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VIETNAM'S ANTITRUST LEGISLATION AND SUBSCRIPTION TO E-ASEAN: AN END TO THE BAMBOO FIREWALL OVER INTERNET REGULATION?

I. INTRODUCTION

On June 11, 2001, Vietnam experienced an unprecedented level of telecommunication congestion, resulting in a virtual stoppage to both Internet and mobile phone services. The severity of the problem peaked when Vietnam's only state-approved Internet Access Provider ("IAP"),¹ Vietnam Data Communications ("VDC"), was forced to close down its gateway until adequate services could be put in place to remedy the on-line Internet and telecommunication debacle.²

Since the early 1990s, similar incidents have not been uncommon among Internet users in Vietnam. Slow surfing, feeble bandwidth, and abhorrent telecom fees have plagued the approximately 130,000 Internet subscribers in the country.³ Many technocrats in Vietnam trace the source of such problems to government policy driven by security con-

1. An IAP is:

a company that provides access to the Internet. IAPs generally provide dial-up access through a modem and PPP connection, though companies that offer Internet access with other devices, such as cable modems or wireless connections, could also be considered IAPs. The terms IAPs and ISP (Internet Service Providers) are often used interchangeably, though some people consider IAPs to be a subset of ISPs. Whereas IAPs offer only Internet access, ISPs may provide additional services, such as leased lines (T-1 or T-3) and Web development. In contrast to both IAPs and ISPs, online services provide their own proprietary content in addition to Internet access.

Webopedia.com, *IAP* <<http://www.pcwebopedia.com/TERM/I/IAP.html>> (accessed Jan. 10, 2003).

2. Tu Giang, *Breakdown Throws Spotlight on Lack of Internet Access*, Vietnam Inv. Rev. (June 11, 2001) (available in 2001 WL 12429720).

3. Margot Cohen, *Information Technology: Calling for Change*, Far E. Econ. Rev. 45, ¶ 1, 3 (Sept. 21, 2000) (available in 2000 WL-FEER 23079751). The 130,000 Internet subscribers comprise less than one percent of the total population of Vietnam. However, current statistics on users have approximately doubled in the past three years. See also Tu Hoang, *Sharp Rise in Internet Subscriptions Forecast*, Vietnam Inv. Rev. 1 (June 4, 2001) (available in 2001 WL 12429689).

cerns.⁴ One such example are the policy directives imposed by the Directorate General of Post and Telecommunications⁵ ("DGTP"), Vietnam's state monopoly that regulates the gateway allowing Vietnam access to the World Wide Web. The most apparent form of regulation by Vietnam's DGPT has been its interception and control of Internet communications⁶ by using what computer system engineers refer to as a "firewall."⁷

Specifically, the government is struggling to achieve a system in which they can regulate Internet usage so as to satisfy their security concerns while simultaneously meeting the increased demand for domestic services. Many scholars have discussed approaches by other countries to regulate the Internet.⁸ Although significant focus has been placed on China's efforts⁹ to mandate Internet regulation, little if any assessment has been made of Vietnam's current technological struggle. Divided into four main parts, this Comment will attempt to provide some analysis in regards to Vietnam's regulatory response to Internet technology.

Part II of this Comment provides a historical overview of Vietnam's management and regulatory policy over the Internet. Part III examines

4. Giang, *supra* n. 2 at ¶ 8, 10.

5. Until 1993 DGPT was the only telecommunications organization in Vietnam. In July 2001, the company commenced a major restructure to separate its post and telecommunications divisions. The DGPT works closely with the Vietnamese operating purchasing authority (VNPT) in the development of Internet technology policies, directives, and regulations.

6. See Huw Watkin, *Censors Slow Advance into Global Information Economy*, S. China Morn. Post. ¶ 1 (Feb. 21, 2001) (available in 2001 WL 2307507).

7. A firewall is:

a system designed to prevent unauthorized access to or from a private network. Firewalls can be implemented in both hardware and software, or a combination of both. Firewalls are frequently used to prevent unauthorized Internet users from accessing private networks connected to the Internet, especially intranets. All messages entering or leaving the intranet pass through the firewall, which examines each message and blocks those that do not meet the specified security criteria.

Webopedia.com, *Firewall* <[www.pcwebopedia.com/ TERM/f/firewall.html](http://www.pcwebopedia.com/TERM/f/firewall.html)> (accessed Jan. 10, 2003).

8. See generally John T. Delacourt, Recent Development, *The International Impact of Internet Regulation*, 38 Harv. Intl. L.J. 207 (Winter 1997) (surveying attempts at Internet regulation in the United States, Germany, and China); Steven M. Hanley, Comment, *International Internet Regulation: A Multinational Approach*, 16 John Marshall J. Computer & Info. L. 997 (Summer 1998); Amy Knoll, *Any Which Way But Loose: Nations Regulate the Internet*, 4 Tul. J. Intl. & Comp. Law. 275 (Summer 1996); John F. McGuire, Student Author, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. Rev. 750 (June 1999).

9. See generally Richard Cullen & Pinky D.W. Choi, *The Internet in China*, 13 Colum. J. Asia L. 99 (Spring 1999); David S. Cooper, *The Dot.Com(munist) Revolution: Will the Internet Bring Democracy to China?*, 18 UCLA P. Basin L.J. 98 (Fall 2000); John H. Taylor, III, *The Internet in China: Embarking on the "Information Superhighway" With One Hand on the Wheel and the Other Hand on the Plug*, 15 Dick. J. Intl. L. 621 (Spring 1997).

Vietnam's legislative provisions that shelter a state centered regulatory firewall, where emphasis is placed on both the Press Law and the Law on Publishing. Part IV identifies the inevitable tension between Vietnam's anti-trust legislation and the maintenance of the firewall. Part V sets forth specific reasons why the Vietnamese government will no longer be able to maintain its regulatory firewall. This Comment concludes that Vietnam's anti-trust legislation, the *Law on Competition*, and subscription to the E-ASEAN Agreement, all of which in effect increase market access to private companies, will bring an end to the government's regulatory "Bamboo Firewall."¹⁰

II. HISTORICAL BACKGROUND

A. SOCIALIST IDEALS

The Vietnamese government's development of regulatory policy governing the Internet is essentially the result of socialist assumptions regarding the role of the state in economic growth. Specifically, there is an assumption that market-based growth must take place within a legal framework that makes the state the preeminent economic actor.¹¹ According to the Index of Economic Freedom,¹² government controls on the means of production and central planning in Vietnam constitute approximately sixty percent of GDP.¹³ The same Index cites that state-owned enterprises ("SOEs") account for forty to forty-five percent of industrial output and absorb sixty to sixty-five percent of available credit.¹⁴ As set forth in the Constitution of Vietnam, power is given to the government to provide a multi-component commodity economy functioning in accordance with market mechanisms under the management of the state and following a socialist orientation.¹⁵

10. "Bamboo Firewall" is a name derived from other journal articles citing China's regulatory policy over the Internet. See e.g. Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 Pac. Rim L. & Policy J. 361 (1997); Kristin M. Reed, Comment, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation of Internet Commerce*, 11 Duke J. Comp. & Intl. L. 451 (2001).

11. See William E. Kovacic, *Antitrust: Capitalism, Socialism, and Competition Policy in Vietnam*, Am. B. Assn. (Summer 1999).

12. The Index published by the Heritage Foundation provides a number of supporting statistics regarding the role of the state as an economic actor <<http://database.townhall.com/heritage/index/country.dfm?ID=158>>. Although the author acknowledges that the Index may not be a comprehensive measure of economic freedom, it does provide a useful model for making relative judgments concerning the role of the state in economic policy. See also Vietnam Economic Monitor, *World Bank, Autumn 2001* 15 <http://www.worldbank.org.vn/data_pub/reports/report002.htm#r31> (accessed Jan. 10, 2003).

