

HAS THE VIETNAMESE DRAGON VERITABLY ASCENDED INTO THE CLUB OF MARKET ECONOMIES? A QUESTION THAT STILL BEFUZZLES THE INDIAN AUTHORITIES

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Abstract *The market-economy determination of any country by another WTO Member is highly political as well as economic in nature. The Designated Authority in India, who is responsible for conducting trade remedial investigations in accordance with the WTO law is faced with a quandary of whether to continue treating Vietnam as a market economy, even when it does not satisfy all the tests required as per the domestic legislations to show the existence of market forces. This comment thereby tries to analyse how and why the Designated Authority has abandoned its duty of carrying out a detailed examination of the non-market economies, and whether the MOU between Indian and Vietnam has any role to play in the authority's failure to adequately scrutinise the market forces present in Viet Nam. The authors briefly discuss all the past findings in the Indian anti-dumping and anti-subsidy investigations from 2009 until 2020 with Vietnam as one of the subject countries to establish the unmethodical pattern of determining market economy, and finally, summarise their apprehension by concluding that the MOU signed between India and Vietnam might continue to impact a fair sectoral analysis requisite in investigating the existence of a particular market situation even in the future investigations.*

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I. INTRODUCTION

Vietnam (also referred as 'Viet Nam') in its Protocol of Accession to the World Trade Organization ('WTO')¹ agreed that the Members of the WTO can consider it as a non-market economy² ('NME'), and apply the requisite NME methodology during the anti-dumping ('AD')³ and countervailing duty ('CVD')⁴ investigations until the expiry period specified to the WTO.⁵ This Protocol included, but was not limited to, the provision for the usage of surrogate or analogue country data instead of relying on the data of the Vietnamese producers/exporters.

The decisions and policies of the Vietnamese government are considered to have distorted the market forces within the country, with allegations on its control over the commercial banking system, industry favouritism, and prices of land at the less than adequate remuneration.⁶ So, the inescapable situation for Vietnam after becoming a WTO Member, transitioning from a socialist economy to a free market, was the threat of being subjected to numerous anti-dumping and countervailing duties against its exports - predominantly by the leading users of such trade remedial measures, which

¹ World Trade Organisation, Protocol on the Accession of the Socialist Republic of Viet Nam, WT/L/662 (Nov. 15, 2006) (This also incorporates within itself the Report of the Working Party on the Accession of Viet Nam, T 255, WT/ACC/VNM/48 (Oct. 27, 2006)). It is hereinafter referred to as 'Vietnamese Accession Protocol'.

² A non-market economy can be said to exist in a country where complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State. See Interpretative Note Ad art VI, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat A-11, 55 UNTS 194.

³ General Agreement on Tariffs and Trade, Oct. 30, 1947, art VI, 61 Stat A- 11, 55 UNTS 194 [also referred as GATT 1947], Agreement on Implementation of art VI of the General Agreement on Tariffs and Trade 1994, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organisation, annex IA, Legal Instruments - Results of the Uruguay Round, 33 ULM 1125 (1994). It is hereinafter referred to as 'Anti-dumping Agreement'.

⁴ GATT 1947, arts VI, XVI; Agreement on Subsidies and Countervailing Measures, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round, 33 ULM 1125 (1994). It is hereinafter referred to as 'SCM Agreement'.

⁵ Vietnamese Accession Protocol (n 1) para 255(d) provides that the NME methodologies shall expire on 31 December 2018.

⁶ Philippe Auffret, *Trade Reform in Vietnam: Opportunities with Emerging Challenges* (World Bank Policy Research Working Paper 2003). This paper discussed the concerns regarding the existence of numerous state-owned industries and state-owned banks in Vietnam.

included United States ('US'), European Union ('EU'), and India. It was interesting to note that countries like Australia and New Zealand had granted a market economy ('ME') status to either some or all of the manufacturing sectors in Vietnam⁷ prior to the 31 December 2018 deadline⁸; meanwhile, the US and the EU continued to treat Vietnam as a non-market economy. India, however, has dealt with this NME situation in an altogether different manner.

India's history of trade remedial investigations against Vietnam clearly illustrates how the Designated Authority ('DA') at the Directorate General of Trade Remedies⁹ ('DGTR') has comfortably avoided any detailed examination for establishing the market economy status of a country, as required by the domestic legislation and rules governing the trade remedial practices in India. Barring a few antidumping investigations,¹⁰ it was seen that after 2009, either the Domestic Industry ('DI') did not bother to raise the non-market economy claim against Vietnam or the Designated Authority brazenly continued to hold it as a market economy without publishing the reports of their examination of such prevalent market forces in that economy. The drop in such claims post 2009 by the ('DI') was primarily due to the Memorandum of Understanding ('MOU') signed between India and Vietnam that year.¹¹ The MOU imposed an obligation on India to treat Vietnam as a full market economy.¹² However, the DA, *au contraire* to its approach taken in the AD investigations, highlighted the presence of state intervention in land rates for Vietnam in its anti-subsidy investigations.

