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A field study of an EU Antidumping
proceeding
- The case of Vietnamese footwear

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Summary

This thesis describes the antidumping duty imposed towards Vietnam on certain footwear and the implications that follows the measure.

In an antidumping investigation it is of great importance to establish whether the exporting country is a market economy or not. The EC decision to impose a provisional antidumping duty on imports of certain footwear with uppers of leather originating in Vietnam was based on the conclusion that Vietnam is a Non-Market Economy. The idea of Non-Market Economy (NME) treatment is based on the system where free trade only works if the trading is maintained on a free market.

A company can be granted Market Economy Treatment (MET) by the EU and when granted this treatment it will be considered as situated in a market economy even though the country is treated as a Non-Market Economy. No company was granted such treatment in the described case based on the fact that the Vietnamese companies did not pay market rent for the land on which their facilities are situated. The term Non-Market Economy is not widely used which also complicates the implementation.

Member States within the European Union (EU) have agreed on a common commercial policy in trade with non Member States (third countries). Articles 131- 134 of the EC Treaty provide for the legal basis for this policy. The EU and its Member States are all Members of the World Trade Organization, WTO, and consequently need to follow the regulations in several international trade agreements (WTO law). EC Courts have however so far sustained that GATT and WTO law does not have direct effect in the EC legal system.

Vietnam was recently accessed to the WTO and became the 150th Member. When accessing WTO the main challenge is that it will force the enterprises in the Member state to increase their competitiveness and that is especially due to small and medium sized enterprises as the footwear companies. The companies have to meet the demands on international standards and the implementation of certain legislation will increase.

The predictability is also an important issue and how the importers and exporters can predict the tariffs on certain goods. Within the WTO there is a right to dispute trial and the AD Agreement also states that all national legislation includes rules that all members should have a trial organ when it comes to final decisions on anti dumping tariffs. In the WTO dispute settlement procedure there is a huge difference though and that is that individual companies cannot have their cases tried, only member states. But this is further complicated by the fact that the EU does not give direct effect to the WTO Law. The EU also gives contradictory conclusions on trade

since it embraces free trade but at the same time use trade defence instruments.

It is difficult to estimate the effects on exports of Vietnamese footwear but according to the Leather and Footwear Association, LEFASO and the Ministry of Trade in Vietnam, the export will decline. There are also risks that foreign investors will move their production to other countries. The costs for the companies will be much higher for the producing companies in Vietnam that have made investments than the actual positive effects from measures for the Common Industry in the EU.

Preface

This thesis has been conducted through a Minor Field Study sponsored by Sida. I would like to thank Sida for the opportunity to meet new people and to get to know the country Vietnam. It has been a pleasure to perform the study on those premises. I also thank the Faculty of Law at Lund University for giving me this chance to travel to Vietnam.

I would also like to thank Marie-Louise Thaning, my contact person in Vietnam, for the invaluable help. She made my stay easier and her kindness will be remembered.

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Abbreviation

ADB	Asian Development Bank
ADA	Anti Dumping Agreement
APEC	Asia-Pacific Economic Cooperation
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nation
ASEM	Asia Europe Meeting
BTA	Bilateral Trade Agreement
CEPT	Common Effective Preferential Tariff
DGT	Directorate- General for Trade
DSU	Dispute Settlement Understanding
DSB	Dispute Settlement Body
EBA	Everything But Arms
EC	European Community
ECT	Treaty Establishing the European Community
EU	European Union
GATT	General Agreement on Tariff and Trade
GDP	Gross Domestic Product
GSO	General Statistics Office
GSP	Generalised System of Preferences
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
LCD	Least Developed Country
LEFASO	Leather and Footwear Association
MET	Market Economy Treatment
MPI	Ministry of Planning and Investment
NME	Non-Market Economy
PNTR	Permanent Normal Trade Relations
SCM	Subsidies and Countervailing measures
Sida	Swedish International Development Cooperation Agency
SOE	State Owned Enterprise
TDI	Trade Defence Instruments
TRIPS	Trade Related aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WTO	World Trade Organization

1 Introduction

Recently the European Commission imposed a permanent anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China (China) and the Socialist Republic of Vietnam.¹

When deciding upon antidumping measures, it is necessary to determine if a product is considered as being dumped (see below).² The initiation on an antidumping proceeding has to be based upon a written complaint on behalf of the domestic industry. During the proceedings, an investigation is made to determine the existence, degree and effect of the alleged dumping.³ A provisional measure may be imposed during the proceedings to prevent injury until a definitive antidumping duty has been determined.⁴ The antidumping measure is imposed by a Regulation through a proposal from the Commission and decided by the Council.

In the investigation prior to the decision on provisional anti-dumping duties, the Vietnamese companies were denied the treatment as market economy for the reason that they do not pay market rent for the land on which their facilities are situated. When imposing trade defence measures such as antidumping duties, the treatment of the target country can be of fundamental importance. In antidumping investigations Members of the WTO often compare prices in non-market economies with calculated prices of goods that originate in a market-oriented substitute country.⁵ In the WTO Anti-Dumping Agreement (ADA)⁶ there is no mentioning of non-market economies but the term is used in a number of protocols concerning accession to the WTO.⁷

The treatment of non-market economies is quite different from the treatment of market economies especially considering antidumping proceedings. Anti-dumping duties are to a larger extent imposed on exports from companies in countries with non-market economies than exports from companies that

¹ Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. OJ L 98, 6.4.2006.

² Article 2, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, ADA) and Article 2 in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community Official Journal L 056 , 06/03/1996 P. 0001 – 0020 (Basic Regulation).

³ Article 5 ADA and Article 5-6 Basic Regulation.

⁴ Article 7 and 9 ADA and in the Basic Regulation.

⁵ Weeks, Ann M. Eu dumps PRC 'non-market' classification. *China Business Review*, (1998) vol 25, nr 4, page 4.

⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

⁷ Horlick, Gary and Shuman, Shannon. Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws. *International Lawyer*, (1984) 18:4, page 834.

have been granted market economy treatment. However, the classification of non-market economy is not coherent.⁸

1.1 Purpose

A lot of questions occur when studying the problematic issue of trade in Vietnam. Questions that need to be answered are:

- What is an antidumping proceeding and its consequences and why is it used against Vietnam?
- Why is Vietnam treated as a Non-Market Economy and how does that affect the country?

To determine these questions it is necessary to describe the reason for imposing antidumping duties, how they are imposed and then illustrate why Vietnam was treated as a Non-Market Economy. In order to understand the meaning and use of antidumping measures, several issues need to be explained.

The Vietnamese economy needs to be described and explored, as well as the EU interpretation and treatment of the concept of Non-Market Economy. Antidumping proceedings are closely connected to the World Trade Organization by being implemented in the EC Law and the agreements and negotiations concerning accession that was currently going on with Vietnam. The different treatment of economies affects the outcome in different ways due to the element of fair comparison.

1.2 Method

The method applied in this thesis is primarily the traditional legal method, using sources such as legal texts, some case law and legal doctrine. It is conducted in the form of a field study with interviews and actual presence in Vietnam. Since the thesis is accomplished in a developing country and many matters need to be under consideration, it is also performed by methods that consist of political, economic and social themes.

This thesis has been carried out by means of a Minor Field Study, financed through a scholarship from Sida, the Swedish International Development Cooperation Agency. The reason for doing the field study was to gather information by interviews and collecting written material. I have also attended various meetings which have provided useful information, both governmental and non-governmental. I have gathered written material that could not be acquired in Sweden, like reports, doctrine and others.

⁸ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* Kommerskollegium. National Board of Trade. 2006-05-05. page 4.

Initially, I intended to conduct more interviews, but it turned out to be difficult to make people talk or to get their approval to publish their statements. This resulted in more research in published material and material that was not yet published. Some material was restricted and others were difficult to get some statistical information from.

In some chapters there are also comparative analysis, especially between the market economy corporate structure and the structure of the Vietnamese economy. To analyse the different structures a comparative method has been used.

1.3 Material

The material consists of legal texts and documents such as doctrine. The best source for EC Law is the website for the EU and the Commission as well as legal texts on the domain www.europa.eu or <http://ec.europa.eu>, the European Commission website.

Other well used websites are www.wto.org, the World Trade Organization's website as well as other Vietnamese information web pages.

Overall the basic material is primary sources, but when necessary I have used articles and doctrine. The doctrine is essentially study material from the Law Faculty and the articles published by scholars. In chapter 4, I have chosen to use only one book (The Anatomy of Corporate Law)⁹ when comparing to the Vietnamese system. This is due to the book's efficacy and widely contributing scholars. The authors come from e.g. Harvard Law School, London School of Economics in Commercial law and Yale Law School. The book is a result from cooperation between seven authors from five countries and many more has contributed. The book is international and neutral and provides for the basic structure of corporations in a market economy.

1.3.1 Legal sources

The legal sources in this thesis consist of Vietnamese law such as the constitution and Enterprise law.¹⁰ They have been read and compared to the European corporate system (see 4.5).

Other sources are the EC treaties and the WTO agreements such as the Anti Dumping Agreement and the GATT.¹¹

⁹ Kraakman Reiner. *The Anatomy of corporate law: A comparative and Functional Approach*. Oxford University Press, (2006).

¹⁰ National Assembly of the Socialist Republic of Vietnam. No. 60-2005-QH11. Legislature XI, 8th Session. Law on Bankruptcy No. 21/2004/QH11 took effect from Oct 15 2004. Law on Investment No. 59/2005/QH11 took effect from July 1 2006. Enterprise law year 2005. National Assembly of the Socialist Republic of Vietnam. Legislature XI, 8th session.

1.4 Delimitations

This subject consists of various aspects of world trade such as free trade and protectionism. World trade is a very large area, so delimitations are necessary in order to write a thesis. The limits of the thesis are above all antidumping measures towards Vietnam and especially according to the EC law. However it is vital to describe antidumping legislation in the WTO in order to fully understand the measure. There is much to explore about the direct effect of WTO Laws in the EC, but it can only be mentioned here. All agreements between the EC, WTO and Vietnam cannot be fully investigated.

Antidumping is a trade barrier that is related to some problems in international trade. These are for example which prices to compare with when determining if they are being dumped, how to determine if the dumped price causes an injury and what demands can be made upon the proceeding prior to the duty. However, this thesis cannot describe all problems related to antidumping issues. The aim of this thesis is to concentrate on the problem with Non-Market Economy Treatment towards countries and Market Economy Treatment towards individual companies.

The number of cases is delimited due to the conclusions. There are not many cases concerning exactly the issues described in this thesis e.g. Non-Market Economy or economical treatment of other countries. The cases mentioned in this thesis are mainly about the relation between EC Law and WTO Law or fair comparison. The discussions on those cases are not investigated fully though, due to the fact that they are not essential for the purpose of this thesis.

The former antidumping legislation cannot be fully described here, only mentioned.

1.5 Terminology and definitions

The terminology in this thesis is quite technical and some explanations might be necessary in order to make the text easier to read. Other terminology is explained in its proper context in the thesis.

The concept of antidumping in an economic perspective and legal can be quite different. In an economic sense antidumping can be defined as price discrimination. If the price differences are manufactured by special factors in international sales or other factors of non-pricing between sales in different national markets, dumping has not occurred.¹² It is assumed that

¹¹ Treaty Establishing the European Community (EC Treaty), GATT, General Agreement on Tariffs and Trade, 1947 and 1994 Article VI, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, ADA).

¹² Wenxi Li. *Antidumping Law of the WTO/GATT and the EC. Gradual Evolution of Antidumping Law in Global Economic Integration*. Juristförlaget i Lund, (2003), Page 53.

each individual firm acts on its own economic interests and most of the firms pursue the goal to maximize profit. If the elasticity of demand is not equal, the firm can increase the profits by setting prices that match the market. A profitable price discrimination can be a success if three conditions are fulfilled; the firm that intends to engage in price discrimination must have some market control over the prices, the different markets in which price discrimination operates must be separated by natural barriers and lastly, there must be unequal elasticity of demand in different markets.¹³ In a legal sense it is decided by more specific rules (see below).

A Non-Market Economy can be defined as:

“A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a non-market economy, production targets, prices, costs, investment allocations, raw materials, labour, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.”¹⁴

A market economy can be defined as:

“The national economy of a country that relies on market forces to determine levels of production, consumption, investment, and savings without government intervention.”¹⁵

Dumping can be defined as selling a product below its normal value.¹⁶ It is defined in GATT (General Agreement on Tariff and Trade) Article VI as

- 1) selling at an export price which is below the home market price
- 2) selling at an export price which is below the export price to a third country, or
- 3) selling at an export price which is below the cost of production plus profit and selling cost.¹⁷

Dumping *margin* can be defined according to the Basic Regulation Article 2(d) (12)¹⁸ as the amount by which the normal value exceeds the export price.

¹³ Wenxi Li. (2003). Page 21-22.

¹⁴ US Department of State Glossary of Trade available at <http://usinfo.state.gov/products/pubs/trade/glossjr.htm#nonmareco> 2006-07-22, 21:52. <http://usinfo.state.gov> is a governmental website which delivers information about current US foreign policy and about American life and culture. On the site US Department of State Glossary of Trade is available.

¹⁵ <http://usinfo.state.gov/products/pubs/trade/glossjr.htm#mark>, 2006-07-22, 21:54.

¹⁶ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). Page 5.

¹⁷ See for a full version http://www.wto.org/english/docs_e/legal_e/gatt47_01.htm <http://www.wto.org>, is the official website for the World Trade Organization.

¹⁸ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community .Official Journal L 056 , 06/03/1996 P. 0001 – 0020.

Zeroing is a method to assign zero values to negative dumping margins.¹⁹

1.6 Gender perspective and civil rights

In a thesis conducted by a field study financed by Sida it can be of interest to establish the relation to gender perspective and civil rights. At the Faculty of Law it is also of importance to ascertain those aspects since especially gender is part of the education.

In international trade law it can be somewhat difficult to have a gender perspective. As will be described below, antidumping duties imposed on imports to the EU of Vietnamese shoes do however have some gender implications.

