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October 2, 2002

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BY HAND DELIVERY

The Honorable Donald L. Evans
Secretary of Commerce
U.S. Department Of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street & Constitution Avenue, NW
Washington, DC 20230

Re: Comments of the Government of Vietnam on the Market Economy Status of Vietnam in the Antidumping Investigation of Certain Frozen Fish Fillet from Vietnam

Dear Secretary Evans:

On behalf of the Government of Vietnam ("GOV"), an interested party in the current proceeding, we hereby submit our comments in opposition to Petitioners' allegation that Vietnam should be considered a non-market economy ("NME"). See 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 (August 14, 2002).

If you have any questions concerning this submission, please contact one of the undersigned.

Respectfully submitted,

Matthew R. Nicely
Julia K. Eppard

Frozen Fish Fillets from Vietnam **A-552-801**

PUBLIC CERTIFICATE OF SERVICE

I, Matthew R. Nicely, hereby certify that a copy of the foregoing public submission has been served by first class mail, this day, upon the following persons:

On Behalf of the Counsel for Catfish Farmers of America; America's Catch, Inc.; Consolidated Catfish Co., L.L.C.; Delta Pride Catfish, Inc.; Harvest Select; Heartland Catfish; Pride of the Pond; Simmons Farm-Raised Catfish; Southern Pride Catfish:
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Dated: October 2, 2002

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COMMENTS ON THE DEPARTMENT'S CONSIDERATION OF THE MARKET ECONOMY STATUS OF VIETNAM

SUBMITTED ON BEHALF OF THE GOVERNMENT OF VIETNAM

Matthew R. Nicely
Julia K. Eppard

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Dated: October 2, 2002

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SUMMARY OF COMMENTS

The Government of Vietnam submits these comments in opposition to the Petitioners' allegation that Vietnam should be treated as a non-market economy ("NME") for purposes of its antidumping analysis. Upon careful consideration of the factors the Department considers in its NME/ME analysis, including a comparison with the Department's treatment of similarly situated countries, it is evident that Vietnam is a market economy.

COMMENTS

I. INTRODUCTION

Vietnam has shed its central planning system and has made sufficient progress in its economic liberalization in accordance with international practices such that it should be considered a market economy under the U.S. trade laws. Market-based economic reforms thus far in Vietnam have been sweeping and deep and the integrity of Vietnam's unwavering commitment to further reforms cannot be doubted. Vietnam recognizes that more should be done to strengthen the institutions of the market, and those efforts continue today even as this case is considered. Yet while reforms continue, the necessary market institutions are already in place. Prices and costs in Vietnam today are simply no longer controlled by the government; rather, these market signals are formed by the collective forces of supply and demand of the market and properly reflect the relative scarcity of resources. Because of this, any economic and financial data collected by the Department from producers, exporters, and other companies in this case, as well as in any other trade case leveled against Vietnam, are more than suitable for its antidumping calculations. To label Vietnam a non-market economy at this stage in the reform process and reject such data *en masse* is simply not justified.

While there may be many preconceived notions about the status of Vietnam's economy, application of the Department's standards should result in no other conclusion than that Vietnam today operates as a market economy. First, Vietnam is a trade-oriented country with current account currency convertibility such that world prices can penetrate the domestic economy. Merchandise trade between Vietnam and the rest of the World is simply too robust to be managed by some central apparatus. Second, though much of Vietnam's economy consists of household enterprises and farmers, where wages are used they are determined by the market forces of supply and demand for labor; the freedom of workers to seek higher wages in the job of their choice can lead to no other result. Third, it is widely recognized that foreign investment is the engine of growth in Vietnam. Such investment from abroad is encouraged and, while certain restrictions may be found regarding such activities, these are in place for legitimate reasons such as the prevention of capital flight and currency stability, and are no more limiting than similar rules in other market-oriented developing nations. Fourth, the agrarian nature of much of Vietnam's economy and the sufficiently codified land-use rights dictate that control of the means of production has been lifted from the hands of the state and placed in the hands of the people and enterprises of the country. And, private enterprises in other sectors are growing in importance. Finally, the allocation of resources in the economy is guided by the forces of supply and demand and is motivated by private gain. Prices, with only a few exceptions, are not controlled by the government; bidding and shopping for a better price are commonplace. And while the banking system may not be as mature and complex as in some developed countries, this has more to do with the fact that capital is allocated through more informal channels or is self-financed and less to do with the fact that the state funds enterprises.

Vietnam has reached this stage only after tremendous efforts. Through the *Doi Moi* reforms, implemented vigorously since 1986 and strengthened significantly since 1991, Vietnam has created a critical mass of market institutions and has instilled rational, market-based economic discipline in its enterprises and citizens -- changes that will serve as an engine of growth for the entire economy. While confessedly the process of reform has not been without "growing pains," the centralized restrictions of the state have been lifted and Vietnam has turned the corner to join the World community under the principles of free and fair trade. Vietnam has demonstrated this commitment through its joining of several international institutions as the Association of Southeast Asian Nations ("ASEAN"), the ASEAN Free Trade Area ("AFTA"), and the Asian Pacific Economic Cooperation forum ("APEC"). Vietnam has applied to join the World Trade Organization ("WTO") and is fully prepared to work with its members to ensure a smooth accession by 2004; and preparation is already under way to move Vietnam closer to compliance with the prerequisites of the WTO's member nations. Additionally, Vietnam has a successful, working relationship with the International Monetary Fund ("IMF") and its strict macroeconomic disciplines -- rules with which Vietnam has complied to ensure sound macroeconomic policies according to the IMF's standards. Through these actions, Vietnam has demonstrated its resolve to integrate itself in the international trading community according a rule-based and market-oriented international trade structure.

While Vietnam has demonstrated its commitment to economic liberalization in these international institutions, perhaps the most relevant sign of this commitment to free and open trade under market principles for purposes of this proceeding is the progress made in the normalization of trade between the United States and Vietnam. This progress in the commercial relationship between Vietnam and the United States was formalized with the signature and implementation of the U.S.-Vietnam Bilateral Trade Agreement ("US-VN BTA") in 2001. This landmark agreement marks not only a tremendous leap forward by both nations toward the development of mutually beneficial and equitable economic trade relations, it also confirms directly to the United States that Vietnam is committed fully to a market-based system of trade.

Moreover, it should be recognized that the types of reform requirements enumerated in the US-VN BTA are not solely reserved for nominally socialist states -- rather, such liberalization of trade and investment regimes is required in other trade agreements to which the United States is a party. For instance, in a manner similar to measures adopted in the US-VN BTA, the U.S.-Jordan Free Trade Agreement ("FTA") requires significant liberalization on the part of Jordan, especially with regard to trade in services, government procurement, and the protection of intellectual property rights.[1] Similarly, the U.S. Jordan Bilateral Investment Treaty (an agreement that preceded the U.S.-Jordan FTA and accompanies it as its *de facto* chapter on investment) requires such measures as "national treatment" of foreign investments, improved convertibility with regard to financial transfers for investment purposes, protection from expropriation, disallowance of performance requirements (*e.g.*, "local content" measures); and assurances regarding the employment of aliens for foreign investments.[2] These types of reform requirements reflect the U.S. desire to open further developing country markets to trade and investment and do not stem from whether a country is a market economy or not.[3]

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1 Agreement Between the United States of America and the Hashemile Kingdom of Jordan on the Establishment of a Free Trade Area (signed Oct. 24, 2000) (available at http://www.ustr.gov/regions/eu-med/middleeast/textagr.pdf).

2 Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment (signed July 2, 1997) (available at http://www.justrade.jo/trade_background/BIT_English.doc).

3 The VN-US BTA recognizes that, "Vietnam is a developing country at a low level of development." Agreement Between The United States of America and the Socialist Republic of Vietnam on Trade Relations (signed July 13, 2000) (available at http://www.ustr.gov/regions/asia-pacific/text.pdf) ("US-VN BTA").

Indeed, to the extent residual distortions can be found in the economy that may affect the suitability of certain prices and costs in the context of the antidumping margin calculation, these reflect Vietnam's struggles with economic development, not the existence of a non-market economy. The problems and distortions remaining in the Vietnamese economy are not due to the pervasiveness of state planning and control but are, rather, more akin to the problems related to reaching the goals of sustained growth, equitable employment, and social welfare that are seen in numerous other developing countries. The Department should be careful not to mistake such problems or the solutions implemented by the government as indicative of a non-market economy. Even without taking into account the important special circumstance of Vietnam's stage of economic development, the economy compares favorably even to more industrialized countries in terms of the extent to which it operates under market principles.

Despite the fact that residual distortions may remain in the economy, Vietnam is confident that ongoing efforts will be successful in tackling the remaining problems. Not only is Vietnam's resolve steeled but it also faces relatively lower hurdles compared to the legacies seen in the former Soviet Union. After all, in a historical context Vietnam operated under command economy principles for a relatively short period of time. Specifically, it was not until 1954 that the process of state control began in Vietnam and, even at that point, this system was implemented only in the northern region of the country; the economy south of the seventeenth latitude continued to operate as a market economy until at least 1975. And these dates represent only the beginning of the implementation of a state-controlled economy. Just as the transition to a market economy takes time and includes many obstacles, the implementation of state control was not immediate and did not affect all parts of the economy simultaneously. Indeed, the United Nations Development Programme ("UNDP") has recognized that the Government of Vietnam has never "exercise[d] as much control over the economy as was the case in most other centrally planned economies of Eastern Europe or the [former] Soviet Union or even China," and that "the activities of various [state owned] enterprises were never truly linked through a central plan."[4]

In contrast to the situation in Vietnam, other countries completing the transition process to a market economy faced a more daunting task of undoing the distortions that had been encouraged for many years. The development of a command economy in Russia began with the Communist Revolution in 1917, while such countries as Kazakhstan and even Latvia were annexed by the Soviet Union in 1936[5] and 1940,[6] respectively, well before the system of state economic control was utilized in Vietnam. The Department has recognized that the long legacy of state control in these countries left the economies with completely skewed capital bases grounded on arbitrary economic planning that bore no relation to comparative advantage or sensible specialization related to the scarcity of resources.[7] Additionally, these countries were isolated from the rest of the world, as trade flows were focused inward among the various Soviet republics.[8] It is important for the Department to recognize this distinction in order to assess the progress made in

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4 United Nations Development Programme, Vietnam's Reform Experience: The Quest for Stability During Transition at 4 (1996).

5 Memorandum for Faryar Shirzad, Antidumping Duty Investigation of Silicomaganese from Kazakhstan -- Request for Market Economy Status at 5 (Mar. 25, 2002) ("Kazakhshan Determination").

6 Memorandum for Troy Cribb, Antidumping Duty Investigation of Certain Steel Concrete Reinforcing Bars from Latvia -- Request for Market Economy Status at 4 (Jan. 10, 2001) ("Latvia Determination").

7 For instance, in its Kazakhstan decision, the Department noted that "Among Kazakhstan's designated products for the general all-union market were phosphate fertilizer, rolled metal, radio cables, aircraft wires, train bearings, tractors, and bulldozers. Kazakhstan also had a well developed network of factories producing military goods that supplied about 11 percent of the total military production of the Soviet Union… As a result of Soviet economic planning priorities, Kazakhstan's service sector was poorly developed.…" Kazakhstan Determination at 5. For Latvia, the Department noted that "Latvia produced every electric and diesel train in the Soviet Union, as well as more than half of all telephones and twenty percent of all telephone exchanges, refrigeration systems, and buses." Latvia Determination at 4.

8 The Department noted that "{t}he high degree of centralized planning and control under the Soviet command system eliminated virtually all direct contact between Latvian enterprises and the rest of the non-Soviet world." Latvia Determination at 4-5.

Vietnam even in the past year and the ease with which remaining obstacles to progress may be overcome. After all, the institutions and behaviors of the command and control economy in Vietnam were significantly less mature than those in countries such as Russia where the population literally knew no other way. While capital continued to accumulate in a skewed manner in an insulated environment over a longer period of time in the former Soviet Republics, Vietnam's experiment with state control was much shorter and all the while it remained a participant in the world trading community. In this comparative sense, the obstacles that may have skewed the economic valuation of resources in Vietnam were never allowed to run their course and, as a result, did not become entrenched in Vietnam in the manner that was witnessed in such long-standing non-market economies as Russia or the other former republics of the Soviet Union. In short, as concluded by the UNDP, unlike many Eastern European countries, the former Soviet Union or China, "the sophisticated central planning never took root as an exclusive factor in Vietnam's development."[9]

While Vietnam does not contend the notion that a significant portion of Vietnam's economy once operated under the principles of centralized command and control, Petitioners' allegation that Vietnam *is still* a non-market economy today ignores the tremendous accomplishments achieved. First, Petitioners' conveniently ignore volumes of evidence available attesting to the strides made by Vietnam, thereby mischaracterizing key aspects of Vietnam's economy.[10] Most of the Petitioners' arguments either misinterpret Vietnamese law or focus on precautionary measures enacted to buffer the Vietnamese economy from the deleterious effects of

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9 United Nations Development Programme, Vietnam's Reform Experience: The Quest for Stability During Transition at 4 (1996) (available at http://www.undp.org.vn/undp/docs/1996/reform/eng/index.htm).

10 Petition Filed by Valerie A. Slater, Akin Gump Strauss Hauer and Feld, on Behalf of Catfish Farmers of America at Exhibit 12 (Jun. 28, 2002) ("Petition").

the Asian financial crisis. Moreover, it is apparent that the petition conveniently omits any reference to the most recently adopted laws and regulations that implement important reforms that directly address the Department's criteria for examining the market economy status of a country. It is our intention in this submission to supplement the record so that the Department has a true understanding of the Vietnamese economy and how it operates.

In light of the information enumerated herein, we respectfully request that the Department determine that the Vietnamese economy is a market economy.

II. LEGAL STANDARDS AND PRECEDENT

Section 771(18) of the Tariff Act of 1930 ("the Act"), 19 U.S.C. § 1677(18), sets forth a clear legal standard that the Department must apply to determine whether a country should be considered a market economy for antidumping determinations. The statutory criteria require the Department to examine specific legal and economic issues pertaining to key aspects of a country's economy, not extraneous and preconceived political issues or allegations.

Section 771(18) specifies six factors that the Department shall consider in determining whether a country is, or remains, a non-market economy, namely:

1. the extent to which the currency of the foreign country is convertible into the currency of other countries;

2. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;

3. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;

4. the extent of government ownership or control of the means of production;

5. the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and,

6. such other factors as the administering authority considers appropriate.

Past Department determinations regarding market-economy status provide further instruction on how the Department applies the criteria when examining the economic framework of countries.[11] As noted in the determinations on the Russian Federation and Kazakhstan, the Department recognizes that market economies do not exist in an academic vacuum, and therefore:

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[11] See Memorandum for Faryar Shirzad, Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law (Jun. 6, 2002) ("Russia Determination"); Memorandum for Robert S. LaRussa, Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic (Oct. 13, 1999) ("Slovak Determination"); Kazakhstan Determination; Latvia Determination.

> {the} Department's evaluation of the statutory criteria does not require that countries be *judged against a theoretical model* or a perfectly competitive laissez-faire economy. Instead, the Department's determination is based on comparing the economic characteristics of the country in question to how other market economies operate, recognizing that market economies around the world have *many different forms and features*.[12]

Further, it is not a matter of whether distortions remain in an economy but, rather, whether the economic environment is such that the forces of demand and supply can sufficiently interact to determine the price and cost structures in an economy. Specifically, the Department noted:

> The problem with NMEs is not one of distorted prices, per se, since few, if any, market economy prices are perfect measures of value, free of all distortions (e.g., taxes, subsidies, other government regulatory measures). The problem, instead, is the price formation process in NMEs (i.e., the absence of the demand and supply elements that individually and collectively make a market-based price system work).[13]

Accordingly, since the *absence* of demand and supply elements is the reason for rejecting the prices and costs of a country, the *presence* of these forces, even accompanied by distortions that may alter resulting prices or costs, is sufficient for finding that an economy is market-based.

The governments of the United States, the members of the European Union, and many other countries around the world frequently intervene to a certain degree in their economies, including regulation of prices for certain resources and ownership stakes in certain industries.[14]

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12 Russia Determination at 6 (emphasis added).

13 Id.

14 Examples of such government ownership and intervention are numerous, including a variety of countries and sectors, such as Amtrak in the United States still today, airlines in a variety of countries, and until recently the steel industry in Brazil. For instance, Amtrak (The National Railroad Passenger Corporation), with assets close to $9.5 billion is primarily owned by the U.S. government. See, e.g., Amtrak 2000 Annual Report at n.1 <<http://www.amtrak.com/pdf/00annualrpt.pdf>>. This relationship is not limited to ownership either. Rather, the U.S. government continues to infuse additional capital in Amtrak. See, e.g., Remarks for the Honorable Norman Y. Mineta, Secretary of Transportation, Announcement on Amtrak Agreement (June 28, 2002) <<http://www.dot.gov/affairs/062802sp.htm>>. (In his remarks, Secretary Mineta announced the approval of a direct $100 million dollar loan from the U.S. Department of Transportation under the Railroad Rehabilitation and Improvement Financing (RRIF) program and plans for request to Congress for $170 million in operating funds for the remainder of the fiscal year.) For a discussion of government ownership of airlines, see William L. Migginson, Robert C. Nash and Matthias C. Randenborgh, World Bank, "The Privatization Dividend: A Worldwide Analysis of

No perfect market or completely laissez-faire economy exists. Thus, the Department noted, "it is not necessary that the country {in question} fully meet every statutory requirement relative to other market economies," but rather show "that the factors, taken together, indicate that reforms have reached a threshold level such that the country can be considered to have a functioning market economy."[15]

Thus, Vietnam's market economy status is a matter of considering the identifiable economic and legal data as compared to other countries that the Department treats as market economies. Relevant comparison markets especially include those having similar economic structure, scale and political background, such as Russia and other former members of the Soviet Union, as well as other ASEAN countries such as Indonesia, Malaysia, the Philippines, and Thailand. We discuss these other economies below for the sake of comparison. We urge the Department to be consistent in applying its criteria by announcing the market-economy status of Vietnam and implementing market-economy investigation methodologies as it has done for other countries under similar circumstances.

(continued)

the Financial and Operating Performance of Newly Privatized Firms" (Feb. 1996) (available at http://www.worldbank.org/html/fpd/notes/68/68meggin.pdf). For a discussion of government ownership of the Brazilian steel industry, see the Department's own decision: Final Affirmative Countervailing Duty Determination: Certain Cold Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 65 Fed. Reg. 5536, 5544-43 (Feb. 4, 2000).

15 Russia Determination at 6; see also Kazakhstan Determination at 4.

III. THE SPECIFIC FACTORS OF SECTION 771(18)(B) SUPPORT VIETNAM'S MARKET-ECONOMY STATUS

A. Vietnam's Currency Is Widely Convertible Into Other Foreign Currencies

Petitioners' claim that the currency of Vietnam, the dong ("VND"), is not convertible is contrary to fact. The question of convertibility involves two interrelated, but distinct, issues: (1) the degree to which the domestic currency is valued vis-à-vis foreign currencies under market-based rules and (2) the degree to which parties in the economy are permitted to buy, sell, and hold foreign currencies freely.[16] Together, these two issues speak to the extent of currency convertibility and the degree to which relative prices in an economy reflect world prices. As demonstrated herein, under Vietnam's exchange rate system, the VND, is valued relative to other currencies under market-based rules. Further, the Government has lifted most restrictions on foreign currency transactions to such an extent that any remaining restrictions do not fundamentally affect the convertibility of the Vietnam currency.

As a preliminary matter, it should be noted that the central bank, the State Bank of Vietnam ("SBV"), operates independently and is responsible for managing the monetary system of the country based on market principles. Specifically, the Ordinance on the State Bank of Vietnam in 1990 and the Law on the State Bank of Vietnam in 1998 established the SBV as a separate legal entity and charged it with the responsibilities typical of a central bank: maintaining stability of the value of Vietnam's currency, managing monetary policies and banking system, serving as creditor of last resort for commercial banks and credit institutions, issuing money, and

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[16] In past determinations, the Department's analysis of currency convertibility appears to primarily focus on the exchange-rate regime and current-account transaction controls. See Russia Determination at 8-9; Kazakhstan Determination at 5-7.

acting as agent in money transactions for the Government.[17] This role of the SBV as the central monetary institution with responsibilities similar to those in other market economies has been recognized by the IMF.[18]

That Vietnam has achieved a significant level of currency convertibility is recognized by the international community. Specifically, Vietnam has made sufficient progress in terms of its compliance with the IMF's Article VIII requirements to merit consideration as a market economy with regard to this aspect of the Department's analysis.[19] Through this monitored process, Vietnam has lifted nearly all exchange restrictions, temporarily maintaining only three types of restrictions subject to approval under Article VIII.[20] Because these final restrictions are scheduled to be phased out by the end of this year,[21] the Department should consider this imminent compliance with Article VIII in its analysis. And, these last remaining restrictions are no more distortive than those maintained by other countries deemed by the Department to be market economies.[22]

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17 Ordinance on State Bank of Vietnam (May 23, 1990); Law on the State Bank of Vietnam (effective from Oct. 1, 1998). (All Vietnamese legal documents cited in this submission can be found at http://www.vietnamembassy-usa.org/renovation/news.php3.)