Thus, the focus of this legislative comment is to highlight the uncertainty that exists in the market economy determination conducted by the Indian authorities for Viet Nam in the past one decade of conducting anti-dumping and anti-subsidy investigations. The existence or non-existence of market economy conditions in Viet Nam, or its movement towards achieving a full

⁷ David A. Gantz, 'Polyethylene Retail Carrier Bags: Non-Market Economy Status and U.S. Unfair Trade Actions against Vietnam' (2010) 36 *NCJ Int'l L & Com Reg* 85

⁸ Vietnamese Accession Protocol (n 1) para 255.

⁹ It was formerly known as the Directorate General of Anti-dumping and Allied Duties ('DGAD') which only dealt with the anti-dumping and countervailing duty investigations. There were separate bodies which dealt with the safeguard measures and the quantitative restriction ('QR') safeguards. DGTR, post-May 2018, deals with all the antidumping, countervailing and safeguard measures in India.

¹⁰ The two recent antidumping investigations where the ME status of Vietnam has been yet again challenged by the DI are concerning the imports of 'Choline Chloride in all its forms' and 'Viscose Spun Yarn' into India, where one of the subject countries is Vietnam.

¹¹ Memorandum of Understanding between the Government of the Republic of India and the Government of the Socialist Republic of Viet Nam on the recognition of Vietnam's Full Market Economy Status, 2009 < https://commerce.gov.in/writereaddata/trade/MOU_India%20Govt_Socialist_Republic_of%20_Vietnam.pdf>.

¹² *Ibid* at art 2.

market economy status has been discussed enough, and is out of the scope of this comment. So, Part I addresses the NME law that exists in India. Part II, with the help of an analysis of the findings of the DA, tries to analyse the transition, if there is any, in the treatment of market economy determination for Viet Nam by India post-signing of the MOU. Part III briefly reviews the legality of the MOU signed between two Member States of the WTO and looks into the language of the MOU to understand whether the parties were looking to create a legal obligation or not. Part IV briefly summarises the current situation and suggests a possible NME methodology that can be adopted to bring further clarity whilst dealing with countries like Vietnam.

II. INDIA'S TREATMENT OF NON-MARKET ECONOMIES

In India, antidumping and countervailing duty investigations are covered in the Customs Tariff Act, 1975¹³ (hereinafter also referred to as the 'Act'), Anti-dumping Rules, 1995¹⁴ (hereinafter also referred to as the 'AD Rules'), and Countervailing Duty Rules, 1995¹⁵ (hereinafter also referred to as the 'CVD Rules'). The concept of non-market economies has been addressed and dealt under the AD Rules wherein Annexure I is a look-alike of the Article 2 of the Agreement on Implementation of Article VI of GATT, 1995. Paragraphs 7 and 8 of this Annexure I are of utmost relevance in a discussion involving the treatment of non-market economies in the Indian context.

Paragraph 7 of the Annexure I is an elaborate provision on the construction of normal value using surrogate country values for anti-dumping investigations against countries which are non-market economy(ies); meanwhile, paragraph 8 enshrines in itself a definition for non-market economies to mean "*any country which the designated authority determines as not operating on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise*". This definition in paragraph 8(1) is followed by a rebuttable presumption in paragraph 8(2) mentioning that any country which has been so identified as a non-market economy for the purposes of an anti-dumping investigation by the DA or by a competent authority of any other WTO Member in the last preceding three years is a non-market economy.

¹³ The Customs Tariff Act, 1975 [Act No. 51 of 1975].

¹⁴ Custom Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Articles and for Determination of Injury) Rules, 1995.

¹⁵ Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995.

Additionally, the DA is required to consider the specified criteria for determining whether market conditions prevail for firms subjected to an anti-dumping investigation, and where such conditions prevail, the DA may follow the normal procedure of investigation.¹⁶ These criteria require the DA to consider factors such as the costs of major raw materials reflecting the market values, the production costs and financial situation of such firms not subjected to significant distortions, such firms governed by the bankruptcy and property laws, and the exchange rate conversions are at the market rate.¹⁷ In application, these criteria are usually evaluated when the domestic industry alleges that the country of export or origin is not a market economy, or when the DA *suo moto* directs the exporters to fill a market economy treatment questionnaire along with an exporters' questionnaire. This questionnaire is also sent to the embassy and the department(s) handling trade remedial investigations in the respective subject countries, with their submissions addressed to the DA in the questionnaire being subject to verification. The DA also refers to the findings of competent authorities in other jurisdictions while dealing with market economy status issues in its findings.¹⁸

The practical application of such provisions shows that the DA enjoys wide discretion in determining the market economy status of the exporter firms. One of the critical parameters on which DA relies is the issue of 'state interference' in the operations of the concerned firm. What constitutes a 'state interference', and how much interference can be held to be 'significant' has not been provided¹⁹, which resultantly limits the guidance available to the DA, ensuing an unlimited and unchecked discretionary power at the authority level.

¹⁶ Para 8 (3) of annex 1 of Custom Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Articles and for Determination of injury) Rules, 1995.

