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Investigation
Public Document

MEMORANDUM FOR:	Faryar Shirzad Assistant Secretary Import Administration
THROUGH:	Jeffrey May Director Office of Policy Import Administration
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FROM:	Shauna Lee-Alaia George Smolik Athanasios Mihalakas Lawrence Norton Office of Policy, Import Administration
SUBJECT:	Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status

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SUMMARY

In response to petitioner's allegation in the above-captioned proceeding that the Socialist Republic of Vietnam ("Vietnam") has a non-market economy ("NME"), the Office of Policy has undertaken an analysis of Vietnam's economic reforms. While Vietnam has made significant progress on a number of reforms, our analysis indicates that Vietnam has not successfully made the transition to a market economy.

The Department recognizes that the Government of Vietnam has taken substantial steps to open its market to the international community and to allow limited forces of supply and demand affect the development of its economy. For example, wages in the private sector are largely determined by free bargaining between labor and management. In addition, the government has

promulgated many positive legal reforms that have led to the marked and sustained growth of the private sector.

However, the level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value. The Vietnamese currency, the *dong*, is not fully convertible, with significant restrictions on its use, transfer, and exchange rate. Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalized for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatization of SOEs and the state-dominated banking sector has been slow, thereby excluding the private sector from access to resources and insulating the state sector from competition. Finally, private land ownership is not allowed and the government is not initiating a land privatization program.

Therefore, based on the preponderance of evidence related to economic reforms in Vietnam to date, analyzed as required under section 771(18)(B) of the Tariff Act of 1930, as amended ("the Act"), we recommend that the Department of Commerce (the "Department") treat Vietnam as a non-market economy for the purposes of antidumping ("AD") and countervailing duty proceedings.

BACKGROUND

On June 28, 2002, the Department received a petition for an antidumping investigation on imports of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam") filed in proper form by Catfish Farmers of America ("CFA") and the individual U.S. catfish processors America's Catch Inc.; Consolidated Catfish Co., L.L.C.; Delta Pride Catfish, Inc.; Harvest Select Catfish, Inc.; Heartland Catfish Company; Pride of the Pond; Simmons Farm Raised Catfish, Inc.; and Southern Pride Catfish Co., Inc., hereinafter referred to collectively as "the petitioners."

In accordance with section 732(b) of the Act, the petitioners alleged that imports of certain frozen fish fillets from Vietnam are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that such imports are materially injuring and threaten to injure an industry in the United States. Based upon our examination of the petition on frozen fish fillets from Vietnam, we found that the petition met the requirements of section 732 of the Act and subsequently initiated an antidumping duty investigation on July 18, 2002.

Petitioners also alleged that Vietnam has a NME for the purposes of the U.S. AD law. The Department found petitioner's allegation to be adequately supported and therefore initiated an inquiry into Vietnam's economic reforms in the context of the investigation referred to above.

On August 14, 2002, the Department published a Notice in the Federal Register announcing an inquiry into petitioner's allegation and requesting comments from the public by September 4, 2002 on Vietnam's economic reforms. This deadline was extended to October 2 as per a request from the Government of Vietnam. Rebuttal comments were accepted until October 15, 2002. A request for a hearing was made on behalf of the Vietnam Association of Seafood Exporters and Producers on October 2, 2002 but the request was withdrawn on October 15, 2002.

SUMMARY OF COMMENTS AND REBUTTAL COMMENTS FROM PARTIES

Parties Who Support a Determination of Vietnam as a Market Economy

The Government of Vietnam (represented by Willkie Farr & Gallagher), Respondents (The Vietnam Association of Seafood Exporters and Producers, represented by White & Case LLP) and a number of public parties, including the following: The American Chamber of Commerce in Vietnam, Ho Chi Ming City Chapter; American Standard Vietnam Inc.; Cargill, Incorporated; Chinfon Global Company; CitiGroup, New York Life International, LLC; Unilever; The US - ASEAN Business Council, Inc.; The US-Vietnam Trade Council; Vedan Vietnam Enterprise Corporation, Ltd., and; The Vietnam Chamber of Commerce and Industry ("VCCI"), have expressed support for granting Vietnam market economy status. These parties submitted comments and rebuttal comments summarized below:

- The State Bank of Vietnam operates as an independent central bank and manages a single exchange rate according to market forces.
- The *dong* is a convertible currency under the analysis applied in determining that Kazakhstan is a market economy.
- Foreign invested companies can convert Vietnamese currency generated from their business in Vietnam into hard currencies for commercial transactions, payment of contracts, repayment of loans, investment or profit remittance.
- Vietnam will formally accept International Monetary Fund ("IMF") Article VIII obligations in 2004. However, all prerequisites for acceptance should be met by the end of this year.
- Repatriation rights are allowed after taxes. The surrender requirement is expected to be removed by the end of this year. The tax on profit remittance of foreign invested enterprises ("FIEs") will be eliminated by the end of the year.
- Vietnam's labor code upholds the principle of free bargaining between workers and employers at or above the minimum wage and guarantees labor mobility. The supply-demand relationship in the labor market is evidenced by an acceleration of wages for skilled labor and retention problems. The commenting companies have hired labor directly with freely bargained wages.
- Vietnam's unions are very active and operate outside the government's influence.
- The Foreign Investment Law has been amended to continue to attract foreign investment and ensure investors' rights. Investors are entitled to make joint investments with local

partners in sectors where there are restraints. The government has reduced license requirements, sped up approvals and taken incremental steps to reduce land costs and leases. 100-percent foreign-owned operations are now allowed in most industries. The areas where foreign direct investment ("FDI") is still restricted is comparable to those in other market economies.

- FIEs have the right to directly import goods and services necessary for their projects.
- Vietnam's tax structure is favorable to FIEs.
- Dual-pricing is being phased out.
- Legal reform, increased export potential under the U.S.-Vietnam Bilateral Trade Agreement ("BTA") and political stability have improved investor confidence, evidenced by substantial increases in FDI inflows.
- Vietnam guarantees private property rights, has recognized the equality of the private and state sectors, and has removed the leading role of State-Owned Enterprises ("SOEs").
- Over 12 million households are independently engaged in agriculture and aqua-culture, contributing to over ninety-eight percent of agricultural GDP and the agricultural sector is ninety-five percent in private hands.
- Although slower than expected, the SOE reform program will be reinvigorated in accordance with World Bank guidelines.
- The SOE reform had reduced the number of SOEs by fifty percent by 1990. Most SOEs, excluding public utilities, have business autonomy and operate according to commercial principles.
- Only forty percent of industry is still state-owned, concentrated in a few discrete sectors and often includes joint ventures with foreign investors.
- Land is a tradable commodity and operates much the way the land market in Australia and in the former Hong Kong operates. Holders of land-use rights may use, transfer, convey, inherit, and lease the land, and may use the land as collateral for loans. The prices of land-use rights now fluctuate with market forces.
- There is a large informal (unregistered) economy not captured in official statistics.
- The government never controlled the price, allocation, and output decisions of enterprises as thoroughly as in other communist countries and began liberalization earlier.
- The government fixes prices only in natural monopolies and regulates prices in other products (such as gasoline, metals, cements, and paper), but these regulated prices are often adjusted to reflect costs.
- The government continues to lift price controls. Energy, water, and other factors of production are available at rates largely determined by supply and demand.
- The 2002 *Pricing Ordinance* is similar to market economies' anti-trust and antidumping laws.
- Banking sector reforms continue to accelerate.
- The lack of depth and distortions in Vietnam's banking sector are comparable to other countries that have been considered market economies in the past.

- Vietnam's central bank, the State Bank of Vietnam ("SBV") is currently introducing a free interest policy using the base rate only as a reference. Capital allocation is increasingly influenced through interest rates.
- State-owned commercial banks now provide sixty percent of bank loans to private firms.
- U.S. firms have control over allocation of their own capital and commenting parties have not encountered any unreasonable intervention by the government in their business decisions, including price setting, distribution, production capacity and securing business assets.
- The private sector accounts for sixty percent of GDP, which is similar to Kazakhstan.
- The Law on Enterprise secures all fundamental entrepreneurial freedoms, and the State is restricted from interfering with the uniform process of business registration.
- The private sector was recognized and encouraged by the Enterprise Law in 2000, leading to the development of over 82,000 businesses. The government has streamlined its licensing procedure and replaced its discriminatory capital requirements based on ownership form with prudential requirements.
- The Department should place considerable weight on the significant commitments Vietnam has made in trade liberalization and creating a competitive environment through global integration. Vietnam is ahead of schedule in facilitating this competition *via* its obligations under the BTA and Asian Free Trade Agreement. Vietnam has been updating its legal structure to bring its laws into line with the BTA.
- Trade between the United States and Vietnam has been increasing. Assigning NME status to Vietnam would hurt these positive developments.
- Vietnam has embarked on a strong reform plan for a commercial dispute settlement system. Private companies may enter into private contracts with other Vietnamese business with confidence that they will be honored.

Parties Who Support a Determination of Vietnam as a NME

Petitioners (Catfish Farmers of America and individual U.S. catfish processors, as represented by Akin Gump Strauss Hauer & Feld LLP) submitted comments and rebuttal comments summarized below in support of a determination of Vietnam as a NME.

- The *dong* is not freely convertible for the full range of commercial transactions required by domestic and foreign entities.
- Vietnam has not assumed IMF's Article VIII obligations.
- The foreign exchange surrender requirement on current account transfers is thirty percent.
- The SBV remains under state control.
- Free bargaining between labor and management over wages are precluded due to the government's control over labor-management relations.
- Recently promulgated labor laws and amendments have further confused labor relations.
- The government restricts public information regarding the conditions of the labor market.

- FIE’s are restricted from recruiting workers directly and must pay a higher minimum wage.
- The State plays an intrusive role in the foreign investment area, thus subjecting foreign investors to Vietnam’s political dynamics.
- The competition law, which will not be enacted until October of 2003, is feeble and incapable of introducing true market-based competition to Vietnam.
- Vietnam’s attractiveness for FDI has sunk in recent years. The large inflows of the mid-1990's must not be understood as normal.
- The government owns all the land in Vietnam and does not recognize private property rights.
- Foreigners cannot own land use rights and can only lease land from the government or form a joint venture with a Vietnamese partner that holds land use rights.
- SOEs account for 7 to 15 percent of the total number of enterprises.
- The State sector accounted for 39 percent of GDP in 2001, only 1 percent less then in 1996. The Non-State sector’s share of GDP has fallen from 53 percent in 1996 to 48 percent in 2001.
- Government restricts private enterprise to certain sectors, thus allowing many SOEs to operate in an environment virtually devoid of competition.
- Seventy percent of bank lending went to SOE’s in 2001, thus severely restricting the credit available to private enterprises.
- The Vietnamese Government Pricing Committee directly sets prices in many industries.
- SOE’s have at least eighty percent of market share in each of the electricity, aviation, and telecom industries.
- Foreign enterprises in Vietnam pay higher rates for goods and services then domestic consumers.
- The SBV controls the four state-owned commercial banks, which comprise eighty percent of the banking sector.
- The constitution guarantees the supreme role of the Communist Party (CP) and CP principles.
- Vietnam has moved slowly in its bid to accede to the World Trade Organization (WTO).
- The rule of law is underdeveloped.

ANALYTICAL APPROACH

In making an NME-country determination under section 771(18)(A) of the Act, Section 771(18)(B) requires that the Department take into account:

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;
6. Such other factors as the administering authority considers appropriate.

In evaluating the six factors listed above, the Department has recognized that it is not sufficient that a country's economy is no longer controlled by the state to treat the country as a market economy. See Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation (60 FR 16440, 16443, March 30, 1995). Rather, the Department considers whether the facts, as applied to the statutory factors, demonstrate that the economy is generally operating under market principles. To this end, Congress has provided the above listed factors which the Department must evaluate to determine whether, in the judgment of the Department, market forces in the country are sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis.

The reason for this analysis is that prices and costs are central to the Department's dumping analysis and calculation of normal value. Therefore, the prices and costs that the Department uses must be meaningful measures of value. NME prices are not, as a general rule, meaningful measures of value because they do not sufficiently reflect demand conditions or the relative scarcity of resources used in production. 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, or other government regulatory measures). The problem, instead, is the price *generation* process in NMEs (*i.e.,* the absence of the demand and supply elements that individually and collectively make a market-based price system work).