18 See International Monetary Fund, Vietnam: Second Year Review Under The Three-Year Agreement Under The Poverty Reduction And Growth Facility And Request For Waiver Of Performance Criteria, IMF Country Report 02/151 at 14, 16 (July 2002) ("IMF Second Review").

19 Id. at 16, 41.

20 Id. These restrictions including surrender requirement, tax on profit remittance abroad applied for foreign investors and restrictions arising from the limit on the availability of foreign exchange for payments for imports of certain commodities.

21 Id.; see also International Monetary Fund, Vietnam Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding (Jun. 3, 2002) (available at http://www.imf.org/external/np/loi/2002/vnm/01/index.htm) ("IMF, Vietnam Letter of Intent (2002)").

22 At present, Russia maintains six (6) restrictions on foreign exchange transactions subject to approval under Article VIII. See International Monetary Fund, Russian Federation: 2001 Article IV Consultation and Post Program Monitoring Discussions - Staff Reports; Staff Statement; Public Information Notice on the Executive Board Discussion, IMF Country Report No. 02/74 at 31 (Apr. 4, 2002) (available at http://www.imf.org/external/pubs/ft/scr/2002/cr0274.pdf).

The Department's criteria specifically notes that the question of currency convertibility is not whether a currency is convertible (after all, every currency is convertible to some degree) or whether currency controls exist, but rather, it is a question of the "*extent to which* the currency… is convertible." Implicit in this standard, then, is the Department's recognition that the existence of *any* currency controls does not mean a currency system is not market-based. Therefore, to provide any meaningful analysis of the remaining currency controls, it is necessary to place Vietnam's currency policy in a relevant and relative context.

1. Management of the exchange rate system is consistent with other market economy practices

The VND is valued in currency exchange transactions under market-based rules through the supply and demand forces of independent sellers and buyers of foreign currency. Specifically, the VND is valued vis-à-vis the U.S. dollar through a "*de facto* managed floating regime"[23] and is allowed to float against other foreign currencies.[24] Since February 1999, the SBV no longer sets exchange rates; rather, individual participating banks determine the rates of exchange vis-à-vis the U.S. dollar and other currencies, though U.S. dollar rates must be within an adjustable band around the previous days average inter-bank rate. [25] Currently, banks are permitted to set U.S. dollar exchange rates within 0.25 percent of the previous day's inter-bank rate, rates for other currencies have no limit, and there are no limits the spread between buy and sell prices of foreign

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23 See IMF Second Review at 41.

24 Decision No. 679/1999/QD-NHNN of the Governor of the SBV (effective Jul. 1, 2002); International Monetary Fund, Annual Report on Exchange Arrangements and Exchange Restrictions at 1007, 1010-11 (2001) ("IMF Exchange Report").

25 IMF Exchange Report at 1007.

currencies.[26] Through this system, the resulting average inter-bank rate for U.S. dollar transactions each day, in turn, becomes the base inter-bank rate for the next day and so forth.[27]

The market-based nature of this system is clear. Under this system, all foreign banks operating in Vietnam can perform foreign currency transactions and participate in the inter-bank currency market with the SBV; and, furthermore, this commercial bank market also includes the active participation of domestic banks.[28] Convertibility of the currency within the band is maintained because the value of the currency is "managed" through the buying and selling of foreign currency reserves by the SBV (when necessary), rather than the restriction of currency exchange transactions.[29] Because Vietnam has also floated interest rates on loans and deposits in both U.S. dollars and VND, the supply and demand interacting to create these exchange rates abide by market forces. In this manner, Vietnam's exchange rate system is similar to systems utilized in countries deemed by the Department to be market economies.[30]

As for Petitioners' allegation that Vietnam possesses a *de facto* dual exchange rate due to its tax on the repatriation of profits by foreign enterprises, [31] such an accusation is clearly unfounded and most likely stems from Petitioners' misunderstanding of Vietnam's tax and foreign exchange systems. In fact, Vietnam does not have a dual exchange rate and has not had anything

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[26] Decision No. 679/2002/QD-NHNN of the Governor of the SBV (effective Jul. 1, 2002).

[27] Decision No. 64/1999/QD-NHNN 7 of the Governor of the SBV (Feb. 25, 1999); Decision No. 679/2002/QD-NHNN of the Governor of the SBV (Jul. 1, 2002).

[28] Government of Vietnam, General Statistics Official Letter No. 587/TCTK-TH (Sep. 4, 2002) ("GSO Official Letter no. 587/TCTK-TH").

[29] See East Asian Development Network, Exchange Rate Arrangements in Vietnam: Information Content and Policy Options at lxxviii - lxxix (Dec. 2000) (available at http://www.iseas.edu.sg/eadnwp18.pdf). For information on SBV's monetary policies, see also World Bank, Vietnam Development Report 2002: Implementing Reforms for Faster Growth and Poverty Reduction at 33-34 (2002) (available at http://www.worldbank.org.vn/data_pub/reports/Bank1/rep34/vdr2000.htm).

[30] The Russian Federation and Kazakhstan both adopted a managed floating regime for foreign exchange rates. See IMF Exchange Report at 759, 480.

[31] Petition, Exhibit 12 at 8.

resembling such a system since at least 1999, following the abolishment of the official exchange rate announced from time to time by SBV.[32] Moreover, Vietnam has not imposed any tax on foreign exchange transactions.[33] The tax on profit remittance abroad by foreign investors is, in fact, a component of the income tax system and, furthermore, this tax will be phased out as part of the program for harmonization of tax treatment between foreign-invested and domestic enterprises.[34] In any event, however such a tax is viewed, it should also be noted that the existence of a dual exchange rate system has been witnessed by the Department previously yet it did not sway its choice to use market-economy calculation methodologies.[35]

The existence of a targeted or managed exchange rate, used regularly by economies at various stages of development and with various degrees of centralized government control, in no way supports the conclusion that prices in an economy are in some way insulated from supply and demand forces in the rest of the world. With this said, though, Petitioners' argument that the VND may "only fluctuate by a range of 0.1%"[36] and that this system "results in insignificant movements of the dong,"[37] is based on outdated information and a misunderstanding of how exchange rates translate into prices from one currency to another. First, as mentioned above, the VND is now allowed to fluctuate within a band of plus/minus 0.25 percent per day. The

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32 Decision No. 64/1999/QD-NHNN7 of the Governor of the SBV (Feb. 25, 1999).

33 IMF Exchange Report at 1007.

34 At present, FIEs are subject to a corporate tax at a standard rate of 25 percent and foreign investors' profits (in the form of dividends or otherwise) remittance abroad are subject to a withholding tax at a standard rate of 7 percent, while domestic enterprises are subject to a standard corporate tax at 32 percent. See Law on Foreign Investment in Vietnam; Law on Corporate Tax; see also IMF Second Review at 16, 41.

35 Certain In-Shell Raw Pistachios from Iran: Preliminary Results of Antidumping Duty New Shipper Review, 67 Fed. Reg. 50863-864 (Aug. 6, 2002). Here, the Department found that "{a}ccording to the International Monetary Fund's 2001 Annual International Monetary Report, as of March 20, 2000, Iran had a dual exchange rate system. The two officially-approved rates are: 1) the effective Tehran Stock Exchange (TSE) which is applied to all transactions, except for 2) government imports of essential goods, and service of public and publicly guaranteed debt."

36 Petition, Exhibit 12 at 6.

37 Id.

percentage cited by Petitioners is outdated and, moreover, it must be reiterated that this position of the band is adjusted each day according to the average inter-bank rate from the previous day. While daily exchange rate fluctuations are managed to prevent sudden movements and to instill confidence in capital markets, the VND can appreciate or depreciate significantly over time (i.e., it can appreciate 0.25 percent one day and an additional 0.25 percent the next day, and so forth).

Moreover, whether a currency is fixed, pegged or is freely floating itself has no bearing on its convertibility or whether domestic and international prices are translated based on market principles. Hong Kong, among the most active market economies in the world, has long pegged its currency extremely tightly to the U.S. dollar. In fact, nearly all of Southeast Asia pegged their respective currencies prior to the Asian financial crisis. Under these regimes, convertible currencies translate international prices to domestic currencies freely. And aside from this point, the system used by Vietnam, with its floating horizontal band of 0.25 percent, is similar to the currency regimes in Greece and Iceland and results in fluctuations vis-à-vis the dollar that exceed the fluctuations seen in Hong Kong.[38] Therefore, Petitioners' emphasis on the stability (or lack of instability) of Vietnam's exchange rates is largely irrelevant.

Much more instructive to the question of Vietnam's currency convertibility is whether the Vietnamese and international economies, through interest rates and movement of financial resources, react to perceptions of the relative value of the VND to other country's currencies. In fact, the IMF and World Bank noted that the removal of interest-rate caps on both VND and dollar

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[38] Stanley Fisher, International Monetary Fund, Exchange Rate Regimes: Is the Bipolar View Correct?, Text of speech delivered at the Meetings of the American Economic Association, New Orleans at Table 3, 5 (Jan. 6, 2001) (available online at http://www.imf.org/external/np/speeches/2001/010601a.htm#tab3).

deposits and other reforms have led to a "flexible exchange rate policy."[39] The ensuing two sections cover in detail the relative ease with which the VND is convertible.

2. The VND is easily convertible in current account transactions

Foreign and domestic parties in Vietnam are permitted to convert VND into foreign currency and vice versa through many and various banks and foreign exchange agents throughout the country. Despite Petitioners' claim to the contrary, the VND has been and continues to be widely converted for current-account transactions.[40] Vietnam's current legal framework guarantees businesses access to foreign currency, thereby allowing both domestic and foreign businesses to buy and sell in VND or a foreign currency directly from commercial banks without the Government's intervention.

Vietnam has gradually lifted most of the restrictions on currency conversion for current-account transactions. The recent reforms represent a vast liberalization of Vietnam's currency system. The law allows both residents and non-residents, being organizations or individuals, to maintain bank accounts in either foreign currencies or VND for both capital and current account transactions and to retain their foreign currencies for saving purposes or otherwise.[41] For current account transactions, all resident (including foreign-invested) organizations and individuals are allowed to transfer money abroad for payments of goods and services and to use their VND to purchase foreign currencies and vice-versa simply upon presentation of the relevant documents evidencing the underlying transactions.[42]

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39 IMF Second Review at 21, 22, 61.

40 Petition, Exhibit 12 at 6.

41 Decree 63/1998/ND-CP of the Government (Aug. 17, 1998) on foreign exchange control as amended by Decree 05/2001/ND-CP at Ch. II (Feb. 1, 2001).

42 Decision 61/2001/QD-TTg of the Prime Minister at Art. 2.

The bulk of these reforms have brought Vietnam further into compliance with Article VIII of the IMF Articles of Agreement, which contains specific provisions requiring countries to not restrict currency conversions for current-account transactions.[43] In past market-economy determinations, the Department recognized compliance with Article VIII as an indicator of a market-oriented monetary system.[44] Indeed, Vietnam is now in good standing with the IMF and is well on its way to full compliance with Article VIII by next year (2003).[45] Recognizing Vietnam's financial stability, the IMF agreed to make an additional disbursement to Vietnam for 2001-2003.[46] The remaining policies inconsistent with Article VIII will be eliminated by 2003 at the latest.[47] As stated previously, the tax on profit-remittance of foreign-investment enterprises ("FIE") will be eliminated by the end of this year.[48]

Petitioners obfuscate Vietnam's currency system and clearly ignore the latest substantial reforms that further link the prices of domestic and foreign-produced goods and services. For instance, Petitioners state, "{t}he Vietnamese dong is not a readily convertible currency," citing a

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43 International Monetary Fund, Articles of Agreement of the International Monetary Fund, at Art. VIII (General Obligations of Members) (available at http://www.imf.org/external/pubs/ft/aa/aa08.htm). At present, Vietnam maintains only limited restrictions on the outward money remittances by individuals for the purpose of providing support, inheritance to family and relatives abroad. However, Vietnam has committed to the IMF to remove all remaining currency exchange restrictions on current international transfers and payments by the end of 2002. See International Monetary Fund, Vietnam Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding (Mar. 14, 2001) (available at http://www.imf.org/external/np/loi/2001/vnm/01/index.htm); see also IMF Second Review at 16, 41.

44 See Russia Determination at 8; Kazakhstan Determination at 6.

45 Like Vietnam, other countries (e.g., Iran) are not fully compliant under Article VIII of the IMF. See IMF Exchange Report at 445-1040. However, the Department already considers Iran to be a market economy.

46 International Monetary Fund, Vietnam: 2001 Article IV Consultation and First Review under Poverty Reduction and Growth Facility and Request for Waiver and Modification of Performance Criteria, IMF Country Report No. 02/4 at 1 (Jan. 9, 2002) (available online at http://www.imf.org/external/pubs/ft/scr/2002/cr0204.pdf).

47 IMF Second Review at 16, 41.

48 Id. at 16.

July 2001 State Department report.[49] However, a closer examination yields the unmistakable conclusion that Petitioners' use of this citation as support is misguided and takes the State Department report woefully out of context. The report clearly refers to Vietnam's policy during the Asian financial crisis and not to the present situation.[50] Furthermore, Petitioners base their extensive description of current-account controls on the IMF's Annual Report on Exchange Arrangements and Exchange Restrictions (2001) and the IMF's Statistical Appendix and Background Notes, released in August 2000.[51] Both reports contain information relevant to Vietnam's policies during the late 1990s and, therefore, do not apply to the current situation under examination by the Department, particularly with regard to the reforms undertaken in 2001. The more recent reforms removed the very controls Petitioners cite.

Examples of the market-oriented nature of Vietnam's currency exchange policies are abundant. The updated IMF Statistical Appendix and Background Notes, released in January 2002, states that "the gradually increasing (albeit moderate) dollarization in Vietnam appears to be largely in line with the country's growing monetization and closer integration into the global economy" and that "allowing residents to hold FCDs {foreign-currency deposits} also enhances

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49 Petition, Exhibit 12 at 6; see also U.S. Department of State, Bureau of East Asian and Pacific Affairs, Vietnam: Background Notes (July 2001) (available at http://www.state.gov/r/pa/ei/bgn/4130.htm).

50 The State Department report reads: "a sharp drop in foreign investment commitments foreshadows slower economic growth than Vietnam experienced in the early 1990s. Government control of the economy and a nonconvertible currency have protected Vietnam from what could have been a more severe impact resultant from the East Asian Financial Crisis." U.S. Department of State, Bureau of East Asian and Pacific Affairs, Vietnam: Background Notes (July 2001) (available at http://www.state.gov/r/pa/ei/bgn/4130.htm).

51 In fact, Petitioners' only citation from the updated 2002 report notes an example of a loosened monetary policy. See Petition, Exhibit 12 at 7; see also IMF Exchange Report at 1010-1011; International Monetary Fund, Vietnam: Statistical Appendix and Background Notes, IMF Country Report No. 00/116 (Aug. 2000) (available online at http://www.imf.org/external/pubs/ft/scr/2000/cr00116.pdf).

the credibility of the macroeconomic policy stance in Vietnam, by giving a greater role to market forces and avoiding direct intervention in asset allocation decisions of the private sector."[52]

The growing role of FCDs is well-documented and shows the increasing role played by individual actors in the currency markets. One IMF report remarks that the growth of FCDs in Vietnam primarily occurred among households, reflecting renewed confidence in the banking system due to the loosening of currency regulations.[53] During the past two years, the IMF noted two important occurrences: (1) domestic households chose to save in the form of FCDs during a period of expected VND devaluation, and (2) enterprises holding short-term VND deposits switched to FCDs during the first four months of 2001 after the value of the VND appreciated by 2.2 percent in real terms against the U.S. dollar.[54]

These actions are extremely significant because they demonstrate that the people and businesses of Vietnam react to changes in the financial climate in precisely the same manner as one would expect of those in any other market-oriented monetary system -- if one expects the value of the VND to depreciate, one would hedge against this possibility by saving wealth in another currency (presumably, one that is more stable). Similarly, if the value of the VND rose in the short-term and this appreciation is not expected to persist or continue, one might switch to FCDs because the value of the VND holdings can buy more FCDs at that moment. The report also notes that Vietnam virtually eliminated the VND-dollar interest rate differential to the range

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52 Dollarization refers to the use of foreign-currency as a medium of exchange and/or as a store of value. It is a common occurrence among developing and transition economies. See International Monetary Fund, Vietnam: Selected Issues and Statistical Appendix, IMF Country Report No. 02/05 (Jan. 2002) (available online at http://www.imf.org/external/pubs/ft/scr/2002/cr0205.pdf) ("IMF Statistical Appendix 2002").

53 Id. at 17-18.

54 Id. at 18.

of zero to 0.25 percent.[55] This would further allow an open market to determine exchange rate equilibrium.

Remaining currency conversion restrictions are largely vestiges of policies implemented to combat the fallout from the Asian financial crisis in 1997. From the start of Vietnam's economic reform in 1986 up until the crisis in 1997 shook the exchange rate systems of nearly all countries in the region, no so-called "surrender" provisions existed. Rather, companies were allowed to accumulate revenue in whatever currency companies earned. However, in the wake of the 1997 financial crisis, currency speculation and capital flight were rampant throughout East Asia, and the entire developing world. At that time many market economies, including Malaysia, Thailand and Brazil, implemented strict controls regarding currency exchange for both capital- and current-accounts.[56] To shield its own economy from the exogenous shocks of the crisis, Vietnam instituted similar policies, imposing surrender requirements on the foreign currency earnings of all companies.[57] In this context, the economic measures required businesses to sell, or "surrender," a certain percentage of foreign-currency earnings for conversion into VND, which was a temporary policy necessary to maintain economic stability.

Furthermore, the specific proportion of foreign currency earnings that must be surrendered has dwindled in line with renewed confidence in the Asian currency markets. While at the height of the crisis in February 1998, companies were required to surrender 80 percent of currency earnings from current account transactions, this requirement quickly fell to 50 percent in August

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55 Id.

56 Natalia Tamirisa, Capital Controls, International Monetary Fund Research Bulletin, Research Summary, Vol. 2, No. 4 (Dec. 2, 2001) (available at http://www.imf.org/External/Pubs/FT/irb/2001/eng/04/index.pdf).

57 Decision 37/QD-TTg (Feb. 14, 1998) of the Prime Minister providing a number of foreign exchange controls.

1999, 40 percent in April 2001, and just 30 percent by May of 2002.[58] As supervised under the Poverty Reduction and Growth Facility (PRGF) arrangement with the IMF, this requirement will be phased out completely by the end of 2003.[59]

Market economies like India have applied similar policies because they allow for a safe trade-off between currency stability and wider utilization of the currency.[60] Similarly, other nations, including those to whom the Department recently granted ME status, also maintain currency controls. For example, Russia currently requires conversion of 50 percent, recently reduced from 75 percent, of foreign currency earnings.[61] Indeed, the Department specifically noted that such requirement did not fundamentally change the "underlying convertibility" of Russian ruble and "the resultant market-based nature of the exchange rate."[62]

The Vietnamese government has also lifted all of the approval requirements for repatriation of money abroad for payments for imports and salaries earned by expatriates working in Vietnam. Since 1998, those companies and individuals are only required to present papers documenting their transactions for commercial banks for the purpose of purchasing foreign currencies and remitting abroad.[63] Such procedural requirements serve only to safeguard against capital flight and tax avoidance.

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58 The Prime Minister's Decision 173/1998/QD-TTg (Sep. 12, 1998); Decision 180/1999/QD-TTg (Aug. 30, 1998); Decision 61/2001/QD-TTg (Apr. 25, 2001); Decision 61/2002/QD-TTg (May 15, 2002).

59 IMF, Vietnam Letter of Intent (2002).

60 Akira Ariyoshi, Karl Habermeier, Bernard Laurens, Inci tker-Robe, Jorge Iván Canale-Kriljenko, and Andrei Kirilenko, International Monetary Fund, Country Experiences with the Use and Liberalization of Capital Controls at 87 (available at http://www.imf.org/external/pubs/ft/op/op190/).

61 Russia Determination at 9.

62 Id.

63 Decree 63/1998/ND-CP of the Government (Aug. 17, 2001) as amended by Decree 05/2001/ND-CP; Circular 01/1999/TT-NHNN7 of SBV (Apr. 16, 1999).

