

How Vietnam Response to “Non-Market Economy” Barrier in the “United States” Trade Law

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Abstract

Over the last several years, ties between Vietnam as well as the “United States” have continued to progress in a number of directions. While US shipments to Vietnam have surged by over 175 percent in the previous five years, Vietnam’s turnover to US customers has expanded by 230 percent. Vietnam’s greatest export market is the “United States”, and thus the “United States” is now Vietnam’s 10th largest trade partner. Partnership between the two nations is expected to reach \$90.8 billion in 2020, the first time it has surpassed the 90 billion dollar mark, with a goal of \$100 billion in 2021. Vietnam’s exports are made more difficult by the “non market economy” clause (NME) in U.S. trade remedies, making it harder for “anti-dumping” inspections to be conducted in the “United States”. In the “anti-dumping” litigation, the NME classification that the “United States” now applies to Vietnamese exports is becoming an invisible trade barrier. “anti-dumping” legislation in the “United States” is analyzed in this article to see how it affects Vietnamese exports toward the U.S. market. According to the article, a “non-market economy” concept has been blamed for damaging Vietnam in “anti-dumping” battles with the “United States” and affecting the integrity of commercial transactions throughout the years.

Keywords— Non market economy; the U.S. Trade Law; Vietnam; trade cooperation; response.

I. INTRODUCTION

Trade cooperation has always been evaluated as a bright key with remarkable developments and achieved the most success in economic relations between Vietnam and the US, especially after the two countries signed successfully the BTA in 2001. The US currently being the largest export market of Vietnam’s goods. However, this is also considered a market with fierce competition, full of obstacles and many barriers, such as “anti-dumping” barriers, especially regulation on the “non-market economy” for imported goods applying to developing countries or in transition including exporting goods from Vietnam.

The objective of the article is to re-evaluate the results of Vietnam’s export activities in the US market since the BTA was signed; pointed out the barriers from the NME status applied in the “anti-dumping” law of the “United States” to developing countries including Vietnam;

Thereby, raising several recommendations to minimize risks from the NME status in the US Trade law in the exporting goods activities of Vietnam to the US market.

II. RESULTS AND DISCUSSIONS

Vietnam and the US trade cooperation: time to look back

The “United States” and Vietnam trade business has made significant strides forward, particularly since the Comprehensive Free Trade deal (BTA) here between two nations was signed on December 10, 2001, and began to take effect the following day. This legal underpinning between the two nations has been crucial in fostering the growth of bilateral commerce involving Vietnam and the “United States”. Before the BTA was implemented, the two-way economic relations between Vietnam and the “United States” only expanded from the value of 450 million USD (in the year of 1995) to 1.09 billion USD (in the year

of 2000); however, after the BTA was implemented, it has accelerated from the volume of almost 1.2 billion USD (in 2000) to 6.75 billion USD (in 2005), 18.10 billion USD (in 2010), and continued to increase to 29.7 billion USD (in 2003). It has attained 41.28 billion US dollars in 2015, and it is projected to reach 75.72 billion US dollars in 2019 (which is 75 times greater than in 2000). In which, the total export turnover of goods from Vietnam to the US in the year 2000 was 0.733 billion USD, in 2005 it was 5.93 billion USD, in 2010 it was measured as 14.24 billion USD, in 2015 it was calculated as 33.48 billion USD, and in 2019 it was 61.35 billion USD, and by the end of April 2020, the total export value to the US managed to reach 20.16 billion USD, an improvement of 12.9 percent in the same period in the year of 2019.

In 2019, the “United States” became the first place export market of Vietnam’s goods, and at the same time, Vietnam also became the 7th largest exporter of goods to the US market and a country with a trade surplus reached 5th largest with the “United States”¹. The main export items of Vietnam to the US market for many years include textiles and garments, seafood, footwear, wood products, machinery, equipment, etc. In which, textiles and garments are considered the main export products of Vietnam to the US market. In recent years, the “United States” has become the largest export market of Vietnam’s textiles and garments, accounting for 14 .85 billion USD in total export turnover of 38.9 billion USD in 2019, equivalent to 39% of the total export value of the whole industry. In the first two months of 2020, textile and garment exports to the US reached US\$2.25 billion, up 5.3% over the same period in 2019 and accounted for nearly 48% of the country’s total textile and garment export value.²

¹ “United States” Census Bureau (2019), Trade in Goods with Vietnam.