The shoe sector employs a half million workers most of whom are women. This will have a serious impact on women's lives due to possible high unemployment amongst women.

Overall Vietnam has a record of gender equality compared to other countries since women account for almost 50 % of the work force in Vietnam (in ages 16 to 55). In the total wage work the amount is lower. In garment and footwear production more than 80 % are women. There are 240 footwear enterprises, 76 are State Owned Enterprises (SOE's), 80 are foreign invested and 84 are private or joint ventures.²⁰

Mekong Economics recently conducted a study on female workers in garment and footwear enterprises and it found that most women that worked in these firms are young single migrants.²¹ The employment meant that they could move from their villages and earn their own money and in some cases even study.²²

Vietnam is a developing country that wants to be a part of international trade and has recently become a member of the World Trade Organization. Trade is a complicated issue since it is controlled by politics and aspects other than just economics. Trade defence instruments are maintained by law and politics which sometimes makes it difficult to understand the justifications of actions towards especially developing countries. No matter what opinion, trade has an effect on poverty.

¹⁹ Jong Bum Kim. Fair price comparison in the WTO Antidumping Agreement. Recent panel Decisions against the "Zeroing" Method. *Journal of World Trade* 36(1):39-56, (2002). page 40.

²⁰ *Vietnam Development report 2006*. Business. Joint Donor Report to the Vietnam Consultative Group Meeting, Hanoi, December 6-7, (2005). page 26.

²¹ Mekong Economics Ltd is a leading economic consulting company and specialises in providing services to international development agencies.

²² *Vietnam Development report 2006*. (2005). page 27.

Civil rights has had a huge impact on Vietnam's history since the civil rights movement grew during the Vietnam War. The economy in Vietnam is also related to the war and the relations built after the war with other countries. The trade with the US was not opened until 1990's while the trade with especially Sweden has been operating for some time.

1.7 Outline

The overall structure of the thesis is as follows; it consists of three parts. The first part focuses on the reasons for imposing antidumping measures, the criteria for assessing (dumped) prices and some economical aspects of antidumping measures. The second part deals with the concept of market economy and the requirements that have to be fulfilled by companies in order to be given market economy treatment (MET). Furthermore, it is discussed why the Vietnamese shoe producing enterprises did not obtain this status. The third part discusses the effects of the antidumping measure towards Vietnam and also gives a conclusion on the thesis.

Within the three parts the thesis is divided into 8 chapters. In chapter 2 the concept of antidumping is explained, in terms of WTO law and EC law. The relation between WTO law and EC law is also portrayed as well as the actual antidumping duty towards Vietnam.

Chapter 3 describes the concept of Non-Market Economy and how it is used.

Chapter 4 deals more in detail with the issue of why Vietnamese companies did not obtain the status of market economy. It therefore gives a description on Vietnamese corporate law and a comparison is made between the company structure in market economies and Non-Market Economies.

Chapter 5 describes the history and economic development of Vietnam. To understand the reasons for imposing an antidumping measure, it is vital to understand the Vietnamese background and the political and economic context. Doi Moi, the reform that started in 1986, is vital because it changed the Vietnamese economy and had important implications for the development of foreign relations. Today, Vietnam faces the accession to World Trade Organization, which is described in chapter 6.

In chapter 6 the Vietnamese accession to the WTO is mentioned and what the challenges and opportunities that can come of it.

Chapter 7 deals with the impact of the principles of proportionality and fair comparison in the investigation prior to an antidumping measure. The effects of an antidumping measure are also described.

Chapter 8 will give some conclusions and hopefully some ideas on trade barriers and how they affect the targeted country as well as the EU.

2 Antidumping law of the WTO/GATT and the EC

An antidumping measure is, in brief, based on the requirements that there exists dumped imports, material injury to a domestic industry and that there is a causal link between the dumped imports and the injury.²³

2.1 History of dumping and at present

Dumping started during the 18th century when increasing capacity of production and the desire for market expansion grew. After the World War II, the economic phenomenon of dumping increased because of the GATT and the advancements of technology and the emergence of newly industrialised countries.²⁴

Antidumping laws were first created in the early 20th century, Canada being the first in 1904 to introduce them.²⁵ The law gave the government the right to levy a special duty on goods and the 1921 British Safeguarding of Industries Act as well as the 1921 American Antidumping Act adopted cost of production and fair value as a substitute of the home market value.²⁶

In 1944 the Bretton Woods Conference was held wherein the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) saw life. Antidumping was incorporated by the Havana Charter into the GATT 1947, Article VI. The purpose of the Article is however not to control the practice of dumping, but to regulate administration of antidumping measures.²⁷

2.2 Antidumping in International law, WTO

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). “Antidumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member, in accordance with the provisions of the AD Agreement, that an

²³ http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm, 2006-04-30.

²⁴ Wenxi Li. (2003). Page 23-24.

²⁵ The Customs Tariff Act, an act to Amend the Custom Tariff, 1897, 4 Edw. VII, I Canada Statutes III (1904).

²⁶ Wenxi Li. (2003).Page 31.

²⁷ Wenxi Li. (2003). Page 33 and Article VI, GATT.

imported product is “dumped” and that the dumped imports are causing material injury to a domestic industry producing the like product”.²⁸

The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure.²⁹ Detailed procedural needs concerning the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures must be fulfilled as well. A failure to respect either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.³⁰ Unlike the Agreement on Subsidies and Countervailing Measures, the AD Agreement does not establish any disciplines on dumping itself, primarily because dumping is pricing practice engaged in by business enterprises, and therefore not within the direct reach of multilateral disciplines.³¹

The SCM Agreement (Subsidies and Countervailing measures) recognizes that subsidies can play an important role in the economic development of developing country Members, and provides special and differential treatment to such Members. Members in the process of renovation from a centrally-planned market to a free-enterprise economy are given a seven-year period to phase out prohibited subsidies. These subsidies must, however, be reported in order for members to benefit from the special treatment. Members in renovation also receive preferential treatment with respect to actionable subsidies.³²

2.3 The relation between EC Law and WTO Law

EC Courts have so far sustained that GATT and WTO law does not have direct effect in the EC legal system.³³ In *Portugal v. Council* it is stated that “the WTO agreements are not, in principle, among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions”.³⁴ There are however two exceptions and the first is where the Community intended to implement a particular obligation assumed in the context of the GATT/WTO (*Nakajima* exception)³⁵ or direct effect is acknowledged where a Community measure refers specifically to

²⁸ http://www.wto.org/english/tratop_e/adp_e/adp_e.htm, 2006-04-25. Stated on “Understanding the WTO: The Agreements”.

²⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

³⁰ The World Trade Organization dispute settlement and article 17 establishes that the Dispute Settlement Understanding is applicable to disputes under the AD Agreement.

³¹ http://www.wto.org/english/tratop_e/antidum2_e.htm, 2006-04-30.

³² http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto4_26.htm#note1.

³³ Gianni, Fabrizio Di and Antonini, Renato. DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has come to an end? *Journal of World Trade* 40(4):777-793, (2006). Page 777.

³⁴ Case C-149/96 *Portugal v. Council*, (1999) ECR I-8395, para.47.

³⁵ Case C-69/89, *Nakajima All Precision Co. Ltd v. Council*, (1991) ECR I-2069, para.31.

precise provisions of the GATT/WTO (*Fediol* exception).³⁶ There is however scholars that support the opinion of direct effect e.g., Mendez,³⁷ Zonnekeyn,³⁸ and Alemanno.³⁹ In the case *International Fruit*, the Court of Justice stated that even though the GATT was binding on the Community:⁴⁰

“this agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of “reciprocal and mutually advantageous arrangements” is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.”

The denying of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners.⁴¹

2.4 Antidumping proceedings in EC Law

Member States within the European Union (EU) have agreed on a common commercial policy in trade with non Member States (third countries). Articles 131- 134 of the EC Treaty provide for the legal basis for this policy.⁴² According to articles 131-134 (EC), Member States enter agreements on common grounds with other states and adopt regulations on import and export to and from the EU. Among these legal instruments, there are regulations on e.g. common taxes, product safety and subsidies. The Treaty, though, does not give a definition of the concept of trade policy. Important nevertheless, is that the EU and its Member States are all Members of the World Trade Organization, WTO, and consequently need to follow the regulations in several international trade agreements.⁴³ The history behind this arrangement of “double” Membership in the WTO is explained below.

³⁶ Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, (1989) ECR 1781, paras 19 to 22.

³⁷ The impact of WTO rulings in the Community legal order, *European Law Review* 517 (2004).

³⁸ EC Liability for non-implementation of WTO Dispute Settlement Decisions- Are the dice cast? *Journal of International Economic Law* 483 (2004).

³⁹ Judicial enforcement of the WTO Hormones Ruling within the European Community: toward EC liability for the non-implementation of WTO Dispute Settlement Decisions? 45 *Harvard International Law* (2004).

⁴⁰ Joined Cases 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit*, (1972) ECR 1219, para.21.

⁴¹ De May, Delphine and Colomo, Pablo Ibáñez. Recent developments on the Invocability of WTO Law in the EC: A wave of mutilation. *European Foreign Affairs Review* 11:63-86, (2006). page 64.

⁴² Consolidated Version of the Treaty Establishing The European Community. Official Journal C 325, 24 December 2002.

⁴³ Article II (1-4), Scope of the WTO, Marrakesh Agreement Establishing the World Trade Organization 1994.

The competence of the EU is exclusive as for the Common Commercial Policy (CCP) is concerned. Member States cannot sign their own agreements with third countries on some areas of trade. The Council comes to an agreement but the Commission negotiates with third countries. The CCP includes trade but the agreements can also concern cooperation- and association agreements. The problem is however that the limits of the common commercial policy are not clearly defined in the EC Treaty.

The European Court of Justice has explained the limits for the European Unions authority in opinion of the Court of 15 November 1994.⁴⁴ In its opinion the Court deals with the issue of the more exact limits of the competence of the Community to conclude international agreements concerning services and the protection of intellectual property rights (Article 228 (6) of the EC Treaty). The case started as a dispute between the Commission and the Member States on EU's authority. The difference of opinion was that both parties agreed that the General Agreement on Tariffs and Trade was included in the exclusive authority, but couldn't agree on other areas within the Uruguay- round. According to the opinion of the Court, the exclusive competence within the field of trade in services, the Community has no exclusive competence due to that it would not further internal Community measures nor was it necessary for the attainment of internal Community objective.⁴⁵

The European Union and the Member States share the authority on the areas that fall outside Article 133. Of these areas, the Member States as well as the EU can establish mixed agreements to be signed by the Council and ratified by the Parliaments of the Member States. The European treaties give the European Union the opportunity to sign three different kinds of agreements with other countries or organisations. The different agreements are trade-, cooperation- and association agreement, but they are often combined.⁴⁶

Trade agreements focus mainly on the free trade between the European Union and third countries. On the Commissions proposal trade agreements are closed by the Council according to Article 133 of the Treaty establishing European Community, with qualified majority.⁴⁷

The legal basis for antidumping in primary EC law is Article 133 (1) of the EC Treaty which provides that:

“The common commercial policy shall be based on uniform principle, particularly in regard to changes in tariff rates, the conclusion of tariff and

⁴⁴ Opinion 1/94 on the WTO Agreement ECR I-5267.

⁴⁵ Opinion 1/94 on the WTO Agreement ECR I-5267. for more information see Craig and De Búrca. *EU Law. Text, cases and materials*. 2nd ed. Oxford University Press (1998) page 117 and N. Emiliou and D.O' Keeffe (eds.) *The European Union and World Trade Law- After the GATT Uruguay Round*. Wiley, 1996).

⁴⁶ Article 133 (5) of the Treaty Establishing the European Community (ECT).

⁴⁷ Article 133 (4) ECT.

trade agreements, the achievement of uniformity in measures of liberalism, export policy and measures to protect trade such as those to be taken in event of dumping or subsidies.”

The Article 133 Committee gives consultancy to the Commission and is composed of representatives from all Member States with the function to coordinate EU trade policy.⁴⁸ Under Article 133 ECT, the Council of European Communities adopted the first EC antidumping legislation in 1968.

The current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995.⁴⁹ The Regulation applies to imports from all countries that are not members of the European Community (EC) but the Community may adopt precise provisions in relation to countries without a market economy or whose economy is in transition.⁵⁰

Antidumping duties can according to Article 1 (1) Regulation No 384/96 be applied to any product whose release for free circulation within the Community causes injury. Article 3 defines determination of injury as material injury to the Community industry or threat of the same. The examination of the impact of dumped imports shall include “all relevant economic factors and indices having a bearing on the state of the industry”.⁵¹

The determination of dumping is made in accordance with Article 2 where in (1) a normal value and (2) an export price shall be applied on the price. A fair comparison shall be made upon these prices (see more in chapter 7.3). The termination of injury and the definition of Community Industry are defined in Article 3 and 4, which is more described in chapter 4.2 and 7.1. If the measure has led to no movement, the investigation can be reopened according to Article 12.⁵²

2.4.1 The definitive antidumping duty on footwear Council Regulation (EC) No 1472/2006

The actual investigation started on request by the European Confederation of Footwear Industry. They represent the shoe producers that complained which are covered by secrecy. The Italian shoe industry has however been the compelling force.⁵³

⁴⁸ Article 133 (3 second paragraph) ECT.

⁴⁹ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal L 056, 06/03/1996 P. 0001 – 0020*.

⁵⁰ Article 2(7) of Regulation (EC) No 384/96.

⁵¹ Council Regulation (EC) No 384/96.

⁵² Council Regulation (EC) No 384/96.

⁵³ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam*. National Board of Trade. Yttrande 2006-07-13.

In regards of the Basic Regulation (Council Regulation (EC) No 384/96) and especially Article 9 thereof, a definitive antidumping duty has been imposed on certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. A provisional antidumping duty had been imposed (Regulation (EC) No 553/2006) but this is now replaced. The products concerned are footwear with uppers of leather other than sports footwear, slippers and footwear with protective toecap. (See more below).

The reason for the antidumping measure is due to dumped prices on footwear that causes injury to the Community industries, see more information in chapter 7.