13. *Id.*

14. *Id.*

15. Socialist Republic of Vietnam Const. of 1992 ch. 2, art. 15.

B. SETTING THE REGULATORY FRAMEWORK: 1997

Given that the state is the primary impetus behind facilitating economic growth in Vietnam, regulation of the Internet through government policy is in complete harmony with long established socialist principles. This is evident in Vietnam's first decree regarding Internet usage issued in 1997, which clearly sets forth the role of the state in Internet development:

[t]he Government will unanimously manage and control the Internet and its service in Vietnam, oversee external gateways hooking up with the Internet, and inspect information transmitted in this network. Any offices, organizations, enterprises, wishing to link their computerized information networks to Internet shall necessarily place the servers in Vietnam, which shall be hooked up with defined external gateways; and be responsible for all information transmitted and received (emphasis added).¹⁶

C. INTERNET MANAGEMENT STATUTES

Under the 1997 decree, three government departments manage the Internet and implement legislation. As Article 2 states: "The Minister of Science, Technology and Environment; the Minister of Culture and Information, and the General Director of the General Postal Bureau ("DGPT") shall be responsible to provide guidance on the implementation of this decree."¹⁷

Especially noteworthy is that under the decree, the DGPT is explicitly delegated the exclusive authority and primary role in managing the Internet. Chapter III, Article 15 of the decree provides that the role of the agency is:

[t]o direct the construction of the back-bone information network (the network's infrastructure); to oversee external gateways and security facilities; and to regulate modes of connection, linkage, and integration for all computerized information networks in Vietnam, linked with Internet with an aim to centrally manage the entire volume of information routed through the national back-bone network.¹⁸

Following the enactment of the decree, the DGPT implemented various policies governing Internet usage and services. One of the DGPT's initial actions consisted of appointing Vietnam Data Communications ("VDC") to operate as the country's sole Internet Access Provider ("IAP") and licensing four other companies to operate as Internet Service Provid-

16. Vietnam Decree No. 21-CP, art. 1 (Mar. 5, 1997) <<http://www.vietsotonline.com.vn/english/policy/attach21.asp>>.

17. *Id.* at art. 2.

18. *Id.* at art. 15.

ers ("ISPs").¹⁹ The five ISPs were structured to be state-owned agencies that would lease access from the gateway.²⁰

The decree and other policies provided that any organization, office, or business that is licensed to supply Internet services²¹ must adhere to a number of requirements.²² First, ISPs are limited to only the Internet services outlined in their licensing agreement.²³ Any change in operations or objectives must be approved by amendment.²⁴ Second, suppliers are required to submit proposed prices to delegated state agencies for approval before setting rates for public use.²⁵ Third, ISPs can only establish computer systems in Vietnam and are limited to access lines through the single gateway or Internet Access Provider.²⁶ Additionally, Internet service suppliers have to register all of their users.²⁷

Furthermore, any organization, business, or office desiring Internet access is required to meet specified standards. The procedure for license approval requires the applicant to state a definite purpose of use, insure proper installation of a computer network, demonstrate adequate control guarantees and have the presence of qualified technicians for Internet services.²⁸

Any individual wishing to obtain Internet access is subject to the following requirements: they must register with a state licensed and approved ISP, and sign subscription contracts that make them responsible for information input into, transmitted to, and received from their networks.²⁹

The conclusion of the 1997 decree clearly states that the only condition necessary to invoke a legal obligation under these requirements is the mere existence of a single connection to the Internet. Thus, any organization, business, or individual, using a computer linked to the Internet where information is transmitted or received, is also subject to the

19. *Vietnam Ready for Internet Connection*, Saigon Times 1 (Nov. 2, 1997) (available in 1997 WL 8991878) (noting that three of the original companies appointed as Internet Service Providers included Vietnam Post and Telecommunications Corp., Corporation for Financing and Promoting Technology, Saigon Postal and Informatics Technology Institute).

20. *Id.*

21. See U.S. Dept. of Commerce, Intl. Market Insight Rpts., *Vietnam Internet Issues*, Asia Intelligence Wire (Apr. 4, 2000) (available in 2000 WL 7292596) (discussing that up until recently, Vietnam was limited to a single IAP and five ISPs).

22. *Vietnam: Plugging Into Internet Under Government Management*, Saigon Times 1 (Apr. 20, 1997) (available in 1997 WL 8991091).

23. Vietnam Decree, *supra* n. 16, at art. 8.

24. *Id.* at art. 9.

25. *Id.* at art. 7; see also *Vietnam*, *supra* n. 22, at 1.

26. Vietnam Decree, *supra* n. 16, at art. 7; see also *Vietnam*, *supra* n. 22.

27. Vietnam Decree, *supra* n. 16, at arts. 5, 7; see also *Vietnam*, *supra* n. 22.

28. *Id.*

29. Vietnam Decree, *supra* n. 16, at art. 12.

supervision of the state.³⁰

III. THE "BAMBOO FIREWALL"

A. REGULATORY LEGISLATION: THE SEEDS OF THE FIREWALL

As demonstrated above, the 1997 Decree makes every effort to hold organizations, businesses, and individuals accountable for information transmitted via the Internet. In particular, Chapter I, Article 3, of the 1997 Decree, states that:

"Information input into, transmitted to and received from the Internet via Vietnam-based external gateways shall be subject to provisions of Article 10 of the Press Law and Article 22 on the Law of Publishing of Vietnam."³¹

The Press Law, adopted on December 28, 1989, by the Sixth Session of the Eighth National Assembly of the Socialist Republic of Vietnam, is the government's quintessential statute governing information.³² Recently, the Vietnamese government has interpreted the Law to also govern telecommunication.³³ As applied to the Internet, the Press law requires that information transmitted through the Internet must *not*:

- Incite the population to oppose the State of the Socialist Republic of Vietnam, or undermine a national unity bloc.
- Incite acts of violence; advocate invasion wars, cause hatred among nationalities and peoples, propagate reactionary ideology, and culture, pornography and criminal behavior, social evils, or sabotaging of traditional values.
- Disclose secrets of Party and Government, military, security, economic, and foreign relations secrets, confidential information on private lives of citizens, and other kinds of secrets determined by law.
- Report false information, or information distorting history, negating revolutionary achievements, insult national heroes; libel the prestige of organizations, or the honor or dignity of citizens.³⁴

30. *Id.*

31. *Id.* at art. 3.

32. Doan Viet Hoat, *Monopoly of the Press in Vietnam Today* <http://www.freemedia.at/pfn_vietnam.htm> (accessed Jan. 10, 2003). The Press Law is based on Article 4, Article 67, and Article 87 of the Constitution of the Socialist Republic of Vietnam. The Press Law determines all activities of the press from approval and appointment of publishers, editors, and reporters, to all other management arrangements. *Id.* The government's Central Committee on Thought and Cultural Affairs controls the content of the press by issuing guidelines and directives to editors, and newsmen who are, in most cases, party members. *Id.* The law was originally applicable to "things banned from information in the Press" but has long since been used to regulate information transmitted over the Internet. *Id.*

33. See Vietnam, *supra* n. 22, at 1.

34. *Law on the Press* ch. III, art. 10 <<http://www.vnnews.com/coci/0202/0202.htm>>; see also Saigon Times, *supra* n. 22.

The second law that enforces regulatory oversight of the Internet is Article 22 of the Law on Publishing. Adopted on July 7, 1993, in the Third Conference of the Ninth National Assembly, the original intent of the law was to protect the rights of creativeness and dissemination of works.³⁵ Article 22 of the Law on Publishing reiterates the tenets of the Press Law, but specifically states that any works with content in violation of the Article are prohibited from publication.³⁶

B. THE FIREWALL: FUNCTION AND EFFECTIVENESS

Interpreted together, the Press Law and the Law on Publishing form the legislative framework upon which the Vietnamese government has established its regulatory firewall. The firewall serves several functions. First, it serves a technological function by centralizing transmitted information that can be controlled or managed.³⁷ Second, it acts as a political control mechanism or functions as an electronic filter by essentially keeping Internet users from connecting to Web sites that the government considers politically, religiously, or sexually offensive.³⁸ Third, the firewall allows the government to intercept e-mail.³⁹ Within the framework of the firewall, the Vietnamese government has installed software that identifies key words in e-mail messages or headers. The e-mail is then referred to a network administrator who may under their own discretion, decode encrypted messages and then either chose to censor or delete objectionable content.⁴⁰

The firewall is extremely effective given the way in which the regulatory structure was designed. Since all Internet traffic must go through the Vietnam's single gateway, the VDC, from a technical standpoint, the government is able to easily monitor information that is traveling through a single bandwidth.⁴¹ As of August 2001, it was estimated that the firewall already blocks well over 3,000 Web sites.⁴² It is unclear, however, whether this approximation is completely accurate. For instance, the estimation excludes the significant number of political and religious sites that also get filtered out, not to mention proxy servers that

35. *Law on Publication* ch. III, Preamble <<http://www.vnnews.com/occi/002/0201.htm>>.