¹⁷ *Ibid.*

¹⁸ James J. Nedumpara & Weihuan Zhou (eds), *Non-market Economies in the Global Trading System* (Springer Singapore 2018). See also, Anti-Dumping Investigations concerning imports of Cathode Ray Colour Television Picture Tubes originating in or exported from Malaysia, Thailand, China PR and Korea, F. No. 14/8/2007-DGAD (Ministry of Commerce and Industry, Feb. 17, 2009) (Final Findings), para 65 <http://www.dgtr.gov.in/sites/default/files/Final-Findings_87.pdf>.

¹⁹ Nedumpara & Zhou (n 18) 289.

III. INDIA'S TREATMENT OF VIETNAM

Till date, India has initiated nineteen antidumping and three anti-subsidy investigations against Vietnam and their producers/ exporters.²⁰ Out of these, six AD investigations and one CVD investigation are currently in progress. The pattern of Vietnam's treatment in all these investigations has been traced below in *Table I*.

Table 1: Anti-dumping and countervailing duty investigations by India against Vietnam

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
Anti-dumping Investigations				
1.	Compact Fluorescent Lamps (CFL) ²¹	China PR, Sri Lanka, and Vietnam	27 February 2009	Vietnam was treated as an NME as none of the exporters responded to the market economy treatment (MET) questionnaire.
2.	Compact Disc Recordable (CD-R) ²²	Iran, Malaysia, Korea ROK, Thailand, UAE, and Vietnam	6 March 2009	ME status is given on the basis of exporter's response.
3.	Fully Drawn or Fully Oriented Yarn/ Spin Draw Yarn Flat Yarn of Polyester FDY ²³	China PR, Thailand, and Vietnam	29 September 2009	ME status is given on the basis of exporter's response.

²⁰ All the cases can be found on DGTR's website under the head 'Antidumping Investigations in India' and 'Countervailing Duty Investigation (CVD)' <<http://www.dgtr.gov.in/>>.

²¹ Anti-Dumping investigation concerning imports of Compact Fluorescent lamps originating in or exported from China PR, Vietnam, and Sri Lanka, F No 14/1/2007-DGAD, (Ministry of Commerce and Industry, Feb. 27, 2009) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/Final-Findings_85.pdf>.

²² Anti-dumping investigation on import of Compact Disc – Recordable (CD-R) from Iran, Malaysia, Korea ROK, Thailand, UAE, and Vietnam, F No 14/9/2007 – DGAD, (Ministry of Commerce and Industry, Mar. 6, 2009) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/Final-Findings_84.pdf>.

²³ Anti-Dumping investigation concerning imports of all Fully Drawn or Fully Oriented Yarn / Spin Draw Yarn / Flat Yarn of Polyester (non-textured and non POY) and other yarns of originating in or exported from China PR, Thailand And Vietnam, F No 14/3/2008-DGAD, (Ministry of Commerce and Industry, Sep. 29, 2009) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/adfn_fdyarn_ChinaPr_Thailand_Vietnam.pdf>.

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
4.	Recordable Digital Versatile Disc DVD of all kinds ²⁴	Malaysia, Thailand, and Vietnam	2 July 2010	This finding mentions MOU. Vietnam was treated as a market economy on the basis of the MET questionnaire by one exporter.
5.	Melamine Tableware and Kitchenware products ²⁵	China PR, Thailand, and Vietnam	20 October 2015	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
6.	Plastic Processing Machines or Injection Moulding Machines ²⁶	Chinese Taipei, Philippines, Malaysia, and Vietnam	7 January 2016	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
7.	Measuring Tapes ²⁷	Chinese Taipei, Malaysia, Thailand, and Vietnam	10 March 2016	Subject countries were recognised as ME in DI's submission.
8.	Plain Medium Density Fibre Board having thickness of 6mm and above ²⁸	Indonesia and Vietnam	5 May 2016	DI did not make a non-market economy claim for Vietnam. Treated like any other country.

²⁴ Anti-dumping investigation on imports of Digital Versatile Discs- Recordable (DVD-R and DVD-RW) from Malaysia, Thailand and Vietnam, F No 14/16/2009-DGAD, (Ministry of Commerce and Industry, July 2, 2010) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/adfin_Recordable_Digital_Versatile_Disc_Malaysia_Thailand_Vietnam.pdf>.

²⁵ Anti-dumping investigation concerning imports of Melamine Tableware and Kitchenware products from China PR, Thailand and Vietnam, F No 14/10/2014-DGAD, (Ministry of Commerce and Industry, Oct. 20, 2015) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/adfin_Melamine_Tableware_Kitchenware_ChinaPR_Thailand_Vietnam.pdf>.

²⁶ Anti-dumping investigation concerning import of Plastic Processing Machines or Injection Moulding Machines from Chinese Taipei, Philippines, Malaysia and Vietnam, F No 14/03/2014-DGAD, (Ministry of Commerce and Industry, Jan. 7, 2016) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/adfin_Plastic_Processing_Machines_Injection_Moulding_machines_ChineseTaipei_Philippines_Malaysia_Vietnam.pdf>.

