The U.S. Commercial Service specifically states that the SBV is not an independent body similar to the U.S. Federal Reserve Bank, but rather that it operates under government guidance.[135] Additionally, the U.S. Commercial Service emphasizes that the SOCBs and the government have a "cozy relationship."[136] The close connection between the SBV, the SOCBs, and the Vietnamese government ensure that FIEs in Vietnam "face a fairly restrictive financing environment.[137] Although Decree 64 on Payment Services provided some ability for banks to clear payment transactions without explicit SBV approval for

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[132] See Akin Gump Oct. 2, 2002 Submission at V-7 to V-8.

[133] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 84-85.

[134] Id. at 83, 84.

[135] U.S. Country Commercial Service, "Vietnam Country Commercial Guide FY2002," at 86, at http://www.usatrade.gov/website/ccg.nsf/ccgurl/ccg-vietnam2002-ch--067b8f0. See Section I for more analysis of the Vietnamese government's control of the SBV.

[136] Id.

[137] EIU, Country Commerce Vietnam, Apr. 2002, at 50.

each transaction,[138] the fact remains that the power remains with the SBV to issue and revoke licenses for all credit institutions.[139]

The GOV and VASEP also inaccurately assert that the SBV has operated since the beginning of 2002 on the principle that "what is not explicitly forbidden is allowed."[140] Implementation of this principle in the Vietnamese economy has, in fact, lagged, as demonstrated by recent foreign bank complaints that restrictions on their performance of banking operations and services in Vietnam precluded them from actually being "allowed to do whatever is not banned by law."[141]

Additionally, complaints by foreign banks operating in Vietnam indicate that, contrary to GOV allegations, they have difficulty accessing capital in Vietnam.[142] Even the GOV's description of the role in Vietnamese project financing, of the British foreign investment fund Dragon Capital and the Thai foreign investment fund Vietnam Frontier Fund,[143] creates an inaccurate impression of the role of foreign investment funds in the Vietnamese economy. Both funds are, in fact, rare examples of foreign participation in the Vietnamese financial sector,[144] and not the examples of broad active participation by

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[138] Decree on Payment Operations Through Organizations Providing Payment Services, No. 64-2001-ND-CP, Sept. 20, 2001, at http://www.vietnamembassy-usa.org/news/newsitem.php3?datestamp=20021002143627.

[139] Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 3, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

[140] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 81; White & Case Oct. 2, 2002 Submission at 54.

[141] "Law on Credit Institutions on Agenda," Lao Dong, Oct. 3, 2002, in Development Governance Vietnam, Oct. 9, 2002, at 8, attached as **Exhibit 6.**

[142] EIU, Country Commerce Vietnam, Apr. 2002, at 50.

[143] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 88.

[144] Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 1, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

foreign banks that the GOV suggests.[145] Foreign shareholdings in joint-stock banks, contrary to the GOV's claim, "are not generally permitted, with the case-by-case exception of several foreign invested funds since 1995," which include the two mentioned by the GOV.[146] Moreover, Vietnam Frontier Fund recently sold the shares it held in two Vietnamese joint-stock banks.[147] Clearly, foreign banks do not have the overall freedom that the GOV alleges.

The Vietnamese government also enhances its "policy of protection of domestic companies" by restricting foreign participation in the banking and finance sector.[148] Although the GOV asserts that capital in Vietnam is allocated based on market principles,[149] the extensive Vietnamese restrictions on the role of foreign banks in the Vietnamese economy contradicts this proposition. In fact, foreign shareholders hold no more than ten percent of shares in a Vietnamese joint-stock bank.[150] Additionally, foreigners do not have access to the "fledgling" Vietnamese equities market.[151] The Vietnamese government also burdens foreign bank branches operating in Vietnam with "onerous reporting obligations, to the extent of reporting on every customer's transactions every month."[152] According to one analyst, "foreign banks taking in and lending local deposits would bring in credibility , capital, capacity, and discipline" to the

145 Willkie Farr & Gallagher Oct. 2, 2002 Submission at 88.

146 Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 1, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

147 Id.

148 Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 1, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

149 Willkie Farr & Gallagher Oct. 2, 2002 Submission at 81.

150 Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 1, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

151 See EIU, Country Commerce Vietnam, Apr. 2002, at 50.

152 Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 9, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

Vietnamese banking system, but the SOCBs "argue that they need time to become more efficient."[153] Restrictions on the investment and operation of foreign banks in Vietnam diminish the "breadth" of the Vietnamese banking sector alleged by the GOV[154] and ensure that capital allocation follows government policy rather than the market principles the GOV alleges.