36. *Id.* at ch. III, § I, art. 22; *see also id.* at ch. IV, arts. 32-37 (providing for state administration of any publishing activities as a unified and centrally located process).

37. Mark McDonald, *Asia Worries Firewalls Won't Screen out Offensive Material*, Knight-Ridder Trib. Bus. News ¶ 2 (Aug. 13, 2001) (available in 2001 WL 25951816).

38. *Id.* at ¶ 2.

39. *Id.* at ¶¶ 23-24, 39.

40. *Id.*

41. *See* U.S. Dept. of Commerce, *supra* n. 21, at 1.

42. McDonald, *supra* n. 37, at ¶ 8.

attempt to inundate the firewall.⁴³ Additionally, this number does not take into account the objectionable Web sites originating in Vietnam. For example, “there are countless anti-Hanoi political sites operating on the Web” by refugees, emigrants, and domestic dissidents.⁴⁴ In fact, the state controlled media in Vietnam has widely reported “that exiled Vietnamese groups were increasing their efforts to slander Hanoi via the Internet by exaggerating ethnic conflicts and fanning religious tensions.”⁴⁵

The regulatory nature of the firewall has manifested itself in other ways. For instance, the Vietnamese government has taken every effort to supplement the regulatory effect of the firewall by raiding homes, disconnecting telephone lines, and confiscating computers.⁴⁶ ISPs fearful of being held accountable for illegally transmitted information, have established censorship teams to prowl the Internet for objectionable sex, violence, and political danger.⁴⁷ Vietnamese security forces have also increased the allocation of resources for controlling transmitted Internet information by creating online identification, tracking, and observation software.⁴⁸

C. REGULATORY COSTS

Despite the appearance of effectiveness, the firewall imposed by the Vietnamese government is not being enforced without significant economic, social, and political costs. The fact that there is only one gateway used by all Internet customers in Vietnam demonstrates that the VDC may only guarantee a limited range of speed and bandwidth.⁴⁹ This, in effect, creates occurrences similar to the June 11, 2001, shutdown where the usage exceeded the capability of the gateway. In addition, users incur costs in the form of narrow bandwidth access that is both time and usage rate dependent. Another important factor is that users generally have no other alternatives for Internet connections that provide quicker, more reliable access.⁵⁰

As a result of this dependency, the DGPT is able to use the gateway to impose some of the world’s highest connection fees.⁵¹ For example, ISPs on average in Vietnam charged the equivalent of \$1500 U.S. dollars a month for a 65K leased line to the gateway whereas individual home

43. *Id.* at ¶ 9.

44. *Id.* at ¶ 15.

45. Watkin, *supra* n. 6, at ¶ 3.

46. McDonald, *supra* n. 37, at ¶ 20.

47. *Id.* at ¶ 24.

48. Watkin, *supra* n. 6, at ¶¶ 7-8.

49. *Vietnam Internet Issues*, *supra* n. 21, at 1.

50. Cohen, *supra* n. 3, at 1.

51. *Id.*

users average approximately \$1.24 an hour for Internet service.⁵² These high costs are extremely significant considering that the annual per capita income in Vietnam is approximately \$370.00.⁵³ The costs are also distributed among domestic businesses in the form of high licensing fees and user costs. As of 2000, only five hundred out of Vietnam's 600,000 local businesses had e-mail addresses. The most significant cost from the regulatory firewall is the opportunity cost of foreign investment. In fact, the Vietnamese government clearly recognizes that its "foreboding" firewall drives off potential foreign investors while severely limiting domestic entrepreneurs.⁵⁴

IV. DEFINITION OF THE PROBLEM

The current technological dilemma in Vietnam is two-fold. First, the government needs a means by which to address the increasing Internet and mobile phone servicing demands of the country. Second, the government faces the question of how to maintain Vietnam's regulatory firewall over transmitted information in spite of the recent trend toward privatization of Internet services.

A. MEETING INTERNET SERVICING NEEDS

As cited below, a number of statistics show that despite the enormous costs of Internet access, there is a sharp increase in the demand and consumption of Internet services. For instance, the Vietnamese government has estimated that by 2005, at least 1.2 million people (1.5 percent of the population) should be able to afford access to the Internet.⁵⁵ By 2010, the Government estimates that there will be approximately twenty-three million Internet users.⁵⁶

With the significant increase in the demand for Internet services, both consumers and suppliers have argued for governmental reform. As early as 1998, ISPs began to openly express discontent with the VDC's role as the sole IAP. The state owned ISPs essentially argued that such a structure represented "unfair competition."⁵⁷ Consumers have long since expressed that the state-owned Internet monopoly is a source of

52. *Id.*

53. U.S. Dept. of State, *Background Note: Vietnam*, ¶ 4 <<http://www.state.gov/r/pa/bgn/4130.htm>> (accessed Jan. 10, 2003).

54. McDonald, *supra* n. 37, at ¶ 11.

55. Tu Hoang, *Sharp Rise in Internet Subscriptions Forecast*, Vietnam Inv. Rev. ¶¶ 1, 3 (June 4, 2001) (available in 2001 WL 12429689); see also James Borton, *Vietnam Joins the Internet Revolution*, Asia Times, ¶ 19 (Feb. 22, 2002) (citing that DGPT aims to increase Internet usage to 4-5 percent of the population by 2005).

56. *Id.*

57. *Reduction in Internet Access*, Vietnam Econ. Times ¶ 6 (Sept. 1, 1998) (available in 1998 WL 29277372).

bandwidth delay, service congestion, and exorbitant usage fees.⁵⁸

But the concerns expressed by domestic consumers and ISPs are in actuality, a tenet of a much larger ongoing campaign for reform. For instance, a major concern among state economists and market reformists in Vietnam is,

[t]he widespread monopoly situation in most industries, the lack of a level playing field for different economic sectors, and policy mechanisms which do not encourage the entry of new competitors to the market.⁵⁹

Additionally, ever since Vietnam implemented the policy of *Doi Moi*,⁶⁰ there has been broad support for economic liberalization of markets.⁶¹ Vietnam has aligned itself with various international bodies such as the Association of South East Asian Nations ("ASEAN") and the Asian Pacific Economic Cooperation ("APEC"), both of which have had an effect on Vietnam's domestic economic policy.⁶² For example, on November 4, 2000, at an ASEAN Summit in Singapore, the Vietnamese government adopted the E-ASEAN agreement, promoting the cooperation between member countries in establishing "Information and Communications Technology" ("ICT").⁶³

In August 2001, as a result of domestic pressure, the Vietnamese government made affirmative efforts to evaluate the plausibility of implementing new antitrust laws, which would open the local Net access market to competition between private Internet service providers.⁶⁴ On September 7, 2001, the Vietnamese government implemented a new Internet Technology decree, allowing ISP businesses to participate with foreign investment enterprises ("FIEs") and other private Internet com-

58. *Id.* at ¶¶ 1-3; see also Giang, *supra* n. 2.

59. *Vietnam: Competition and Anti-trust*, Vietnam Econ. Times 1 (Feb. 1, 1999) (available in 1999 WL 9140984).

60. The literal translation of "Doi Moi" is a "new change." See Nguyen Van Khon, *Anh-Viet Viet-Anh, Tu Dien* (Dainam Publ. 1987). For a broader discussion of the economic liberalization effects of "Doi Moi," Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: The Uneven Legacy of Doi Moi*, 29 N.Y.U. J. Intl. L. & Policy 555 (1997); Pamula L. Polevoy, *Privatization in Vietnam: The Next Step in Vietnam's Economic Transition From a Nonmarket to a Market Economy*, 23 Brook. J. Intl. L. 887 (1998).