²⁷ Anti-dumping investigation on the imports of Measuring Tapes originating in or exported from Chinese Taipei, Malaysia, Thailand & Vietnam, F No 14/21/2014-DGAD, (Ministry of Commerce and Industry, Mar. 10, 2016) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/adfin_Measuring_Tapes_Chinese_Taipei_Malaysia_Thailand_Vietnam.pdf>.

²⁸ Anti-dumping investigation concerning import of Plain Medium Density Fibre Board (MDF) having thickness of 6mm and above originating in or exported from Indonesia and Vietnam, F.No. 14/23/2014-DGAD, (Ministry of Commerce and Industry, May 5, 2016)

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
9.	AA Dry Cell Batteries ²⁹	China PR and Vietnam	27 September 2016	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
10.	Elastomeric Filament Yarn ³⁰	China PR, South Korean, Taiwan, and Vietnam	24 March 2017	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
11.	Nylon Filament Yarn (Multi Filament) ³¹	European Union and Vietnam	6 August 2018	ME status is given on the basis of individual exporter response.
12.	Aluminium and Zinc coated flat products ³²	China PR, Vietnam, and Korea RP	21 February 2020	DI made a non-market economy claim for Vietnam, which the DA rejected. The producers/exporters from Vietnam were asked to need not provide information in the supplementary questionnaire, as required from non-market economy country producers/exporters.
13.	Digital Offset Printing Plates ³³	China PR, Japan, Korea RP, Taiwan, and Vietnam	15 May 2020	DI did not make a non-market economy claim for Vietnam. Treated like any other country.

(Final Findings) <http://www.dgtr.gov.in/sites/default/files/Adfin_Plain_medium_density_Fibre_Board_thickness_6mm_Indonesia_Vietnam.pdf>.

²⁹ Anti-dumping investigation concerning imports of 'AA Dry Cell Batteries' originating in or exported from China PR and Vietnam, F No 14/31/2014-DGAD, (Ministry of Commerce and Industry, Sept. 27, 2016) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/MOC636106776635402287_adfin_AA_Dry_Cell_Batteries_ChinaPR_Vietnam.pdf>.

³⁰ Anti-dumping duty investigation concerning imports of Elastomeric Filament Yarn from China PR, South Korea, Taiwan and Vietnam, F No 14/29/2015-DGAD, (Ministry of Commerce and Industry, Mar. 24, 2017) (Final Findings) <<http://www.dgtr.gov.in/sites/default/files/final%20finding%20NCV-EFY.compressed.pdf>>.

³¹ Anti-dumping investigations concerning imports of Nylon Filament Yarn (Multi Filament) originating in or exported from European Union and Vietnam, F No 14/33/2016-DGAD, (Ministry of Commerce and Industry, Aug. 6, 2018) (Final Findings) <http://www.dgtr.gov.in/sites/default/files/NCV_FF.pdf>.

³² Anti-dumping investigation on the imports of Aluminium and Zinc coated flat products originating in or exported from China PR, Vietnam and Korea RP, F No 6/4/2019-DGTR, (Ministry of Commerce and Industry, Feb. 21, 2020) (Final Findings) <<http://www.dgtr.gov.in/sites/default/files/Final%20findings%20of%20Aluminum%20Zinc%20coated%20steel%20dated%2021st%20February%2C%202020.pdf>>.

³³ Anti-dumping investigation concerning imports of Digital Offset Printing Plates originating in or exported from China PR, Japan, Korea RP, Taiwan and Vietnam, F No 6/7/2019-DGTR, (Ministry of Commerce and Industry, May 15, 2020) (Final Findings) <<http://www.dgtr.gov.in/sites/default/files/Non-Confidential.pdf>>.

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
14.	Flat-Rolled Products of Stainless Steel ³⁴	China PR, Korea RP, European Union, Japan, Taiwan, Indonesia, USA, Thailand, South Africa, UAE, Hong Kong, Singapore, Mexico, Vietnam, and Malaysia	Ongoing	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
15.	Choline Chloride in all its form ³⁵	China PR, Malaysia, and Vietnam	Ongoing	DI has made a non-market economy claim for Vietnam. (Investigation is still ongoing).
16.	Viscose Spun Yarn ³⁶	China PR, Indonesia, and Vietnam	Ongoing	DI has made a non-market economy claim for Vietnam. However, it was observed by the DA in the Initiation Notification that Vietnam has been given market economy status by India. (Investigation is still ongoing)
17.	Plain Medium Density Fibre Board ³⁷	Vietnam, Malaysia, Thailand and Indonesia	Ongoing	DI did not make a non-market economy claim for Vietnam. Treated like any other country.

³⁴ Anti-dumping investigation concerning imports of Flat Rolled Products of Stainless Steel from China PR, Korea RP, European Union, Japan, Taiwan, Indonesia, USA, Thailand, South Africa, UAE, Hong Kong, Singapore, Mexico, Vietnam and Malaysia, F. No 6/12/2019-DGTR, (Ministry of Commerce and Industry, July 3, 2019) (Initiation Notification) <http://www.dgtr.gov.in/sites/default/files/Initiation%20Notification_0.pdf>.

