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VIETNAM'S TRANSITION TO A MARKET ECONOMY: THE USE OF NME STANDARDS IN DUMPING AND COUNTERVAILING INVESTIGATIONS:

or

WHAT HAPPENED TO ME ON THE WAY TO ROME?

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ABSTRACT

There is no question that Vietnam has made significant progress in its march to revamp its system to respond to and participate actively in the global economy. It has done this by embracing market principles and freeing up its enormous potential to grow and compete. The U.S. government has played an active role in encouraging Vietnam to take these steps under the Bilateral Trade Agreement and as Vietnam moves forward in its effort to accede to the World Trade Organization.

Despite what appears to be an environment of predictable certainty for foreign investors in the Vietnamese market, the November 8, 2002 decision by the US Department of Commerce to designate Vietnam a non-market economy (NME) for purposes of U.S. trade remedy laws is inconsistent with its earlier decisions with respect to Russia and other FSU countries.

So what happened to Vietnam on the way to Rome? This paper demonstrates the inconsistency between elements of the US Government, some supporting Vietnam's march to economic development while others placed unnecessary constraints in its path. In 2001 Vietnam passed the market test and became a partner in the US-Vietnam BTA. In 2002, with a new US Administration, Vietnam failed the test. On the way to Rome it learned the lesson of time-inconstancy when you are playing in an asymmetric game with a giant. The experience in the 2002 US decision is instructive of the process of Vietnam's accession to the WTO.

I. INTRODUCTION

Vietnam has made remarkable economic progress in recent years. Macroeconomic and structural reforms introduced as part of the *Doi Moi* or "renovation" policy for transition to a market economy in the late 1980s. The structural reforms undertaken in the 1980s were credible and remain sustainable. Many multinational corporations believing that Vietnam was a nascent East Asian tiger, began shifting some of their operations to Vietnam. Much of this multinational activity in Vietnam was positively affected by the US-Vietnam BTA which moved Vietnam out of the small group of countries that do not have Normal Trade Relation (NTR, formerly called Most Favored Nation Status) with the United States, a move which reduces U.S. tariffs on Vietnamese goods from an average of 40 percent to about 3 percent.[1]

As an economy in transition to a market economy, Vietnam is bound by the Jackson-Vanik freedom of emigration provisions of the 1974 Trade Act. The United States has waived the provisions for Vietnam, subject to congressional approval, since 1998. The waiver is crucial for investment activity since it enables export financing agencies such as the U.S. Export-Import Bank and the Overseas Private Investment Corporation to support U.S. exports to Vietnam, and is necessary for Vietnam to maintain NTR status. The outcome was immediately seen, Vietnam's exports to the US doubled in 2002 and again in 2003. (CIA (2006)).

There is no question that Vietnam has made significant progress in its march to revamp its system to respond to and participate actively in the global economy. It has done this by embracing market principles and freeing up its enormous potential to grow and compete. The U.S. government has played an active role in encouraging Vietnam to take

[1] Vietnam's NTR status was still be subject to annual congressional renewal.

these steps under the year-old Bilateral Trade Agreement (Pelzman (2006). and on January 11, 2007, Vietnam became the 150th WTO member state.

Despite what appeared to be an environment of predictable certainty for foreign investors in the Vietnamese market, comes the November 8, 2002 decision by the US Department of Commerce to designate Vietnam a non-market economy (NME) for purposes of U.S. trade remedy laws. Vietnams were selling fish in the US at less than fair value. Antidumping duties have been imposed on catfish imports from Vietnam since that time. This decision makes Vietnamese industries vulnerable to higher antidumping duties if they are found to be "materially injuring" a U.S. industry with dumped imports.[2] In effect this act by the ITA makes doing business in Vietnam that much more risky.

This paper reviews the economic justification of this decision in light of the fact that it flows in complete contradiction to the US-Vietnam BTA and the stated progress of the Vietnamese transition reforms. One would think that in the interest of policy consistency the U.S. government would be rewarding Vietnam's efforts by recognizing that Vietnam no longer deserves to be treated as a non-market economy under the Tariff Act of 1930 (as amended). Continuing to burden efficient Vietnamese producers with inappropriate comparisons under the NME rules, particularly in agriculture and food production, appears to be unjustified and unfair. Section II presents an overview of Vietnam's transition process. Section III presents the governing paradigm of a market economy as applied to Vietnam by the US Department of Commerce and compares it to other countries, in a similar position, where USDOC did not designate as a non-market economy. Section IV reviews the economic implications of NME status for a respondent like Vietnam. Concluding remarks are presented in Section V.