2.5 Summary and comments

The first part of this study has now been concluded by examining the reasons for imposing antidumping measures and implications that follow.

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure. This is however not without difficulties due to the reasoning on direct effect.

The legal basis for antidumping in primary EC law is Article 133 of the EC Treaty and the current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995. In accordance with this, a definitive measure has been implemented on footwear; Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Antidumping and the reasons for imposing them will be explained below.

3 Antidumping and Non-Market Economies

In an antidumping investigation the price at which the good is sold in the exporting company's "home" market is compared to the price at which the good is sold in the market of the importing country. In a Non-Market Economy (NME) the price in the home market may however be relatively low, due for instance to different types of subsidies. The investigation may therefore depart from the price at which the good is sold in the home market if the exporting country is a Non-Market Economy. As an alternative the value may instead be determined on the basis of the price or construed value in a third country to other countries, or where those are not probable, on any other reasonable basis.⁵⁴ This makes it easier for the importing country to prove that dumping has occurred. The companies in the exporting country are however normally interested in having their country considered as a market economy and they therefore often try to put forward arguments that support the classification of the country at issue as a market economy.

3.1 Antidumping investigations and proceedings

In an antidumping investigation it is thus of great importance to establish whether the exporting country is a market economy or not. The EC decision to impose a provisional antidumping duty on imports of certain footwear with uppers of leather originating in Vietnam was based on the conclusion that Vietnam is still a Non-Market Economy. In a comparable antidumping case concerning Vietnamese exports of certain fish products to the United States, the so-called "cat-fish-case"⁵⁵, the US came to the same conclusion and treated Vietnam as a Non-Market Economy.⁵⁶ These decisions have been much debated and have caused considerable tensions in trade between on the one side Vietnam and the other side the EU and the US.

3.1.1 Classifications of Non-Market Economy

The idea of Non-Market Economy treatment is based on the system where free trade only works if the trading is maintained on a free market. This idea originates from a time where there was a clear distinction between Non-

⁵⁴ Article 2(7) of Regulation (EC) No 384/96.

⁵⁵ Decision Nov 8, 2002 US DOC (Department of Commerce) of frozen Fish Fillets From the Socialist Republic of Vietnam.

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<http://www.aquaculturemag.com/siteenglish/printed/archives/issues03/03articles/pastprespfucatfishUS3.pdf>, 2006-05-01, 12:08. <http://www.aquaculturemag.com>; is the website for Aquaculture Magazine, which has served the International Aquaculture Industry for over 30 years. It gives information on Fish Farming, Processing, and Breeding etc. from the US.

Market Economies and market economies.⁵⁷ “GATT was designed by market economies and for market economies”⁵⁸ and can therefore be seen as a market-based institution.⁵⁹

The International Trade Organizations Charter after the World War II mentioned the system of Non-Market Economy treatment where the Soviet Union was to be a party. The Charter had a suggestion on “Expansion of Trade by Complete State Monopolies of Import Trade” that stated that a minimum value needed to be agreed upon in imports. The US and the Soviet Union had a bilateral agreement already stating this in order for the Soviet Union to be treated as most favoured nation.⁶⁰

The Soviet Union did not join GATT and the provision was cut out of the GATT. A non-discrimination requirement on state trading enterprises was made in GATT 1947, article XVII.⁶¹

In the antidumping rules in the GATT, there is a reference to state trading economies:

“It is recognized 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”.⁶²

In the 1995 WTO Antidumping Agreement there is no mention of Non-Market Economies, but there is an acceptance of the use.⁶³ In a number of accession protocols to WTO there has been an acceptance of Non-Market Economy exceptions.⁶⁴

The US carried out its first antidumping investigation that involved a planned economy in 1960 and the EU first used its rules on non market economies in 1979.⁶⁵ The 1979 Basic Regulation was passed after the 1979

⁵⁷ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006) page 5.

⁵⁸ Polouektov, Alexander. Non- Market Economy Issues in the WTO Antidumping Law and accession Negotiations Revival of a two-tier Membership? (2002), *Journal of World Trade* 36(1): 1-37. Page 5.

⁵⁹ Polouektov, Alexander (2002). Page 5.

⁶⁰ Polouektov, Alexander (2002). page 6.

⁶¹ Polouektov, Alexander (2002). page 6.

⁶² Second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994. The Antidumping Agreement subsequently re-affirms this provision by stating that “This Article [2.7] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994”.

⁶³ Article VI of the GATT and the AD Agreement.

⁶⁴ Horlick, Gary and Shuman, Shannon. (1984). page 834.

⁶⁵ Horlick, Gary and Shuman, Shannon. (1984). Page 808 and Van Bael & Bellis. *Antidumping and other Trade Protection Laws of the EC*, 4th ed. 2004.

GATT Anti-Dumping Code which was formulated on the later with interpretations by the major trading partners of the EC.⁶⁶

Most WTO members do not use antidumping measures but for the US, the EU and India they are significant. Most countries that have been a target for antidumping measures have never been granted Market Economy Treatment, MET. This is because they have never been classified as a Non-Market Economy.⁶⁷

According to Polouektov, article VI in GATT may endanger the credibility of the WTO system. This is due to article XII of the WTO Agreement dealing with accession that provides no guidance to what principles the accession process should have. There is however technical notes or reference papers which is not binding for either members or acceding parts. This has led to bilateral agreements where some countries are seen as non-market economies and therefore can be seen as discriminated.⁶⁸

Table 1: Status of WTO newly acceded transition economy members under selected legal provisions⁶⁹

Country exceptions or reservations in WTO Accession documents	Status under US AD legislation	Status under EC AD legislation
Bulgaria	Non market	Market
Mongolia	Non market	Non market
Kyrgyz Republic	Non market	Non market
Latvia	Market	Market
Estonia	Non market	Market
Albania	Non market	Non market
Croatia	Non market	Market
Georgia	Non market	Non market
Lithuania	Non market	Market
Moldova	Non market	Non market
Vietnam	Non market	Non market

3.2 Criteria for Non-Market Economies

Different countries use different criteria for what constitutes a market economy as well as a Non-Market Economy. These differences indicate that

⁶⁶ Wenxi Li. (2003). Page 69.

⁶⁷ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 18.

⁶⁸ Polouektov, Alexander. (2002). pages 3-4.

⁶⁹ Source of the table: Polouektov, Alexander. Non- Market Economy Issues in the WTO Antidumping Law and accession Negotiations Revival of a two-tier Membership? 2002, *Journal of World Trade* 36(1): 1-37. Page 30 and for the purpose of this current study, Vietnam is added to the table.

there is no coherent problem that the treatment of Non-Market Economy seeks to address.

In the WTO it is more common with the term transition economy than market economy.⁷⁰ The World Bank sees Vietnam as a start-up market where all developing economies are called emerging markets.⁷¹ The emerging markets are then divided into low income countries and middle income countries. The stock and capital markets of such economies which are growing are then divided into three sections. There are emerged markets such as Singapore and South Korea and emerging markets. The last is start-up markets that just started emerging from a non-capital market. Vietnam is an example of start-up but is quickly moving into emerging market if not already according to Mr. Akamatsu, Regional advisor at the World Bank. The World Bank classifications can be found in Supplement A.

The UNCTAD states in a report on Greening Trade in Vietnam that it is a market oriented economy but has not yet been integrated in the global economy.⁷² It is one of Vietnam's most important objectives to integrate into the world economy and trade and investment is important in the process.⁷³

Asia Development Bank (ADB) was founded in 1966 and is dedicated to reduce poverty in the Asia and the Pacific region through pro-poor sustainable economic growth, social development and good governance. Vietnam joined in 1966 but paused for 23 years due to the conflicts in the area such as the war. ADB states that Vietnam is one of Asia's fastest growing economies and that it is opening up through international and regional economic integration initiatives. During the years 1993 and 2004, two thirds of the poverty was reduced from 58 % to 19.5 %. ADB calls Vietnam a socialist market-based economy which has evolved from central planning.⁷⁴

Business Monitor International is a publisher of business information on global emerging markets. They present market intelligence, country risk, financial markets etc. To establish whether a market is market oriented, Business Monitor International Ltd looks at three measures. It looks at openness, tax environment and governmental intervention. It wants to know to what extent state intervention precludes the functioning of a free market economy. The openness is the same thing as to how the economy is linked to the outside world through trade. Competition from other countries, wage inflation, international links, innovation and creativity in business are signs of openness as well as developed trade infrastructure. The magazine

⁷⁰ Polouektov, Alexander. (2002). page 30.

⁷¹ Regional meeting, Sofitel Plaza Hanoi, 8-10 October 2006. Noritaka Akamatsu, Regional advisor for Capital development, East Asia and Pacific Region World Bank, Hanoi.

⁷² Dr. Veena Jha. *Greening Trade in Vietnam*. UNCTAD/DITC/TED/8. Page 12 and 76.

⁷³ Dr. Veena Jha. page 12.

⁷⁴ Breakfast meeting on the Business Opportunities with the Asian Development Bank, 11 October 2006, Hanoi. Ayumi Konishi, Country Director.

assesses openness through the economy's financial and bureaucratic barriers to trade. Government intervention can sometimes bring justification for official participation but mostly it creates preventions for developments. Hong Kong, Singapore and Taiwan are number 1, 2 and 4 on a scale that measures market economy status, where the UK come as number 54 and the US number 4.⁷⁵

Asia has an average score of 52.6 compared with other emerging markets at 47.3 in the area of market orientation and state intervention. The region scores well at openness, but low corporate tax rates are a major feature. Communist rule and state intervention are more apparent and many sectors that are state owned could be privatized.⁷⁶

3.3 Summary and comments

There exist different views on the economic status amongst EU, US, World Bank etc. This shows that there is no coherence in world trade and that it can convey unfair treatment and that antidumping can be discriminatory.

In the decision on imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, the EU decided to treat Vietnam as a Non-Market Economy. In an EU antidumping procedure it is important to establish whether it is a Non-Market Economy or a market economy due to different treatment.

If a country is seen as a Non-Market Economy, a company can still be granted Market Economy Treatment as seen in next chapter.

⁷⁵ *The Vietnam Business Forecast Report Q4 2006*. Published by *Business Monitor International Ltd*. ISSN 1745-0764. Page 22-23.

⁷⁶ *The Vietnam Business Forecast Report Q4 2006*. Page 26.

4 Market economy treatment, (MET) for individual companies

A company can be granted Market Economy Treatment by the EU and when granted this treatment it will be considered as situated in a market economy. In the case of Vietnam and leather shoes, no companies were granted such treatment.⁷⁷

4.1 Provisions on Market Economy Treatment

When individual companies seek to be granted the treatment, they have to prove that:⁷⁸

1. “decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,
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,
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, barter trade and payment via compensation of debts,
4. the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
5. exchange rate conversions are carried out at the market rate.⁷⁹”

The possibility to be granted MET was first introduced for companies in China and Russia in the EU antidumping regulation in 1998.⁸⁰ The reason for the treatment was the change in Russian and Chinese economies. In

⁷⁷ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam Official Journal L 275 , 06/10/2006 P. 0001 – 0041. Para 79-81.

⁷⁸ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, *OJ L 128*, 30.4.1998, p. 18–19 and *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*.(2006). page 12-13.

⁷⁹ Exchange rate is the State Bank of Vietnam (SBV) monetary policy tool. The Vietnam Business Forecast Report Q4 2006. Published by *Business Monitor International Ltd*. ISSN 1745-0764. Page 16.

⁸⁰ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. (2006). page 13.

literature there are nevertheless little said about the reasons of granting market economy treatment to individual companies.

In the US antidumping laws, there is no system for granting individual companies MET.⁸¹ The US Department of Commerce has however the authority to designate individual industries that are market economy oriented.⁸² No request for such treatment has though been granted. In the agreement with China there is though an exception where Chinese prices or costs under investigation can be used if the producers can show that market economy conditions prevail in the industry producing the like product.⁸³

Looking at the definition in the Antidumping Agreement, firms can sell at a profit even when they are dumping. This is the main argument used to defend the imposition of an antidumping instrument, because companies can choose to use so low prices that their competitors cannot meet. When the competitors are gone, the dumping industries make a larger profit than they would have with market prices. But in Nonmarket Economies it is different. The companies do not make profit maximizing, but are instead obliged to abide rules of production by the state.⁸⁴

In the Basic Regulation it is stated that companies granted MET should be compared with their domestic selling price when determining individual dumping margins. Normal value shall be determined on the basis of the price or constructed value in a market economy third country (analogue country).⁸⁵ Domestic sales have to be done in the ordinary cause of trade in order to use normal value as domestic selling price.⁸⁶ This means in EU practice that there needs to be a volume of profitable sales in the home market. In order to determine if it is profitable, one needs to calculate the cost of production. In a NME it is believed that the cost of production cannot be calculated.⁸⁷

When the costs of production are set by the state in terms of labor and land, price of inputs etc. and the price are lower than it would be in a market situation, it is considered as subsidized. This means that the price paid in a NME will represent the actual cost of production. If they sell at a price that is above the cost of production, it is classified as in the ordinary cause of trade, as stated in the AD Regulation. Two problems arise in NME's; either

⁸¹ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). Page 18.

⁸² United States Government Accountability Office, January 2006, US-CHINA TRADE. *Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for some Chinese Companies*, page 26.

⁸³ Polouektov, Alexander. (2006). page 32.

⁸⁴ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 13.

⁸⁵ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community. Official Journal L 056, 06/03/1996 P. 0001 – 0020. (Basic Regulation). Article 2(a) (7).

⁸⁶ Basic Regulation Article 2 (a) (1).

