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DISCRETIONARY RULES: ANTI-DUMPING AND VIET NAM'S NON-MARKET ECONOMY STATUS

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Foreword

Viet Nam's accession to the World Trade Organisation (WTO) is an important milestone in the country's transition from central planning to the market. The road to WTO has been long and arduous, and the government can take great pride in the great skill that is has exhibited in steering a course towards international economic integration.

WTO membership will provide Viet Nam with access to the world's largest markets and a seat at the table in present and future multilateral trade negotiations. However, it is important to remember that WTO accession marks the beginning, and not the end of the process of international integration. Viet Nam still faces in many challenges in the country's quest to achieve prosperity and human development through increased participation in global markets. Making a success of WTO membership will require the development of public institutions, massive investment in infrastructure and close attention to improvements in education and training.

This UNDP Policy Dialogue Paper considers another key challenge in Viet Nam's efforts to derive maximum benefit from economic integration. Viet Nam's main trading partners still classify the country as a non-market economy (NME). NME status does not preclude Viet Nam from the main benefits of WTO membership, but it does increase the country's vulnerability in anti-dumping cases. Some trading partners will be tempted to use anti-dumping provisions as a means of protecting domestic producers from Vietnamese imports.

The paper argues that Viet Nam must respond strategically and carefully to dumping allegations even as a WTO member. Analysis of previous dumping cases demonstrates that Viet Nam can reduce the scope of these investigations and ultimately the damage imposed on Vietnamese producers. Moreover, Viet Nam must work closely with the United States and the European Union to achieve market economy status and thus full use of the dispute resolution mechanism of the WTO.

UNDP Policy Dialogue Papers seek to contribute to key policy debates in Viet Nam through the analysis of critical development issues. Our aim is to stimulate informed discussion and debate through the presentation of information and evidence collected and presented in a clear and impartial manner.

While the views expressed in the paper do not necessarily reflect the official view of UNDP, we value the opportunity to contribute to policy discussions in Viet Nam's. Congratulations are due to the research team for their thorough and precise examination of this complex issue. We hope that the paper encourages other institutions and scholars to research the impact of NME status on Viet Nam's trading relations and the policies needed to ensure that the country can make the most out of WTO membership.

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Contents

Tables, Figures and Boxes

Tables

Figures

Boxes

Glossary

Adverse Facts Available: If the administering authority finds that the petitioned party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority, the administering authority may use information which is adverse to the interests of that party among the facts otherwise available to arrive at determinations. Such adverse facts may include information derived from the original petition or any other information placed on the record.

Affirmative Determination: A finding by the administering authority that dumping has occurred. The authority will impose anti-dumping duties or other penalties if applicable on the exporting country.

Appellate Body of the WTO: An independent seven-person body that considers appeals in WTO disputes. When one or more parties to the dispute appeals, the Appellate Body reviews the findings in panel reports.

Dumping: The practice of selling below cost. It occurs when a product is exported to another country at an export price which is less than the comparable price for consumption of a like product sold for consumption in the exporting country.

Dumping Margin: The calculable difference between the 'normal value' of a product and its dumped export price.

Export Price: The price of a product when exported. By comparing the export price of a product to the price or 'normal value' of a like product prevailing in the domestic market of the exporting country, authorities can determine whether or not dumping is occurring.

Home Market: The market for sales of the foreign like product in the country in which the merchandise under investigation is produced.

Injury: Costs imposed on domestic producers because of dumped imports. Harm, or injury, can be 'material' or can consist of a threat of injury, or can delay the establishment of an industry in the importing country. Anti-dumping duties can only be imposed if it is found, as a result of investigations, that there is a causal link between the imported dumped products and the harm caused to producers of the importing country.

Like Product: When undertaking a comparison between prices, administering authorities must choose comparable products, also referred to as a like product, which is identical to the product under investigation or a product that is similar in kind and quality.

Normal Value: The selling price at which the product is sold in the domestic market of the exporting country.

Petitioner (in the US) or Complainant (in the EU): The individual or organisation lodging the dumping petition/complaint on behalf of the domestic industry of the importing country. For the petition/complaint to proceed, the petitioner/complainant must account for at least 25 percent of total domestic production of the like product; or, must account for more than 50 percent of the production of producers who express interest in the petition/complaint. This allows a small group of producers to 'express interest' and push forward a petition/complaint even if they together only represent a small share of total domestic production.

Petitioned: One or a group of exporters in the exporting country accused of dumping in a complaint .

Price Depression: Price depression or price erosion occurs when selling prices of the local product are reduced to meet dumped import prices.

Price Undercutting: Price undercutting occurs when exporters offer to sell at a lower price than the price of the comparable local product.

Provisional Anti-dumping Duties: Duties imposed following a preliminary finding, pending the final determination. For the European Commission provisional duties may be applied no sooner than sixty days after the initiation of the case, and shall normally not exceed four months or, under certain conditions, up to a maximum period of nine months.

Sunset Clause: Once imposed, anti-dumping duties cannot last indefinitely. Article 11.3 of the WTO Anti-dumping Agreement establishes an automatic expiry period for all anti-dumping duties. All anti-dumping duties shall be terminated not later than five years from the date of the imposition (or review) of the anti-dumping measure.

Zeroing: Among the methods to calculate dumping margins, authorities can compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Zeroing is a method of calculation in which weighted average export prices are calculated by assigning the negative figures (when the export price is higher than the weighted average home market price) a zero value. By doing so, subgroups for which negative dumping has been found are counted not as negative numbers but as zero. This increases the value of the margins and leads to higher anti-dumping duties.

Acronyms and Abbreviations

AD	Anti-dumping
ADA	Anti-dumping Agreement
AFA	Adverse Facts Available
ANCI	The National Association of Italian Footwear Manufacturers
BTA	Bilateral Trade Agreement
CBI	Centre for the Promotion of Imports from Developing Countries
CDSOA	Continued Dumping and Subsidy Offset Act
CEC	European Confederation of the Footwear Industry
CFA	Catfish Farmers of America
CFR	Code of Federal Regulations
CN	Combined Nomenclature
DAF	Development Assistance Fund
DGT	Directorate General for Trade
DGTAXUD	Directorate General Taxation and Customs Union
DITC	Division on International Trade and Commodities
DOC	Department of Commerce
DSM	Dispute Settlement Mechanism
EBMA	European Bicycle Manufacturers Association
EC	European Commission
ECOSOC	United Nations Economic and Social Council
EU	European Union
FAIR	Footwear Association of Importers and Retail Chains
FAO	Food and Agriculture Organisation
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GNP	Gross National Product
GSO	General Statistics Office of Viet Nam
HS	Harmonised System
IP	Investigation Period
ILO	International Labour Organisation
IMF	International Monetary Fund
ITA	International Trade Administration
IT	Individual Treatment
ITC	International Trade Commission
ITO	International Trade Organisation
JVA	Jackson-Vanik Amendment
LEFASO	Viet Nam Leather and Footwear Association
MET	Market Economy Treatment

MFN	Most Favoured Nation
MOT	Ministry of Trade
NME	Non-Market Economy
OECD	Organisation for Economic Cooperation and Development
PNTR	Permanent Normal Trade Relations
PPP	Purchasing Power Parity
SAA	Statement of Administrative Action
SCM	Subsidies and Countervailing Measures
SG&A	Selling, General and Administrative
SME	Small and Medium Enterprise
SOE	State-Owned Enterprise
SRV	Socialist Republic of Viet Nam
STAF	Special Technology Athletic Footwear
TNCD	Trade Negotiations and Commercial Diplomacy Branch
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organisation
US	United States
USD	United States Dollar
VCAD	Viet Nam Competition Administration Department
VIETRADE	Viet Nam Trade Promotion Agency
VND	Viet Nam Dong
WTO	World Trade Organisation

Executive Summary

Dumping is defined as the setting of export prices below domestic prices, thus causing harm to industries in the importing country. Any investigation method yielding increased domestic prices increases the likelihood of affirmative dumping determinations. As tariff and non-tariff barriers are reduced to comply with World Trade Organisation (WTO) rules, anti-dumping (AD) cases have been increasingly used to protect domestic industries.

The anti-dumping investigation methodologies of the United States (US) and European Union (EU) are characterised by vague and ambiguous definitions. They lack detailed guidelines for use in practice, for example how to establish that dumping is causing material injury to domestic industry. Calculation methods are flawed and even WTO-incompatible. The result is overestimation of exporting country domestic prices, affirmative dumping determinations and inflated dumping margins. In addition, discretion is a structural feature of AD regulations. Since AD cases are handled in national courts, this discretion results in politically motivated rather than technical determinations of AD findings.

These methods apply to all countries. Non-market economies (NMEs) face an additional burden through the use of the surrogate country approach. This method emerged out of negotiations over how to determine domestic prices in state trading countries in the 1960s and has been retained in WTO regulations. The approach allows petitioners to select a market economy as a surrogate for the NME. Prices in the surrogate country proxy for domestic prices in the NME. Discretion in the selection process and comparison of dissimilar products between countries are common. Calculation of normal value is often abused. Overvaluation of the factors of production is nearly universal, particularly for labour costs since this method ignores these differences between countries. This disregards the primary reason that exports from poorer countries are cheaper and leads to biased findings. In addition, the use of adverse facts available allows the US to use questionable data in calculating normal value. The surrogate country method allows petitioners to manipulate calculations and manufacture affirmative determinations and inflated dumping margins.

In recognition of market oriented reforms in NMEs, the US and EU provide additional procedures for some NMEs. Firms in industries under investigation can attempt to qualify for special treatment predicated on the demonstration of market conditions for the firm and often the entire industry. These additional approaches are an improvement over the pure surrogate country method as they allow for the use of actual domestic prices and separate duty rates for qualifying firms. However, these firms remain subject to the flawed 'normal' AD methods. Many firms are excluded because the criteria for qualification are ambiguous and applied in a discretionary manner.

The criteria for classification of NMEs is also characterised by ambiguity and subject to the discretion of the administration. The EU simply has a list that it periodically updates but no published selection criteria. The US has a provision allowing it to make designations based on 'other factors considered appropriate'. These are not defined. This amount of discretion yields classifications based on political considerations rather than empirical results. It is unclear when a country can or should change status. The ability to generate whatever findings are desired through use of the surrogate country method makes this a critical issue for NMEs.

Case studies of AD investigations in Viet Nam involving catfish, shrimp, bicycles and footwear reveal the extent of discretion applied in practice by both the US and EU. The entire array of distorting methods were employed to arrive at the desired results. The US refused to abide by its WTO commitments and defended this by stating that WTO rulings are not binding. NME status was the consistent factor resulting in affirmative determinations and exaggerated anti-dumping duties. This gave the US and EU increased scope to influence investigation outcomes through use of the surrogate country method. The shrimp case indicates that Viet Nam can contest some aspects of these calculations and reduce final AD duties. Although Viet Nam can reduce the scale of damage from AD investigations, NME status will continue to result in affirmative determinations and inflated dumping margins.

The dispute settlement mechanism (DSM) of WTO will not provide an avenue for contesting discriminatory AD determinations. National AD laws for the most part comply with the WTO Anti-dumping Agreement. The problem is that WTO validates the surrogate country approach. It is therefore not possible to challenge this mechanism. The benefit to Viet Nam of joining WTO is not access to the DSM. It is the inclusion of an expiry date on NME status in its accession agreements. That this date is negotiated indicates the political rather than technical meaning of NME designation. Until NME status is revoked, Viet Nam will continue to be vulnerable to discretionary AD claims.

1. Introduction

Viet Nam has rapidly expanded trade volumes over the last two decades. The US - Viet Nam Bilateral Trade Agreement (BTA) of 2001 and the Viet Nam - EU Cooperation Agreement have increased access to these two important markets. However, trade growth has been accompanied by increased exposure to dumping allegations.[1] In these trade disputes Viet Nam is designated a non-market economy (NME).

Anti-dumping (AD) duties are imposed by an importing country on the exports of another country if export prices are deemed to be lower than prices in the domestic market of the exporter and this is found to cause injury to producers in the importing country. As tariff and non-tariff barriers have been reduced according to World Trade Organisation (WTO) commitments anti-dumping actions have increased from an average of 100 per year prior to 1995 to as many as 300 per year since 1996.[2] This primarily applies to large traders such as the United States (US) and the European Union (EU).[3]

This paper explores the legal framework for anti-dumping cases, with a focus on the US and EU. It will also examine the additional burden of NME status, arguing that AD methodologies in general and NME status in particular allow importing countries to manufacture affirmative dumping determinations and inflate dumping margins.

The next section will review international AD regulations and US and EU legislation. The methodologies used are seriously flawed, and therefore impose substantial costs on exporters and constitute a form of protection for domestic producers. Section 3 reviews the history of NME status and the surrogate country approach used to determine domestic prices in NMEs. It also reviews US and EU calculation methods used in addition to the surrogate method to argue that anti-dumping procedures and NME specific approaches are ambiguous and discretionary. Determinations are based on political rather than technical criteria and calculation methods systematically overestimate domestic prices, resulting in affirmative determinations and exaggerated dumping margins. Instead of guaranteeing a 'level playing field' and safeguarding domestic industries against foreign protectionism, AD laws allow discrimination against foreign goods by subjecting them to exceptional tariffs to legally protect domestic industries. Section 4 demonstrates this by reviewing four AD cases involving Viet Nam.[4]

Before Viet Nam entered WTO, the country's foreign trade relations were regulated by various bilateral agreements. However, neither the US BTA nor the Viet Nam - EU Cooperation Agreement contain formal dispute settlement mechanisms (DSMs).[5] Viet Nam did not have access to third party mediation and its ability to contest discriminatory rulings is limited. Section 5 explores the degree to which access to the WTO dispute settlement mechanism will provide an avenue to challenge AD determinations. Section 6 concludes.

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1 See the Annex for a list of AD cases initiated against Viet Nam since 1994.

2 WTO statistics on AD can be found at the website: www.wto.org/english/tratop_e/adp_e/adp_e.htm.

3 From 1 January 1995 to 31December 2005, out of 2840 total AD cases initiated by 38 importing countries, the US and EU accounted for 366 and 327, respectively, ranking second and third. India ranked first with 425 cases (WTO 2006a).

4 The paper will not address the impact of affirmative dumping determinations on the livelihoods of Vietnamese. Several excellent studies on this issue have already been conducted and interested readers should consult these reports, in particular Nguyen Thanh Tung et al (2004) and Peacock (2004).

5 Chapter VII, Article 5 of the US BTA simply establishes a 'Joint Committee on Development of Economic Trade Relations' that is given a mandate to serve as a forum for consultations over problems regarding implementation of the agreement.

2. Anti-dumping

The Havana Charter of 1947 was intended by the US and 49 other countries to create the International Trade Organisation (ITO), a third institution under the United Nations (UN). The ITO was meant to handle the trade side of international economic cooperation, complementing the World Bank and the International Monetary Fund (IMF). However, the Havana Charter was never ratified by the US Congress and progress towards the creation of the ITO was abandoned in 1950. A parallel round of negotiations conducted by 23 countries also negotiating the ITO charter resulted in the General Agreement on Tariffs and Trade (GATT) in 1947.

GATT provided the rules for much of world trade from 1948 to 1994, but only one article, Article VI, regulated AD and countervailing duties. The definition of dumping was vague and the article lacked clear guidelines for determining whether or not dumping had occurred. It also failed to specify the causal links between dumping and domestic injury and did not specify penalties. The Kennedy Round in the mid-1960s resulted in the GATT Anti-dumping Agreement, which was replaced by the Interpretation of Article VI during the Tokyo Round conducted between 1973 and 1979.

In 1994 this Interpretation was incorporated into the multilateral commitments of the World Trade Organisation (WTO) as the Agreement on Implementation of Article VI of GATT 1994, currently known as the WTO Anti-dumping Agreement (ADA). All members of WTO are obliged to amend their national AD laws to comply with Article VI of GATT 1994 and the WTO ADA.[6]

Article VI of GATT 1994 authorises member importing countries to levy AD duties on imports if two conditions are met:

- determination of dumping through investigations carried out by the importing country; and,
- determination of a causal link between dumped imports and 'material injury' to domestic industries.[7]

The US first enacted an AD law in the Revenue Act of 1916. Much of the law was replaced by the Anti-dumping Act of 1921, which introduced many of the AD related terms in current use.[8] It also introduced the current administrative structure for handling US anti-dumping cases and served as the basis for the original GATT Article VI. The US Congress approved the GATT Interpretation of Article VI in the Trade Agreements Act of 1979, which replaced the 1921 Anti-dumping Act. The 1979 Act inserted a new Title VII into the Tariff Act of 1930, which implemented the GATT anti-dumping provision.[9] Currently, Title VII of the 1930 Tariff Act is considered the US anti-dumping law.

In the US, the International Trade Administration (ITA) within the Department of Commerce (DOC) is the administrative authority responsible for anti-dumping. It is tasked with determining whether less than fair value sales are occurring. The International Trade Commission (ITC) is an independent regulatory agency responsible for determining if a causal relationship exists between dumping and injury to domestic industries.

In the EU, anti-dumping is covered by Council Regulation (EC) No 384/96 issued in December 1995 following the WTO ADA. This Regulation is commonly referred to in European Commission (EC) legal documents as the Basic Regulation.[10] The Directorate General Trade (DGT) of the European Commission acts on behalf of member states in response to complaints lodged by EU industries. It investigates the occurrence of dumping and the causal links to injury of domestic industries.