61. See generally Mark Sidel, *New Directions in the Study of Vietnamese Law*, 17 Mich. J. Intl. Law 705 (1996) (discussing the content and origin of Doi Moi); see also Pham Van Thuyet, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Vietnam*, 27 L. & Policy Intl. Bus. 541 (1996).

62. See Yoshi Kodama, *Annual Review of Significant Developments: 1995 Asia-Pacific Region, APEC and ASEAN*, 30 Intl. Law. 367 (1996) (discussing Vietnam's involvement with both international organizations).

63. See E-ASEAN Framework Agreement: Singapore <http://www.aseansec.org/summit/inf4_afw.htm> (Nov. 24, 2000) (accessed Jan. 10, 2003).

64. Adam Creed, *Vietnam Government Readies New Internet Rules*, Newsbytes News Network ¶¶ 1-4 (Aug. 20, 2001) (available in 2001 WL 23417879).

panies.⁶⁵ The decree also allowed other businesses to compete within the IAP market, contingent upon the State holding a controlling stake.⁶⁶

B. MAINTAINING VIETNAM'S FIREWALL IN LIGHT OF LIBERALIZATION

The second technological dilemma facing the Vietnamese government is how to maintain Vietnam's regulatory firewall over transmitted information given the recent trend toward privatization of Internet services. While Vietnamese leaders generally support the expansion of the Internet service market, many are adamant in maintaining the integrity of the firewall. Do Quy Doan, chairman of the Vietnam Web site Project at the Ministry of Culture and Information, stated that the Vietnamese authorities show no signs of tearing down their firewall.⁶⁷ This statement is indicative of Vietnam's efforts to insure the continued existence of its regulatory approach to the Internet.

The intent of the Vietnamese government in maintaining control over the firewall is also being manifested in various policy measures. For instance, the government has launched a propaganda campaign to educate and warn citizens about accessing inappropriate sites.⁶⁸ The intent of such campaigns is to make users aware of various content restrictions while providing a preventative tool to limit the number of potential offenders.⁶⁹ The government has established stricter fines and penalties for illegal use of the Internet.⁷⁰ These fines can be imposed for activities ranging from minor offenses such as accessing prohibited sites to more serious offenses such as computer hacking.⁷¹

V. ANALYSIS: WHY VIETNAM CAN NO LONGER MAINTAIN ITS REGULATORY FIREWALL

As previously described, development of the means to address the increasing Internet servicing needs of the country is incompatible with the maintenance of the firewall over transmitted Internet information. The two goals present conflicting and contradictory policy outcomes.

The tension between these two issues is reflected in Vietnam's legal texts, demonstrating the current discord between socialism and mar-

65. See *Government Throws Open Internet Door To All Economic Sectors*, Vietnam News 1 (Aug. 31, 2001) <<http://vietnamnews.vnagency.com.vn/2001-8/30/Stories/19.htm>>.

66. *Id.*

67. See McDonald, *supra* n. 37; see also *Communist Vietnam May Fortify Internet Firewall*, Lao Dong Newsp. (Aug. 16, 2002) (citing Phan An Sa, Deputy Chief Inspector of the Culture and Information Ministry, intent to further strengthen Vietnam's firewall).

68. *Communist Vietnam May Fortify Internet Firewall*, *supra* n. 67, at 3.

69. *Id.*

70. *Id.*

71. *Id.*

kets.⁷² For instance, the Constitution of Vietnam sends a conflicting message. On one hand, it states that the state sector shall play the leading role in the national economy.⁷³ On the other hand, it allows for private individuals and private capitalist sectors to “set up enterprises of unrestricted scope in all fields of activity.”⁷⁴

The threshold issue then becomes whether Vietnam’s attempt to increase Internet servicing through privatization will undermine the regulatory effect of the country’s firewall over the Internet. There are three major reasons why Vietnam will not be able to maintain its regulatory control over the firewall. First, Vietnam’s recently implemented anti-trust policies in the form of the *Enterprise Law*,⁷⁵ the *Law on Competition*,⁷⁶ and the *Law on Competition and the Internet Technology Market*⁷⁷ will significantly reduce the regulatory effectiveness of Vietnam’s state owned gateway. Second, increased privatization resulting from these anti-trust measures will significantly strengthen the domestic lobby⁷⁸ among business owners and consumers in opposition to the firewall. Third, Vietnam’s formal subscription to E-ASEAN⁷⁹ will lead to greater international pressure for the government to open Internet markets and reduce regulatory barriers over telecommunication channels.

A. VIETNAM’S ANTITRUST POLICY

The first reason why the Vietnamese government will not be able to maintain its regulatory firewall over information transmitted via the Internet is due to its recent anti-trust policies that have been promulgated in the form of various laws.

The notion of anti-trust is a relatively new concept among Vietnamese political and economic policy makers.⁸⁰ Ever since Vietnam’s extraordinary economic reforms beginning with *Doi Moi* coupled

72. See Kovacic, *supra* n. 11; see also Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 UCLA P. Basin L.J. 221 (1993) (discussing Vietnam’s difficulties in achieving legal reform in light of the country’s transition toward market liberalization).

73. See Kovacic, *supra* n. 11.

74. Socialist Republic of Vietnam Const. of 1992, ch. II, art. 21 <http://www.cpv.org.vn/vietnam_en/constitution/1992/chapter2.htm>.

75. See *infra* pt. V. A2.

76. See *infra* pt. V. A1.

77. See *infra* pt. V. A3.

78. See *infra* pt. V. B.

79. See *infra* pt. V. B.

80. See Kovacic, *supra* n. 11, at 1077-78; see also William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies For U.S. Antitrust Policy*, 74 St. John’s L. Rev. 361, n.9 (Spring 2000) (mentioning the work that Western antitrust institutions have engaged in to help governments such as Vietnam understand and develop specific antitrust legislation).

with nearly a decade of significant growth, the government has considered the economy at somewhat of a standstill. As a result of this,

Vietnamese policy makers are seeking to identify the proper approach to developing a competition policy system in emerging markets and determine how a competition regime would operate in a national that mandates a preeminent role for the state as a market participant.⁸¹

In fact, it was not until October 2000, that the Ministry of Trade actually began drafting an anti-trust law to regulate monopolies and competition within Vietnam's emerging open market economy.⁸² In a series of seminars and legislative workshops, the Ministry of Trade attempted to heed the concerns of business leaders regarding the inability of private companies in Vietnam to compete with state-owned enterprises.⁸³ After much discussion, the net result of these negotiations between business leaders and the Ministry of Trade was a tentative draft, entitled the *Competition Law*.⁸⁴

1. *Development of Vietnam's Law on Competition*

The anti-trust legislation attempts to address four key types of anti-competitive behavior. First, it takes preventative measures against collusion among producers to fix prices, output, and divisions of market share.⁸⁵ Second, the legislation prohibits dominant firms from dumping goods into the market or overcharging during the low point in the production cycle.⁸⁶ Third, it limits mergers and acquisitions that would create monopolies or overly dominant companies in a particular sector.⁸⁷ And finally, the new laws eliminate anti-competitive activities such as undercutting, misleading advertising, and illegal bribery.⁸⁸

To fully understand how business groups were able to effectively negotiate, lobby, and coordinate with the Vietnamese government in draft-

81. See Kovacic, *supra* n. 11, at 1075-76.

82. Nguyen Hong, *Talks Delay Inking of Draft Competition Law*, Vietnam Inv. Rev. ¶ 1 (Oct. 2, 2000) (available in 2000 WL 9576638).

83. *Id.* at ¶ 2.

84. See generally Ngo Hong Hanh, *Competition Law Draft Takes Monopolies to Task*, Vietnam Inv. Rev. (June 2001) (available in 2001 WL 12429728); Ngo Hong Hanh, *Competition Law to Free Deserving Market Players*, Vietnam Inv. Rev. (July 2001) (available in 2001 WL 12429870) (discussing the background of the legislative process involved in the drafting of the Law on Competition); see also Kovacic, *supra* n. 11, at n. 6 (citing to other publications on the development of the Law on Competition); Nguyen Binh, *General Report on Competition Law in the Market Economy in Vietnam* (Mar. 1997) (discussing existing Vietnamese laws with competition policy implications and suggesting need for new initiatives in Vietnam pursuant to United Nations Development Program VIE/94/003).