² The US does not have a policy to suspend the import of Vietnamese textile and garment products. <http://baochinhphu.vn/Kinh-te/Hoa-Ky-khong-co-chu-truong-tam-ngung-nhap-khau-san-pham-det-may-Viet-Nam/390515.vgp>, accessed on 25/3/2020

With the advantage of low-cost infrastructure, raw materials, and labor, the “price” of Vietnam’s products is competitive with those of other countries. Among the top 5 the US import suppliers from ASEAN countries for 2018, Vietnam ranked the first with 49.2 billion USD, followed by “Malaysia (39.4 billion USD), Thailand (31.9 billion USD), Singapore (27.3 billion USD), and Indonesia (20.9 billion USD)”. It indicated that, since the two countries normalized the bilateral diplomatic relations, especially since the BTA was signed and took effect, the trade relationship between the two countries has made remarkable progress, especially on the Vietnamese side. This is one of the important pillars in promoting the long-term stable comprehensive partnership between the two countries, raising the bilateral relationship to a new height.

However, those competitive advantage of Vietnam has also been the obstacles when exporting to the large markets such as the European Union and the “United States”. Vietnam’s exports have been investigated in the U.S. market for being accused of dumping. The imposition of “anti-dumping” duties, such as the case of “frozen shrimp”, pangasius, the case of cold-rolled steel, etc., have had negative impacts on the export activities of these products of Vietnam, affecting fair competitiveness in international trade, especially in the context that Vietnam is still considered by the U.S. and EU as a country with a “non-market economy status”.

“Non-market Economy” barrier under the “United States” Trade Law

In accordance with the “legislation governing anti-dumping” (AD) in the “United States”, dumping occurs when a foreign manufacturer sets a “price” for its product that is “much less than the fair market value.” During the period of determining the true market “price” of dumping commodities coming from countries without a market, a certain standard procedure is used. In the requirement of initiating, the “Department of Commerce” of the “United States” determines whether or not the merchandise of overseas businesses is being

chucked in the market of the “United States” by conducting an analysis of the commodity prices in the “United States” and the perfectly natural volume of the commodity prices importation to the domestic market of the “United States”. If the products are not supplied or sold at auction in the home market of the foreign firm, the “price” from which the commodities will be marketed or put up for auction in different parts of the “United States” will be determined by the “Department of Commerce” in the “United States”. In the event that the “United States” and the “Department of Commerce” concludes that there is a possibility of “dumping”, an open dumps margin may be determined by determining the average amount by which the market demand of the goods exceeds the “price” of the products made available across various dimension of the “United States” marketplace along with the coordination with the “subsection 1673b(b)(1)(A) of Title 19 of the “United States” Code”.

As shown above, a broad approach to NMEs has its drawbacks. It's almost hard to make decisions about fair prices in a non-market economic system because sources are no longer allocated in accordance with the standard marketplace concept of supply and demand (Tatelman 2007). In the year of 1960s, the “US Department of Finance” applied “anti-dumping” legislation to NMEs using the so-called “surrogate country” strategy. Surrogate nations with equivalent economic conditions may be employed instead of NME countries to determine the true market value of a product. Within the Trade Act of 1974, Congress enacted a rule that followed this method. In theory, the chosen surrogate nation would have to be an economic and political system with similar financial problems to the international market, which implies that the NME structure of the international market has the same level of financial progress. As a result, using this technique has at times become difficult since it is no longer always possible to locate a suitable country to update it. Because of this, it became necessary to supply you with a different solution that would be more successful.

Adopting a new approach in 1975 was the solution that the Department of Commerce came up with to address the problems that were caused by the method used by the surrogate country. The name “components of production technique” was given to this approach at some point in time. Therefore, in the event that there was not a surrogate USA that was available, the “DOC” might be focused on the decision on a “surrogate U.S.A” taken from either a non-market economic structure that has been considered to be in the process of getting relevant to financial to the U.S.A. where the products were being investigated for dumping. This would be the circumstance in the event that there was not a surrogacy arrangement at the “United States” that was available. (Robert H. Lantz 1995).