[2] Vietnam's NME status will apply to all future trade remedy cases until it is revoked. See USDOC, 2002b.

II. THE VIETNAMESE REFORMS

The transition program of Vietnam is contained in its Comprehensive Poverty Reduction and Growth Strategy (CPRGS). As it currently stands, the CPRGS has articulated 7 outcome goals and 11 long term targets (mostly setting 2015 as a deadline for achievement).[3] The CPRGS lays out the various areas for structural reforms: trade liberalization, banking/financial sector reform, SOE restructuring, public expenditure management, and private sector development. The linkages between trade liberalization and private sector development on the one hand and job creation and full employment promotions are all developed in the transition package. The adopted trade reforms increased the employment, incomes, and consumption of all income groups

One outcome of the CPRGS is that industrial output by the domestic private sector grew fastest then the state. State industrial production still accounts for about one third of the industrial production. But as can be seen in table 1 the percentage of the state industrial sector is diminishing over the years and is replaced by the private local sector.

Table 1
Industrial Production by Sector of Ownership as a percent of total industrial production

Year	2000	2001	2002	2003	2004
State sector	41.8	41.1	40.3	38.6	37.2
Non-state sector	22.3	23.6	24.3	25.7	27.2
Foreign invested sector	35.9	35.3	35.4	35.8	35.7

Source: IMF 2006 Country Report No. 06/52, Vietnam: Statistical Appendix

[3] The IMF report noted that "The CPRGS has several strengths, both in substance and in the process guiding its preparation. Important strengths include: (i) the active participation by a wide range of stakeholders in the drafting process; (ii) a robust and comprehensive analysis of poverty which makes balanced use of quantitative and qualitative evidence; (iii) the articulation of a growth-based strategy for poverty reduction with policies covering macroeconomic, structural, and sectoral areas; (iv) the attention given to improving governance; (v) the identification of outcome targets addressing the national challenges and the government's international commitments to the Millennium Development Goals (MDG); and (vi) an attempt to prioritize public actions and to assess their resource implications." See IMF (2002) p. 3.

Including the foreign-invested enterprises, the private sector provides more than half of all industrial output. However, the data tends to underestimate the true contribution of the State sector, since the foreign-invested sector includes joint ventures with minority state-ownership, particularly in oil and gas. The average foreign investment inflow is about US$2.6 billion a year in the last years.

An important part of the transition package includes the conversion of the existing SOEs, thus improving local competition. The first round of substantive SOE reforms took place during 1989-93 when the number of SOEs was reduced form 12,000 to 5,800. With the trade liberalization under AFTA and the US-Vietnam BTA, SOE reform is increasingly tied to market openness.

The Government implemented the equitization-component of the SOE reform program, before the comprehensive transition program had been developed and adopted. The equitizations sold more than 65 percent of shares to non-state shareholders. With the advent of legal legislation in 1999 (Decree 103) the menu of applicable techniques to change the ownership structure of the sector have expanded. The legal framework provides for smaller SOEs (with capital less than 1 billion VND), to be sold entirely to one owner directly or via an auction. Also, small loss-making SOEs can be transferred to employees free of charge, conditional on the enterprise being turned around. In line with the SOE privatization, there has been a remarkable growth in SME start-ups, do to the Enterprise Law implemented in 2000. The number of foreign-invested projects rose twenty-fold in the 1990s and the share of 100 percent foreign-owned projects, though small in the early years, has risen to 43 percent. Nearly a third of total industrial output is now produced by foreign-invested enterprises. FDI inflow peaked at $2 billion each year during the 1995-97 period, a peak that was exceptionally high both as a share of GDP and per capita.

FDI projects in the energy sector were signed in late 2000 and early 2001(i.e. Nam Con Son gas pipeline project of US$ 1.6 and the first-ever BOT projects in power generation of $800 million). This combined with the US-Vietnam BTA-induced foreign investments in manufactured exports.