85. See Nguyen Hong, *Competition Law Subject to Sectoral Exemptions*, Vietnam Inv. Rev. 1 (Nov. 13, 2000) (available in 2000 WL 9576977).

86. *Id.*

87. *Id.*

88. *Id.*

ing this law, it is important to take a step back and to briefly note the legislative policy that set the ground work for such actions, notably the *Enterprise Law*.

2. *The Enterprise Law*

As mentioned before, as a result of Vietnam's economic standstill in the late 1990's, the government made an active attempt to boost the competitiveness of the country's domestic exports.⁸⁹ This included an effort by the government to cut red tape, license fees, and bureaucratic supervision.⁹⁰

In addition, the law expedited specific procedures among individuals applying for business licenses. As the Prime Minister, Phan Van Khai, emphasized: "an important component of the [Enterprise] law is that it removes specific legal franchise requirements for private enterprises, making it easier for them to set up business."⁹¹

Thus, the extent to which domestic businesses were able to successfully negotiate anti-trust legislation with the Vietnamese government was completely dependant upon the implementation of the *Enterprise Law*.⁹² A recent report by the World Bank found that the *Enterprise Law* significantly simplified the business start-up process.⁹³ In addition, the report estimated that approximately 10,000 additional domestic firms had registered for business licenses in the first nine months after the adoption of the Law.⁹⁴ The Vietnamese government also estimated that the Law had resulted in the creation of approximately 100,000 new jobs.⁹⁵

3. *The Law on Competition and the Internet Technology Market*

The National Assembly is not expected to formally codify the *Law on*

89. See Ngo Quang Xuan, *Vietnam: Potential Market and New Opportunities*, 19 *Fordham Intl. L.J.* 32, pt. II.B. (Oct. 1995) (discussing Vietnam's policy objectives regarding increased exports in the early 1990s).

90. See Bich Ngoc, *Enterprise Law Hailed for Boosting Trade and Jobs*, *Vietnam Inv. Rev.* ¶ 3 (Sept. 18, 2000) (available in 2000 WL 9576594).

91. Ha Thang, *State to End Bias Against Private Firms*, *Vietnam Inv. Rev.* ¶ 3 (May 10, 1999) (available in 1999 WL 16539165).

92. See Thai Thanh, *Entrepreneurship Should be Fostered*, *Saigon Times Mag.* (Aug. 2, 2000) (interviewing Dr. Le Dang Doanh, Director of the Central Institute of Economic Research; discussing the relationship between established enterprises and the openness of Vietnam's business laws).

93. Joint Report of World Bank, Asian Development Bank and UNDP, Consultative Group Meeting for Vietnam, *Vietnam 2010: Entering the 21st Century, Overview, Vietnam Development Report 2001 9* (2001) <http://www.adb.org/documents/reports/Vietnam_2010/overview.pdf>.

94. *Id.*

95. Ngoc, *supra* n. 90, at ¶ 1.

Competition until 2003.⁹⁶ Despite this, there is significant evidence that the law already has had a profound effect on the Internet technology and communications market.⁹⁷ When evaluating the future of the Internet technology market in the context of the legislative purpose and intent of the *Law on Competition*, a number of significant observations develop.

First, with the advent of the *Enterprise Law* and the prospective *Law on Competition*, domestic Internet servicing companies find themselves in a much more favorable position to negotiate against the perils of Internet market regulation.⁹⁸ Since the *Enterprise Law* fundamentally eased the number of licensing requirements for business applications, business owners can also easily argue that the benefits of the law should be extended to licenses within the Internet servicing market.⁹⁹

Second, the current political climate is also conducive to consumer activism in support of restructuring the Internet service market. This is based on the notion that consumers have more information about services in Vietnam and understand the adverse effects of a monopoly.¹⁰⁰ The fact that consumers of Internet services in Vietnam have been subjected to high fees, unreliable access, and excessive use requirements, indicates that a large percentage of Internet users are highly dissatisfied with the State's control over the Internet market.¹⁰¹

Third, there is already evidence that the government has been forced to adjust its economic policy regarding the Internet service market. This is demonstrated by Vietnam's recent decree opening the Internet market to competition between private ISPs. The government also has recently allowed businesses to compete within the IAP market as long as the State has a controlling stake.¹⁰² Even the head of the DGPT, Mai Liem Truc, has asserted that, "to promote the use of the Internet we need to improve the quality of IT services and reduce Internet

96. Hong *supra* n. 82, at ¶ 5; see also Sun-Hee Lee, *Vietnam Competition Law and Competitiveness*, AsiaLine ¶ 7 (Dec. 23, 2002) <<http://www.asialine.dfat.gov.au/asialine/asialine.nsf>> (citing that the final draft is to be discussed at April 2003 National Assembly).

97. See Paulette Blanscet, *Vietnam: Telecommunications Market Overview*, Off. of Telecomm., U.S. Dept. of Commerce, U.S. Intl. Trade Commn. (July 2000) (citing that due to anticipated Competition Law, the build up of Vietnam's telecommunication network is increasingly becoming one of the largest in the world despite being highly regulated).

98. *Vietnam: Competition and Anti-Trust*, *supra* n. 59, at ¶ 13.

99. See Ngo Hong Hanh, *Competition Law to 'Free Deserving Market Players'*, Vietnam Inv. Rev. 4 (July 23, 2001) (available in 2001 WL 12429870) (discussing how Vietnam's competition laws are requiring regulators to consult interested market participants before implementing policy).

100. See *Vietnam: Competition and Anti-Trust*, *supra* n. 59, at ¶ 13.

101. Cohen, *supra* n. 3, at ¶¶ 1-4.

102. See *Government*, *supra* n. 65.

access fees.”¹⁰³

From these observations, it is clear that the *Law of Competition* will affect the Internet service market in some form. The degree to which the Law will alter the market remains to be seen until it is officially implemented in 2005, but all indications tend to demonstrate a trend toward privatization in the Internet market.¹⁰⁴ The next question that needs to be addressed is the manner in which privatization within the Internet service market will constitute an end to Vietnam’s regulatory firewall.

B. PRIVATIZATION AND THE FIREWALL

The second reason why the Vietnamese government will not be able to maintain its regulatory firewall over the Internet is due to the privatization of the telecommunication market. Historically, the ability of the Vietnamese government to effectively monitor information transmitted over the Internet is the result of operating a single gateway through which all Internet traffic must travel.¹⁰⁵ Thus, since the gateway is administered through Vietnam Data Communications, which is owned by the DGPT, the government has direct oversight over the single bandwidth transmitting Internet information.¹⁰⁶ Essentially, the gateway provides a “bandwidth shared line”¹⁰⁷ which means that customers accessing the Internet either within or outside of Vietnam are forced to transmit information through the gateway.

Given this arrangement, the government is able to distribute resources to the single bandwidth through the use of software, decoding applications, e-mail interception, and censoring programs.¹⁰⁸ The effectiveness of these technological monitoring tools is clearly dependent on the quantity of information received and the various channels upon which information is being transmitted. In theory, the convenience of a single bandwidth enables the government to not only control the speed and quantity of information, but also to focus regulatory resources to a single channel of transmitted information.¹⁰⁹ Additionally, all five of Vi-

103. *Internet Usage Tipped to Skyrocket*, Vietnam News 1 (Sept. 10, 2001) <<http://vietnamnews.vnagency.com.vn/2001-08/30/Stories/24.htm>>.

104. See Blanscet *supra* n. 97, at 1; see also Lee, *supra* n. 96, at ¶¶ 8, 11.

105. See *supra* n. 21.

106. See Watkin, *supra* n. 6, at ¶ 1.

107. A “shared bandwidth line” is defined as : (1) A range within a band of frequencies or wavelengths, (2) The amount of data that can be transmitted in a fixed amount of time. For digital devices, the bandwidth is usually expressed in bits per second(bps) or bytes per second. For analog devices, the bandwidth is expressed in cycles per second, or Hertz (Hz) <www.pcwebopedia.com/TERM/b/bandwidth.html>.

