

ECONOMIC UPDATE

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Vietnam's first dispute at WTO against imposition of antidumping measures on frozen warm water shrimp by the US

Introduction

Antidumping is one of the major challenges that one country has to face when it opens the market to integrate in the world. It has been the most frequently and widely used trade remedial measure by members of the World Trade Organisation (WTO) to protect domestic industries against the import of products at unfairly low prices. However, some WTO members have taken advantage of antidumping measures to create barriers to new entry in the domestic market.

With the advent of the Doi Moi (Renovation) policy in 1985, Vietnam has gone into a new phase of development. One of the most significant achievements is the rapid growth rate of its export. In 2010, the export turnover was US\$71.6bn, compared to that of over US\$5.4bn in 1995¹. It is believed to be a direct result of increased trade due to the country's admission to the WTO in January 2007. A number of products have become globally competitive such as agriculture, textile, marine products, wooden furniture, and footwear. Moreover, the number of countries and territories that import Vietnamese products has been increasing.

Until now, Vietnam have created and maintained trade relations with more than 200 countries and territories in the world, among which Vietnam's principal export destinations in 2010 are US (20.4 percent), Japan (11.1 percent), China (10.5 percent) and Australia (3.9 percent)². However, as a matter of fact, deeper integration into the global market also increases the challenges for Vietnam, one of them being to face with antidumping cases initiated by its trade partners. And in most of these antidumping cases, Vietnam is more often a defendant than a plaintiff.

The very first antidumping case that Vietnam had to face with was the action against Vietnamese rice by Columbian producers in 1994³. In 2009, the country was targeted by 42 investigations related to antidumping, anti-subsidy and safeguard that led to higher antidumping duties against Vietnamese products⁴. It is only until recently that Vietnam first brought its own WTO lawsuit against the US imposition of antidumping taxes on the country's frozen shrimp. The initial success of the case marks the effort of Vietnam in applying WTO dispute settlement mechanism and antidumping regulations only after three years of accession.

This issue of our economic update aims to look at the case with more insights, with references to the WTO dispute settlement mechanism and antidumping

Box 1: Antidumping in the GATT/WTO

In the GATT/WTO, dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. According to Article 2 of the Antidumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994):

- "..., a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
- When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."

agreement. Some conclusions and recommendations are also drawn to help Vietnamese enterprises to deal with antidumping measures in the future when exporting their products to overseas markets.

Vietnam in the face of antidumping investigations

The number of antidumping investigations against Vietnam is increasing in recent years, e.g from 1-2 investigations in the period of 1994-2001 to 7 investigations in 2004. According to a survey conducted by the Vietnam International Arbitration Council, Vietnam ranked among the 100 countries sued the most and it lost in 70 percent of cases. Besides, the most frequent complainants against Vietnam such as EU, and

the US, are Vietnamese important markets. The products which were the main subjects of these antidumping lawsuits were chemicals, steel, footwear, electronics, seafood and garment products. These export items make up a major proportion of the country's export turnover so if there are any changes in these export markets, production will be severely hurt.

The large majority of Vietnamese exporters continue to have difficulties with antidumping lawsuits, for various reasons. The main reason lies in the constraints of the enterprises themselves in terms of their lack of knowledge, experiences, human and financial resources in dealing with antidumping lawsuits or in terms of their inconsistent accounting practices with international standards; which hinder them from defending and protecting their business interests in such lawsuits. Statistics showed that small and medium-sized enterprises in Vietnam make up more than 90 percent of the total number of domestic enterprises.

Another major problem is that Vietnam continues to be considered a non-market economy in its WTO accession agreement. Therefore, the importing party can use the reference production costs of a third country instead of production cost in Vietnam to determine whether dumping has occurred. Consequently, many major export products of Vietnam to the US and the EU (such as seafood, textiles and garment, footwear, etc.) are easily subject to anti-dumping lawsuits and therefore in a disadvantaged position.