Three policy changes undertaken in 2000 and a decision on BOT helped to improve the outlook for private investment considerably. (US-Vietnam Trade Council Education Forum, 2002) First, the Enterprise Law, together with the implementing decrees (01, 02, and 03) and the abolition of licensing requirements for domestic companies in 145 different trades, industries and services, opened up domestic private entry into many sub-sectors, generating the SME response discussed above. Second, the National Assembly revised and modified the Foreign Investment Law and issued Decree 24 and Circular 12 to implement that revision. The changes in foreign investment rules include the following:

- *Registration instead of licensing.* Export oriented foreign investment can be established on the basis of automatic registration (instead of the process of discretionary licensing and approval).
- *Government guarantees.* The new law provides for the Government to issue specific project related guarantees. Complex financing of infrastructure projects, can now get the guarantees that are needed.
- *Better access to foreign currency.* Trading rights for foreign investors have been relaxed by permitting foreign-invested enterprises to purchase foreign currency from commercial banks for the purpose of making payments for current transactions.
- *Mortgages by Banks.* Banks operating in Vietnam (including foreign bank branches) can take mortgages over land use rights and assets attached to the land.
- *Overseas Vietnamese investors encouraged.* The remittance tax rate for overseas Vietnamese investors is reduced to the lowest applicable rate of 3 percent.

- *Conversion/ corporate restructuring allowed.* It is recognized that businesses may find it appropriate to convert or restructure invested capital e.g. by changing investment form, merging, consolidating or dividing. Such actions must now be approved by the investment license issuing body within 30 days.

- *Corporate governance improvements.* Now unanimous consent by the board of management of a joint venture is required for far fewer items, thereby reducing the potential for deadlock in decision making.

Third, the Vietnam-US bilateral trade agreement has created the required positive signal to other investors, generating new export opportunities in the world's largest market (especially in labor-intensive manufactures), and thus new investment opportunities for both domestic and foreign investors. This positive element is under fire with the US Department of Commerce decision.

The first round of banking reforms was initiated in Vietnam during 1988-91 and was directly responsible for the separation of commercial banks from the central bank, and allowed entry of joint stock banks (JSBs), joint venture banks and foreign bank branches.

The reform program in the banking industry consists of the following elements:

- *Improving and strengthening the legal, regulatory and supervisory framework under which banks operate.* This will secure transparency and accountability so that all banks have incentives to become competitive. To achieve this loan classification and loan-loss provisioning will be brought in line with international standards and, a legal framework for creditor rights and asset resolution will be established;
- *Leveling the playing field for all banks.* As SOEs have mostly serviced the state-owned sector, service of the private sector has been mostly left to JSBs and foreign banks. Unfortunately these have not been able to rise to the challenge - for the JSBs due to mismanagement and low depositor confidence and for the foreign banks due to discriminatory regulations.
- *Restructuring 48 joint-stock-banks, by closing, merging or rehabilitating them to around half their current number.* Lax and weak regulations and supervisions have allowed several JSBs to fail.
- *Restructuring state-owned commercial banks, making them operate on a commercial basis.* SOCBs were re-capitalized and their balance sheets cleaned of bad loans, as they meet performance targets.

In 2000 the ROV issued *Decree 49* which is the most significant regulation on banking activities since the *Law on Credit Institutions* in 1997. The decree establishes that control with, and notably responsibility for, the credit cycle lies with the individual bank. The functions and responsibilities of different committees and bodies within banks are clarified and in some instances specific duties and procedures are listed. This act enhances organizational transparency and corporate governance of banks. Better corporate governance contributes to improving public confidence in banks. *Decree 49* also allows banks to complement their current product lines with non-core services. This helps banks to diversify their income sources away from traditional credits, guarantees and L/Cs on which they are now dependent. It also provides the corporate sector with the kind of services that are available in other countries.

As a further sign of market reforms, the interest on dollar deposits is now based on the SIBOR, while the interest rate on dong deposits is allowed to fluctuate within a band. This will make it easier for banks to price loans according to credit risk. The immediate outcomes of the reform are the banking system activity increases and the foreign-invested banks have a high growth rate, leading to a high percentage of the market share in the finance business, while the state commercial banks' percentage share fallen. All of these reforms point to a shift in Vietnam towards a market economy. So what happened on the road to Rome?

III. WHAT CONSTITUTES A NON-MARKET ECONOMY?

On June 28, 2002, the Department of Commerce (hereinafter DOC) received a petition for an antidumping investigation on imports of certain frozen fish fillets from the

Vietnam 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 § 732(b) of the Tariff Act of 1930, as amended ("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 §731 of the Act, and that such imports are materially injuring and threaten to injure an industry in the United States.