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6 WTO incorporates GATT 1994, including Article VI on anti-dumping and countervailing duties. It also contains the ADA, which corresponds to the Agreement on Implementation of Article VI of GATT 1994. In order to comply with WTO regulations, member countries must conform to both Article VI and the ADA.

7 he WTO ADA provides further regulations on initiating and conducting investigations.

8 For example, 'injury determination', 'purchase price', and 'exporter sale price'.

9 As already mentioned, the Interpretation became the WTO ADA in 1994. Further revisions to US AD law occurred in Title VI of the Trade and Tariff Act of 1984 and Title I, Subtitle C, Part 2 of the Omnibus Trade and Competitiveness Act of 1988; and by Title II of the Uruguay Round Agreements Act in 1995.

10 The Basic Regulation has been amended in Council Regulation (EC) No 2331/96, Council Regulation (EC) No 905/98, Council Regulation (EC) No 2238/2000, Council Regulation (EC) No 1972/2002, and Council Regulation (EC) No 2117/2005.

To comply with Article VI of GATT 1994 and the WTO ADA, the two conditions for imposing AD duties - determination of dumping and a link between dumping and injury to a domestic industry - are covered in Title VII of the US Tariff Act of 1930 and Council Regulation (EC) No. 384/96.[11] However, research on both US and EU anti-dumping procedures has raised serious questions about the adequacy of these laws and regulations.

Lindsey (1999) argues that of the five different calculation methodologies used by the US DOC to determine whether imports have been dumped, only the straightforward comparison of exporters' home market prices and US prices can identify price discrimination.[12] However, none of these methods can verify that sale prices are below cost.

Calculation of the extent of dumping, or the dumping margin, is another problematic area.[13] Where possible, these are based on comparisons between the weighted average normal value and the weighted average export price. However, margins are easily inflated. The arm's length test eliminates low price sales to home market affiliated companies, but retains high price sales. The cost test eliminates low price sales when they are found to be below cost and keeps the highest price home market sales. In addition, non-identical product adjustments are sometimes made, resulting in dumping margins that simply reflect different commercial values (Lindsey and Ikenson 2002a).

EU calculation methods apply asymmetrical rules to adjust prices. For home market prices, the EU deducts only direct selling expenses but for export prices the EU deducts direct and indirect selling expenses as well as profits. Home market prices are therefore overvalued and artificially create or inflate dumping margins.

The US and EU practice of 'zeroing' has also been criticised (Ikenson 2004). This involves increasing negative dumping margins for transactions under investigation to zero and thus excluding them. This removes transactions in which the export price is higher than the weighted average home market price (the opposite of dumping), leading to an underestimation of the weighted average export price. The justification for use of the zeroing method is that dumping margins by definition must be positive. A negative or zero margin indicates the absence of dumping and this cannot be included in calculation of the dumping margin.

The problem is that zeroing is used to determine whether or not dumping is occurring. Since it excludes any zero or negative margins, it results by definition in affirmative dumping determinations and inflated dumping margins. The Appellate Body of the WTO found fault with EU anti-dumping investigations and measures, including the zeroing method. It concluded that zeroing is WTO-inconsistent because it prevents true average-to-average comparisons as called for by Article 2.4.2 of the WTO ADA.[14] Nevertheless, the practice is still used by both the US and EU.

To prove that dumping is taking place export prices must be shown to be lower than home market prices. Importing countries have an incentive to overestimate home prices and underestimate export prices. This is reflected in the methods used to calculate market prices, most of which either overestimate home market

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11 For the US, Section 731: 'Anti-dumping duties imposed if (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value, and (2) the Commission determines that (A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation.' For the EU, Article 1: 'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.'

12 Title VII of the Tariff Act of 1930 regulates five dumping calculation methodologies: comparison of US prices to (i) exporters' home market prices; (ii) third country prices if home market sales are not viable, defined as less than 5 percent of its exports to the US; (iii) constructed value if home market prices are below cost; (iv) NME surrogate country based normal value; and, (v) 'facts available' if exporters do not participate. Only 2 of 107 affirmative dumping findings reviewed in Lindsey (1999) relied exclusively on the first methodology.

13 Dumping margins are calculated by subtracting the export price from the normal value and dividing the difference (assuming it is positive) by the export price. The 'normal value' is based either on the price of the same or similar product in a comparison market (normally the exporter's home market) or on a 'constructed value', the cost to produce the product plus some amount for profit.

14 For more discussion on the US zeroing method see Ikenson (2004). The WTO finding on the EU zeroing method was in relation to imports of cotton-type bed linen from India.

prices or ignore transactions involving higher export prices. The outcome is an almost automatic determination of dumping and inflated dumping margins. The flawed methodologies used to determine dumping provide the US and EU with the tools to meet the first criterion of Article VI.

For the second condition, both the US and EU anti-dumping laws require positive evidence of 'material injury' based on examinations of the impact of dumped imports on domestic industry. However, the ambiguous language in these laws - 'significant increase' or 'significant price undercutting' or 'to a significant degree' - without concrete benchmarks creates room for subjective interpretations.[15] Exporters also face information asymmetries because the evidence is held by the domestic industry or the AD authority in the importing country, some of which is commercially sensitive and may not be released to the exporter under investigation.

The US and EU anti-dumping laws lack mechanisms to determine whether alleged unfair pricing practices are caused by market distorting policies in the exporting country or normal market behaviour. Other than dumping, price differences can result from exchange rate fluctuations, differences in economic or business cycles in the two markets, and different market structures or conditions (for example a brand name only recognized in the exporter's home market). In this respect, the EU AD law is more comprehensive than the US law and more in line with the WTO ADA as it takes into account 'known' factors other than the dumped imports which are injuring the industry.[16] While this is an improvement on the US law, the unknown and unlisted factors in the EU law - for example, international price fluctuations, changes in government subsidy policy, or the downturn or upgrading of domestic subsidiary industries - are excluded in investigations.

The vague language relating to determination of injury and the exclusion of possible causes of injury to domestic industry render assessments of the second condition of Article VI susceptible to manipulation. Combined with the biased methodologies to determine dumping discussed above, the entire process is riddled with bias and inconsistency. National courts have significant room to maneuver when deciding dumping cases, and domestic interest groups actively lobby politicians and court public opinion influence decisions.

National legislation often provides incentives to pursue the use of anti-dumping law in the interests of domestic industry. For example, the US Byrd Amendment provides for distribution of revenue from AD duties imposed on foreign firms to the 'affected domestic producers' who support investigation petitions. This gives material incentive to domestic industries to use AD complaints as a tool to protect themselves.[17]

The current anti-dumping methodologies of the US and EU contain serious problems, even though they, for the most part, comply with GATT Article VI and the WTO ADA. The high degree of ambiguity and discretion results in politically biased decisions rather than decisions reached on technical grounds. These issues apply to any AD case the US or EU initiate. However, the problems of discretion and political influence are even worse for exporting countries designated as non-market economies.

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15 For the US: Section 771, Article 7, Title VII of the Tariff Act of 1930; for the EU: Article 3, Recital 3 and Recital 9, Basic Regulation.

16 Article 3(7) of Council Regulation (EC) No. 384/96: 'Known factors other than the dumped imports which at the same time are injuring the Community industry ….. include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.'

17 President Bill Clinton signed the Byrd Amendment into law, formally known as the Continued Dumping and Subsidy Offset Act (CDSOA), on 28 October 2000. The US has had to pay $1.26 billion to domestic producers from duties collected on imports that are considered dumped or subsidised, mainly in four industries: steel, bearings, candles, and food products (including honey, pasta and catfish). This amendment has been condemned as incompatible with WTO rules and retaliation measures of about $115 million have been imposed on US exports by other WTO members. Consequently, the US House of Representatives voted to repeal it on 18 November 2005 and the Senate on 21 December 2005. In a compromise reached between the House and Senate, this will be delayed for two years and Byrd Amendment distribution will continue for entries made prior to 1 October 2007.

3. Anti-dumping and NMEs

The flaws in AD methodology apply to all countries that come under investigation. However, a separate methodology to determine domestic prices is applied to countries with NME status. The 'surrogate country approach' takes prices in a selected market economy (ME) as proxies for prices in the NME. This process often results in affirmative dumping determinations and inflated dumping margins. This section will review the history of NME status and the origins of the surrogate country approach. It will then examine the criteria used by the US and EU to determine NME status, cover the use of the surrogate method by the US and EU, and discuss approaches by the US and EU in addition to the surrogate method.

3.1. History of NME Status and the Surrogate Country Approach

The term 'non-market economy' has a peculiar genesis (Polouektov 2002). Following the Second World War, the dominant state role in the foreign trade of Eastern European countries resulted in both official documents and economic texts adopting the term 'state trading countries'.[18] Following trade liberalisation and the relaxation of absolute state monopolies on foreign trade transactions, economists and politicians shifted to the term 'centrally planned economies'.[19] With further market oriented reforms in nearly all centrally planned economies in the late 1980s and early 1990s, transition countries have come to be referred to as 'non-market economies'.

The proposed charter for the ITO had attempted to provide for the participation of state trading countries. At the first session of the United Nations Economic and Social Council (ECOSOC), the Soviet Union voted for the establishment of the ITO, including the section on state trading in the suggested charter. An article entitled 'Expansion of Trade by Complete State Monopolies of Import Trade' provided that a state trading member country should negotiate with other member countries:

an arrangement under which, in conjunction with the granting of tariff concessions by such other Members, and in consideration of the other benefits of this Chapter, it shall undertake to import in the aggregate over a period products of the other Members valued at not less than any amount to be agreed upon.

The proposed methodology for dealing with countries that had a state foreign trade monopoly had previously existed in the 1935 BTA between the US and the Soviet Union.[20] However, the Soviet Union withdrew from the parallel negotiations that led to the formation of GATT and the provision was dropped. Only one of the proposed three articles remained. This became Article XVII obligating state trading enterprises to abide by the general principles of non-discriminatory treatment.

The difficulties in defining 'right prices' in state controlled economies is acknowledged in the second complementary provision to GATT Article VI and included in WTO (Note 2 Ad Paragraph 1 of Article VI, Annex I):

It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.[21]

This text is simply a statement of fact and does not provide any guidelines on actions investigating authorities should take to deal with dumping cases involving centrally planned economies. It also fails to provide a list of countries included in this category. No country in the world today, with the exception of North Korea, qualifies as a 'complete or substantially complete monopoly…by the State'.

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18 During WWII, state trading also emerged in countries normally based on private economic activity as a result of the need to control imports and exports.

19 The United States Customs Regulation of 1973 used the term 'controlled economy country'.

20 This bilateral trade agreement provided that in exchange for MFN the Soviet Union would accept an obligation to place orders in the United States worth at least USD 30 million a year.

21 The issue of establishing comparable prices in the case of a country whose trade is operated by a state monopoly was first raised by Czechoslovakia in the GATT Review Session of 1954-1955 to amend sub-paragraph 1(b) of GATT Article VI. However, GATT members were not able to revise the text but agreed on an interpretative note to address the case, which was then transferred to new text linked to Article 2.7 of the ADA, which is commonly known as the second complementary provision to Article VI.

In response to the lack of regulations, GATT contracting parties jointly agreed to apply a special methodology referred to as the 'surrogate country' approach to determine the normal values in AD investigations relating to Polish accession in 1967.[22] This ad hoc method became commonly used for NMEs irrespective of their membership in GATT and has subsequently been carried over into WTO. However, no specific legal basis for use of the surrogate country method appears in WTO regulations.[23]

Importing country governments select the surrogate country to determine the 'true' prices in the NME. This discretion to pick the surrogate country gives importers a tremendous advantage since they can choose surrogates that yield the desired results in AD investigations. Combined with the flaws in anti-dumping methodology, this additional condition for NMEs leaves them defenseless. Examination of US and EU legislation and practices will demonstrate this point.

3.2. National Anti-dumping Laws and NMEs: the US and EU

The following sections explore US and EU regulations concerning NMEs. The first reviews classification criteria for NME status. The second discusses the surrogate approach. The third section examines procedures used by the US and EU in addition to the 'pure' surrogate country approach.

3.2.1. Determination of NME status

According to both the US and EU anti-dumping laws, producers in transition countries must prove that they operate under market conditions. The importing (petitioner) country is not responsible for providing the evidence. However, the DOC and the EC determine NME status for the US and EU, respectively, based on their national AD laws rather than by internationally agreed standards. Transition economies have little opportunity to defend themselves given the tight time frames for providing evidence of ME mechanisms in the form of replies to questions. Furthermore, it is unclear precisely what requirements transition economies must satisfy in order to qualify as market economies.

Determination of NME status is a political decision rather than being based on economic rationale. The DOC and the EU do not clearly define the point at which an NME completes its transition to an ME. The DOC provides a list of broad criteria to perform a one time test of NME status for each country. If NME status is imposed the country must wait until the DOC decides to revoke it.[24] For the EU, Article 2(7) of the Basic Regulation only allows for the use of an ME third country to determine the normal value for NME countries.[25] This article refers to prior legislation, Council Regulation (EC) No 519/94, for the list of state trading and former state trading nations to which Article 2(7) shall be applied. However, the EU acknowledges that this list is out of date and has promulgated amended regulations on NMEs.[26]

The first set of EU criteria to test ME status were not issued until 1998 with the introduction of market economy treatment (MET).[27] This will also be discussed in Section 3.2.3. Five criteria are applied to individual

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22 Its first application was in 1960 when the United States Treasury Department applied it to the Bicycles from Czechoslovakia investigation, 25 FR 5657 (1960).

23 Article II(2) of the Marrakesh Agreement establishing WTO allows WTO members to use 'associated legal instruments' originally used under GATT. This provides for use of the surrogate country approach by WTO members even though it was never formalised in GATT or WTO regulations. In addition, by stipulating that any state or separate customs territory may accede to WTO 'on terms to be agreed between it and the WTO', Article XII.1(b) prevents new member countries (for example China) from challenging the surrogate country approach under the WTO DSM.

24 Section 771 (18) of the Tariff Act of 1930.

25 Council Regulation (EC) No 384/96.

26 Four out of five EC amendments to the Basic Regulation concern NME status, indicating the EU's changing position on this issue.22

27 Council Regulation (EC) No 905/98 of 27 April 1998 replaced Article 2(7) of Regulation (EC) No 384/96 with two new paragraphs: Article 2(7)(b) and Article 2(7)(c).

producers because the EU lacks criteria for the determining the status of the entire economy. In some ways this is an improvement, since it allows for variation of status within an NME.[28]

Table 1: Comparison of US and EU Criteria for Market Economy Status

US Section 771 (18) of Title VII of Tariff Act of 1930 10.04.1995	EU Council Regulation (EC) No. 905/98 27.04.1998
(1) The extent to which the currency of the foreign country is convertible into the currency of other countries	(5) Exchange rate conversions are carried out at the market rate
(4) The extent of government ownership or control of the means of production	(1) Decisions of firms regarding prices, costs and inputs - including raw materials, technology and labour costs, output, sales and investment - are made in response to market signals reflecting supply and demand, without significant state interference, and costs of major inputs substantially reflect market values
(5) The extent of government control over the allocation of resources and over the price and output decisions of enterprises	Same as above
(2) The extent to which wage rates in the foreign country are determined by free bargaining between labour and management	No similar provision
(3) The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country	No similar provision
No similar provision	(2) Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes
No similar provision	(3) The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write offs and payment via compensation of debts
No similar provision	(4) The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms
(6) Such other factors as the administering authority considers appropriate	No similar provision

Note: Figures in brackets indicate the order in which the criteria appear in the respective national laws.
Source: Polouektov (2002)

[28] According to the Viet Nam Ministry of Trade, the EU has granted ad hoc treatment for Viet Nam and China, in which these two countries can attempt to justify themselves as market economies on the basis of a set of five criteria. These criteria are developed from the five criteria to grant MET to firms. Determination of ME status for Viet Nam is based on:

- Degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly, for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes;
- Absence of state-induced distortions in the operation of enterprises linked to privatisation and absence of use of non-market trading or compensation systems such as barter trade;
- Existence and implementation of a transparent and non-discriminatory enterprise law which ensures adequate corporate governance, for example application of international accounting standards, protection of shareholders, and public availability of accurate company information;
- Existence and implementation of a coherent, effective and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime; and,
- Existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.

However, these criteria are not publicly available in any EC regulations. Furthermore, the criteria are ambiguous and unclear. For example, 'degree of government influence' is not defined, nor is a 'genuine' financial sector or 'adequate supervision'. To date, both Viet Nam and China have not been successful in obtaining market economy status by the EU.

To date MET has been applied to Russia, China, Ukraine, Viet Nam, Kazakhstan and all NME countries that are WTO members.[29] Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan are still considered pure NMEs and not subject to MET. Russia and Ukraine have recently been excluded from the NME list altogether.[30] However, no clear justification has been given for the change in status or its relation to MET criteria. Table 2 compares these criteria with those used by the US. The primary difference between US and EU criteria is that the US assesses countries while the EU assesses firms.

The absence of definitions for the terms 'extent', 'significant', 'degree' or 'freedom' effectively ensures that 'no country or even a separate industry will ever pass through such a bureaucratic exercise until and unless a political decision is taken to revoke NME status' (Polouektov 2002, p.20). The 'other factors as the administering authority considers appropriate' criterion for the US facilitates arbitrary rulings, making the determination process political rather than evidence based.[31]

Furthermore, most ME countries fail to qualify for ME status according to these broad criteria. For example, many countries, including the US and EU, maintain state trading or price control practices for key commodities. Many countries also fail under the 'freedom to fire and bargain salaries' test because of extensive safety nets (Polouektov 2002) and some countries do not have fully convertible currencies.