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. Although it is not necessary that the country fully meet every statutory factor relative to other market economies, the Department must determine 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.

The Department has carefully considered the facts and arguments presented by all of the parties who made submissions during this proceeding. In addition, consistent with the Department's practice in addressing prior market economy determinations, the Department has relied upon the expert evaluations of third parties such as the World Bank, the International Monetary Fund, the

European Bank for Reconstruction and Development, the Asian Development Bank, the Asian-Pacific Economic Cooperation and the Economist Intelligence Unit.

OVERVIEW OF ECONOMIC AND LEGAL REFORMS

The Socialist Republic of Vietnam ("Vietnam") is a largely agrarian economy of approximately 80 million people. In 1989, food supply management problems and high inflation prompted the government to implement several reforms under the program of economic renovation, *doi moi*, that had begun three years earlier. The currency, the *dong*, was devalued, agricultural communes were de-collectivized, restraints on internal trade were eliminated, a central bank was created, and most direct budgetary subsidies to SOEs were eliminated. As a result, inflation came down, agricultural output increased dramatically, Vietnam (long a net importer of food) became a net exporter of rice, the services sector began to grow rapidly, and FDI in Vietnam increased. Recently, in response to the Asian financial crisis, the onset of diminishing returns from the first round of reforms, and a rapidly growing labor force, the government has been concentrating on more difficult structural reform issues concerning the banking sector, SOEs, trade and foreign exchange policies, and the private business sector. A legal needs assessment is also being conducted as part of the government's larger overall legal reform strategy.

Factor One. The extent to which the currency of the foreign country is convertible into the currency of other countries.

A country's integration into world markets is dependent upon the convertibility of its currency. The greater the extent of currency convertibility, for both trade and investment purposes, the greater are the supply and demand forces linking domestic market prices in the country to world market prices. The greater this linkage, the more market-based domestic prices tend to be.

A. Legal framework

Vietnam's banking activity is conducted by the State Bank, the operations and duties of which are spelled out in the 1997 *Law on the State Bank of Vietnam*. The SBV is not an autonomous entity but rather a body of the central government, supervised by the National Assembly, which is authorized to formulate and oversee the implementation of the national monetary policy.[1]

[1] Law No. 01/1997/QH10 *On the State Bank of Vietnam*, Article 1 (1997), stating that "the State Bank of Vietnam is a body of the Government and the Central Bank of the Socialist Republic of Vietnam." The Preamble states that the Law on the State Bank of Vietnam shall "contribute to the development of the socialist-oriented multi-sector market economy operating under the State's management." The 2002 US Commercial Guide for Vietnam states that "(d)espite the government's good intention, the SBV is not an independent body like the US FED, and it continues to operate under government guidance."

Under the 1998 *Decree on Foreign Exchange Controls*, the central government shall exercise uniform state management over foreign exchange ("FOREX") and foreign exchange activities.[2] The SBV establishes the foreign exchange rates of Vietnamese *dong*, as described below, creating a state-regulated market. The SBV is also authorized under law to inject and withdraw money from circulation according to market signals and to use refinancing instruments, interest rates, exchange rates, reserve requirement, open market operations and other instruments as decided by the central government.[3]

B. Developments in the economy

Vietnam's currency is not yet fully convertible for either trade or investment purposes. Although an interbank (currency) market has operated since 1994, the government maintains significant control over that market.

Current and capital account convertibility

As noted above, the *dong* is not yet fully convertible for current account purposes, *i.e.*, transactions involving trade, income and profit remittances. Consequently, Vietnam has not yet assumed IMF Article VIII obligations requiring full convertibility on the current account, something that all recent successful market economy graduation candidates have accomplished.

Restrictions on FOREX are characterized by close government supervision and discretionary intervention. Any entity converting *dong* must declare the origin of the money and provide considerable documentation to substantiate the reasons for purchasing foreign currency.[4] Foreign currency may only be bought at authorized banks and access to foreign exchange depends on the bank's ability to supply the currency, unless the purchasing entity is a FIE on a priority list designated by the government.[5]

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[2] Decree No. 63/1998/ND-CP *On Foreign Exchange Controls*, Article 2 (1998).

[3] Law No. 01/1997/QH10 *On the State Bank of Vietnam*, Articles 15, 16 and 19 (1997).

[4] *The Economist Intelligence Unit; ViewsWire, Vietnam: FOREX regulation*, June 7, 2002. See also Decree No. 173/1998/QD-TTg *On the obligation to sell and right to buy foreign currencies of residents being organizations*, Article 2 (1998).

[5] *Annual Report on Exchange Arrangements and Exchange Restrictions* (Washington, DC: International Monetary Fund, 2001), p 1009. See also *The Economist Intelligence Unit; ViewsWire, Vietnam: FOREX regulation*, June 7, 2002.

The *dong* is practically inconvertible for capital account purposes, *i.e.*, transactions involving international investment and lending activities. There are significant controls on all transactions in capital, bond and money market instruments, and investment securities.[6]

Exchange rates

The official exchange rate for the *dong* is established daily by the government based on the average of price quotes in the interbank market from the previous day. Price quotes are restricted to a narrow range of .25 percent of the previous business day's official rate.[7] Due to this constraint on bid prices and high participation fees, the interbank market is quite thin and sometimes completely dormant, which decreases market credibility of the daily rate.[8] Convertibility of the *dong* is therefore limited by government intervention in the FOREX market, resulting in a highly managed exchange rate regime. Vietnam's FOREX administration is designed to avoid a precipitous slide in the value of the *dong*, such as was experienced by Vietnam's neighbors during the 1997 Asian crisis. The result is an exchange rate that is not responsive to the forces of supply and demand.

Trends in FOREX policy

The increased use of the U.S. dollar in commercial transactions or for savings, *i.e.*, dollarization, plays a major role in Vietnam's currency and FOREX policies.[9] Dollarization tends to undermine the *dong* and complicates implementation of the government's monetary and exchange rate policy. To limit the effects of dollarization, the government implemented a surrender requirement, whereby all FIEs are required to convert thirty percent of foreign currency earnings into *dong* immediately upon receipt.[10] However, similar controls are often imposed in many market economies.

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[6] *Annual Report on Exchange Arrangements and Exchange Restrictions* (Washington, DC: International Monetary Fund, 2001), p 1007 et. al.

[7] *The Economist Intelligence Unit; Vietnam: Country Outlook*, August 16, 2002.

[8] *The Economist Intelligence Unit; Country Profiles, Vietnam: External Sectors*, August 2, 2001. See also *The Economist Intelligence Unit; ViewsWire, Vietnam: Economy: State loosens up a bit on currency*, July 3, 2002.

[9] U.S. dollar reserves officially constitute over one-third of liquidity in the banking sector (compare with 27 percent in Russia, 14 percent in Poland and 77 percent in Laos). *Vietnam: Selected Issues and Statistical Appendix,* (Washington DC: International Monetary Fund, January 2002), p 15-16. However, this ratio might increase if unreported household savings were included.

[10] *Catalog of Legal Update: Vietnam* (Hanoi: Phillips Fox, August 2002), p 8, citing to Decision 61 - 2002-QD TTg (2002).

In 2001, the government expanded current account convertibility for FIEs by broadening the number of allowable transactions.[11] The FOREX surrender requirement has been reduced from 80 percent to 30 percent in the last three years.[12] The government expects to fulfill all requirements for accepting Article VIII obligations by the end of 2002 by eliminating the tax on profit remittances abroad (which is currently assessed after corporate taxes), restrictions on FOREX availability for certain imports, and to formally adopt Article VIII obligations by the end of 2003.[13] In addition, the government has taken progressive steps in the FOREX market by allowing the *dong* to depreciate by two percent during May-June 2001 and recently expanding the band of maximum depreciation from .1 to .25 percent.[14]

Assessment of factor

The extent of Vietnam's currency convertibility lags behind all recent NME graduation candidates. Despite positive advances in currency convertibility that evidence a gradual movement toward liberalization, overall, the FOREX regime remains shielded from exogenous market forces. Vietnam's current currency polices do not meet the necessary requirements of a market-based foreign exchange. The *dong* is not fully convertible for current or capital account transactions and the exchange rate remains effectively set by the government.

Factor Two. The extent to which wage rates in the foreign country are determined by free bargaining between labor and management.

This factor focuses on the manner in which wages are set because they are an important component of a producers' costs and prices and, in turn, are an important indicator of a country's overall approach to setting prices and costs in the economy. The reference to "free bargaining between labor and management" reflects concerns about the extent to which wages are market-based, *i.e.*, about the existence of a market for labor in which workers and employers are free to bargain over the terms and conditions of employment.

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[11] Additionally, as part of the 2001 amendments to the Foreign Investment law, tax on profit remittances were reduced from 10 percent to a range of 3-7 percent and foreign exchange balance requirements were lifted. FIEs were previously required to balance payments and receipts in foreign exchange unless granted exemption. *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, January 2002), p 34. See also *The Economist Intelligence Unit, ViewsWire, Vietnam: Forex regulations,* June 7, 2002.

[12] *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, 2002), p 18.

[13] *Vietnam: Second Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility and Request for Waiver of Performance Criteria* (Washington DC: International Monetary Fund, 2002), p 16 & 63. See also *Catalog of Legal Update: Vietnam* (Hanoi: Phillips Fox, August 2002), p 8, citing to Decision 61 - 2002-QD TTg (2002).

[14] *The Economist Intelligence Unit; Vietnam: Country Outlook*, August 16, 2002.

A. Legal framework

Vietnam has several laws establishing the rights, obligations, and guarantees of workers and employers that form both the basis for free bargaining over wages and other terms and conditions of employment.

Under the 1994 *Labor Code* and subsequent decrees, the government maintains a minimum wage which is currently set at 180,000 *dong* (U.S.$ 11.87) per month for domestic enterprises and between 626,000 to 487,000 *dong* (U.S.$ 41.29 to $32.12) for FIEs depending on geographic location.[15] Under Articles 56 and 57 of the *Labor Code*, the government also maintains a wage scale based on the minimum wage, which varies by profession, location, sector, and skill level. Under the language of the *Labor Code*, this wage scale applies to all enterprises.

However, a 1994 government decree on the implementation of the Labor Code, specified the circumstances under which the wage scale applies. Under this decree, the State stipulated the wages and wage scales for SOEs and reserved the right to set wage scales in FIEs.[16] The private domestic sector was free to set wages, provided that they observed the basic minimum wage. A 1999 circular further minimized this state control by allowing FIEs to develop their own wage scales, provided that wages followed the same general structure of the wage scales in SOEs. The circular further provided that FIEs were free to set higher wages than required for SOEs.[17]

Recent amendments to the 1994 Labor Code, passed in 2002 and slated to come into effect in January 2003, eliminate all remaining constraints for private domestic enterprises and FIEs in setting wages above the basic minimum wage.[18] However, for SOEs, mandatory wage scales are still set by the government.[19]

The right to collective bargaining is established by Chapter 5 of the *Labor Code,* under which collective agreements have the same legal status as individual agreements, and are negotiated

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[15] *Vietnam: Foreign Labor Trends*, (Hanoi: US Embassy, 2002), p14, citing to Decree No. 10-2000-ND-CP.

[16] Decree No. 197/CP *On elaborating and providing guidance for the enforcement of relevant provisions of the Labor Code on wages*, Article 4 (2) (1994).

[17] Circular No. 11/BLDBXH-TT *On Giving instructions for the implementation of Government Decree No. 197/CP on wage payment for Vietnamese workers in foreign -invested enterprises and in offices of international organizations in Vietnam*, Section 2 (1995).

[18] Law No. LLD *The Labor Code*; Chapter 6, Section 57 (1994); as amended by Law No. 35-2002-QH10 *Law on Amendments of and additions to a number articles of the Labor Code*, (2002).

[19] Decision No. 708/1999/QD/BLDTBXH *On the minimum wage and the wage of Vietnamese workers in enterprises with foreign invested capital*, Article 1 (1999). See also *Vietnam: On the road to labor-intensive growth*, (Washington DC: World Bank, 2000), p 19.

between the trade union leadership and the employer. Workers have the right to find employment in "any location not prohibited by law," with this exception not further clarified.[20]

Employees are free to leave their employment at will. Employers are generally able to terminate employment contracts, provided severance is paid for non-performance terminations. In addition, employers are required to consult with the union to terminate for performance reasons.[21]

All enterprises are required to establish local trade unions organized under the General Federation of Labor, a governmental body.[22] Where no trade union exists, the Federation of Labor must establish a provisional union. All unions are established under the leadership of the Vietnamese Communist Party and are partly funded by the State. Workers may also form or join national or international unions, which must then be recognized as legal entities.[23] The right to strike is protected under law, although not allowed in "essential" sectors as determined by the People's Court.[24]

[20] Law No. LLD *The Labor Code*; Chapter 2, Section 16 (1994).