The DOC found that the petition met the requirements of § 732 of the Act and subsequently initiated an antidumping duty investigation on July 18, 2002. Petitioners also alleged that Vietnam has a Non-Market Economy (NME) for the purposes of the U.S. Anti-Dumping (AD) law. The DOC found petitioner's allegation to be adequately supported, initiated an inquiry into Vietnam's economic reforms and on November 8, 2002, recommend that Vietnam be treated as a non-market economy for the purposes of antidumping ("AD") and countervailing duty proceedings, effective July 1, 2001. In August 2003, after considering the volume of imports, the effect of imports on domestic prices, and the total impact on the domestic catfish fillet producers, the USITC determined that the domestic processors of frozen catfish fillets were materially injured by imports of frozen fish fillets from Vietnam. (USITC, 2003)

The obvious question to ask is what is the criteria for such a determination and does it not fly against the spirit of the US-Vietnam BTA. In making an NME-country determination under § 771(18)(A) of the Act, § 771(18)(B) requires that the DOC take into account the following factors:

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 DOC 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 (US DOC, 1995). Rather, the DOC 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 DOC must evaluate to determine whether, in the judgment of the DOC, market forces in the country are sufficiently developed to permit the use of prices and costs in that country for purposes of the DOC's dumping analysis.

In reviewing the DOC's decision we follow the same 6 factor outline as noted above:

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

In theory 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. There is no binary choice here. It is only a matter of the degree of currency convertibility that matters.

The DOC's legal argument started with the basic declaration that 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. (Law No. 01/1997/QH10).

The DOC further noted that under the 1998 Decree on Foreign Exchange Controls, the central government shall exercise uniform state management over foreign exchange ("FOREX") and foreign exchange activities. (Decree No. 63/1998/ND-CP) 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. (Law No. 01/1997/QH10 Articles 15, 16 and 19).

The DOC concluded that "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." (US DOC, 2002b, p.9) Moreover, "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. (Law No. 01/1997/QH10, Article VIII). Finally, the DOC concludes that "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. (Law No. 01/1997/QH10, p.10).

This conclusion is inconsistent with other DOC findings. For example, the DOC considers Colombia, Egypt, and Iran, all of whom are non-compliant with Article VIII, and Brazil and India both all of whom possess current-account restrictions, as market economies. (USDOC 1996 and 2002c) With respect to capital-account restrictions; Colombia, Egypt, India, Indonesia, Iran, Malaysia, and Russia all maintain significant capital-account restrictions, and yet the DOC still treats each of these countries as market-economies. (IMF, 2001, pp 1038-1044).

Vietnam has made significant strides within the past years to raise its currency regime up to international standards. In an *Economist Intelligent Unit* report on Vietnam (p.39), it was noted that foreign investors "may now purchase foreign currencies at prescribed banks in Vietnam without an SBV permit" and that "ordinary foreign-currency accounts may be used to service current-account transactions, and no regulatory approval is needed." Moreover, under the US-Vietnam BTA agreement, Vietnam has remove all policies inconsistent with Article VIII by the end of 2002, including the tax on profit and remittances (investment-related current-account transactions) and all approval requirements for payments abroad (general current-account transactions). (USDOC , 2002c, p. 9 and ROV, 2002, p. 23.) As part of the BTA with the United States, all limits on availability of foreign exchange for payments of imports removed. (US-Vietnam BTA Article 11 and Chapter IV).

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

The primary issue for the DOC is how wages are determined. It is the general perception that 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.

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. (US-Vietnam Trade Council Education Forum (2002)). 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 equivalent to the regulations of the implementation of the Labor Code, permits the State to stipulate the wages and wage scales for SOEs and reserved the right to set wage scales in Foreign Invested Enterprises (FIEs). (GOV (1994), Article 4(2)). The private domestic sector is not affected by these regulations, provided that they observed the basic minimum wage. A 1999 regulation 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 regulation further provided that FIEs were free to set higher wages than required for SOEs. (ROV, 1995). Recent amendments to the 1994 Labor Code, passed in 2002 and came into effect in January 2003, eliminate all remaining constraints for private domestic enterprises and FIEs in setting wages above the basic minimum wage. (ROV, (1994), Chapter 6, § 57 and ROV (2002)).

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 between the trade union leadership and the employer. Workers have the right to find employment in "any location not prohibited by law," (ROV, Chapter 2, § 16). 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.[4] All enterprises are required to establish local trade unions organized under the General Federation of Labor, a governmental body. (ROV (1994), Chapter 13, § 153). In cases 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. (ROV (1990), Articles 3 and 16(b)). The right to strike is protected under law, although not allowed in "essential" sectors as determined by the People's Court. (ROV, (1994), Chapter 14, § 174).