³⁵ Anti-dumping investigation concerning imports of 'Choline Chloride in all forms' from China PR, Malaysia and Vietnam, F No 6/18/2019-DGTR, (Ministry of Commerce and Industry, Oct. 1, 2019) (Initiation Notification) <<http://www.dgtr.gov.in/sites/default/files/Choline%20Chloride-English.pdf>>.

³⁶ Anti-dumping investigation concerning imports of 'Viscose Spun Yarn' originating in or exported from China PR, Indonesia and Vietnam, F No 6/41/2019 -DGTR, (Ministry of Commerce and Industry, Jan. 14, 2020) (Initiation Notification) <<http://www.dgtr.gov.in/sites/default/files/VSY%20INITIATION.pdf>>.

³⁷ Anti-dumping investigation concerning imports of 'Plain Medium Density Fibre Board having thickness less than 6 mm' originating in or exported from Vietnam, Malaysia, Thailand and Indonesia, F No 6/13/2020-DGTR, (Ministry of Commerce and Industry, April 22, 2020) (Initiation Notification) <<http://www.dgtr.gov.in/sites/default/files/Initiation%20Notification%20english.pdf>>.

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
18.	Plain Medium Density Fibre Board having thickness 6 mm and above ³⁸	M/s Kim Tin MDF Joint Stock Company, Vietnam	Ongoing	DI did not make a claim for the Vietnamese exporter to be operating in non-market economy conditions.
19.	Polyester Yarn (Polyester Spun Yarn) ³⁹	China PR, Indonesia, Nepal, and Vietnam	Ongoing	DI did not make a non-market economy claim for Vietnam. Treated like any other country.
Countervailing duty Investigations				
1.	Welded stainless steel pipes and tubes ⁴⁰	China PR and Vietnam	31 July 2019	For the provision of land at less than adequate remuneration, it was noted that since the land is owned by the Government of Vietnam, the price of the land is being determined by a public body. This program scheme satisfied other conditions of a countervailable subsidy, and has been recognised as a countervailable scheme by other authorities in the EU, US, and Canada too.

³⁸ While the antidumping duty on 'Plain Medium Density Fibre Board having thickness 6 mm and above' (n 28) continues to be effective until July 2021, a fresh investigation is initiated against one of the exporters (i.e. Kim Tin MDF Joint Stock Company) for allegedly dumping the same product again after getting de-minimis margins in the earlier investigation. See Anti-dumping investigation concerning imports of 'Plain Medium Density Fibre Board having thickness 6 mm and above produced by M/s Kim Tin MDF Joint Stock Company' from Vietnam, F. No.6/09/2020-DGTR, (Ministry of Commerce and Industry, May 11, 2020) (Initiation Notification), <<http://www.dgtr.gov.in/sites/default/files/KIM%20TIN%20ENGLISH.pdf>>.

³⁹ Anti-dumping investigation concerning imports of 'Polyester Yarn (Polyester Spun Yarn)' from China PR, Indonesia, Nepal and Vietnam, F. No.F No 6/10/2020-DGTR, (Ministry of Commerce and Industry, May 21, 2020) (Initiation Notification), <<http://www.dgtr.gov.in/sites/default/files/6-10-20-DGTR%28E%29-PSY.pdf>>.

⁴⁰ Anti-subsidy investigation concerning imports of Welded Stainless Steel Pipes and Tubes originating in or exported from China PR and Vietnam, F No 6/22/2018 -DGAD, (Ministry of Commerce and Industry, July 31, 2019) (Final Findings) <<http://www.dgtr.gov.in/sites/default/files/NCV%20FF.pdf>>.

SN	Product	Subject Country(ies)/ Exporter	Date of Finding	Reasoning
2.	Continuous cast copper wire rods ⁴¹	Indonesia, Malaysia, Thailand and Vietnam	10 September 2019	For the exemption or reduction of land rent to companies who have invested in identified regions and investment projects for encouraged industries, the DA noted that it is provision of goods and services at less than adequate remuneration to specific industries and identified it as a countervailable subsidy.
3.	Fibreboards ⁴²	Indonesia, Malaysia, Thailand, Vietnam and Sri Lanka	Ongoing	The DI has alleged the existence of the provision of land at less than adequate remuneration subsidy. The investigation is ongoing.

It can be seen from the Table 1 (as provided above) that the Designated Authority's findings in the antidumping investigations until recently were predominantly based on the responses they had received from the exporter(s) to their market economy treatment questionnaire. However, one of the latest final finding concerning the imports of Aluminium and Zinc Coated Flat Rolled Products shows a shift in the approach of the Authority -as they not only denied the claims of the domestic industry with the rationale of not being able to show why NME methodology shall apply to Vietnam⁴³, but also issued a public letter⁴⁴ clarifying that the producers/exporters from Vietnam are not required to provide information in the supplementary questionnaire, as is needed from non-market economy country producers/exporters. This finding, like most of the other findings, is devoid of the reasoning behind why Vietnam has been accorded a ME status. Is it because the finding came

⁴¹ Anti-subsidy investigation concerning imports of continuous cast copper Wire Rods from Indonesia, Malaysia, Thailand and Vietnam, F No 6/17/2018-DGAD, (Ministry of Commerce and Industry, November 5, 2019) (Final Findings) <<http://www.dgtr.gov.in/sites/default/files/FINAL%20NCV%20FF.pdf>>.