In addition, the ME tests do not cross reference transition country international commitments. Most NMEs are IMF members, WTO members or are undertaking reforms during WTO accession. These IMF and WTO reform issues cover (1) foreign exchange and payments; (2) state ownership and privatisation; (3) pricing policies; (4) trading rights; (5) AD, countervailing, and safeguard regimes; (6) export subsidies; (7) industrial policy, including subsidies; (8) state trading entities; (9) transparency; and, (10) national competition policies and investment regimes.[33] This is another area where exclusion of existing or imminent reforms skews determination results.

Differences between US and EU AD determinations demonstrate the political dimension of NME status.[34] The DOC defends its arbitrary classifications by stating that 'it is not necessary that the country fully meet every statutory factor relative to other market economies' and the 'DOC must determine that the factors, taken together, indicate that reforms have reached a threshold level such that the country can be considered to have a functioning market economy' (US Import Administration n.d., p.7). However, the definition of 'threshold level' cannot be found in US legislation.

3.2.2. The Surrogate Market Economy Approach

Both US and EU legislation rely on prices in surrogate ME countries to determine the 'normal value' for the NME country under investigation.[35] In AD cases involving NMEs both the US and EU ignore NME domestic prices and costs and construct a normal value using a surrogate ME third country. The US determines the normal value on the basis of the value of the factors of production.[36] Physical amounts of input components used in the production process in the NME are valued at prices prevailing in the surrogate country. The EU

29 Council Regulation (EC) No 2238/2000.

30 Council Regulation (EC) No 1972/2002 and Council Regulation (EC) No 2117/2005 exclude Russia and Ukraine respectively.

31 Although the DOC has developed a number of other requirements that fall into this item such as the existence and operation of antimonopoly laws, securities exchange, and customs and anti-dumping laws, the blurred language provides 'significant' room for administrators to maneuver.

32 National Trade Policy Reviews prepared by the WTO Secretariat, IMF country reports, OECD Economic Surveys and the US Trade Representative's Annual Reports on Foreign Trade Barriers reveal the extent to which various ME countries fail under US and EU criteria.

33 The last issue is for WTO accession only.

34 or the US: Latvia, Estonia, Lithuania, Kazakhstan, Ukraine, Romania and Russia are classified as MEs while Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, Uzbekistan , Viet Nam, Mongolia, and China are classified as NMEs. For the EU: Bulgaria, Latvia, Estonia, Croatia, Lithuania, Russia and Ukraine are classified as MEs while Albania, Armenia, Azerbaijan, Belarus, North Korea, Mongolia, Moldova, Kyrgyz Republic, Tajikistan, Turkmenistan, Uzbekistan and Georgia are classified as NMEs. Producers in China, Viet Nam and Kazakhstan are eligible for MET.

35 Section 773 (c) of Title VII of the Tariff Act of 1930; Article(2)(A)(7) of Council Regulation (EC) No 384/96.

36 Section 771 and Section 773 (c)(B) of Title VII of the Tariff Act of 1930.

does not recognise quantitative data for input components and instead uses the respective prices paid or payable in the surrogate country for comparable product types.[37]

The selection of the surrogate country, additional procedures beyond the surrogate country approach and the definition of economies as market or non-market provide significant scope for national authorities to protect their domestic industries against competition from NMEs, and often result in affirmative determinations of dumping and exaggerated dumping margins. Additional procedures in the US that are hostile to NMEs and encourage domestic industries to pursue AD claims include the Byrd Amendment (see above) and Section 406 of the Trade Act of 1974, which allows the US president to apply additional tariffs or take other measures against communist countries. The following sections explore these issues in more detail.

The surrogate ME approach can lead to inflated dumping margins by artificially increasing normal values in four ways. The first involves the regulations governing the selection of surrogate countries. Article 2(A)(7) of Council Regulation (EC) No. 384/96 provides that 'normal value shall be determined on the basis of the price or constructed value ….in an appropriate market economy third country … selected in a not unreasonable manner'. No clear definition of 'an appropriate market economy country' or 'unreasonable manner' is provided.

If national income per capita is considered a key determinant of comparability, then in most cases surrogates selected by the EU fail to meet the 'appropriate' condition.[38] For example, Russia, when it was still considered an NME, was on various occasions compared with Japan, Norway, the US, Austria or Sweden; China's surrogate countries have been Yugoslavia, Japan, Norway, India, Argentina, the US and Brazil; and surrogate countries for Viet Nam have included Brazil and Mexico.

The DOC provides more detailed selection criteria but ambiguity remains. Section 773 (c)(4)(A) of Title VII of the Tariff Act of 1930 provides for the use of 'prices or costs of factors of production in one or more ME countries that are (i) at a level of economic development comparable to that of the non-market economy country; and, (ii) significant producers of comparable merchandise'. Primary emphasis is placed on per capita GDP in determining economic comparability.[39] The Conference Report to the 1988 Omnibus Trade and Competitiveness Act states that 'significant producer' includes any country that is a 'significant net exporter'.

However, the definition of 'significant net exporter' is vague and US legislation also fails to clarify the relative weights attached to the two selection criteria. Furthermore, the two criteria cannot ensure that the NME, the selected surrogate country and the importing country have similar production technologies and conditions.[40]

The second practice is the selection of 'comparable merchandise' or 'like products' for price comparison.[41] This may lead to inaccurate rulings because different consumer tastes and habits mean finding a comparable or even similar product in the surrogate country market is not straightforward. For example, if the size or material of a selected like product is different from the investigated product, dumping margins will reflect the difference in commercial value.[42] Higher value could result from more durable materials or a more stylish designs. Section 4.4 will discuss the AD case against Vietnamese footwear involving the comparison between Vietnamese shoes at economical and medium-low price segments and Brazilian and EU shoes at premium and medium-high price segments, which come under the same Combined Nomenclature (CN) codes but are not comparable products.[43]

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37 Article 2(A)(7) of Council Regulation (EC) No 384/96.

38 National income per capita is the main criteria applied by the US.

39 Section 351.408(b) of Title 19 of the Code of Federal Regulations (CFR).

40 The discussion in Section 4.1 of the US anti-dumping case against Vietnamese frozen fish fillets will demonstrate how this can result in inflated dumping margins.

41 'Comparable merchandise' is the term used in US AD law. 'Like products' is the term used in the EU AD law.

42 For more discussion see Lindsey and Ikenson (2002a).

43 CN is the EU coding system for classifying products for customs and statistical purposes. This classification is based on the Harmonised System (HS), which is also the basis for the import and export codes used by the US.

The third practice which can affect the findings of AD investigations is the valuation of factors of production. The calculation of labour costs is the most controversial. Low labour costs provide countries like Viet Nam with their comparative advantage in international markets, making many of their products price competitive. However, as Viet Nam has been classified an NME the EU does not consider labour costs when selecting surrogates.[44] Viet Nam's NME status means the most likely explanation for low prices is not considered by those investigating AD cases. This represents a blatant example of policy incoherence, as EU and US governments constantly lectures countries like Viet Nam on the need to capitalise on their comparative advantage in labour intensive products.

Recent changes in US legislation have increased the room for discretion when determining the cost of labour in NMEs. Section 773 (c)(4)(A) of Title VII of the US Tariff Act of 1930 states that valuations of factors of production shall utilise the prices or costs of factors of production in one or more ME countries that are at a comparable level of economic development and significant producers of comparable merchandise. However, Section 351.408(c)(3) of Title 19 of the Code of Federal Regulations (CFR) promulgated in 1997 states that 'for labour, the Secretary will use regression based wage rates reflective of the observed relationship between wages and national income in market economy countries'. This paragraph was originally proposed in 1996 as 'for labour, the Secretary will use regression based wage rates reflective of the observed relationship between wages and national income in market economy countries found to be economically comparable to the non-market economy country under Section 773(c)(4)(A)'. No explanation has been given for the change, but it has subsequently been used to include countries at a far higher level of development than any NME in the calculation, including Switzerland, the United Kingdom, the United States and Canada (Kaye Scholer LLP 2005). The CFR also permits valuing factors of production using data from countries which are not significant producers of comparable merchandise, leading to inflated wage rates for NMEs subject to investigation.

This process can be seen in DOC wage rate determinations for China. The DOC excluded from the regression many ME countries with available data in International Labour Organisation (ILO) and World Bank statistics, whose average wage rates and average per capita GNI were lower than those of the DOC selected subset (Kaye Scholer LLP 2005). The DOC subset excludes 23 lower income MEs while retaining high income countries. The resulting inflation is presented in Table 1.[45]

Table 2: DOC Wage Exaggeration for China

Year	A DOC subset (USD/hr)	B All available (and qualifying) countries (USD/hr)	(A-B)/B Increase due to use of arbitrary subset versus all available data (%)
1999	0.77	0.65	18.46
2000	0.83	0.74	12.16
2001	0.90	0.79	13.92
2002	0.85	0.70	21.43
2003	0.98	0.77	27.27

Source: Kaye Scholer LLP (2005)

The fourth practice resulting in inflating dumping margins is the use of adverse facts available (AFA).[46] Anti-dumping cases are handled in the courts of the petitioning country. When these courts determine that producers in the investigated country fail to 'cooperate by not acting to the best of their ability to comply with a request for information', then the AD investigation is able to use any information available.[47] The ambiguity

44 Sections 4.3 and 4.4 examine the EU anti-dumping cases against Viet Nam involving bicycles and footwear to demonstrate this point.

45 The inflation of wage rates in AD investigations involving Viet Nam will be discussed in Sections 4.1 and 4.2 covering Vietnamese frozen fish fillets and frozen and canned warmwater shrimp.

46 Section 776 (b) of Title VII of the US Tariff Act of 1930; Article 18 of the EU Basic Regulation.

47 Section 776 (b) of Title VII of the US Tariff Act of 1930.

of this statement is compounded by the difficulties many developing countries face compiling accounting details, financial data and other requested information.

In practice, when AFA is used the DOC relies on the information provided in the original petition. Petitioners calculate normal values based on US factors of production and value them according to selected surrogate country data. The petition must be accurate enough to convince national authorities to pursue a full investigation, but as it is the petitioners that directly benefit from affirmative AD determinations through reduced competition and Byrd Amendment duty redistribution, it is in their interest to manipulate the data. The limitations of the US methodology have already been discussed. The petitioner methodology is even more interest rather than evidence driven.

Article 18 of the EU Basic Regulation also provides for the application of AFA. 'If an interested party does not cooperate, or cooperates only partially,… the result may be less favourable to the party than if it had cooperated' by the use of 'information obtained from other interested parties during the investigation'. The use of AFA and original petition calculations often results in the highest possible AD duties.[48]

Ambiguous guidelines and the high level of discretion allowable in selecting the surrogate country, the comparison of dissimilar products, the overvaluation of factors of production - particularly labour - and the ability to invoke AFA provide four ways to inflate the normal value of the exporting country under investigation. This results in affirmative determinations of dumping and high dumping margins.

3.2.3. Procedures Additional to Surrogate ME Third Country Approach

In recognition of ongoing reforms in transition countries, the DOC now applies three additional approaches to NMEs: the market oriented industry approach, the separate rates approach and suspension agreements. These additional procedures are summarised in Box 1.

Box 1: Additional US approaches to NMEs

Market oriented industry approach

The DOC implements a three factor test and deems an industry to be market oriented if:

(i) there is virtually no government involvement in setting prices and production volume for the subject merchandise;

(ii) the entire industry is characterised by private or collective ownership; and,

(iii) all but an insignificant portion of material and non-material inputs have been purchased at market determined prices.

Separate rates approach

To determine the absence of de jure government control, the DOC examines three factors:

(i) the existence of legislative enactments that decentralise control of companies;
(ii) an absence of restrictive stipulations associated with business and export licenses; and,
(iii) other formal measures taken to decentralise control of companies.

To determine the absence of de facto government control the DOC examines four factors:

(i) whether the exporter can set its own export prices without government approval;
(ii) whether the exporter has the authority to negotiate and sign contracts and other agreements;
(iii) whether the exporter has autonomy in decisions relating to the selection of management; and,
(iv) whether the exporter can retain its export sales proceeds and make its own decisions regarding profits and losses.

Suspension agreements

The DOC may suspend an investigation upon acceptance of an agreement with an NME if three factors are met:

(i) the agreement is in the public interest;
(ii) the agreement can be effectively monitored; and,
(iii) the agreement 'will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation'.

Source: Laroski (1999) and US ITA (2005)

[48] The use of AFA will be discussed further in Sections 4.1 and 4.2 covering Vietnamese frozen fish fillets and frozen and canned warmwater shrimp.

The market oriented industry approach expands DOC inquiries beyond the industry under investigation to include the market orientation of the industries that supply factor inputs. If the industry meets the three criteria its normal value will be calculated by the ME method.[49] However, the second criterion - that the entire industry must be characterised by private or collective ownership - excludes all industries in Viet Nam due to the presence of state-owned enterprises (SOEs). Although the influence of SOEs in Viet Nam varies by industry state involvement in industry also exists in developed countries such as France, Singapore, and Germany.

The separate rates approach, on the other hand, can be applied to Viet Nam. It entitles individual companies to a separate, company specific dumping margin on the basis of clear proof of the absence of both de facto and de jure government control over exports (Laroski 1999, ITA 2005). The separate rate is usually either an individually calculated rate or a weighted average based on the rates of the investigated companies. However, like the AD zeroing methodology described in Section 2 this approach excludes any rates that are zero or de minimis from calculations of normal value. This additional procedure removes the extra burden of the surrogate approach for specific NME firms but retains the flaws of AD methodology.

Section 734 of the Tariff Act of 1930 gives the DOC great flexibility in dealing with NMEs through suspension agreements. The vague wording directing the use of this option allows for a high degree of discretion in its application. Suspension agreements essentially operate as an exemption clause in US anti-dumping law. This approach then becomes subject to domestic and international political influences. On the basis of such discretion, it has been argued that the DOC is only restrained in dumping cases involving NMEs by its own 'reluctance to use all the authority at its disposal' (Laroski 1999, p.3).

Acknowledging that significant market oriented reforms have been made by NMEs, the EU provides two supplements to the surrogate ME approach. The details of these two approaches are described in Box 2.

Box 2: Additional EU approaches to NMEs

Market economy treatment

To be entitled to this treatment, producers must provide sufficient evidence that ME conditions prevail in the manufacture and sale of the product concerned in accordance with five criteria and procedures:

(i) decisions of firms regarding prices, costs and inputs - including raw materials, technology and labour costs, output, sales and investment - are made in response to market signals reflecting supply and demand, withou significant state interference, and costs of major inputs substantially reflect market values;
(ii) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
(iii) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write offs, barter trade and payment via compensation of debts;
(iv) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and,
(v) exchange rate conversions are carried out at the market rate.

Individual rate of duty

To be eligible producers must meet five criteria:

(i) in case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
(ii) export prices and quantities, and conditions and terms of sale, are freely determined;
(iii) the majority of shares belong to private persons - state officials appearing on the board of directors or holding key management positions shall either be in a minority, or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;
(iv) exchange rate conversions are carried out at the market rate; and,
(v) state interference is not such as to permit circumvention of measures if individual exporters are given different rate of duty.

Source: Council Regulation (EC) No 905/98 of 27 April 1998 and Council Regulation (EC) No 1972/2002 dated 5 December 2002

[49] Not employing the surrogate country method.

The EU can grant MET to individual producers in NMEs. Normal value is determined on the basis of prices paid or payable in the exporting country rather than a surrogate. To be entitled to this treatment, producers must provide sufficient evidence that ME conditions prevail for the manufacture and sale of the product concerned in accordance with the five criteria.[50]

The EU also provides for the application of an individual rate of duty treatment (IT) to eligible exporters in NMEs.[51] Exporters whose normal value is established according to the surrogate country methodology will be assigned an individual rate of duty calculated by comparing the normal value with the exporter's individual export prices instead of the weighted average of prices of all export transactions to the EU.

Additional US and EU procedures make it possible for selected countries to escape elements of the surrogate country approach. At best they result in use of the regular but still flawed AD calculation methodology. Which countries have access to which additional approaches is a matter of discretion rather than selection according to clear criteria.

Ambiguity and discretion allow the US and EU to manipulate NME and AD procedures to achieve desired outcomes. They can employ various layers of flawed methodologies to manufacture affirmative dumping determinations and inflate dumping margins to the detriment of exporting countries. The next section will explore four dumping investigations against Vietnamese producers to demonstrate these points in more detail.

[50] The criteria are introduced in Article 2(7)(c) of Council Regulation (EC) No 905/98 of 27 April 1998, which, along with Article 2(7)(b) also covering MET, replaced Article 2(7) of Council Regulation (EC) No 384/96.

[51] Council Regulation (EC) No 1972/2002 dated 5 December 2002 introduced the five criteria for the individual duty rate approach, replacing Article 9(5) of Council Regulation (EC) No 384/96.

4. Case Studies from Viet Nam

The previous sections examined the problems inherent in AD methodology applicable to all countries and the additional issues faced by NMEs. This section discusses four AD cases in Viet Nam to show how these problems manifest themselves in practice. The case studies demonstrate how affirmative dumping determinations are manufactured and result in inflated dumping margins. The first two case studies concern the US and the following two cases deal with the EU.