The DOC assessment of the labor market in Vietnam was that is was "free". In stated:

> "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." (USDOC, (2002b) p. 16)

[4] When economic restructuring requires 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. See ROV (1994), Chapter 4, § 38; Chapter 2, § 17 and Chapter 13, § 153.

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

One of the most efficient mechanisms that an economy in transition can initiate in order to assure itself of the positive re-enforcement in the drive to reform is to open its economy to FDI. Foreign investment tends to expose domestic industry to competition from world 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.

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. (ROV, 2000, Articles 4, 21(a) and 22).

The *Law on Promotion of Domestic Investment* recognizes private property rights, guarantees against expropriation, and pledges to allocate land-use rights to encourage investment. (ROV, 1995b). 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.[5]

The Vietnam International Arbitration Center has jurisdiction over economic disputes involving foreign parties. (ROV, 1993). Vietnam also recognizes foreign arbitral decisions. (ROV, 1995c) In accordance with the US-Vietnam BTA, Vietnam is drafting a law to ensure neutral international arbitration procedures.

As noted above, most of the past FDI in Vietnam 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. As the legal environment changed, and trade liberalization started, FDI has been redirected into export oriented enterprises.[6] In addition, some foreign investors have experienced operational and management difficulties within the joint ventures. (Trang, 2001).

As investors have become more familiar with Vietnamese regulations, 100 percent foreign-owned enterprises have become more popular where permitted. The government has 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. (ROV, 2002c, Articles 104-105).

[5] 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 may be eligible for up to eight years of tax holiday. (ROV, 2000, Articles 3 and 38-42).

[6] 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. See ROV, 2000 Article 105. In addition, FIEs are now permitted to engage in exports of coffee, minerals, certain wood products and certain textile and garments. See ROV, 2001a.

Renewed interest among foreign investors may be a result of the legal changes that have been induced by the US-Vietnam BTA. 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. Employment restrictions on FIEs were 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.

Vietnam like many other developing countries and US States 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.[7] As one would expect, changes to the Law on Foreign Investment and other regulations contribute to an increase in investor confidence. (Brown, 2002).

Given these positive moves to liberalize FDI into Vietnam, how could the DOC view this transition as less then a pro-market development? To get a sense of the DOC's findings on the FDI question one need only look at their restated question. They note:

> "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." (USDOC, 2002b, p.18).

[7] 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. See ROV (1996 as amended in 2000) Article 38, 43 and 50.

Having laid out the question in that manner, the DOC concluded that:

> "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.
>
> 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. Licensing 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." (USDOC, 2002b, p.22).

Vietnam's success at attracting foreign investment is not the question here. The question comes down to – is the investment flow in response to market signals and does the GOV direct these investment flows to non-viable operations. Licensing requirements are common and utilized by many market-economy countries, developed, developing and countries in transition. Within Asia, the Malaysian government reviews all investment proposals to see if these investments are consistent with their strategic and social policies. Malaysia pays particular attention to manufacturing projects and reviews whether foreign investment is consistent with their "Second Master Plan." (USDOC, 2002d) In the case of Russia and Kazakhstan licensing requirements are second nature. In each of these cases, the DOC treats these countries as market economies. (USDOC, 1995)

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

It is an accepted fact that the right to own private property is fundamental to the operation of a market economy, and the scope and extent of private sector involvement in the economy is taken to be an indicator of the extent to which the economy is market-driven. In the case of Vietnam, the DOC focused on two elements of the privatization issue

– the extent and pace of privatization of enterprises; and the extent and pace of any private land ownership in the Vietnamese economy.

The privatization path in Vietnam was until 2002 a reflection of much of the earlier experience in the FSU and East Europe. Under a 1998 decree on privatization, any "civilian" state-owned enterprise ("SOE") could be privatized.[8] Under this old law, 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.[9]

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. (ROV, 2002d, Article 4-5). Thirty percent of the shares must be put aside for the public and foreign ownership remains capped at thirty percent.[10] Up to 10 percent of shares can be sold at a 30 percent discount to employees and suppliers. (ROV, 1999 and 2002d, Article 27). 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. (ROV, 2002e).

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[8] By Privatization, the GOV refers to the conversion into joint-stock companies via "equitization." Civilian SOEs include all SOEs not producing explosives, radioactive or toxic chemicals, not printing money, and not operating in telecommunications. See ROV, 1998b, Article 59.