⁸⁷ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 14.

the companies dump prices because the state orders them to do so or the government gives subsidized inputs.⁸⁸

4.2 EU denial of Market Economy Treatment

The European Commission denied all companies that applied for Market Economy Treatment but one Chinese company the status of market economy.⁸⁹ It believed that in all cases there was clear evidence of state intervention or non-standard accounting practice. The Commission also found evidence of non-commercial loans from the state, non-enforcement of international accounting standards, improper evaluation of assets and non-commercial conditions for land-use.⁹⁰

In the Council Regulation (EC) No 1472/2006 a representative sample was used due to the high amount of exporting producers. It was impossible to make an individual assessment according to the Commission. This was done in accordance with Article 17 of the Basic Regulation which sets out a method to deal with a large number of companies involved. The governments of the exporting countries had themselves chosen these samples to represent all exporters.⁹¹ The companies that claimed they were not granted MET held investment licenses which imposed quantitative sales restrictions and therefore denied the treatment.⁹² The individual treatment was claimed to be in conflict with WTO Law, but that claim was rejected due to WTO rules are not directly applicable in the Community.⁹³

The success rate of market economy treatment varies between countries but that can also be compared to what products are under investigations. The most frequently given explanation as to why companies are refused MET is because they are under state influence or does not keep adequate accounts. 58 % failed due to these circumstances, 38 % failed because of “carry-overs” from Non-Market Economy system and the rest because they were not subject to bankruptcy and property laws.⁹⁴

⁸⁸ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 14.

⁸⁹ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006). Page 3.

⁹⁰ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam Official Journal L 275 , 06/10/2006 P. 0001 – 0041. Para 79-81.

⁹¹ Council Regulation (EC) No 1472/2006 notes 61-69 and Council Regulation (EC) No 384/96. Article 17.

⁹² Council Regulation (EC) No 1472/2006. Para 81.

⁹³ Council Regulation (EC) No 1472/2006. Para 86-87.

⁹⁴ *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings.* (2006). page 23.

Table 2 Success rate of the 200 MET- applications examined⁹⁵

Country	Number of applications	MET refused		MET granted	
		Number	Percentage	Number	Percentage
China	180	115	64 %	65	36 %
Russia	8	2	25 %	6	75 %
Ukraine	4	2	50 %	2	50 %
Vietnam	8	6	75 %	2	25 %
Totalt	200	125	63 %	75	38 %

Both the European Community and the Swedish National Board of Trade have done surveys on companies in Vietnam in order to determine whether or not they should be treated as market economies. The National Board of Trade has stated that it does not accept the Commissions calculations when not granting any Vietnamese companies Market Economy Treatment.⁹⁶

4.2.1 Sample of companies in the investigation

Pou Chen Vietnam Enterprises Ltd was one of the companies that applied for MET but were denied. The company stated that they were not governed on exportation, but this turned out to be false. The company has to export 100 % of its production and therefore the decisions are not made by the market. The Commission stated that the company also does not follow international accounting standards. The company does not pay market rent due to the export of more than 80 %.⁹⁷

Same reason as described above was also valid for Pou Yuen Vietnam Enterprise Ltd, which is the owner of Pou Chen. Haiphong Leather Products and Footwear Company were denied the MET because they did not pay market rent for the land and it is also a State Owned Enterprise (SOE).⁹⁸

Common for all companies that were denied MET is that they did not pay market rent for the land, some of them had not equivalent accounting standards, but none of them were really capable of making their own decisions due to State interference.⁹⁹

⁹⁵ Source of the table is *The EU Treatment of Non-Market Economy Countries in Antidumping proceedings*. Kommerskollegium. National Board of Trade. 2006-05-05. page 23.

⁹⁶ *Möte med EU:s antidumpningskommitté den 16 mars 2006: Läderskor från Kina och Vietnam*. (2006).

⁹⁷ *Möte med antidumpningskommitté den 1 december 2005: Läderskor från Vietnam*. Yttrande 2005-11-23. National Board of Trade. Page 2.

⁹⁸ *Möte med antidumpningskommitté den 1 december 2005: Läderskor från Vietnam*. (2005). Page 3.

⁹⁹ *Möte med antidumpningskommitté den 1 december 2005: Läderskor från Vietnam*. (2005). Page 6.

4.3 Five core structures of business corporation in a market economy

In the book *The Anatomy of Corporate Law*, the authors give five core structures of Business Corporation.¹⁰⁰ These are said to exist in a market economy, which is why it can be necessary to explore if these exist in a Non-Market Economy. The authors state that these characteristics are a basic statute in almost all economically important jurisdictions.¹⁰¹

The first criterion is legal personality, where a firm is permitted to serve in a role as a legal person. It is a contracting party distinct from individuals who own the firm and can sign own agreements, own assets etc. There are two distinct rules of law involved where corporations are concerned. The first rule is to grant creditors of the firm a claim on the firm's assets as a security to the firm's debt. The second rule provides that the individual owners of the firm cannot withdraw their shares to force liquidation.¹⁰²

Next is the limited liability where the creditors are limited to make claims against the assets from the firm and the firm's shareholders. Legal personality gives the firm assets and the limited liability reserves shareholders' individual assets exclusively for their personal creditors. Limited liability also separates incorporating.¹⁰³

Transferable shares are also important and give permission to conduct business uninterruptedly as the identity of its owner's changes.¹⁰⁴

The fourth is centralized management under a board structure, which means a delegated management with board structure. The board is separate from the operational managers of the firm but the nature can vary. The board is also distinct from the firm's shareholders and it is elected. The board usually consists of multiple members.¹⁰⁵

The last character is shared ownership by contributors of capital. The ownership is divided in two elements, the right to control the firm and the right to receive the firm's net earnings.¹⁰⁶

¹⁰⁰ *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Paperback) by Reinier Kraakman (Editor), Paul Davies (Editor), Henry Hansmann (Editor), Gerard Hertig (Editor), Klaus Hopt (Editor), Hideki Kanda (Editor), Edward Rock. The book represents a common base of corporate law as an academic discipline. Kraakman is professor of Law at Harvard Law School, Davies professor at the London School of Economics in Commercial law, Hansmann professor of Law at Yale Law School, Klaus Hopt is the director of Max Planck Institute of Foreign and Private International Law, Hamburg etc.

¹⁰¹ Kraakman, Reiner. (2006). Page 1 and 5.

¹⁰² Kraakman, Reiner. (2006). Page 7.

¹⁰³ Kraakman, Reiner. (2006). Page 9.

¹⁰⁴ Kraakman, Reiner. (2006). page 10.

¹⁰⁵ Kraakman, Reiner. (2006). pages 12-13.

¹⁰⁶ Kraakman, Reiner. (2006). page 13.

4.4 Corporate structure in Vietnam

In Vietnam, the Enterprise Law year 2005 states that there are five different types of corporations.¹⁰⁷ First there is the limited liability company, the Shareholding Company, partnership and sole proprietorship and lastly state-owned enterprises (SOE). Enterprise is defined in article 4, which states that an enterprise “means an economic organization that has its own name, assets, stable office and is duly constituted for the purpose of conducting business.” The Enterprise Law is also called the Unified Enterprise Law (UEL) since it unified all former enterprise laws. There are two improvements and that is first that it does not set restrictions on foreign ownership and second that it abolished the unanimous consensus.¹⁰⁸

In chapter IV, a shareholding company is described. In Article 77 (2) it is stated that the shareholding company will be given legal status and 77 (1) (c) describes the liability where the shareholders only are liable for the amount of capital they contributed. Primarily (article 77 (1) (d)) shareholders are free to transfer their shares which is also stated in article 87 (5). Exceptions to transferable shares are mentioned in article 81 (3) and 84 (5) which are: (i) voting preference shares and (ii) ordinary shares of founding shareholders within a time limit of three years from the issuing date of certificate of business registration. All restrictions that are imposed on the ordinary shares are void after three years.

In article 95 the organisational management of the shareholding company is mentioned. In a shareholding company it will comprise of the Shareholder’s Meeting, the Board of Management, director or general director and in some companies the Board of Supervision (obligatory with companies with more than eleven individual shareholders or having an institutional shareholder holding more than 50 % of total share capital).¹⁰⁹

Concerning investor ownership it is important that the shareholders own their own shares. In the case when a company becomes liquidated the owners will be entitled to surplus remains after all the corporate obligations are satisfied, then it is stated that the shareholders own their own shares. It is from the Enterprise Law difficult to say if that occurs. However, voting preference shares can only be owned by government-authorized organisations and founding shareholders and they are given more votes than ordinary shares.¹¹⁰

¹⁰⁷ National Assembly of the Socialist Republic of Vietnam. No. 60-2005-QH11. Legislature XI, 8th Session.

¹⁰⁸ *Commercial Counsellors report on Vietnam 2006*. European Union Economic and Commercial Counsellors. Page 29.

¹⁰⁹ The law actually states that a company *will* comprise of, not that it should or must comprise of.

¹¹⁰ Article 78 (3) and article 81 (1) in the Enterprise law year 2005. National Assembly of the Socialist Republic of Vietnam. Legislature XI, 8th session.

A philosophy on the wealth is that the unrealized/unused capital from potential sources can be accumulated in shareholding companies with talented governors. As a result, the investor ownership shall be protected in fact. Regarding legal aspects, investor ownership is protected by many laws. Herein after are some relevant quotations on this.

Article 23 in the Constitution of the Social Republic of Vietnam states that the lawful property of individuals and organisations shall not be nationalised.

In cases made absolutely necessary by reason of national defence, security and national interest, the State can make a forcible purchase of or can requisition pieces of property of individuals as well as organisation against compensation after taking into account current market prices. The forcible purchase or requisition shall be determined by law.

Law in Investment article 6 (1)¹¹¹ states that lawful assets and invested capital of investors shall not be nationalized or confiscated by administrative measures.

In the Law on Bankruptcy in article 37 it is described that on the liquidation procedures for enterprises, where the value of the property of the enterprises remains surplus after the repayment of all debts (bankruptcy charge, debts of wage, severance allowances, social insurance; unsecured debts), and the remaining amounts shall belong to the shareholders of shareholding companies.¹¹² With this provision, however, the Law on Bankruptcy only provides in general, there are no details on the preference between ordinary shareholders and voting preference shareholders. But this can be found in the Enterprise Law, accordingly:

Article 79 (1) (g): an ordinary shareholder is entitled to receive part of the *remained property* in proportion to his shares when the company is dissolved.

Article 81(2) (a): voting preference shareholders are entitled to vote for all issues subjected to decision of the Shareholders' Meeting with preference in the number of votes, one of which is the right to decide on the reorganization and dissolution of the company. As being entitled to do this right, voting preference shareholders may turn into advantage in preparation before the liquidation of the company.

In general, the Law on Bankruptcy gives the legal bases for companies, as the debtors, to “enjoy” procedures prescribed by law such as *Automatic Stay* that creating reorganization opportunities; *Rehabilitation* that creating opportunity to make bargaining with the creditors on rehabilitation; *Discharge* for the quittance from payment.

¹¹¹ Law on Investment No. 59/2005/QH11 took effect from July 1 2006.

¹¹² Law on Bankruptcy No. 21/2004/QH11 took effect from Oct 15 2004.

4.5 Summary and comments

The EC Regulation No 905/98 states that there are certain circumstances that are important when deciding market economy treatment.¹¹³ The governmental or company control, accounting, financing, bankruptcy and property law are all vital areas of concern. State interference and costs of major inputs that substantially reflect market values will be important. The market signals need to reflect supply and demand in order to be treated as a market economy. The firms need to have a clear accounting and the production costs and the financial situation are not to be subjected to significant distortions. Bankruptcy and property laws must guarantee legal certainty and the exchange rate must be carried out on a market rate.¹¹⁴

In the EU basic regulation individual treatment can be given when the applicant can show that foreign investors can repatriate capital and profits, the prices are freely determined, the majority of shares belong to private persons, exchange rate are carried out at market rate and state interference does not allow different duty to individual exporters. This can be compared to the corporate structure in Vietnam and market economies.

The five core structures in a company in a market economy seem to exist in the Vietnamese law, at least. However the implementation is far away from the laws. In order to understand the problems with implementation and the economy, it is vital to recognize the economic development in Vietnam.

¹¹³ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, *OJ L 128*, 30.4.1998, p. 18–19.

¹¹⁴ Polouektov, Alexander. (2002), pages 18-19.

5 Vietnam's economic development

In order to understand the concept of Non-Market Economy and how it affects the Vietnamese society, it is important to describe the Vietnamese economy before and today.

5.1 Vietnam's history and political background

The Socialist Republic of Vietnam is a one-party state and a developing country with a population of 82, 5 million. The constitution from 1992 states that the communist party, Dang cong san Vietnam, is the leading power but that it is not above the law.¹¹⁵

The National Assembly, Quoc Hoi, is elected every five years and is the states highest organ. The Assembly chooses a committee which investigates the governments work and the application of the laws. The Assembly also chooses the president, who is the commander in chief.¹¹⁶ The president appoints the prime minister and the other ministers. However, the Congress can dismiss ministers.

Vietnam is party to five of the seven core human rights treaties, but claims to sign more such as the Convention against torture. The death penalty is however applied in Vietnam. Economic crime and drug-related offences are among the crimes that can result in death penalty. The Vietnamese media are controlled and the religious freedom is also a matter of concern.¹¹⁷

5.1.1 Doi Moi

Vietnam has significantly reshaped its foreign relations in recent years. The country has become an increasingly active member of ASEAN (Association of Southeast Asian Nation) and engaging its regional and non-regional partner's through the ARF (ASEAN Regional Forum), APEC (Asia-Pacific Economic Cooperation) and ASEM (Asia Europe Meeting).¹¹⁸

¹¹⁵ http://landguiden.se/pubCountryText.asp?country_id=187&subject_id=0. 2006-08-24, 12:12 <http://landguiden.se>, is a pay-service from the Utrikespolitiska Institutet, Sweden, about all the world's countries.

¹¹⁶ http://landguiden.se/pubCountryText.asp?country_id=187&subject_id=0

¹¹⁷ Vietnam, Sida country report 2005. May 2006 Embassy of Sweden, Hanoi Page 4-5.

¹¹⁸ http://europa.eu.int/comm/external_relations/vietnam/intro/index.htm 2006-04-25, 10:08. <http://europa.eu.int>; is the portal site of the European Union and it provides up-to date coverage of the EU affairs etc.