WTO Regulations: Dispute Settlement Mechanism and Antidumping Agreement

When disputes arise in the antidumping area, they are subject to binding dispute settlement before the Dispute Settlement Body (DSB) of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (DSU) (Article 17). The DSB takes charge of overseeing the resolution of resolution of trade disputes between nations. Decisions made by the DSB are binding on the parties, with automatic and conclusive effect.

For antidumping cases, a special standard of review by a Panel is applicable in WTO dispute settlement and is to prevent dispute settlement panels from making decisions based purely on their own views. This will require the exporting countries to clarify their antidumping measures by establishment of facts and interpretation of law. The standard of review shall be reviewed after a period of three years⁵. In the subject case, the subject of the review is the US's methodology adopted to determine punitive antidumping duties on Vietnam's frozen shrimp.

Any antidumping measure must be in conformity with the WTO Antidumping Agreement. In fact, dumping is not prohibited in GATT/WTO system. For an action against dumping, there must be proof that dumping causes or threatens to cause material injury to the domestic market of the importing country. It means that a causal link between the act of dumping and the act of injury must be established, and only in that case can the antidumping duties be imposed. Besides, the extent of dumping on

these products is to be calculated. There is only dumping if goods are being exported at lower than its normal value. The normal value is generally the price of the product sold at the domestic market of the exporting country.

Other alternatives available are: (a) the price at which the product is sold to a third country; and (b) the "constructed value" of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits⁶. The difference between the dumping and the export price of export is the dumping margin. Investigation will be terminated if the margin of dumping is *de minimis*⁷, i.e. less than two percent of the export price or if the volume of dumped imports from any country accounts for less than three percent market share of imports of the like product in the importing country.

The Vietnam-US dispute on frozen warm water shrimp

Summary of the dispute⁸

The original investigation was initiated by the US Department of Commerce (US DoC) against Vietnam's frozen shrimp in January 2004, leading to an antidumping duty order in February 2005 which fixed the antidumping duty at 4.13-25.76 percent. The fact is that on account of Vietnam being a Non-Market Economy (NME), the US did not use domestic prices in Vietnam in the antidumping investigations but use comparable prices in a third country, such as India and Mexico, to determine whether dumping occurred from Vietnam's export. It is only until recently that Vietnam lodged its claims against the US to the WTO challenging US's unreasonable method of calculating dumping margin.

According to the Report of the Panel and the final ruling of the Appellate Body, the United States "has acted inconsistently with provisions of the Antidumping Agreement and the GATT" and said the US should bring its calculation method into line with the two agreements.

Box 2: The Developments of the Case

February 01, 2010: Vietnam requested a Consultation with the US regarding antidumping measures that the US applied for frozen warm-water shrimps imported from Vietnam. The Consultation request also related to some regulations and administrative procedures of the US, including "zeroing methodology";

February 12 & 15, 2010: The EU, Japan and Thailand requested to take part in the Consultation;

April 07, 2010: Vietnam requested to establish a Panel;

April 20, 2010: The Dispute Settlement Body of WTO requested to establish the Panel;

May 19, 2011: The Panel's Report were established to Members;

July 11, 2011: The Panel's Report was announced publicly;

September 02, 2011: The DSB officially approved the final ruling of the Appellate Body.

The Panel's ruling in favour of Viet Nam is on two of three Vietnam's claims. These two claims are related to the US application of the 0 method (also known as zeroing) to calculate the antidumping duty in its second and third rounds of review and that the US's applying of its national tax rate increased the tax much higher, causing damage to Vietnam's shrimp exporters. However, the Panel disagreed with Vietnam's claim that the US had violated the Antidumping Agreement with respect to the US DoC's decision to limit the number of respondents individually selected for full review.

It also rejected Vietnam's request to consider zeroing methodology used in the US DoC's successive proceedings (including the fourth, the fifth administrative reviews and sunset reviews) as "continued use of challenged practices". Nevertheless, this is a significant victory for the Vietnamese shrimp industry as well as for Vietnamese exporters which might be subject to antidumping measures in the future.

