

Current Issues in U.S.— Vietnam Trade Relations

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Sponsored by USVTC Educational
Forum and the GE Foundation

Introduction

- 2009 is proving to be a challenging time for trade and investment law and policy formation under Obama Administration:
 - Inevitable challenges of new presidency
 - Financial crisis and a deep recession
 - Congress controlled by strong Democratic Party majorities in both House and Senate.
 - Trade and investment policy remain under review

President Obama's Views

- Greater sensitivity to labor union objectives, especially on FTAs
- President has expressed opposition to some protectionism in Congress:
 - “Buy American” provisions
 - Denial of Mexican truck access
 - Border taxes in energy bill

- No timetable set for renewal of Trade Promotion Authority
- President has abandoned campaign promise to renegotiate NAFTA, at least for now
- With Secretary Clinton, President support greater economic development role for U.S.

Higher Priorities

- Wars in Afghanistan and Iraq
- Worldwide financial crisis
- Deep recession and high unemployment in United States
- Health care reform
- Energy and climate change bills

Bilateral Issues for Vietnam

- NME treatment in AD cases
- Initiation of CVD actions
- Possibility of GSP eligibility
- Negotiation of BIT
- Other risks of U.S. protectionism
- Vietnam to join expanded P4/ Trans-Pacific partnership?

Key Pending Trade Issues in the U.S.

- Pending FTAs with Colombia, Panama and Korea
- Resumption of Doha Round and Review of U.S. negotiating objectives
- Enforcement of trade obligations
- Addressing alleged Chinese currency manipulations

- Congressional pressures to renegotiate NAFTA
- Possibility of expanded P4 Agreement and other FTAs
- Anti-trade Democrats in House won't likely prevail in protectionist initiatives, but could block trade liberalization initiatives .

International Agreements in U.S. Constitutional System

- Some international agreements, such as BITs, approved as self-executing treaties in US, without need for implementing laws
- Trade agreements require Congressional approval and implementing legislation in U.S.; not self-executing as in some “monist” systems

Trade Promotion Authority

- President can't as practical matter negotiate trade agreements without Trade Promotion Authority
- Otherwise, Congress could require unilateral modifications of agreement before approving text, or delay approval indefinitely

Implementation of WTO Obligations by the U.S.

- Thus, WTO obligations are not self-implementing
- Each must be approved and implemented by legislation, in this case Uruguay Round Agreements Act
- URAA specifically requires legislation where WTO obligations would otherwise be in conflict with U.S. law

- For example, URAA made the following changes in U.S. law:
 - Patent protection altered from 17 years from grant to 20 years from application
 - De minimis level for dumping margins altered from 0.5% to 2%
 - All WTO Members afforded injury test in CVD actions

- U.S. Courts apply US law, not WTO provisions directly, even if this puts US in conflict with WTO obligations
- Fortunately, under URAA most U.S. WTO obligations are part of U.S. law
- Contrasts with countries such as Mexico, where courts may rely directly on provisions of WTO Agreements

Monist Approach to Implementation?

- Classical “monist” approach is in Latin American civil law jurisdictions
- Once treaty, e.g., Marrakech Agreement, approved by constitutional provisions it is directly incorporated into national law
- Mandatory for agencies and courts to apply these provisions

- Problems in this approach:
 - Courts and agencies require more specific guidance in many situations
 - WTO Agreements aren't always detailed enough for implementation
 - For example, ADA doesn't tell us who is the "investigating authority" in U.S., Vietnam, elsewhere and provides national administrative discretion in other procedures

- Under such circumstances no system is truly monist with regard to international trade agreements
- WTO Members want to review implementing legislation before supporting accession for new members
- Vietnam enacted or modified over 200 laws, decrees, etc. for this purpose

Vietnam's Compliance with WTO Obligations

- Many challenges for Vietnam of WTO accession obligations through implementation and enforcement of relevant laws enacted or modified for accession purposes.
- Implementation of WTO obligations depends on related changes in national legal system and elsewhere.

Recommendations

- Build on existing success in implementing WTO obligations and taking additional steps to stimulate foreign and domestic investment and job creation.
- Take advantage of desire of MNEs to diversify their Asian manufacturing.
- Plan for a time when low-cost apparel, footwear and consumer electronics production moves to still lower wage cost countries.

Law and the Judiciary

- Increase judicial salaries and training (in law and judicial ethics)
- Select judges on the basis of a merit-based process drawing on members of the bar and law faculties.
- Consider creating a specialized court or courts with exclusive jurisdiction over international trade cases, intellectual property cases and commercial disputes.
- Improve centralized coordination of the court system and publish a broader range of court decisions.

Focus on Implementing Regulations

- Consider a “time-out” in enacting new legislation or modifying existing laws relating to the WTO implementation process so that government agencies can concentrate on publishing implementing regulations and take related steps.

Coordination

- Improve coordination of WTO implementation obligations and initiatives among responsible ministries.
- Take steps to improve vertical coordination between the central and provincial governments; problem exists in many countries, including U.S.