Earlier, Vietnam's economy depended on traditional agriculture and based itself on central planning and collective ownership.¹¹⁹ The Sixth National Congress of the ruling Communist Party of Vietnam, held in December 1986, initiated an economic renovation called the Doi Moi. Before that there was poverty, severe shortage of food and basic consumptive goods, three-digit inflation, chronic trade imbalance amongst others.¹²⁰ The reforms helped Vietnam overcome the crisis but high inflation and large macroeconomic imbalances persisted despite the economic growth.¹²¹

Doi Moi was aimed at shifting the economic priority towards three programs instead of heavy industry. One of the programs consisted of production of food, production of consumer goods and production of exports. Another consisted of reducing state intervention in business and opening trade relations with the rest of the world. The third aimed at encouraging foreign and domestic private investment. The recent National Assembly has reiterated its commitment to a socialist-oriented multi-sector economy and it is operating under both the market apparatus and the state administration.¹²² The ideas of market economy had crossed over Vietnam and several other countries in the 1980's and the free market had made its way, a development which the Vietnamese people called the "fence breaking". The Doi Moi (the new change) was supposed to solve a lot of problems. Each family received one share of the village for each person in the family and foreign investments started in the cities. Peasant's could now own and sell land. The new strategy was to turn Vietnam into a low-wage economy exporting cheap goods by turning to the International Monetary Fund and the World Bank.¹²³

A law reform started after the economic renovation and some laws were replaced and others adopted. The encouragement of domestic and foreign law was one of the most important aspects of the economic reforms and the foreign invested sector is recognized as an integral part of Vietnam's economy. Another vital area is the state sector, where Vietnam has reduced state interventions in business. State owned enterprises (SOE) have been reorganized and have dropped more than half of their units through mergers and dissolutions. Subsidies and other privileges have been taken away from the state sector.¹²⁴

¹¹⁹ Authorized by Nguyen Duy Khien- Vietnam Commercial Counsellor in the US.

<http://www.info.vn/?content=economy&id=2&lang=en>, 2006-07-14, 11:26.

<http://www.info.vn>, is the Vietnamese Trade Catalogue of manufacturers, importers, exporters and business news.

¹²⁰ Authorized by Nguyen Duy Khien, 2006-07-14, 11:26.

¹²¹ Service policies and international trade integration in Vietnam. Prepared by Mr. Alberto Gabriele, Economic Affairs Officer, Division on International Goods and Services, and Commodities, UNCTAD. UNCTAD/TNCD/MISC/2003/8. Page 4.

¹²² Authorized by Nguyen Duy Khien, 2006-07-14, 11:26.

¹²³ Neale Jonathan. *A people's history of the Vietnam War*. A New Press People's history. (2003) pages 208-209.

¹²⁴ Authorized by Nguyen Duy Khien, 2006-07-14, 11:26.

The double price system has been abolished and prices and domestic trade have been liberalized.¹²⁵ “Prices are now determined by the market”, says Nguyen Duy Khien, Vietnam Commercial Counsellor in the US. However, some resources and products are still controlled by the government to ensure prices, brackets and ceilings. These are for example natural resources, water surface, monopoly-based goods and services as electricity, water, telecommunications, gasoline and seaports. Import and export restrictions have been reduced and foreign trading companies are allowed to set up branches.¹²⁶

Vietnam applied for becoming a member of the World Trade Organization and has participated in the Doha round. Vietnam states (Mr. Luong van Tu, Vice- Minister of Trade) that there are benefits from a fair and equitable multilateral trading system. Vietnam also favours a strengthened cooperation and coordination between WTO and other international institutions such as UNCTAD (United Nations Conference on Trade and Development), UNDP (United Nations Development Programme), the World Bank and IMF (International Monetary Fund).¹²⁷

5.2 Vietnam’s recent economic development

Economic growth has remained encouraging in 2006 after a good performance in 2005.¹²⁸ Consumer price inflation, CPI, was 8.4 % at the end of 2005 and according to the government, real GDP grew by 8.43 % which is the highest growth rate in the past nine years. Public external debt is about 32 % of GDP and exports grow strongly.¹²⁹ There is however different values estimated by the Ministry of Planning and Investment, MPI, and by the General Statistics Office, GSO.¹³⁰

Footwear witnessed a strong growth in the first five months in 2006 and rose 21 %, making it the next largest manufacturing export. There will be effects though on the export to the EU of footwear, related to the definitive antidumping measure against Vietnam.¹³¹

¹²⁵ Double price system is a system where the price is differentiated, where some people get one price and others another. It is common for goods that are subsidized by the state. In the case of Vietnam citizens get one price when for example buying goods or visiting a museum than foreigners. It is said to be abolished, but by experience, it still exists! Several museums in Hanoi charge different rates for foreigners than citizens and it is well known that foreigners pay more for goods.

¹²⁶ Authorized by Nguyen Duy Khien, 2006-07-14, 11:26.

¹²⁷ www.wto.org, Ministerial Conference, Fourth session Doha, 9-13 November 2001.

¹²⁸ *Taking stock, An update on Vietnam’s Economic Developments and reforms*. Prepared by the World Bank Vietnam Mid-Year Consultative Group Meeting for Vietnam. Nha Trang, June 9-10, 2006. Page 3.

¹²⁹ *2006 Commercial Counsellors. Report on Vietnam*. European Union Economic and Commercial Counsellors. Hanoi, July 2006. Page 13.

¹³⁰ *Taking stock, An update on Vietnam’s Economic Developments and reforms*. (2006). page 4.

¹³¹ *Taking stock, An update on Vietnam’s Economic Developments and reforms*. (2006). Page 5.

Table 3: Destination and Growth of Selected Exports¹³²

	Footwear			Garments			Seafood		
	2004	2005	Q1-2006	2004	2005	Q1-2006	2004	2005	Q1-2006
Japan									
% Share	2.6	3.1	3.8	12.1	13.0	11.4	31.1	29.9	22.0
% Growth	14.5	32.8	24.1	11.1	18.8	3.7	18.2	6.6	-10.1
US									
% Share	15.4	20.1	22.7	56.4	23.8	55.8	25.0	23	20.2
% Growth	47.0	47.1	63.6	25.4	5.2	41.8	-22.7	5.3	-1.0
EU									
% Share	65.5	58.1	53.9	15.8	16.9	19.0	10.7	15.1	20.4
% Growth	10.5	0.2	11.5	28.0	18.2	81.0	57.1	60.8	65.6

As can be seen from the table above, the growth rate of footwear is increasing but the share rate is decreasing when it comes to export from Vietnam to the EU.

5.3 Foreign trade relations

The European Union is Vietnam's largest trading partner absorbing approximately a fifth of Vietnam's export (Euro 5.2 billion in 2004). The major export to the EU consists of textile and footwear products, tea and coffee. Imports are mainly machine tools, electrical equipment and pharmaceutical products. Vietnam benefits from preferential access to EU markets under the Generalised System of Preferences (GSP). The EU was also Vietnam's first major partner to conclude bilateral WTO market access negotiations.¹³³

The EU has for several years included Vietnam in the list of priority countries for development cooperation and the two way trade is continuing despite the fact that the EU has not yet accepted Vietnam as a market economy country.¹³⁴ One of the basic principles that the relation between the EU and Vietnam relies on is respecting each other's independence and sovereignty, which includes no interfering in each other's internal affairs. In order to broaden the economic and trade relations on a win-win basis all signed legal documents needs to be adjusted to Vietnam's integration into a global economy. The EU needs to maintain the GSP treatment for Vietnam and recognise it as a market economy and by that Vietnam has to meet the high demands of the European consumers. Vietnam has to implement bilateral commitments with the EU that are consistent with the WTO on

¹³² Source of the table: General Department of Customs (GDC) and GSO, found in *Taking stock, An update on Vietnam's Economic Developments and reforms*. Prepared by the World Bank Vietnam Mid-Year Consultative Group Meeting for Vietnam. Nha Trang, June 9-10, 2006. Page 6.

¹³³ http://europa.eu.int/comm/external_relations/vietnam/intro/index.htm, 2006-04-25, 10:36.

¹³⁴ Master plan for relations between Vietnam and the European Union until 2010 and orientations towards 2015. Decision no. 143/2005/QD-TTg. Page 7.

market opening for goods and services to enhance competitiveness. The EU also needs to develop Vietnamese trademarks such as footwear for products of high quality, nice design and cheap prices.¹³⁵

The Market Access Agreement between the EU and Vietnam acknowledges the importance of strengthening the friendship and desires to develop and broaden trade. EU has eliminated the textile and clothing quotas and in return Vietnam shall apply tariffs on wines, spirits, yarn etc.¹³⁶

Before the Doi Moi Vietnamese footwear were mostly exported to the Soviet Union, but after the reform the Government of Vietnam encouraged the formation of joint ventures with foreign partners due to the crisis in the Soviet Union. The shoe sector found new markets and the industry grew.¹³⁷

5.4 Summary and comments

The economy in Vietnam is growing and changes are already being made. The accession to the World Trade Organization will have an impact on the economy and the trade in Vietnam as is described in the next chapter.

Above the economic development is described and earlier the actual antidumping measure towards Vietnam has been portrayed. The reasons for imposing such measure have been explained and why Vietnam was treated as a Non-Market Economy. It is now vital to understand the impact of the WTO accession and later the effects of antidumping measures.

¹³⁵ Decision no. 143/2005/QD-TTg. Pages 9-11.

¹³⁶ Agreement between the European Community and the Government of the Socialist Republic of Vietnam on market access. Article 1-2.

¹³⁷ *Commercial counsellors report on Vietnam 2006*. European Union Economic and Commercial Counsellors. Page 52.

6 WTO accession and observation by Vietnam

Membership in the WTO is a result of negotiations a balance of rights and obligations. The members of the WTO enjoy the privileges other members have given them and in return open their markets and abide rules towards others.¹³⁸

Vietnam's membership is set to become the WTO's 150th member after the General Council's approval in November 2006. WTO Director-General Pascal Lamy said that Vietnam had made remarkable efforts when preparing for the membership which should be regarded as an inspiration.¹³⁹

6.1 Vietnam's accession to the World Trade Organization

In 1995 the Government of the Socialist Republic of Vietnam applied for membership in the WTO. Since the Doi Moi, economic reforms had focused on development of external relations and economic growth. Vietnam had joined the ASEAN, APEC and started to recognize the role of economic globalization.¹⁴⁰

Some member states in the World Trade Organization complained or requested further information due to the negotiations to accession. One member wanted information on Vietnam's plans for equitization of State Owned Enterprises. In response Vietnam stated that the state will act as any private owner of shares when equitized.¹⁴¹ Since the 1994 law on Bankruptcy, State Owned Enterprises are treated as any other enterprise.¹⁴²

Some opportunities from accession to WTO are a more stable market access for the fast growing economy. It can also constitute a protection of trade interests through multilateral rules and leverage a stronger capacity towards China. It can also attract foreign investors when the stability increases.¹⁴³

¹³⁸ http://www.wto.org/english/thewto_e/whatis_e/org3_e.htm, 2006-09-20, 14:11.

¹³⁹ http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm, "7 November 2006 — General Council approves Viet Nam's membership" 2006-11-24, 10:51.

¹⁴⁰ WT/ACC/VNM/48 Working Party on the Accession of the Vietnam. Page 5.

¹⁴¹ WT/ACC/VNM/48. Page 25.

¹⁴² WT/ACC/VNM/48. Page 26.

¹⁴³ Massmann, Oliver. *Opportunities and challenges for Asian Countries resulting from WTO accession*. Recommendations for Vietnam. Baker & McKenzie. PowerPoint presentation. Oliver Massmann is a lawyer at Baker & McKenzie and also Board Member of German Business Association in Vietnam, Head of the WTO working group of European Chamber of Commerce.

Asset prices, stock markets and banking are of concern for the growth and the WTO accession. Heavy stock market losses would undermine business confidence but bank loans and reinvested profits are still the most important. The outlook for Vietnam is positive despite the short-term risks where WTO entry and open markets for exporters will encourage the pace of reform. The agreement with the US (see below) will allow foreign banks to set up branches in Vietnam and they are now allowed to own 30 % shares in local banks.¹⁴⁴ The WTO entry can constitute a threat where increased imports will require Vietnam to reduce tariffs.¹⁴⁵

Some also believe that the antidumping case concerning footwear has been delaying the accession to WTO. The accusation of dumping prices on shoes will be harmful for Vietnam since Europe is Vietnam's most important market for footwear. The US supports the Vietnamese entry but has imposed antidumping tariffs on Vietnamese catfish and shrimp while the EU has stated that it supports the entry but has other antidumping cases such as bicycles towards Vietnam. Le Dang Doang, former director of Vietnam's Institute of Economy, doesn't believe that the lawsuits will affect the entry, but others think that "the bad example set by China after entering the organization could create more difficulties for Vietnam".¹⁴⁶

The bilateral negotiations with the U.S. were completed in May 2006 and the BTA (US-Vietnam Bilateral Trade Agreement) was the last to be done before the accession to the WTO.¹⁴⁷ Implementation of the reforms entailed by the WTO commitments should help Vietnam complete its transition to a market economy.¹⁴⁸ The agreement between US and Vietnam establishes that the later will reduce tariffs on 94 % of US exports and US will in return drop quotas on exported Vietnamese textiles.¹⁴⁹ The BTA has been a great challenge, but also a help in the post-accession period due to all reforms and requirements.¹⁵⁰

When it comes to trade relations with the US, Vietnam appears to be courted as a trade partners and a military ally. Vietnam seems to attract opportunities for US firms as an export market and direct investments. In 1994 the US lifted its trade embargo on Vietnamese products and the US is Vietnam's biggest trade partner according to Business Monitor International Ltd. There is a large lobby group called the US-Vietnam WTO Coalition, which is made up from 156 US firms including Boeing, Nike and Coca-Cola that promotes Vietnam's entry to the WTO.¹⁵¹

¹⁴⁴ The Vietnam Business Forecast Report Q4 2006. Page 16.

¹⁴⁵ The Vietnam Business Forecast Report Q4 2006. Page 17.

