



U.S. Antidumping and Countervailing Duty Proceedings:
Major Procedural and Substantive Issues Confronting Vietnamese
Exporters

Presentation to the Vietnam Chamber of Commerce
and Industry

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Procedural Safeguards in U.S.: Court Appeals

- In the U.S., DOC determinations are all reviewable by the U.S. Court of International Trade
- Access to the Court is available to any interested party that is also a party to the underlying proceeding (i.e. that has entered a notice of appearance)
- Only final determinations can be appealed
- The standard of review is whether or not the determination is “supported by substantial evidence on the record” and otherwise in “accordance with U.S. law
- Court gives deference to DOC in certain areas of DOC expertise, but applies a standard of whether or not the legal interpretation is reasonable

- Steps in court appeal:
 - Filing of summons
 - Filing of complaint
 - Scheduling order
 - Filing of DOC record
 - Motions (stays, consolidation, etc.)/Motions for Summary Judgment on the Agency Record
 - Oral argument before the court
 - Court issues decision with “remand” to DOC if court overturns DOC decision
 - Remand determination
 - Comments on remand determination
 - Final court decision

- Frequently, multiple remands are required before DOC agrees to implement the directions of the court (first remand is with general directions, while second remand is with specific instructions)
- DOC may issue remand determination “under protest” to move case on to next phase, appeal to the Court of Appeal for the Federal Circuit
- Losing party at the U.S. Court of International Trade (CIT) may appeal to the Court of Appeals for the Federal Circuit (CAFC)
- All appeals are as a matter of right

- Parties that are not plaintiffs or defendants may become plaintiff-intervenors or defendant-intervenors
- Court decision only applies to those entities which are parties to the litigation and not to all of a certain category of parties (e.g. all respondents)
- Court is not reluctant to overturn DOC: GPX, Amanda Foods
- CIT/CAFC decisions apply retroactively and liquidation of duties is virtually always postponed until the final decision by the courts
- Courts maintain control over process throughout appeal

- CIT/CAFC decisions only address U.S. law issues and not issues arising under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures
- CIT/CAFC litigation is complimentary to WTO litigation, but usually not a substitute
- Advantages: enforcement, retroactive application, clearer standards of review, not dependent on GOV decision to pursue dispute

- WTO Dispute Settlement Understanding (DSU) provides mechanism for enforcement of Member rights and obligations through binding dispute settlement
- Two levels of dispute settlement: (1) panel proceedings; (2) review of panels by the Appellate Body
- Oversight is provided by the Dispute Settlement Body
- Implementation panels and arbitration is provided to enforce panel decisions, with compensation for lost benefits being the penalty for non-compliance
- Panel mandate is to make an “objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements

- Steps in WTO Dispute Settlement Process
 - Request for consultations by complaining party
 - Consultations
 - Request to the DSB for the establishment of a panel
 - Choosing panelists and panel chair (the WTO uses a 3 panelist system)
 - Scheduling
 - First written submissions of the parties
 - Third party submissions
 - First meeting with the panel (parties and third parties)
 - Responses to panel questions
 - Second written submissions of the parties
 - Second meeting with the panel

- Response to second set of panel questions
- Draft descriptive section of the report and comment
- Interim draft of panel report and comment
- Final panel report
- Appeal opportunity
- Appellate Body submissions and hearing
- Appellate Body decision
- Adoption of decision by DSB
- Implementation in reasonable period of time (agreed on by parties, up to 15 months)
- Challenges to implementation and/or establishment of compensation

- Different types of claims have different effects prospectively: (1) as such violations; (2) as applied violations; (3) ongoing and continuing practice violations.
- Panels and the AB can only find violation and provide reasoning for the finding, neither can instruct the Member on how to bring its practice into consistency with its obligations (provides implementing Member with much more flexibility and leads to multiple litigations)
- Decisions often incremental and slow to be implemented
- No monetary incentives for complaining party

- While WTO dispute settlement originally intended as a mechanism to encourage “negotiated” settlement, it has actually become primarily a forum for litigation of rights and obligations
- Has been an effective, albeit slow, mechanism for making trade remedy rules more balanced, including addressing: (1) zeroing; (2) application of facts available; (3) country-wide and separate rates in NME investigations; (4) double counting in CVD/AD NME investigations; (5) treatment of state-owned enterprises in CVD law; and (6) causation and non-attribution in injury investigations.