VASEP further states that the Department should base its analysis of the Vietnamese economy on unfulfilled Vietnamese government commitments to the IMF and the World Bank that "confirm that Vietnam does not use banks to dictate the allocation of credit and financial resources."[155] However, with 74% of the SBV's capital allocation going to SOCBs,[156] and with the services of SOCBs chiefly allotted to the Vietnamese government,[157] it is impossible to conclude, as the GOV does, that "[t]he autonomy and diversity in banking and financing operations in Vietnam create free competition and choice in the economy and clearly indicate that the financing of the economy is not controlled by the Government."[158]

Finally, although the GOV suggests that "capital is allocated through more informal channels or is self-financed" and that there may be a "likelihood that capital accumulation and distribution could be taking place through informal credit markets and

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[153] David Dapice, "Economic Policy for Vietnam in a Period of Economic Turbulence," 2001, at 10, available at http://www.fetp.edu.vn/shortcourse/0102/Eco_Management/English/7-Wed-Jan16/Dapice-Economic%20Policy%20for%20Vietnam-English.pdf.

[154] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 87.

[155] White & Case Oct. 2, 2002 Submission at 59.

[156] Maureen McLaughlin & Nigel Russell, "Banking & Finance – Vietnam," July 2002, at 1,3, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 5-3.

[157] 2002 Index of Economic Freedom (Washington, D.C.: The Heritage Foundation and The Wall Street Journal, 2002) at 414, attached to Akin Gump Oct. 2, 2002 Submission Exhibit 6-4.

[158] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 89.

self-financing," this suggestion is without support.[159] There is a significant amount of capital channeled through the formal Vietnamese banking system, but it disproportionately goes to SOEs. One analyst describes a market economy's financial system "like the heart in a person. Money is the blood, and a healthy financial system takes in money (savings) and pumps it to where it is needed. The financial system in Vietnam is not healthy. Institutions that have a great deal of trouble lending to private businesses dominate the banking system."[160] Growth of private businesses is impeded by these conditions.[161] As a result, the distortions in the Vietnamese banking system distort the allocation of resources in Vietnam, and the distortion of capital flows results in distorted prices throughout the Vietnamese economy.

C. The Vietnamese Government Also Controls the Entrepreneurial Activities of Vietnamese Individuals and Enterprises.

The GOV acutely overstates the degree to which Vietnamese individuals and enterprises may engage in entrepreneurial activities in part because it neglects the degree to which small enterprises continue to base their decisions on government output targets.[162] The Vietnamese government plays a substantial role in channeling the efforts of smaller enterprises, in addition to its direct control of SOEs.

Despite GOV claims that private enterprises operate free from government control,[163] the EIU reports that most Vietnamese private companies receive 10-50 visits

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[159] Id. at 2, 82-83.
[160] David Dapice, "Economic Policy for Vietnam in a Period of Economic Turbulence," 2001, at 10, available at http://www.fetp.edu.vn/shortcourse/0102/Eco_Management/English/7-Wed-Jan16/Dapice-Economic%20Policy%20for%20Vietnam-English.pdf.
[161] Id.
[162] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 90.
[163] See id. at 90-93.

per year from government inspectors, while some private companies receive at least one visit per week.[164] Moreover, despite GOV claims that SOEs generally operate free of Vietnamese government control,[165] the Vietnamese government, as noted in Section IV of this submission, has been extremely reluctant to relinquish control of SOEs and to hasten SOE privatization.