¹⁴⁶ <http://www.atimes.com/atimes/printN.html>, 2006-09-07, 11:04. <http://www.atimes.com>; is the Asia Times Online with Head Office in Hong Kong.

¹⁴⁷ http://www.wto.org/english/thewto_e/whatis_e/org3_e.htm, 2006-09-20, 14:11.

¹⁴⁸ *Taking stock, An update on Vietnam's Economic Developments and reforms.* (2006). Page 21.

¹⁴⁹ The Vietnam Business Forecast Report Q4 2006. Page 9.

¹⁵⁰ Massmann Oliver. *Vietnam's WTO accession. WTO Accession and its impacts on Vietnam's Economy.* Sofitel Plaza Saigon. 6 December 2006.

¹⁵¹ The Vietnam Business Forecast Report Q4 2006. Page 9.

The international investments might increase when being a member of the WTO which can have an impact on the labour market as well as on the capital market in Vietnam. But there is much left to be done for the accession, one example being conformity with international business standards. Corporate governance in Vietnamese companies will increase due to the accession. The Government needs to uphold the duty that the laws and regulations must be harmonized and in conformity with international rules and corresponding to international agreements to which Vietnam is party. It will be remarkable changes in the Vietnamese legal system with the direction of internationalization. The membership will give Vietnam access to foreign markets and capital, while enterprises will be stronger due to increased competition.¹⁵²

Vietnam's Trade Minister Truong Dinh Tuyen has said that the membership to WTO is of crucial importance. Both the membership and the reforms will be necessary for the growth and will help expand the global economy. The action Vietnam has taken towards a membership, is the introduction of 24 new laws and numerous regulations, including commercial, enterprise and intellectual property right laws. The minister also said that even though Vietnam is a developing country; it must make commitments that go beyond those of current members in similar positions.¹⁵³

The trading rights, labour standards and excise duty on spirits and beer, are issues that need to be dealt with according to other members in the WTO. Argentina defends the right to impose export taxes and restrictions while the US and the EU oppose them and Vietnam is caught in the middle. The US however praises the revisions on intellectual property laws.¹⁵⁴

Being a member of WTO means a balance of rights and obligations. The members enjoy the privileges that other members give to them and the security that the trading rules provide. In return a member of the WTO has to make commitments to open its markets and to abide by the rules that are stated in the accession negotiations. When becoming a member, a country has to describe all aspects of its trade and economic policies, then in bilateral talks describe what the country has to offer to the WTO. After that the draft membership terms are completed in form of a bilateral market accession negotiation and these appear in a report. Finally a decision is made, which is voted at the WTO General Council or the Ministerial Conference.¹⁵⁵

¹⁵² The Vietnam Business Forecast Report Q4 2006. Page 12.

¹⁵³ http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm, 2006-09-20 11:17.

¹⁵⁴ http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm, 2006-09-20.

¹⁵⁵ Uruguay Round Agreement. Marrakesh Agreement Establishing the World Trade Organization.

In the market access agreement with the US there is an understanding that Vietnam will be treated as a Non-Market Economy for some years after the accession to the WTO. The US will use a non-market methodology in antidumping cases for at least 12 years after accession to the WTO. It will be easier for the US producers to file and also win antidumping cases with the NME treatment. Almost 94 % of Vietnams import from the US will also be facing duties of 15 % or less.¹⁵⁶ China has the same commitments with the US, stating that the country will be treated as a Non-Market Economy for 15 years. During a 12 year period China will be subject to a specific product safeguard provision for products of Chinese origin.¹⁵⁷ The ratification of the Permanent Normal Trade Relations (PNTR) by the US congress failed and the non-application principle must be invoked. It means that the US cannot benefit from WTO terms applicable to all other members. However the BTA remains in effect and it enclose benefits that are beyond WTO commitments.¹⁵⁸

The BTA confirmed a lack of bank competitiveness which many financial institutions and also Vietnamese enterprises have found to be holding them back in the world market.¹⁵⁹

During Vietnam's first year as a WTO member there will exist an "unprecedented enforcement mechanism" according to the US Agreement. By this, the US can request consultations with Vietnam when not taking away certain export subventions. If no results are made in the consultation an arbitrator will be appointed which can make decisions after 120 days where the US can reintroduce its quotas.¹⁶⁰

6.2 Advantages of WTO membership

Most countries that join the WTO believe that the economic and political benefits will outweigh the costs, such as adjustments costs associated with the reforms taken before accession.

The Swedish International Development Cooperation Agency has stated in a report that WTO membership involves quite a few advantages of noteworthy value to developing countries. In the WTO the negotiations are dealt with at the multilateral level instead of the bilateral level, which can contribute to powerful partners in some cases. The advantages are the same

¹⁵⁶ *Taking stock, An update on Vietnam's Economic Developments and reforms.* (2006). Page 21-22.

¹⁵⁷ Polouektov, Alexander. (2002). Page 32.

¹⁵⁸ Massmann Oliver. *Vietnam's WTO accession. WTO Accession and its impacts on Vietnam's Economy.* Sofitel Plaza Saigon. 6 December 2006.

¹⁵⁹ Managing the challenges of WTO participation: case study 45. Preparation by Vietnam's Banking sector for WTO Accession. Phan Van Sam and Vo Thanh Thu.

¹⁶⁰ The Bilateral Trade Agreement between the Socialist republic of Vietnam and the United States of America and the relevant Annexes thereof and the Review of Annual Bilateral trade Agreement.

for all countries, for instance non-discrimination treatment, but developing countries also benefits from differential and special treatment.¹⁶¹

The WTO judicial system is based on those members that have agreed on compulsory jurisdiction. The WTO Understanding on Rules and Procedures Governing the Settlements of Disputes (DSU) states that all member governments can complain against any other and secure an independent panel to deem the complaint and provide a judgment. When a final decision is determined, it is automatically adopted by the Dispute Settlement Body (DSB). “A reasonable period of time”¹⁶² is given to the government found to be in default to come into compliance. The complaining governments can ask for authority to “suspend concessions or other obligations”.

In the services sector Vietnam has focused so far on transitions from closed and monopolistically-oriented regimes to competitive market structures. The crucial bargaining of Vietnam’s accession is also stated to be the offers on services in order to obtain concessions on goods.¹⁶³

The accession to the WTO provides both opportunities and challenges and it is important to integrate Vietnam into the global economy in order to be able to face these challenges and opportunities.¹⁶⁴ The economy can be more vulnerable to global economic challenges and it will constitute a reform of the public sector. Vietnam also lacks some skills in management and financial system. Compared to Cambodia, Vietnam has not been able to pass all necessary laws and take the important reforms, but Cambodia is also quite different from Vietnam. Cambodia was the first Least Developed Country that became a WTO member and it did so in 2003. Compared to China, Vietnam did not succeed to implement all necessary Intellectual Property Rights, so Vietnam is required to do that before the accession. But some of the measures that are taken towards China are also implied on Vietnam, which makes it better if Vietnam is a WTO member. The main challenge for Vietnam when accessing WTO is that it will force the enterprises to increase their competitiveness and this is especially due to small and medium sized enterprises.¹⁶⁵ There will be a massive competition in the supply chain and many tax privileges have to be abolished.¹⁶⁶ The bureaucracy and administration has to be simplified and many of the tax privileges and substitutions have to be abolished. Oliver Massman

¹⁶¹ Sida. *Trade brief on...Trade and poverty*. February 2004. Published by Sida 2003. Page 4.

¹⁶² The reasonable time period can be determined on different basis. It can be proposed by the Member concerned, mutually agreed by the parties or determined by the arbitrator according to Article 21.3 of the DSB, Dispute Settlement Body.

¹⁶³ *Service policies and international trade integration in Vietnam*. Prepared by Mr. Alberto Gabriele, Economic Affairs Officer, Division on International Goods and Services, and Commodities, UNCTAD. UNCTAD/TNCD/MISC/2003/8. Page 14.

¹⁶⁴ Massmann, Oliver. *Opportunities and challenges for Asian Countries resulting from WTO accession*.

¹⁶⁵ Massmann, Oliver. *Opportunities and challenges for Asian Countries resulting from WTO accession*.

¹⁶⁶ Massmann Oliver. *Vietnam’s WTO accession. WTO Accession and its impacts on Vietnam’s Economy*. Sofitel Plaza Saigon. 6 December 2006.

recommends some actions in order to face the challenges and that is especially to undertake more reforms and foundate a WTO institute which should act as the main advisor to the government. It could give consultations to enterprises and the government to the challenges.¹⁶⁷

From the date of accession TRIPS, Technical Barriers to Trade and Sanitary and Phytosanitary Measures agreements will fully comply with the WTO rules. Customs evaluation, antidumping, safeguards and subsidies amongst others will partially be subject to phase in periods. There will be a reduction of State involvement in the economy and this is especially in equitization program. Vietnam will have full trading rights from 1 January 2007 for all foreign individuals and enterprises.¹⁶⁸

6.3 Summary and comments

After joining the WTO Vietnam has to make more changes but Vietnam is one of few countries that have made changes prior to the accession. The main issue is to improve the competitiveness for enterprises and the subsidies in the agricultural sector need to disappear. Vietnam also has to lower duties, open up more sectors for foreign investors and take away special duties on alcohol and cigarettes. Advantages on taxes for investment projects in special businesses also needs to disappear according to Oliver Massmann.¹⁶⁹

All that is mentioned above can be seen in relation to the Market Economy Treatment and Non-Market Economies as discussed earlier. If these changes will be done, it is likely that Vietnam no longer will be treated as a Non-Market Economy.

The second part of the thesis is now completed by examining the status as Non-Market Economy, Market Economy Treatment and by looking at the economic development in Vietnam and the accession to the WTO. The status as NME appears again when describing the bilateral agreements to the WTO, but the Market Economy Treatment is rarely used worldwide. To understand the use of the terms it is essential to comprehend the Vietnamese economy and the history. Vietnam is a country that is rapidly developing the growth but at the same time is a Socialist Republic affected by its history and wars.

¹⁶⁷ Massmann, Oliver. *Opportunities and challenges for Asian Countries resulting from WTO accession.*

¹⁶⁸ Massmann Oliver. *Vietnam's WTO accession. WTO Accession and its impacts on Vietnam's Economy.* Sofitel Plaza Saigon. 6 December 2006.

¹⁶⁹ Massmann, Oliver. *Vietnam nach dem WTO Beitritt. Post Accession Action Plan.* Powerpoint presentation.

7 Effects of antidumping procedures

One of the requirements for imposing an EU trade defence instrument is that there has to be a concern of the Union. The measure has to be in a wider European economic interest. If a measure cannot comply with this statement, it cannot be implemented.¹⁷⁰ An investigation of the industry of concern is therefore vital. Without an investigation it is impossible to establish whether the matter of concern can be of such an important value in order to make a trade defence instrument proportional.

7.1 The complainants and economic interests

The European Union recently agreed on imposing tariffs on Chinese and Vietnamese shoes with uppers of leather in order to prevent cheap imports from flooding local markets.¹⁷¹ 11 out of every 100 pair of leather shoes sold in Europe will be held with duties from Friday 6 October 2006 and two years ahead. The governments in the EU Member States were split in the issue and the last time they voted against a proposal to impose tariffs for up to five years. The vote that passed the measure was a 13 to 12 majority.¹⁷²

Alisdair Gray, director of the British Retail Consortium stated, according to Reuters, that not one job will be saved as a result of this. He saw the measure as political and anti-consumer.¹⁷³ “Shoppers all over Europe will now have to pay the price for political horse-trading on subjects of no relevance to shoe production or consumption” he declared.¹⁷⁴ The president of Vietnam Leather and Footwear Association Nguyen Gia Thao objected the decision and said that Vietnam did not dump shoes or violated international trade law. He also stated that many of the shoe workers will be affected when several of the smaller footwear companies might go bankrupt.¹⁷⁵

When the expert mission from the European Commission met with representatives of the Vietnamese leather and footwear companies in 2005 it

¹⁷⁰ Article 21.1 AD Regulation.

¹⁷¹ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Official Journal L 275 , 06/10/2006 P. 0001 – 0041.

¹⁷² Brussels, Belgium (AP). Sent by email from cec.eu.int.

¹⁷³ <http://vietnamnews.vnagency.com.vn/showarticle.php?num=04BUS051006>, 2006-10-05. 11:32 <http://vietnamnews.vnagency.com.vn>; is a website for Viet Nam News, English language Daily that started publishing in 1991.

¹⁷⁴ Reuters. 4/10/2006 11:16 Update 1- EU countries approve compromise on Asia shoe duties.

¹⁷⁵ <http://vietnamnews.vnagency.com.vn/showarticle.php?num=04BUS051006>, 2006-10-05. 11:34.

was the first time ever that the EC was sending an expert mission in an antidumping case. EC experts Frederic Michiels and Bernd Andreas Schmidt spoke with reporters afterwards and tried to explain the outcome. They said that the EC was willing to help the Vietnamese shoe companies in the lawsuit and that the EC recognizes that Vietnam is in the process of developing a market economy.¹⁷⁶

In order to initiate an investigation, the producers need to be 25 % or more of European production of the product in question and it has to be a credible complaint to initiate an investigation. An investigation lasts between a year and 15 months and is maintained to collect economic and commercial data through questionnaires and on-site investigations. Article 5 states that an investigation to determine dumped prices shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, which acts on behalf of the Community Industry.¹⁷⁷

There are about 8000 producers of shoes with uppers of leather in the EU that are affected by the measure and the complainants were 814 of these.¹⁷⁸ The definition in the provisional measure does not include producers that are importing the shoes in question or are connected to exporters or importers of the product.¹⁷⁹

80 % of the producers in the Community come from the region of Italy, Portugal and Spain.¹⁸⁰ The rest are regioned in Poland and Greece, which means that there are only five countries that are affected economically by the supposed dumping. These kinds of shoes are also only less than 35 % of the whole amount of the shoe market in the Community.¹⁸¹ The Trade Minister in Vietnam, Mr Truong Dinh Tuyen, states that the consumers in Europe will be unable to benefit from competitive prices in the market. He also says that the antidumping measure will directly affect cooperative relations between Vietnam and EU.¹⁸² Supplement B can give a view of the expected changes due to the antidumping measures.