[21] Employment can be unilaterally terminated by the employer in case of "business restructuring" or "change of technology," provided that a severance allowance of one month's salary for every year of service is payed to the terminated workers. *Vietnam: On the road to labor-intensive growth* (Washington DC: World Bank, 2000), p 24. However, when the need arises for a "massive layoff," the employer must discuss each case with the Executive Committee of the local trade union; if both parties agree, employment termination becomes effective 30 days after the local labor office has been notified. Termination of employment contracts for disciplinary or poor performance reasons still requires agreement from the trade union. Law No. LLD The Labor Code; Chapter 4, Section 38; Chapter 2, Section 17 and Chapter 13, Section 153 (1994).

[22] Law No. LLD *The Labor Code*; Chapter 13, Section 153 (1994).

[23] Law No. LCD *On Trade Unions*, Articles 3 and 16(b) (1990).

[24] Resolution of labor disputes is first to be attempted internally between labor and management. If that fails, the dispute is passed to an Arbitration Council with mixed membership at the provincial level. If the recommendation of the Labor Arbitration Council are unacceptable to either party, parties then have the right to turn to the People's Court or to strike. Strikes shall be prohibited at certain enterprises of public service and enterprises which are essential to the national economy or national security and defense. For that reason, the competent authorities shall be required to organize periodic consultations between employers and organized workers in order to provide prompt assistance and response to legitimate demands of the workers. Law No. LLD *The Labor Code*; Chapter 14, Section 174 (1994).

B. Developments in the economy

Wage formation

Wages tend to vary geographically and across sectors.[25] On the whole, Vietnamese workers are paid very low wages and are often forced to supplement their earnings by running household businesses or working a second job.

Despite the large differential in minimum wages between the foreign invested sector and the private sector, it appears that FIEs are paying roughly at or slightly above the average national wage and compete with the wages offered in the private domestic sector.[26] Hence, the wage system prior to the recent labor code amendments has not necessarily been a constraint on the private domestic labor market and the recent amendments reflect the existing dynamics of the labor market.

In SOEs, including enterprises not part of the government administrative sector and therefore presumably responsible for their own profits and losses, the government has *de jure* control over setting basic wage scales that cover all employment categories.[27] SOEs are then free to set actual wages up to 50 percent higher than the economy-wide minimum wage. The difference in pay levels across SOEs suggests that a major determinant of SOE actual wages is the level of reported profit of the enterprise.[28]

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[25] For example, monthly minimum wages in FIEs are $45 in Hanoi and Ho Chi Minh City, $40 in suburban districts and $35 in the remainder of the country. *Vietnam: Foreign Labor Trends*, (Hanoi: US Embassy, 2002) p 2.

[26] Wage data is inconsistent. According to one commentator, FIEs are paying between 93 and 106 percent of the country's average wages and between 78 and 89 percent of private sector. *Vietnam: On the road to labor-intensive growth*, (Washington DC: World Bank, 2000), p 20. However, according to U.S. embassy reports, the average reported wage at FIEs is 756, 991 *dong* per month, as compared to 518, 075 *dong* in the State sector and 519, 462 *dong* for nation. *Vietnam: Foreign Labor Trends* (Hanoi: US Embassy, 2002), p 2. See also Steer, Liesbet and Taussig, Markus, *A little Engine that Could... Domestic Private Companies and Vietnam's Pressing Need for Wage Employment* (Washington DC: World Bank, August 2002), p 19; providing statistics on wage levels in different sectors showing in general that wages of workers in the formal private sector are about 50percent higher than those in the informal sector, but generally lower than wages in state owned enterprises and foreign invested enterprises.

[27] Law No. LLD *The Labor Code*; Chapter 6, Section 57 (1994); as amended by Law No. 35-2002-QH10 *Law on Amendments of and additions to a number articles of the Labor Code,* (2002): "subject to consultation with the Vietnam General Confederation of Labour 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 [wage scales, wage tables and labour rates] in accordance with the production and business conditions of the enterprise; <u>and shall stipulate a wage scale and wage table for State owned enterprises."</u> (emphasis added).

[28] McCarty, Adam, *Vietnam's Labor Market in Transition* (University of the Philippines, 1999), p 11-12, citing to Decree 28/CP (1997) and stating that "wages [in the state sector] for similar skilled labor can differ by thousands of dollars per year in different enterprises depending on their profitability. The dispersion of wages is also much greater in the more successful SOEs relative to that in the unprofitable ones."

The significance of any government's involvement in the wage labor market is limited by the fact that 85 to 90 percent or more of the active labor force is self-employed and not subject to any government wage control, of whom over 60 percent work on the farm. Wage employment therefore accounts for only about 15 to 20 percent of total employment.[29]

Labor mobility and recruitment

Labor mobility in Vietnam has increased markedly, much of it informal and seasonal rural to urban migration.[30] This is a typical trend in developing countries where an income gap between cities and villages exists. Despite the lack of a universal social system which would allow for the transfer of pensions, the flow of labor from state to non-state sectors has increased, drawn by higher wages and burgeoning opportunities in the private sector.[31] There are no direct restrictions on geographic or inter-sectoral labor mobility in the Labor Code.[32]

Under current law, a domestic employer may hire directly or may register at a state-run labor bureau. Until recently, all foreign employers were required by law to recruit through these bureaus.[33] However, this legal obligation has been repealed for foreign joint ventures, 100 percent foreign-owned enterprises, business cooperation ventures or licenced branches of foreign companies.[34] Diplomatic missions and representative offices of foreign firms are still required by law to recruit through the labor bureau. If the labor bureau is unable to locate a suitable employee within fifteen days, the employer can recruit directly.[35]

Trade unions and the right to strike

There are currently over 45,000 trade unions in Vietnam, covering approximately 90 to 95

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[29] Steer, Liesbet and Taussig, Markus, *A little Engine that Could... Domestic Private Companies and Vietnam's Pressing Need for Wage Employment* (Washington DC: World Bank, August 2002), p 11.

[30] McCarty, Adam, *Vietnam's Labor Market in Transition* (University of the Philippines, 1999), p 23-24.

[31] McCarty, Adam, *Economy of Vietnam* (The Hague: Institute of Social Studies, 2001), p 14-15. See also McCarty, Adam, *Vietnam's Labor Market in Transition* (University of Philippines, 1999), p 14.

[32] Law No. LLD *The Labor Code*; Chapter 2, Section 16 (1994).

[33] Before this obligation was repealed, these labor bureaus may have interfered with the free allocation of labor. For example, there had been reports of the bureau giving preference to workers from a joint venture or other state organizations with excess labor. See McCarty, Adam, *Vietnam's Labor Market in Transition* (University of Philippines, 1999), p 20.

[34] *Business for Social Responsibility Report*, (Washington DC: Baker and McKenzie, 2002), p 7, citing to Decree No. 75/2001/ND-CP, (2001).

[35] Decree No. 24/2000/ND-CP *On Regulation of the Law on Foreign Investment*, Article 83 (2000).

percent of total wage workers.[36] Although it is true that there is no freedom of association in Vietnam as defined by Western precepts (there are no unions independent of the government), labor rights sentiments in Vietnam are backed by a conciliation system and a "judiciary sympathetic to labor demands."[37]

The number of strikes in Vietnam is on the rise.[38] Thirty strikes were recorded in the first half of 2001, a fifty percent increase from the same period the previous year. Approximately 20 of these strikes occurred at FIEs, generally concerning wage issues and workplace safety. Although the majority of the strikes did not follow proper legal procedures, they were tolerated by the government with no reports of retribution against the strikers.[39]

Assessment of factor

The government retains *de jure* control over some wage levels which could affect free bargaining between employers and employees, having an ultimate effect on price formation. However, to the extent that legal control has not been consistently enforced, a *de facto* free labor market has developed. Legal control over the private sector will be rolled back with the implementation of the 2002 amendments to the *Labor Code* that are slated to come into effect in January 2003. The FIE and the domestic private sector compete for labor, which is reflected in higher wages. Labor rights are also protected, including the right to strike.

Factor Three. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country.

Opening an economy to FDI tends to expose domestic industry to competition from profit-maximizing market-based suppliers, including the management, production and sales practices that they bring. It also tends to limit the scope and extent of government control over the market, since foreign investors, as a general rule, demand a certain degree of autonomous control over their investments.

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[36] *Vietnam: Foreign Labor Trends*, (Hanoi: US Embassy, 2002), p 5.

[37] *The Economist Intelligence Unit, Risk Wire, Vietnam risk: Alert: Labor Reform*, April 2, 2002.

[38] *The Economist Intelligence Unit, Views Wire, Vietnam economy: Labor strife is increasing*, July 3, 2002.

[39] *Vietnam: Foreign Labor Trends*, (Hanoi: US Embassy, 2002), p 11.

A. Legal framework

The 1996 *Law on Foreign Investment*, as amended in 2000, together with a number of implementing regulations, provide the basis for FDI in Vietnam. They describe the procedures for registering a foreign-invested company in Vietnam, establish the foreign investor as a legal entity, protect the investor against future adverse changes in the legal regime, guarantee the ownership of invested capital against expropriation, and provide for compensation in the event of expropriation. A variety of forms of foreign investment are allowed, from business cooperation agreements with Vietnamese companies to joint ventures and 100 percent foreign-owned enterprises. Foreigners are free to remit profits (subject to remittance tax) and repatriate investment capital.[40]

The *Law on Promotion of Domestic Investment* recognizes private property rights, guarantees against expropriation, and pledges to allocate land-use rights to encourage investment.[41] Both laws also provide for numerous tax incentives for FDI, particularly in agriculture, export and high technology sectors, and infrastructure building, as well as in impoverished regions.[42]

The Vietnam International Arbitration Center has jurisdiction over economic disputes involving foreign parties.[43] At present, all of the arbiters at the Center are Vietnamese.[44] Vietnam also recognizes foreign arbitral decisions.[45] In accordance with the US-Vietnam Bilateral Trade Agreement, Vietnam is drafting a law to ensure neutral international arbitration procedures.[46]

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[40] Law No. 52/L/CTN *On Foreign Investment*, Articles 4, 21(a) and 22, (1996 as amended in 2000).

[41] Law No. 03-1998-QH10 *On Promotion of Domestic Investment*, (1995).

[42] These include tax incentives, tax holidays, writing off of losses, and tax refunds if profits are reinvested in country. Depending on how many investment promotion criteria the firm meets, companies pay from 10-25 percent corporate income tax and be eligible for up to eight years of tax holiday. Law No. 52/L/CTN*On Foreign Investment*, Articles 3 and 38-42 (1996 as amended in 2000).

[43] Decision No. 204/1993/ttg *On Organization of the Vietnam International Arbitration Center*, (1993).

[44] "Arbitration of Foreign Investment Disputes at the Vietnam International Arbitration Center," Nagoya University, p10 http://www.gsid.nagoya-u.ac.jp/project/apec/lawdb/vietnam/dispute/viac-en.html.

[45] Ordinance No.42-L/CTN *On the Recognition and Enforcement of Foreign Arbitral awards in Vietnam*, (1995).

[46] *The Economist Intelligence Unit, Business Asia, Coming Up: Vietnam*, August 26, 2002.

B. Developments in the economy

Economic development and FDI

Per capita FDI in Vietnam in 2001 was about $28, while in Central and Eastern Europe, per capita FDI was much higher, *i.e.*, typically in the hundreds of dollars and, in some cases, exceeding a thousand dollars.[47] However, a simple comparison of per capita FDI levels would ignore important differences in economic development levels. Despite Vietnam's recent sustained growth, it remains a poor country with 80 to 90 percent of the labor force engaged in low value-added farming, household enterprises and light manufacturing, accounting for approximately one-third of GDP.[48] Investment opportunities are constrained by an underdeveloped consumer market. FDI inflows have therefore been limited. However, the FDI that does take place has a relatively large economic impact from a GDP standpoint. FIEs now account for twelve percent of GDP and one-third of industrial output, but only one to three percent of the total labor force.[49]

Therefore, it is essential to look beyond actual FDI inflows and, instead, assess Vietnam's openness to FDI in terms of the government's regulation of foreign investors, their choice of investment vehicles and permitted sectors for investment. Further, it is necessary to determine the impact of FDI on overall prices and costs in Vietnam.