The "zeroing" methodology is the major thrust of the lawsuit. It is because this method will generate a larger margin of dumping resulting in higher duty which causes damages to Vietnamese shrimp exporters. By definition, it is a methodology to calculate the dumping margin of imported products whereby an investigating authority discounts so-called "negative dumping margin" to zero.

As mentioned earlier, the dumping margin is the difference between the price of export and the normal value (normally the domestic price). As sales are often in different transactions, a weighted-average of the domestic transactions must be calculated and the export price varies according to transactions. Zeroing excludes the export prices which are higher than the weighted average domestic price, which may turn the total margin of dumping from "positive" to "negative".

Positive impacts generated for Vietnam

Since its entry to WTO in January, 2007 this is the first time Vietnam has used the WTO membership status to initiate a lawsuit on trade disputes, using WTO dispute settlement mechanism as an effective tool to protect the legitimate rights of its own producers. Bring this specific

case to WTO also means that Vietnam conveys a message to the world that it will be able to protect exporters' rights in antidumping cases against the US or any other countries. No doubt this victory has helped to increase Vietnam's standing in the international arena. It should be also noted that this is the first time that a new member has initiated a dispute only after three years from its accession.

Besides, Vietnam's shrimp exporters will no longer be suffering from the high anti-dumping tax which will undoubtedly bring about great benefits for the competitiveness of Vietnam's frozen shrimps in the US market. A more appropriate and reasonable tax will help Vietnam's shrimp exporters to compete on a more equal basis with other exporters in the same market. In fact, due to its designation as a 'non-market economy' up to 12 years, Vietnam has been subjected to numerous anti-dumping measures and high antidumping tax was applied.

As an NME, domestic prices in Vietnam are not used in the anti-dumping investigations if Vietnamese producers cannot demonstrate that they are operating under market economy conditions. Instead, the import countries use comparable prices in a third country, such as India and Mexico, to determine whether dumping occurred from Vietnam's export. Generally speaking, such prices often put Vietnam exporters at a disadvantage to fight against anti-dumping charges. In addition, antidumping duties result in huge losses to Vietnam's exporters and in some cases the closing down of businesses and the shrinking of industries.

The case will also provide many useful lessons for both the experts of the government and the producers themselves. The more integrated Vietnam becomes the higher possibility Vietnam has to face with trade disputes which may vary to a great extent. Through this case, at least Vietnamese enterprises can be more aware of WTO rules and more confident to trade globally. In addition, the case will also increase experiences of Vietnamese trade experts in dealing with cases to protect the domestic producers.

Box 3: US and the "Zeroing" Methodology of Dumping Margin

In fact, the practice of "zeroing" is nothing new. It remains the most important and controversial issue with the US. There have been great similarities between the case of Vietnam and the case "US - Final Antidumping Measures on Stainless Steel from Mexico" in which zeroing was also considered illegal in the end. The WTO opened its March 23-24, 2009 oral hearing to its members on zeroing dispute at the request of the EU. The EU alleged that it was not consistent with GATT 1994 and the Antidumping Agreement.

Previously, the US DOC also judged that shrimp exporters from Brazil, Ecuador, India, and Thailand were also dumping. Ecuador and Thailand later took legal proceedings to the WTO against this decision, accusing the US DoC of having used illegal methods in its investigations, namely to artificially inflate profit margins or to invent a profit margin where none was detected. Other countries such as Argentina, Brazil, Canada, Japan, Mexico, and South Korea have all won zeroing cases at the WTO.

From a legal perspective, WTO regulations provide for countries to impose antidumping duties on dumped imported products only if all transactions/shipments included. However, the US DoC ignores import sales for which the export price exceeds the "normal value" (usually the value in the home market), instead taking into account only those sales where export price is less than normal value. As a result, the dumping margin will be unreasonable, causing great damage to producers of the domestic market.