⁴² Anti-Subsidy investigation concerning imports of 'Fiberboards' from Indonesia, Malaysia, Thailand, Vietnam and Sri Lanka, F. No. 6/17//2019-DGTR, (Ministry of Commerce and Industry, November 5, 2019) (Initiation Notification) <http://www.dgtr.gov.in/sites/default/files/Initiation%20Notification_Fiberboards.pdf>.

⁴³ Anti-dumping investigation on the imports of Aluminium and Zinc coated flat products originating in or exported from China PR, Vietnam and Korea RP, (n 32), para 48.

⁴⁴ Notice to the producers/exporters from Vietnam and other interested parties in the Anti-dumping investigation on the imports of Aluminium and Zinc coated flat products originating in or exported from China PR, Vietnam and Korea RP, F No 6/4/2019-DGTR, (Ministry of Commerce and Industry, May 3, 2019) (Public Notice) <<http://www.dgtr.gov.in/sites/default/files/Submission%20of%20response%20to%20exporters%27%20questionnaire%20for%20producers%20and%20exporters%20from%20Vietnam.pdf>>.

after the December 2018 deadline as provided in the Vietnamese Accession Protocol or due to some other factor?

To look at this question in the context of previous findings, we see that there is only one investigation, in 2010, where the Authority has mentioned the existence of a Memorandum of Understanding between India and Vietnam. Thus, it becomes vital for the authors to analyse the language of the concerned MOU in order to fully comprehend the byzantine methods undertaken by the Indian authorities to justify Vietnam's market economy status under the trade remedial investigations.

In late October 2009, India signed an MOU with the Government of the Socialist Republic of Viet Nam on the recognition of Vietnam's full market economy status (MES)⁴⁵. This MOU was signed, taking into consideration the requests put forth by the Vietnamese government⁴⁶ prior to the signing of the India-ASEAN Free Trade Agreement.⁴⁷ The MOU in its language also recognises the desire of these two nations "to strengthen the long-term friendly and cooperative relationship and to develop a healthy and stable partnership".⁴⁸

Article 2 of this MOU states that:

"India recognises Vietnam as a full market economy and shall not apply, from the date of signing of this Memorandum of Understanding, paragraph 255 of the Report of the Working Party on the Accession of Viet Nam to the World Trade Organization (WTO) in relation to trade between India and Viet Nam."

⁴⁵ Indian Commerce, 'Memorandum of Understanding Between The Government of the Republic of India and The Government of the Socialist Republic of Viet Nam on The Recognition of Vietnam's Full Market Economy Status' (Indian Commerce, 4 January 2020) <https://commerce.gov.in/writereaddata/trade/MOU_India%20Govt_Socialist_Republic_of%20_Vietnam.pdf> accessed 5 Jan. 2020.

⁴⁶ PTI, 'India grants market economy status to Vietnam' (The Hindu, 25 October 2009) <<https://www.thehindu.com/news/national/India-grants-market-economy-status-to-Vietnam/article16888472.ece>> accessed 19 Nov. 2019.

⁴⁷ Indian Commerce, 'Agreement on Trade in Goods under The Framework Agreement on Comprehensive Economic Cooperation Between The Republic of India and The Association of Southeast Asian Nations' (Indian Commerce, 13 August 2009) <<https://commerce.gov.in/trade/ASEAN-India%20Trade%20in%20Goods%20Agreement.pdf>> accessed 7 Jan. 2020.

⁴⁸ Indian Commerce, 'Memorandum of Understanding Between The Government of The Republic of India and The Government of The Socialist Republic of Viet Nam on The Recognition of Vietnam's Full Market Economy Status' (Indian Commerce, 25 Oct. 2009) <https://commerce.gov.in/writereaddata/trade/MOU_India%20Govt_Socialist_Republic_of%20_Vietnam.pdf> accessed 12 Jan. 2020.

Article 2 provides for the non-application of the provisions in paragraph 255 of the Vietnamese Accession Protocol to the WTO, which heavily focused on the price comparability mechanisms that can be employed during the investigations involving exports from Viet Nam. This paragraph warrants a breakdown as it provided for the usage of alternative methodologies in antidumping proceedings where the reliance is not kept on the Vietnamese prices or costs of the industry in Viet Nam. It states that “*if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product*”⁴⁹; the importing WTO Member may use a methodology that is not based on a strict comparison with domestic price or costs in Viet Nam. Similarly, during the anti-subsidy proceedings if there are difficulties in “*identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in Viet Nam may not be available as appropriate benchmarks*”⁵⁰. These alternative methodologies once adopted are thereby to be notified to the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures for the concerned anti-dumping and anti-subsidy investigations, respectively.⁵¹