[9] 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.

[10] 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. See (ROV, 1999.)

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 considered being in danger of becoming "non-performing" 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 permits its exit via either the assignment of the firm to a labor collective, the complete sale of the firm unencumbered by existing debt, or via the contracting or leasing of the firm to new management. (ROV, 1999b and 2002f).

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.[11] The larger and more capital-intensive SOEs, that account for 90 percent of the SOE debt, will despite the revisions in the privatization program, will in the short-run remain largely untouched by the reforms. (Asian Development Bank, 2002). It has been reported in the business media that 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. (Asia Pulse, 2002).

None of the information on the Vietnamese transition process of SOEs is new. In most cases in the FSU and East Europe the process was similar. The clearly distinguishing factor which was also prevalent in Poland was the size of the SMEs and new start-up activity. The vast majority of Vietnam's population is involved in private enterprise.[12] The domestic private sector is characterized by small (micro)-sized businesses in agriculture and

[11] In August 2002, 104 enterprises had been privatized, out of a total of 989 enterprises partially or fully transformed in the whole period of privatization. See The Saigon Times Daily, September 12, 2002.

[12] The size of the private sector in Vietnam is relatively the same as in Kazakhstan (50% GDP) or Poland (60% of GDP) when the DOC decided to treat those countries as a market economies.

light-industry, while SOEs tend to be larger businesses operating in more capital intensive industries. (Steer and Taussig, 2002)

The private sector in Vietnam accounts for a majority share of the industrial sector. The private sector held 58 percent of industrial GDP in 2003, a 12 percent increase from the 52 percent share held by private companies in 1997,136 of which the domestic private sector -- mostly households and private corporate sector -- held more than 22 percent.

Around 27,000 new private enterprises were registered during the first 10 months of 2004, with a total capital of $3.4 billion, representing a year-on-year increase of 24% in number and 25% in capital value. (Asian Development Bank, 2005).

Similar to the case of Poland's reforms, there are 2 million household businesses in Vietnam that are not registered under any corporate forms listed under the Law on Enterprise, but their business and right of ownership are recognized by the law[13] and they represent at least 13 percent of industrial GDP. (IMF, 2002, Statistical Appendix, p. 63)

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. (EIU, 2001b). This suggest that the SOEs are exposed to foreign competition and economic decision making, regardless of whether or not they are in head-to-head competition or are joint ventures with SOEs. It is interesting to note that the DOC misinterprets the basic market structure issue involved, by focusing only on 'head-to-head" competition and ignoring the restructuring that is undertaken in joint venture activities. The conclude by saying that in Vietnam –

[13] These individual business were previously registered under Decree 66 and are presently governed under Decree 02/2000/ND-CP dated Feb. 18, 2000 on Business Registration. The ownership rights of these micro-business are guaranteed under the Constitution, Articles 15 and 22, and the Civil Code at 6.

> "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." (USDOC, 2002b, p.26).

Vietnam like many other developing economies does not permit private land ownership of any kind. It does permit long-term land leases. The Land use rights as they exist in Vietnam is not an abnormal development nor does it limit the role of the market. 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.[14] It is therefore not surprising to find that the government would be involved in the supervision of land exchange, transfer, lease, inheritance and mortgage of land use right.[15]

The DOC findings with respect to the role of the State in the economy was again not surprising but economically wrong. They note that:

> "Despite a burgeoning private sector ….. competition between the private and public sectors remains limited.
>
> 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." (USDOC, 2002b, p. 29).

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[14] "Land is the property of the entire people, uniformly managed by the State." See ROV, 1993b, Chapter 1, Article 1.

[15] A land use right is an interest in land that is short of complete ownership since there are restrictions on transferability, duration of ownership and prescribed use. See ROV, 1993b, Chapter 1, Articles 7, 8, 13, 14. See Gillespie,(1998).

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

The general position of the transition literature in the early 1990s was parenthetically stated as follows – if we can get "the prices right" then these economies would begin to resemble market economies as their economic decision making becomes more decentralized. The empirical literature in the late 1990s proved that this simple prescription was wrong in many cases. Getting the prices right is not a necessary or sufficient condition to become a market economy. Free entry and exit and predation may in fact be more important. In the case of Vietnam, the DOC considered all of these factors. The three main areas of concern to the DOC were: (i) the extent of price liberalization, (ii) the status of commercial banking reform, and (iii) the degree to which individuals and businesses can engage in entrepreneurial activities.