108. Watkin, *supra* n. 6, at ¶¶ 1-2, 8, 12; see also Cohen, *supra* n. 3, at ¶ 1.

109. *Vietnam Internet Issues*, *supra* n. 21, at 1.

etnam's original state controlled ISPs were only able to provide Internet services based on access that originated through the gateway.

As mentioned in part, on September 7, 2001, the Vietnamese government issued a decree allowing for the participation of private entities in the ISP market and in the IAP market, contingent on the State owning a controlling stake.¹¹⁰

The privatization of Internet services as demonstrated by this recent decree, hampers Vietnam's policy goal to maintain the integrity of the regulatory firewall in a variety of ways. First, by allowing private companies and foreign investment enterprises (FIEs) to provide Internet services, the expectation is that the cost of service will significantly decrease.¹¹¹ As private ISPs compete with state-controlled ISPs, the price of Internet access will no longer be set at a state regulated price, rather it will be based on the demand of consumers. The government, to some extent, has given credence to this foreseeable outcome. For instance, the government has estimated that by 2003, as many as ten new ISPs are expected to utilize these new regulations.¹¹² Additionally, the expectation is that when the consumer price of Internet service decreases, the demand for such servicing will naturally increase.¹¹³ Increased demand for Internet services subverts the effectiveness of Vietnam's firewall in that the quantity of information transmitted over the Internet will also exponentially increase.¹¹⁴

Unless Vietnam is able to distribute more resources to the firewall in response to the increased information flow resulting from consumer demand, it is highly unlikely that effective monitoring can take place. There are many who have substantiated this claim by referring to the structural failure of Vietnam's firewall at current demand levels.¹¹⁵ Do Quy Doan, Chairman of the Vietnam Web site Project at the Ministry of Culture, has openly expressed that control through the firewall is no longer effective.¹¹⁶ As consumer demand for Internet services increases, it appears that the government is more interested in making investments in the infrastructure of the gateway to improve the quality of access than in reinforcing the firewall.

Additionally, rather than strengthening the technical infrastructure of the firewall, the government seems to be more adamant about impos-

110. Creed, *supra* n. 64, at 1; *see also supra* n. 65.

111. *See The View From Here*, Vietnam Inv. Rev., Jul. 2001, at 2 (discussing the domestic price effects from privatization and the reduction in state owned enterprises).

112. *See Creed, supra* n. 64; *see also Government, supra* n. 65.

113. *See Government, supra* n. 65.

114. Blanscet, *supra* n. 97, at 2 (discussing the increase of information flow in Vietnam's telecommunications market).

115. McDonald, *supra* n. 37, at ¶ 3.

116. *Id.*

ing high fines and penalties as a new source of deterring subscribers from accessing adverse Internet content.¹¹⁷ Such penalties are also assigned to ISPs that fail to provide adequate regulatory safeguards and do not meet a set standard of quality service.¹¹⁸

Second, opening the IAP market to other businesses, even if the State holds a controlling stake, eliminates the convenience of regulating a single bandwidth. An example of this is the VDC's recent business cooperation contract ("BCC") with Hong Kong Telecommunications, Ltd. The contract allows Hong Kong Telecommunications to provide many of Vietnam's ISPs with a higher bandwidth area.¹¹⁹ Cooperative contract arrangements such as this inevitably subvert the firewall where there are new incoming lines that provide Internet access without having to go through the gateway.

Third, as privatization increases the demand for Internet services, the regulatory costs of regulating the firewall can be expected to increase.¹²⁰ As already stated, if the purpose of the firewall is to ensure that politically, religiously, or sexually offensive material is inaccessible,¹²¹ then sufficient resources must be in place to oversee the increased availability and use of the Internet. These resources include sophisticated filtering software, high capacity servers, and a wide network to identify incoming or outgoing transmissions, all of which are extremely costly.¹²² This does not include the immense human capital in the form of technical expertise, system engineers, and network analysts that have to maintain the structural architecture of the firewall.¹²³ The Ministry of Culture and Information will also need to employ more inspectors and trained censors to insure compliance.

Fourth, in the long run, privatization will personify the opportunity costs of imposing a firewall in the form of lost foreign investment.¹²⁴ In an attempt to minimize the loss of foreign and domestic investment in the Internet service market, the government has adopted a firewall free

117. Adam Creed, *Vietnam Government Readies New Internet Rules*, Newsbytes News Network ¶¶ 1, 7-11 (Aug. 30, 2001) (available in 2001 WL 23417879).

118. *Id.* at ¶ 11.

119. David Tran, *Hong Kong Telecom Steps into Internet Market with VDC*, NEA ¶¶ 1, 9 <<http://www.nikkeibp.com/nea/jul98/napjuly/nam.html>>.

120. Reed, *supra* n. 10, at pt. II (discussing the significant costs to Chinese government from Internet regulation).

121. See McDonald, *supra* n. 37.

122. See Reed, *supra* n. 10.

123. *Id.*

124. Minimizing opportunity costs is consistent with Vietnam's efforts to foster foreign investment through economic reform. See Norman Brown IV., *The Long Road to Reform: An Analysis for Foreign Investment Reform in Vietnam*, 25 B.C. Intl. & Comp. L. Rev. 97 (2002); see also Luke Aloysius Mcgrath, *Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 Fordham Intl. L.J. 2095 (1995).

business zone.¹²⁵ It is still questionable whether or not this zone will sufficiently offset the loss of investment from businesses deterred by Vietnam's regulatory scheme.

Fifth, Vietnam's *Law on Competition* will provide a body of litigation that will undermine the value of the regulatory firewall. For instance, anti-trust laws will provide both foreign and domestic investors with a legal tool to fight government protectionism.¹²⁶ The *Law on Competition* will be viewed as a remedy to adequately address concerns regarding corruption, red tape, lackluster law, and lack of transparency in the Vietnamese legal system.¹²⁷ Where regulatory requirements such as the registration of users or adequate safeguards to insure the transmission of appropriate content are imposed on ISPs, firms to some extent may argue that such requirements limit their competitive advantage and act as a bureaucratic tool hindering efficiency. Anti-trust laws in Vietnam could reasonably be used by private ISPs as a wedge against Internet regulation in the name of competition.¹²⁸

Among consumers, anti-trust laws will encompass a new source of social justice.¹²⁹ Consumers will become more apt to state claims allowing for consumer choice in the Internet market. They will also be more able through anti-trust laws to litigate against "unfair practices such as predatory and discriminatory pricing by maintaining competitive markets."¹³⁰ In essence, consumer liberalization through privatization may translate into broader civil rights claims. Arguably, the right to life, healthcare, education, and employment are associated with economic prosperity to some degree. This is demonstrated by the contribution of anti-trust laws in the United States, where such laws emphasize "human liberty and benefiting the consumer's economic position."¹³¹

The anti-trust laws in Vietnam will also form a specialized body of case law, a dispute system, and a resolution process. This is evident from Vietnam's recent penalties against ISPs to adequately provide content safeguards or maintain a certain set level of quality services. Anti-

125. McDonald, *supra* n. 37, at ¶ 12.

126. See Hiep D. Truong, *Encouraging Foreign Direct Investment in Vietnam: Economic Reform, Protection Against Expropriation, and International Arbitration*, 8 J. Transnatl. L. & Policy 347, 353 (1999) (discussing the various legal remedies and mechanisms Vietnam has adopted to facilitate foreign investment).

127. *Id.*

128. See Dror Ben-Asher, *What's the Connection? Vietnam, The Rule of Law, Human Rights, and Antitrust*, 21 Hous. J. Intl. L. 427, 434-435 (1999) (discussing the general effects of anti-trust policy in Vietnam on business and consumers).

129. See *id.* at 439-41 (discussing the relationship of Vietnam's anti-trust laws and development of human rights).

130. *Id.* at 439-40.

131. *Id.* at 441.

trust laws may act as a “safe harbor” for ISPs hoping to alleviate the effects of these content requirements.