4.1. Frozen Fish Fillets

The US brought an anti-dumping case against Vietnamese catfish producers shortly after the implementation of the US BTA in 2001. The BTA facilitated the entry of Vietnamese fishery products into the US market, which are preferred by American consumers and about 50 percent cheaper than US catfish. Vietnamese catfish quickly gained a dominant market share and the price of domestic American catfish fell from 1.65 USD/kg to 1.25 USD/kg for whole fish and from 4.5 USD/kg to 3.8 USD/kg for fillet Ictalurus. The Catfish Farmers of America responded by filing an AD petition on 28 June 2002.

The eventual affirmative dumping determination was based on the exploitation of existing rules, especially those relating to NME status. Classification of Viet Nam as an NME allowed the US to utilise the ambiguity and discretion in its national AD laws to inflate normal values and achieve an affirmative determination. The methods used are described in Section 3.2.1 and included the inconsistent use of the comparable merchandise mechanism, repeated discretionary application of surrogate country data in valuing the factors of production and the use of adverse facts available.

Viet Nam was designated an NME by the DOC effective 1 July 2001, allowing for the use of the surrogate country approach for AD cases involving Vietnamese producers.[52] The first element of manipulation in the catfish investigation involved comparable merchandise. The labeling of Vietnamese tra and basa exports as 'catfish' was challenged. It was claimed that the products were different from American channel catfish as they were raised in 'Third World rivers' and therefore of lower quality. The US Congress passed a law making it illegal to label the products as catfish. Vietnamese exporters switched to the use of 'tra' and 'basa' labels. However, after Vietnamese products were declared to be fundamentally different from American catfish, in the second stage of the investigation the ITC determined that no competitive difference existed between imported Vietnamese tra and basa and US catfish. The hypocrisy implied by these two decisions requires no further comment. The products were then considered comparable and the investigation proceeded.

Bangladesh was selected as the surrogate ME for Viet Nam. While at similar level of economic development, important differences exist at the firm and production level, which result in higher costs of production in Bangladesh and so an overestimated normal value for Viet Nam. The DOC did not calculate the normal value on the basis of integrated production - from upstream inputs through to the processing stage. Instead the DOC opted to evaluate from the main input (live fish) used to produce the merchandise under investigation. This resulted in overvaluation. The decision was based on the fact that seven Bangladeshi companies did not possess integrated production and instead relied on less efficient wild production in ponds.[53] In contrast, the Vietnamese fishery industry is fairly well integrated from the fingerling stage to the frozen fish fillet processing stage, with well established river based cage aquaculture. In addition, cages in the Mekong Delta are not made using expensive materials but from bamboo and are primarily taken care of by household members. Household aquaculture producers do not have to pay water tax and fish processors can use fish byproducts in the production process (Nguyen Thanh Tung et al 2004).[54]These differences reduce Vietnamese production costs.

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[52] Until revoked by the DOC, Viet Nam's NME status will apply to all future administrative proceedings covering periods of investigation or review that fall after its effective date of 1 July 2001. The US BTA was signed on 13 July 2000 and entered into force on 10 December 2001.

[53] These seven companies focused more on shrimp production.

[54] For example waste, fish oil, fish skin and fish powder.

The competitiveness of agricultural processors depends on their capacity to manage the costs of material inputs, in this case unprocessed live fish. If the determination of the factors of production had been based on integrated production, many factors would have been excluded (for example, water tax) or determined on a smaller quantity and at less value (for example, the number of paid labour hours, quantities of raw materials, energy and other utilities consumed). Furthermore, the DOC determination of normal value in this case contradicts 19 US C§ 1677b(c)(1), which regulates to determine the normal value 'on the basis of the value of the factors of production utilised in producing the merchandise' - in other words, the actual factors of production. The reliance on less efficient Bangladeshi production methods resulted in the overvaluation of Vietnamese production costs.

Furthermore, using the regression based wage rate of USD 0.63 per hour for Viet Nam led to monthly wage payments two or three times higher than the average monthly wage of VND 500,000 (USD 32.3) for paid labour on household farms and VND 800,000 (USD 51.6) to VND 1,000,000 (USD 64.5) for workers at processing companies (Nguyen Thanh Tung *et al 2004*).[55] The methodological flaws in this regression are discussed in Section 3.2.1. In Viet Nam, since each catfish raft requires four to five labourers, the household producer first uses family members or relatives to reduce current costs and only hires on average two wage workers (Nguyen Thanh Tung et al 2004). The result is inflated costs of production.

The period of investigation ran from 1 October 2001 to 31 March 2002. However, lack of data resulted in the use of Bangladeshi data from different years according to availability. Furthermore, Indian data was also used to supplement inadequate Bangladeshi data, specifically on raw material inputs and water tariff rates. This likely produced higher prices.

The most inflationary element in the calculation was the DOC use of AFA to decide upon the country wide duty rate. This was based on the argument that fifty-three Vietnamese companies did not respond to the DOC request for information. The DOC decided to apply the highest rate, 63.88 percent, calculated from the information provided in the CFA petition. The rate was based on US production factors rather than Vietnamese production factors and was valued according to the Indian rather than the Bangladeshi data.[56]

Two companies entitled to the separate rates approach also suffered from the application of AFA due to missing data. The estimated monthly rice husk consumption for Nam Viet was based on another respondent's single highest recorded month. The estimated ice consumption for CATACO was based on data from Apex, a Bangladeshi seafood company. As a result, their separate rates are higher than those of the other companies.

Table 3: Anti-dumping Duties Imposed on Certain Frozen Fish Fillets from Viet Nam

Producer/Manufacturer/Exporter 03042060 (Frozen fillets of fresh water fish, flat fish, etc.)	**Weighted average margin** 0 (MFN rate)
Viet Nam-wide	63.88
Afiex	45.55
Agifish	47.05
CAFATEX	45.55
CATACO	45.81
Da Nang	45.55
Mekonimex	45.55
Nam Viet	53.68
QVD	45.55
Viet Hai	45.55
Vinh Hoan	36.84
Vinh Long	45.55

Source: US ITA (2003)

[55] Exchange rate July 2003: USD 1 = VND 15,500.

[56] See ITA's Initiation of Anti-dumping Duty Investigation dated 24 July 2002 for the CFA calculation of normal value. The application of AFA was decided at the DOC Preliminary Determination dated 31 January 2003 and reinforced in a DOC Memorandum dated 16 June 2003.

The DOC announced its decision in August 2003. The results are presented in Table 3. The separate rates were applied to eleven exporters with duties ranging from 37 percent to 54 percent. The country wide rate was 64 percent. This is compared to the MFN duty rate of zero percent that Vietnamese producers enjoyed prior to the affirmative determination.

4.2. Frozen and Canned Warmwater Shrimp

Only three months after the final determination on Vietnamese catfish, the Vietnamese fishery industry confronted another anti-dumping petition.[57] This was submitted by the Ad Hoc Shrimp Trade Action Committee on 31 December 2003 and claimed certain frozen and canned warmwater shrimp were being dumped on the American market. The Vietnamese government requested the DOC to revoke NME status on 14 June 2004. This was refused and Bangladesh was again selected as the surrogate for Viet Nam.

Viet Nam learned valuable lessons in the catfish case. Increased cooperation between companies in the industry and the hiring of a better qualified law firm resulted in lower final AD duties than those announced by the DOC at the initiation of investigations. However, NME status again led to an affirmative determination of dumping. The three main reasons for this outcome are the use of AFA, the zeroing methodology and the regression based wage rate.

The country wide duty rate was determined on the basis of AFA because the DOC claimed that not all Vietnamese exporters under investigation replied to its questionnaire and neither did the Vietnamese Government.[58] In its preliminary determination, the DOC decided to apply the highest rate, at 93.13 percent, calculated from information provided in the petition. The petitioners used production factors provided by several US warmwater shrimp processors and selected India as the surrogate country.

The Vietnamese argued that the letter sent to the government arrived only six days before the questionnaire response deadline and did not clearly request the government to reply. This position was rejected. The Vietnamese also argued that the AFA rate was incorrect. The rate was based on the petition calculation and was overvalued due to the selection of India as the surrogate country instead of Bangladesh. It also used an unpublished source for the Indian data. The DOC eventually assigned the lowest calculated rate from the petition, 25.76 percent, instead of the original 93.13 percent.

In addition, the Vietnamese argued against the use of the zeroing method since increasing any specific negative dumping margins to zero and excluding them increased the overall margin. The Vietnamese demanded that the DOC abide by its WTO obligations and eliminate the use of zeroing in its final determination.[59] In a blunt rejection of WTO authority, the DOC refused to eliminate the use of zeroing, stating that 'in implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body will not have any power to change US law or order such a change'.[60] The result was inflation of both the separate rates and the country wide rate.

This particular element of the negotiations between the US and Vietnamese is worth highlighting. It indicates the lack of protection Viet Nam will enjoy after it accedes to the WTO. It also indicates the willingness of the US to pursue its interests irrespective of its international commitments and obligations. This will be discussed further in Section 5.1.

Another component of the manipulation of data to secure an affirmative determination is the use of the regression based wage rate for Viet Nam. The DOC used a wage rate of USD 0.70 per hour, which yielded

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57 Also included in the petition were Brazil, Ecuador, India, Thailand, and the People's Republic of China.

58 See Section 776(b) of the Tariff Act of 1930.

59 The zeroing methodology , as mentioned above, was found WTO-inconsistent by the WTO Appellate Body, in a case filed by India against the EU, by the Timken Company against the US, and by Corus Engineering Steels against the US.

60 Memorandum dated 29 November 2004, Comment 2, p.12, which refers to the Statement of Administrative Action 660 and also 19 U.S.C. § 3538.

a monthly wage about three times higher than the actual wage Vietnamese workers can earn. It is exaggerated when compared to an average per hour labour rate of USD 0.24 before inflation calculated by using surrogate data from India, Pakistan and Sri Lanka. The DOC previously determined these countries to be economically comparable to Viet Nam and all three have available data (SRV MOT 2005). The regression based wage rate again resulted in inflated dumping margins through overvaluation of the factors of production.

Table 4: Weighted Average Margin Determined by DOC, percent

	Preliminary Determination	Amended Preliminary	Final Determination	Amended Final Determination
		Mandatory Respondents		
Viet Nam-wide	93.13	93.13	25.76	25.76
Camimex	19.60	19.60	4.99	5.24
Kim Anh	12.11	12.11	25.76	25.76
Minh Phu	14.89	14.89	4.21	4.38
Seaprodex Minh Hai	18.68	18.68	4.13	4.30
		Section A Respondents (Separate Rate)		
	16.01 (17 firms)	16.01 (18 firms)	4.38 (29 firms)	4.57 (31 firms)

Source: DOC Preliminary Determination dated 16 July 2004, Amended Preliminary Determination dated 1 September 2004, Final Determination dated 8 December 2004, and Amended Final Determination dated 1 February 2005

Table 4 provides the outcome of the AD investigation. Three issues successfully contested by the Vietnamese helped to reduce the imposed AD duties. First, it defended the use of count size specific shrimp input values published by the Bangladeshi government instead of head on shell for raw shrimp input.[61] Data for the latter were from an unpublished private source. The count size is the most important cost factor in valuing shrimp input. Second, it identified the misapplication of surrogate value for water of USD 0.93/liter in the DOC preliminary margin calculation. The DOC's own calculated surrogate value for water is USD 0.000093/liter.

Third, most Vietnamese firms have successfully proved the absence of both de jure and de facto government control over their export activities. The number of firms that are entitled to the separate rates procedure increased continuously from the preliminary determination until the amended final determination, eventually totaling 31 firms. This warrants re-evaluation of NME status for Viet Nam.

However, the successful reduction of AD tariffs has been offset by the DOC application of Section 735(c)(1)(B) of the Tariff Act of 1930 instructing US Customs to require the posting of a bond equal to the estimated amount by which the normal value exceeds the US price until the DOC reviews the case. This is in addition to AD duties. To avoid any risks, American importers have required Vietnamese exporters to deposit these bonds.

This case reveals that the DOC will use unreliable data sources, unsuitable surrogates, incorrect figures from its own previous calculations and limit the response times to its inquiries unless challenged. It is up to the exporter to challenge this. Viet Nam demonstrated that it is possible to reduce imposed AD duties. Ultimately, NME status still ensures affirmative dumping determinations and the DOC retains tools to punish exporters even if they succeed in reducing duties. In addition, when convenient the DOC willfully ignores its international commitments in the pursuit of its own interests. However, the impact of this discretion can be mitigated by detailed work and cooperation to expose the existing flaws and reduce the degree of injury.

[61] 'Count size' refers to shrimp sold by size groups. A count size of 21/25 means there is an average of 21-25 shrimp per pound. The fewer shrimp per pound, the bigger the individual shrimp and the higher the price.

4.3. Bicycles

The European Bicycle Manufacturers Association (EBMA) lodged a complaint on 15 March 2004 claiming that Vietnamese and Chinese bicycles were being dumped in the EU market. NME status secured an affirmative determination. The EU imposed a country wide AD duty rate of 34.5 percent on all Vietnamese bicycle producers and an MET rate of 15.8 percent on Always Company Ltd. [62]

The conventional EU rate for bicycles and other cycles is 15 percent.[63] The MET rate applied to Always Company Ltd. implies that the company was not dumping its products. MET resulted in a thin dumping margin and MET status was denied to Vietnamese producers. The two central causes for the inflation of the NME dumping margin were the EU selection of an inappropriate surrogate country and the contention that the labour market in Viet Nam is not free.

The EU selected Mexico as the surrogate country based on similarity of products and the existence of competitive markets in Mexico. However, it did not take into account the two countries' different levels of economic development. In 2004 purchasing power parity (PPP) GNI per capita in Viet Nam was USD 2,700 but USD 9,640 in Mexico (World Bank 2006b).[64] The EU calculated the normal value for Vietnamese bicycle producers not granted MET or IT status on the basis of the prices of the two cooperating Mexican producers even though prices in Mexico are higher. The EU assumes that free labour markets do not exist in NMEs and instead relies on surrogate country prices. This denies factoring in the lower cost labour that is the main competitive advantage of poorer countries. The result is inflated AD duties.

Arguing against the EU selection of Mexico as the surrogate country for Viet Nam, 'one cooperating importer submitted that the labour costs in Mexico are three times the Vietnamese labour costs. As a result, the cost of production and selling prices of the end product in Mexico are higher than those in Viet Nam.'[65] The EU responded that 'Viet Nam is considered to be a country with an economy in transition. The labour costs of the Vietnamese producers not granted ME status are not free market prices….The very purpose of using an analogue country is to eliminate the effect of such non-market prices on companies costs' and rejected the argument. [66]

The EU does not take into account the existence of a free labour market in its ME criteria. However, in its judgment on the ME status of Viet Nam the US made a positive assessment of Viet Nam's labour market stating that 'a de facto free labour market has developed … foreign-invested enterprises and the domestic private sector compete for labour, which is reflected in higher wages. Labour rights are also protected, including the right to strike.'(US Import Administration n.d., p.16). The US concluded that 'wage rates are largely market based'(US Import Administration n.d., p.42).

Furthermore, a simple comparison of wages between any two countries, market economy or not, is irrelevant since many factors determine wages and these substantially differ across countries. Without controlling for differences in labour supply, production technology, labour productivity, capital intensity and institutional factors such as minimum wage regulations, it is impossible to determine whether wages in one economy are 'distorted' by comparing them to wages in another. The gap in PPP GNI per capita between Mexico and Viet Nam is compatible with the labour cost gap mentioned by the cooperating importer.

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62 Always Co., Ltd., Tan Thuan Export Processing Zone, District 7, Ho Chi Minh City, Viet Nam.

63 CN code 871200 which includes bicycles and other cycles (including delivery tricycles), not motorised.

64 According to the World Bank, 'Purchasing power parity (PPP) conversion factors take into account differences in the relative prices of goods and services - particularly non-tradables - and therefore provide a better overall measure of the real value of output produced by an economy compared to other economies. PPP GNI is measured in current international dollars which, in principal, have the same purchasing power as a dollar spent on GNI in the US' (World Bank 2006a). For problems using PPP data, particularly for cross country comparisons, see Reddy and Pogge (2002) and Wade (2004).

65 Council Regulation (EC) No 1095/2005 of 12 July 2005, recital 64.

66 Council Regulation (EC) No 1095/2005 of 12 July 2005, recital 64.

The normal value constructed from the prices of Mexican producers inflated the dumping margin to 34.5 percent. The MET rate of 15.8 percent for Always Company Ltd. was calculated on the basis of the domestic production costs plus the weighted average selling, general and administrative (SG&A) costs and the weighted average profits of the producers in Mexico.[67] The use of domestic production costs, even with Mexican profit data, significantly reduced the dumping margin for Always Company.