With respect to price regulations, 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. (ROV, 1993c, Article 2). 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. (ROV, 2002g, p. 6). In effect, it is apparent that Vietnam no longer has direct price intervention.

With respect to banking and capital market controls, the 1997 Law on Credit Institutions provides for the organization and operation of credit institutions and banks in Vietnam and names the State Bank (SBV) as the sole competent body to oversee the licensing of banks and credit institutions. (ROV, 1997b, Articles 12 and 20- 22). The SBV is not an autonomous entity but rather a body of the central government, supervised by the National Assembly. (ROV, 1997, Article 1). 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. (ROV, 1999c, Article 3).

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." (ROV, 2000b, Article 3, and ROV, 2001c, Articles 1 & 4). 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 institutions 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 non-state-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 non-state credit institutions is to be decided by the institution itself, once the reserve requirements for the charter capital have been met. (ROV, 1999d).

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. (World Bank, 2002, p.15.) 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.

According to the IMF, despite all the legal reforms, "the Vietnamese 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." (IMF, 2002b, p.50). Clearly the extent of SOE nonperforming loans are a serious cause for concern.[16] Official estimates suggest that over

[16] " 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." (USDOC, 2002a). See also IMF, 2002b, p.52.

60 percent of state firms are loss making but only sixty SOEs of the original 12,000 have ever been declared bankrupt. (ADB, 2002, p.31 and IMF, 2002c, p.8).

It is still far too early to determine how the new legislation will affect the nature and preponderance of non-performing loans. The Government established the National Development Assistance Fund ("NDAF") in 2000 in order to separate the commercial bank activity from and policy-based lending. A number of positive changes have been implemented, such as the issuance of new rules for classifying nonperforming loans consistent with international standards.[17]

According to the Economist Intelligence Unit 2006, "As of March 2005, there were five state-run commercial banks, 38 joint stock commercial banks, four joint-venture banks, 29 foreign bank branches and 46 foreign bank representative offices"

Foreign participation in Vietnam compares favorably to the banking sector in Kazakhstan at the time its NME status was revoked, where foreign bank branches were not permitted and only 16 banks had foreign participation and in Russia where the banking sector is still not open to foreigners. (USDOC, 2002c, p.19.).

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. (ROV, 1997c, Article 10). 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. (ROV, 1999d).

[17] See ROV, (2002h), 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.

According to the Government of Vietnam, more than 70,000 businesses have registered in the period from when the Law on Enterprise (ROV, 2002i), took effect to September 2002. This means that more private businesses have registered between 2000 and 2002 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).

To the DOC these positive steps are considered too small. In their findings they argue that:

> "…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." (USDOC, 2002b, p.39)

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

This last determining factor which serves as a potpourri is generally used by the DOC to consider issues not otherwise easily fit into one of the earlier categories. In the case of Vietnam the DOC raised issues relating to trade liberalization, rule of law, and corruption.

The US-Vietnam BTA is the key element in Vietnam's legal reform and trade liberalization. Vietnam is ahead of the schedule mandated by the BTA in eliminating quantitative restraints ("QRs") on imports and exports, notably on construction materials, glass, and remaining steel products. (Catalog of Legal Updates.) By 2003, only sugar and petroleum products will still be subject to QRs. The BTA represents a major commitment in Vietnam toward trade and investment liberalization.

In July 1995, Vietnam was admitted to Association of Southeast Asian Nations ("ASEAN"), and joined the ASEAN Free Trade Agreement ("AFTA"). Vietnam has already made good progress on reducing tariffs on goods from other ASEAN countries.[18] Vietnam also joined Asian Pacific Economic Cooperation forum ("APEC") in 1998. 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. It is obvious that the Government of Vietnam is vested in the process of trade liberalization and will continue to make positive steps to integrate its market to that of the rest of the world.

Vietnam's exports and imports increased rapidly throughout the 1990s[19] and the first years of the new millennium. In 2004, exports have accounted for 65.9 percent of the country's GDP. (IMF, 2002c, p. 42) Imports also represented an important part in the economy and, together with exports, increased from more than 50 percent in 1993 to 139.4

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[18] Tariffs are also largely reduced under AFTA, the US-VN BTA, and various bilateral trade agreements. By March 2002, under the AFTA, only 962 items out of 6520 items (or less than 15 percent) are subject to a tariff rate of more than 20 percent, of which 770 are on a "Temporary Exclusion List" and will be released for tariff reduction by 2003.293 The remaining 5558 items are on the "Inclusion List," which are subject to tariff reduction and currently represent about 85 percent of all items and -- with the addition of the temporary excluded products -- will increase to 97 percent by 2003.294 Of these items, about 65 percent are subject to a tariff of 0-5 percent and the remaining are subject to 5-20 percent, making an average rate of about 7.3 percent in 2000 even before the US-VN BTA was signed. See EIU, 2002.