19 U.S. Code, Section 1677 (18) (B), when making a decision about the overall environment of the economy at the non-market context the “DOC” must consider the following factors:

(i) The extent to which foreign currencies can be converted to the currencies of other countries;

To the extent that overseas remuneration rates are recognized by free negotiations between workers and employers;

(ii) Scope of joint ventures and other interconnected financial investments which are undertaken by various international business companies allowed abroad;

(iii) Scope of ownership by the government in terms of increasing the volume of the good production

(iv) Scope of government control over resource allocation and corporate pricing and production decisions; and

(v) Other factors that the management considers appropriate.

In addition, the “DOC” has the authority to conduct investigations into a wide variety of other matters, such as the accordance with the requirements of the “Antitrust Law”, the “anti-dumping Law”, and other similar laws.

In addition, the “DOC” can determine if a foreign country is a NME. By law, NME status

decision can at any time in any country and are valid until explicitly revoked by the “DOC”³.

In addition, the “Trade Deals Act of 1979” gave the Department of Commerce the authority to select which method should be used to calculate the fair market value. The Department of Consumer Affairs recommends basing the determination of the property’s market value on the “price” of the item that has the next highest priority which are mentioned as follows- (1) Domestic market “price” of such or similar goods in the alternative country; (2) Export “price” of such or similar goods entrusted by the substitute; (3) Actually If the “price” or exact “price” is not available, the calculated value of such or similar goods in alternative countries; and (4) Production of such or similar goods used in the non-market economy. The value of the element in the alternative country (Lantz 1995).

In point of fact, the MEs and NMEs are treated quite differently under the “United States” Trade Law (Horne 2001). The Department of Commerce (“DOC”) estimates the amount of dumping for only certain pro government cases involving manufacturers from NME by increasing the values of the two marketplaces. The “DOC” will evaluate the “price” of the imported product to the “price” of goods that are comparable that are sold in the marketplaces of the nation that is exporting the good. In case the export industry might not have the relatively similar goods available in the domestic economy, then the “DOC” will start comparing the value of the final goods with the “price” of building works or the “price” of performance comparable goods sold in different countries in the world. Meanwhile, if this resemblance is not possible, then the “DOC” will make a comparison the value of the foreign - made goods and services with the “price” of building works or the dollar value of performance comparable goods sold in different countries in the world.

Dumping will take place if the “price” of imported products on the U.S. market is cheaper than the alternatives of the identical

good, and “anti-dumping” actions will be implemented if the international commerce (ITC) deems that there is a possibility of damage being caused to domestic manufacturers in the “United States”. Will happen. Eliminate the disparity and safeguard the domestic industry in the “United States”. However, if a nation is deemed to be an NME by the rules of the “United States”, the pricing of such items as well as the production costs are regarded to be untrustworthy.

The Department of Customs and Border Protection (“DOC”) may assess the confidence interval of the commodity under consideration or the “price” of the item based on the “price” of comparable items in the country of importation, depending on the authenticity of the information that is currently available. The “DOC” is able to reduce the cost of NME extension while maintaining the same amount of ME extension. This is what many people mean when they talk about a “alternative technique” (Rana 2008). Using distinct approaches for ME as well as NME has come under fire for a number of different reasons, and the criticism has been widespread. In this manner, this can be mentioned that, it is not simple to discern between manufactured end products (MEs) and non-manufactured end products (NMEs) for the objectives of “anti-dumping” legislation, particularly with regard to the techniques of computing lowering margins.

Second, rules concerning the non-market economies are uncertain they motive arbitrary in application of the AD agencies. The decision of MEs or NMEs mostly relies upon on the translation of the “DOC”.

Since ME and NME norms are almost nonexistent, the choice of a surrogate nation is very difficult and virtually impossible to make. A surrogate country may seem sensible, but it’s hard to get an appropriate replacement “price” for “anti-dumping” proceedings.

A last disadvantage of using a “surrogate nation” is the unpredictability it brings. In the requirement of avoid the dumping, NME makers should not consider export costs.

³ 19 U.S.C. § 1677(18)(C) (2000).