Furthermore, the GOV's references to a state directive on inspection and examination at Vietnamese enterprises, the State Enterprise Law, and a decree on enterprise tendering[166] are also misplaced because, in practice, implementation of these provisions has not been effective; on the contrary, as noted by the EIU, Vietnamese "rhetoric stresses deregulation and liberalization," but "suspicion of private enterprise remains entrenched in the bureaucracy, political circles, and at many financial institutions. In practice, reform efforts inch along, while officials continue the tradition of state interference in business activity."[167]

Finally, with little support for its broad proposition, the GOV claims that the Vietnamese government "completely lifted control over output decisions in the agricultural sector."[168] The cited UNDP report merely states, however, that the Vietnamese government recognized the role of family farmers in the Vietnamese economy and allocated land-use rights to them for farming, which resulted in an increase in rice output and the establishment of Vietnam, by the mid-1990's, as a major rice

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[164] EIU, Country Commerce Vietnam, Apr. 2002, at 11.
[165] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 94.
[166] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 92-95.
[167] EIU, Country Commerce Vietnam, Apr. 2002, at 11.
[168] Willkie Farr & Gallagher Oct. 2, 2002 Submission at 91.

exporter.[169] The fact that even now the Vietnamese government sets export targets and gives corresponding bonuses to exporters in the rice industry casts doubt on the GOV's conclusion.[170] In fact, the Vietnamese government employs a number of measures to support the Vietnamese rice industry, such as government control over rice export prices, provision of access to state-owned warehouses for storing rice, permission to use stored rice as collateral for bank loans, and government instruction to the SBV to lend to farmers to aid them in not defaulting and losing their stored rice stock.[171] All of these measures contradict the GOV's proposition that the Vietnamese government no longer controls output decisions in the agricultural sector and typify the control the Vietnamese government maintains over even the family farmers' contribution to the Vietnamese economy.

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[169] See Jordan D. Ryan & Jens C. Wandel, "Viet Nam's Reform Experience – the Quest for Stability During Transition," UNDP Programme Staff Paper, May 1999, at 8, available at http://www.undp.org.vn/undp/docs/1996/reform/eng/index.htm.

[170] "Oryza Market Report – Vietnam: Rice Update," Apr. 18, 2002, at http://oryza.com/asia/vietnam/index.shtml, attached as **Exhibit 7.**

[171] Id.

VI. The Additional Factors Put Forth by VASEP and the GOV Do Not Support a Finding of Market Economy Status

A. The U.S.–Vietnam BTA is Evidence of Vietnam's Nonmarket Economy Status

Throughout their submissions, VASEP and the GOV repeatedly refer to the U.S.-Vietnam Bilateral Trade Agreement ("BTA") as evidence supporting Vietnam's market economy status.[172] These arguments belie a serious misunderstanding of the BTA and its purpose.

As then-U.S. Trade Representative Charlene Barshefsky testified before Congress, the United States signed a Bilateral Trade Agreement with Vietnam because "[u]nder the Jackson-Vanik Amendment, such an agreement is necessary, together with certification of freedom of emigration, for the United States to maintain conditional Normal Trade Relations with non-market economies."[173] In other words, rather than signaling that Vietnam had achieved market economy status as VASEP and the GOV would have the Department believe, the BTA itself is an indication that the U.S. government considers Vietnam to be a nonmarket economy.[174]

Indeed, USTR Barshefsky explained in her testimony to Congress that the BTA is simply "setting a course for greater openness to the outside world; promoting economic reform and market principles, transparency in law and regulatory policy, and helping

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[172] See, e.g., White & Case Oct. 2, 2002 Submission at 1, 18, 20, 24, 39, 60; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 3, 96.

[173] See Testimony of Ambassador Charlene Barshefsky, U.S. Trade Representative, before the House Subcommittee on Asian and Pacific Affairs, House Subcommittee on International Economic Policy and Trade (Sept. 19, 2000) (emphasis added), at http://www.house.gov/international_relations/ap/Vietnam/vietbars.htm.

[174] The BTA is a bilateral commercial agreement provided for under Title IV of the Trade of 1974, as amended (commonly referred to as the Jackson-Vanik Amendment). See Mark E. Manyin, Congressional Research Service, "The Vietnam-U.S. Bilateral Trade Agreement," June 20, 2001, at 3. The United States only enters into Title IV bilateral agreements with nonmarket economies. See id.

Vietnam to both integrate itself into the Pacific regional economy and build a foundation for future entry into the World Trade Organization."[175] Ralph Ives, Assistant USTR for Southeast Asia, the Pacific and APEC also quite recently explained to Congress that, "[t]he BTA provides Vietnam the incentive it needs to open its economy, introduce competition – both internally and internationally – and make its entire economic regime more transparent."[176] Clearly, the establishment of a market economy in Vietnam is the ultimate goal of the BTA, not the starting point.