FDI in flows

After rising steadily for almost ten years, FDI fell sharply between 1998-2000. The worldwide market downturn following the 1997 Asian crisis led to a decrease in investment opportunity in Vietnam and the sectors that originally attracted FDI, *i.e.*, heavy industry, real estate, and construction, became saturated.[50] Although FDI has picked up recently, due in part to reforms designed to open up Vietnam to more foreign investment, the government continues to direct and control FDI in a manner consistent with its SOE development policies. In general, foreign invested companies face a host of government policies that favor domestic companies with respect to land use and access to financing, business structure, and, until recently, FOREX

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[47] Calculated Asian Development Outlook 2002 (Hong Kong: Oxford University Press, 2002), p 75.

[48] *National Human Development Report 2001: Doi Moi and Human Development in Vietnam* (Hanoi: The Political Publishing House 2001, submitted to the UNDP as a development report), p 33-34.

[49] *The Economist Intelligence Unit, Country Profiles, Vietnam: External sector,* August 2, 2001.

[50] *Country Economic Review, Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 22.

sourcing. The prices of telecom services, land leases, advertising, and utility services have also been higher for FIEs under a dual-pricing system.

The government has maintained control in setting ownership caps for foreign investors in many industries and corporate forms.[51] In many cases the government has set specific levels of permissible foreign ownership.[52] However, recent government decisions allow foreign investors to buy up to a 30 percent of share of joint-stock enterprises and of newly privatized SOEs in a wide rage of sectors.[53] Since foreign ownership is capped at a minority share, the practical effect of these legal changes is to allow domestic partners to maintain corporate control while also benefitting from the infusion of capital and welcoming foreign investors to new sectors.

Licensing requirements provide another control on FDI. Depending on the sector, location, share of production exported, and adherence to governmental development plans, obtaining a license can require either a simple registration or ministerial evaluation. The simple registration procedure applies to investments in special industrial zones or in purely export industries, and applies to all forms of investment, with the license to be granted within 15 days. Licensing of FIEs in certain projects in infrastructure, natural resources, cement, chemicals, media and communications, insurance and finance require Prime Ministerial or Ministry of Planning approval, which can be a significant hurdle to overcome.[54]

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[51] For example, Article 8 of the *Law on Foreign Investment* requires that the parties to a joint venture in "important economic establishments" agree to gradually allow the local partners' ownership share to increase.

[52] Foreign ownership is limited to up to 30 percent in non-state enterprises in 35 designated industries, including agriculture, forestry and fisheries, science and technology, education and medicine. *The Economist Intelligence Unit, Views Wire, Vietnam regulations; Changes for the non-state sector*, May 24, 2002.

[53] Previously, foreign share-holding in many of these sectors was sharply limited and required Prime Ministerial approval. *The Economist Intelligence Unit, Views Wire, Vietnam finance: New options for foreign venture capital*, August 30, 2002. See also *Vietnam Legal Update* (Hanoi: Phillips Fox, May 2002), p 9, citing to Decision No. 260/2002/QD/BKH On the Issuance of the List of Industries where Foreigners are Allowed to Buy Shares in Non-State Enterprises, (2002). See also Decision No. 145/1999/QD-TTg *On Sales of Shares to Foreign Investors*, (1999).

[54] Decree No. 24/2000/ND-CP *On Regulations of the Law on Foreign Investment*, Articles 104-106 and 114 (2000).

Trends in FDI

In the past, two-thirds of FDI was concentrated in the form of joint ventures with SOEs, mostly operating in import-substituting and capital-intensive sectors in which local domestic producers could not satisfy demand, such as oil, heavy industry, and transportation.[55] This is a reflection of the protection offered to these sectors in the form of import restrictions, creating local monopolies that include foreign investment.[56] However, many of these markets have been saturated and changes in the *Law on Foreign Investment* and import/export regulations, such as reductions in quantitative restrictions and export restrictions, have redirected FDI into export-oriented enterprises.[57]

In addition, some foreign investors have experienced operational and management difficulties within the joint ventures.[58] As a result, and as investors have become more familiar with Vietnamese regulations, 100 percent foreign-owned enterprises have become more popular in the sectors where this form of ownership is allowed. The government has recently been more willing to accept 100 percent foreign-owned enterprises in Vietnam, at least in the export sector and those which fulfill projects listed in the government's plan for development.[59]

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[55] *Country Economic Review: Vietnam* (Manila: Asian Development Bank, 2000), p 22.

In a joint venture enterprise, foreign and local companies share capital and profits, frequently in a 70 percent (foreign) / 30 percent (local) split. The contribution of the local SOE is typically limited to land use rights. Investors have complained that the government allows SOEs to overvalue their land use rights to meet the 30 percent capital requirement. *Vietnam Country Commercial Guide FY2002* (Washington DC: US Commercial Service, 2002).

[56] In the late 1990s, more than 70 percent of foreign investment was disbursed in sectors with effective rates of protection above 50 percent, in particular steel and cement. Belser Patrick, *Vietnam: On the road to labor intensive growth?* (Background paper for UNDP Vietnam Development Report, 2000), p 9. See also Harvie, Charles, *Competition Policy and SME in Vietnam* (University of Wollongong, Working Paper Series, 2001), p11-12.

[57] For example, under the 2000 amendments to the *Law on Foreign Investments*, foreign enterprises that export their production are no longer required to obtain investment licenses, but rather need only register the enterprise, with approval expected within two weeks. Decree No. 24/2000/ND-CP *On Regulations of the Law on Foreign Investment in Vietnam,* Article 105 (2000). In addition, FIEs are now permitted to engage in exports of coffee, minerals, certain wood products and certain textile and garments. See also *Vietnam Economic Monitor* (Washington DC: Word Bank, 2002), p 20, citing to Circular 26/2001/YY-BTM, December 2001.

[58] "Since acrimonious and public disputes between Proctor and Gamble and Coca-Cola and their respective Vietnamese joint venture partners over financial and corporate governance issues, many investors shied away from the JVC form of investment, and often were unwilling to make investment unless it was permitted to be made in the form of [wholly-owned foreign enterprises] in Vietnam." Trang, Duc V. *Eighteenth Annual International Law Symposium, "Doing Business in Vietnam: Law/Economy/Politics; The Practice of Law and Foreign Investment in Vietnam,*" 22 Whittier L. Rev. 1067, 1072 (2001).

[59] Vietnam Legal Update (Hanoi: Phillips Fox, May 2002) p 3-8, citing Decision No. 62/2002/QD-TTg, Articles 104-105 (2002).

FDI is up from U.S. $800 million in 2000 to U.S. $1 billion in 2001, with an estimated U.S. $1.2 billion being invested in 2002.[60] Renewed interest among foreign investors, albeit from a very low base, may be the result of the government's recent efforts to provide FIEs with the same opportunities as domestic firms. Resolutions adopted in August 2001 accelerated the phase out of the dual pricing system, especially in telecom and electricity tariffs, and the government has voiced its commitment to eliminate price discrimination altogether.[61] The government is also in the process of unifying land rental fees, which are currently 40 percent lower for domestic firms.[62] Employment restrictions on FIEs will be eased through the 2002 amendments to the Labor Code by making work permits easier to obtain for foreigners and allowing FIEs to recruit local workers directly.[63]

Vietnam also offers investment incentives in the form of tax holidays and preferential corporate income tax. These incentives serve to both encourage FDI in general and draw the flows of investment into certain sectors or regions of the country.[64]

Recent changes to the *Law on Foreign Investment* and other regulations contribute to an increase in investor confidence. Foreigners may now mortgage their land-use rights, which allows FIEs to borrow from foreign banks using their interests in land as collateral.[65] Other positive steps include reducing profit remittance taxes, allowing FIEs to set up offshore bank accounts, easing

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[60] *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 8.

[61] Ibid. 22. See also *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, 2002), p 32.

[62] *The Economist Intelligence Unit, Country Reports: Vietnam Economic Policy,* April 18, 2002.

[63] Foreign firms will be allowed to hire foreign staff and not only those with engineering degrees or managerial qualifications. *The Economist Intelligence Unit, Country Reports; Vietnam Economic Policy*, April 18, 2002. See also *The Economist Intelligence Unit, Risk Wire, Vietnam risk: Alert: Labour reform*, May 9, 2002.

[64] The corporate income tax rate for FIEs is 25 percent, as compared to 32 percent for domestic firms. Both may pay less if they invest in areas where the government encourages investment, or pay more (50 percent) if investing in petroleum, gas, or "other precious natural resources." Investors who reinvest profits in the Vietnamese export sector or in disadvantaged regions are eligible for a corporate tax refund of 50-100 percent if they commit to keep their investments at least three years. A preferential rate, ranging from 10-20 percent for a 10-15 year period, is granted to FIEs investing in export and service sectors as well as in particularly impoverished regions. The tax placed on foreign investors transferring profits abroad was recently reduced from 10 percent to a range of 3-7 percent, depending on nationality and investment type. Law No. 52?L/CTN *On Foreign Investment*, Article 38, 43 and 50 (1996 as amended in 2000).

[65] Brown, Norman, *The Long Road to Reform: An Analysis of Foreign Investment Reform in Vietnam*, 25 B.C. Int'l & Comp. L. Rev. 97, 100 (2002).

current account restrictions on FOREX use, increasing the number of tax incentives, and reducing the ability of local partners to frustrate a joint venture's activities.[66]

The government has taken significant positive steps to address regulatory obstacles to investment and has recently proposed easing licensing procedures (*i.e.*, switching from an evaluation process to a registration process) for 16 business licenses in transport, trade, healthcare, telecommunications, industry, environment, and culture.[67]

Assessment of Factor

Vietnam is receptive to FDI, and numerous incentives (mainly tax benefits) are used to attract FDI. At the same time, however, the government seeks to regulate and direct FDI as a part of its overall plan for economic development which includes a leading role for the SOE sector.

As opportunities have decreased in the heavy industry sectors, the government has encouraged FDI to flow into export-oriented sectors, where wage employment potential is significant. The government is also cautiously acknowledging market forces, *i.e.*, investors' demands for increased independence in corporate governance, as it lifts restrictions on 100 percent foreign-owned enterprises.

Although open to investment as an essential element to economic development, Vietnam's regulatory framework does not evidence a willingness to allow FDI to flow throughout the economy. Licencing and registration procedures and limitations on choice of corporate form have been the means for directing FDI and implementing the government's economic development plan.

Factor Four. The extent of government ownership or control of the means of production.

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.

The two key elements under this factor for Vietnam are (1) the extent and pace of privatization of enterprises, and (2) the lack of any private land ownership and the role of land-use rights in the Vietnamese economy.

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[66] *The Economist Intelligence Unit, Risk Wire: Legal and Regulatory Risk*, June 21, 2002.

[67] Pending prime ministerial approval. See *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 22.

1. The extent and pace of privatization of enterprises

A. Legal framework

Under a 1998 decree on privatization, any "civilian" state-owned enterprise ("SOE") could be privatized.[68] Organizations could purchase up to twenty percent of shares, individuals ten percent, and total foreign investment combined was capped at thirty percent. The state would continue to hold dominate shares in "strategic" industries, a category which extended beyond natural monopolies.[69]

Until quite recently, SOEs were privatized at an extremely slow rate, due to the high debts of the SOEs, the requirement that privatized firms keep redundant workers, and cumbersome privatization regulations. Foreign participation in the reform was restricted to a few export-oriented sectors and ownership limited to minority shareholding.[70] The decision to privatize was optional for each SOE, and was not the result of the central government strategically selecting candidates or directly undertaking restructuring efforts. As a result, the resistance of SOE managers to privatization and the skepticism of policy-makers further slowed reforms.[71]

In June of 2002, the government passed new legislation to replace the 1998 laws and rejuvenate the privatization process. There are no longer any restrictions on the quantity of shares that Vietnamese nationals may buy of privatized firms.[72] Thirty percent of the shares must be put

[68] Privatization, *i.e.,* conversion into joint-stock companies, is often referred to in Vietnam as "equitization." Civilian SOEs include all SOEs not producing explosives, radioactive or toxic chemicals, not printing money, and not operating in telecommunications. *Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grants to the Socialist Republic of Vietnam for the State-Owned Enterprise Reform and Corporate Governance Program* (Manila: Asian Development Bank, November 1999), p 14-15, describing Decree No. 44/1998/ND-CP *On Transformation of State Enterprises into Joint Stock Companies*, Article 59 (1998).