The aftermath of this MOU’s aim of abolishing NME methodologies practised against Vietnamese exports was silently unveiled in the findings of the DA in the anti-dumping investigations that followed it. Either the DI itself would not make a claim of non-market economy against the Vietnamese exporters considering the uncertainty surrounding the legality of this MOU or the DA would itself declare Vietnam to be a market economy without assiduously examining the criteria mentioned in Paragraph 8 of Annexure I of the AD rules. The DA, however, through its findings in the anti-subsidy investigations, interestingly and albeit indirectly, agreed to the fact that the land rates in Vietnam are distorted because Government of Vietnam is the owner of all land in Vietnam and decides the rates of the land⁵² which dissatisfies the criteria under the AD rules. Therefore, it is established that this flagrant irregularity in the approaches whilst conducting anti-dumping and anti-subsidy investigations against the same country displays the dilemma of the authority in conferring the ME status to Vietnam.

⁴⁹ Para 255 (a) (ii) of the Vietnamese Accession Protocol to the WTO.

⁵⁰ Para 255 (b) of the Vietnamese Accession Protocol to the WTO.

⁵¹ Para 255 (c) of the Vietnamese Accession Protocol to the WTO.

⁵² Anti-subsidy investigation concerning imports of welded stainless-steel pipes and tubes originating in or exported from China PR and Vietnam (n 40) at para 138.

IV. LEGAL GAPS RELATING TO THE MOU AND AD RULES CONCERNING MARKET ECONOMY STATUS

The much-discussed Paragraph 8 of the Annexure I of the AD Rules also manages to complicate the position of the DA with respect to previously recognised non-market economies, as subparagraph 4 requires the DA to publish the results of its evaluation of the market conditions concerning the criteria specified in the subparagraph 3. Such evaluations must be published in a public document for a country that is now determined as a market economy for the purposes of the anti-dumping investigations. It is imperative to note here that the DA has not published any such examination(s) for Vietnam either pre or post the signing of the MOU and has continued to treat Vietnam as a market economy in several investigations without providing any detailed reasoning. Therefore, it becomes pertinent to question the binding nature of this MOU on India, specifically with reference to Article 2 of this MOU to understand whether the Indian authorities are no longer obligated to follow the AD rules for NMEs.

In determining the legal importance and binding nature of an MOU between two countries, the language used in the MOU and the intention of parties become very relevant. The International Court of Justice ('ICJ') has observed that international agreements may take several forms and be given a diversity of names.⁵³ Article 2, paragraph (1)(a) of the Vienna Convention on the Law of the Treaties ('VCLT'), 1969 provides that for the purpose of that Convention⁵⁴, “*treaty*” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

In its Commentary, the International Law Commission recognised that MOUs are “*undoubtedly international agreements subject to the law of treaties*”.⁵⁵ Further, as validated by the VCLT the title of any diplomatic document does not determine the legally binding nature. Rather the intent of the drafters to conclude an agreement in written form governed by international law is determinative.⁵⁶ Thereafter, this principle has been used by

⁵³ *Aegean Sea Continental Shelf Judgement*, ICJ Reports 1978, p 3 at para 96.

⁵⁴ Report of the International Law Commission to the General Assembly, [1966] 2 YB Int'l L. Comm'n 188, UN Doc. A/CN.4/SER.A/1966/Add. <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁵⁵ Report of the International Law Commission to the General Assembly, [1966] 2 YB Int'l L. Comm'n 188, UN Doc. A/CN.4/SER.A/1966/Add.

⁵⁶ John H. McNeil, 'International Agreements: Recent US-UK concerning the Memorandum of Understanding' (1994), 88(4) AMJIL 823

international courts and forums to adjudicate on the binding nature of the international agreements which are similar to MOUs.

For instance, in the *Aegean Sea Continental Shelf* case, the ICJ referred to a joint communiqué and held that there is no rule in international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement.⁵⁷ The court also emphasised that in order to ascertain whether an agreement has been concluded, “the Court must have regard above all to its actual terms and to particular circumstances in which it was drawn up.”⁵⁸ In the *Maritime Delimitation and Territorial Questions case*, the legality of two documents was under contention, *Exchange of Letters of 1987* and *Doha Minutes 1990*. Emphasising upon the form and content of the document, the Court held that the *Doha Minutes* was not merely a summary recording of the meeting, but a document enumerating the commitments to which both parties had consented. The Court referred to the *Doha Minutes* and observed that they not only give an account of agreement and disagreement between the parties but enumerate the commitments the parties consented to.⁵⁹ These Minutes were ruled to be creating rights and obligations in international law for the parties.⁶⁰ Although these cases were not with respect to an MOU, they throw some light on the ICJ’s interpretation of legally binding documents.

After analysing the language of the MOU between India and Vietnam, the authors are of the opinion that the language per se shows the intention of the parties to place an obligation primarily on India. Article 2 of the MOU declares that India recognises Vietnam as a full market economy, and it *shall not* apply Paragraph 255 of the Vietnamese Accession Protocol in relation to the trade between India and Vietnam. Hence, with this clear intent from the text, the MOU becomes an international agreement between the two countries. However, the appropriate forum to adjudicate the violations of this MOU is beyond the scope of this comment.