The selection of Mexico as a surrogate country is problematic. The EU denied MET and IT for the five exporters in Viet Nam primarily due to the allegation of state interference.[68] This was considered a minor issue in Mexico. The main reason for disqualifying the five companies was the export requirement of at least 80 percent of company products, which was stipulated in their investment licenses. The five investigated companies are located in industrial zones and the export requirement is linked to tax privileges.[69] However, this requirement was abolished in March 2003. It is up to firms to decide whether to update their investment license and many exporting firms choose not to pursue this in order to continue enjoying tax privileges.[70] The EU ignored the Vietnamese government's explanation of this legal improvement and chose to interpret this as significant state interference effectively preventing these companies from making decisions according to market signals.[71]

However, Mexican bicycle producers operate under so-called Maquiladora programmes that require domestic producers to meet certain performance requirements. One of them is the requirement to export at least 30 percent of total production a year to be eligible for free imports of raw materials for exports. The EU did not consider this to be incompatible with its first criterion for market economies or sufficient to reject the selection of Mexico as the ME surrogate country for Viet Nam and China.[72] Instead, it argued that the two representative Mexican companies were not very involved in exporting and sold the majority of their production in the domestic market.[73]

The EU also failed to take into consideration the characteristics of the five companies in Viet Nam when claiming export requirement as significant state interference. All five are wholly foreign invested Taiwanese companies. Taiwan has been one of the world's leading bicycle producers and exporters since the 1990s and has always been the biggest bicycle exporter to EU markets. However, due to its higher domestic labour costs and its strategy to focus on high end, high value products, Taiwanese manufacturers have moved plants to China and Viet Nam. This was reinforced due to the EU imposition of an AD duty of 30 percent on Taiwanese bicycles, which was reduced in February 2004. Since 1988, over 270 Taiwanese bicycle manufacturers have moved to China and 30 to Viet Nam (Ruan 2005).

Taiwanese companies prefer to locate in Viet Nam rather than China to export to EU markets. They do not sell their products in Viet Nam because of the small domestic Vietnamese market and the rapid replacement of bicycles with motorbikes. These firms seek to take advantage of cheaper Vietnamese labour, Vietnamese government incentives, the favourable trade status with the EU and to avoid the AD duty of 30.6 percent the EU previously imposed on Chinese bicycle exports.

Table 5 shows the gradual switch from Taiwan to Viet Nam and China to export bicycles into EU markets.

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67 The total volume of domestic sales by Always to independent customers were not judged to be representative so according to Article 2(3) of the Basic Regulation, its normal value was not calculated on the basis of prices in the domestic markets but on the domestic production costs plus SG&A costs and profits. Furthermore, since Always did not have any sales in the domestic market for the product concerned nor for the same category of product in Viet Nam, the amounts of SG&A and profits to be added to its cost of production were therefore based on the weighted average SG&A costs and the weighted average profits incurred in the ordinary course of trade by the producers in Mexico in pursuance to Article 2(6)(c) of the Basic Regulation.

68 The five companies in Viet Nam are (i) Asama Yu Jiun Intl. Co. Ltd. (ii) Dragon Bicycles Co. Ltd. (iii) High Ride Bicycle Co. Ltd. (iv) Liyang Viet Nam Industrial Co. Ltd. (v) Viet Nam Sheng Fa Co. Ltd.

69 Decree 24/2000/ND-CP dated 31 July 2000.

70 Decree 27/2003/ND-CP dated 19 March 2003 amending Decree 24/2000/ND-CP.

71 The Always Company does not have to comply with export requirements because it is located in an export processing zone so it does not have export requirements stated in its investment license.

72 Council Regulation (EC) No 905/98 of 27 April 1998.

73 Council Regulation (EC) No 1095/2005 of 12 July 2005, p.11.

Table 5: Top Three Bicycle Exporters to EU Markets

	1998	2000	2001	2002	2003	IP
Taiwan						
Volume (units)	2,725,000	2,520,000	1,894,000	2,106,000	2,052,000	2,106,000
Index		100	86	92	81	80
Market share	55.6	14.5	12.4	13.4	11.8	11.6
Viet Nam						
Volume (units)	134,000	307,282	586,051	766,680	1,457,245	1,577,737
Index		100	191	250	474	513
Market share	2.7	1.77	3.84	4.88	8.4	8.7
China						
Volume (units)	-	128,091	257,728	561,706	707,351	733,901
Index		100	201	438	552	572
Market share	-	0.73	1.68	3.58	4.08	4.07

Source: Council Regulation (EC) No 1095/2005 of 12 July 2005, p. 29

The selection of Mexico as the surrogate country for Viet Nam is questionable due to the differences in levels of economic development. Prices between the two countries are not comparable, partly because of differences in the cost of labour. This inflates normal value for Viet Nam. In addition, the EU inconsistently applied its own market economy criteria regarding state interference denying Vietnamese exporters the opportunity to access MET and use domestic production costs in determining normal value. The difference between the country wide rate (34.5 percent) and the MET rate (15.8 percent) indicates the importance of this exclusion.

The denial of MET status was the product of an inconsistent application of the EU's own rules. The first concerns the export requirement for some Vietnamese exporters. It is unclear why the EU ruled that Vietnamese firms were subject to state interference, and not Mexican firms. Both derive privileges from meeting export requirements. Second, the actual effect of the export requirement on the firms under investigation was not considered. The firms were all Taiwanese export oriented bicycle manufacturers and the export requirement did not change that. It is thus unclear how the export requirement amounts to state interference in firm decision making. The result of this casual application of already ambiguous criteria confirmed the dumping allegations and inflated dumping margins for non-MET exporters in Viet Nam.

4.4. Footwear with Leather Uppers

On 23 February 2006, European Commissioner Peter Mandelson formally announced the decision to impose a provisional progressive anti-dumping duty schedule on Vietnamese leather shoes. The schedule increased in four steps over a period of five months, beginning at the rate of 4.2 percent on 7 April 2006 and reaching 16.8 percent from 15 September 2006. The duty excludes children's shoes and Special Technology Athletic Footwear (STAF). The progression is presented in Table 6.

Table 6: EU Progressive Duty Schedule on Vietnamese Footwear

7 April - 1 June 2006	2 June - 13 July 2006	14 July - 14 Sept 2006	From 15 Sept 2006
4.2	8.4	12.6	16.8

Source: Commission Regulation (EC) No 553/2006 of 23 March 2006

On 30 August 2006, to reconcile the different economic interests at stake in Europe, the EC proposed a duty of 10 percent on Viet Nam for certain leather shoes. After lengthy internal negotiations, on 4 October 2006 the EU ratified the application of this anti-dumping duty for two years, effective from 7 October 2006. Nine member countries agreed to this duty, twelve vetoed and four cast blank votes.

Viet Nam is classified by the EU as an NME and Brazil was selected as the surrogate country. Eight firms were selected as sample companies out of 63 Vietnamese enterprises in the dumping complaint lodged by the European Confederation of the Footwear Industry (CEC) on 30 May 2005.[74] The sample firms were then investigated to assess qualification for MET and IT and determine the extent of dumping. None of the eight companies were granted MET or IT. Other companies also submitted documents for IT and MET, which brought the total up to 115 firms, but they were also unsuccessful. Citing evidence of state intervention, an affirmative determination was announced and the dumping margin was calculated using domestic prices in Brazil during the investigation period.

There are several problems with this determination. First, the allegation of state intervention fails to consider the impact of the presence of SOEs in the industry and the real scope of state involvement, particularly in light of Viet Nam's ongoing reforms prior to WTO accession. The claim denied MET or IT status to Vietnamese firms, which led to the use of surrogate country prices. This had the effect of increasing dumping margins.

Second, comparison of Vietnamese and Brazilian unit prices and monthly imports to the EU reveals no clear import surge. Prices in the two countries track each other, indicating that Vietnamese firms are responding to the same market signals as Brazilian producers. It is then difficult to argue that state interference is distorting Vietnamese prices and resulting in dumping.

Third, exclusion of labour costs in Viet Nam calls into question the entire exercise. Brazilian unit prices are higher than Vietnamese unit prices. However, since Viet Nam is considered an NME, its domestic prices are deemed inapplicable. This prevents any explanation of differences in costs based on lower labour costs in Viet Nam. However, footwear production is a labour intensive activity that allows poorer countries to take advantage of cheaper labour. In addition, Brazil and Viet Nam export into different product and price segments of the EU footwear market, largely as a result of the different costs of labour. The only other explanation for the difference between domestic Brazilian prices (as a proxy for domestic Vietnamese prices) and Vietnamese export prices is that Vietnamese firms are dumping. The remainder of this section will explore these issues in more detail.

The original GATT concern about state trading countries centered on price distortions resulting from controlled domestic prices and the state monopoly of trade. The EU does not have a definition of NMEs. It only has a list of state trading and former state trading nations subject to the surrogate country method.[75] Except for several key goods and services that the state reserves the right to determine and valorise prices, the state in Viet Nam does not set prices for products or inputs, including wages outside the state sector.[76] Price management does not exist even when disguised as quantity restriction measures. Footwear production is not an exception.

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74 The eight companies are (i) Viet Nam Pou Yuen company, (ii) Viet Nam Pou Chen Company, (iii) Taekwang Vina Company, (iv) 32 Footwear Company, (v) Dona Biti's Company, (vi) Binh Tien Export-Import Company, (vii) Kainan Joint Venture, and (viii) Haiphong Leather Products and Footwear Company. However, the defendants were not just these 60 companies (three names on the list were repeated) but all footwear producers that export their products to the EU market. The complainant could only list 60 firms due to insufficient collection of data.

75 Council Regulation (EC) No 384/96 regulates for the use of the surrogate country method based on the list contained in Council Regulation (EC) No 519/94.

76 According to Decree 170/2003/ND-CP of 25 December 2003 and Circular 15/2004/TT-BTC of 9 March 2004, the state shall valorise the prices of petrol, oil, liquefied gas, cement, iron, steel, fertiliser, paddy, rice, coffee, cotton seeds and ginned cotton, raw material sugarcane, salt and a number of preventive and curative medicines for human use; and determine the prices of some goods and services subject to state monopoly such as electricity and a number of post and telecommunications services and important to the national economy and daily activities.

The footwear industry in Viet Nam includes a diversified set of enterprises. The number of SOEs has been significantly reduced due to the acceleration of SOE transformations and will continue declining. SOEs accounted for less than one third of total industry output in 2000. This is shown in Table 7. However, state ownership in Viet Nam, particularly for smaller SOEs, is only an indication of the initial establishment capital. For these smaller SOEs, few advantages remain and this has been the case since the late 1990s. They no longer receive capital injections from the government and must acquire bank loans on collateral and look for contracts and orders themselves. Government policy is that any SOE not in a strategic industry must balance its own books. Footwear is not a strategic industry.

Table 7: Product Categories by Types of Enterprise in 2000

Unit: number of product categories

	State enterprises	Non-state enterprises	100% foreign direct investment	Joint ventures	Total
Sport shoes	36,547	38,226	151,322	12,888	238,983
Canvas shoes	35,107	14,106	10,106	5,167	64,535
Ladies' shoes	30,305	23,895	0	0	54,200
Others	13,045	30,124	9,052	14,227	64,282
Total	115,004	104,400	170,480	32,080	422,000
Percent	**27.3**	**24.7**	**40.4**	**7.6**	**100**

Source: VIETRADE (2002)

Table 7 shows the dominant role of non-state and foreign invested firms. With regard to the original GATT concerns, the Vietnamese footwear industry is not demonstrably dominated by the state. Evaluating it as such under NME status ignores the rapid progress in market oriented reforms undertaken in Viet Nam since the 1980's.

The EU does provide for MET and IT as alternatives to the surrogate country approach. However, the EU denied this alternative route to Vietnamese footwear companies, citing state intervention in the form of tax incentives linked to export performance, cheap finance, exemption from land rental fees relating to export performance, improper asset valuation and the absence of accounting systems of international standard.

The EU comment that the export requirement prevents firms from making business decisions in response to market signals is an unsubstantiated claim.[77] As explained in the bicycle case study above, this requirement was abolished in 2003.

Article 27 of the WTO Agreement on Subsidies and Countervailing Measures (SCM) states that least developed countries and low income developing countries with per capita GNP of less than USD 1,000 are exempt from the rule prohibiting export subsidies. If they develop export competitiveness in any product, these countries are under an obligation to phase out export subsidies on that product after a transitional period. Given Viet Nam's current level of development, it is not surprising that Viet Nam maintains some export subsidies. It is unclear why the EU criterion for MET status opposed to export subsidies is not consistent with this provision.

Furthermore, Viet Nam has agreed to waive its claim to least developed country status and meet WTO rules concerning domestic and export subsidies. In the working party meeting on Viet Nam's WTO accession in

[77] Commission Regulation (EC) No 553/2006 of 23 March 2006, recital 81.

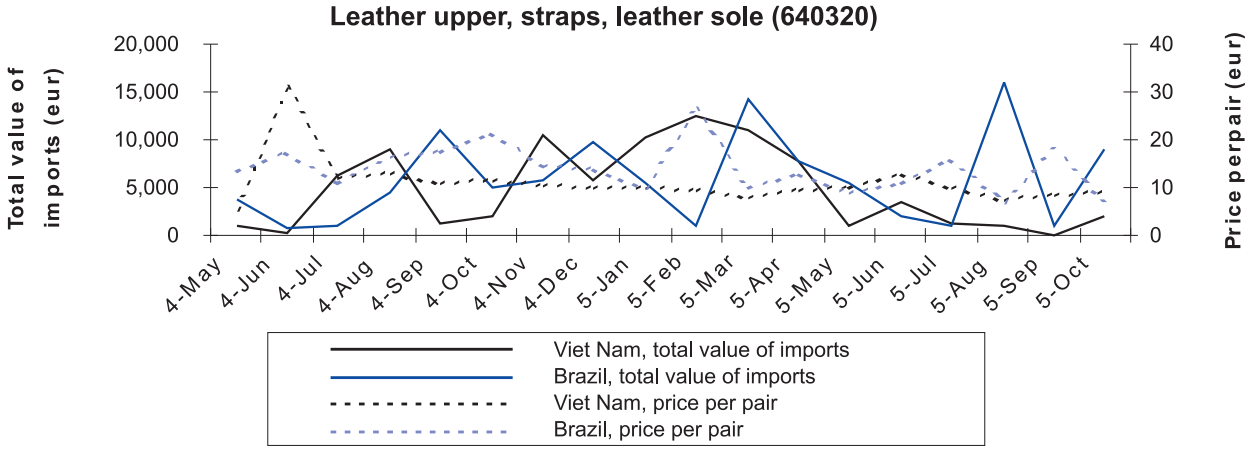
Geneva on 20 May 2005, Viet Nam made a commitment to eliminate export subsidies in the form of direct payment from the state budget contingent upon export performance following accession. This commitment did not affect the EU AD determination. However, the relevant question is whether export subsidies are significant enough to lead to distorted prices and dumping into the EU market.

It is difficult for footwear companies in Viet Nam to receive subsidies and the amount of subsidies available is low. There are no specific domestic and export subsidy policies for the Vietnamese footwear industry. Footwear producers are eligible for general government programmes currently in the form of direct tax reductions or exemptions, and investment assistance and export credit from the Development Assistance Fund (DAF).[78] Companies can be exempted from corporate income tax for the first two years after establishment and enjoy a tax reduction of 50 percent in the next three years on condition that export earnings account for 50 percent of total turnover and 20 percent in the following years.[79] These firms are free to ask for modification of their investment licenses if they want to sell on the domestic market and not receive tax preferences. Entitlement for export credit requires that export earnings must account for at least 30 percent of annual revenue for domestic enterprises and 80 percent for joint ventures. However, footwear producers find it difficult to acquire investment assistance from DAF due to the limited number of sectors targeted for support.[80]

The EU is the most important export market for Vietnamese footwear. It is therefore economically irrational for exporters to sell below production costs given current low levels of indirect government subsidy. According to the Plan for Development of the Export Market, the government makes it clear that items entitled to export preferences shall be reduced and direct financial support will be limited.[81] This will be replaced with support for raw material suppliers, and technological, scientific and technical assistance solutions to improve production for export, all of which is compatible with WTO rules.[82]

To assess the importance of export subsidies to Vietnamese export prices, Figure 1 compares unit prices and import trends in Viet Nam and Brazil to determine whether government subsidies have led to dumping and caused material injury to the EU footwear industry.[83]

Figure 1: Unit Prices and EU Monthly Imports from Brazil and Viet Nam of Seven Categories under Investigation



78 See Decision 231/1999/QD-TTg dated 17 December 1999, Decree 106/2004/ND-CP dated 1 April 2004 on the state investment credit, Circular 63/2004/TT-BTC dated 28 June 2004 and Decision 133/2001/QD-TTg dated 10 September 2001 on export credit. For recent updates on Viet Nam's domestic and export subsidies, see US - Viet Nam Trade Council (2005).