[69] This category included: public service enterprises with capital in excess of 10 Billion *dong* and enterprises in large-scale mineral and petroleum exploitation; production of fertilizers, petrochemicals, tobacco, alcohol, and pharmaceutical products; aircraft repair; large-scale electricity production, transmission and distribution; post and telecommunications services; rail, sea, and air transport; printing and publication; investment banks and banks for the poor.

[70] Decision No. 145/1999/QD-TTg *On Promulgating the Regulation on Sale of Shares to Foreigners*, Article 12 (1999).

[71] *The Vietnam Investment Review: SOE's bite the bullet*, August 5, 2002.

[72] Decree No. 64/2002/ND-CP *On the Transformation of State-Owned Enterprise into Shareholding Company*, Article 4-5 (2002). Decree 44/1998/ND-CP, which has been replaced by Decree 64/2002/ND-CP, previously limited individual Vietnamese companies to purchasing ten to twenty percent of shares in privatized firms and individuals to five to ten percent.

aside for the public and foreign ownership remains capped at thirty percent.[73] Up to 10 percent of shares can be sold at a 30 percent discount to employees and suppliers.[74] Newly privatized firms are no longer required to keep redundant workers.

The Government has also taken steps to create a restructuring program for under-performing SOEs. Decree No. 69, issued in July of 2002, addressed the bad debts of SOEs, which have been a major impediment in the privatization process in Vietnam.[75] The Decree allows for SOEs' unrecoverable debts to be subtracted from the state's stake in the firm, making them more attractive candidates for privatization. Firms with extremely large debts outweighing their capital can either be recapitalized by the state or dissolved, at the Prime Minister's discretion. For firms with capitalization under 5 billion *dong,* in which the government does not want to hold shares and which the government has been unable to privatize, a new amendment either allows for the assignment of the firm to a labor collective, the complete sale of the firm unencumbered by existing debt, or the contracting or leasing of the firm out to new management.[76]

B. Developments in the economy

After passing the 1998 Decrees delineating the process for privatization, 450 firms were privatized by 2000, with half of them involving the sale of more than 65 percent of their shares.[77] The government then reconfirmed its commitment to reform SOEs under a plan in 2001 that included privatization or divestiture sale of an additional 2,300 enterprises over the course of five years. If the plan is fully implemented, it would cover one-third of all SOEs and one-fourth of

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[73] Circular No.132/1999/TT-BTC *On Guidelines on Selling Shares to Foreign Investors*, (1999). Foreign companies are allowed to buy up to 20 percent of an SOE's shares, institutional investors are allowed to buy up to 7 percent, and individuals are allowed only 3 percent of shares.

[74] Decree No. 64/2002/ND-CP *On the Transformation of State-Owned Enterprise into Shareholding Company*, Article 27 (2002). See also Circular No.132/1999/TT-BTC *On Guidelines for Selling Shares to Foreign Investors*, (1999).

[75] Decree No. 69/2002/ND-CP *On Handling and Managing of Outstanding Debts for State Enterprises*, (2002).

[76] See Concetti (http://concetti-vn.com/news/vietnamlegalsystem/index.htm), citing to Decree No. 49/2002/ND-CP Amending and Supplementing Decree No.103/1999/ND-CP on assigning, selling, business contracting or leasing state enterprises, (2002). See also Decree No. 103/1999/ND-CP *On Assigning, Selling, Business Contracting or Leasing State Enterprises*, (1999). The first round of Vietnamese privatization reforms began in the period of 1989 to 1994, during which time the number of SOEs fell from 12,000, one-fourth of which were in industry, to about 6,500. Most of these were small and medium sized enterprises. See also *Vietnam 2010: Entering the 21st Century, Pillars of Development. Vietnam Development Report 2001* (Joint Report of World Bank, Asian Development Bank and United Nations Development Program; December 2000), p 30. See also *Vietnam, Transition to a Market Economy* (Washington DC: International Monetary Fund, 1996), p 12.

[77] *Vietnam 2010: Entering the 21st Century, Pillars of Development. Vietnam Development Report 2001* (Joint Report of World Bank, Asian Development Bank and United Nations Development Program: 2000), p 30.

SOE employment.[78] However, yearly objectives have not been realized; 400-500 enterprises were scheduled for sale in 2001 but less than 200 were privatized.[79] Of about 6,000 SOEs existing in 2000, only 780 were privatized by June 2002, accounting for only 2.5 percent of capital.[80] Hence, the pace of reform had been slow, with the reform program designed to focus on the smallest, least capitalized enterprises.

Although there is some evidence of accelerated reform in 2002, it is still too early to determine how effective the five-year reform plan will be.[81] Despite the ambitious goals of this program, the larger and more capital-intensive SOEs that account for 90 percent of the SOE debt, will remain largely untouched by the reforms.[82] The government plans to retain full ownership of over 700 state enterprises, which are the largest SOEs, as well as to retain majority ownership in approximately 2,000 other enterprises.[83]

With the state share of the economy accounting for 40 percent of GDP, the SOE sector plays a significant role in the Vietnamese economy. In fact, the government has stated publicly its intent

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[78] *Country Economic Review: Socialist Republic of Vietnam* (Manilla: Asian Development Bank, 2000), p 31.

[79] See Asian Development Outlook 2002 (Hong Kong: Oxford University Press, 2002), p 76: "Against the 2001 target of 450-500, only 113 enterprises were equitized in the first 8 months of the year." See also *Vietnam: Economic Monitor* (Washington DC: World Bank, 2002), p 17, showing slightly less than 200 completed privatization in 2001.

[80] *The Vietnam Investment Review: SOE's bite the bullet*, August 5, 2002.

[81] The laws to guide this program are nascent, most adopted within the last 6 months. However, in August 2002 alone, 104 enterprises had been privatized, out of a total of 989 enterprises partially or fully transformed in the whole period of privatization. *The Saigon Times Daily: Guidelines on Financial*, September 12, 2002.

There is no single independent agency to oversee state-owned companies and manage their privatization. See *Government Gets SOE Privatisation Process Back On Track With Landmark Decree* (Vietnam Trade Information Center: Ministry of Trade, 2002), http://asemconnectvietnam.gov.vn/asemvn/asps/news.asp?idnews=3925&tuan=27. Managers of state-owned firms are responsible to the ministry under which their SOE was created, and SOEs with similar orientation are often grouped together as state corporations. These ministries oversee the specifics of SOE restructuring and privatization, within guidelines set by the Prime Minister. The government has set up a National Enterprise Reform Committee, also maintains a Steering Committee for SOE Renovation and Development to help the PM set goals and guidelines, and the Ministry of Finance runs an Privatization Board. *Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grants to the Socialist Republic of Vietnam for the State-Owned Enterprise Reform and Corporate Governance Program* (Manila: Asian Development Bank, November 1999), p 12 and 24.

[82] Asian Development Outlook 2002 (Hong Kong: Oxford University Press, 2002) p 76.

[83] *Asia Pulse, Vietnam Restructures 84 State-owned Enterprises*, August 6, 2002.

to preserve an active and key role for SOEs in what the government refers to as a "socialist-oriented market economy."[84]

Nonetheless, a focus on industrial production and state share of GDP does not present a complete picture of the Vietnamese economy. From a labor perspective, the vast majority (almost 90 percent) of the population is involved in private enterprise, albeit lower value-added enterprises. However, competition between the domestic private sector and SOEs is limited. The domestic private sector is characterized by small (micro)-sized businesses in agriculture and light-industry, while SOEs tend to be larger businesses operating in more capital intensive industries.[85] As stated above, the plan for reform still envisions a leading role for SOEs with "continued state protection of and investment in" key industries that extend far beyond natural monopolies.[86]

In contrast to the domestic private sector, FIEs tend to populate the more capital intensive industries in which SOEs operate and now account for 35 percent of industrial output.[87] Without further inquiry, this would suggest that the SOEs are exposed to foreign competition. However, as mentioned above in the discussion on the extent of FDI, many of these FIEs are joint ventures with SOEs and have traditionally shared in the monopoly profits of industries protected from external competition. Therefore, SOEs currently operating in major income producing industries are not subject to sufficient competition from private domestic enterprises or independent FIEs to assure that the sectors on the whole are market-based.

[84] *The Strategy for Socio-Economic Development 2001-2010* (Presented by the Central Committee, Eight Tenure, to the Ninth National Congress in Spring of 2001), p 6; stating that "(the specific goals of the Strategy:) the leading role of State economic sector is to be enhanced, governing key domains of the economy; State enterprises are to be renewed and developed, ensuring production and business efficiency. The collective economic sector, the individual and small-owner economic sector, the private capitalist economic sector, the State capitalist economic sector, and the foreign invested economic sector are all to develop vigorously and durably. The institutions of a socialist-oriented market economy are to basically established and to operate smoothly and efficiently."

[85] Steer, Liesbet and Taussig Markus, *A Little Engine that Could... Domestic Private Companies and Vietnam's Pressing Need for Wage Employment*, (Washington DC: World Bank, 2002), p 1.

[86] *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, 2002), p 37. Industries where full or controlling state ownership of SOEs is contemplated include: food wholesale trading, production of some electronic products, ferrous and non-ferrous metal production, basic chemicals, fertilizer, cement, construction, and insurance.

[87] *The Economist Intelligence Unit, Country Profiles, Vietnam: Economic sectors*, August 2, 2001.

2. Land and land use rights

A. Legal framework

The *Land Law* of 1993, as amended in 1998 and 2001, stipulates the system of land administration as well as the rights and obligations of land users, setting out the principles governing land in Vietnam. Under the *Land Law*, the land belongs to the entire people and is administered by the State.[88] Further, the State's role includes the protection of agricultural land, encouraging investment in land, and stipulating the value of land.[89]

The central government is therefore required to protect the legal rights of land users, including supervising the exchange, transfer, lease, inheritance and mortgage of land use right.[90] In practice, much of land management has devolved to the local People's Committees, which also have the responsibility for promulgating zoning and land use regulations, registration and settling certain types of land use disputes.[91]

B. Developments in the economy

Vietnam does not permit private land ownership of any kind, only limited land use rights. The Vietnamese model of State administration of interests in land-use rights precludes the creation of a free market in land rights supported by a legal framework that protects the rights of market participants. [92]

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[88] Law No. LDD *The Land Law*, Chapter 1, Article 1 (1993): "Land is the property of the entire people, uniformly managed by the State."

[89] *Land Administration: Vietnam* (Canberra: Australian Agency for International Development, 2000), p 15.

[90] A land use right is an interest in land that falls short of full ownership since there are restrictions on transferability. The right is also restricted by duration and prescribed use.

[91] Law No. LDD *The Land Law*, Chapter 1, Articles 7, 8, 13, 14 (1993).

[92] Law No. LDD *The Land Law*, Chapter 2, Articles 26, 27 and 28. For example, the government maintains broad discretion to expropriate land. While the actual risk of expropriation for foreign investors is very low, domestic concerns are rising as cases involving expropriation mount in the court system and the media notes political unrest arising from land seizures. Hot-spots" have erupted throughout rural Vietnam, with political demonstrations challenging land management policies. Human Rights Watch has noted that over the past ten years, local authorities have acquired a great deal of agricultural land for conversion to commercial development, sometime forcing farmers to sell below market price. In the central highlands, the allocation of land to migrants from the lowlands has prompted serious civil unrest. See generally Gillespie, John, *Land Law Subsystems? Urban Vietnam as a case study*, 7 Pac. Rim L & Pol'y 555, 556 (1998). See also *Vietnam's repression of Montagnards: Land Grabbing, Church destruction and Police Abuse in the Central Highland*, (New York: Human Rights Watch, 2002). See also *Economist Intelligence Unit, ViewsWire, Land and Freedom*, June 14, 2002.