Furthermore, manufacturers of similar items in the surrogate nation typically compete with those in the international country. In order to avoid a conflict of interest, producers and exports of the distributors in the surrogate nation are sometimes unable to provide antidumping investigators with relevant information.

Impacts of “Non-market Economy” barrier on Vietnam exports

Vietnamese membership in the World Trade Organization was officially granted in 2007. (WTO). In order to join the EU, Vietnam must agree to remain a non-market economy for a period of 12 years. Vietnam’s NME status expires on December 31, 2018. WTO members are required to use an alternative (surrogate) approach for analysing the pricing or cost connected with an “anti-dumping” item since Thailand is a proxy country (AD). Many other members of the WTO argued that utilizing Vietnam’s “price” of the product to estimate dumping advantages would be difficult in many cases because of distortions inside this Vietnamese economy caused by government intervention. As a consequence of a series of legislative and institutional changes, 69 countries recognized Vietnam as a market economy between 2007 and 2018. The European Union as well as the “United States”, two of both the world’s largest import marketplaces, have not yet approved this. Vietnam has been accused of failing to comply with all of the requirements of a market economy (MES) as stated by WTO pronouncements.

Recognizing the country as a ME allows Vietnam to avoid certain highly restrictive “anti-dumping” measures. “anti-dumping” charges imposed by nations that employ the costs and numbers of the surrogate country are regularly applied to Vietnamese exports. “anti-dumping” efforts that target NME exports result in double levies for these companies. Antidumping duties on Vietnamese “frozen shrimp” were extended for another five years by the Department of Commerce (“DOC”). Vietnamese freezing shrimp products were

subject to a 25.39 percent pro government tax in the 2016-2017 period of review (POR) on March 9, 2018. In addition, Vietnamese shrimp imported into the “United States” faced a hefty duty charge. The amount of goods imported into the Country has decreased considerably since the levy of this tax was implemented. Thus, US demand for Vietnamese freezer shrimp products has dropped from first position in 2016 to fourth position among the key export locations for Vietnamese freezer shrimp commodities (Nguyen 2018). A 9.9 percent drop in Vietnamese tra as well as basa fish exports from January through September of this year compared to 2016, and “kept falling” through “the later months of the year,” according to a press release (Luu & Vu 2018). Catfish exports from Vietnamese enterprises with the Us market are getting increasingly difficult due to “anti-dumping” taxes imposed by the “United States”.

To improve the response to the “non market economy” provision in the “anti-dumping investigations of the “United States”, a number of solutions Vietnam needs to be specifically applied as follows:

Firstly, complete the vision of building the socialist-oriented market economy “Resolution No. 11-NQ/TW” on perfecting the “socialist-oriented market economy” institution of the 12th “Committee of the Communist Party of Vietnam” clearly stated: The socialist-oriented market economy that Vietnam builds is a fully functioning economy, simultaneously set according to the rules of the market economy, suitable to each development stage of the country. After decades of renovation from “Doi Moi”, Vietnam’s economy has now risen to become one of the most dynamic economies and has affirmed its position in the international market. However, particular note is that even in 2019, when the global economy is experiencing slow growth due to pandemic strains, Vietnam’s economy is still among the fastest-growing, despite its low overall growth rate. Vietnam’s GDP grew at a 6.8% annual rate in 2017, governmental debt fell by roughly 8 percentage points of GDP from 2016 to 2017, and the

country has had a trade surplus since then. [World Bank 2019]. The EU-Vietnam Free Trade Agreement (EVFTA) is a typical example of efforts to reform the domestic economy of Vietnam, meeting the strict standards of the market economy. Among the regulations of the market economy that Vietnam has applied, there are laws of competition and profit. Currently, Vietnam is being evaluated as the leading attractive emerging market, the door to many major markets in the world come to invest. According to the Vietnamese Government's announcement in February 2020, 71 countries have recognized Vietnam as a market economy.

The "United States" also recognized the remarkable results achieved in building and developing a market economy of Vietnam, especially the remarkable development of small and medium enterprises. However, the US side believes that Vietnam's economy is still in the process of transition and has not really met the standards to be recognized as a country with a market economy as mentioned above.