France is the world's 5th biggest economy and the 4th biggest trader and in the EU it is the second biggest trade partner of Vietnam which is a member of the Francophone Community. Germany is however the world number 3 and Vietnam's biggest trade partner in the EU. The German government has given priority to provision of development aid to Vietnam but the investment is limited. UK is Vietnam's third biggest trading partner in EU and the major grant donor. The Nordic countries are however some of

¹⁷⁶ http://www.ven.org.vn/print_news.php?id=4787, 2006-04-10, 13:33.

¹⁷⁷ Council Regulation (EC) No 384/96. Basic Regulation.

¹⁷⁸ Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. OJ L 98, 6.4.2006, p. 3–54.

¹⁷⁹ Article 4.1 (a), AD Regulation.

¹⁸⁰ Regulation (EC) No 553/2006. Para 146.

¹⁸¹ Regulation (EC) No 553/2006. Para 244.

¹⁸² Communist Party of Vietnam Online Newspaper, 9/16/2006, http://cpv.org.vn/print_preview_e.asp?id=BT1690635272.

Vietnam's most important partners and has been the most prosperous relations for the last decades. Sweden was the first country to provide grants but the Southern parts of Europe as well as the Eastern has no significant trade with Vietnam.¹⁸³ This can be compared to the votes when deciding on the permanent measure on shoe tariffs. The Southern states voted for the measure whilst the Northern parts voted against.

7.2 Proportionality and openness to trade

The principle of proportionality means that the goals that are achieved and the means to achieve them have to be in balance. The costs it will render for a trade measure has to be in proportion to the gains of the measure.¹⁸⁴ It is also stated in Article 5 of the Treaty Establishing the European Community that actions by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.¹⁸⁵ The anti dumping legislation declares the highest amount of dumping margin which it cannot exceed.¹⁸⁶ There are also discussions whether the tariffs are protectionist sanctions against companies that are stated to dump prices and therefore make a negative impact on the competition.¹⁸⁷

In international law proportionality is used to describe whether different measures are in proportion to the damage. In an antidumping procedure, it is vital to determine if the injury of dumped prices is in wider European economic interests.

Malcolm Shaw writes in his book *International Law* that “the principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states”.¹⁸⁸ Article 2(7) in the UN Charter states that not even the UN has the right to intervene in other states internal affairs with the exception of Chapter VII.

EU intends to fulfil the idea of the Doha Round by giving real new market access for all, which means tariff and quota-free access to Least Developed Countries. The Union also intends to let developing countries contribute on their own basis. Furthermore, the EU is also “fully committed to negotiating their elimination and exploring the scope for more horizontal mechanisms to

¹⁸³ Master plan for relations between Vietnam and the European Union until 2010 and orientations towards 2015. Decision no. 143/2005/QD-TTg. Page 16.

¹⁸⁴ http://ec.europa.eu/comm/trade/issues/respectrules/anti_dumping/index_en.htm, 2006-05-15, 15:32. <http://ec.europa.eu>; is the Commission's official website which provides for the latest official press releases, details on forthcoming events etc.

¹⁸⁵ Consolidated Version of the Treaty Establishing The European Community.

¹⁸⁶ Moëll, Christina. *Antidumpingstullar i ett skatterättsligt perspektiv*. Page 305 and 308.

¹⁸⁷ Moëll, Christina. Page 309.

¹⁸⁸ Shaw, Malcolm. *International law*. 5th ed. Cambridge University Press. Page 1039. See also the Corfu Channel case, ICJ Reports, 1949, pp.4, 35; 16 AD, pp.155, 167 and the Nicaragua case ICJ Reports, 1986, pp.14, 106; 76 ILR, pp.349, 440.

deal with trade-restrictive barriers”.¹⁸⁹ The Doha Round also included a review of the antidumping tariffs where there are two differences in opinion amongst WTO members. One group wants to change them so they are no longer seen as hidden trade barriers and limit the practice made by governments. The other group that mainly consists of the US wants to strengthen the rules and make them more efficient. There is a proposal to include a “mandatory lesser duty rule” in the agreement which has led to discussions.¹⁹⁰ The phrase “lesser duty rule” is from article 9.1 in the Anti Dumping Agreement that states:

“It is desirable that ... the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.”

The predictability is also an important issue and how the importers and exporters can predict the tariffs on certain goods. Within the WTO there is a right to dispute trial and the AD Agreement also states that all national legislation includes rules that all members should have a trial organ when it comes to final decisions on anti dumping tariffs. The Dispute Settlement Understanding is applicable to consultations according to Article 17.1 AD Agreement.¹⁹¹ A Member can make consultations with another Member if not satisfied with a matter in accordance with Article 17.3 and if these fail, it may refer the matter to the Dispute Settlement Body (DSB).¹⁹² In the WTO dispute settlement procedure there is a huge difference though and that is that individual companies cannot have their cases tried, only member states.¹⁹³

In countries where there exists no trade barriers or antidumping, the reality is quite different from those who do. A protectionist view of trade can be positive when not giving access to cheap goods that will be a threat to domestic producers.

China has reformed its economy and is shifting from planned economy to market economy in the economic globalization.¹⁹⁴ The stability is growing in the country, but the agreements with other countries might not always have a positive effect. China has recently signed an agreement with 48 African countries which especially worries Europe. The economic growth has never been as fast anywhere in the world as it is in China says Jean-Pierre Tuquoi, at the French magazine *Le Monde*.¹⁹⁵ This means that at some markets it is flooded by cheap Chinese goods instead of selling their own produced goods. China threatens neighbouring countries with its

¹⁸⁹ Stated on: http://ec.europa.eu/trade/issues/global/development/index_en.htm, 2006-10-16, 13:10.

¹⁹⁰ Moëll, Christina. *Antidumpingstullar i ett skatterättsligt perspektiv*. Page 310.

¹⁹¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. (GATT).

¹⁹² GATT. Article 17.4.

¹⁹³ Christina Moëll. *Antidumpingstullar i ett skatterättsligt perspektiv*. Page 312.

¹⁹⁴ Tong Zhiguang, The Development of China and World Trade. *Journal of World Trade*. 2006. vol. 40 No 1 Page 130.

¹⁹⁵ Helsingborgs Dagblad. Måndag 20 November 2006, page A10.

mercantilist approach. Export is cheap and only a protectionist economy can stop it.¹⁹⁶

7.3 Fair comparison

The existence and the idea of dumping measures are being put into practice because of the difference between the export price and the domestic price of the product. However, a fictitious price is more commonly used which calls for an international rule on dumping, which guarantees fairness in price comparison.¹⁹⁷ The exporter's price can discriminate in the domestic market of the exporting country, when the normal value may not reflect the comparable price for the like product.¹⁹⁸

Article 2(4) of the AD Agreement and Article 2(10) of the Basic Regulation mentions fair comparison, but it does not mandate exactly how the investigations should be designed.¹⁹⁹

The Uruguay Round presented a strengthened fair comparison requirement in the WTO Antidumping Agreement. In the case "Bed Linen", the WTO panel found that zeroing of negative dumping margins accomplished by the EU was not consistent with the WTO AD Agreement. In the Stainless steel case, the panel found that the investigating authorities had not shown that the comparability between the export price and the normal value had been affected.²⁰⁰

In Regulation No 384/96 a fair comparison is mentioned in Article 2 (C) (10). The Regulation states that a fair comparison shall be made between the export price and the normal value. In the comparison, it shall be made at the same level of trade and in respect of sales made at the same time.²⁰¹ The Trade Minister Truong Dinh Tuyen stated earlier that the comparison in the shoe-case between Brazil and Vietnam is unreasonable as the countries have different levels of economic development, when using Brazil as an analogue country in the investigation.²⁰² The Vice chairman of the Vietnam Leather and Footwear Association (LEFASO) also believes that Brazil was an unreasonable choice. He argued that Indonesia would be a better choice

¹⁹⁶ Norberg Johan. *Far Eastern Economic Review*. Hong Kong. Jan/Feb 2006 Vol. 169, Iss 1, Pages 46 – 47.

¹⁹⁷ Jong Bum Kim. (2002). Page 39.

¹⁹⁸ Jong Bum Kim. (2002). Page 45.

¹⁹⁹ URUGUAY ROUND AGREEMENT Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Article 2(4) and Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal L 056, 06/03/1996 P. 0001 – 0020*.

²⁰⁰ Jong Bum Kim. (2002). Page 56.

²⁰¹ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal L 056, 06/03/1996 P. 0001 – 0020*.

²⁰² Communist Party of Vietnam Online Newspaper, 9/16/2006, http://cpv.org.vn/print_preview_e.asp?id=BT1690635272.

since input costs and prices are more similar. Brazil has an average per capita on US\$ 2,700 while Vietnam has only US\$ 400 and the production costs are much higher in Brazil.²⁰³ The EU stresses that the representatives of the domestic sales is not the only reason for choosing Brazil. The competition of the market, the difference in the costs and the know-how are other factors that lead to the choice. The choice of Brazil is not unreasonable according to the EU.²⁰⁴

The intention of an analogue country is to allow investigators to evaluate the prices as if they followed market economy conditions. The intention is therefore not to choose a country that is comparable to the target country, because those comparable conditions cannot be known in a Non-Market Economy. The reason for choosing Brazil is according to the EU because its footwear sector, production range and export capacity is of analogous size.²⁰⁵

7.4 Costs and revenues from the antidumping measure on footwear

The National Board of Trade in Sweden was unwilling to support the antidumping measure towards Vietnamese shoes for several reasons. In July 2006 an indicative measure was decided upon which included quotas instead of regular tariffs. Prior to that, the National Board of Trade stated those quotas would be far more expensive for both government and business and that it would lead to an uncertainty among importers.²⁰⁶

The Swedish national Board of Trade states that the negative consequences in the European Community during 2005 and therefore the injury of imported shoes, mostly is due to the system in the EU.²⁰⁷ There were recently import quotas on shoes from China but since they were taken away in 2004/05 the import has increased a lot. In the investigations prior to the antidumping measures there was first no acceptance on the behalf of the Commission towards the increase due to released quotas. Accordingly, the Commission has shifted and states that only volumes above a certain level cause an injury that is worth correcting with tariffs.²⁰⁸

²⁰³ <http://www.atimes.com/atimes/printN.html>, 2006-09-07, 11:23.

²⁰⁴ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Para 105.

²⁰⁵ http://ec.europa.eu/comm/trade/issues/respectrules/anti_dumping/pr230206_qa_en.htm, 2006-08-17, 12:35.

²⁰⁶ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006). Page 1.

²⁰⁷ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006) Page 8.

²⁰⁸ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006) Page 8.

The Commission has calculated that the estimated gain from antidumping measures will be 6 %, instead of earlier stated 2 %. The Swedish National Board of Trade believes that the estimated 2 % is closer to the truth. It also believes that the companies that invest in Vietnam and China and produce their shoes there will likely move their business to other countries in Asia.²⁰⁹

Those who suffer from the injury of dumped prices are according to the Commission not only the Community producers, but the importers that maintain design, branding, management and retail activities in the Community.²¹⁰ The Community Industry is defined as the Community producers whose collective output constitutes a major proportion as described in Article 5(4) of the Basic Regulation.²¹¹ No producer opposed the claim from the Community.²¹²

The costs for the companies will be much higher for the producing companies in Vietnam that have made investments than the actual positive effects from measures for the Common Industry in the EU.²¹³ According to Danish calculations, the costs for the European consumers will be eight times higher than the actual improvements from the protection.²¹⁴

The import price has been decreasing when it comes to import to the EU, almost 24 %. However the currency in Vietnam has increased 16 %. Some of the injury can therefore be explained by exchange rate changes.²¹⁵

The Trade Minister in Vietnam Truong Dinh Tuyen has stated that Vietnam did not dump prices on the European market. It will only have a serious impact on Vietnamese workers and it will also make European consumers unable to enjoy competitive prices in the market. It will even affect cooperative relations between Vietnam and the EU.²¹⁶ Deputy Trade Minister Le Danh Vinh said that the provision was unfair and that it failed to reflect the reality of production and export. “Vietnamese-made leather-capped shoes are neither a cause nor a threat to trigger economic damages to

²⁰⁹ *Möte med EU: s antidumpningskommitté den 19-20 juli 2006: Läderskor från Kina och Vietnam.* (2006). Page 9.

²¹⁰ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam Official Journal L 275, 06/10/2006 P. 0001 – 0041. Para 149.

²¹¹ Council Regulation (EC) No 1472/2006. Para 154.

²¹² Council Regulation (EC) No 1472/2006. Para 155.

²¹³ *Möte med EU: s antidumpningskommitté den 16 mars 2006: Läderskor från Kina och Vietnam.* National Board of Trade. Yttrande 2006-03-14. Page 1.

²¹⁴ *Möte med EU: s antidumpningskommitté den 16 mars 2006: Läderskor från Kina och Vietnam.* (2006). Page 11.

²¹⁵ *Möte med EU: s antidumpningskommitté den 16 mars 2006: Läderskor från Kina och Vietnam.* (2006). Page 10.