Reducing SOE Influence and Power

- Take steps to reduce and eventually eliminate discrimination in favor of SOE and against foreign-invested enterprises and privately-owned domestic enterprises.
- Encourage the use of realistic valuations for the equitization program in order to speed up the transfer of SOE ownership to the private sector.
- Discourage further diversification of SOEs into new sectors.

- Korean chaebol example may not work in Vietnam:
 - In Vietnam, like Taiwan, individuals are much more entrepreneurial than in Korea
 - Some evidence that chaebol have restricted rather than encouraged innovation in Korea
 - Discourages non-chaebol foreign investment
 - Chaebol have required massive financial support from government over many years

Customs Law & Procedures

- Implement automated electronic filing of all customs documents and create a related database to assist customs officials in classification, valuation and risk assessment decisions.
- Consider reducing the number of different MFN tariff categories to 4-5 different rates so as to simplify the entry process and reduce corruption.

Encouraging New Enterprises

- Continue reducing time, regulations, costs and bureaucratic red tape for the formation of new enterprises.
- Improve access to credit for small and medium-sized businesses.
- Allow Vietnam's entrepreneurship culture to flourish!

Intellectual Property

- Consider a well-publicized anti-piracy campaign and implement criminal penalties for wilful infringement in commercial quantities.
- Relax controls on importation of foreign media (movies, music, etc.)

Anti-Corruption

- Establish a truly independent Anti-Corruption Commission.
- Increase transparency, publication and disclosure throughout the central and provincial governments.
- Implement the U.N. Convention on Corruption, ratified this week

- According to UN, “Vietnam already has a comprehensive legal framework to fight corruption in place but implementation of the framework is weak and uncoordinated.”
- Key convention articles are 6 (preventive bodies) and 36 (independent specialized authority)

Defending Unfair Trade Actions

- Encourage and support industries affected by foreign antidumping and CVD actions
- Consider participating in Chinese WTO actions as a Third Party
- Treat removal of NME status as a medium-term goal that will be realized as Vietnam becomes more market economy oriented.

Doha Negotiations

- No significant movement since breakdown of negotiations in July 2008
- Since 2010 is Congressional election year, major concessions by U.S. are unlikely, not supported by either Democrats or Republicans
- Lack of TPA or plans to seek it
- Relationship between Doha and recession

- Principal U.S. objectives:
 - Better NAMA access to major developing country markets
 - Better agricultural product access
 - Improved services market access
 - More open trade in environmental goods and services
 - Consumer product safety

- Trade facilitation
- U.S. opposes:
 - Expanded agricultural safeguards as proposed by India
 - Weakening ADA and SCMA
 - Lack of transparency in system
 - Weakening of IP protection

2009 Trade Policy Agenda

- Focus on market-opening for goods and services
- Concern over “imbalance” in current Doha negotiations:
 - Value of proposed U.S. concessions is well known and easy to calculate
 - Others’ [India, China, Brazil] commitments are vague and uncertain in terms of value to US interests

- U.S. willing to consider additional plurilateral trade agreements; wave of the future?
 - General success of information technology agreement
 - Slow increase in GPA membership (e.g., Taiwan) driven in part by “Buy American” provisions and similar laws elsewhere

Subsidies Policy

- Implications of subsidies in world recession:
 - U.S. and France for auto industry
 - U.S. and many other countries for financial industry
 - Energy subsidies, e.g., ethanol in U.S.
- De facto modification of SCM Agreement?

- Rules Negotiations (AD) issues:
 - Zeroing
 - Distinguishing injury caused by imports from other causes
 - Grace period between investigations
 - Treatment of affiliates not under parent's control
 - Consideration of public interest v. domestic producer interests

- Guidelines for imposing a lesser duty
- Specific rules on anti-circumvention actions?
- Feasibility of dealing with third-country dumping in ADA
- Rules Negotiations (SCM) issues:
 - Renewal of Article 8 (green light)
 - Benchmarks for measuring credit subsidies
 - Measuring subsidies to SOEs

- Determining export competitiveness
- Tying OECD export credit arrangement to Annex para. k)?
- Addressing fisheries subsidies

DSU Reform

- Monetary compensation in lieu of trade sanctions?
- Costs of litigation for poor countries
- U.S. advocacy of more political, less judicial type of process
- EU advocacy of more judicial-type process

NME and Other Trade Remedy Actions in the U.S.

- Vietnam's Protocol of Accession: MNE methodology permitted until 2019 (vs. 2016 for China)
- CVD case on polyethylene retail carrier bags (PRCBs), following earlier AD cases against China, Malaysia, Thailand

- Distinguishing NMEs from MEs that act like NMEs:
 - U.S. government ownership of GM, Chrysler, much of banking industry
 - U.S. treatment of Canada as NME in terms of benchmark for determining stumpage subsidies in softwood lumber industry
- Dividing lines that seemed obvious in 1980s have been blurred.