C. E-ASEAN

The third indicator that the Vietnamese government will not be able to maintain its regulatory firewall over information transmitted via the Internet stems from its obligations under E-ASEAN. This is supported by the fact that both domestic pressures, such as privatization, and international pressures hinder the effectiveness of Vietnam’s firewall.¹³²

1. *Brief overview of ASEAN*¹³³

The Association of Southeast Asian Nations (“ASEAN”) was established on August 8, 1967, in Bangkok, Thailand by five original members: Indonesia, Malaysia, Philippines, Singapore, and Thailand.¹³⁴ It was not until July 28, 1995, that Vietnam joined the organization.¹³⁵ The ASEAN declaration sets forth two main objectives of the organization: (1) to accelerate the economic growth, social progress and cultural development in the region through joint endeavors and partnerships,¹³⁶ and (2) to promote regional peace and stability by adherence to the principals of the UN charter.¹³⁷ Since its original founding, ASEAN has been active in enacting various political accords, agreements, and cooperative partnerships ranging from issues such as transnational crime to energy policy.¹³⁸

2. *Legislative Intent of E-ASEAN*¹³⁹

On November 24, 2000, Vietnam, as well as the other members of ASEAN entered into an agreement regarding Information and Communications Technology (“ICT”), which was later titled as E-ASEAN.¹⁴⁰ Article 2 sets forth the basic objectives of the Agreement consisting of:

132. See generally Dawn Tan Ly-Ru, *Singapore and International Law: July-December 2000*, 4 Sing. J. Intl. & Comp. L. 530 (discussing changes in Singapore domestic ITC policy as a result of E-ASEAN).

133. See generally Sherry M. Stephenson, *ASEAN and the Multilateral Trading System*, 25 L. & Policy Intl. Bus. 439 (Winter 1994).

134. Association of Southeast Asian Nations: *An Overview, Establishment and Membership* ¶ 2 <<http://www.aseansec.org/147.htm>> (accessed Jan. 10, 2003).

135. *Id.*

136. *Id.* at ¶ 4.

137. *Id.*

138. *Id.* at ¶ 9.

139. See E-ASEAN Task Force ¶ 8 <<http://www.e-aseantf.org>> (accessed Jan.10, 2003) (providing additional resources regarding the background, formation, purpose, and projects associated with E-ASEAN).

140. See *E-ASEAN Framework Agreement: Singapore, 24 November 2000* <<http://www.aseansec.org/910.htm>> (accessed Jan. 10, 2003).

promoting cooperation to enhance the competitiveness of the ICT sector in ASEAN, reducing the digital divide between ASEAN member states, promoting cooperation between public and private sectors, and promoting the liberalization of trade in ICT products and services.¹⁴¹

It is important to address the various reasons why fulfilling their obligations under E-ASEAN is of utmost concern to the Vietnamese government. In the past decade, Vietnam has attempted to integrate itself with the emerging Asian-Pacific regional bloc. This has involved aligning itself with other nations by becoming members of regional blocs such as ASEAN and APEC.¹⁴² Furthermore, Vietnam has been active in forming trade alliances with countries such as the United States.¹⁴³ Some have speculated that Vietnam's attempt to integrate itself within the international economic sphere centers on future plans to join the World Trade Organization ("WTO")¹⁴⁴ or obtain most favored nation trade status.¹⁴⁵

Vietnam's signing of the E-ASEAN agreement is an outward manifestation of the country's current efforts toward economic integration. In addition, it is the government's recognition of the vital role e-commerce plays in the region and the importance for Vietnam to participate in this trend.¹⁴⁶ The government also realizes its precarious position in relationship to Internet technology. A recent report by an ASEAN working group ranked Vietnam's information technology as the fourth lowest

141. *Id.* at art. 2.

142. APEC, *Why APEC Matters to Americans* <<http://www.apec.org>> (accessed Jan. 10, 2003). The Asia-Pacific Economic Cooperation (APEC) forum was established in 1989 to promote economic integration around the Pacific Rim and to sustain economic growth. *Id.* APEC currently has twenty one members: Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; Republic of the Philippines; Russia; Singapore; Chinese Taipei; Thailand; USA; Vietnam. *Id.*; see also Martin Runder, *Institutional Approaches to Regional Trade and Cooperation in the Asia Pacific Area*, 4 *Transnatl. L. & Contemporary Problems* 159, 167-78 (Spring 1994) (discussing the role of APEC).

143. See U.S. Embassy, Hanoi, Vietnam, *Bilateral Trade Agreement, in effect from December 10, 2001* <<http://usembassy.state.gov/vietnam/wwwhtiss.html>> (accessed Jan. 10, 2003). The United States recently entered into a renewed bilateral trade agreement with Vietnam, which took effect on December 10, 2001. *Id.*; see also Yen D. Chu, *The Making of a Quagmire: The Inadequacies of Applying the Jackson-Vanik Amendment to Vietnam's Transitional Economy*, 5 *Colum. J. Transnatl. L.* 453 (1997) (discussing Vietnam's recent trade relationships with the U.S.).

144. See Fredrick Burke, *Vietnam's WTO Accession Negotiations* <<http://www.itis-online.com.sg/doc/Vietnam'sWTOAccession.pdf>> (accessed Jan. 10, 2003).

145. See Davis Frye, *Vietnam's Contemporary Battle with the United States: Vying for Most Favored Nation Trading Status*, *Vand. J. Transnatl. L.* 777 (Oct. 1996).

146. Tu Giang, *Board Chief Sheds Light on National E-Commerce Plan*, *Vietnam Inv. Rev.* ¶ 1 (July 30, 2001) (available in 2001 WL 12429947).

compared to all ten of the member countries.¹⁴⁷ The report also stated that there were only nine PCs for every 1000 people, and that just 0.013 percent of the total population had access to the Internet.¹⁴⁸ Vietnam's telecommunications fees and Internet access charges were also cited as the highest in the region.¹⁴⁹ The Government also recognizes the limited availability of financial resources to improve its Internet infrastructure. As Tran Cong Due, an officer within the Ministry of Science, Technology, and Environment, stated: "the severe lack of capital is barring us from materializing the dream of prosperity brought about by information technology."¹⁵⁰

Given these facts, the Vietnamese government views E-ASEAN as a way to develop regional partnerships to alleviate its struggling technological crisis.¹⁵¹ In particular, E-ASEAN is perceived as a means to obtain financial and technical resources that the country otherwise could not access.¹⁵² For instance, in January 2002, Vietnam implemented a program within the E-ASEAN Agreement, called the "E-Trade Bridge" to help incorporate new technologies into trading practices.¹⁵³

3. *E-ASEAN and the Firewall*

Vietnam's adoption of E-ASEAN undermines all policy efforts to maintain the regulatory firewall. First, Article 4, Clause 1 of the E-ASEAN agreement conflicts with any long run policy of maintaining the firewall through the use of a single IAP.¹⁵⁴ Article 4, Clause 1, states that members shall design their domestic information infrastructure to facilitate interconnectivity and ensure technical inter-operability between other member information infrastructures.¹⁵⁵ In theory, for Vietnam to meet this requirement, the country will have to substantially change its gateway design. The presence of a single bandwidth, which basically supports the primary structure of the firewall, severely limits both interconnectivity and inter-operability.¹⁵⁶ Additionally, it has been

147. Tu Giang, *Asian IT Poll Ranks Country as Seventh Best*, Vietnam Inv. Rev. ¶¶ 1-3 (Feb. 19, 2001) (available in 2001 WL 12429059).

148. *Id.* at ¶ 11.

149. *Id.*

150. Tu Giang, *It is Still the Case: Main Information Technology Projects Lacking Cash*, Vietnam Inv. Rev. ¶ 4 (Sept. 24, 2001) (available in 2001 WL 12430260).

151. Dao Yen, *Can Vietnam Hatch the E-Commerce Golden Egg?* <http://www.internetnews.com/ec-news/article/0,,4_869671,00.html> (accessed Jan. 10, 2003).

152. *Id.*

153. U.N. Development Programme, *E-trade Plan to Back Dot.com Entrepreneurs in Viet Nam*, Media Release <<http://www.undp.org.vn/undp/unews/mr/2002/eng/0124e.htm>> (accessed Jan. 10, 2003).