Liberalization in the trade sector has also greatly increased the interaction of the VND with market forces. Since 1998, no longer must cross-border trade be carried out through licensed trading companies. Instead, private enterprises can engage directly in foreign trade.[64] In addition, 16 out of 19 quantitative restrictions on import and export of essential goods were also lifted.[65]

Although admittedly the new currency law of Vietnam does not remove all exchange restrictions completely, the mere existence of a surrender requirement as a current-account currency restriction does not provide a conclusive indication of Vietnam's monetary system *per se*. Indeed, many market economies (including those recently graduated from NME status) possess current-account restrictions on currency convertibility. For instance, Kazakhstan still employs some current-account controls and yet, the Department graduated that country to ME status.[66] Meanwhile, India,[67] Chile, and Malaysia[68] employ or employed current-account controls similar to those of Vietnam. Further, South Africa employed a two-tier exchange rate system as late as 1995. South Africa replaced this with a system that only allowed institutional investors to purchase foreign securities under an asset swap transaction where they exchanged part of their

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64 See World Bank, Vietnam Economic Monitor at Annex 1 (Spring 2002) (available at http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/eapupdate0402/$File/vietnam.pdf).

65 Id.

66 IMF Exchange Report at 429-30, 205, 571.

67 If the existence of current-account currency controls created extensive distortions, to the extent that domestic prices do not reflect world market prices, then prices from that country would not be useful in an antidumping context. However, even with India's use of current-account controls, the Department routinely uses prices in India as a market-economy surrogate in NME cases involving China. For information regarding India's current-account controls, see IMF Exchange Report at 429-430.

68 See Akira Ariyoshi, Karl Habermeier, Bernard Laurens, Inci tker-Robe, Jorge Iván Canale-Kriljenko, and Andrei Kirilenko, International Monetary Fund, Country Experiences with the Use and Liberalization of Capital Controls, Chile at 69-79, India at 80-93, Malaysia at 94-105 (available online at http://www.imf.org/external/pubs/ft/op/op190/).

South African portfolio for foreign securities.[69] Yet, the Department has never questioned whether any of these economies are NMEs.

3. Vietnam's capital account regulations compare favorably to other developing economies

Vietnam allows for a reasonable level of convertibility for capital account transactions and any restrictions on such transactions should not alter the Department's determination regarding the market-oriented nature of Vietnam's economy. Although it is recognized that Vietnam does not have completely open convertibility with regard to capital account transactions, both foreign and domestic residents of Vietnam are capable of shifting capital resources both to and from Vietnam for investment and capital funding purposes. Further, economists widely recommend maintaining a larger degree of capital control for countries at Vietnam's stage of development.[70] In this manner, capital account restrictions have been used in a manner similar to those of other developing countries, such as Malaysia, India and Russia.[71]

First, foreign investors in Vietnam are not subject to any restrictions on capital account transactions, as they may purchase foreign currencies for capital account transactions from commercial banks. Specifically, foreign investors may purchase foreign currencies from commercial banks for the purposes of remitting overseas profit earned from business activities, distributed income (e.g., dividends), income from the supply of services and from technology transfers, and other items of money and assets, after they have fulfilled relevant tax obligations in

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69 See South Africa Reserve Bank, Exchange Control Publications: Historical Background (available at http://www.reservebank.co.za/internet/Publication.nsf/LADV/7BABB1987ADB819142256C4400374485/$File/C.pdf).

70 Natalia Tamirisa, Capital Controls, International Monetary Fund Research Bulletin, Research Summary, Vol. 2, No. 4 at 2, 3 (Dec. 2, 2001) (available at http://www.imf.org/External/Pubs/FT/irb/2001/eng/04/index.pdf).

71 IMF Exchange Report at 431-36, 570-75, 762-66, 1011-13, 1040-44.

Vietnam.[72] Enterprises with foreign-owned capital and foreign business co-operation parties may use their VND to purchase foreign currencies for the purpose of payment of principal, interest and fees on loans in foreign currencies, to domestic banks or foreign lenders.[73] Foreign investors and foreign-invested enterprises may purchase foreign currencies for capital account transactions directly from commercial banks and may remit such foreign currencies abroad upon presentation of relevant papers evidencing the underlying transactions (e.g., loan contracts for repayment of loans and interests, or tax payment for remittance of profits), without obtaining any approval from SBV or other authorities.[74]

Domestic investors may purchase foreign currencies from commercial banks and transfer these funds abroad for the purpose of making investments abroad upon registration of such investments with the SBV.[75] Domestic entrepreneurs may also purchase foreign currencies from commercial banks for payment of loans and interest where these liabilities are denominated in foreign currencies and, with respect to foreign loans, transfer such currencies abroad upon representation of loan contracts.[76] Such a requirement for the presentation of relevant documentation evidencing underlying transactions is very common in countries with market economies and are maintained to prevent tax avoidance and capital flight.[77]

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[72] Circular 04/2001/TT-NHNN of SBV (May 18, 2001), on Foreign Exchange Management of Foreign Invested Enterprises and Parties to Business Cooperation Contracts; see also Law on Foreign Investment at Art. 22, 33.

[73] Id.

[74] Id.

[75] Decree 63/1998/ND-CP of the Government (Aug. 17, 1998) as amended by Decree 05/2001/ND-CP at Art. 18 (Jan. 17, 2001) on foreign exchange control; see also Circular 01/1999/TT-NHNN7 of the SBV (Apr. 16, 1999); Circular 05/2001/TT-NHNN of the State Bank (May 31, 2001).

[76] Decree 90/1998/ND-CP of the Government on borrowing and payments of foreign loans (Nov. 7, 1998); Circular No. 03/1999/TT-NHNN7 (Aug. 12, 2000 as amended on Nov. 16, 2001).

[77] See e.g., Russia Determination at 9.

The Vietnamese Government has also lifted its control over the interest rates of deposits and savings in foreign and domestic currencies, as well as for loans extended by foreign lenders, thereby allowing capital to flow more freely between the VND and assets held in foreign currencies.[78]

Taken as a whole, Vietnam's exchange regime allows the VND to provide relatively accurate pricing both at home and in international trade and finance. Likely the best example of the degree the VND interacts on a market basis with foreign currencies is seen in the booming international trade sector. The Asian Development Bank noticed that

> Viet Nam's trade outlook looks bright due to a bilateral agreement with the US and diversification toward manufactured exports. Exports are expected to jump to $16.7 billion in 2002 and to $18.7 billion in 2003, showing growth of 8.5 and 12 percent, respectively. . . .
>
> Recent trade liberalization and a rise in capital goods imports to implement approved foreign direct investment will result in import growth of 10 percent and 13 percent in 2002 and 2003, respectively.[79]

As already stated, the Department's first criteria for determining whether a country possesses a market economy is not whether a currency is convertible, but rather, the "*extent to which* the currency… is convertible." Whether the measuring stick is Kazakhstan and Russia or market economy countries at the same level of development, Vietnam has clearly exceeded the standards set by the Department's test of whether a country's currency is convertible.

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78 Decision No. 546/2002/QD-NHNN of the Governor of SBV (May 30, 2002) liberalizing interest rates on VND credit transactions and subject such rates for market supplies and demands of capital; Decision 718/2001/QD-NHNN of the Governor of SBV (May 29, 2001) lifting the ceiling of interest rates on loan in foreign currencies; Decision 39/2000/QD-NHNN7 (Jan. 24, 2001) allowing banks to fix interest rates on FCDs.

79 Asian Development Bank, "Viet Nam's Economy Continues on High Growth Path" (Apr. 9, 2002) (available at http://www.adb.org/Documents/News/2002/nr2002046.asp).

B. Vietnam's Wage Rates Are Determined By Free Bargaining Between Labor And Management

Vietnamese law provides a reliable framework for wage negotiation through a process of free bargaining between labor and management. These free-market rules establishing the principles of supply and demand for labor are underpinned and enhanced by rules guaranteeing the free mobility of labor. Finally, the *de facto* presence of such principles in action in Vietnam is evidenced by the structure and activities of labor unions in the country.

1. Vietnam's legal framework provides for workers' rights

Before discussing the rules in existence in Vietnam regarding the labor market, it should be noted that such rules do not exist in a vacuum; rather, they are influenced and monitored by objective standards from outside the country. Vietnam is a member of the International Labor Organization ("ILO") and ratified numerous ILO conventions. Additionally, Vietnam works closely with the ILO to further implement ILO conventions and monitor the country's compliance with those conventions it has already ratified.[80]

In this context, Vietnam has established a clear and codified legal framework in Vietnam that guarantees free bargaining between labor and management. Vietnam's Labor Code ("Labor Code"), effective since January 1, 1995, and as amended on April 2, 2002, sets forth clearly defined principles that wages and other working conditions must be established through the negotiation of individual labor contracts between individual employees and employers.[81] The Labor Code guarantees workers fundamental rights including:

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[80] See Virginia Foote, President of the U.S.-Vietnam Trade Council, "Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means" (Jul. 18, 2002) (available at http://waysandmeans.house.gov/trade/107cong/7-18-02/7-18foote.htm).

[81] Labor Code at Art. 55. All references to the Labor Code refer to Vietnam's Labor Code as amended in April 2002. (All Vietnamese legal documents cited in this submission can be found at http://www.vietnamembassy-usa.org/renovation/news.php3.)

(i) "the right to work, to choose freely the type of work … without being discriminated against on the basis of his gender, race, social class, beliefs, or religion." and the right to seek employment directly and "to be hired by any employer in any location not prohibited by the law";

(ii) the right to be paid a wage "on the basis of an agreement reached with the employer provided that the wage is not less than the minimum wage" set forth by the Government;

(iii) the right to form, joint or not to join trade union and to participate in union activities;

(iv) the right to strike in accordance with the law. [82]

Though workers may choose to negotiate a collective labor agreement, any such agreement does not replace individual labor contracts.[83] Rather, any collective labor agreement serves to provide better working conditions and benefits than those established under individual contracts.[84]

The Labor Code also provides the right of labor mobility. Workers can apply for a job with any enterprise or organization in any business sector located in any part of the country.[85] Under the Labor Code, employees may enter into one or more labor contracts with one or more employers, and may negotiate for full-time or part-time jobs.[86] Employers and employees may terminate employment relations after a trial period of up to 60 days without any cause, or after that subject to certain conditions such as severance payments or compensations in case the termination is made unilaterally without cause.[87] Therefore, if any employee does not receive what he/she

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82 Labor Code at Art. 5, 7, 16.

83 If employees choose to initiate the collective bargaining process, employers must negotiate under the law. Therefore, employers can not simply ignore requests. <u>See</u> <u>id</u>. at Art. 46.

84 <u>Id</u>. at Art. 44, 49.2.

85 <u>Id</u>. at Art. 6.

86 <u>Id</u>. at Art. 30.

87 <u>Id</u>. at Art. 17, 32, 36-43.

feels is adequate compensation, the employee possesses the right to search for better opportunities elsewhere. The government also encourages workers to find jobs abroad.[88]

The Labor Code guarantees the rights of all individuals, including foreign workers, and applies to all businesses in Vietnam, including private businesses, foreign-invested enterprises, and SOEs.[89] The Labor Code also extends to protect workers' rights in household businesses and farms, unofficially known as the "informal sector," which accounts for almost 89 percent of the total labor force.[90]

These rules guaranteeing basic labor rights and the free bargaining of wages between labor and management were broadened very recently. In April 2002, Vietnam passed and implemented new legislation substantially strengthening the Labor Code of 1995. In all, the new law revises and clarifies 56 articles of Vietnam's Labor Code. Specifically, Vietnam's new labor law codifies internationally recognized worker rights like the freedom to choose employers, a standardized work week, payment guarantees, overtime limits and pay, a minimum wage, bonuses, severance pay, maternity leave, and workplace safety.[91] The new law also creates a labor environment more

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88 Id. at Art. 134; see also Decree 152/1999/ND-CP of the Government at Art. 1-2 (Sep. 20, 1999) on export of labor.

89 Labor Code at Art. 2-3; see also Congressional Research Service, Vietnam's Labor Rights Regime: An Assessment at 9 (Mar. 23, 2001) (available at http://www.usvtc.org/Documents/CRS_LaborRights.pdf). With respect to Vietnamese and foreign workers under an international treaties to which Vietnam is signatory, or participants or state civil servants and officials, police and armed forces, members of political and social institutions who are specifically subject to a separate regimes, the Labor Code, however, may be applied to the extent not contrary to these international treaties or regime or if specifically referred to by those international treaties or regimes.

90 Labor Code at Art. 2; Circular No. 23/2000/TT-BLDTBXH (Sep. 28, 2000) of the Ministry of Labor, War Invalids and Social Affairs (MOLISA); see also United Nations Development Programme, Non-State Sector Development and Job Creation at 12.

91 Amendments to the Labor Code at Art. 30 (freedom to choose employers), 69 (standardized work week), 66 (payment guarantees), 61 (overtime limits and pay), 55-56 (minimum wage), 64 (bonuses), 37, 38, 41 (severance pay and termination rights), 111, 144 (maternity leave), 96, 107 (workplace safety); see also Virginia Foote testimony at 6.

conducive to foreign enterprises by codifying the right of foreign enterprises to directly recruit and hire employees.[92]

2. The extent of government involvement in wage negotiations and unions is limited

The Government does not interfere with or control wages other than establishing a minimum wage. Instead, individuals negotiate with employers to determine the provisions of their individual labor contract, subject to minimum standards provided under the Labor Code and established through collective bargaining agreements.[93] In the event that an individual's labor contract provides for conditions less than the level established by the collective bargaining agreement, the bargaining agreement ensures that the individual workers still receives the minimal condition guaranteed to all workers under the agreement.[94]

Individual trade unions represent and bargain on behalf of employees within each enterprise. The Labor Code of Vietnam clearly grants employees of each enterprise a large degree of autonomy as employees elect their collective-bargaining representative.[95] Moreover, the trade union representative is required to solicit opinions from all employees, including non-union

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92 Previously, foreign companies hired employees through a government agency or middlemen. See Virginia Foote testimony at 6; see also U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Vietnam: Country Reports on Human Rights Practices - 2001 at 19 (March 2002) ("Human Rights Report") (available at www.state.gov/g/drl/rls/hrrpt/2001/eap/8384pf.htm). (**Please note: While this report contains some useful insight, the Government of Vietnam rejects its conclusions with respect to human rights violations.**) The amendment to the Labor Code has provided for the right of foreign enterprises to recruit Vietnamese labor directly. See Labor Code at Art. 132; see also Economist Intelligence Unit, Country Commerce: Vietnam at 55-56 (April 2002).

93 Labor Code at Art. 29, 30, 49.

94 Id. at Art. 9, 29, 49, 63.

95 Another example of autonomy is the fact that only employees of the company that wish to join comprise these labor unions. See Labor Code at Art. 8, 45.3.

members, and any agreement negotiated by the elected representative is subject to 50 percent approval of all workers within the trade union.[96]

Substantial evidence indicates that unions are indeed representing the interests of workers in Vietnam. A State Department paper reports that unions were able to gain concessions through collective bargaining on the length of a work week and abolish the practice of annual-employee review.[97] Evidence indicates that taxi drivers, cooks, market porters, and motorcycle drivers have organized "hundreds of unaffiliated 'labor associations'" to represent their interests.[98] Moreover, unions organized 72 strikes in Vietnam during 2001, many of which did not follow the official protocol of the Vietnam General Confederation of Labor ("VGCL") and only received VGCL's support after the strikes already occurred.[99] These strikes are indicative that many labor unions operate independently of VGCL control and, therefore, government influence.[100]

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96 Labor Code at Art. 45.3, 46; see also Decree 196/CP of the Government (Dec. 31, 1994) on Collective Labor Agreement (for implementation of the Labor Code).

97 Human Rights Report at 20.

98 Id. at 19.

99 Christopher Lafleur, Acting Assistant Secretary for East Asian and Pacific Affairs, "Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means" (Jul. 18, 2002) (available at http://waysandmeans.house.gov/trade/107cong/7-18-02/7-18lafleur.htm); see also U.S. Department of Commerce, U.S. Commercial Service, Vietnam: Country Commercial Guide FY 2002 at Ch. 7 (2002) (available at http://www.usatrade.gov/website/ccg.nsf/ShowCCG?OpenForm&Country=VIETNAM) ("Vietnam's Country Commercial Guide (2002)"). Petitioners mistake the name of the relevant organization. Petitioners call the organization the "Communist Party Fatherland Front's Vietnam General Confederation of Labor," which is actually the combination of the name of two different organizations, the Fatherland Front and the VGCL. Petitioners mistake the name of the relevant organization. The Vietnam Fatherland Front is established under Article 9 of the Constitution as a political organization representing interests of various organizations, individuals of different social classes, ethnic and religious groups, Vietnamese overseas, and other social and political groups. The VGCL is established under Article 10 of the Constitution as a socio-political organization of workers, representing interests of those workers. The VGCL participates in the Vietnam Fatherland Front like many other organizations such as women associations, Buddhist Association, Vietnam Chamber of Commerce and Industry, Vietnamese restaurant association, etc.

100 Lafleur cited the strikes in a context that strongly indicates that the strikes are a positive sign of the freedom of workers in Vietnam:

> "Conditions for workers have also improved. The U.S. Department of Labor has developed technical assistance projects with Vietnam in the areas of employment services, social insurance and safety nets, employment of people with disabilities, industrial relations, and prevention of child

Thus, contrary to Petitioners' assertion, there is no meaningful role of the Government in the formation and management of labor unions or other organized labor. Although admittedly the VGCL may receive financial support from the state, this does not necessarily imply government control. Unions at the business level simply represent the employees of that business.[101] The VGCL operates as an "umbrella organization"[102] that essentially handles broader labor regulations like setting minimum-wage standards.[103] Therefore, the individual unions' affiliation with the VGCL allows them to participate in determining government policy on labor issues.[104]

The Government's role in wage determination in the labor market is limited predominately to regulating wage formation practice. Article 57 of the Labor Code, as amended, states:

> Subject to consultation with the {VGCL} and representatives of employers, the Government shall stipulate the *principles* for formation of wage scales, wage tables and labour rates for the employer to formulate and apply {them} in accordance with the production and business conditions of the enterprise; and shall *stipulate* a wage scale and a wage table for {state-owned enterprises}.[105]

(continued)

> labor. A sixth project on HIV/AIDS education and prevention is in the works. And the first Labor Dialogue between the U.S. and Vietnam took place in March this year.
>
> You should also know that there were 72 private and public strikes during the year, many against foreign-owned or joint venture companies, but others that involved state-owned and private firms. The Government tolerated these strikes, even though most were spontaneous and supported by organized labor after the fact. In some cases, the Government disciplined employers for illegal practices that led to strikes.
>
> The brightest spot in our engagement with Vietnam has been on the economic side..."

[101] Law on Trade Union at Art. 5. The VGCL is not involved in the establishment of labor unions at the enterprise level, except on a temporary basis where there is not yet any union representative appointed to work for the interests of labor at the enterprise. The VGCL's role is also limited to encouraging employees to form trade unions.

[102] Vietnam's Country Commercial Guide (2002) at Ch. 7.

[103] Article 56 of the Labor Code states that the Government will establish minimum wages for regions and/or industries, subject to consultations with the VGCL.

[104] Indeed, trade unions can comment on laws that affect labor regulations. See Law on Trade Unions at Art. 5(1); Foreign Investment Law of Vietnam at IV-3.

[105] Labor Code at Art. 57, as amended (emphasis added).

The law provides a clear distinction between SOEs and other businesses that becomes extremely important in understanding how wages are determined in Vietnam's labor market. With SOEs, the Government naturally assume a larger role with regard to SOEs, and thus, wage negotiations are subject to certain wage-scale and benefits standards. However, with regard to private enterprises and FIEs, the law clearly intends for the government to assume a different and significantly lesser role in the setting of wages. The Government does not interfere in wage determinations other than by setting a minimum wage standard. Private enterprises are not subject to the wage-scale standard established by the Government for SOEs. Rather, the revised Labor Code only requires private enterprises and FIEs to publish the salary structure agreed upon by employees and management.[106]

Furthermore, the Government's involvement in farming, the largest employing sector of the economy, is also extremely limited. Small farms employ the vast majority of Vietnam's workforce, and the presence and role of unions is understandably minimized as most farm workers are not unionized. Rather, farm workers negotiate individually with their employers to determine wages and other working conditions,[107] a fact which Petitioners also acknowledge when they state that these employees' wages "are not set by the state."[108] These wages are freely negotiated and determined in a manner consistent with a free market as farm workers are often very mobile and can leave if conditions do not suit them. Since the SOEs employ a small and declining percentage

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106 Virginia Foote testimony at 6-7. In essence, this requirement essentially allows for a better informed labor market. The role of information in microeconomic theory is well-established -- without well-informed market actors, markets tend to become distorted. By requiring firms to publish a wage scale, potential employees are in a better position to negotiate and less likely to be taken advantage of by businesses.

107 Circular 23/2000/TT-BLDTBXH of the MOLISA at § II, Cl. 3 (Wages and Social Insurances) (Sep. 28, 2001) on benefits for farm workers.