Half-way success and difficulties ahead

It has been already mentioned that the final decision in Vietnam's shrimp dispute against the U.S. is still not quite in favor of this developing country. WTO only concluded that the U.S. acted inconsistently with Antidumping Agreement as a result of the US DoC's application of the zeroing methodology to calculate the dumping margins of selected respondents in the second and third administrative reviews. This is not completely beneficial for Vietnam in this case as the Panel did not conclude the same in the fourth, fifth and final reviews. This means that antidumping duty would be probably imposed on Vietnamese frozen warm-water shrimp for another five years.

Hence, it can be observed that though a strong start has been made, difficult challenges are still ahead for Vietnam as the country integrates deeper into the global trade club. The country has to, on one hand, know how to implement the regulations in compliance with WTO commitments and on the other hand, know how to respond to antidumping cases in foreign markets.

Conclusions and Recommendations

All points considered, the initial success of the case has helped to open a new chapter of Vietnam's being more proactive in applying WTO regulations to protect their own businesses. Being a member of the global trade body, Vietnam has every legitimate right to do so. The lesson drawing from this case is a lesson of transformation. However, in order for this right to be

effectively exercised, there must be combined efforts from enterprises, industry associations, and government institutions of Vietnam.

First of all, enterprises should be proactive in exploring WTO rules especially those related to anti-dumping and anti-dumping measures so that they will not only protect themselves in lawsuits but also initiate their own complaints against dumping imports and exporters. Besides, they must bring up their products to global quality standards to be competitive in any foreign markets. Industry associations will play a key role in providing enterprises with more information and knowledge about anti-dumping regulations of imported countries and helping them to deal with lawsuits if any.

Though antidumping cases are the "stories" of enterprises, government institutions such as the Ministry of Industry and Trade, the Ministry of Finance should also be engaged. To begin with, they should develop a more comprehensive legal framework for a functioning market economy and regulate the activities of export enterprises to certain markets, on the basis of a proper mechanism of quantity supervision and export growth rate of strategic export items on strategic export markets. Besides, they can give warning and support with regard to antidumping lawsuits against Vietnamese enterprises.

Last but not least, training courses on anti-dumping regulations and duties organised by government institutions should also be very helpful, enabling the establishment of a network of relevant stakeholders such as academics, consultants, research centres and civil society organisations to share and disseminate knowledge on the issues.

Endnotes

- 1 Italian Trade Commission – Ho Chi Minh City – Vietnam, Trade Promotion Section of the Italian Embassy, *Textile Report Vietnam 2010*
- 2 Department of Foreign Affairs & Trade, Australia. *Vietnam Fact Sheet*, 2010
- 3 Van, Le & Tong, Sarah Y., 2009, *Vietnam and anti-dumping: regulations, applications, and responses*, EAI Working Paper No. 146.
- 4 Nguyen Manh Hung & Pham Sy An, *Impacts of the global economic crisis on foreign trade in lower-income economies in the Greater Mekong Sub-region and policy responses: the case of Vietnam and its implications for Lao PDR and Cambodia*, Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 102, May 2011
- 5 World Trade Organisation, *Antidumping: Technical Information on Antidumping*, to be seen at <http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm>
- 6 World Trade Organisation, *Antidumping Agreement, Article 2: Determination of Dumping*
- 7 According to WTO Antidumping Agreement, the margin of dumping shall be considered to be de minimis if this margin is less than 2 per cent, expressed as a percentage of the export price.
- 8 More details can be seen at: WTO dispute settlement gateway, 2011, *United States – Antidumping measures on certain shrimp from Vietnam*.

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This economic update is meant to bring to readers the most up-to-date information, with some analytical discussion, collected from various sources, about important regulatory issues (trade, competition, consumer protection & investment) emerging in the Southeast Asian region, with special focus on Vietnam. It is not a research study and not meant to provide any official viewpoint of CUTS International on the subject matter.