154. E-ASEAN, *supra* n. 140, at art. 4.

155. *Id.*

156. Cohen, *supra* n. 3, at 1; *see also* Watkin, *supra* n. 6, at 2.

demonstrated that Vietnam's use of a single IAP is not sufficient to meet current demand.¹⁵⁷ With this in mind, it is unlikely that a country with a single IAP is in any position to fully comply with the legislative expectations set forth by this Clause.

Second, Article 4 also mandates that Vietnam shift its distribution of resources from regulatory Internet monitoring to improving domestic technological infrastructure.¹⁵⁸ As Clause 2 states, "member states shall work toward establishing high speed direct connection between their national information infrastructures with a view to evolving this interconnection into an ASEAN Information Infrastructure backbone."¹⁵⁹ The language in this clause is significant because it essentially urges Vietnam to depart from its current use of a single bandwidth structure. As stated earlier, the time delay, congestion, and unreliability of Vietnam's current Internet is due to its singular bandwidth. Thus, Clause 2 sets forth that the emphasis is not on Internet regulatory policy, but on establishing high-speed connections, something that Vietnam's current Internet structure does not provide.¹⁶⁰

Third, the E-ASEAN agreement attempts to facilitate regional content exchanges. As stated in Article 4, Clause 3, "member States shall work towards developing ASEAN content, relating but not limited to, cooperation in digital libraries and tourism portals."¹⁶¹ Content exchange is a very controversial issue among advocates of the firewall in Vietnam. It not only increases the type of information accessible over the Internet, but it also provides large databases that some government leaders view as a potential threat to national security.¹⁶² Tourism portals also pose a significant risk in that they undermine the stronghold of the gateway. Such portals provide an alternative route in which information may be accessed or transmitted. Thus, any attempt by Vietnam to regulate content may be easily thwarted through alternative means, especially, the type of exchange that is envisioned by the E-ASEAN Agreement.

Fourth, the ASEAN Agreement places an emphasis on regional, rather than national gateways. Article 4, Clause 4, states: "Member States shall work towards facilitating the setting up of national and regional Internet exchanges and Internet Gateways, including regional caching and mirroring."¹⁶³ The last part of this clause indicates the em-

157. Giang, *supra* n. 2, at ¶¶ 1-2.

158. E-ASEAN, *supra* n. 140, at art. 4.

159. *Id.*

160. Blanscet, *supra* n. 97, at 1 (discussing that Vietnam's current firewall has reduced Internet speeds up to 300 percent).

161. E-ASEAN, *supra* n. 140, at art. 4.

162. *Vietnam: Plugging into Internet Under Government Management*, Saigon Times ¶¶ 10, 14 (April 20, 1997) (available in 1997 WL 8991091).

163. See E-ASEAN, *supra* n. 140, at art. 4.

phasis that the Agreement places on regional gateways. For instance, "caching"¹⁶⁴ is essentially the temporary storage of information transmitted over the Internet. "Mirroring"¹⁶⁵ is creating a duplicate set of Internet content (i.e. information accessed through one gateway may be identically accessed through a completely separate gateway). The last part of Clause 4 creates an Internet structure where, for example, information accessed through Thailand's gateway, may be reciprocally, accessed through Vietnam's gateway.¹⁶⁶ Again, this type of structure constitutes a major threat to Vietnam's ability to preserve its regulatory firewall.

Fifth, E-ASEAN liberalizes ICT services. As articulated in previous sections, privatization poses a significant threat to the continuing viability of Vietnam's firewall.¹⁶⁷ Just as domestic pressure in the form of anti-trust law further pushes Vietnam's Internet servicing market toward privatization, E-ASEAN will produce a similar effect. Article 6 clearly outlines a variety of member obligations in respect to the liberalization of trade, products, services, and investment in ICT.¹⁶⁸ Clause 4, specifically states that members shall, "open immediately [their] ICT products to investments by ASEAN investors."¹⁶⁹ Again, the Vietnamese government is placed in an awkward position. The government must weigh the risks associated with alienating ASEAN investors with those of imposing regulatory mandates to enforce the firewall.

Overall, E-ASEAN sets forth member obligations that are completely contrary to the Vietnamese government's maintenance of its firewall. In fact, Vietnam's subscription to E-ASEAN is the variable that will largely shape the government's Internet technology policy.¹⁷⁰ Member obligations in the form of interconnectivity, information sharing, and regional networks will ultimately bring about the complete demise of Vietnam's regulatory firewall. Thus, there is a high likelihood that Viet-

164. Webopedia.com, *Cache* <<http://www.webopedia.com/TERM/c/cache.html>> (accessed Jan. 10, 2003) (referring to a special high-speed storage mechanism). It can be either a reserved section of main memory or an independent high-speed storage device. Two types of caching are commonly used in personal computers: memory caching and disk caching. *Id.*

165. Webopedia.com, *Mirror Site* <www.webopedia.com/TERM/M/mirror_site.html> (accessed Jan. 10, 2003) (referring to the creation of a Web site that is a replica of an already existing site, used to reduce network traffic (hits on a server) or improve the availability of the original site). Mirror sites are useful when the original site generates too much traffic for a single server to support.

166. E-ASEAN, *supra* n. 140, at art. 4.

167. *See supra* Part V.B.

168. E-ASEAN, *supra* n. 140, at art. 6.

169. *Id.*

170. *See* U.N. Development Programme, *supra* n. 153. This is becoming more evident as Vietnam implements measures such as "E-Trade" which are more consistent with E-ASEAN policy goals rather than those in support of maintaining the firewall. *Id.*

nam will not be able to maintain its firewall given the policy obligations imposed on the government by E-ASEAN.

VI. CONCLUSION

The Vietnamese government is at a pivotal time in its involvement in the Internet servicing market. The government faces a number of critical decisions regarding domestic anti-trust policy, the enforcement of Internet regulatory statutes and long-run integration into the international economic sphere.

Whatever approach the government takes to enforce its control over Internet content will inevitably involve significant costs. If the policy choice is to enforce the firewall by maintaining content, upholding access restrictions, and strengthening the use of a single gateway, the government incurs the costs of limited Internet access speed, capability, and usage. This in turn, will further upset the balance among domestic businesses and customers. Furthermore, the government risks alienating foreign investors interested in domestic Internet servicing. The Vietnamese government could possibly expect to disappoint member states by not fulfilling their commitment under the E-ASEAN agreement.

Conversely, if the Vietnamese government chooses to fully comply with the *Law on Competition*, and completely open the market up to Internet servicing without tedious licensing requirements, content restrictions, and liability for transmitted information, the government will face other costs. Privatization of the Internet market will naturally increase the number of Internet users, IAPs, ISPs, and other private entities. As asserted earlier, the growth of participants in the market will increase the costs of regulation, oversight, and human capital.

An interesting inquiry is whether or not there is any middle ground. According to some scholars, non-regulation is the answer to the regulatory question involving the Internet.¹⁷¹ The premise is based on the following: first, that it is better to allow the Internet to develop and evolve before making any attempt to impose intervening policy;¹⁷² and second, that only after the growth of the Internet has peaked, can regulatory law have any profound effect on content.¹⁷³ Although in practice non-regulation appears to be an attractive solution, it seems to be economically unrealistic. With the increasing use of the Internet for transactional purposes involving commerce, including such activities as e-banking, e-purchasing, and e-reservations, it is highly unlikely that Vietnam, or any

171. Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 *Cornell Intl. L.J.* 435, 458 (2000).

172. *Id.*

173. *Id.*

other country for that matter, will adopt a complete non-regulatory approach.

The recent events in Vietnam demonstrate that at the least, the government is more open to allowing private participation within the Internet market. But even with the government's increasing affiliation with privatization, the complete demise of Vietnam's regulatory firewall may not be apparent for quite some time. Since the Vietnamese government has taken a gradualist approach to privatization, the effects of both the anti-trust laws and expansionist policies affecting the firewall may not manifest themselves immediately. Vietnam's strict fines and penalties over Internet activities may continue to artificially uphold the firewall. Also, until the anti-trust laws are fully applied and until a significant amount of case law results, it is unclear what remedies consumers or business owners may assert against the government for maintenance. What is clear however, is that the government's anti-trust laws, privatization, and subscription of E-ASEAN all have the potential to bring an inevitable end to Vietnam's "bamboo firewall."

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