Assessing the current situation of Vietnam's economy, although there have been many reforms in the direction of the market economy, it has not yet met the criteria of the market economy. Accordingly, there are still some barriers that need to be overcome for the US and other countries to recognize as a full market economy, such as the freely convertible currency, the level of participation of the State in decisions of enterprises, equal competition, etc.. As required, the market economy must be a fair competitive economy, without preferential treatment for any economic sectors. Therefore, on the one hand, it is necessary for the Government to accelerate economic reforms to integrate Vietnam's economy with the world, and on the other hand, it is necessary to limit the interference of public factors in business activities of enterprises. In order to strengthen the market economy effectively, the improvement of the legal system is also an urgent requirement.

The market economy poses an urgent requirement on the need to perfect the legal

system in line with the trend of globalization, in which the law is not just a mandatory code of conduct for market members. The laws in the market economy need to satisfy the following requirements: They must have consistency, that is the synchronization of the whole legal system in terms of strict logic, no contradictions; avoid being overlapped; publicity and ease of access; the laws must ensure reliability and predictability; social justice; the law-making must ensure a harmonious balance of interests between the state and the citizen.

Secondly, solutions on completing the regulations related to the organization and operation of export enterprises: There are many cases that despite careful preparation of documents and strict compliance with regulations, Vietnamese companies are still at risk of facing unpredictable investigations in "anti-dumping" disputes. When such an incident occurs, the exporting companies usually suffer the most from costly investigative requirements, and damage to their reputation in the US market. Vietnamese companies themselves should well prepare to minimize increased losses. Vietnamese exporters need to standardize and maintain a transparent accounting system; master and strictly enforce international "anti-dumping" regulations and procedures in general as well as the US "anti-dumping" regulations in particular; ensuring the strict legality of economic - commercial contracts with the US partners to ensure the smooth completion of the "DOC's" investigation questionnaire as well as having all the evidence that can be provided grant for the investigation; each enterprise and association needs to be clearly aware of the active role of participating in the lawsuit to avoid being considered by the "anti-dumping" investigation agency as uncooperative, that makes a high "anti-dumping" duty .

Thirdly, The Tariff Act 1930 allows the "DOC" to develop a comparable normal value for use in "anti-dumping" investigations. As Vietnam is still considered a non-market economy country, the market "price" of products in Vietnam is usually not taken into

account and will be subject to the “surrogate country” rule. It means that the “DOC” will select a country with similar products and similar markets to calculate the normal value. However, in some special cases, Vietnamese defendants under “anti-dumping” investigation may be able to persuade the “DOC” to use information from Vietnam to determine the normal value when they provide sufficient evidences that their products follow the market economy standards.

Vietnam can be accepted as a market economy when an importing country decides on its own and agrees to recognize Vietnam as a market economy. However, this is only a temporary preference without any guarantee if not accepted by all remaining WTO members. In a market economy, factors such as the autonomy of economic actors are very high; the volume and types of goods in the market economy are diverse; prices are determined freely on the market; competition is an inevitable part of the market economy; and an open economic system is important, considered the most basic characteristics for a market economy.

III. CONCLUSIONS

Even though they are designated an NME, Vietnamese businesses have run across several challenges when trying to export their products to the market in the “United States”, including as “anti-dumping” inspections. Because all information on the pricing and expenses of Vietnamese goods is now being investigated by the relevant authorities in the “United States” of America. The “United States” continues to maintain its position that Vietnam does not have a market economy. Therefore, it is very crucial for the Vietnamese administration to continue to increase its active support role. This is necessary in order to successfully avoid and react to pro government actions taken by trade partners, particularly the “United States”.

During this period, trade groups and corporations that take part in “dumping” litigation need to take a more active role in “anti-dumping” proceedings. The desire and creativity of trade groups play essential roles in avoiding and mitigating the negative

repercussions of “anti-dumping” lawsuits. These responsibilities are especially crucial when it comes to eliminating “anti-dumping” cases. Apart from this, trade groups should establish their representative offices overseas in order to concentrate on major markets and take preventative action regarding litigation as soon as they are filed.

In addition, Vietnamese businesses need to place a greater emphasis on enhancing their competitive strength, proactively having to apply quality management systems in accordance with the standards, corporate identity and product endorsement, training and improvement of the quality resource management, and other similar activities in order to quickly resolve any conflicts that may arise in global commerce.

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