²¹⁶ http://www.cpv.org.vn/print_preview_e.asp?id=BT1690635272, 2006-10-07, 11:12. <http://cpv.org.vn>; Communist Party of Vietnam Online Newspaper is an organ of Vietnam's Communist Party (CPV) Central Committee. It provides orthodoxy information on CPV's viewpoints, guidelines and policies.

the EU's leather and shoes industry," said Deputy Trade Minister Le Danh Vinh.²¹⁷

It is too early to understand the effects on exports of Vietnamese footwear but according to LEFASO and the Ministry of Trade, the export will decline. There are also risks that foreign investors will move their production to other countries which already can be seen in some companies. Instead Vietnam hopes to increase the export to other markets. There are also differences between shoes from China and Vietnam but the different tariff levels will allow competition compared to Chinese export.²¹⁸

The Swedish National Board of Trade concludes that the measures will not be given the positive effects that are wanted. Instead all producers will move their business to other Asian countries and it is not likely that they will move their companies to Europe.²¹⁹

There was a claim that Vietnam is one of the world's poorest countries and it benefits from the GSP and that it therefore should not be cumulated with China in the injury assessment. However, this claim was not included due to the fact that the Basic Regulation does not take the economic situation in consideration.²²⁰

7.5 Reciprocity

It is likely that reciprocity will occur when the EU imposes antidumping duties towards Vietnam.²²¹ In the ordinance on antidumping of imports into Vietnam, it is stated that antidumping taxes will be imposed if imports threatens to cause material injury to a domestic industry.²²²

Pursuant to Article 27 of the Ordinance on antidumping the provisions of international agreements to which Vietnam is a party will prevail over Vietnamese antidumping legislation in the event of conflict. Vietnam is arguing therefore, that its legislation on antidumping complies fully with the WTO Agreement on Subsidies and countervailing measures. So far, no trade remedy cases have been initiated in Vietnam though.

²¹⁷ http://www.cpv.org.vn/print_preview_e.asp?id=BT7100659087, 2006-10-07, 11:15.

²¹⁸ *Commercial Counsellors report on Vietnam 2006*. European Union Economic and Commercial Counsellors. Page 55.

²¹⁹ *Möte med EU: s antidumpningskommitté den 16 mars 2006: Läderskor från Kina och Vietnam*. (2006). Page 11.

²²⁰ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam Official Journal L 275, 06/10/2006 P. 0001 – 0041. Para 163 and 165.

²²¹ Regional meeting, Sofitel Plaza Hanoi, 8-10 October 2006. Commercial Counsellors meeting, Hanoi.

²²² Ordinance on antidumping of imports into Vietnam, passed on 29 April, 2004 by the Standing Committee of the XIth National Assembly of the Socialist Republic of Vietnam. No. 20/2004/PL-UBTVQH11 of April 29, 2004.

Vietnam has also confirmed that it would not apply antidumping measures after its WTO accession until its legislation is in conformity with the relevant WTO Agreements and the amendments have been notified and implemented.²²³

Vietnam is dismantling tariffs in order to meet WTO accession goals, but import tariffs normally constitute high regional standards. Within the ASEAN region, Vietnam has agreed to comply with ASEAN's Common Effective Preferential Tariff (CEPT) on manufactured goods which means rates on 0-5 % range. At one of the WTO meetings Vietnam had to propose a revision of excise duties to end discrimination against imported motor vehicles, beer, conformity in products that are produced in free zones and the reduction of restrictions on trading rights as oil, sugar, tobacco etc.²²⁴

Antidumping policies have spread to developing countries and the question is whether it is a necessary safety measure that ensures broad trade liberalisation or whether it is an obstacle to trade. Antidumping rules can constitute compensation in the absence of quality standards and regulations to keep away dumped product or "dodgy" merchandise.²²⁵ There are also results that question the former results that antidumping duties impose a high welfare cost on consumers and that the tax addresses no essential market failure (see for example Gallaway et al., 2000; Prusa, 2001). Other researchers suggest that dumping is a profit-maximizing strategy for some firms which would indicate antidumping duties as welfare-reducing (e.g. Gruenspecht, 1998). However, there are analyses that show no high costs for consumers and little distortion on trade flows (e.g. Fischer and Prusa, 1999).²²⁶

7.6 Summary and comments

The third part of this thesis is now completed by investigating the effects of the actual antidumping measure towards Vietnam.

As stated earlier the measure can have a serious impact on women's lives since most women work in the shoe industry.

Interesting to notice is the collaboration amongst trade partners and which countries that voted for or against the measure. The countries that have a good cooperation and trade with Vietnam have not supported the decision to impose antidumping duties but those who don't have that collaboration did.

²²³ Katarina Kuehn, Intern at Baker & McKenzie LLP, Hanoi Branch Office, 2006-10-18.

²²⁴ *The Vietnam Business Forecast Report Q4 2006*. Page 38.

²²⁵ Niels, Gunnar and Kate ten Adriaan. Antidumping policy in developing countries: safety valve or obstacles to free trade? *European Journal of Political Economy* 22 (2006) 618-638. Page 625.

²²⁶ Crowley, Meredith A. Do safeguard tariffs and antidumping duties open or close technology gaps? *Journal of International Economics* 68 (2006) 469-484. Page 481.

The EU has made contradictory statements when promoting free trade but at the same time using trade barriers towards especially developing countries.

In international law proportionality is used to describe whether different measures are in proportion to the damage. In an antidumping procedure, it is vital to determine if the injury of dumped prices is in wider European economic interests in order to meet the demands of proportionality.

8 Conclusions

The legal basis for antidumping in primary EC law is Article 133 of the EC Treaty and the current EC antidumping legislation in force is the 1995 Basic regulation. In accordance with this, a definitive measure has been implemented on footwear; Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam.

8.1 Results

Antidumping procedures are essentially based on the requirements that there exists dumped imports, material injury to a domestic industry and that there is a causal link between the dumped imports and the injury. Antidumping procedures can be seen as discriminatory or a safety measure for the domestic market, depending on the reason of implementation.

The EU intends to fulfil the idea of the Doha Round by giving real new market access for all, which means tariff and quota-free access to Least Developed Countries. The Union also intends to let developing countries contribute on their own basis. This is though contradictory to the concept of trade barriers. In international law proportionality is used to describe whether different measures are in proportion to the damage. In an antidumping procedure, it is vital to determine if the injury of dumped prices is in wider European economic interests in order to meet the demands of proportionality. In the case described, it is questionable whether the proportionality is accomplished. By examining the data, it seems as if the measure is greater than the actual gain from it.

It is too early to understand the effects on exports of Vietnamese footwear but according to LEFASO and the Ministry of Trade, the export will decline. There are also risks that foreign investors will move their production to other countries. The costs for the companies will be much higher for the producing companies in Vietnam that have made investments than the actual positive effects from measures for the Common Industry in the EU. As seen in supplement B the cost will also be higher for the consumers.

Fair comparison is important in antidumping cases and according to EC Law it must be made. However, it is very difficult to make a fair comparison based on the terms of analogue country. When choosing an analogue country it is therefore vital to assess more criteria and preference should be given to countries with comparable cost composition and level of development as the target country. The question is if the EC really can motivate the use of an analogue country. The perplexity and the understanding of the target country will be lost as well as the

proportionality. The calculations can only be fair and in proportion if the actual country is examined.

Other differences are the Non-Market Economy treatment and the Individual Treatment MET. The treatment of Non-Market Economies is quite different from the treatment of market economies especially considering antidumping proceedings. Anti-dumping duties are to a larger extent imposed on exports from companies in countries with non-market economies than exports from companies that have been granted market economy treatment. In the 1995 WTO Antidumping Agreement there is no mention of Non-Market Economies, but there is an acceptance of the use. In a number of accession protocols to WTO there has been an approval of Non-Market Economy exceptions. However, the classification of non-market economy is not coherent. The WTO uses the phrase transition economy, the World Bank calls Vietnam a start-up market and UNCTAD a market oriented. This shows that there is no coherence in world trade and that it can convey unfair treatment and that antidumping can be discriminatory. An interesting fact is also the reading of the word NME's which sounds like "enemies". The measure of imposing antidumping duties can have a negative connotation and the phrase NME does not help.

In the EU Basic Regulation No 905/98, individual treatment can be given when the applicant can show that foreign investors can repatriate capital and profits, the prices are freely determined, the majority of shares belong to private persons, exchange rate are carried out at market rate and state interference does not allow different duty to individual exporters. This can be compared to the corporate structure in Vietnam and market economies. The five core structures in a company in a market economy seem to exist in the Vietnamese law, at least. However the implementation is far away from the laws. The implementation is a slow process, but might be improved due to the accession to the WTO.

The firms need to have a clear accounting and the production costs and the financial situation are not to be subjected to significant distortions. Bankruptcy and property laws must also guarantee legal certainty. In the case examined, the Vietnamese companies were denied the treatment as market economy for the reason that they do not pay market rent for the land on which their facilities are situated. This is a huge problem, since many especially small or medium-sized companies cannot afford to pay market rent due to the low selling price. When subsidies are found they should be adjusted to the production cost instead of denying MET. The companies make commitments to the Vietnamese State in terms of exportation in order to receive the benefits of rent and it is an immense process to change all this. The decision in itself, to impose antidumping measures might be the right decision after reviewing the data, but looking at the interest and the proportionality it is wrong.

There are indications seen above that EC Law and WTO Law are not consistent and that there are difficulties when imposing antidumping duties.

These differences are most obvious in the discussion whether WTO Law has direct effect in the EC or not. Antidumping measures imposed by a Member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). The AD Agreement establishes substantive requirements that must be satisfied in order to impose an antidumping measure. However the European Court of Justice (ECJ) has stated that WTO law does not have direct effect in the EC legal system.

The denying of direct effect was based on reciprocity and granting it would reduce the capacity for tactic enjoyed by the Community with respect to its commercial partners. Pursuant to Article 27 of the Ordinance on antidumping the provisions of international agreements to which Vietnam is a party, will prevail over Vietnamese antidumping legislation in the event of conflict. Vietnam is arguing therefore, that its legislation on antidumping complies fully with the WTO Agreement on Subsidies and countervailing measures. No trade remedy cases have been initiated in Vietnam though. Vietnam has also confirmed that it would not apply antidumping measures after its WTO accession until its legislation is in conformity with the relevant WTO Agreements and the amendments have been notified and implemented.

The SCM Agreement gives Members to the WTO a seven-year period to phase out prohibited subsidies. Whether or not Vietnam is given this is uncertain. In the Bilateral Agreements there are however phase out periods to treat Vietnam as a Non-Market Economy for a while longer. According to the AD Agreement a failure to respect the substantive or the procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure. But again, this is uncertain due to the fact that the EC denies the WTO direct effect.

After joining the WTO Vietnam has to make more changes but Vietnam is one of few countries that have made changes prior to the accession. The main issue is to improve the competitiveness for enterprises and the subsidies in the agricultural sector need to disappear. Vietnam also has to lower duties and open up more sectors for foreign investors. Vietnam needs to harmonize legislation so that they correspond to international agreements.

The challenge for Vietnam is to abolish tax privileges and the bureaucracy and administration has to be simplified. The accession to the WTO is a historic step for Vietnam into the global trading system and if these challenges are dealt with successfully it will also contribute to the development of the country. The economy in Vietnam is growing despite the treatment as a Non-Market Economy. Vietnam has asked the EU to review the master plan and recognise Vietnam as a market economy and abolish the technical barriers in order to boost trade. However, the accession to the World Trade Organization will have an impact on the economy and might help Vietnam to change the economy so that it will be treated as a market economy.

Supplement A

World Bank classification of Countries

Industrialised countries:

Australia, Austria, Bahrain, Belgium, Canada, Denmark, European Community, Faroe Islands, Finland, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, Korea, Republic of Liechtenstein, Luxembourg, Macau, Netherlands, New Zealand, Norway, Portugal, Qatar, Singapore, Spain, Sweden, Switzerland, United Arab Emirates, United Kingdom, United States.

Developing countries (World Bank: Very Low, Low or Middle Income Countries):

Algeria, Argentina, Bangladesh, Belarus, Bosnia Herzegovina, Brazil, Bulgaria, Chile, China, P.R., Chinese Taipei, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, Egypt, Estonia, Georgia, Guatemala, Honduras, Hungary, India, Indonesia, Iran, Jordan, Kazakhstan, Korea (PDR), Latvia, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mexico, Moldova, Mozambique, Nepal, Nicaragua, Nigeria, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Romania, Russia, Saudi Arabia, Serbia, and Montenegro, Slovak Republic, Slovenia, South Africa, Sri Lanka, Thailand, Trinidad and, Tobago, Turkey, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zimbabwe.

Supplement B

Statistics from a Danish calculation on costs and revenues

Member State	A Producer surplus 1000 Euro	B Consumer/importer surplus 1000 Euro	B-A Net effects 1000 Euro	Price change %	Consumer / Producer ratio
France	1936,6	25080,3	23143,7	1,1	13,0
Netherlands	3659,9	31189,5	27529,6	3,8	8,5
Fr Germany	2397,5	63534,9	61137,4	2,9	26,5
Italy	13290,1	35990,8	22700,7	1,0	2,7
Utd. Kingdom	884,1	66731,5	65847,4	3,4	75,5
Ireland	109,9	577,7	467,7	0,4	5,3
Denmark	762,0	8085,4	7323,4	2,2	10,6
Greece	250,5	3442,6	3192,2	1,1	13,7
Portugal	3513,4	845,4	2668,0	0,4	0,2
Spain	4515,8	19802,5	15286,8	1,6	4,4
Belgium	2096,3	12007,5	9911,2	2,1	5,7
Luxembourg	110,5	110,5	0,0	0,4	1,0
Sweden	135,5	5952,4	5816,8	2,9	43,9
Finland	180,4	1823,1	1642,7	1,1	10,1
Austria	1019,5	4755,4	3735,9	0,9	4,7
Malta	-	60,4	60,4	0,9	-
Estonia	60,6	359,0	298,4	1,4	5,9
Latvia	8,8	461,2	452,4	1,6	52,2
Lithuania	30,0	886,7	856,7	2,1	29,5
Poland	639,6	5446,3	4806,7	2,0	25,3
Czech Rep.	133,0	3360,8	3227,8	2,0	25,3
Slovakia	794,4	761,4	32,9	1,3	1,0
Hungary	153,1	927,0	773,9	1,1	6,1
Slovenia	45,9	605,5	559,7	1,3	13,2
Cyprus	3,3	311,2	307,9	1,3	94,0
Sum EU 25	36730,9	293109,3	256378,4		

Column A shows the expected improvements within the protected industry.
Column B shows the expected costs for importers and consumers.

Source: Danish calculation on injury taken from Swedish National Board of Trade: *Möte med EU:s antidumpingskommitté den 16 mars: Läderskor från Kina och Vietnam*. Yttrande 2006-03-14. Page 16

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