108 Petition, Ex. 12 at 9.

of the work force, the wages of the vast majority of Vietnam's workers are set independent of any Government influence.[109]

Although the Government does perform a limited role in labor relations, Department practice acknowledges that governments often play some role in labor markets. In the Kazakhstan Determination, the Department noted that the Government of Kazakhstan "administered wages" of SOEs.[110] Similarly, the Russian Government establishes a wage scale for state enterprises.[111] In the Slovakia Determination, the Department noted, "like other Eastern European Countries in transition, Slovakia relies on collective bargaining among the government, trade unions and employers associations to determine wage rates."[112] Moreover, the Department noted a specific instance where the Slovakian government unilaterally imposed wage controls.[113] In these instances, the Department recognized that the government does not have to be completely absent from the labor market in order to satisfy the statutory requirement on labor and determined that these countries were market economies.

3. Vietnam's labor market is not subject to other disruptive forces that affected Kazakhstan and Russia

In both the Russia and Kazakhstan ME determinations, the Department discussed wage arrears which can significantly distort labor markets if the practice becomes routine. Continual wage arrears, as a phenomenon, undermine collective-bargaining agreements or individual employee contracts, and are indicative of an unhealthy labor market not functioning on market principles. For instance, wage arrears can reflect restricted labor mobility as employees with little

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109 IMF Statistical Appendix 2002 at 64.

110 Kazakhstan Determination at 7.

111 Russia Determination at 10.

112 Slovak Determination at 6.

113 Id.

opportunity elsewhere possess no choice in obtaining employment and can allow employers to overstaff.[114] Moreover, wage arrears can create barter economies where employers compensate for arrears by using non-monetary forms of compensation like housing.[115] However, the value of these compensations are not set by supply and demand, and therefore, to some degree, labor markets essentially function on non-market principles.[116] Furthermore, wage arrears often lead to situations in which local governments artificially support failing companies, thereby transferring the labor costs as a public externality.[117] Notwithstanding the existence of wage arrears in Russia and Kazakhstan, the Department still revoked these countries' NME status.

The Department's graduation of these countries to ME status strongly implies that the statutory framework, as applied in past cases, allows for some distortions which may undermine the interplay of supply and demand in the labor market. However, wage arrears are not a problem in Vietnam and the Government's role in determining labor conditions is limited and consistent with other graduated economies. Moreover, a State Department report specifically states, "{s}ince {Vietnam} began moving away from central planning, market forces have played an increasingly important role in determining wages."[118] Considered in the above-mentioned

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114 The Department noted that wage arrears in Russia and Kazakhstan persisted, in part, because of limited opportunities elsewhere. See Russia Determination at 11; Kazakhstan Determination at 8.

115 See Russia Determination at 11.

116 As noted in a previous footnote, persistent wage arrears arise in locales where other employment opportunities (which pay) are scarce. Wage arrears in this area can cause a shortage of money, leading to a market in which goods cannot be valued or are artificially overvalued because there is no constant medium of exchange. To obtain goods, people must barter, thereby creating a market where goods do not necessarily hold constant value or are valued through an interplay of supply and demand.

117 The Department noted that local governments in Kazakhstan often did not shut down bankrupt companies, which in effect absolves the company from any recourse. This can lead to a domino effect in which the creditors of these companies become insolvent and amass wage arrears, thereby spreading out the labor cost of the original company to multiple companies. To some extent, this is a public externality as people unrelated to the original company now bear the cost of that company. See Kazakhstan Determination at 8.

118 Human Rights Report at 20.

framework, Vietnam arguably contains a healthier and more market-oriented labor situation than those of Russia and Kazakhstan.

C. Vietnam Permits Broad Participation by Joint Ventures or Other Investments by Firms of Other Countries

Vietnam's foreign investment regime has undergone an intense reformation starting in 1987 and culminating with a more aggressive program instituted in the late 1990s and continuing to the present.[119] These reforms have resulted in an atmosphere that is increasingly favorable to foreign investment. Foreign investors now possess a range of investment forms, including joint-ventures, business cooperation contracts and 100 percent owned foreign-invested enterprises, including concession contracts in infra-structure projects (commonly known as Build-Operate-Transfer, ("BOT"), Build-Transfer ("BT") or Build-Transfer-Operate ("BTO"). Together, these types of enterprises are referred to as foreign invested enterprises ("FIEs"), most of which are manufacturing operations.

Foreigners and foreign companies may also set up representative offices or branch offices for distribution and other trading activities or providing various types of services including insurance, banking, legal and other services, or to hire agents for distributions of their products in Vietnam. In addition, foreign investors may elect to invest in existing Vietnam domestic companies by purchasing shares or other forms of investment.

Although the depressed world economy has adversely affected investment worldwide, foreign investment in Vietnam is expected to grow in 2002, reflecting new investor confidence in the country's liberalized investment climate.

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[119] The Government's policies to promote foreign investments have been codified and furthered in the Government's Resolution No. 09/2001/NQ-CP (Aug. 28, 2001) on improvements of Vietnam's attractiveness for foreign investors and foreign investment efficiencies and the Prime Minister's Decision No. 62/2002/QD-TTg (May 17, 2002) announcing the list of national projects calling for foreign investment. See also Vietnam's Country Commercial Guide 2002 at Ch. VII, §A (Openness for Foreign Investment).

(All Vietnamese legal documents cited in this submission can be found at http://www.vietnamembassy-usa.org/renovation/news.php3.)

1. Vietnam's legal framework protects the rights of foreign investors and allows foreign enterprises to operate with autonomy

Vietnam instituted its first Law on Foreign Investment in 1987. Various regulations were instituted throughout the late 1980s and 1990s, culminating in a new law in 1996. Additional improvements have been implemented in the most recent amendment to the law in 2000. (References to the "LFI" in this submission are to the latest version of the law.) The amended LFI has substantially improved the legal environment and liberalized restrictions on foreign investment. The LFI provides a comprehensive legal framework in which foreign investors are accorded "right to autonomy in conducting their business," the right to transfer, split, merge or consolidate their business, [120] protection against Government requisition, expropriation (including regulatory expropriation), or nationalization of assets;[121] fair and equitable treatment;[122] the right to select projects, local partners including private companies, forms of investment, business location, project duration, markets for the products, and the level of legal-capital contribution; and national treatment to foreign investors.[123] Additionally, foreign investors are permitted to establish wholly-owned businesses in most industries, including infrastructure projects, energy, agriculture, and fishery cultivation and processing.[124] Foreign investors are guaranteed the rights to repatriate profits derived from their investments, initial investments and all other assets as well as to transfer their investment partly or entirely to others[125] and contract directly with commercial

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[120] LFI at Art. 31.

[121] LFI at Art. 21.

[122] LFI at Art. 20.

[123] Ordinance on Most Favorable Treatment and National Treatment in International Trade enacted by the National Assembly's Standing Committee at Art. 2 (May 25, 2002).

[124] Decree 24/2000/NP-CP (Aug. 1, 2000).

[125] LFI at Art. 22, 34.

banks to purchase foreign currencies for all purposes without obtaining any further approval.[126] Foreign laborers are similarly entitled to receive salary and benefits in foreign currencies and repatriate their earnings after taxes.[127] Moreover, all private enterprises are guaranteed equal standing with SOEs under the law.[128]

Foreign investors are also protected against legal risks in Vietnam, i.e. foreign investors will be compensated against any damages caused by changes of law.[129] Foreign investor may demand the Government to allow a change in their registered projects' activities and objectives, to grant tax reduction and exemption, to grant compensation by way of setting up against the enterprises' income tax due to the Government, or to make cash compensation payment to investors.[130] On the other hand, in case a change of law provides more benefits to a foreign invested enterprise or foreign investor, such change will be applied unconditionally on a retroactive basis.[131]

Through the passage of the LFI, as well as applicable provisions of the Enterprise Law, Vietnam has removed various bureaucratic red tape and reformed other administrative procedures that affect foreign investors. Among the key revisions are the removal of business licensing requirements in more than 200 sub-sectors, the streamlining of business registration from an average of 1-2 months to 10 days, and the automatic approval of licenses for export-oriented

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[126] LFI at Art. 33; see also Circular 04/2001/TT-NHNN (May 18, 2001) on Foreign Exchanges of FIEs.

[127] Id. at Art. 23.

[128] See Constitution at Art. 25; see also Theo Larsen and Viet Tuan Dinh, Taking Stock: An update on Vietnam's Economic Reforms: Progress and Donor Support at 14 (May 24, 2002) (available at http://www.worldbank.org.vn/partnerships/cg_meeting/Taking%20Stock.pdf) ("Taking Stock"). Both authors also prepared the World Bank's most recent update on Vietnam, released in the Spring of 2002. See World Bank, Vietnam Economic Monitor.

[129] LFI at Art. 21a.

[130] Id.

[131] Id.

FIEs.[132] Foreign investments are permitted in most sectors.[133] Foreign investments in agricultural processing, energy, infrastructure projects are specifically encouraged and given preferential treatment.[134] As a result, foreign investors from all over the world have widely diversified their investments in Vietnam.[135]

Contrary to petitioners' allegation,[136] FIEs have the right to import directly goods and services necessary for their projects.[137] FIEs are exempted from import duties on goods imported as fixed assets for their projects and, for certain projects, import duties on raw materials and other goods for their manufacturing activities in Vietnam.[138] Moreover, FIEs may engage in exporting various types of goods that are not produced by them or not within their licensed business activities such as coffee, minerals, certain wood products and certain textiles and garments.[139] Distribution of foreign goods in Vietnam as well as many other business activities other than manufacturing, of foreign companies are not covered under FIL or carried out under the forms of

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132 IMF Second Review at 30-32; see also Asian Development Bank, Vietnam: Asian Development Outlook 2002 at 2 (2002) (available at http://www.adb.org/Documents/Books/ADO/2002/VIE.asp). The IMF report also indicates that Vietnam pledged to remove or reduce the business licensing requirements for an additional 50 sub-sectors by the end of 2001.

133 See Decree 24/2000/ND-CP at App. 1. Foreign Investments are restricted in areas that are of harmful for national security and public interests, historical and cultural relics or traditional customs, environment or those involved toxic chemical or hazardous agents.

134 Id.; see also List of Projects calling for foreign investments announced by the Prime Minister under Prime Minister's Decision No. 62/2002/QD-TTg (May 17, 2002).

135 IMF Statistical Appendix 2002 at 82-84.

136 Petition, Exhibit 12 at 12.

137 LFI at Art. 31, 47.

138 Id.

139 See World Bank, Vietnam Economic Monitor at App. 1, Box 4.

FIEs.[140] For distribution of foreign produced goods, foreign companies may establish branches (100% owned affiliates) or employ local agents.[141]

In addition, foreign investors are not subject to any restrictions in obtaining financing from banks and other sources, either in Vietnam or abroad, and are permitted to use their assets as collateral for their obligations.[142] Banking reforms like the removal of interest rate caps on foreign and domestic loans, in both foreign currency and VND, and other reforms that facilitate mortgages and collateral procedures further liberalize investment restrictions by allowing private enterprises, including FDI, better access to credit.[143]

Also, there is no unequal treatment between FIEs and Vietnamese domestic enterprises in the right to lease land, or the rate of land rents or corporate taxes, as alleged by petitioners.[144] FIEs may lease land directly from the Government or sublet from others, such as infrastructure developers, at the same rates as those paid by Vietnamese companies leasing land for the purpose of contributing such land to a joint ventures with foreign companies. Indeed, due to the various incentives provided foreign investment, some FIEs are entitled to various exemptions and

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140 For example, foreign bank branches are established under the Law on Credit Institutions of 1997, codifying previous regulations on foreign bank branches.

141 These activities are covered under Decree 45/ND-CP of the Government on Representative Offices and Branches of Foreign Companies (Sep. 6, 2000) and Decree 57/ND-CP of the Government (Jul. 31, 1998, as amended on Aug. 2, 2001), on import-export activities, processing, sales and purchase agency involving foreign parties.

142 Decree 24/2000/ND-CP at Art. 92.

143 IMF Second Review at 33.

144 Petition, Ex. 12 at 12-14. For a more detailed discussion of taxation of FIEs and domestic enterprises, <u>see</u> footnote 34 <u>supra</u>.

reductions in land rent.[145] Vietnam has additionally reduced price gaps between domestic businesses and FIEs on several key inputs including telecommunications and electricity.[146]

Vietnam's recent efforts to liberalize its investment environment codified the legal standing of foreign investors, guaranteed equal treatment of all enterprises regardless of ownership, and effectively lowered the risk and cost of investing in, starting, and conducting business in the country. As a result, the 17 percent increase in foreign investment in 2001 consisted of increased investments by foreign investors who were already operating in Vietnam as well as new investors from various countries including the United States.[147] It is beyond doubt that Vietnam is continuing to improve the overall climate for FDIs.[148]

2. Vietnam's restrictions on foreign investment compare favorably to other market economies in Asia and countries to whom the Department granted ME status

The Department's past determinations acknowledge that investment restrictions protecting industries sensitive or important to a country's particular interests are not necessarily inconsistent with a market economy.[149] Vietnam's protection of certain sectors deemed vital to national interest from foreign investors compare favorably with Kazakhstan and Slovakia. In both of the determinations concerning these economies, the Department noted that each country prohibited foreign investment in certain sectors like natural monopolies, gas, electricity, telecommunications,

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145 Decree 24/2000/ND-CP at Art. 85, 86 (Aug. 1, 2000); see also Circular 35 on Land Rents and Contributions of Land Use Rights (May 25, 2001).

146 Taking Stock at 10; see also IMF Second Review at 17.

147 World Bank, Vietnam Economic Monitor at App. 1. For example, in 2001 alone Vietnam had FDI projects in the energy sector with total investment of US $850 million. Id. at App. A, Box 5.

148 Id. at App. 1.

149 Kazakhstan Determination at 9. In their original submission concerning Vietnam's market-economy status, Petitioners discussed extensively Vietnam's use of investment restrictions, export requirements and licensing procedures.

and armament production, thereby indicating that the Department explicitly recognizes that excluding foreign participation in certain sectors does not necessarily undermine or destroy market functions.[150] These prohibitions clearly do not exist in Vietnam.[151]

Moreover, Vietnam's investment limitations are similar to or even less than those used by countries in the Asian region that the Department considers to be market economies. The Philippines Government restricts investment in more sectors of its economy.[152] Currently, the Philippines explicitly restricts foreign investment in numerous sectors like retail, mass media, small-scale mining, private security, utilization of marine sources, the manufacture of fireworks and pyrotechnics, licensed professionals, public works and construction, advertising, natural resource extraction, education, public utilities, commercial deep sea-fishing, rice and corn processing, national security projects, the public health sector, and the defense industry.[153] In these sectors, foreign investors are limited to a certain percentage ownership, ranging from 30 to 60 percent.[154] The Philippines also caps foreign-ownership of private enterprises to "no more than 40% in nonexport firms."[155] Despite these restrictions, the Philippines is still deemed a market economy by the Department.

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[150] Id. at 9; see also Slovak Determination at 7.

[151] See Decree 24/2000/NP-CP at App. 1 (Aug. 1, 2000); see also IMF Statistical Appendix 2002 at 82-84.

[152] Vietnam's Country Commercial Guide 2002 at Ch. 7. Although the Commercial Guide notes that SOEs still predominate in a large number of sectors, it is important to note that the Commercial Guide does not state that Vietnam explicitly restricts investment in these areas and that Vietnam is privatizing its SOEs.

[153] See U.S. Department of Commerce, U.S. Commercial Service, Philippines: Country Commercial Guide FY 2002 at "Investment Climate Statement" (available at http://www.usatrade.gov/Website/ccg.nsf/CCGurl/CCG-PHILIPPINES2002-CH-7:-00033A6A).

[154] Id. In some sectors, foreign-investors are allowed 100 percent ownership, but these sectors are subject to stipulations like presidential approval and a requirement that foreign-ownership be lowered after 30 years of business operation.

[155] Id. In this context, small and medium enterprises are defined as those firm with a capitalization of less than US $200,000.

Malaysia's investment restrictions are also more stringent than that of Vietnam. The Malaysian investment regime imposes ownership limitations for foreign investors in numerous sectors. Although recent reforms granted a temporary reprieve, Malaysia limits foreign investment in the manufacturing, telecommunications, forwarding agencies, insurance, and shipping sectors.[156] Malaysia also extensively regulates ownership and employment by "often {requiring} foreign and domestic firms to take on bumiputera {an ethnic group in Malaysia} partners (usually 30% of share capital) and to maintain a workforce that proportionately reflects Malaysia's ethnic composition."[157] And whereas Vietnam subjects manufacturers of specific products to export requirements like tourist buses and trucks with tonnage less than 10 tons, Malaysia does not limit its export policies to certain goods -- its restrictions are far more broad.[158]

For example, the Malaysian Government commonly monitors FDI by way of reviewing investment proposals. All proposals (including foreign and domestic) for manufacturing projects are subject to the approval of the Malaysian Industrial Development Authority who "determines whether each project is consistent with the Second Industrial Master Plan (1996-2005) and government strategic and social policies."[159] Investments in other sectors of the economy are reviewed by the "relevant regulatory agency."[160] Yet, no one argues that this limits competition on such a level that prices in Malaysia are not reflective of a market-based economy.

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[156] Id. Vietnam, however, allows 100 percent foreign ownership of insurance and freight forwarding. See Law on Insurance; Decree 24/2000/ND-CP at App. 1.

[157] Id.

[158] Id. Malaysia stipulates that a certain percentage of production must be exported in the business license of each foreign-owned manufacturing firm. In 2001, Vietnam removed 10 out of 24 items that required FDI to export. See World Bank, Vietnam Economic Monitor at Annex 1, Box 4.

[159] Id.

[160] Id.

Similarly, Indonesia possesses an extensive investment-approval regime that requires certain projects to be approved by the President of Indonesia.[161] Other investment projects are subject to review and approval by the Capital Investment Coordinating Board, which is part of the Board of Investment and State-Owned Enterprises.[162] Although reforms have reduced the average time to obtain licensing, investors often had to wait months before completing the application process.[163] In addition to bureaucratic obstacles, Indonesia prohibits any private of foreign investment in eleven sectors of its economy, including some areas of trade and support services.[164] Despite these restrictions, the Department classifies Indonesia as a market economy.

However, the fundamental point here is not that the Philippines, Malaysia, or Indonesia should be considered non-market economies; rather, it is that Vietnam's investment restrictions are not uniquely non-market oriented and are consistent with those used by market economies. Table 1 below shows that Vietnam's foreign-direct investment ("FDI") inflows compare favorably to more developed "market economies," reflecting, in part, that Vietnam's liberalized investment policy does not inhibit foreign-investment and investor confidence in the stability of the investment climate.

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161 See U.S. Department of Commerce, U.S. Commercial Service, Indonesia: Country Commercial Guide FY 2002 at "Investment Climate Statement" (available at http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-INDONESIA2002-CH-7:-00155AA2).

162 Id.

163 Id.

164 Id.

Table 1:
FDI Inflows: Vietnam in Comparison (1994-2000)
(Millions of U.S. Dollars)

	1994	1995	1996	1997	1998	1999	2000
Vietnam	742	2336	2519	2824	2254	1991	2081
Philippines	1591	1459	1520	1249	1752	737	1489
Malaysia	4342	5816	7296	6513	2700	3532	5542
Indonesia	2109	4346	6194	4677	-356	-2745	-4550

Source: UNCTAD, World Investment Report 2001

Although investment inflows reflect a myriad of factors, the massive growth in FDI from 1994 to 2000 and the recovery of FDI inflows in 2000 after the Asian Financial Crisis would not have happened without a substantially liberalized investment climate in which investors possessed a large degree of autonomy. Vietnam's growth and recovery patterns firmly provide evidence of Vietnam's market-oriented economic climate.

3. Vietnam's reforms have led to strengthened investor confidence, growth in foreign investment, and promises of future reforms

The reform effort has led to impressive FDI performance and positive trends in Vietnam's investment climate.[165] As of May 2001, 3,300 FDI enterprises with a total capital of more than US$ 37 billion operated in Vietnam.[166] Foreign capital inflows during 1996 - 1999 account for nearly one third of annual investment in the national economy.[167] Currently, there are about 400 U.S. firms operating in Vietnam with total U.S. investment of about 1.4 billion USD. The United States is also a leading investor in the oil sector and ranked 13th in investment commitments, not

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165 Vietnam's Country Commercial Guide 2002 at 6, 7.