Moreover, the GOV's references to the U.S.-Jordan Free Trade Agreement and the U.S.-Jordan Bilateral Investment Treaty as support for its claim that "the types of reform requirements enumerated in the US-VN BTA are not solely reserved for nominally socialist states" are simply misplaced.[177] Apart from certain broad categories of measures related to trade in services and intellectual property rights, the U.S.-Jordan Free Trade Agreement and the U.S.-Jordan Bilateral Investment Treaty contain entirely different types of provisions from the U.S.-Vietnam BTA.[178] Unlike these other agreements, the BTA requires Vietnam to undertake comprehensive reforms related to trading rights, tariff and non-tariff measures, import licensing, customs valuation and fees, state trading, and transparency, just to name a few. The extensive reform measures

[175] See Testimony of Ambassador Charlene Barshefsky, U.S. Trade Representative, before the House Subcommittee on Asian and Pacific Affairs, House Subcommittee on International Economic Policy and Trade (Sept. 19, 2000) (emphasis added), at http://www.house.gov/international_relations/ap/Vietnam/vietbars.htm.

[176] Testimony of Ralph F. Ives, III, Assistant U.S. Trade Representative for Southeast Asia, the Pacific and APEC, before the House Subcommittee on Trade of the House Committee on Ways and Means (July 18, 2002), http://waysandmeans.house.gov/trade/107cong/7-18-02/7-18ives.htm.

[177] See Willkie Farr & Gallagher Oct. 2, 2002 Submission at 4.

[178] Moreover, neither of these agreements is a Title IV bilateral agreement, as explained supra note 174.

enumerated in the BTA illustrate clearly how much further Vietnam must go before it can reasonably be considered to have a market economy.

B. Future Commitments Under the U.S.–Vietnam BTA and Other International Agreements Do Not Support a Finding of Market Economy Status

Not surprisingly, rather than addressing many of the current de facto shortcomings of Vietnam's economy, both VASEP and the GOV rely heavily on future commitments made by Vietnam to reform its economy.[179] For example, as both VASEP and the GOV admit, many of the commitments made by Vietnam under the BTA will not be effective for at least several years.[180] Some of these commitments include, but are not limited to: tariff reductions which will not be effective for 3-6 years from the date of implementation; restrictions on import trading rights which will generally be unaffected for 3-5 years; restrictions on distribution rights which will generally be unaffected for 3-7 years; restrictions on export trading rights which will generally be unaffected for 3-7 years; obligations regarding customs valuations and fees which will not be effective for 2 years.[181] Moreover, the phase-out of most imports and exports subject to state trading are not bound by any timetable, while the few that are will generally be unaffected for at least 5 years.[182]

Many of Vietnam's commitments under other international agreements cited by VASEP and the GOV will also not be effective for a number of years. For example, both

[179] See, e.g., White & Case Oct. 2, 2002 Submission at 1, 15, 27, 29, 34, 50, 56, 60; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 3, 13, 19, 23, 29, 52, 67, 96.

[180] See, e.g., White & Case Oct. 2, 2002 Submission at 20; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 97.

[181] See, e.g., Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations at 4, 5, C1-C3, E1-E20, available at http://www.ustr.gov/regions/asia-pacific/ text.html.

[182] See id. at D1-D12.

VASEP and the GOV refer to Vietnam's commitments under the ASEAN Free Trade Agreement ("AFTA")[183] but fail to mention that Vietnam is not required to reduce tariffs on most products subject to the Agreement until 2006.[184] For certain agricultural products, Vietnam is not required to reduce tariffs until 2013.[185]

In a nonmarket economy status determination, the Department must determine whether "market forces in a country are sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[186] In this regard, future commitments cannot be substituted for current de facto conditions when determining whether the Department may rely on prices and costs in Vietnam for purposes of its antidumping analysis.

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[183] See, e.g., White & Case Oct. 2, 2002 Submission at 61; Willkie Farr & Gallagher Oct. 2, 2002 Submission at 97.

[184] See ASEAN Free Trade Area (AFTA): An Update, available at http://www.aseansec.org/general/publication/afta-upd.htm.

[185] See id.

[186] See Russia NME Memo at 6.