The government's intervention in the allocation, transfer, use, and valuation of land, each discussed in turn below, seriously frustrate the development of a free market in land-use rights. Interests in land are classified by the government according to purpose, distinguishing between income and non-income producing land. The highest land rights are granted to households and individuals for non-income producing land and the most restricted land-use rights are leased to commercial enterprises.[93]

The three methods for gaining access to land use rights (income or non-income) are allotment, leasing, and transfer. Land use for residential purposes is allotted, *i.e.*, granted, in perpetuity. Land use for income production is allotted or leased for short periods, determined by business production plans.[94] The ability to transfer land use rights is subject to significant government review and varies between different categories of land, landholder and interests in lands, effectively negating a true free-market in land use rights.[95] Conversion of one land use to another, *i.e.*, residential to commercial manufacturing, is subject to significant government control.[96]

Though falling short of full ownership, land allotted for residential use conveys rights in perpetuity to transfer, bequeath, lease, and mortgage. The holder pays an initial land allocation fee, after which no further state charges apply.[97] Therefore, land use certificates issued for domestic dwellings are perpetual, and theoretically transferable within its prescribed use. While some commentators have noted that this flexibility has allowed for the formation of a residential land market, legal conditions for the transfer and lease of land are quite strict. Households or individuals can only transfer land use rights if they move to other places to live or take up production or take up business activities, change to other occupations or have no capacity to

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93 *Land Administration: Vietnam* (Canberra: Australian Agency for International Development, 2000), p 17.

94 Ibid.,16.

95 Exchange of land-use rights may occur if "it is convenient for production and livelihood" and the land is used for "the right purposes and within the term set by the state when the land is assigned. Marsh, Sally P., & MacAulay, Gordon T., *Land reform and the development of commercial agriculture in Vietnam: policy and issues*, Agribusiness Review - Vol.10 - 2002, Section 2.1 (2002), citing Decree No.17/1999/ND-CP (1999), p 15.

96 The applicant for the right to convert land from one use to another is forced to trade in a free rights in perpetuity for a renewable five year lease with rent payable to the State. Moreover, the lease must be pre-paid for five years in order to be used as collateral to secure a loan, effectively excluding under-capitalized ventures from access to commercial credit. Quinn, Brian, J.M., *Legal Reform and its Context in Vietnam*, 15 Colum. J. Asian L. 219, 270 (2002). See also Marsh, Sally P., & MacAulay, Gordon T., *Land reform and the development of commercial agriculture in Vietnam: policy and issues*, Agribusiness Review - Vol.10 - 2002, Section 2.1 (2002).

97 *Land Administration: Vietnam* (Canberra: Australian Agency for International Development, 2000), p 17.

work. Households can make their land use rights available for lease if the family is in poverty, if they have taken up other occupations or if they lack capacity to work the land.[98]

Commercial organizations, foreign investors and households that are using land for commercial purposes, other then for infrastructure development, are granted leases. The duration of leases is determined according to business plans that rarely extend beyond 20 years (50 years maximum).[99] Companies must strictly use leasehold land for licensed purposes, otherwise their land use rights automatically revert to the state. Only domestic leaseholders are granted the right to transfer, sell, or rent property under their control. Foreign invested enterprises must lease land directly from the state, as opposed to sub-leasing from a domestic company, excluding foreign investors from the land-use transfer market.[100]

Assessment of factor

SOEs continue to play a decided role in the Vietnamese economy, with the state share of the economy accounting for 40 percent of GDP and 42 percent of industrial output. Moreover, the government's stated goal is to preserve an active leading role for SOEs. Despite a burgeoning private sector that employs 85 to 90 percent of the work force, competition between the private and public sectors remains limited.

Finally, free alienability and access to real property markets are key elements of private property ownership. There is no private land ownership in Vietnam, and the government is not initiating a land privatization program. All land belongs to "all the people" but is managed by the state. The government leases land and grants limited land-use rights to individuals and firms while the transfer and conversion of land-use rights are subject to government review and approval.

Taken together, the right to own private property and private sector involvement in Vietnam's economy is greatly limited by government intervention.

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[98] Marsh, Sally P., & MacAulay, Gordon T., *Land reform and the development of commercial agriculture in Vietnam: policy and issues*, Agribusiness Review - Vol.10 - 2002, Section 2.1 (2002).

[99] *Land Administration: Vietnam* (Canberra: Australian Agency for International Development, 2000), p 17, citing to Law No. LL *The Land Law*, Article 78d (1998).

[100] Land leased directly from state is often valued as part of the local contribution to a joint venture. Foreign investors have complained that the government over-values their land contribution to joint ventures. The land is valued by the People's Committees after the project has received license approval from the national government. As the domestic partner has already agreed to a set contribution to the venture, there is an incentive to overvalue the land to reduce the local partner's capital contribution. Furthermore, rather than attempting to buy land-use rights from an existing owner, a firm looking for property will typically apply to the local government for a green-field that has not yet been allotted. The local government has complete discretion to grant such a request and there have been reports of denial for land allotment to a successful private business government where the state has a competing enterprise. Quinn, Brian, J.M., *Legal Reform and its Context in Vietnam*, 15 Colum. J. Asian L. 219, 268 (2002).

Factor Five. The extent of government control over the allocation of resources and over the price and output decisions of enterprises.

Decentralized economic decision-making is a hallmark of market economies, where the independent investment, input-sourcing, output and pricing actions of individuals and firms in pursuit of private gain collectively ensure that economic resources are allocated to their best (most efficient) use. Prices in such economies tend to reflect both demand conditions and the relative scarcity of the resources used in production.

An important measure of government control over production decisions and the allocation of resources is the degree to which the government is involved in the allocation of capital. Given that banks are important allocators of capital, the degree to which the State exercises control over the commercial banking sector is an important consideration.

For purposes of this factor, the three main issues are: (1) the extent of price liberalization, (2) the status of commercial banking reform, and (3) the degree to which individuals and businesses can engage in entrepreneurial activities.

1. The extent of price liberalization

A. Legal framework

The government abolished most price controls in 1992, except those relating to state monopolies and prices for commodities essential to the economy, including electricity, postal service, and telephone services. The Government Pricing Committee ("GPC"), governed by a 1993 decree, currently sets prices not only in sectors commonly regulated in market economies (*e.g.*, electricity, telecom, water, air and train travel), but also those for cement, steel, iron, other industrial products and pharmaceuticals, with the primary objective of controlling inflation and ensuring that prices for basic goods stay within reach of the majority of the population.[101]

The 2002 Ordinance on Prices limits the State to setting the prices for land, natural resources, assets of the State, and goods or services essential to the economy of the nation or under monopoly control. The ordinance has been described as a stop-gap measure designed to prevent monopoly pricing abuses until Vietnam's competition law comes into effect.[102]

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[101] Decree No. 01-CP *On Powers, Responsibilities and Apparatus of the Government Pricing Committee,* Article 2 (1993).

[102] Vietnam: Legal Update (Hanoi: Phillips Fox, July 2002)p 6, citing to Ordinance No. 40-2002-PL-UBTVQH On Price (2002) p 6.

B. Developments in the economy

Most price controls were abolished at the end of the 1980s, but some remain, *e.g.*, those on electricity.[103] The GPC's stated policy objective with respect to these remaining price controls is to regulate monopoly pricing and ensure that basic consumer goods and services remain within reach of the majority of the population. There are, however, industrial goods, *e.g.*, steel and cement that are also subject to GPC controls.

The GPC's statutory mandate is set for review in 2002 and it is expected that the list of industries subject to price controls will be shortened. Some of the industries will be freed from government regulation, while other industries, including cement, steel and iron, will set their prices in cooperation with the government and consumer representatives. The trend toward price liberalization continues forward on other fronts as well. As described in the discussion on foreign direct investment above, the dual pricing system, which discriminates against FIEs, has been rolled back with a reduction in price gaps, especially in telecom and electricity tariffs, and the government has voiced its commitment to eliminate such price discrimination altogether.[104]

The 2002 Ordinance on Prices allows the State to investigate and intervene in monopolistic pricing practices that might not have been covered by the mandate of the GPC.[105] However, the government has not yet specified the administrative authority that will implement the Ordinance. Therefore, it is impossible to evaluate the law's effect.

2. The status of commercial banking reform

A. Legal framework

The 1997 *Law on Credit Institutions* provides for the organization and operation of credit institutions and banks in Vietnam and names the State Bank as the sole competent body to

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[103] See Rana and Hamid, *From Centrally Planned to Market Economies, The Asian Approach, Volume 3 Lao PDR, Myanmar and Vietnam* (Asian Development Bank, 1996) 356-357. Of the 15 major power stations, 14 are run by the State-owned Electricity of Vietnam ("EVN"). The government requires EVN to charge domestic firms 5.2 US cents/kW and foreign invested firms are charged 6.5, while the long term marginal costs of production is closer to 8 cents/kWh. EVN wants to raise average price to 6.1 cents, but faces political pressure from influential users such as loss-making SOE's. See *The Economist Intelligence Unit, Country Profiles, Vietnam: Resources and infrastructure*, August 2, 2001.

[104] See also U.S. Vietnam Trade Council, *Vietnam: One Country, one system - one price* (May 29, 2001), citing to "Orienting the Pricing Policies towards FDI Enterprises and Foreigners from 2001 to 2005."

[105] *Vietnam Legal Update* (Hanoi: Phillips Fox, August 2002) p 12.

oversee the licensing of banks and credit institutions.[106] It should be noted that the SBV is not an autonomous entity but rather a body of the central government, supervised by the National Assembly.[107] The 1999 *Decree on Foreign Credit Institutions* deems the State Bank to be the body that grants and withdraws licenses as well as manages and inspects operations of all types of foreign credit institutions in Vietnam. All licenses must be granted in accordance with Vietnam's "economic development process and the status of its financial market," as defined by the central government.[108]

The 2001 State Bank *Decision On the Organization and Operation of State Commercial Banks* states that State-Owned Commercial Banks ("SOCB") are "subject to State management by the State Bank," and through their banking activities "shall contribute to the realization of economic objectives of the State."[109]

The 1999 *Decree on the Finance Regime of Credit Institutions* requires banks to be financially autonomous and independently responsible for their business, their obligations and their commitments. Credit institution are entitled to acquire, transfer, lease, liquidate and mortgage assets under the principles of "effectiveness, safety and fund development." The Decree differentiates between state-owned and nonstate-owned credit institution, whereby the profit of state-owned credit institutions are directed into a number of funds, such as a business development fund. Profit distribution of nonstate credit institutions is to be decided by the institution itself, once the reserve requirements for the charter capital have been met.[110]

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[106] The types of organizations covered by this law include: state-owned institutions, joint-stock credit institutions owned by the State and the people, and co-operative credit institutions. Cooperative credit institutions are established by organizations, individuals, and family households on a voluntary basis. Conditions for the establishment of credit institutions include: a) a need for banking activities in the areas where the credit institution is to operate, b) the government stipulated minimum capital requirement is met, c) the founding members have financial capability and prestige, d) the directors and executives possess civil capability and are professionally qualified, e) a conforming charter of organization and operations is already in place, and f) the business plan is feasible. Conditions for the issuing of a banking operation licence to an organization includes: a) banking activities are necessary and closely related to its main activities, b) there is sufficient capital and appropriate material conditions for banking activities, c) it has a team of experts in banking operations, d) it has a feasible business plan for banking operations. See Law No.02/1997/QH10 *On Credit Institutions*, Articles 12 and 20- 22 (1997).

[107] Law No. 01/1997/QH10 *On the State Bank of Vietnam*, Article 1 (1997). In some key areas of operation, such as the provision of liquidity support, the management of foreign currency reserves, and issuance of banking licenses, SBV's actions are subject to prime ministerial approval. SOCBs financial statements are not audited by independent auditors, but rather by the State.

[108] Decree No.13/1999/ND-CP *On organization and operation of foreign credit institutions*, Article 3 (1999).

[109] Decree No. 49/2000/ND-CP *On the organization and activities of the commercial banks*, Article 3 (2000). See also Decision No.122/2001/QD-NHNN *On the organization and operation of state commercial banks*, Articles 1 & 4 (2001).

[110] Decree No.166/1999/ND-CP *On the finance regime of the Credit Institutions* (1999).

B. Developments in the economy

The responsibilities of the SBV were divided in 1988 with the SBV assuming a regulatory role over the banking sector, which is composed of four main SOCBs, a number of cooperatives, joint-venture banks, and representative offices and branches of foreign banks.[111]

Vietnam's banking sector has not yet reached the level of development required to function as a true financial intermediary in market economy. The two main issues are: 1) insufficient independence as of today from State control regarding interest rates and lending to SOEs, and 2) the exclusion of sufficient competition in the banking sector *via* state regulation.