[19] Vietnam's annual exports increased by more than 30 percent during 1993-1997 (prior to Asian economic crisis) and by more than 24 percent during 1999-2000, continuing to increase despite the global downturn and historic low prices of key agricultural exports and crude oil. Vietnam's annual imports have also increased by more than 40 percent. See IMF, 2002c, pp. 42-53 and World Bank, 2002b, pp. v- ix.

percent of GDP since 2004. Vietnam's exports and imports are reported as broadly diversified by items and trading partners (IMF, 2002c, p. 42). It would be correct to conclude, therefore, that Vietnam is a price taker in the traditional sense and is subject to the world market in the full array of products, from raw materials, to intermediate goods to final products.

Vietnam's main exports include crude oil, coal, rubber, rice, coffee, seafood (*i.e.*, marine products), garments, footwear, handicrafts, and electronics. Vietnam's agriculture trade accounts for about 42 percent of agricultural GDP, comparing favorably to many other market economies such as the Philippines (27 percent) and Indonesia (30 percent).

Vietnam's main imports include petroleum products and industrial products, such as fertilizers, insecticides, steel, iron, cement, motorcycles, cars, trucks, textile yarn, cotton, leather, garment material, cigarette materials, machinery, equipment, and electronics. Thus, Vietnam's economy is highly externally oriented and vulnerable to the world marketplace.

A common provision in Economies in Transition is for foreign firms to include arbitration clauses in their contracts. This is par for countries that are in the process of legal reforms. It is also true for Vietnam that rule of law is weak and that many FIEs have included a provision in their contracts that disputes be handled by the Singapore Court of Arbitration. The Government is in the process of developing a strategy to reform its legal system. Reforms in the area of corruption eradication are also under discussion. It should be noted, however, that legal reforms and reforms of corruption is a major problem in many other transition economies, developing economies and in some market economies.

It should be stressed that Vietnam has a substantial body of law governing and protecting the business environment, thereby limiting the opportunities for corruption. While Vietnam does need to continue developing its rule of law, the Economist finds that in

Vietnam "…high level corruption is perhaps not as marked as other south-east Asian societies." (EIU, 2001, p.8) Indeed, they go on to say that in Vietnam they find "a remarkable commitment to good governance among senior ranks, which to some extent balances the party's tight control over the levers of power and influence." (EIU, 2001, p.8) Therefore, whatever problems one may have with Vietnam's judicial system and the rule of law reflect more Vietnam development status and not that corruption is an officially sanctioned activity.

IV. CONCLUDING OBSERVATIONS

An independent observer of Vietnam's transition would have little reservations in noting that Vietnam is well into the continuum of the market. Yet the DOC, probably more for political reasons than sound economics concluded that:

> "we have found that Vietnam's economy remains in transition and does not yet qualify as a market economy under the antidumping law." (USDOC, 2002b, p. 42)

There is no question that Vietnam has made significant progress in its march to revamp its system to respond to and participate actively in the global economy. It has done this by embracing market principles and freeing up its enormous potential to grow and compete. The U.S. government has played an active role in encouraging Vietnam to take these steps under the year-old Bilateral Trade Agreement (Pelzman, 2006) and as Vietnam moves forward in its effort to accede to the World Trade Organization.

Despite what appears to be an environment of predictable certainty for foreign investors in the Vietnamese market, the November 8, 2002 decision by the US Department of Commerce to designate Vietnam a non-market economy (NME) for purposes of U.S. trade remedy laws is inconsistent with its earlier decisions with respect to Russia and other FSU countries. The DOC decision is a sign of the political manipulation that often accompanies trade decisions of this kind, a charge that was easily thrown at Vietnam.

So what happened to Vietnam on the way to Rome? Vietnam got derailed. The cost of doing business in Vietnam just went up. Vietnam learned an important lesson, the issue of non-market or market is open to interpretation. In 2001 it passed the test and became a partner in the US-Vietnam BTA. In 2002, with a new US Administration, Vietnam failed the test. On the way to Rome it learned the lesson of time-inconstancy when you are playing in an asymmetric game with a giant.

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