U.S. NME Criteria

- i) Extent to which the currency is convertible;
- ii) Extent to which wage rates are determined by free bargaining between labor and management;
- iii) Extent to which joint ventures or other investments by foreign firms are permitted;

- iv) Extent of government ownership or control of the means of production;
- v) Extent of government control over allocation of resources and the pricing and output decisions of enterprises; and
- vi) Such other factors that Commerce considers appropriate

(19 U.S.C. § 1677(18)(B))

U.S. Approach in Fish Fillets

- Evidence of a market-driven economy:
 - Wages are largely determined by free bargaining between labor and management
 - Various legal reforms have led to the “marked and sustained growth” of the private sector.

- NME factors (according to Commerce):
 - Government intervention in the economy is “such that prices and costs are not a meaningful measure of value”
 - Dong is not fully convertible, and is less so than in countries which have recently been determined to be market economies

- Foreign direct investment is still controlled by regulation, limitations on corporate form and the flow of the investment throughout the economy
- Government pricing committees maintain discretionary control over prices in certain sectors, including those which are not natural monopolies

- The private sector is excluded from access to resources, because SOEs and the banking sector remain insulated from competition, and are not being privatized
- Private land ownership is prohibited and the government is not taking any steps toward a land privatization program

- The rule of law is weak, laws are vague, the judiciary lacks independence, there are few lawyers and trial procedures are “rudimentary”
- What changes have taken place during ensuing years?
- PRCBs AD action will again test Commerce criteria against ME progress in Vietnam

Other NME Considerations

- Political issue in U.S. with treatment of Vietnam tied to treatment of China
- Any major trade policy changes viewed as increasing Chinese, Vietnamese exports to U.S. (as with GSP or affording ME treatment) unlikely in foreseeable future
- Treatment of Vietnam as developing nation subject to 2% and 4% *de minimis* rules under SCM Article 27.10 unlikely.

- Commerce can treat specific sectors as market oriented industries, but doesn't do so in practice
- Separate individual rates for export price authorized when enterprises demonstrate independence from government in setting prices and other aspects related to operations

- Chinese challenge in the DSU to US NME practices “as applied” (including denial of MOI) may force Commerce to use these authorities more reasonably.
- Chinese requested consultations July 31 for EC final AD decision on fasteners, alleging failure to accord MOI status in violation of para. 15 of accession agreement

CVD Actions against NMEs

- *Georgetown Steel* policy of 1980s abandoned in 2006:
 - “private industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing”
 - “The role of central planners is vastly smaller”
- Commerce decided subsidy margins could be measured in a mixed economy such as China’s (and likely in Vietnam as well)

- Approach uses a mix of Chinese data and foreign benchmark data
- Consistency of applying CVDs to NMEs (based in part on use of local data) and use of surrogate country data for AD has not been established
- CVD methodology also being challenged by China in WTO

Methodology

- in *Coated Free Sheet Paper*, Commerce calculated the benefit for certain tax reductions provided to producers by simply comparing the normal tax rate with the preferential tax rate
- Treated the difference as the benefit, as would have occurred in a normal ME CVD analysis.

- In determining benefit for allegedly preferential loan rates afforded to producers or exporters, Commerce determined that there was no commercial, non-preferential interest rate available in China.

- To create a benchmark rate, Commerce analyzed a “basket” of commercial interest rates in 33 developing countries with per capita GDPs similar to China’s, with the composite interest rate being determined to be 7.56%.

Is Canada a NME?

- With alleged Canadian subsidies of softwood lumber, Commerce found absence of Canadian commercial rates for the sale of standing timber
- Relied instead on commercial timber charges in the US as benchmark for determining subsidy margins
- Practice was tentatively upheld by the AB without completing analysis.

- In CFSP, Commerce also considered as a subsidy various Chinese Government policies, such as providing preferential financing for the paper industry through a ten year plan and other mechanisms.
- Specificity was a key issue under dispute.

Safeguards and Market Disruption

- Use of safeguards under GATT Article XIX and Safeguards Agreement likely never fully legal under AB standards
- How can increased imports be a result of “unforeseen developments” resulting from tariff reductions?
- Very difficult to isolate injury resulting from imports
- Are safeguards a two year free ride (pending DSU action)?

- High injury standard is difficult to meet
- Injury from other factors cannot be attributed to imports
- Ultimately, compensation will be required
- Positive dumping margins usually are found by investigating authorities, although administrative costs for determination are high.

Why do most WTO members and Domestic Industries prefer AD actions?

- No compensation requirements
- AD duties don't have to be temporary; Sunset Reviews often leave AD orders in place
- In U.S., investigating authorities and president have less discretion to deny AD/CVD relief to interested parties
- Effective judicial review possible

Market Disruption

- Special safeguards available against China (but not Vietnam)
- “Market disruption” standard easier to demonstrate than serious injury
- Bush Administration refused four times to provide MD relief
- First case (tires) now pending before Obama Administration

AD and Good Faith

- Some (including former Amb. Zoellick) have argued that AD actions should not be used as substitute for safeguards actions
- Falsely created dumping margins suggest unfair trade practice that does not really exist
- AB has made it difficult to use safeguards, thereby encouraging use of AD actions