Interest rate controls

In August 2000, the SBV replaced the monthly ceiling rate on *dong* borrowing with a monthly prime rate, based on the lending interest rates that nine selected commercial banks offer to their "best" clients. Banks were then free to adjust the interest rate they offered within a band of ± .3 percent for short term loans and ± .5 percent for medium- and long-term loans. This policy was intended to bring interest rates closer to market-determined rates. In June of 2001, the SBV lifted controls on *dong* denominated lending rates to improve the private sector's access to credit.[112]

As of June 1, 2002, non-state commercial banks are permitted to set their own loan rates, in addition to deposit rates. Although this marks another step in the gradual movement toward market-based interest rates, the central bank will still have control over lending rates of SOCBs, which account for 74 percent of the lending market and 70 to 80 percent of banking sector assets.[113]

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[111] *Country Economic Review: Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 32. The 4 main SOCBs are the Bank of Foreign Trade (Vietcombank) which is the *de facto* import-export and trade-financing bank. The Vietnam Industrial and Commercial Bank(Vietincombank) which is the primary financier for industrial development. The Vietnam Bank for Agriculture and Rural Development (BARD) which finances agriculture and commodities. The Vietnam Bank for Investment and development (BIDV) which is the infrastructure bank.

[112] *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 15.

[113] *The Economist Intelligence Unit, Views Wire, Vietnam finance: More liberal lending rates*, June 21, 2002. The government has also indicated that it wants to avoid lowering interest rates, particularly the prime rate, which is still used by state-owned banks to calculate the interest rate on *dong* loans. *The Economist Intelligence Unit, Country Reports, Vietnam at a glance: 2002-3,* March 19, 2002.

Policy lending to SOCBs

Despite the legal obligation for commercial banks to screen potential borrowers in terms of risk, SOCBs continue to engage in policy lending and make the majority of their loans to SOEs on terms that are not consistent with commercial considerations.[114] The SOCBs are clearly weakened by state-directed lending under non-commercial criteria and the extent of SOE non-performing loans are a serious cause for concern.[115]

Official estimates suggest that over 60 percent of state firms are loss making but only sixty SOEs of the original 12,000 have ever been declared bankrupt.[116] While new bankruptcy and debt restructuring laws have been promulgated, it is still too early to determine how effective these measures will be.[117]

The Government established the National Development Assistance Fund ("NDAF") in 2000 to set the path for a separation of commercial and policy-based lending. A number of positive changes have been implemented, such as the issuance of new rules for classifying non-performing loans consistent with international standards.[118] However, observers note that

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[114] "The banking system is dominated by the four large SOCBs, which have weak lending practices and developed a large stock of non-performing loans, many to SOEs, and partly as a result of policy lending and directed lending by the government." See *Vietnam: 2001 Article IV Consultation and First Review Under the Poverty Reduction and Growth Facility and Request for Waiver and Modification of Performance Criteria* (Washington DC: International Monetary Fund, January 2002), p 50.

[115] " The true level of non-performing and under-performing loans is difficult to gauge, as there is a very low level of transparency and disclosure in Vietnam. Secrecy laws cover much of the banking industry's data and meaningful information on the sector as a whole and on individual financial institutions has typically not been available... Officially, overdue loans in the banking system were about 12 percent-14 percent of total assets in mid-1999, although the basis of the calculation is unclear. A recent report by the IMF stated that, based on audits undertaken in 1997 that adhered to internationally accepted standards, impaired loan ratios in the SOCBs ranged from 17 percent of total loans to as high as 50 percent. According to the IMF report, nonperforming loans in the sector averaged about 30-35 percent." *Vietnam: Country Commercial Guide FY2002* (Washington DC: US Commercial Service, 2002). See also *Vietnam: 2001 Article IV Consultation and First Review Under the Poverty Reduction and Growth Facility and Request for Waiver and Modification of Performance Criteria* (Washington DC: International Monetary Fund, January 2002), p 52.

[116] *Country Economic Review: Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 31. See also *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, 2002), p 8.

[117] In August of 2002 the Ministry of Finance introduced new regulations detailing when state-owned firms must go bankrupt, including when a firm's debts equals 75 percent of the state's capital after three years of losses, or when a firm repeatedly fails to achieve government targets. See *The Vietnam Investment Review: SOEs given official bankruptcy rules*, August 19, 2002. It remains to be seen, however, how the new regulations will affect the practice of bankruptcy. Although weak bankruptcy laws are of concern, they are common in most transition economies and many market economies.

[118] *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 18 & 24-25. Citing to the following Decisions which embody positive steps including: the issuance of new regulations for operations of banks in respect of calculating provisions against their nonperforming loans on a quarterly basis (Decision 488); bringing banking regulations closer

implementing commercially viable lending standards on a consistent basis will take some time.[119] For example, the Government of Vietnam continues to allow lending on an unsecured basis to state owned enterprises and foreign invested enterprises, while domestic private enterprises are faced with stringent collateral requirements for obtaining medium term financing.[120] Although credit growth to SOEs has slowed significantly, while accelerating by 27.5 percent to other sectors, only 27 percent of the loans provided by the NDAF have gone to the private sector.[121]

Competition in the banking sector

Foreign participation in Vietnam's banking sector remains extremely restricted under the *Law on Credit Institutions,* which only allows for the establishment of joint venture credit institutions, wholly foreign owned non-bank credit institutions and bank branches of foreign banks.[122] Foreign shareholding in domestic joint stock banks has generally not been authorized, with only several exceptions since 1995.[123]

There are more than 30 foreign banks operating in Vietnam, including four joint venture banks and 27 foreign bank branches. Although they are constrained in terms of the banking transactions they can engage in, they bring some stability and competition to the system.[124] There are 53 representative offices of foreign banks, which are only permitted to act as agents for off-shore banking activities and are not permitted to carry out domestic banking operations in

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to international accounting norms, by stating that should customers fail to repay an installment the entire loan can be accelerated and classified as overdue, and giving banks more discretion in setting interest rates on overdue debt. See also Banking & Finance, Vietnam (Hanoi; Phillips Fox, July 2002)p 4, citing to Decision No.1627/2001/QDNHNN (2002): permitting non-state banks to make decisions on the terms of any given loan, including domestic banks' lending to foreign borrowers in Vietnam, such as maturity and interest rate, and generally devise new forms of lending provided they are not forbidden by law, including, for the first time, the possibility of overdraft lending.

119 *Country Assistance Plan (2001-2003): Vietnam* (Manila: Asian Development Bank, 2000), p 3. See also *Vietnam Country Commercial Guide FY2002* (Washington DC: US Commercial Service, 2002).

120 *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 24-25; citing to Decision No.266, (2000).

121 *Country Economic Review: Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 9.

122 Law No.02/1997/QH10 *On Credit Institutions*, Article 105 (1997). Non-banking credit institution, such as finance companies and finance leasing companies, are permitted to conduct a limited number of banking operations such as are necessary to carry out project finance activities, but are not permitted to receive on-call deposits or provide payment services.

123 Banking & Finance, Vietnam (Hanoi; Phillips Fox, July 2002,) p 1.

124 For example, branches may not receive foreign currency deposits from Vietnamese Customers. However, joint venture banks may receive foreign currency deposits from Vietnamese persons, subject to certain limitations. *Dong* deposits are limited to on-call accounts and subject to a limit of 25 percent of the banks capital. Banking & Finance, Vietnam (Hanoi; Phillips Fox, July 2002), p 4.

Vietnam. Off shore loans obtained by Vietnamese businesses, including foreign invested enterprises, are subject to conditions and supervision from the SBV.[125]

Provisions under the Bilateral Trade Agreement are expected to open the banking sector to foreign participation. However, these national treatment reforms will be phased in over an eight to ten year period.[126]

In March of 2001, the SBV adopted a detailed SOCB restructuring plan supported by the International Monetary Fund and the World Bank. The plan includes yearly structural benchmark targets that must be achieved in order to obtain phased re-capitalization funds from the government. The four SOCBs have so far met these goals.[127] However, similar to the SOE reforms discussed in the previous section, the Government of Vietnam envisions a major role for the four state-owned banks, which dominate domestic banking activity.[128]

The banking sector accounts for only one-quarter of total savings.[129] Most households keep their savings in dollars or gold outside of the banking system.[130] Although not dispositive of a market-based banking sector, such a low deposit base together with the *de jure* and *de facto* government control, prevent the banking sector from acting as a true financial intermediary. Access to credit for the private sector is increasing, but the official banking sector has not met the finance needs of the growing number of small- and medium-sized private enterprise, which instead have turned to informal funding channels such as family, friends, and credit-cooperatives.[131]

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[125] Ibid., 3.

[126] Over the first 8-10 years, Vietnam will phase in full national treatment with respect to the right of US bank branches to accept *dong* deposits from Vietnamese customers and issue credit cards. After 9 years, 100 percent subsidiary banks of US banks will be permitted to be established.

[127] This plan included increased autonomy of commercial banks by allowing them to set up internal systems for clearing payment transactions without State Bank involvement, but with State Bank permission. *Vietnam: Economic Monitor* (Washington DC: World Bank, 2002), p 24-25. See also *The Economist Intelligence Unit, Country Reports, Vietnam: Economic policy outlook,* February 13, 2002.

[128] *Country Economic Review: Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 32.

[129] *The Economist Intelligence Unit, Country Profiles, Vietnam: Economy*, August 2, 2001.

[130] *Vietnam: Country Commercial Guide FY2002* (Washington DC: US Commercial Service, 2002).

[131] *The Economist Intelligence Unit, Country Profiles, Vietnam: Economic sectors*, August 2, 2001.

3. The degree to which individuals and businesses can engage in entrepreneurial activities

A. Legal framework

The right of persons, organizations, and households to conduct economic activities is established by the 1997 *Commercial Law*. The law protects the right of private businesses, both domestic and foreign, to engage in competition, but reserves a leading role for the state-owned sector.[132] The permissible forms of private enterprises in Vietnam are established by the *Law on Enterprises*, which took effect in January, 2000 and replaced a 1990 law.[133] This law details the rights and obligations of all domestic private firms, including privatized SOEs, and allows for limited liability companies, joint-stock companies, partnerships, and private enterprises. Firms have the right to allocate and dispose of resources, select their lines of business, and conduct business autonomously.[134]

Under the previous *Law on Enterprise*, private firms found it difficult to compete with state-owned firms. It was burdensome to legally register an enterprise and a lengthy approval process was necessary to transform into a limited liability or shareholding company. Unlike SOEs, private firms were unable to use their land-use rights as an equity contribution in joint ventures.[135] The government has also taken steps to support the development of private enterprise and in 2001 amended the constitution to give the private sector equal status to that of the state sector.[136]

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[132] Law No. 58-L/CTN *The Commercial Law*, Article 10 (1997); "The state shall invest in finance, physical technical facilities and human resources to develop State owned enterprises which deal in essential goods in order to ensure the leading role of State owned enterprises in commercial activities as one of the instruments used by the State to regulate supply and demand and to stabilize prices, contributing to the implementation of the national social economic policies."

[133] Law No.13/1999/QH10 *On Enterprises*, (1999).

[134] Law No.13/1999/QH10 *On Enterprises*, Article 9 (1999).

[135] *Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grants to the Socialist Republic of Vietnam for the State-Owned Enterprise Reform and Corporate Governance Program* (Manila: Asian Development Bank, November 1999), p 16.

[136] *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 22.

B. Developments in the economy

The private sector has become the economic engine of Vietnam, with growth far exceeding that of the state-owned sector.[137] Most new jobs in Vietnam are created in the private sector.[138] Since 2000, the private sector has experienced particularly strong growth in the export sector and has become a major source of currency earnings for Vietnam.[139]

Although the private sector in Vietnam is still underdeveloped, with registered Vietnamese-owned private companies contributing only about eight percent of GDP, the *Law on Enterprise* appears to have prompted a surge in the registration of new private firms by making it simpler to register businesses and by making it easier to conduct business.[140] According to the Vietnamese government, more than 70,000 businesses have registered in the period from when the *Law on Enterprise* took effect to September 2002.[141] This means that more private businesses have registered since 2000 than in the entire prior period of *doi moi* starting in 1986. Around 90 percent of these enterprises are small- or medium-sized, with an average capitalization of 250 million *dong* ($16,700).[142] The government has also recently issued a directive to make its citizens more aware of their new rights under the *Law on Enterprise* to persuade more businesses to register officially.[143]

These advances are significant for the economic development of Vietnam. However, private business is still disadvantaged in the realms of finance, land-use rights, and red tape. A survey conducted late last year found that only 50 percent of firms surveyed received financing from

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[137] *Vietnam News Briefs, Hanoi: Industrial Production up 26.2 percent in nine months*, September 25, 2002.