166 Id. at 52.

167 United Nations Development Programme, The Role of the State and the Market in the Economy of Vietnam at 4, Table 1.3 (available at http://www.sais-jhu.edu/depts/econ/riedel/Role%20of%20the%20State%20in%20the%20Economy%20of%VN.pdf.)

to mention numerous investment projects made by U.S. subsidiaries in third countries.[168] American corporations and companies such as Cargill, Coca Cola, Nike, Pepsi, and Proctor & Gamble have invested heavily in Vietnam. An increasing number of foreign-investment projects take the form of wholly-owned FIEs, and many foreign investors have bought out their joint-venture partners to become wholly-owned FIEs.[169] These events reflect investor confidence that foreign enterprises can operate with autonomy and meaningfully compete in Vietnam's economy, helping Vietnam experience a 12 percent growth in foreign-direct investment from 2000 to 2001.[170] The Asian Development Bank ("ADB") attributes this growth to "the improved climate for foreign enterprises following amendments to the Foreign Investment Law and the successful conclusion on a number of large energy projects."[171] Moreover, the IMF predicts that FDI disbursements in 2002-2003 will exceed 2001 levels.[172]

Moreover, the United Nations Conference on Trade and Development's ("UNCTAD") 2002 World Investment Report rankings further reflect Vietnam's substantially improved investment climate as Vietnam climbed the UNCTAD investment rankings from the 53rd to the 20th most successful country in attracting foreign investment.[173] The UNCTAD Inward FDI Performance Index factors the share of a country's foreign investment with its share of global

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168 Vietnam's Country Commercial Guide 2002 at 7.

169 U.S. Department of State, Bureau of Economic and Business, Vietnam: FY 2001 Country Commercial Guide at Ch. 7 (July 2000) (available at www.state.gov/www/about_state/business/com_guides/2001/eap/vietnam_ccg2001.pdf).

170 Asian Development Bank, Asian Development Outlook 2002 at 4.

171 Id.

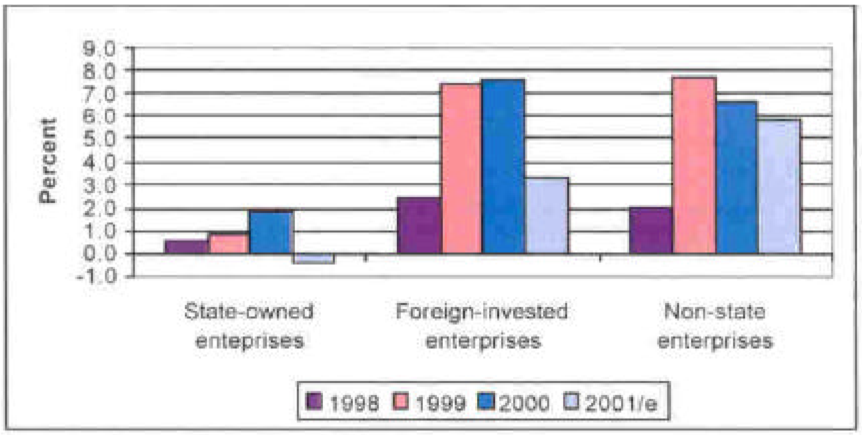
172 IMF Second Review at 48.

173 UNCTAD, World Investment Report: Vietnam - Country Fact Sheet (Sep. 2002) (available at http://www.unctad.org/wir/index.htm) ("World Investment Report"); see also Associated Press, Belgium, Luxembourg Top Investment List (Sep. 17, 2002) (available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020917/ap_on_bi_ge/un_global_investment_1).

GDP -- a score of one indicates that a country's share of global foreign investment equals its share of global GDP.[174] Vietnam's score indicates that it attracts twice its share of foreign investment as compared with its share of global GDP, reflecting the liberalized nature of Vietnam's investment climate. Vietnam ranks higher than Kazakhstan (which was 21st), Latvia (32nd), Slovakia (35th), Argentina (48th), Poland (37th) , Thailand (41st), and Malaysia (44th).[175]

The increase in foreign investment has produced substantial changes in Vietnam's economy. As the figure below indicates, foreign-enterprises are playing a greater role in Vietnam's increasingly export-oriented economy; the share of GDP accounted for by exports rose from 36 percent in 1997 to 50 percent in 2001.[176]

Figure 1:
Contributions to Non-Oil Export Growth



Source: *General Department of Customs*

Foreign-invested enterprises and joint ventures have contributed greatly to this export growth.[177] The non-oil SOE export share has decreased consistently within the past five years, declining

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174 UNCTAD, World Investment Report.

175 Id.

176 Taking Stock at 9.

177 Id.

from 65 percent in 1997 to an estimated 35 percent in the first quarter of 2002.[178] Meanwhile, the share attributable to FIEs rose from 23 percent to 35 percent during the same period.[179]

In their petition, domestic producers disregard many of the recent reforms and positive growth trends in foreign investment by focusing on Vietnam's past investment environment. Petitioners claim that foreign investment restrictions "have resulted in two-thirds of foreign investment in the form of SOE joint ventures."[180] However, petitioners cited an ADB report from 2000, which does not contain current information on recent reforms. Petitioners also cite liberally from the U.S. Commercial Service's 2002 Country Commercial Guide.[181] Yet, an examination of the Commercial Guide reveals that the report often contains outdated information. For instance, the Country Commercial Guide states that the requirement to exchange foreign currency for VND in Vietnam is 50 percent.[182] As discussed above, a review of recent legal reforms and IMF reports indicates that the surrender requirement is currently 30 percent, down from 50 percent in 2000 and 40 percent in 2001.[183] Moreover, apparently no attempt was made to update some of the information. A comparison of the 2001 Country Commercial Guide and the 2002 Country

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178 Id.

179 Id.

180 Even if this were currently true, heavy foreign investment would belie Petitioners' contention that SOEs are completely under government control as foreign investors, in the words of the Department, often "demand a certain degree of autonomous control over there investments. See Petition, Ex. 12 at 11-14; see also Kazakhstan Determination at 8.

181 Petition, Ex. 12 passim; see also Vietnam's Country Commercial Guide 2002 at Ch. 7.

182 Vietnam's Country Commercial Guide 2002 at Ch. 7.

183 Decision 173/1998/QD-TTg (Dec. 9, 1998); Decision 232/1998/QD-TTg (Jan. 12, 1998); Decision 180/1999/QD-TTg (Aug. 30, 1999); Decision 61/2001/QD-TTg (Apr. 25, 2001); see also IMF Statistical Appendix 2002 at 16, 63.

Commercial Guide shows that the reports contain substantially the same information, to such an extent that sections of text are essentially verbatim.[184]

In some instances, Petitioners blatantly mischaracterize key facts. Arguing that Vietnam's tax polices discriminate against foreign enterprises, Petitioners claim that, "foreign entities with after-tax income of more than 20% of the companies' total capital must pay a 25% tax in addition to the standard 32% income tax."[185] However, the IMF refutes this claim:

> In some respects, Vietnam treats foreign investors more generously than domestic firms: the standard rate is lower (*25 percent versus 32 percent*); foreign investors enjoy a tax refund on reinvested profits; and *only* domestic firms are subject to the 25 percent surtax on excess income.[186]

Vietnam's tax scheme is largely prejudicial against domestic businesses and not vice-versa. Only domestic firms pay the 32 percent income tax, just as only domestic firms pay the additional 25 percent tax. FIEs and FDI enterprises pay the lower tax and are exempt from the surtax.[187]

Most importantly, Petitioners ignore the Department's precedent in determining ME status. Past determinations establish that the Department does not require that reforms have to be complete or that all reforms have to be successful. The Department also considers future reforms. Specifically, in the Slovak Determination, the Department granted ME status despite specifically noting the "failings of past policies" and that the "Slovak government is currently attempting to

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184 Compare Vietnam's Country Commercial Guide 2002 at Ch. 7 and U.S. Department of Commerce, U.S. Commercial Service, Vietnam: Country Commercial Guide FY 2001 at Ch. 7. Moreover, in certain cases, the Commercial Guide is unclear. According to it, FIEs are subject to a 32 percent profit tax. However, as discussed above, the LFI clearly provides that FIEs are subject to a maximum 25 percent profit tax and the IMF notes that only domestic enterprises are subject to the profit tax at 32 percent and that, in many ways, Vietnam's tax policy favors foreign enterprises. For more detail, see also footnote 29 supra.

185 Petition, Ex. 12 at 12.

186 IMF Second Review at 10 (emphasis added).

187 When FDIs remit profits abroad, however, they are subject to a 3-7 percent withholding tax. See the more detailed discussion on taxation of FIEs at footnote 34, supra.

improve the investment climate in Slovakia."[188] Similarly, in the Russian Determination, the Department considered "new laws {that were} still being implemented" at the time of market graduation, because these reforms "addressed a number of key issues affecting… the investment climate."[189]

These reforms will further create an investment environment in which foreign investors are largely autonomous and can compete in domestic markets.[190]

D. Government Ownership or Control of the Means of Production Is Limited, Encouraging a Vibrant Private Sector

Since 1986, Vietnam has transformed its economy from a state-controlled command economy to a market-based system by significantly reducing the level of government ownership or control of the means of production. The private sector is increasingly and predominantly in control of production activities in Vietnam. Furthermore, the entities that remain under state ownership are significantly less subject to government control and are increasingly subject to competitive factors that are comparable to private enterprises. Together, the burgeoning private sector and the transformed state-owned sector have created a competitive environment in Vietnam that is based on market principles.

The statute requires the Department to consider "the extent of government ownership or control of the means of production" in order to determine whether Vietnam's economy operates on market principles of cost and pricing such that sales of merchandise in Vietnam reflect their

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188 The Department stated in the Slovak Determination: "Recognizing the failings of past policies affecting foreign investment, the Slovak government is currently attempting to improve the investment climate in Slovakia. The government intends to actively promote FDI. …" Slovak Determination at 8.

189 The full text reads: "While these laws are still being implemented, they have nevertheless addressed a number of key issues affecting investor confidence and investor climate." Russia Determination at 14.

190 See World Bank, Vietnam Economic Monitor at Annex 1.

fair value.[191] Following the statutory requirement and its objectives, the Department has consistently determined that "the right to own private property is fundamental to the operation of a market economy" and "the scope and extent of private sector involvement in the economy often is an indicator of the extent to which the economy is market-driven."[192] In this regard, the Department frequently investigates the progress in the country's land reform and shares of private enterprises as compared to state-owned enterprises (SOEs) in the economy.[193] In many countries with transitioning economies, the Department has found that the private sector's share in the economy results from privatization of SOEs as well as formation of a private domestic sector and FDI.[194] As discussed below, these factors indicate that Vietnam has transitioned successfully to a market economy.

1. The Government has implemented market-oriented reforms, encouraging a growing private sector

The formation of the private sector in Vietnam was initiated in late 1986, whereupon farm land was reallocated from collectives to family units. This led to the formation of about 10 million household farms by 1996. As a result of this change in policy, 95 percent of Vietnam's agricultural output is now in private hands.[195] Vietnam in turn became the third largest exporter of rice with total average annual output of 23 million tons from 1989 to 1995.[196]

Thereafter, Vietnam passed the law on Foreign Investment (1987), the Law on Private Enterprise (1990) and the Law on Companies (1990), all of which established the FDI sector and

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191 19 U.S.C. § 1677(18)(B)(iv).

192 Kazakhstan Determination at 10.

193 Id. at 10-12; Russia Determination at 15-17.

194 See, e.g., Kazakhstan Determination at 10; Russia Determination at 15-17.

195 IMF Statistical Report 2002 at 56.

196 Ryan and Wandell, United Nations Development Programme, Vietnam's Reform Experience at 5, 8 (1996) (available at http://www.undp.org.vn/undp/docs/1996/reform/eng/index.htm

private domestic corporate sector.[197] Together, these laws have permitted the non-farm private sector to become an increasingly important force in the economy. In 1994, the non-state sector's contribution to the economy had reached almost 60% of GDP and increased to 61% in 1999.[198]

The 1992 Constitution codified these reforms. Article 23 provides that "property of individuals and organizations shall not be nationalized" and that the Government may enforce mandatory transfer of private property only for the purposes of the national interest, defense, and security, and only with adequate compensation at market prices. Article 16 also recognizes the equal legal position and autonomy of each form of enterprise: state-owned, collective, individual, small-sized private, private proprietorship, and foreign direct investment. Article 15 of the Constitution recognizes that the country's economy functions under market rules.

Then under the Civil Code of 1994, a more comprehensive legal basis was provided to recognize and protect private ownership of the means of production. Under Part II of the Civil Code, private ownership of production means and materials, equity, income, savings, benefits, houses, living facilities, and rights to property are protected for individuals and organizations.[199] Also in 1994, the Government passed a law aimed at easing barriers on domestic investment to improve private enterprises' access to credit by providing the private sector and SOEs equal rights

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[197] The Government also passed a law aimed at easing barriers on domestic investment to improve private enterprises' access to credit by providing the private sector and SOEs equal rights and encouraging Vietnamese overseas and foreigners residing in Vietnam to invest in the domestic private sector. See Law on Domestic Promotion (1994) as amended in 1998. (All Vietnamese legal documents cited in this submission can be found at http://www.vietnamembassy-usa.org/renovation/news.php3.)

[198] IMF's Statistical Appendix 2002 at 56.

[199] Civil Code at Art. 172, 173, 175, 220. As discussed in greater detail below, private land use rights are also protected.

and encouraging Vietnamese overseas and foreigners in Vietnam to invest in the domestic private sector.[200]

The Government has implemented many other notable reforms since 1999,[201] culminating in a 2002 Constitutional amendment that legally recognizes the equal standing of the private sector, removes the leading role of SOEs, and codifies the Government's commitment to an economy that functions according to market principles.[202] The Law on Enterprise (enacted by the National Assembly in 1999 and effective as of January 2000) and its implementing regulations are considered the most important legal actions by the Government to promote the development of private enterprises as they eliminated significant restrictions on private businesses in several sectors of the economy and removed onerous licensing requirements. Article 4 of the Law confirms, that "{t}he State recognizes the long-term existence and development of all forms of enterprises stipulated by this Law and ensures their equal status before the law, as well as legitimate profits earned by business activities. The State also recognizes the ownership rights of property, invested capital, income, other rights and legitimate interests of enterprises and business owners."

Overall, these reforms have taken hold, stimulating a strong private sector that controls a significant share of the country's production.

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200 Law on Domestic Promotion (1994) as amended in 1998. As discussed in more detail in the next section, SOEs are no longer favored in the distribution of credit, accounting for a smaller and smaller share of available credit.

201 See World Bank, Vietnam Economic Monitor at Annex 1 (providing a list of recent reforms).

202 Constitution, as amended on Dec. 25, 2001 at Art. 15-16.

2. Vietnam's economy is not dominated by state-owned enterprises, but includes a diverse and important private sector

Any discussion of the degree to which the means of production in Vietnam are owned or controlled by the government must take place in the context of the structure of Vietnam's economy. Vietnam's private sector is comprised of household/farming businesses, other private enterprises, foreign direct investment ("FDIs"), and collectives (also referred to as "cooperatives").[203] The public sector consists of state-owned enterprises ("SOEs") and state administration (i.e., the government and its agencies).

Figure 2:
Sectors of the Vietnam Economy

Private Sector	Public Sector
Households/Farmers	SOEs
Other Private Enterprises	State Administration
Foreign Direct Investment (FDIs)	
Collectives	

At present, the non-agricultural private sector in Vietnam includes approximately 70,000 private enterprises, 2 million households engaged in business operations, and 4,000 non-agricultural cooperatives.[204] As a result of the legal reforms adopted over the past two decades, the private sector's share of Vietnam's GDP has risen as the GDP attributable to the public sector declined. As recently as the early 1980s, the state accounted for literally all of Vietnam's GDP, but the

[203] Under the Law on Co-operatives, cooperatives are legal entities formed by individuals who contribute capital and share profits. Cooperatives operate largely like private enterprises, but are managed by its members and mainly serve its members. Thus, by definition, collectives are under private ownership, and therefore belong to the private sector, rather than the public sector. Some statistical reports have characterized collectives as public, but even the IMF agrees that collectives belong in the private sector. See Law on Cooperatives, Art. 1, 6-9, 12, 20; see also IMF Statistical Appendix at 56.

[204] World Bank, Vietnam: Economic Monitor at 16.

private sector now accounts for more than 60 percent of Vietnam's GDP (Table 2) and at least 90 percent of the total labor force (Table 3).[205]

Petitioners would have the Department believe that the public sector overwhelmingly dominates Vietnam's economy, which is simply not true. Table 2 below showing shares of GDP proves this is false.

Table 2:
GDP by Sector and Ownership at Current Prices, 1997-2000[206]

	1997	1998	1999	2000
State Sector	40.5	40.0	38.7	39.0
(excluding state management*)	37.1	36.7	35.8	36.2
Private Sector	59.5	60.0	61.3	61.0
(foreign investment sector)	9.1	10.3	12.2	13.3
Agriculture	25.8	25.8	25.4	22.9
State	1.2	1.1	1.0	
Private	24.6	24.7	24.4	
Industry	32.1	32.5	34.5	36.6
State	15.4	15.4	15.5	
Private	16.7	17.1	19.0	
Services	42.2	41.7	40.1	39.1
State	23.9	23.5	22.2	
(excluding state management)	20.6	20.2	19.3	
Private	18.2	18.2	17.9	

The sources upon which Petitioners rely are misleading as they fail to take account of the largest segment of the economy -- private household and farming enterprises, which happen to be the subject of the antidumping case in which the question of Vietnam's economic status arises.

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205 IMF Statistical Appendix 2002 at 56, 64.

206 IMF Second Review at 56; GSO Official Letter No. 587/TCTK-TH.

During 1996 - 1999, households and farms contributed to more than 33 percent of total GDP[207] and about 89 percent to the total labor force (Table 3).

Table 3:
Composition and Growth of Labor by Enterprise Form (1999)[208]

	1997		1998		1999	
	Share (%)	**Growth (%)**	**Share (%)**	**Growth (%)**	**Share (%)**	**Growth (%)**
Total labor force & growth rate	**36,994,200**	**3.40**	**38,094,200**	**3.00**	**39,402,150**	**3.43**
Public	**8.90**	**4.55**	**8.80**	**2.97**	**9.00**	**2.2**
State enterprises	5.20	3.80	5.20	2.97	5.1	1.4
State administration	3.70	4.60	3.60	0.2	3.7	6.3
Private	**90.60**	**3.36**	**90.50**	**2.86**	**90.60**	**3.55**
Households and farmers	89.00	3.10	88.90	2.85	89.00	3.5
Formal private sector	1.20	12.00	1.30	11.55	1.40	11.38
Collective sector	0.40	16.90	0.30	0.77	0.2	6.89
Foreign-invested sector	**0.60**	**3.90**	**0.70**	**8.32**	**0.6**	**8.86**
Total	**100**		**100**		**100**	

The number of non-farm household enterprises has ballooned from about 800,000 in 1990 to an estimated 2.5 million in 1999.[209] These small enterprises employ on average 3.3 people in rural areas and 6.3 people in urban areas.[210] The majority of household enterprises are in the service sector with retail sales as the major activity.[211] About one-fourth of such businesses are involved

207 United Nations Development Programme, Non-State Business Sector Development and Job Creation at 11 (available at http://www.undp.org.vn/projects/vie99002/busines.pdf).

208 United Nations Development Programme, Non-State Business Sector and Job Creation at 12.

209 Id. at 12.

210 Id.

211 Id.

in manufacturing, primarily food processing, textiles and garments, and wood processing.[212] It is important to note that about 30 percent of those household enterprises reorganized by selecting a corporate form and thereby graduated to the domestic private corporate sector, leaving the balance of non-farm households at approximately 2 million in 2002.[213]

Petitioners apparently ignore the vibrant and rapid growth of Vietnam's domestic private corporate sector, which contributed roughly 13 percent of GDP in 2000 (Table 2).[214] New laws and other measures aimed at simplifying registration procedures and improving the overall investment climate spurred a great expansion of new businesses. According to the World Bank, "improvements in the policy environment for the domestic private sector in Vietnam over the last two years appear to be leading to impressive results" and that "private sector reform is progressing well."[215] The World Bank estimates that 36,000 new private enterprises were established between early 2000 and early 2002, bringing the total number registered to about 70,000.[216] This is compared to only 6,000 registrations in the two years prior to 2000. In fact, the number of private enterprises established in the last 2.5 years is more than the total number of new businesses established during the previous eight years, and represents an investment value of US$ 2 billion and 6 percent of GDP at present.[217]

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212 Id.

213 World Bank, Vietnam: Economic Monitor at 16.

214 The domestic private corporate sector includes private enterprises established under various forms including sole proprietorship or private enterprise, partnerships, limited liability companies, and stock-based corporations, all of which are subject to the Law on Enterprise. Since most of them are small and medium sized, they are also called SMEs or formal private sector in various reports. See United Nations Development Programme, Non-State Business Sector and Job Creation at 11.

215 World Bank, Vietnam Development Report at 40.

216 Id. at 16. The massive growth in private enterprises indicates that the Law on Enterprise effectively provided private parties access to key sectors of the economy where economic opportunity was abundant.