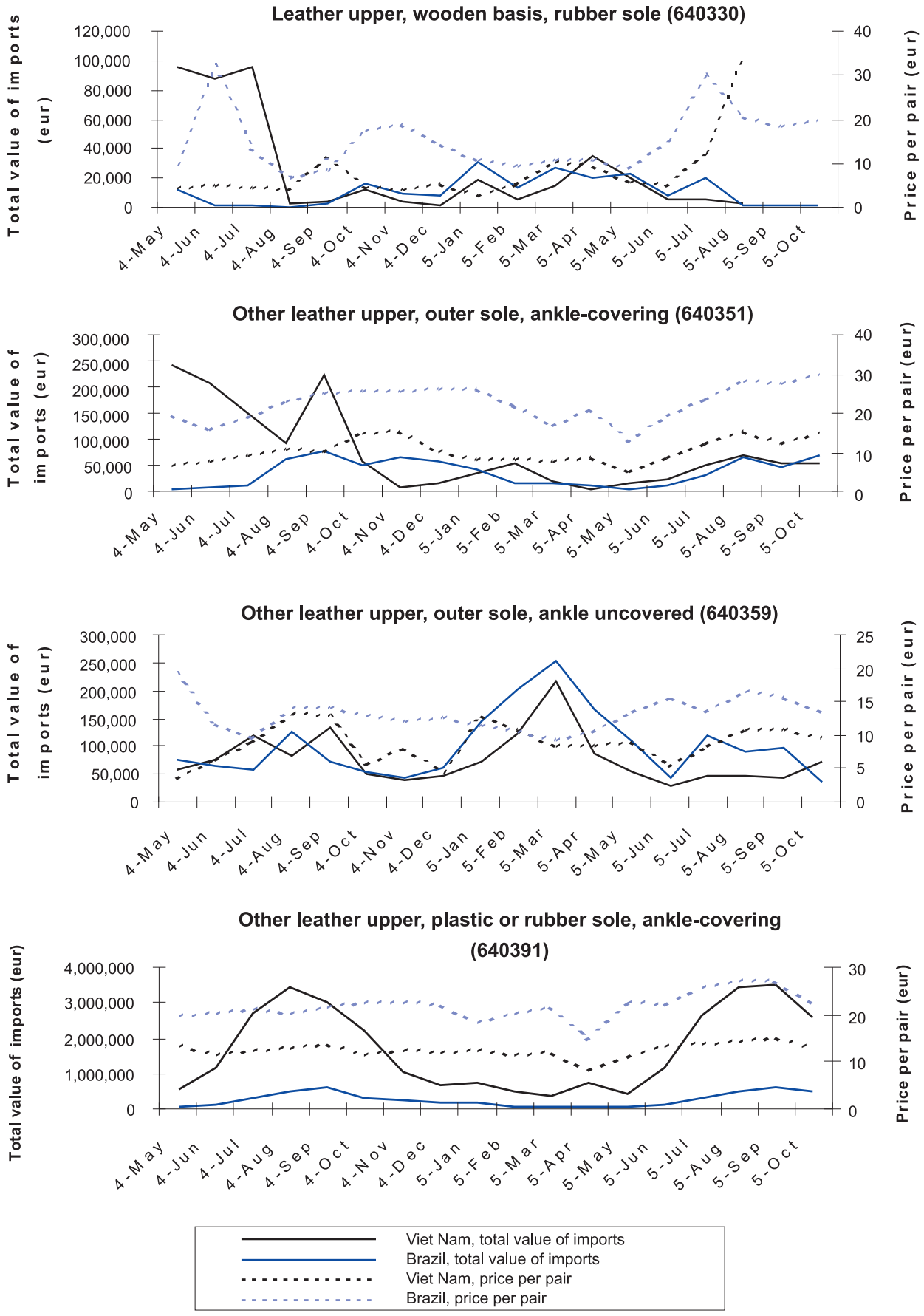
79 See Decree 24/2000/ND-CP dated 31 July 2000, amended by Decree 27/2003/ND-CP dated 19 March 2003; Law on Domestic Investment Promotion dated 20 May 1998 and Law on Corporate Income Tax dated 17 June 2003.

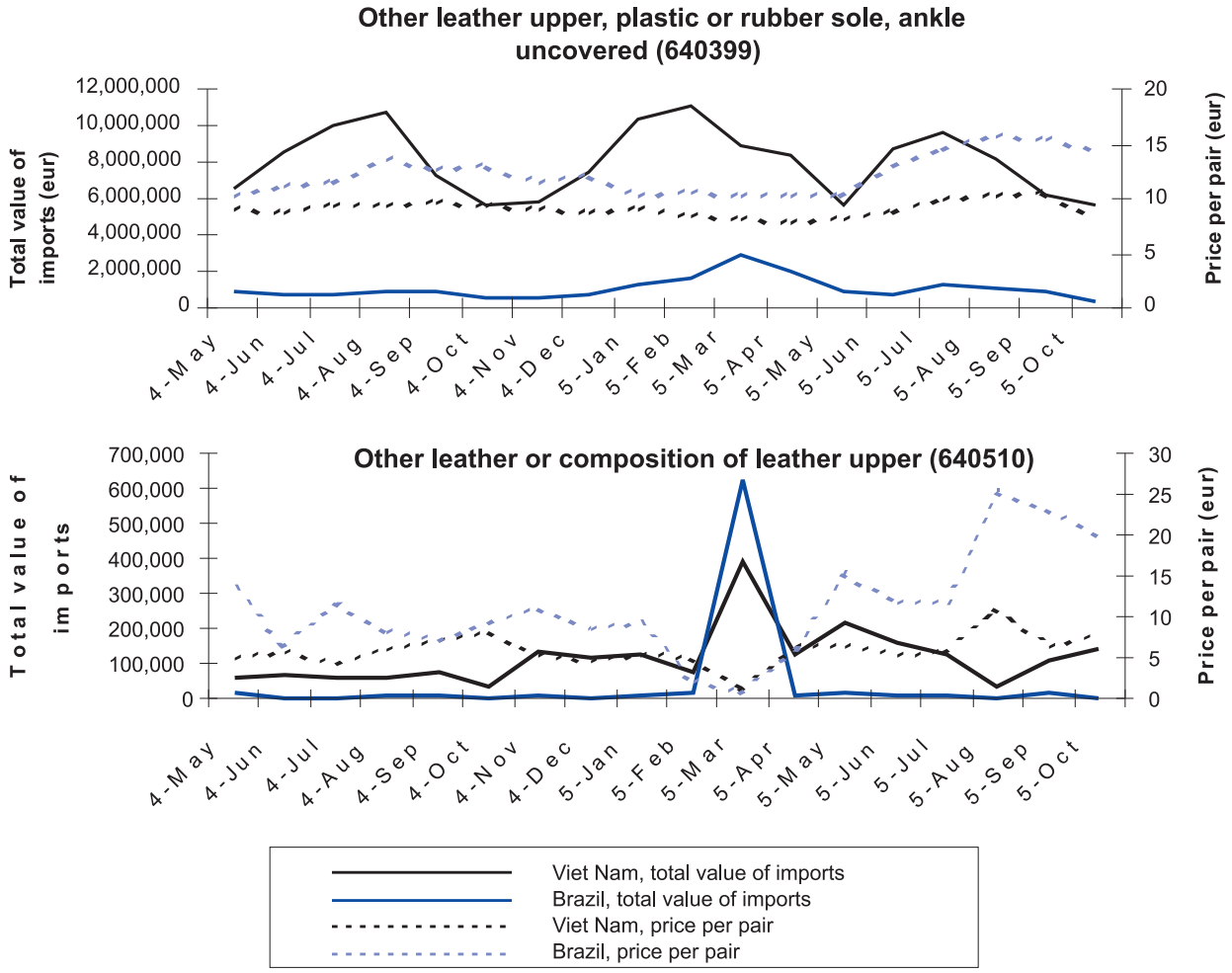
80 Decision 231/1999/QD-TTg dated 17 December 1999, Decree No 43/1999/ND-CP dated 29 June 1999, Decree 106/2004/ND-CP dated 1 April 2004 on the state investment credit and Circular 63/2004/TT-BTC dated 28 June 2004.

81 Decision 266/2003/QD-TTg dated 17 December 2003.

82 Viet Nam has committed in its WTO bilateral agreement with the US to phase out all export subsidies in five years.

83 The period under investigation was from 1 April 2004 to 31 March 2005.


Leather upper, wooden basis, rubber sole (640330)
Total value of imports (eur)
Price per pair (eur)
120,000
100,000
80,000
60,000
40,000
20,000
0
40
30
20
10
0
4-May
4-Jun
4-Jul
4-Aug
4-Sep
4-Oct
4-Nov
4-Dec
5-Jan
5-Feb
5-Mar
5-Apr
5-May
5-Jun
5-Jul
5-Aug
5-Sep
5-Oct
Other leather upper, outer sole, ankle-covering (640351)
Total value of imports (eur)
Price per pair (eur)
300,000
250,000
200,000
150,000
100,000
50,000
0
40
30
20
10
0
Other leather upper, outer sole, ankle uncovered (640359)
Total value of imports (eur)
Price per pair (eur)
300,000
250,000
200,000
150,000
100,000
50,000
0
25
20
15
10
5
0
Other leather upper, plastic or rubber sole, ankle-covering (640391)
Total value of imports (eur)
Price per pair (eur)
4,000,000
3,000,000
2,000,000
1,000,000
0
30
20
10
0
Viet Nam, total value of imports
Brazil, total value of imports
Viet Nam, price per pair
Brazil, price per pair



Source: Eurostat (Comext database) and EC DGTAXUD taken from EC DGT (2006)

The monthly unit prices of Vietnamese products in all seven categories under investigation track the unit prices of Brazilian products closely. No lasting price decrease occurred in any of these categories. When Vietnamese unit prices dropped, so did Brazilian prices. The fluctuations of Vietnamese unit prices therefore reflect EU market conditions as do Brazilian unit prices. Figure 1 also shows that trends of Vietnamese exports mirror Brazilian exports. Brazil is a market economy, and these price and volume fluctuations are driven by market conditions. It is unclear why similar trends are considered the result of state intervention for Viet Nam.

In addition, there was no sustained or significant import surge of Vietnamese products. It is therefore not possible to conclude that price undercutting or price suppression was the result of a surge in Vietnamese exports. Although usually at lower levels, Vietnamese unit prices in all seven categories did not pull down Brazilian unit prices or reduce Brazilian export volumes. For most product categories the unit prices and export volumes of the two countries move in parallel.

Figure 1 also shows that Brazilian unit prices are nearly twice as high as Vietnamese unit prices. This was highlighted by the CEC in its dumping complaint. The CEC prices are presented in Table 8. However, these price differences are not in themselves proof of dumping. They suggest that the two economies are at different stages of development and not similar enough to justify a simple comparison.

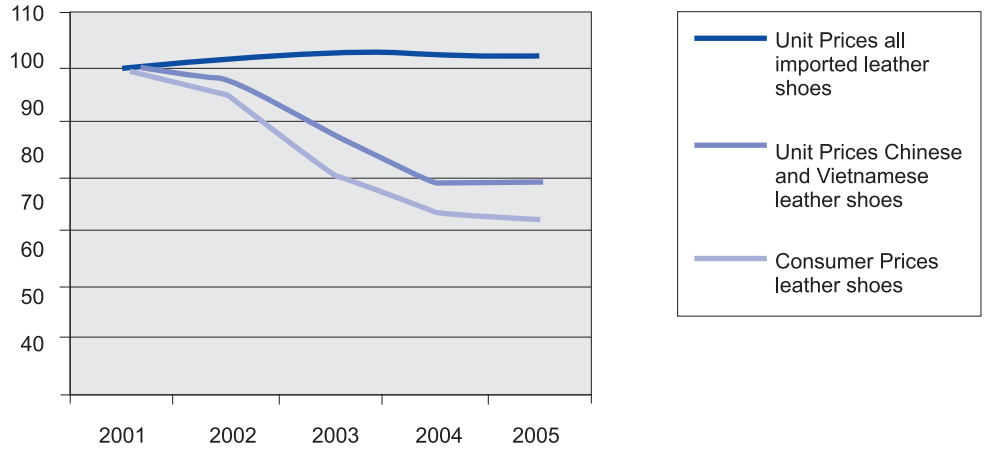
The EU also produced Figure 2 on price trends to demonstrate that Vietnamese and Chinese dumping is causing serious injury to EU producers.

Table 8: Prices Used by the CEC in their Complaint, Euros

Country	Shoes for men	Shoes for women	Shoes for both men and women
Brazil (domestic prices)	16.33	13.58	19.94
China (export prices)	2.97	10.07	3.65
Viet Nam (export prices)	8.80	7.22	8.52

Source: Viet Nam Ministry of Trade, personal communication

Figure 2: Macro Trends in Leather Footwear Import Prices 2001-2005 (2001=100)



Source: EC (2006)

However, Figure 2 simply reflects the price competitiveness of Vietnamese and Chinese footwear producers and does not constitute proof of dumping. Dumping occurs when export prices are below domestic prices for a given country. Without data on Vietnamese and Chinese domestic prices, this figure only shows that Viet Nam and China export at lower cost than other footwear exporters. This misrepresentation of facts influences public and official opinion to suit protectionist interests within the EU.

Complaints about dumping and its effects based on price differences ignore the main cause of these differences - lower labour costs. The EU does not accept this as an explanation for Vietnamese footwear competitiveness since it does not consider Viet Nam to possess a free labour market. The EU stated that 'these costs are deemed biased by the fact that the countries concerned [Viet Nam and China] have no ME or their economy is in transition'.[84] With Vietnamese monthly wages ranging from USD 50-100 compared to Italian monthly wages of around USD 2,000, Vietnamese shoes retailed in the EU at USD 20-25 are claimed to be dumped against Italian shoes at USD 70-100 (Viet Nam Economic Times 2005). Refusing to acknowledge lower labour costs leaves dumping as the only explanation of price differences. As noted earlier, this stance contradicts EU development assistance policy, which views the development of labour intensive manufacturing as appropriate to Viet Nam's labour market conditions.

Footwear is a labour intensive industry and the EU footwear industry faces increasing labour costs. While material costs account for the largest share of total costs in footwear manufacturing in developing countries and economies in transition, labour costs are largest for the EU15 (Schmél 2000). These costs are presented in Table 9.

[84] Commission Regulation (EC) No 553/2006 of 23 March 2006, recital 117.

Table 9: Labour Costs in Selected Footwear Producing Countries, 1998

Country	US$/hr	Country	US $/hr
France*	20.7	Brazil	1.5
Italy*	14.3	Indonesia	0.7
Korea	7.2	Romania	0.7
Taiwan	5.9	China	0.6
Hong Kong	5.4	Viet Nam	0.6
Portugal	5.3	Thailand	0.5

Source: Vila (2000) from Oxalaga and Tata International (2006)
(*): figures for France and Italy are for per pair of Oxford shoes, from Schmél (2000).

Labour costs correspond to 38 percent of total footwear production costs in Italy but only 10 percent in Hungary (Oxalaga and Tata International 2006). This difference in the composition of total production costs is even higher for East Asian countries with lower labour costs than Eastern European countries and Brazil. Given the increasing cost of labour, leading EU footwear producers (Italy, Spain, Germany, France) are shifting production to lower cost regions. They keep final assembly in Europe and focus on higher end segments of the market. CBI (2004) commented on these strategies in Italy and Spain:

> The Italians could long cope with the intense competition from low cost countries and their deteriorating exports figures, partly because of the outsourcing strategy of Italian producers. This strategy involves outsourcing the high labour stages of footwear production, namely the uppers of the shoes, to countries with low labour costs. Another way to cope with the increasing competitive pressures from emerging low cost countries was to diversify production by increasing specialisation in high quality goods (vertical product differentiation), which do not compete directly with low quality goods from emerging economies. Italian production is traditionally located in the upper-end of the market. According to ANCI (The National Association of Italian Footwear Manufacturers) and Pambianco, 51 percent of Italian production is located in the medium and upper end of the market. Italy is therefore known for its quality and fashionable footwear. Due to the increased competition, the production of some types of footwear has almost disappeared in Italy. Sports footwear has for example almost disappeared. Italian producers like Diadora and Lotto increasingly rely on overseas sourcing.
>
> Stiff competition from Asian countries (particularly China), Latin American countries like Brazil and Mexico, and a number of countries in Eastern Europe including Romania, has led Spanish producers to make radical changes to their business strategies. In fact, in recent years, there has been a move away from the production of predominantly mid-range footwear towards mid-high and top-end lines of superb quality with a strong design component. Spain transformed itself from a low cost centre of production to one of the world's leading style setters in the medium to high-end market. Fashion can be considered to be the driving force behind these changes.

Commenting on the dumping investigation against Vietnamese and Chinese footwear with leather uppers, Paul Verrips, president of the Footwear Association of Importers and Retail Chains (FAIR), remarked that affordable shoes are unlikely to be made in Europe again. Asian imports are not a threat to the European footwear industry because only a handful of footwear manufacturers still maintain all of their production in Europe. These are mainly family owned small and medium enterprises (SMEs) that specialise in the kind of high quality or niche products that are not produced in Viet Nam or China (FAIR 2005). In recognition of this fact, on 18 November 2005 the EU General Trade Department informed the related sides that STAF would be removed from the AD investigation. Due to distinctive and basic physical and technical characteristics, STAF do not directly compete with other types of footwear and there is only marginal production of STAF remaining in the EU (Ouwehand 2005).

Developing countries with low labour costs such as Viet Nam, China, Cambodia and Indonesia have become footwear processors for big EU manufacturers. According to the Viet Nam Leather and Footwear Association (Lefaso), 80 percent of Vietnamese footwear companies which export their products to EU markets are operating under processing contracts with foreign companies. They receive materials from foreign companies and only add labour value and small operational costs to their products. They do not directly export their products to the EU and very often do not know the final destination of their exports. Lefaso estimates that more than 95 percent of its members' output are exported under foreign brands such as Nike, Adidas, Famous Footwear and K Shoes (Viet Nam News 2005). The AD lawsuit is then partly a contest between struggling European traditional shoemakers and big EU manufacturers that outsource production to Asia and partly the competing interests of European producers and retailers (Wall Street Journal 2006).

Finally, Brazil is not an appropriate surrogate country for Viet Nam. The EU footwear market can be segmented into four price categories, shown in Table 10. Price is a decisive factor especially in the lower segments of the market. Quality and fashion are more important than price in higher segments, in which exclusiveness and design are the central factors.