[138] *The Associated Press: Vietnamese official says private enterprise law helping economy*, September 16, 2002.

[139] *Xinhua General News Service: Vietnam intensifies development of private economy*, August 4, 2002.

[140] In most sectors, licensing a business has switched from an discretionary procedure to a swift, low-cost registration. 160 licenses requirements removed, reducing the time for setting up a new enterprise from 98 days to around 7. Decree 30 also issued in 2000 leading to revocation of further 61 licenses and permits. The average cost of creating an enterprise has dropped from 10million dong to 200,000 to 500,000. Business registration costs cut and approval time reduced from 1-2 months to an average of 10 days, and even less for small enterprises and in urban areas. See United Nations Development Programme, UNDP Viet Nam News - *Viet Nam Needs More and Better Laws*, (Viet Nam Investment Review, 29 April - 5 May 2002). See also *Vietnam: Selected Issues and Statistical Appendix* (Washington DC: International Monetary Fund, 2002), p 32. See also *The Economist Intelligence Unit, Views Wire, Vietnam Economy: Vietnam's change of heart*, August 30, 2002.

[141] *The Associated Press: Vietnamese official says private enterprise law is helping economy*, September 16, 2002.

[142] *The Vietnam Investment Review: Officials agree on financial assistance for private sector*, August 26, 2002.

[143] Directive No.17/2002/CT-TTg *On Further stepping up the Implementation of the Law on Enterprises*, (2002).

banks, as compared to 80 percent of SOEs.[144] Those firms that do find financing are likelier to face higher interest rates. SOEs can obtain unsecured loans, while private and privatized firms must mortgage their property.[145] Private firms find this particularly burdensome, as many do not possess the ownership papers for their physical assets.[146] Listing on the stock market is not a viable alternative; there are only 17 companies listed, and all but one are former SOEs.[147] Private companies also face a burdensome tax regime.[148]

Assessment of factor

Despite the government's steps in restructuring the banking sector in conjunction with the International Monetary Fund, the slow pace of commercial banking sector reform and the continued significant government presence, dominating 70 to 80 percent of the sector, are significant causes for concern.

The burgeoning private sector, comprised mainly of small- and medium-sized businesses, is an impressive component of the Vietnamese economy. However, since the government still has considerable control over interest rates and lending policies, this sector is constrained from access to the necessary credit for continued growth in accordance with the principles of a market economy. Although the banking sector only represents one quarter of Vietnam's total saving, the *de jure* and *de facto* controls that the government maintains prevent the sector from developing into a true financial intermediary.

Finally, although prices have been largely liberalized, the GPC maintains discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies.

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[144] *Vietnam Investment Review: Life according to the stars of free enterprise*, August 19, 2002.

[145] *Country Economic Review: Socialist Republic of Vietnam* (Manila: Asian Development Bank, 2000), p 9.

[146] *The Vietnam Investment Review: Directors still shy away from equitization,* August 5, 2002.

[147] *Associated Press: World Stream; Communist Vietnam's stock market experiment slows after roller coaster first two years*, July 25, 2002.

[148] Whereas, the standard corporate tax rate is 32 percent, companies must pay an additional 25 percent tax if their accounts still show at least a 20 percent return on capital. This 2002 rule is an improvement over the 1998 rule, where companies paid an additional tax if they showed a 12 percent return on capital. See Circular No.18/2002/TT-BTC *On Providing Guidelines for Implementation of Decree No.26/2001/ND-CP and Decree No.30/1998/ND-CP detailing the implementation of the Law on Corporate Income Tax,* (2002).

Factor Six. ***Such other factors as the administering authority considers appropriate.***

Under this factor, the Department can address any additional issues relevant to its consideration of market economy status. A number of economic reform issues raised by the commenters do not readily fit into any of the preceding five factors. These issues include trade liberalization, rule of law, and corruption.

Trade liberalization

The BTA entered into force in December 2001. The BTA gives Vietnam greater access to the U.S. market, and Vietnam has agreed to reduce or eliminate its tariffs, quotas, licensing requirements, and other non tariff measures over a nine-year period. It also includes provisions to liberalize export trading rights and open its services sector, including banking, and increase its discipline on intellectual property rights enforcement.

Central to this agreement is the introduction of national treatment. This pledge to treat U.S. firms no differently from Vietnam's own SOEs means that the current investment screening process (by which potential foreign investments must first be evaluated) will be dismantled for most sectors within nine years. Excepted sectors include media and culture; banking and investments; minerals and energy; telecommunications; and ports and transportation. This means, for the covered sectors, that Vietnam will end its conditions against 100 percent foreign investment and required export ratios, as well as give U.S.-invested firms the right to mortgage and transfer their land-use rights, over the next few years.

While certain sectors, including finance and telecommunications, are excepted from the national treatment clause, the agreement does liberalize U.S. participation in these sectors. With the entering into force of the agreement, branches of U.S. banks are allowed, and the limitations on U.S. equity in Vietnamese banks will gradually be eliminated by 2009.[149] U.S. firms will also be able to invest in the Vietnamese telecommunications market, albeit only with a minority share. The net effect of these exceptions to national treatment is that the Vietnamese government will still be allowed to "screen" U.S. participation in these areas through maintenance of its licensing requirement that requires governmental evaluation.

With a view to comply with the BTA, the government in 2001 announced a five-year Import-Export Regime, replacing earlier one-year plans. Vietnam is ahead of the schedule mandated by the BTA in eliminating quantitative restraints ("QRs") on imports and exports, notably on

[149] *Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations,* US State Department No. 02-9, 2000.

construction materials, glass, and remaining steel products.[150] By 2003, only sugar and petroleum products will still be subject to QRs.

Although the concessions made and commitments undertaken apply only to U.S. firms, and depend on a three- to nine-year phase-in period, the BTA still represents a major commitment in Vietnam toward trade and investment liberalization. Vietnam estimated that it would change 148 of its legal documents to bring its laws into accordance with the agreement.[151] FDI in Vietnam's import and distribution sector is subject to separate provisions that have never been issued, but the government is preparing to issue a decree allowing foreign participation by 2004, with the exceptions listed above.[152] Also significant is that Vietnam will institute internationally-recognized arbitration standards by 2007.

Vietnam has also been actively pursuing membership in international organizations. In July 1995, Vietnam was admitted to Association of Southeast Asian Nations ("ASEAN"), and is scheduled to join ASEAN Free Trade Agreement ("AFTA") by 2006. Vietnam has already made good progress on reducing tariffs on goods from other ASEAN countries.[153] Vietnam also joined Asian Pacific Economic Cooperation forum ("APEC") in 1998 and seeks membership in the , although it is unlikely to be admitted before 2005. Liberalizing trade and opening markets is crucial to Vietnam's accession to the WTO, and provides a major impetus for reform of Vietnam's economy. While these advances are significant for the economic development of Vietnam and its integration into the world trading system, it is still too early to determine how effective these steps will be.

Rule of Law

Rule of law is particularly weak in Vietnam: laws are vague, the judiciary is not independent of the Communist Party, there are few lawyers, and trial procedures are rudimentary.[154] As a symptom of the lack of faith in the legal system, many FIEs have included a provision in their contracts that disputes be handled by the Singapore Court of Arbitration.

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[150] *Vietnam: Second Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility and Request for Waiver of Performance Criteria,* (Washington DC: International Monetary Fund, July 2002)p 10.

[151] *Catalog of Legal Updates* (Hanoi: US-Vietnam Trade Council. September 27, 2002) p 1.

[152] Decree 24/200/ND-CP *Government Decree Providing Detailed Regulations on the Implementation of the Law on Foreign Investment in Vietnam,* Appendix 4. (2000).

[153] *The Economist Intelligence Unit, Risk Wire: Foreign Trade and Payments Risk,* September 27, 2002.

[154] *The Economist Intelligence Unit, Risk Wire: Vietnam risk: Legal & Political Risk,* June 21, 2002..

The government is undertaking a Legal Needs Assessment in conjunction with a consortium of international and bilateral donors. The assessment will cover the main areas of needed reform: creating an internally consistent legal framework; rationalizing the law and treaty making process; creating and strengthening much needed legal institution for the implementation of the law; legal education for both lawyers and judges, and; increased transparency and information systems.[155] The strategy for the development of the legal system is expected to be approved by the National Assembly before the end of 2002.

Corruption

Reports indicate that Vietnam has high levels of corruption and the current government is taking steps to address this problem.[156] It should be noted, however, that corruption is a major problem in many other transition economies and some market economies.

ANALYSIS AND ASSESSMENT

Although section 771(18)(B) of the Act enumerates six factors that the Department must consider in determining whether a country operates on market principles, the statute provides no direction or guidance with respect to the relative weight that should be placed on each factor in assessing the overall state of the economy. As discussed above in the "Analytical Approach" section, the Department considers whether the facts, as applied to the statutory factors, demonstrate that the economy is generally operating under market principles.

The Department is cognizant of the positive changes, both in the law and on the ground, that Vietnam has experienced over the past 15 years. The Government of Vietnam has undertaken significant market reforms in its *doi moi* initiative and passed legislation to promote the market-based development of its economy. Wage rates are largely market-based. The government has also encouraged the development of small- and medium-sized enterprises through legal reforms that have led recently to the impressive growth of the private commercial (non-farm) business sector.

However, in applying the factors required under section 771(18)(B) of the Act, we have found that Vietnam's economy remains in transition and does not yet qualify as a market economy under the antidumping law. Vietnam's currency, the *dong*, is not fully convertible for current account purposes and practically inconvertible for capital account purposes. This, and

[155] *Vietnam Economic Monitor* (Washington DC: World Bank, 2002), p 19.

[156] *The Economist Intelligence Unit, Risk Wire: Government Effectiveness Risk,* September 27, 2002. See also *Transparency International Corruption Perceptions Index 2002*. The index placed Vietnam at number 85 out of 102 countries surveyed, with 102 being the most corrupt.

government regulation of the interbank FOREX market, frustrates the development of linkages *via* the exchange rate between Vietnamese and world markets.

Although FDI is encouraged, it is at the same time directed and channeled through licensing and registration requirements. Restrictions on corporate control and levels of permissible foreign ownership minimize the impact of foreign investment on large SOE-sector development. The government's stated objective is to continue protection of and investment in industrial state-owned enterprises to ensure that they retain a key role in what the government refers to as a socialist market economy. This policy promotes the development of SOES at the expense of foreign direct investment.

The industries in which these SOEs operate are not limited to traditional natural monopolies, but extend to food, wholesale trading, petrol and oil wholesale trading, information technology products, some mechanical and electronic products, ferrous and non-ferrous metal production, basic chemicals, fertilizers, cement, construction, and pharmaceuticals. As a result of these policies, competition between the state and non-state sectors remains limited, despite other recent government efforts that have stimulated development of the private sector and increased foreign investment, with the percentd aim of increasing competitive pressure on large SOEs.

The limited extent of reform in other critical areas of Vietnam's economy raises similar concerns about continued significant government control over the economy. Despite recent banking sector reforms, the government retains overwhelming ownership and control over the commercial banking sector. This results in the opportunity for continued lending conducted on a non-commercial basis. Moreover, there are no private land ownership rights in Vietnam. While the government has de-centralized the allocation of land-use rights, such rights are not freely transferable and remain subject to local government approval.

In conducting its analysis, the Department is required to consider the totality of Vietnam's economic reforms in determining whether its economy is sufficiently operating under market principles. While many percent controls have been abandoned in Vietnam, functioning markets have not yet sufficiently replaced government controls over much of the economy. Our conclusion is that market forces in Vietnam are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis.

RECOMMENDATION

Based on the preponderance of evidence related to economic reforms in Vietnam to date, analyzed as required under section 771(18)(B) of the Act, we recommend that the Department treat Vietnam as a NME country for the purposes of antidumping and countervailing duty proceedings, effective July 1, 2001.

Agree________ Disagree________

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Faryar Shirzad
Assistant Secretary for Import Administration

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Date