217 World Bank, Vietnam: Development Report at 40.

FDI has also posted significant and impressive growth from 9.1 to 13.3 percent of Vietnam's GDP (Table 2), and more than 30 percent of the total investment of all economic sectors during 1996 - 1999.[218] As shown in Table 4, share of industrial GDP attributable to FDI has consistently grown by more than 20 percent since 1996,[219] reaching more than one third by 1999 and 2000.

Table 4:
Industrial Production by Sector of Ownership 1997 - 2000[220]
(in percent of total industrial production)

	1997	1998	1999	2000
Public	**48.0**	**45.9**	**43.4**	**42.0**
State sector	48.0	45.9	43.4	42.0
Private	**52.0**	**54.1**	**56.6**	**57.9**
Households	14.7	13.8	13.0	
Private	2.4	2.2	2.2	
Mixed	5.5	5.5	6.1	
Collective	0.6	0.6	0.6	
Foreign - invested sector	28.9	32.0	34.7	35.5

Although the state sector still accounts for a large portion of the economy, its share has been reduced to 39 percent of GDP in 2000, while the total share of SOEs in the economy is only approximately 36 percent (Table 2).[221] In addition, SOEs accounted for less than 5 percent of the

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218 Under Nations Development Program, The Role of the State and the Market In the Economy of Vietnam at 4.

219 IMF Statistical Appendix at 63.

220 IMF Second Review at 63.

221 Id. at 56.

agricultural sector (Table 2) employed only 5 percent of the population (Table 3), and reduced their share of industrial GDP from 51 percent in 1994 to 42 percent in 2000 (Table 4).[222]

Private enterprises therefore employ the large majority of workers in Vietnam and control a significant share of production across most sectors of Vietnam's economy. According to the World Bank's 2002 Economic Monitor Report, the non-state sector's share in industrial production has grown by 20-21 percent from 1999-2001 and in the first quarter of 2002. The share of foreign investment in industrial GDP has also grown by 12 percent per year.[223] Thus, it is clear that the private sector share of GDP in Vietnam will not stop at 61 percent, but will continue to grow rapidly. Importantly, the share of the non-state sector in Vietnam's economy (more than 61 percent) compares favorably to other market economies, such as Kazakhstan (60 percent[224]) and Poland ("half, maybe more"[225]) at the time the Department graduated those countries to market economy status. Therefore, as in prior cases, the Department should find that private sector -- not the Government -- dominates the Vietnamese economy.

3. Vietnam has equitized a significant portion of SOEs, prompting increased competition in the market

The Department has found that reducing state-controlled enterprises and presence of competition from private sector FDI evidence the influence of market forces over the economy.[226] While the pace of such efforts may often be slow, consistent progress demonstrates a country's

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222 Id. at 63.

223 World Bank, Vietnam's Economic Monitor at 5, 15-16.

224 Kazakhstan Determination at 10.

225 Memorandum to the File from Albert Hsu, Office of Policy, Respondent's Request for Revocation of Poland's NME Status at 22 (Jun. 21, 1993) ("Poland Determination").

226 Kazakhstan Determination at 10-12; Russia Determination at 15-17.

commitment to market reforms.[227] In Vietnam, SOEs are already and will continue to reduce their shares in the economy, as a result of the Government's comprehensive program to "equitize" SOEs by transforming the companies to joint stock companies and selling shares to employees and private investors.

In 1989, the Vietnamese Government launched the first major program to reform SOEs, starting with the reorganization and liquidation of half of the 12,000 SOEs.[228] Subsequently, the Government started a pilot program to equitize SOEs, and subjected already equitized companies to the Law on Companies (1990) (currently the Law on Enterprises).[229] Later on, in 1996, the Government issued a Decree laying down a more comprehensive legal framework for a broad equitization program.[230] These efforts of the Government led to a major reduction of the number of SOEs from 12,000 in 1989 to 5,800 in 1997.[231]

In 1998, to further accelerate the process, the Government subjected all SOEs to equitization, except certain public-interest enterprises and certain state monopoly sectors.[232] The Government will retain a controlling share (majority shares) or special shares (shares with special

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227 See Kazakhstan Determination at 10-12.

228 International Monetary Fund, Vietnam: Selected Issues, IMF Country Report No. 99/55 (July 1999) (available at http://www.imf.org/external/pubs/ft/scr/1999/cr9955.pdf).

229 The status of equitized SOEs has been confirmed recently by the Law on Enterprises Article. See also Decree 64/2002/ND-CP (June 2002) replacing Decree 44/1998/ND-CP (June 29, 1998), Decree 28/CP dated May 7, 1996, and Decision 143/HDRT dated Oct. 15, 1990 on equitization of SEOs.

230 Decree 28/CP (May 7, 1996) on equitization of SOEs.

231 United Nations Development Programme, The Role of the State and the Market in the Economy of Vietnam at 10-11.

232 Decree No. 44/1998/ND-CP (June 29, 1998) (replacing Decree 28). Public-interest enterprises are specified in Article 1 of Government Decree No. 56-CP of 2 October 1996, including enterprises in the defense industry and enterprises that derive at least 70 percent of their revenue from urban public works and public transportation. State monopoly sectors include production of radio-active or toxic chemicals, printing money, and operation of communications backbone network.

control right, commonly known as golden shares) in certain of these sectors.[233] For all other enterprises, the Government may either hold a minority share or sell all of its ownership.[234] Shares of equitized SOEs are offered for sale publicly to both domestic and foreign individuals and organizations.[235] In addition to equitization, the Government adopted a system whereby SOEs could be directly sold, contracted out, or leased.[236] The Government also established a committee (known as the National Steering Committee) to facilitate the reform of SOEs.[237]

The climate of SOE equitization has significantly improved even since the end of 2001.[238] In particular, the Government has removed most limitations and restrictions that slowed progress of SOE equitization.[239] The Government's main objectives are now:

- To improve the efficiency and competitiveness of enterprises, creating enterprises owned by multiple holders, including employees, in order to better manage and utilize the state capital and assets, and to create incentives and dynamic management mechanism for enterprises;

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233 See Decree 44. The enterprises and sectors include public service enterprises which have equity of over ten billion (10,000,000,000) dong; SOEs in exploitation of rare and precious ores; SOEs in large-scale exploitation of minerals; technical services for petroleum exploitation; production of fertilizers, insecticides, medicines and chemo-pharmaceuticals; large-scale manufacture of non-ferrous metals and rare, precious metals; large-scale production of electricity, transmission and distribution of electricity; repair of aircraft; postal services and telecommunications operation services; railway, air and sea transportation; large-scale printing, and publication; production of alcohol, beer, and cigarettes; banks for investment and banks for the poor; large-scale business activities involving oil and petrol.

234 See Decree 44.

235 Decree 44 at Art. 33.

236 Decree No.103/1999/ND-CP (Sept. 10, 1999) on the transfer, sale, contracting out, and leasing SOEs.

237 Decision of the Prime Minister No. 548/TTg (Aug. 15, 1996).

238 World Bank, Vietnam Economic Monitor at 15, 16. The World Bank has reported the Party's position to support privatization of the economy in its Party Plenum, including, among others, recognizing the importance of private enterprises in maintaining political and economic stabilization, encouraging the country's leaders to praise private businessmen so as to improve their image and perception by the public, and allowing party member to own private businesses.

239 Decree 64/2002/ND-CP (June 19, 2002) on transformation of SOEs into joint stock companies (replacing Decree 44 on Equitization of SOEs (1998).

- To mobilize funds from the whole society, including individuals, socio-economic domestic and foreign organizations, to renew technology, develop business; and

- To strengthen the real ownership of employees and shareholders and to strengthen investor's monitoring of the enterprise, as well as balancing the interests of the state, the enterprise, and the employees.[240]

Moreover, to encourage foreign investment in equitized SOEs, the Government allows foreign investors (i) to participate in the management of the joint stock companies, (ii) to use their stock as collateral in credit transactions in Vietnam; (iii) to convert the dividend earnings and the income from selling shares into foreign currency and repatriate these amounts, after fulfilling all tax obligations as required by Vietnamese laws; and (iv) to trade their stocks in the stock exchange in Vietnam where the equitized SOEs are listed. [241]

The new Decree clearly facilitates further equitization by allowing the equitized SOEs to lay off redundant employees upon equitization and establishes a fund from sales of state shares to support severance payments to those employees who lost their jobs during this process,[242] and removing the limitation of the maximum value or percentage of shares that may be purchased by domestic individuals and organizations.[243] Moreover, the Government has significantly decentralized authority to approve the valuation of SOEs for equitization. Only where the value is equal to VND 500 million or more will approval by the Minister of Finance be required.[244] To speed up the process, the Government will hold government agencies specifically responsible for

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240 Id. at Art. 1.

241 Id. at Art. 28.

242 Id. at Art. 25, 27.

243 Id. at 4.

244 Id. at Art. 2.

formation and implementation of the equitization program for industries within their responsibilities.[245]

Finally, two stock exchanges in Hanoi and Ho Chi Minh City were established and a comprehensive legal framework for trading securities and other instruments has been in place since 1998.[246] The fact that most of the stocks listed in these markets as well as those traded outside of the stock exchanges are shares of equitized SOEs is convincing evidence of the improvement of economic efficiency and corporate governance of equitized SOEs. With these changes in the law and policies as well as impressive economic achievements of equitized SOEs, there is no doubt that the pace of equitization will increase in the future.

Indeed, the success of this process was immediately noticeable and has progressed rapidly. By the end of December 1999, 370 enterprises had been equitized.[247] Among them, 43 enterprises had registered capital of more than 10 billion dong and 6 enterprises had foreign shareholders.[248] Approximately 500 SOEs were equitized and 51 have been transferred, sold or contracted out during 2000, 2001 and the first eight months of 2002, which is more than 2.5 times the total number of SOEs equitized during the first 9 years of equitization.[249]

Clearly, the importance of SOEs in Vietnam's economy is dwindling, with SOEs occupying roles similar to those held by SOEs in other developing countries such as monopolistic industries or those related to infrastructure and national security. In many instances, the

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245 Id. at Art. 30.

246 Information is available online at http://www.vneconomy.com.vn/en/stock/dir.cgi and www.stockmarket.vnn.vn.

247 GSO Official Letter No. 587/TCTK-TH.

248 Id.

249 Until June 2002, about 900 SOEs have been completely equitized. See id.; see also "Speeding up equitization," Vietnam Economic Times (Jun. 21, 2002).

Department found that the Government's policy to maintain a monopoly or control over certain "strategic sectors" such as natural monopolies is not a *per se* indicator of a non-market economy.[250] To the contrary, the Department found that this can be justified for a market economy if it is serving a socio-economic development strategy for the country.[251] In the Kazakhstan determination of market economy status, for example, the Department determined that an industrial policy involving state control or ownership in "natural monopoly providers (e.g., utilities, transportation)" and even "enterprises in commercial sectors" does not necessarily conflict with market principles because it served the country's prudent macroeconomic strategy, e.g. to diversify the economy for the purpose of reviving depressed markets and rejuvenating industrial growth, rather than to institute government control.[252]

The Department has recognized that competition from domestic private sector and FDI can provide "a market-based alternative" to SOEs and, therefore, subject SOEs in these sectors to overall market forces.[253] In Vietnam, there is a significant and increasing presence of private enterprise and FDI in most sectors of the economy, including traditional monopolies, such as telecommunications, electricity production, transportation services, banking, insurance, and oil and gas production.[254] As to telecommunications, major international telecommunications firms are already established in Vietnam, including Telstra, Siemens, Ericcson, Comvik, Alcatel, NEC, France Telecom, NTT, and Lucky Goldstar, to sell equipment and provide services.[255] Similarly,

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250 Kazakhstan Determination at 10.

251 See id. at 11; Russia Determination at 16.

252 Kazakhstan Determination at 11; see also Russia Determination at 16.

253 Kazakhstan Determination at 11; see also Russia Determination at 16.

254 See IMF, Statistical Appendix at 83-89.

255 Vietnam: Country Commercial Guide 2002 at "Telecommunications Equipment and Services."

in 2001 alone, there were two new FDI projects in electricity, with total investment of 850 million USD: Electric de France led a consortium of Tepco and GEC (US $400 million) and BP lead a second project (US $450).[256] The US-VN BTA is likely to improve U.S. access to the market as well.[257] The BTA will open banking services initially to 30-49 percent U.S. ownership, to be increased to 100 percent after nine years.[258] Even now, banking services are subject to stiff competition among 6 state owned banks, about 30 foreign bank branches, several joint venture banks and about 40 private joint stock banks.[259] The BTA will also improve competition in insurance services, where foreign and Vietnamese firms are already sharply competing to provide life and non-life insurance for a growing market in Vietnam.[260] Finally, various international companies are involved in oil and gas exploitation in Vietnam, of which a U.S. company is a leading investor.[261] Clearly, the influence of foreign investment in such traditional monolistic sectors will push SOEs towards market-based competition.

In general, privatization and liberalization of the Government's control of SOEs have shifted Vietnam's economy from state-controlled to market-based. These reforms have led to a larger and more significant private sector and have forced remaining SOEs to compete with others in the market.

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256 World Bank, Vietnam Economic Monitor at Annex 1, Box 5.

257 Id.

258 Mark Manyin, Congressional Research Service, The Vietnam-U.S. Bilateral Trade Agreement at CRS-13 (Jun. 20, 2001) (available at http://usvtc.org/BTA/CRS%20Vietnam%20BTA.21jun01.pdf).

259 GSO Official Letter No. 587/TCTK-TH; see also "Vietnam Economy: Local banks lose out to foreign rivals," Saigon Times Weekly (Apr. 4, 2002) (available at http://www.vneconomy.com.vn/en/finance/banking_monetary/02-0085.htm).

260 "Vietnam Economy: Insurance Boom," Saigon Times Weekly (Jan. 19, 2002) (available at http://www.vneconomy.com.vn/en/finance/dir.cgi?sb=2.0&cat=0&ft=31); Mark Manyon, The Vietnam-U.S. Bilateral Trade Agreement at CRS-13 to CRS-14.

261 Vietnam's Country Commercial Guide 2002 at 7.

4. Vietnam's law protects private ownership, particularly land use rights

The Department has found that an important indication of the degree of government control over production is the right of private ownership.[262] To examine this factor, the Department must consider the legal framework that has been established in the subject country and the progress that has been made to foster private ownership. In this case, given the significant influence of the agricultural sector, private land rights demonstrate Vietnam's market orientation.

Private ownership of houses, property, income and means of production are first and foremost protected by the Constitution and may not be nationalized without adequate compensation.[263] Rights of individuals and organizations to use land and to transfer land-use rights are guaranteed under the Constitution.[264]

In conjunction with the Law on Land, as introduced in 1989 and amended in 1993, the Civil Code of 1994 created a comprehensive legal basis to recognize and protect private ownership in most of means of production. Part II of the Civil Code (Articles 172-284) protects private ownership of production means and materials, equity, income, savings, benefits, houses, living facilities, and property rights.[265] In 2000, amendments of the Law on Land were approved by the National Assembly and, since then, additional regulations have been issued to clarify and codify the establishment of property rights for private parties.[266]

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262 Kazakhstan Determination at 10-12; Russia Determination at 15-17.

263 See Constitution at Art. 58, 23.

264 Constitution at Art. 18.

265 Civil Code at Art. 172, 173, 175, 220.

266 Recently, the following additional regulations have been issued: Decree No. 4/2000/ND-CP (Feb. 11, 2000) as amended by Decree 66/2001/ND-CP (Sep. 28, 2001), stipulating the implementation of amendments and additions to a number of articles of the Land Law; Decree 38/2000/ND-CP Government on collecting land use fee (Aug. 23, 2000); Decree No 178/1999/ND-CP (Dec. 29, 1999), providing procedures for exchanging, transferring, renting, re-renting, inheriting, mortgaging, co-financing, and allowing land-use rights transactions in compliance with the revised Land Law to make land more attractive for collateral.

Property rights include the right to use, transfer, convey, lease, and sublease land. Land rights may also be used as collateral for loans and other contractual obligations, as well as capital contributions.[267] Individuals and households have the right to inherit land use rights.[268] Residential land can be held by individuals or households on a permanent basis, *i.e.*, on an indefinite term, and may be transferred without changing the status of the land use right, or sublet to economic organizations.[269] Additionally, Vietnam recognizes private ownership, including ownership by foreign investors, in fixed assets erected on the land[270] and of residential houses.[271] Land use rights for agriculture and forestry land and land leased or allocated for purposes other than residential use may be extended to 50 years, or, in special circumstances, 70 years.[272] Land allocated for one purpose may be converted, upon approval by the provincial authorities, for another purpose with different associated rights.[273] And, recently, the Government has enacted a regulation on Re-evaluation of Tariff for Land-Use Rights that reduced land rents by 20 percent.

Additionally, these property rights are largely irrevocable, subject to rare exceptions. The Government may not withdraw land-use rights granted to businesses and individuals prior to the duration of the intended period, unless there is a serious violation of the law, as specified by the

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[267] Civil Code at Article 690, 691; see also Law on Land, as amended (Dec. 2, 1998, Jun. 29, 2001); Decree 04/2000/ND-CP (Feb. 11, 2000) as amended by Decree 66/2001/ND-CP (Sept. 28, 2001) on implementation of the Law on Land; Decree 17/1999/ND-CP (Mar. 29, 1999) on procedures for conversion, assignment, leasing, subleasing, and capital contribution of the land use right.

[268] Id.; see also Circular 35 on land rents and capital contribution by land use right dated May 25, 2001, codifying and replacing former regulations.

[269] Decree 04/2000/ND-CP at Art. 27.

[270] Constitution at Art. 58; Civil Code at Art. 6, 176; Law on Foreign Investment at Art. 21.

[271] See Decree 81/2001/ND-CP (Nov. 5, 2001) on ownership of residential housing and land by oversea Vietnamese; Decree 60/ND-CP (July 5, 1994) (as amended on August 3, 1996) on residential housing and land.

[272] See Law on Land, as amended (Dec. 2, 1998, June 29, 2001); Decree 04/2000/ND-CP (Feb. 11, 2000) as amended by Decree 66/2001/ND-CP (Sept. 28, 2001).

[273] Id.

Law on Land (Article 26). Vietnam's Constitution provides that "property of individuals and organizations shall not be nationalized" and limits the Government's ability to commandeer private property for the purposes of the national interest, defense, and security, and only with adequate compensation subject to market value.[274]

Finally, the Government has significantly improved the process of documenting land-use rights beginning in mid-1999 through the use of certificates documenting the person or entity with rights to a given property.[275] Under this system, the Government is conducting a survey of land-use rights in order to issue certificates as a precondition for using land-use rights as collateral. As of January 2000, land-use right certificates had been issued to some 10 million household farms (covering 84 percent of all farmers and 75 percent of all farm land). The issuance of certificates was strengthened in August 2000, when authority for issuing such certificates was expanded to include local level governments.[276] As of March 2001, revisions to the Land Law were proceeding in a manner that promoted further decentralization of authority and eliminated delays in the issuance of certificates.[277]

In addition, the real estate market has also be formalized since 2001 and its function was enhanced by allowing Vietnamese overseas to hold land use rights.[278] As a result, according to a

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274 Constitution at Art. 23 and Land Law, as amended, Art. 26-28.

275 The General Department of Land and Ministry of Finance issued a joint notification No. 1442 regarding the issuing of land-use right certificates on September 18, 1999. This clarified the procedures for issuing land-use rights and mortgaging land.

276 The General Department of Land Notification No. 1248. It was decided that the People's Committees at the prefecture level would be in charge of issuing land-use right certificates for regional industries such as fisheries, forestry, cultivation and salt production, as well as for residents.

277 In addition to progress made with farms, some efforts have been seen in promoting issuance of land-use right certificates in urban areas. The standards for issuing land-use right certificates in urban areas were determined by Government Decree No. 38 issued in August 2000.

278 See World Bank, Vietnam Economic Monitor at Annex 1, Box 5. The Government issued Decree 79/2001/ND-CP in Nov. 2001 to improve transparency and formalize real estate market by providing clear cut rules

recent report of the Asian Development Bank, the real estate market in Vietnam has developed and the price of real estate has fluctuated due to market forces: "Real estate services were the bellwether, strengthening by 8 percent due to a buoyant real estate market. The easing of procedures for issuing land-use certificates, the granting of permission to overseas Vietnamese to buy land, and the recognition of Vietnam as one of the safer countries promoted land transactions. As a result, land prices in major urban areas such as Hanoi and Ho Chi Minh City increased by three or four times during the year."[279]

Nonetheless, it should be noted that the title to land officially remains under the Government. While admittedly these laws do not yet formally recognize private ownership of land, the rights accorded by the government to land users are typical of those of most market economies and amount to *de facto* private control of land as a means of production. Indeed, this is no different from policies of countries whose economies are clearly market oriented. Hong Kong, for instance, has maintained a system of land use rights without the accompanying right to own the land.[280] Israel is the same, with the State owning 93 percent of land, which also includes houses, buildings and permanent fixtures.[281]

Importantly, the Department's practice in previous ME determinations recognizes that the land-use right system is not contrary to the existence of a market economy.[282] In the Kazakhstan

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(continued)

on the sale, lease, mortgage and transfer of land use rights and in June 2001, Vietnamese overseas are officially permitted to hold land use rights.