Furthermore, it was interesting to note that the People’s Republic of China has a history proactively engaging in the practice of signing such MOUs with other WTO members.⁶¹ While China considers these MOUs to be binding, the language and therefore, the commitment differ from country to country.

⁵⁷ *Aegean Sea Continental Shelf Judgement*, ICJ Reports 1978, at para 96.

⁵⁸ *Ibid*, at para 96.

⁵⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Jurisdiction and Admissibility, Judgement*, ICJ Reports 1994, p 112 at para 25.

⁶⁰ *Ibid*.

⁶¹ Laura Puccio, Granting Market Economy Status to China: An analysis of WTO law and of selected WTO members’ policy, European Parliamentary Research

Some MOUs clearly prohibit the application of provisions from the relevant Accession Protocol providing for the usage of alternative methodologies for determination of normal value,⁶² while others only required a non-discrimination treatment and are interpreted as a mere political statement.⁶³ The legality of these MOUs nonetheless have differed across jurisdictions.⁶⁴

V. CONCLUSION

The muddled position that the Designated Authority has undertaken whilst carrying out anti-dumping and anti-subsidy investigations indubitably demonstrates the predicament that it has faced in failing to successfully establish the status of Viet Nam as a full market economy, especially after signing of the MOU between India and Viet Nam.

The DA has failed to undertake any detailed examination of Viet Nam, for past one decade, in accordance with the criteria mentioned in the AD Rules Annexure I. The authority has also not given any comprehensive reasoning in its findings to justify its position of continuing to hold Vietnamese producers to be operating under market economy conditions, apart from relying on the market economy treatment questionnaire, which is also not made public, consequently barring the interested parties' right to scrutinise such an assessment. The latest finding of the DA in the Aluminium and Zinc Coated Flat Products⁶⁵, has also not stated the reasons on which the ME status has been maintained for Vietnam. Therefore, in the opinion of the authors, it is fair to conclude that the perfunctory approach taken by the DA in its anti-dumping findings were designed exclusively with an aim to fulfil the obligations that

Service, November, 2015 <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA\(2015\)571325](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)571325)>

⁶² S 15 of China's Protocol of Accession to the WTO provides for the usage of alternative methodologies for determination of normal value much like the para 255 of the Vietnamese Accession Protocol to the WTO. The MOUs which clearly prohibited the usage of s 15 of the Chinese Accession Protocol are *Memorandum of Understanding on launching negotiations of China-Costa Rica Free Trade Agreement between the Ministry of Commerce of the People's Republic of China and the Ministry of Foreign Trade of the Republic of Costa Rica*, November 2008; and *Memorandum de Entendimiento sobre el Fortalecimiento de las Relaciones Económicas y comerciales entre el Ministerio de Comercio Exterior y Turismo de la República del Perú y del Ministerio de Comercio de la República Popular de China*, September 2007.

⁶³ Adam Thomson, 'Argentina recognizes China as Market economy', *Financial Times*, (Buenos Aires, Nov. 19, 2004) <<https://www.ft.com/content/7d28587e-39bf-11d9-b822-00000e2511c8>>.

⁶⁴ These countries include Australia, Brazil, Argentina, Costa Rica, South Africa, Norway, Switzerland, South Korea, Peru, Chile and ASEAN. *See also*, Puccio (n 61).

⁶⁵ Anti-dumping investigation on the imports of Aluminium and Zinc coated flat products originating in or exported from China PR, Vietnam and Korea RP, (n 32)

India has undertaken in the MOU as a nearly comprehensive examination of the market conditions, which was witnessed in the anti-subsidy investigations, would eventually end up raising some uncomfortable questions that the DA is not willing to address under the current political pressure of strengthening the economic ties with the ASEAN members.

The authors are cognizant of the fact that such woolly determinations by the DA in the light of a binding MOU are eventually leading to a situation wherein a detailed sectoral analysis is being avoided – something that might have helped the Authority in determining the presence of a particular market situation for each industry in Vietnam. Therefore, this paper tries to suggest two possible solutions to the problem.

The first proposition to address and counter such legislative gaps would always be through forward-looking amendments to the domestic legislations. Such amendments can be to the effect of providing the Designated Authority with enough discretion under the AD Rules to decide on the nature of a market economy on a case to case basis, with no definitive countries to be treated as market or non-market economies.

Secondly, as authors have already acknowledged the political motive behind recognising other WTO Members as market economies, an alternative solution to the former proposition could be that the DGTR may want to consider publishing the market economy status reports -like the European Union⁶⁶, particularly for the Members that have either requested for such graduation to market economy status or are the major exporters in key industries of India.

⁶⁶ Commission staff working document on preliminary assessment of the Socialist Republic of Vietnam's request for graduation to market economy status in trade defence investigations, SEC (2010) 122 final, 5 Feb. 2010.