Brazil and Viet Nam focus on different segments of the EU footwear market. Brazil compensates for its relatively high costs by investing in quality, speed and flexibility. Brazil is also one of the biggest leather producers in the world and its footwear exports to the EU contain more expensive types of materials than other developing countries (CBI 2004).

Table 10: Price Segments in the European Footwear Market

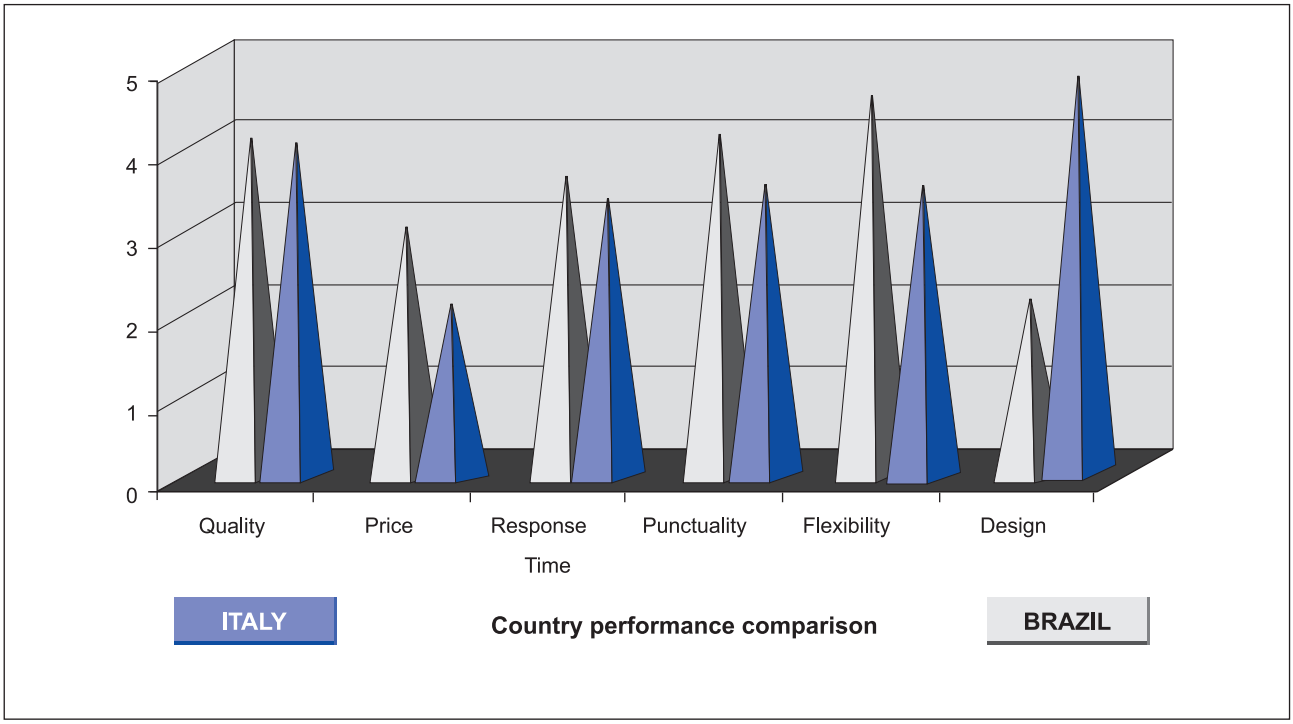
Price segment	Important purchase criteria	Retail location	Retail Price Indication
Premium	Quality, Brand, Exclusiveness, Design	Exclusive retail stores Special departments in department stores	150,00 euro +
Medium-high	Quality, Brand, Fashion	Footwear (fashion) multiples Independent specialty shops	75,00 euro + .
Medium-low	Quality, Price, Fashion	Footwear multiples Department stores Clothing multiples	40,00 euro +
Economical	Price	Variety stores Discounters Street markets	15,00 euro +

Source: CBI (2004)

A survey of European and American footwear buyers investigated the performance of Brazil, China and India in the footwear global value chain. Brazil equaled or surpassed Italy in most areas but was weak on price. Brazil gained competitiveness in middle level retail chains by supplying quality branded products. This is presented in Figure 3. Price is the main reason for buyers placing orders from China and India (Oxalaga and Tata International 2006).

Viet Nam is much closer to China and India than Brazil in terms of market segment. The primary reason for the different focus is labour costs. As shown in Table 9, labour costs in the Brazilian footwear sector are nearly double those of Viet Nam and other Asian countries. The gap in labour costs reflects differences in income levels between the two countries. In 2004 the average PPP GNI per capita was USD 7,940 in Brazil but only USD 2,700 in Viet Nam (World Bank 2005). Although various factors can influence wage rates, the level of economic development is a key determinant. Given this disparity between the level of development and wages in the footwear sector, Brazil seems an unsuitable surrogate country for Viet Nam.

Figure 3: Export Performance of Italian and Brazilian Footwear Producers



Source: Schmitz and Knorringa (1999) from Oxalaga and Tata International (2006)

The EU argued that 'by definition, an NME country or an economy in transition does not have the same economic characteristics as an ME country. It is not unusual that such difference in economic development exists between an analogue country and an NME country or an economy in transition'.[85] This is tantamount to admitting that surrogate country prices are incapable of serving as an accurate proxy for NME domestic prices. Calculations of normal value based on higher surrogate country prices (partly due to higher levels of economic development) are therefore likely to produce results favourable to importing countries.

The footwear industry is one of the leading foreign exchange earners for Viet Nam and generates thousands of jobs. The imposition of AD duties by its biggest footwear export market will cause severe economic and social problems. Perhaps this would be acceptable if Viet Nam was indeed dumping. Claims of state interference prevented Vietnamese exporters from accessing MET or IT status and resulted in the use of higher Brazilian prices to construct normal value. This ignores reforms undertaken by Viet Nam which have reduced state involvement in the footwear sector to negligible levels and does not account for unit price and import volume data indicating operation according to market conditions.

The four case studies presented in this section have offered concrete examples of the problems inherent in NME status and anti-dumping methodology. The US and EU manipulated procedures to manufacture evidence of dumping and to exaggerate dumping margins. This included use of structural (and legal) discretion in US and EU anti-dumping laws, misuse of available data, failure to apply standards consistently, failure to uphold international commitments through use of WTO-incompatible calculation methods, comparison of dissimilar products, and a lack of attention to reforms in Viet Nam. Although US and EU anti-dumping laws contain flawed methododolgies, NME status was the consistent factor resulting in affirmative determinations. This gave the US and EU increased scope to influence investigations through the use of the surrogate country method. Although a strategic and careful response by Vietnamese authorities and firms can often reduce the scale of damage from AD investigations, NME status represents a continued threat to exports and jobs. The next section addresses whether WTO membership will change this situation.

[85] Commission Regulation (EC) No 553/2006 of 23 March 2006, recital 114.

5. Implications for Viet Nam as a WTO Member

An important benefit of WTO membership is access to the organisation's dispute settlement mechanism. This allows member countries to contest national rulings and attempt to redress discriminatory determinations. This section will evaluate the effect of accession to WTO and the DSM on AD cases.

WTO accession is a notoriously difficult process for late comers. There is also a long history of additional entry conditions for NMEs. Poland (entered GATT in 1967), Romania (1971) and Hungary (1973) had to commit to a 'buffering mechanism' that included a selective safeguard clause permitting contracting parties to apply import restrictions to their goods. Two decades later, China had to make the same commitments. For twelve years, China will be subject to a product specific safeguard provision for goods of Chinese origin.[86] This mechanism will be invoked if goods 'are imported into the territory of any WTO member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.' [87] In the US - Viet Nam WTO Bilateral Accession Agreement Viet Nam agreed to an enforcement mechanism on textiles and apparel. The US reserves the right to reimpose quotas if it determines that Viet Nam has not eliminated all WTO-prohibited subsidies to its textiles and garments industries. The decision to reimpose quotas will be determined unilaterally by the US and does not require approval from the WTO dispute settlement panel (USTR 2006).

NMEs face a difficult situation. They can expend often limited bargaining power trying to avoid the inclusion of safeguard provisions. However, they still face near automatic AD rulings given their NME status. Either way, existing WTO members possess the tools to restrict exports from NMEs and NME status duration is negotiated rather than determined empirically. Evidence is less important than bargaining power. For example, DOC determination of NME status remains in effect until it is revoked by the DOC, and the US reserves the right to re-impose NME status at any time.[88]

China negotiated NME status for up to 15 years 'if the producers under [dumping] investigation cannot clearly show that market economy conditions prevail in the industry'.[89] This is equivalent to the existing additional procedures (other than the pure surrogate country approach) already available to China as an NME. This provision was reproduced in the Protocol on China's Accession to the WTO, which gives all WTO members the right to treat China as an NME for up to a fifteen year period.[90] Viet Nam negotiated similar treatment, with NME status for up to 12 years following accession (WTO 2006).

In addition to the difficulties facing NMEs, the recent proposal of an anti-dumping monitoring programme by the US as a condition for granting permanent normal trade relations (PNTR) could erode the potential gains of WTO. The 2001 US BTA granted MFN status to Viet Nam.[91] However, Viet Nam remains subject to the Jackson-Vanik Amendment (JVA) of the 1974 Trade Act which denies normal trade relations to NMEs that restrict emigration. The president can recommend annual JVA waivers and these require congressional approval.[92] PNTR would end the requirement for annual renewal.[93]

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86 China's commitment is higher than Article XIX of GATT 1994 on safeguard measures, which regulates for triggering safeguard measures only when 'serious' injury is proved. Even after the twelve year time limit expires, Section 201 of the US Trade Act of 1974 still permits temporary exemptions from WTO rules in cases of 'serious' injury for a period of up to eight years.

87 These provisions first appeared in the Product Specific Safeguard section of the US - China Protocol. These provisions were reproduced in the Protocol on China's Accession to the WTO, Section 16, Transitional Product-Specific Safeguard Mechanism.

88 Section 771(18)(C) of Title VII of the Tariff Act of 1930.

89 Starting from the date of entry into force of China's Bilateral Protocol with the Unites States. US - China Protocol Language, Price Comparability in Determining Dumping and Subsidisation, paragraph (4) Non-Market Economy Duration.

90 Protocol on the Accession of the People's Republic of China, Part I, Article 15, Price Comparability in Determining Subsidies and Dumping.

91 The US refers to MFN as normal trade relations.

92 This does not always require a formal vote.

93 PNTR is granted only if a country meets the JVA requirement of free emigration.

Granting PNTR is not a requirement for WTO accession. However, failure to grant PNTR to Viet Nam puts the US in violation of its WTO obligation to provide 'immediate and unconditional non-discriminatory treatment' to all WTO members and Viet Nam is not required to extend all its WTO commitments to the US.[94] This puts US companies at a disadvantage and granting PNTR for Viet Nam is being pursued by the US administration.

Strong resistance to PNTR for Viet Nam has emerged from textile producing states, in particular from Senator Elizabeth Dole of North Carolina and Senator Lindsey Graham of South Carolina. To obtain political support for PNTR, the Bush administration has suggested the creation of an anti-dumping monitoring programme for Vietnamese textile and garment exports to the US.[95] The DOC will monitor imports of textiles and apparel goods and make this information publicly available. If the monitoring process indicates dumping and US textile producers can demonstrate material injury, then the DOC will self-initiate anti-dumping investigations. This will not require a petition from textile producers. Viet Nam is an NME, the monitoring mechanism will use a selected surrogate country to determine 'fair market price'.

This mechanism is unprecedented and could have a negative impact on the benefits of WTO membership for Viet Nam. First, since it includes use of the surrogate country method, the determination of dumping is open to discretion and manipulation. Second, it may violate the 'like product' principle of WTO anti-dumping regulations. Viet Nam is a net importer of textiles and its textile exports to the US are very low. Demonstration of material injury should come from US garment producers rather than US textile producers. Third, this mechanism violates the MFN treatment of WTO since it is not applied to other member countries and discriminates only against Viet Nam. However, if Viet Nam does not contest this mechanism it will be considered a bilateral 'consensus' between the US and Viet Nam and Viet Nam will find it difficult to challenge this through the WTO DSM.

The scope of such a mechanism is also unclear and could possibly be expanded to cover more of Viet Nam's exports to the US. Currently, the proposed mechanism only applies to textiles and garments, but American domestic producers of other commodities such as footwear, catfish, and other products could demand similar treatment once the mechanism is acceptable in principle.

Furthermore, it exposes Viet Nam to use of this anti-dumping monitoring mechanism by other WTO member countries on the basis of WTO's MFN principle. Paradoxically, an agreed bilateral exception to equal treatment could be argued to be available to other member countries through the principle of equal treatment. The EU could argue that it is unfair for only the US to have such a mechanism and demand that it also establishes one. The legal grounds for such a claim are unclear but it threatens to force Viet Nam into further negotiations and concessions.

The proposed anti-dumping monitoring mechanism could reduce the potential benefits to Viet Nam of joining WTO. The conditions for granting PNTR could result in permanent discrimination against Viet Nam. It is already subject to NME status. This mechanism puts Viet Nam in an even more precarious and uncertain position in order to win political support from two US senators from textile producing states.

Anti-dumping actions are a protectionist tool that enables countries to impose tariff barriers under WTO rules. The WTO cannot reduce the number of AD-related trade disputes. Furthermore, WTO regulations do not replace national AD laws. Member country laws should conform to the WTO Anti-dumping Agreement but often do not.

However, the WTO ADA has technical shortcomings. It does not contain a mechanism to distinguish between systematic dumping and incidental dumping. The calculation of dumping margins does not follow transparent and logical methods. Some of the more egregious examples include asymmetrical comparisons between domestic and export prices, restrictive interpretations of allowances, systematic exclusion of sales below cost

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94 The WTO obligation originates in GATT Article 1(1).

95 Annex II provides the US administration letter to the two senators containing the details of this proposal.

and use of remaining sales above cost as the basis for normal value, and use of constructed normal values with unrealistically high profit margins. The WTO ADA lacks transparency in calculation of injury margins and it does not have a mechanism for accused exporters to defend themselves against blame for causing injury (Vermulst 1999, Lindsey and Ikenson 2002b).

Most WTO member countries have reformed their national AD laws to approach compliance with the ADA. Anti-dumping cases are still handled in national courts and these courts are susceptible to political influence. The four case studies in Section 4 reveal the scale of discretion involved in AD cases prosecuted in national courts. The only avenue to contest discriminatory national rulings is to appeal to the WTO Appellate Body and the WTO dispute settlement mechanism.

The central problem with the DSM for anti-dumping cases is that it recognises the surrogate country approach as legal. WTO does not contain detailed regulations on when, to whom and how this approach can be applied. The DSM does address other issues in AD cases, such as initiation, injury determinations and 'sunset' provisions. However, the key area of manipulation by petitioners is through NME status and the use of surrogate country prices to manufacture affirmative dumping determinations and inflate dumping margins. Since this is WTO compatible it cannot be contested and the DSM will not redress discriminatory AD findings.

In addition, the US Congress has decided that reports issued by WTO panels and the Appellate Body are overridden by US laws, procedures and determinations. Statement of Administrative Action (SAA) 660 emphasises that 'panel reports do not provide legal authority for federal agencies to change their regulations or procedures'. This is reinforced in 19 U.S.C. § 3538.[96] Even if an NME managed to win a favourable ruling through the DSM, the US is likely to ignore it.

The benefit to Viet Nam of joining WTO with regard to AD cases is not access to the dispute settlement mechanism. The DSM will not provide recourse against discretionary national AD determinations since it allows the surrogate country methodology. The benefit to Viet Nam is the inclusion of a specific date for the end of NME status in its accession agreement. Until NME status is revoked, Viet Nam will continue to be vulnerable to AD claims and discretionary rulings as a WTO member.

The policy implications of these findings are not encouraging. However, the case study discussed in Section 4.2 involving frozen and canned warmwater shrimp indicates the importance of contesting every element of an AD investigation. The US and EU consistently use unreliable and inconsistent data in the course of constructing normal value. While it is not possible to overcome the bias of NME status and the surrogate country approach, it is possible to mitigate the impact of AD rulings.

[96] This was used by the DOC to defend its use of the WTO-incompatible zeroing methodology in its AD investigation against Vietnamese frozen and canned warmwater shrimp discussed in Section 4.2.

6. Conclusion

This paper has investigated the legal and practical components of anti-dumping cases, particularly for Viet Nam. Dumping exists when export prices are below domestic prices in a given country and this causes harm to industries in the importing country. Any investigation method yielding higher domestic prices increases the likelihood of affirmative dumping determinations. As tariff and non-tariff barriers are being reduced to comply with WTO rules, AD is used increasingly to protect domestic industries.

The anti-dumping investigation methodologies of the US and EU are characterised by vague and ambiguous definitions. They lack detailed guidelines for use in practice, for example how to establish that dumping is causing material injury to domestic industry. Calculation methods are flawed and even WTO-incompatible. The result is overestimation of exporting country domestic prices, affirmative dumping determinations and inflated dumping margins. In addition, discretion is a structural feature of AD regulations. Since AD cases are handled in national courts, this discretion results in politically motivated rather than technical determinations of AD findings.