279 Asian Development Bank, "Vietnam's Economy Continues on High Growth Path" (Apr. 9, 2002).

280 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China at Ch. 1, Art. 7 (Apr. 4, 1990) (available at http://www.info.gov.hk/basic_law/fulltext/index.htm).

281 Basic Law: Israel hands at §§ 1,3 (Jul. 19, 1960) (available at http://www. http://www.uni-wuerzburg.de/law/is__indx.html); Israel Lands Authority website (available at http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_general.html).

282 Kazakhstan Determination at 11-12.

case, the Department determined that the right of land users to sell, mortgage or otherwise dispose of land use rights received from the State creates a real difference between the land regime under a non-market economy and one adopted under a market economy. Indeed, in that case, while the Department noted the fact that the title to land belongs to the State, it did not change the Department's holding that Kazakhstan's economy has graduated from NME to ME status.[283]

Therefore, as with prior cases in which the Department has considered the market status of countries, property rights are an important indicator of the degree of government control of production. In Vietnam, private parties have the right to use, transfer, lease and encumber land, freeing private enterprises to pursue commercial activities without government intervention. This is particularly relevant to the agriculture sector, which is subject to this antidumping proceeding. Combined with the broad private sector involvement in the economy, this factor clearly demonstrates Vietnam's status as a market economy.

283 Id.

E. <u>The Government Of Vietnam Does Not Exercise Control Over The Allocation Of Resources Or The Price And Output Decisions Of Enterprises</u>

Vietnam has implemented significant economic reforms such that the Government does not control the allocation of resources or the price and output decisions of private enterprises. Rather, decisions regarding investments, purchases of supplies, output, and pricing are decentralized, resulting in a critical mass of market-based valuation of resources. Such decentralization has developed so that demand and supply conditions determine the allocation of resources in the economy.

Compared with Eastern Europe, members of the former Soviet Union, and even China, the Government of Vietnam has never extended that much control over the economy, particularly with regard to the agriculture sector, the most important part of the economy.[284] As the UNDP reports, the activities of various enterprises "were never truly linked through a central plan,"[285] so that price controls were always less extensive than those in the predominantly centrally planned economies.

The reforms implemented in order to lift the Government's control over price, allocation of resources, and output decisions took root in the early 1980s in Vietnam, starting with the increase in autonomy in the agricultural sector and household units, the liberalization of trade between provinces and external trade, and the abolition of the two-price system (i.e., market prices and government-announced prices). As a result of these reforms, and in order to prevent inflation,

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284 <u>See</u> United Nations Development Programme, <u>Vietnam's Reform Experience - The Quest for Stability During Transition</u>, at 4.

285 <u>Id.</u>

further reforms were implemented in the form of diminished state subsidies, curbed access of the state sector to credit, and increased interest rates.[286]

Further reforms took place during the last 20 years, with significant improvement since 1998 under the close assistance and monitoring of the World Bank, the IMF, and various international organizations, leading to impressive performance of the Vietnamese economy as evidenced by the growth of the private sector, high inflow of foreign investment, low inflation and budget deficits, and rapid growth in import-export budget balances. The evidence therefore shows that Vietnam's entrepreneurs and resources are free to react against market forces, unbound by Government control over prices, the allocation of resources, or productive output.

1. Prices have been liberalized to a sufficient extent that transactions are now valued based on considerations of supply and demand

Prior to its economic reform, the Government of Vietnam controlled the price of only 100 items -- much less than the 2000 commodities controlled by the former Soviet Union or the 500 items controlled by China.[287] Today, however, Vietnam controls far fewer prices, having lifted most of its price controls in 1992.[288] Under the 1992 regulation, the government ceded its authority to regulate pricing in all areas other than natural state monopolies and certain prices deemed essential to the economy. The areas in which the Government specifically fixed prices under this law were electricity, postal services, and domestic telephone services.[289] The Government also regulates, pursuant to the 1992 law: domestic prices of petrol, metals, some

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286 Id. at 5.

287 Id. at 4.

288 Decision No. 137/HDBT (Apr. 27, 1992). (All Vietnamese legal documents cited in this submission can be found at http://www.vietnamembassy-usa.org/renovation/news.php3.)

289 Id. This regulation also set principles for the Government to regulate prices on non-commodities, e.g., the sales prices of state assets, land rent charged by the Government, and prices for determination of taxes on land and import duties.

fertilizers, cement, paper for newspaper printing, freight costs on certain essential commodities shipped within Vietnam, international telecommunications, and water; export prices for rice and crude oil; and import prices for petrol and some fertilizer.[290] Prices of all other products and services are set by the market without any intervention by state institutions.[291] The regulations are focused, therefore, on products aimed at protecting the public interest, but even these prices are adjusted frequently to reflect the cost of production. Indeed, as shown in Table 5 below, the energy prices for businesses (commercial and industry) are similar to the prices charged in other market economies in the region.

Table 5

Energy Costs of Selected Countries in the Area in 2000[292]

Countries	Consumers	Commercial	Industry	Public Lighting
Malaysia	6.1	7.3	5.7	4.1
Singapore	8.5	7.4	7.3	
Thailand	6.7	7.0	5.8	
Philippines	10.6	10.6	9.4	
Korea	8.5	8.9	7.9	6.0
Japan	22.6	18.8	14.6	8.9
Hong Kong	11.3	11.3	10.6	9.8
Taiwan	9.1	9.1	6.2	
Vietnam	3.4	8.9	5.3	5.5

The initial price liberalization measures undertaken in 1992 were strengthened in 1999 under the Enterprise Law (1999). The Law stipulates that enterprises have complete autonomy in

290 Id.

291 Id.

292 GSO Official Letter No. 587/TCTK-TH.

doing business, including setting prices independently. [293] The same principle applies to all enterprises, including SOEs and FIEs,[294] thereby ensuring that market-based pricing was instilled in all sectors of the economy.

Additional reforms in this area were passed in 2002. The 2002 Ordinance on Price establishes autonomy in price setting by enterprises and more clearly defines the scope of state price management. In particular, these newest regulations ensure that:

- "The State respects the right to set prices and to compete in price by organizations and individuals engaged in business and production according to the law."[295]

- "The Government decides only the price of assets that are of special importance for the social development of the country."[296]

According to the 2002 Ordinance, the Government will regulate only the following prices:[297]

- Renting land and water surfaces, and important mineral resources;

- Selling and renting state assets;

- Monopoly goods and services (meaning fresh water and electricity supplied to individuals and households (i.e., consumption) and production, post and telecommunication services, seaport services, and domestic aviation and train fares); and

- Goods and services essential for the economy and the public (meaning bus fares within cities, towns, or industrial zones; printing paper for newspapers; text books for elementary and secondary schools; and gasoline).

This specific delineation and limitation of areas in which the government can control prices is similar to many other countries -- developed and developing alike -- and stems from

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293 Law on Enterprise, Article 7.

294 Id., Article 1. SOEs and FIEs are both limited liability companies and subject to the Law on Enterprise.

295 Ordinance on Price, Article 2.

296 Id., Article 9.

297 Id., Article 7.

understandable concerns about monopoly pricing, social welfare, and economic development.[298] Indeed, even in the United States the Government regulates fees and charges on various telecommunication services, oil, and electricity. The Federal Energy Regulatory Commission ("FERC") regulates natural gas, oil and electricity in the United States.[299] According to the FERC website, in the area of natural gas, "Under the NGA, the Commission regulates both the construction of pipeline facilities and the transportation of natural gas in interstate commerce." Companies providing services and constructing and operating interstate pipelines must first obtain Commission certificates of public convenience and necessity. In the area of electricity, the FERC website points out, "The Commission approves rates for wholesale electric sales of electricity and transmission in interstate commerce for private utilities, power marketers, power pools, power exchanges and independent system operators."[300] While deregulation of the electricity industry has occurred in the last 5 years, prior to that the industry in the U.S. was fully regulated.[301] The

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[298] Vietnam's regulations stipulate that the Government has the right to abolish monopoly prices set by organizations or individuals using monopolist linkages, and to impose fines according to the law. Section 4 on the Control of Monopoly Prices of the Ordinance on Prices; Section 5 of this Ordinance deals with antidumping measures and regulations on complaints, accusations, investigations, and related issues of administration.

[299] FERC Regulates the transmission and sale of natural gas for resale in interstate commerce; regulates the transmission of oil by pipeline in interstate commerce; regulates the transmission and wholesale sales of electricity in interstate commerce; licenses and inspects private, municipal and state hydro electric projects; oversees environmental maters related to natural gas, oil, electricity and hydroelectric projects; administers accounting and financial reporting regulations and conduct of jurisdictional companies, and; approves site choices as well as abandonment of interstate pipeline facilities. (Available at http://www.ferc.fed.us/about/about.htm.)

[300] Available at http://www.ferc.fed.us.

[301] In 1978, Congress passed the Public Utility Regulatory Policies Act which laid the groundwork for deregulation and competition by opening wholesale power markets to nonutility producers of electricity. Congress voted to promote greater competition in the bulk power market with the passage of the Energy Policy Act of 1992. The Federal Energy Regulatory Commission (FERC) implemented the intent of the Act in 1996 with Orders 888 and 889, with the stated objective to "remove impediments to competition in wholesale trade and to bring more efficient, lower cost power to the Nation's electricity customers." The FERC orders required open and equal access to jurisdictional utilities' transmission lines for all electricity producers, thus facilitating the States' restructuring of the electric power industry to allow customers direct access to retail power generation, (available at http://www.eia.doe.gov/cneaf/electricity/page/fact_sheets/restructuring.html).

regulation of the oil industry is much the same.[302] Regulation of the telecommunications industry is the work of the Federal Communications Commission, which regulates radio, television, wire, satellite and cable. Each of these is regulated in the sense that the FCC regulates the fees and taxes to be charged for each of these services.[303] The natural monopoly controls in Vietnam are no more than those that currently exist in the United States.

Furthermore, the Department has recognized the understandable resistance to price liberalization in certain sectors in its analysis of other formerly NME countries. With regard to the energy sector in Russia, the Department stated that "{t}he government is liberalizing these regulated prices over time, balancing the need for economic stability and order, on the one hand, and the long-term viability of the utility."[304] Overall, the Department recognized that remnant price controls were distortionary but, nevertheless, did not lead to the conclusion that prices as a whole were not market-based. The Department found that Russia was a market economy despite the fact that "regulated energy prices in Russia remain a significant distortion in the economy, as they encourage the wasteful use (mis-allocation) of Russia's energy resources and slow the adoption of more efficient production methods."[305] The Department noted in its decision that despite rampant inflation in the economy, "most regulated prices, particularly those for gas and electricity … remain well below world market-levels and may not even cover the cost of

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[302] Available at http://www.ferc.fed.us. The objective is to establish just and reasonable rates to encourage maximum use of oil pipelines--a relatively inexpensive means of bringing oil to market -- while protecting shippers and consumers from unjustified costs. The Commission does not oversee the construction of oil pipelines or regulate the supply and price of oil or oil products. Rather, it helps to assure shippers equal access to pipeline transportation, equal service conditions on a pipeline, and reasonable rates for moving petroleum and petroleum products by pipeline.

[303] Available at http://www.fcc.gov/ccb.

[304] Russia Determination at 18.

[305] Id.

production."[306] Yet, in that case, the Department recognized that price liberalization in Russia is "essentially complete," noting that significant distortions in a major sector of the economy such as energy remain in some market economies such as Venezuela in the late 1980s and early 1990s and Hungary and Indonesia currently.[307]

Similarly, for Kazakhstan, the Department acknowledged that the presence of market-based pricing should be recognized even when the prices of natural monopolies are substantially influenced or set by the government.[308] The Department recognized that the list of sectors subject to price controls in Kazakhstan "appears to be extensive." Yet this fact was de-emphasized by the Department because "the sectors subject to price controls in Kazakhstan are the same as those in which many Western countries exercise price regulation, i.e., the transportation, utilities, telecommunications, and postal sectors.

Indeed, a careful review of the price regulatory systems in several former Soviet Republics and Eastern European nations, all of which the Department recently deemed market economies, reveals controls that existed at the time of the Department's analysis that were at least as extensive as those in Vietnam:

- In addition to its control over the prices charged by natural monopolies, Russia also controls prices of the defense industry and certain socially important goods and services including some types of drugs, prosthetics, and orthopedic appliances.[309]
- Slovakia maintained price controls "on a limited number of goods and services, primarily for household consumption, covering such items as energy products,

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306 Id.

307 Id.

308 Kazakhstan Determination at 12-15.

309 Comments of Russian Respondents, December 10, 2001, at 126.

utilities, rents, and some public services."[310] The Slovakian government also controlled the prices of water, gas, and household electricity.[311]

- Similarly, the Czech Republic regulated the prices of "a limited number of goods and services, primarily for household consumption, covering energy products, utilities, rents, and some public services."[312] Specifically, the Czech Republic controlled water and sewer rates, bus fares, housing rents, and the price of electricity and natural gas.[313]

- In Poland, residential rents and the prices of gas and electricity, milk, domestic heating and hot water supplies, basic medicines, and public transportation were regulated by the government.[314]

- Hungary maintained price controls on household electricity and gas, public transportation, and natural monopolies, including telecommunications and gas and electricity distribution.[315]

- Latvia, where fully 20 percent of the consumer price index was comprised of regulated prices, maintained price controls on public transportation; water and sewerage; residential and industrial electricity, gas, and steam; and housing.[316]

So, although certain prices are regulated by the Government, such controls are common in market economies and have not prevented the Department from determining that, overall, an economy is still based on market principles. Indeed, Vietnam's price controls are no more restrictive than other countries that the Department has deemed market economies, and its Government is devoted to building on its already substantial progress towards ensuring that prices

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310 Slovak Determination at 12.

311 Id.

312 Memorandum to R. LaRussa, Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy Country Status at 12 (Nov. 29, 1999).

313 Id.

314 Poland Determination at 22.

315 Memorandum to R. LaRussa, Antidumping Administrative Review of Tapered Roller Bearings from Hungary: Market vs. Non-Market Economy Analysis at 14 (Feb. 23, 2000).

316 Latvia Determination at 15.

are set by the market forces of supply and demand reflecting the cost of production and scarcity of resources.[317]

2. Vietnam has implemented substantial banking reforms such that the system of banks operates independently of the Government and allocates capital based on market principles

The banking sector in Vietnam operates under a liberalized framework, which ensures that government interference in the allocation of capital through banks is minimized and there is a market-based interface between the sources and users of capital in the economy. Through its regulations of the banking system in Vietnam, the central bank, the SBV, has adopted a stance that "what is not explicitly forbidden is allowed."[318] Under this policy, a number of reforms have been implemented in Vietnam to allow a free, but stable, banking system that includes private banks and ensures the independence of credit institutions and their lending policies from the Government. In fact, it is relevant to note that the establishment of a sound banking system has resulted in an improvement of the risk rating of Vietnam from negative in 1999 to stable in 2001.[319]

However, before discussing the rules and situation with regard to Vietnam's banking sector, it is important to note that the Department has recognized that the level of banking sector reforms need not be without remaining distortions, and that the banking system is only important to this analysis to the extent that banks are controlled by the Government and, more importantly,

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317 Indeed, as discussed below in section F (factor 6), Vietnam's liberalization of international trade, and the growing volume of trade, makes it more and more difficult for the prices to be controlled by anything other than the market.

318 World Bank, Vietnam Economic Monitor at 17.

319 Id. at 9.

whether credit/capital are allocated by the Government.[320] Specifically, in the decision regarding Russia, the Department determined that

> The problems with Russia's banking sector are not relevant to the issue of the extent of government control over credit allocation because so little investment is financed through the banking sector, i.e., the bulk of investment in Russia is self-financed.[321]

The Department described Russia's immature credit markets as follows:

> Russia's … banks do not play a significant role as financial intermediaries between savers and investors. … Although banks are not serving as the main capital allocation mechanism, it is important to note that the State is not allocating capital/credit in Russia either. Instead, enterprise working capital needs and investments in fixed assets are, for the most part, self-financed through foreign capital markets. Russians do not, as a general rule, place much of their savings in banks. …"[322]

Similarly, the Department recognized the shallow nature of Kazakhstan's banking system in its decision to graduate that country to market-economy status. Specifically, the Department noted that "local citizens are wary of the reliability of Kazakh banks and generally keep their saving at home 'under the mattress.'"[323] Additionally, the Department recognized the distortions in the allocation of credit in Kazakhstan when it noted that the oil and gas sectors of the economy have drawn "a large share of investment capital from the banking sector" such that non-energy enterprises have had difficulty raising capital.[324]

For this reason, the Department must be careful not to mistake lack of depth or distortions in Vietnam's banking system as government control of the allocation of resources. Rather, due to

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320 Russia Determination at 17.

321 Id. at 19.

322 Id. at 18.

323 Kazakhstan Determination at 15.

324 Id. at 13.

the likelihood that capital accumulation and distribution could be taking place through informal credit markets and self-financing, the Department must determine that, absent evidence of pervasive government control of credit, resource allocation is taking place based on market principles, however crude or potentially distortive.

In this context, it should be concluded that Vietnam's banking and credit system operates independently of government control. The Ordinance on the State Bank of Vietnam (1990) and its improvements codified in the Law on State Bank of Vietnam (1998), separated the SBV from the Government, confirmed its independence and ended direct financing from the SBV to the Government's budget.[325] Furthermore, commercial banks, including state-owned banks, are also separate and independent from the SBV under the Ordinance on Banks, Credit Institutions and Financial Companies (1990).[326] All banks and credit institutions have the right to autonomy protected by the law and any intervention to such right that is contrary to the law is strictly prohibited.[327] Article 15 of the Law on Credit Institutions provides that:

> Credit institutions have the right to autonomy in doing business and will be responsible for their business by their own account. No organizations or individuals may intervene in the credit institutions' rights to autonomy. Credit institutions have the right to refuse to extend credits, to make capital contributions, to provide banking services {to any organizations or individuals} if they decide that {such individual or organization} is not qualified, or the extension of the requested credit, capital contribution or provisions or services are not profitable or are contrary to the law.

325 See Ordinance on State Bank of Vietnam (May 23, 1990); Law on State Bank of Vietnam (effective October 1, 1998). See also discussion on State Bank of Vietnam in Part III, Section A above.

326 See Ordinance on Banks, Credit Institutions and Financial Companies dated May 23, 1990.

327 Law on Credit Institutions at Art. 15.

Thus, Vietnam's banking reforms have resulted in a banking system that operates free of government interference.[328] Vietnam has also committed to further banking reform under various programs monitored by the World Bank and the IMF. The most important are the banking reform element of the structural reforms that are coupled with fiscal and monetary policy reforms under the three year arrangement under the Poverty Reduction and Growth Facility monitored by the IMF since early 2001. These reforms have significantly improved the banking system in Vietnam as well as its function to facilitate financing of the economy.[329] Comprehensive banking reforms over the last 4 years have substantially improved the autonomy of bankers and facilitated banking operations.[330] Most basically, but importantly, banks are allowed to clear payment transactions without the SBV's involvement.[331] Banks are also permitted to grant loans with or without collateral, to adopt any lending instruments not specifically prohibited by the law, and to determine interest rates on loans and deposits without any ceiling limits.[332]

These reforms, coupled with reforms taken to improve the private sector and FDI, has resulted in a change in credit allocations to different sectors of the economy. The share of credit to SOEs has dropped dramatically in recent years demonstrating increasing separation of government interests and private financing.

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[328] See United Nations Development Programme, Vietnam's Reform Experience: The Quest for Stability During Transition, at 6.

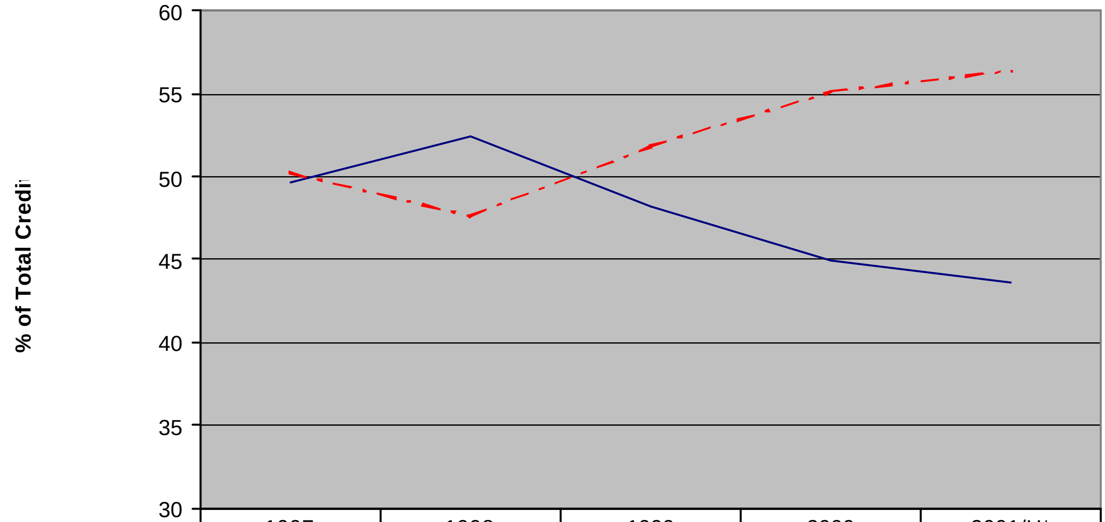
[329] See IMF Second Review at 17-18.

[330] See World Bank, Vietnam Economic Monitor at Annex 1.

[331] Decree 64 (Sep. 20, 2001).

[332] See World Bank, Vietnam Economic Monitor at Annex 1 Box 7 (Strengthening the Banking System (1998 - March 2002)); see also World Bank, Vietnam Development Report at 33-34. The most recent reform was made in May 2002, to fully liberalize interest rates.

Figure 3
Share of Credit by Ownership[333]



	1997	1998	1999	2000	2001/H*
State Enterprises	49.7	52.4	48.2	44.9	43.6
Private Enterprises	50.2	47.6	51.8	55.1	56.4

Vietnam has also instituted market-oriented policies regarding the resolution of non-performing loans. For instance, improved regulations permit domestic commercial banks and credit organizations to sell loans backed by collateral at market-determined prices instead of having the State absorb these losses.[334] These include guidelines on recovery of debts by credit institutions through either the sale or seizure of secured property.[335] Vietnam has also enacted rules to ensure disciplined decision-making by lenders so as to prevent the banking system from

333 IMF Second Review at 73.

334 Directive 01/2002/CT-NHNN (Jan. 2002).

335 Joint Circular 03/2001 (Apr. 23, 2001).

being undermined. As such, "{n}ew rules for classifying non-performing loans consistent with international standards, have been issued."[336] Indeed, the IMF has recognized this progress:

> In the past year, the following measures have been taken to advance the following reform agenda: ... Moving loan classification closer to international best practice by adopting Decision 1627 in December 2001 (a structural performance criterion) ... Implementation of the decision in expected to be completed by end-2002.[337]

Vietnam has established detailed regulations to enhance the credit available to entrepreneurs through sound lending policies. For instance, there are established guidelines and clear requirements for foreign-invested enterprises to mortgage land-use rights and assets.[338] This type of thrift supervision includes the establishment of a National Registry for Secured Transactions opened on March 12, 2002, under the Ministry of Justice to facilitate transparency in the transactions of credit institutions by making such information available to third parties.[339]

It is clear from the discussion above that neither the Government nor the SBV interfere with the commercial activities and lending decisions of commercial banks, including commercial banks formed with state capital. Indeed, banks and credit institutions may be subject to special monitoring by the SBV only under special circumstances, rules that relate solely to the SBV's role of ensuring stability in the banking system, such when:[340]

> (i) there are sufficient indications that the institution is unable to maintain its payment capability;
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> (ii) its overdue debts have reached a level that threatens its payment capability; and

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[336] Taking Stock at 26.

[337] IMF Second Review at 12.

[338] Inter-Circular 772 NHNN/TCDC (May 2001).

[339] World Bank, Vietnam Economic Monitor at Annex 1.

[340] Law on Credit Institutions at Art. 92.

> (iii) its accumulated losses have exceeded its total equity and reserved fund.

In the event that the credit institution does not recover after special monitoring by the SBV and, in most cases, debt restructuring, it will be subject to bankruptcy proceedings.[341]

One clear sign that Vietnam is building a more sound banking structure is the concrete steps it has taken to improve the health of existing banks. Specifically, in 1998, the Bank Restructuring Committee was established for the purpose of implementing restructuring plans for banks, including state owned banks.[342] This committee has taken important steps including closing and/or merging four joint stock banks in 1999, and nine additional joint stock banks by March 2002, and developing a comprehensive plan for restructuring four large state owned banks that include annual milestones (*i.e.* actions and targets).[343] The Committee also completed financial assessments of all joint-stock banks and independent audits of four large state-owned commercial banks by international auditors.[344]

Another sign of the development of the banking sector in Vietnam is its increasing breadth, as evidenced by the numerous types of institutions. Since the early 1990s the banking sector in Vietnam has included private domestic commercial banks, domestic banks with foreign capital, and branches of foreign banks, as well as state-owned banks.[345] In addition, loans and other forms of financing (*e.g.* leasing) may be extended by non-banking credit institutions such as financial companies, financial leasing companies, or collective credit organizations (i.e.,

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341 Id. at Art. 98.

342 See World Bank, Vietnam Economic Monitor at Annex 1, Box 7.

343 Id. at Annex A, box 7; Annex 2, at 30.

344 Id. at Annex A, box 7; Annex 2, at 30.

345 Law on Credit Institutions (Dec. 12, 1997), codifying previous law and regulations on banks and credit institutions.

organizations established for the purpose of internal funding among members).[346] These non-banking credit institutions may be state-owned, private-owned, foreign-owned, or some combination of the three.[347]

Importantly, offshore banks, credit institutions, and international financial institutions may participate in Vietnam's capital market by way of extending loans and commercial funding to Vietnamese individuals and organizations.[348] Until now, there are about 30 foreign banks' branches.[349] In addition, the International Financial Corporation, and several other international funds including Dragon Capital and Vietnam Frontier have actively participated in project financing in Vietnam during recent years.[350] The foreign participation in Vietnam's banking sector surpasses the standards set by the Department. For instance, in the Kazakhstan decision, the Department recognized that "foreign banks may not operate in Kazakhstan through branches."[351]

Vietnam's regulations permitting foreign banks are not merely nominal either. Rather, foreign banking institutions are given significant latitude in their activities. Regulations established in 2001 strengthened the rights of foreign banking institutions in Vietnam. Among other privileges, these regulations codified the right of joint venture and foreign banks operating in Vietnam to take collateral in the form of land-use rights and land certificates from local

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346 Id.

347 Id.

348 See Decree 90/ND-CP on foreign loans dated (Jul. 11, 1998) (replacing earlier decree).

349 GSO Official Letter No. 587/TCTK-TH.

350 See "Exchange Makes Room for Foreign Investors" Vietnam News (Jul. 23, 2002). IFC's Activities in Vietnam at http://www.worldbank.org.vn/wbivn/wb_ifc_mpdf_miga/wb_ifc_mpdf001.htm).

351 Kazakhstan Determination at 13.

clients.[352] Joint venture banks are permitted to receive foreign-currency deposits from Vietnamese clients.[353]

Offshore banking institutions catering to Vietnam have also been covered by these reforms. Vietnam has freed interest rates on foreign currency lending by both offshore banks to Vietnam.[354] Vietnam has also provided an improved framework for cross-border payment transactions, recognizing formally that international practices can be used to govern cross-border transactions if Vietnamese law does not require otherwise.[355]

Additionally, the freedom of entry to the banking sector is defined concretely under the law. Under the Law on Credit Institutions introduced on December 12, 1997, codifying previous regulations, private organizations satisfying professional and financial criteria set forth by the law are permitted to establish commercial banks and credit institutions.[356] The SBV is required, upon receipt of the application for establishment of commercial banks or credit institutions, to issue a license or a letter explaining the reason for not issuing the license.

The 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.[357] Vietnam's banking system is, therefore free and subject to the influences of the market and should therefore contribute to a decision to deem Vietnam a market economy.

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352 Decree 79/2001/ND-CP (Nov. 16, 2001).

353 See World Bank, Vietnam Economic Monitor at Annex 1, Box 7.

354 Decision 718/2001/QD-NHNN (May 29, 2001); Decision 980/2001/QD-NHNN (Aug. 1, 2001).

355 Decree 64 and its implementing decision (Sept. 20, 2001).

356 Law on Credit Institutions at Art. 14, 22.

357 See "Vietnam Economy, Local banks lose out to foreign rivals" Saigon Times Weekly (Apr. 4, 2002).

3. Individuals and businesses are free to engage in entrepreneurial activities

In addition to price liberalization and a lack of interference by the Government in the allocation of credit and capital formation, it is also important to consider the framework under which individuals and businesses in Vietnam operate to take advantage of their own skills and ideas through entrepreneurial endeavors. As reviewed in detail in the previous section on the issue of government control and ownership of the means of production, Vietnam possesses a well-developed system of laws and regulations ensuring a rules-based environment in which economic decisions are largely put in private hands for private gain. First, there are solid protections of the rights of individuals to engage in entrepreneurial activities and the structure of Vietnam's economy reflects this. Second, where the government understandably retains a presence in certain sectors, the corporate governance system ensures a more than adequate system for valuing resources. Finally, Vietnam is increasingly open to world pricing practices through its participation in the world trading system.

The Law on Enterprise is the cornerstone of Vietnam's entrepreneurial freedoms.[358] Specifically, Article 7 stipulates that an enterprise shall have the rights to:

1. Possess, use and dispose of its assets;
2. Take initiative in selecting lines of business and areas for investment, the form of investment including joint venture with or capital contribution to other enterprises as well as in expanding the scope and lines of business;

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[358] Law on Enterprise at Art. 9. Vietnamese citizens may choose to register their business activities as households, individuals, proprietorships or limited liability entities, including joint stock companies and limited liability companies. Professionals may provide services as individuals, partnerships or, in the case of consulting and insurance firms, limited liability companies. There are some limited exceptions, however, which cover state bodies, state officers and those appointed to represent the Government's shares in SOEs or enterprises to which the Government holds shares, individuals otherwise prohibited by court decisions due to tax evasion, illegal business practices, production of fake goods, or those that own or manage a business in bankruptcy within the previous three years.

3. Take initiative in seeking markets and customers and signing contracts;

4. Select the form and way of mobilizing capital;

5. Conduct import and export business;

6. Recruit, employ and use labor in accordance with business requirements;

7. Conduct business autonomously, apply modem and scientific management methods in order to raise the efficiency and competitiveness;

8. Refuse and report any demand by any individual, body or organization for supply of any resources not prescribed by law, except for voluntary contributions for public-interest or humanitarian purposes; and

9. Other rights as provided for by law.

Additionally, the Law on Promotion of Domestic Investment in 1994 and amended in 1998 established a more comprehensive legal foundation and introduced economic incentives to private entrepreneurs in all fields of the economy.

Public companies and mutual funds for investment purposes are also available alternatives following a series of regulations preparing for the establishment of the Stock Exchanges in Ho Chi Minh City in 2000 and in Hanoi in 2002.[359]

Freedom to exercise one's own choice in economic endeavors is *not* a new concept to Vietnam. Rather, these rules regarding the freedom to allocate resources under one's own volition have been developing for many years in Vietnam and are strong today. Soon after adopting the *Doi Moi* program in 1986, the Government completely lifted control over output decisions in the agricultural sector,[360] a principal sector of the Vietnamese economy, representing nearly a quarter of GDP and 90 percent of the workforce.

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[359] See World Bank, Vietnam Economic Monitor at Annex 1, Box 5.

[360] See United Nations Development Programme, Vietnam's Reform Experiences: The Quest for Stability during Transition, at 8.

Additionally, the freedom to enter into a business of one's own choosing is not limited by burdensome restrictions or subjective licensing requirements.[361] Rather, there are uniform procedures for business registration and the state is restricted from interfering with this process.[362] For example, business registration is conditional based on certain obvious guidelines, for example, that those engaged in professional services (e.g., attorneys) be properly certified.[363]

The government has made it a top priority to ensure that the gains in the private sector do not backslide through government interference in the operations of firms. As a result of these follow-up measures, the Government has abolished some licenses and permits previously required (e.g., for import and export transactions), because they were deemed superfluous.[364] For example, in 2001, the Prime Minister issued a Directive strictly limiting the inspection and monitoring of enterprises to such situations where there is a reasonable indication that an enterprise is violating the law, and in such cases, approval must be granted by the head of the applicable state agency.[365] Moreover, the Directive ensures that the role of the state is transparent and that enterprises are not

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[361] Law on Enterprise at Art. 6 stipulates that enterprises of any form may be established and operate upon registration, without obtaining any licenses and permits from the Government, except for those required by the Law. Such entry may be limited in sensitive areas like national defense, security, social order and safety; historical, cultural and ethical traditions or customs; and health.

[362] Decree 02/2000/ND-CP of the Government at Art. 1, 22 (effective Feb. 18, 2000). This decree laid out uniform procedures for business registration of enterprises under the Law on Enterprise and household businesses, which were previously covered under various regulations. The decree also provided a basis for monitoring activities of the Government's agencies and officers in dealing with business registration. Article 1 of the Decree states that the right to establish enterprises and register businesses are part of the civil rights of citizens, which are protected by the state. The Decree clearly prohibits ministries and state agencies at all levels from issuing any regulations to apply for business registration in their area or sector, or to impede or harass business registration. Failure to comply with these provisions will subject state officers to administrative sanction. Refusals to issue a registration certificate to a qualified person or issuance of registration certificates to unqualified persons may subject state officers to criminal prosecution.

[363] Id. Those professions for which certification is required include legal services, medical services and pharmacy, veterinary medicine, architecture, auditing, and stock brokerage.

[364] See World Bank, Vietnam Economic Monitor at Annex 1, Box 5. For example, in 2000, there were 145 sub-licenses removed.

[365] Directive of the Prime Minister No. 22/2002/CT-TTG (Sep. 11, 2001).

subject to harassment through repeated inspections concerning the same accusation.[366] Violation of these regulations may subject state officers to serious administrative punishments and compensation for any damages caused by unauthorized inspection.[367]

In addition to the rules governing a conducive environment to new and private entrepreneurial activities, Vietnam has greatly improved the mechanisms by which SOEs allocate resources. The behavioral environment of SOEs is based on market rules, whereby the enterprises themselves, not the Government, control pricing, input, and output decisions. Under this system, SOEs sign an agreement with the Ministry of Finance, acknowledging the receipt of state's equity from the Government,[368] and business decisions are placed in the hands of an SOE's management, including:

- An SOE's management may use the capital provided by the government as it sees fit,[369] and is accountable for its results in much the same manner as a private company.[370]
- SOE business plans, i.e., input, output and pricing, are decided solely by their management, except for pricing of monopoly good and services.[371]
- SOEs are subject to the same tax regime and accounting principles as private and FDI enterprises, thereby leveling the playing field and ensuring that all sectors of the economy compete equally for scarce resources.[372]

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366 Id. Specifically, unless there is an exceptional circumstance, state officers in any agency may not request an inspection of an enterprise on the same issue that was inspected once by any other agencies including his/her agency. After the inspection, a written understanding must be signed by the inspector and the respective enterprise, and that document can be used by the enterprise as evidence to refuse the same inspection requested by others. Different state agencies cannot carry out inspections at one enterprise at the same time.

367 Id.

368 Id.

369 Id.

370 Id.

371 Id.

372 Law on Corporate Tax.

- SOEs are permitted to obtain loans or credits from other sources, to use assets as capital contributions for business cooperation and to pay debts from their own accounts.[373]
- SOEs may transfer or dispose of assets or use them as collateral for loans.[374]

One of the most direct results of such deregulation is the manner in which purchases are made in state-owned sectors. The "state order" system of supply requisition has been discarded in favor decentralized supply-chain management. SOE procurement is contract-based and is subject to bidding, in much the same manner as any other entity in the economy.[375] Participation in this bidding system is open to foreign suppliers and contractors and a number of regulations and laws have been introduced to ensure transparency of bidding.[376] Since 1996, the UNDP has concluded that SOEs migrated from the Government Control and that SOEs cold no longer rely on state budget.[377]

In addition to codifying the market-based rules of domestic enterprises, Vietnam has instituted regulations to ensure a role for market-oriented foreign players, as reviewed in detail above. Foreign participation in certain key sectors such as electrical utilities has been allowed.[378] Furthermore, the new Ordinance on Post and Telecommunications opened most of the sector to private and foreign participation, but the Government will remain in control of certain activities normally controlled by government, such as issuing stamps and holding ownership and

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[373] Law on State Enterprise (1994).

[374] Id.

[375] Decree 88/ND-CP/1999 (Sept. 1, 1999) on Tendering, replacing Decree 43/CP (July 16, 1996).

[376] Id.

[377] United Nations Development Programme, Vietnam's Reform Experience: the Quest for Stability during Transition at 14-15.

[378] Under Decree No. 45/2001/ND-CP (Aug. 2, 2001) on electricity activities and use of electricity, private domestic sector and FDI are permitted in most of electricity production and distribution.

management in network infrastructure.[379] All other services and business in these sectors are open to private and foreign investment.[380] Finally, under the Law on Petroleum introduced in 1993 and amended in June 2000, foreign companies may participate in the petroleum sector by contracting with Vietnamese oil and gas corporations.[381] In its recent report, the World Bank concluded that the production of both industrial and agricultural products in Vietnam reflected market demands, externally and domestically.[382]

Whether considering pricing, banking, entrepreneurship, or even the structure of SOEs, the Government of Vietnam does not control the allocation of resources or the price and output decision of enterprises to an extent that would justify deeming Vietnam a non-market economy.

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379 Ordinance on Post and Telecommunication.

380 Law on Electricity; Ordinance on Post and Telecommunications.

381 Such contracted activities may include production sharing contract, joint operating contracts, and joint venture contracts.

382 See World Bank, Vietnam Economic Monitor at 4-8.

F. Trade Liberalization Also Contributes to Market Competition in Vietnam

In addition to the five enumerated factors discussed above, the statute directs the Department to consider "such other factors as the administering authority considers appropriate."[383] The influence of foreign competition and foreign participation in an economy demonstrates that market forces predominate. Accordingly, Vietnam's participation in the global trading system through bilateral and multilateral agreements should be considered.

Vietnam has made significant improvements in international trade, including lifting of import and export license requirements, high tariffs, quantitative restrictions and some outright prohibitions. In addition, Vietnam is now a member of various multilateral and bilateral trade and investment agreements. Vietnam is also a member of conventions under which Vietnam will recognize and enforce international arbitration awards. Vietnam has also committed to enforce civil judgments of foreign courts on a reciprocal basis.

Since 1998, the licensing requirements on import/export trading rights of domestic firms trade have been largely abolished.[384] Under the US-Vietnam Bilateral Trade Agreement ("BTA"), Vietnam has pledged to eliminate all discretionary import licensing in accordance with WTO standards.[385]

Other restrictions are being progressively liberalized. The number of products subject to quotas has diminished dramatically since 1999 at the height of the financial crisis to only four products today; only two of these -- petroleum and sugar -- will be subject to quota by the end of

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383 19 U.S.C. § 1677(18)(B)(vi).

384 World Bank, Vietnam Economic Monitor at Annex 1; see also Decree 44/2002/ND-CP (Aug. 2, 2001).

385 Reuters, "Vietnam Trade Agreement: Summary of Key Provisions" (Jul. 13 2000) (available at http://www.usvtc.org/BTA/BTA_Reuters.htm).

2002.[386] Indeed, Vietnam has liberalized its quantitative restrictions ahead of schedule: although Vietnam only committed to removing quotas on two items by the end of 2001, it removed quotas for 14 of 18 items for removal under the ASEAN Free Trade Agreement ("AFTA").[387]

Under the BTA, Vietnam's tariffs on 250 products -- which were not particularly high for a developing country even before the Agreement was signed (averaging only 15-20 percent) -- are being phased down from 33-50 percent over a three-year period.[388] Vietnam also reduced tariffs on over 700 items in preparation to join the AFTA. Currently, approximately 65 percent of 4,986 products covered by the AFTA are subject to tariffs ranging from 0-5 percent, with the remaining products subject to tariffs of 5-20 percent.[389]

Trade liberalization is an important additional factor in the Department's analysis as it shows that businesses in Vietnam are subject not merely to internal domestic competition, as discussed above, but also international competition. Vietnam's commitment to international practices in trade and investment as well as its obligation to enforce those practices in Vietnam make clear that Vietnam is fully subject to international trade and its rules. In order for any country's economy to weather such competition, market-based principles must exist, as they clearly do in Vietnam.

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386 Decision 46/2001/QD-TTg (Apr. 4, 2001).

387 World Bank, Vietnam Development Report at 39-40.

388 US-VN BTA at Annex E.

389 World Bank, Vietnam Development Report at 39; Economist Intelligence Unit, Country Commerce: Vietnam at 61 (April 2002).

IV. CONCLUSION

Based on the forgoing and the fact that Vietnam has successfully implemented significant market economy principles and practices, we respectfully request that the Department find that Vietnam has a market-based economy. Vietnam's market economy status is supported by the evidence on the record and is consistent with recent determinations of the Department regarding the market economy status of Russia, Slovakia, the Czech Republic, and Latvia, Kazakhstan, and Russia.

Respectfully submitted,

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