These methods apply to all countries. NMEs face an additional burden through the use of the surrogate country approach. This method emerged out of negotiations over how to determine domestic prices in state trading countries in the 1960s and has been retained in WTO regulations. The approach allows petitioners to select a market economy as a surrogate for the NME. Prices in the surrogate country proxy for domestic prices in the NME. Discretion in the selection process and comparison of dissimilar products between countries are common. Calculation of normal value is often abused. Overvaluation of the factors of production is nearly universal, particularly for labour costs since this method ignores these differences between countries. This disregards the primary reason that exports from poorer countries are cheaper and leads to biased findings. In addition, the use of adverse facts available allows the US to use questionable data in calculating normal value. The surrogate country method allows petitioners to manipulate calculations and manufacture affirmative determinations and inflated dumping margins.

In recognition of market oriented reforms in NMEs, the US and EU provide additional procedures for some NMEs. Firms in industries under investigation can attempt to qualify for special treatment predicated on the demonstration of market conditions for the firm and often the entire industry. These additional approaches are an improvement over the pure surrogate country method as they allow for the use of actual domestic prices and separate duty rates for qualifying firms. However, these firms remain subject to the flawed 'normal' AD methods. Many firms are excluded because the criteria for qualification are ambiguous and applied in a discretionary manner.

The criteria for classification of NMEs is also characterised by ambiguity and subject to the discretion of the administration. The EU simply has a list that it periodically updates but no published selection criteria. The US has a provision allowing it to make designations based on 'other factors considered appropriate'. These are not defined. This amount of discretion yields classifications based on political considerations rather than empirical results. It is unclear when a country can or should change status. The ability to generate whatever findings are desired through use of the surrogate country method makes this a critical issue for NMEs.

Four case studies of AD investigations in Viet Nam have revealed the extent of discretion applied in practice by both the US and EU. The entire array of distorting methods were employed to arrive at the desired results. The US refused to abide by its WTO commitments and defended this by stating that WTO rulings are not binding. NME status was the consistent factor resulting in affirmative determinations and exaggerated anti-dumping duties. This gave the US and EU increased scope to influence investigation outcomes through use of the surrogate country method. The shrimp case indicates that Viet Nam can contest some aspects of these calculations and reduce final AD duties. Although Viet Nam can reduce the scale of damage from AD investigations, NME status will continue to result in affirmative determinations and inflated dumping margins. The dispute settlement mechanism of WTO will not provide an avenue for contesting discriminatory AD determinations. National AD laws for the most part comply with the WTO Anti-dumping Agreement. The problem is that WTO validates the surrogate country approach. It is therefore not possible to challenge this mechanism. The benefit to Viet Nam of joining WTO is not access to the DSM. It is the inclusion of an expiry date on NME status in its accession agreements. That this date is negotiated indicates the political rather than technical meaning of NME designation. Until NME status is revoked, Viet Nam will continue to be vulnerable to discretionary AD claims.

Annex I: Anti-dumping Investigations Against Viet Nam

Year	Complainants	Commodities and Determination
1994	Colombia	Rice, negative determination because dumping did not cause injury to domestic industry
1998	EU	Seasoning, affirmative determination, AD duty of 16.8%
1998	EU	Footwear, negative determination because dumping did not cause injury to domestic industry
2000	Poland	Gas-fuelled lighters, affirmative determination, AD duty of 0.09 euro/lighter
2001	Canada	Vietnamese garlic, affirmative determination, AD duty of Canadian $1.48/kg
2002	Canada	Footwear and footwear soles, NME status not imposed, negative determination because dumping did not cause injury to domestic industry
2002	EU	Gas-fuelled lighters, complainant withdrew petition
2002	South Korea	Gas-fuelled lighters, complainant withdrew petition
2002	USA	Frozen fish fillets, affirmative determination, AD duty of 36.84% to 63.88%
2003	EU	Zinc oxides (extended from zinc oxides China), affirmative determination, AD duty of 28%
2003	USA	Frozen and canned warmwater shrimp, affirmative determination, AD duty of 4.13% to 25.76%
2004	EU	Ring binder mechanisms (extended from China), determination on circumvention, AD duty of 51.2%-78.8%
2004	Turkey	Tubes and rubber tyres, affirmative determination, AD duty of 29% to 49%
2004	EU	Bicycles, affirmative determination, AD duty rates of 15.8% for Always Company and country-wide rate of 34.5%
2004	EU	Certain tube or pipe fittings, complainant withdrew petition
2004	EU	Stainless steel fasteners and parts thereof, affirmative determination, AD duty of 7.7%
2004	EU	Integrated electronic compact fluorescent lamps, extension of definitive duties, AD duty of 66.1%
2004	Peru	Surf boards, affirmative determination, AD duty of USD 5.2 per one board
2005	EU	Footwear with leather uppers, affirmative determination, AD duty of 10%
2005	Egypt	Compact fluorescent lamps, affirmative determination, AD duty of USD 0.32 per lamp
2005	Argentina	Spokes of bicycles and motorbikes, ongoing
2006	Turkey	Drive belts, ongoing
2006	Peru	Footwear with cloth uppers, ongoing
2006	Mexico	Sport shoes, ongoing

Annex II: Letter from the US Administration

The Honorable Elizabeth Dole
United States Senate
Washington, D.C. 20510

Sep 28 2006

Dear Senator Dole:

Thank you for sharing with the Administration your concerns regarding granting Permanent Normal Trade Relations (PNTR) to Vietnam and its possible effect on the domestic textile industry. We understand the sensitivity of these issues for the textile industry at a time of increased global competition after the end of worldwide quotas.

In the course of the negotiations on our bilateral market access agreement that is part of Vietnam's accession to the World Trade Organization ("WTO"), we consulted closely with the domestic textile industry. The bilateral agreement contains a unique mechanism to ensure that Vietnam will live up to its obligations to immediately end all WTO0prohibited subsidies for textile and apparel goods. Specifically, in addition to the standard remedies for WTO-prohibited subsidies already available to the United States through WTO dispute settlement, we have taken the unprecedented step of adding an enforcement mechanism that would allow for the prompt reimposition of quotas on textile and apparel goods, if Vietnam fails to fulfill its obligations to eliminate WTO-prohibited subsidies immediately upon becoming a WTO Member.

We understand that some of your constituents nevertheless remain concerned that, notwithstanding these undertakings, Vietnam may continue to offer prohibited subsidies to the state run textile and apparel industry, which could result in unfair competition in this sector, possibly including dumping in the U.S. market. The WTO system allows U.S. producers injured by any such dumping to seek anti-dumping remedies against Vietnamese imports being sold for less than fair value in the United States. However, according to domestic textile industry representatives, the structure of the U.S. textile and apparel industry may make it difficult for them to make effective use of this remedy.

The Administration is prepared to systematically monitor and review U.S. imports of textile and apparel goods from Vietnam and such data will be made publicly available on a monthly basis. Specifically, upon entry of Vietnam into the WTO and for the duration of this Administration, the Department of Commerce (the Department) will conclude a review every six months as to whether there is sufficient evidence to initiate an anti-dumping investigation of any textile or apparel goods from Vietnam pursuant to section 732(a) of the Trade Act of 1930 (19 U.S.C. § 1673a(a)), and, if so, whether critical circumstances exist that would allow for preliminary duties to be applied retroactively. The Department is responsible for initiating and conducting anti-dumping investigations and would examine whether initiation of an anti-dumping action would be warranted under U.S. law and the applicable WTO rules.

The Honorable Elizabeth Dole
Page 2

The Department will begin a comprehensive program to monitor imports of textile and apparel products from Vietnam, including the import values and volumes of these goods. In order to this, the Department will construct, in consultation with industry, production templates for textile and apparel products of interest in order to determine the inputs and other factors that contribute to the fair market price of a good. As long as Vietnam is considered a non-market economy for anti-dumping purposes, the Department will use a proxy country for this monitoring program in order to assess whether Vietnamese goods may be dumped into the U.S. market. If this monitoring process indicates that dumping exists and the domestic textile industry fully cooperates in supplying data available to the domestic industry indicating the existence of material injury caused by such imports, the Department will self-initiate anti-dumping investigations with respect to the relevant products. For the duration of this Administration, as part of the monitoring system, the Department will take note of the special sensitivity to the domestic industry of trousers, shirts, underwear, swimwear, and sweaters and the Department will make available to interested private-sector parties as much of the information it gathers as possible. In addition, the Department will endeavor to prepare templates and monitoring criteria that are consistent with its current dumping methodologies, however, consistent with the quasi-judicial nature of anti-dumping investigations, the Department may not prejudge the specific methodologies or information that would be utilized in any particular investigation.

We hope this will help to alleviate the domestic textile industry's concerns and look forward to working with you on this approach. If you have any further questions, please contact Nat Wienecke, Commerce Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663, or Justin J. McCarthy, Assistant U.S. Trade Representative for Congressional Affairs, at (202) 395-3406.

Sincerely,

Susan C. Schwab
U.S. Trade Representative

Carlos M. Gutierrez
Secretary of Commerce

* The letter to Senator Lindsey Graham is identical to this letter.

References

Centre for the Promotion of Imports from Developing Countries (CBI) (2004) 'EU Market Survey: Footwear', December, http://www.cbi.nl/marketinfo/cbi/?action
=showDetails&id=223&via=pub.

European Commission (EC) (2006) 'Anti-dumping Investigation on Chinese and Vietnamese Footwear: Questions and Answers', 23 February, http://ec.europa.eu/
comm/trade/issues/respectrules/anti_dumping/pr230206_qa_en.htm.

European Commission (EC) Directorate General Trade (DGT) (2006) 'Integrated System for the Management of Licenses, http://sigl.cec.eu.int/queryactualfw.html.

Footwear Association of Importers and Retail Chains (FAIR) (2005) 'Walking on Eggshells - EU Regulations That Protect the Footwear Industry Could Lead to the Loss of Thousands of Jobs', 3 November, http://www.prnewswire.co.uk/cgi/news/
release?id=157454.

Ikenson, Dan (2004) 'Zeroing In: Anti-dumping's Flawed Methodology Under Fire', Free Trade Bulletin No. 11, Center for Trade Policy Studies, Cato Institute, April.

Kaye Scholer LLP (2005) 'Comments of the Ministry of Commerce, People's Republic of China on Calculation Methodology for Expected Non-Market Economy Wages', 1 August, http://ia.ita.doc.gov/download/nme-calculation-methodology/
mofcom-cmt.pdf.

Laroski, Joseph (1999) 'NMEs: A Love Story, Nonmarket and Market Economy Status under US Anti-dumping Law', *Law and Policy in International Business,* vol. 30, 369-398, Winter.

Lindsey, Brink (1999) 'The US Anti-dumping Law Rhetoric versus Reality', Trade Policy Analysis No. 7, Center for Trade Policy Studies, Cato Institute, August.

Lindsey, Brink and Dan Ikenson (2002a) 'Anti-dumping 101, The Devilish Details of "Unfair Trade" Law', Trade Policy Analysis No. 20, Center for Trade Policy Studies, Cato Institute, November.

Lindsey, Brink and Dan Ikenson (2002b) 'Reforming the Anti-dumping Agreement: A Road Map for WTO Negotiations', Trade Policy Analysis No. 11, Center for Trade Policy Studies, Cato Institute, December.

Nguyen Thanh Tung, Nguyen Van Thanh and Michael Phillips (2004) 'Implications of Liberalisation of Fish Trade for Developing Countries: A Case Study of Viet Nam', paper prepared for Project 26109, Food and Agriculture Organisation (FAO), July.

Ouwehand, Martin (2005) 'Update on European Anti-dumping Proceedings Concerning Footwear', *Global Trade Practice Group Newsletter*, Greenberg Traurig LLP, December, http://www.gtlaw.com/practices/intl_trade/newsletter/GT_200512.pdf.

Oxalaga and Tata International (2006) 'World Leather Market: Factbook 2000', http://www.factbook.net/leather_evolution.php.

Oxfam International (2004) 'Extortion at the Gate: Will Viet Nam join the WTO on Pro-Development Terms?', Oxfam Briefing Paper No. 67, Oxfam International, October, http://www.oxfam.de/download/vietnam_wto.pdf#search=%22extortion%20at%20the%20gate%22.

Peacock, Nigel (2004) 'Trade Issues Background Paper: The Impact of Dumping on Trade in Fisheries Products', paper prepared for Project 26109, Food and Agriculture Organisation (FAO), July.

Polouektov, Alexander (2002) 'The "Non-market Economy" Issue in International Trade in the Context of WTO Accession', Misc. No. 20, United Nations Conference on Trade and Development (UNCTAD) Division on International Trade and Commodities (DITC), Trade Negotiations and Commercial Diplomacy Branch (TNCD), October.

Reddy, Sanjay and Thomas Pogge (2002) 'How Not to Count the Poor', June, http://www.columbia.edu/~sr793/count.pdf.

Ruan, Grace (2005) 'The Present Situation in the Taiwan Bicycle and Electric Bicycle Industries', presentation given at Taipei International Cycle Show, 3 May, http://www .datei.de/public/extraenergy/GraceSRuan_Taipei2005.pdf.

Schmél, Ferenc (2000) 'Structure of Production Costs in Footwear Manufacture', paper prepared for the 14th United Nations Industrial Development Organisation (UNIDO) Leather and Leather Products Industry Panel held in Zlin, Czech Republic, 13-15 December, http://www.unido.org/userfiles/timminsk/LeatherPanel14 SchmelCosts.pdf.

Schmitz, Hubert and Peter Knorringa (1999) 'Learning from Global Buyers', University of Sussex Institute of Development Studies (IDS) Working Paper 100, November.

Socialist Republic of Viet Nam (SRV) Ministry of Trade (MOT) (2005) 'Comments on the Department's Calculation of Wages in NME Anti-dumping Proceedings', 1 August, http://ia.ita.doc.gov/download/nme-calculation-methodology/vietnam-gov-cmt.pdf.

United States (US) Executive Office of the President and Department of Commerce (DOC) (2006) 'Letter from the US Administration to Senators Dole and Graham' 28 September, http://www.usvtc.org/trade/wto/coalition/LetterAdministrationDole Graham28Sep06.pdf.

United States (US) Import Administration (n.d.) 'A-552-801 Investigation Public Document regarding Anti-dumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam - Determination of Market Economy Status', http://ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-status-determination.pdf.

United States (US) International Trade Administration (ITA) (2003) 'Notice of Anti-dumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Viet Nam', *Federal Register*, 68:155, US Department of Commerce, Tuesday 12 August, Notices, http://a257.g.akamaitech.net/7/257/2422/12aug20030800/edocket.
access.gpo.gov/2003/pdf/03-20509.pdf.

United States (US) International Trade Administration (ITA) (2005) 'Separate-Rates Practice and Application of Combination Rates in Anti-dumping Investigations involving Non-Market Economy Countries', *Import Administration Policy Bulletin*, No. 05.1, Department of Commerce, 4 May.

United States (US) Trade Representative (TR) (2006) 'US - Viet Nam WTO Bilateral Accession Agreement: Ensuring a Level Playing Field for US Textiles and Apparel Industries', *Trade Facts*, Office of the United States Trade Representative, May, http://www.amchamvietnam.com/download/596/L2Rvd25sb2FkLzU5Ng==.

United States (US) - Viet Nam Trade Council (2005) 'Catalog of Legal Updates: Viet Nam Trade Policy Regime', December, http://www.usvtc.org.

Vermulst, Edwin (1999) 'Anti-dumping and Antisubsidy Concerns for Developing Countries in the Millennium Round: Key Areas for Reform', United Nations Conference on Trade and Development (UNCTAD), June.

Viet Nam Economic Times (2005) 'Treading Carefully', 1 August, http://www. vneconomy.com.vn/vet/index.php?param=info&backissues=138&id=9564.

Viet Nam Economic Times (2006a) (Vitas Opposes US Imposition of Anti-dumping Monitoring Mechanism), 2 October, http://www.vneconomy.com.vn/vie/?param=article&catid=0806&id=aa57e9bf60e11e.

Viet Nam Economic Times (2006b) 'An anti-dumping scheme to be imposed on Vietnam's textiles and garments exported to the US?', 4 October, http://www.vneconomy.com.vn/eng/article_to_print.php?id=0dbc1515cdff7a.

Viet Nam News (2005) 'Footwear Industry Needs to Change', 12 December, http://vietnamnews.vnanet.vn/showarticle.php?num=01ECO121205.

Viet Nam News (2006) 'Textile duty sells out US retailers', 9 November, http://vietnamnews.vnanet.vn/showarticle.php?num=03BUS071006.

Viet Nam Trade Promotion Agency (VIETRADE) (2002) 'Viet Nam Shoes and Leather Industry', CDROM, http://www.vietrade.gov.vn.

Vila, Lorenzo (2000) 'Status and Outlook of the Leather Industry in the New Millennium', paper presented at the Round Table of the Leather Industry, Bologna, 6 May.

Wade, Robert (2004) 'Is Globalization Reducing Poverty and Inequality', World Development, 32:4, 567-589.

Wall Street Journal (2006) 'Shoe Spat with Viet Nam, China splits EU members', Wednesday, 11 January.

World Bank (2006a) 'Purchasing Power Parities', http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20399244~menuPK:1192714~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html.

World Bank (2006b) World Development Indicators 2005, 18 April, http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf.

World Trade Organisation (WTO) (2006a) 'Statistics on Anti-dumping', http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

World Trade Organisation (WTO) (2006b) 'Report of the Working Party on the Accession of Viet Nam', WT/ACC/VNM/48, October, http://www.mpi.gov.vn/default.aspx?Lang=2.