- Legislative change (e.g. double counting)
- Section 129 of Uruguay Round Act (to change results of particular investigations or reviews)
- Section 123 of Uruguay Round Act (to change methodologies applicable to all investigations or reviews)
- Normally a combination of these actions is required to bring U.S. into conformity with WTO obligation
- Zeroing: Required a 123 proceeding to change methodology applicable to all future investigations and 129 proceeding to change the actual results of the WTO decisions

- Double Counting: Required legislative change to permit adjustment for double counting and then section 129 proceeding to apply double counting adjustment to determinations which had been found to be WTO inconsistent
- Individual determinations found to be WTO inconsistent cannot be changed unless there is a 129 proceeding initiated.
- Methodologies of general application cannot be changed without a 123 proceeding.
- In DS404 (Vietnam Shrimp) the U.S. has not initiated either a 123 or a 129 proceeding

- Zeroing: Required a 123 proceeding to change methodology applicable to all future investigations and 129 proceeding to change the actual results of the WTO decisions

Key Issues for Challenge in Antidumping Proceedings

1. Determining mandatory respondents based on sampling rather than largest export volume
2. Broader consideration of appropriate surrogate countries
3. Use of targeted dumping as a mechanism to reintroduce zeroing into the calculation of the margins of dumping
4. 33% rule for inputs imported from market economy as threshold for replacing surrogate value
5. Failure to apply revocation regulation and establishment of impossible to meet sunset threshold

- Three forums: (1) DOC during investigation and review; (2) U.S. Court of International Trade (CIT); and (3) dispute settlement at the World Trade Organization (WTO)
- Success usually requires participation in all three forums:
 - Creating an adequate factual and legal record before DOC on which to base further appeals
 - Challenging U.S. law issues at the CIT
 - Challenging WTO inconsistencies at the WTO
- Generally, a single forum is inadequate to resolve complex overlapping issues of fact, domestic law, and WTO jurisprudence

Example of Multi-Forum Strategy: Revocation

- Investigations and Reviews:
 - Establish solid basis for surrogate values with uniform approach by all respondent parties and over time
 - Strong challenge to any alternative surrogate values proposed by petitioners by using comparisons
 - To set up CIT appeal, must make arguments during investigation or review to ensure “exhaustion” of administrative remedies (e.g. separate rate and country-wide rate challenge)
 - Pay attention to surrogate values of minor inputs because these may often cause problems (e.g. packing materials in shrimp)
 - Don’t just accept new DOC methodologies, challenge them (e.g. targeted dumping)

Example of Multi-Forum Strategy: Revocation

- U.S. Court of International Trade
 - Eligible to appeal if an interested party and a party to the proceeding being appealed
 - Summons to notify the CIT of intent to appeal within 30 days, complaint specifying issues for appeal, then CIT assigns case and issues a scheduling order
 - Appeal based on the record in the underlying proceeding and the issues raised in that proceeding
 - In shrimp revocation, it was important to challenge basis of separate rate (e.g. Amanda Foods reduced separate rate to zero or de minimis) in consecutive proceedings with a view to having all zero or de minimis margins in sunset review
 - Problem still remained of effect of zeroing on margins in subsequent cases and the country-wide rate

Example of Multi-Forum Strategy: Revocation

- WTO Dispute Settlement
 - Force U.S. to change WTO inconsistent practice and change investigation or review results in implementing WTO decision
 - For revocation, need WTO to find zeroing in reviews WTO inconsistent, country-wide rate WTO inconsistent, and basing sunset review on WTO inconsistent margins of dumping WTO inconsistent
 - These WTO decisions combined with CIT decision in Amanda foods, provide basis for either (1) individual respondents to receive revocation based on absence of dumping or (2) revocation in a revised sunset review
 - WTO dispute settlement is government-to-government, but implementation usually requires participation of company respondents

Roles of Parties to Disputes

- Mandatory (individually investigated) respondents
- Separate Rate respondents
- Trade association (coordination of common issues)
- Government (WTO)

Key CVD Issues to be Addressed

- National and provincial plans and relationship to preferential access to or preferential rates for loans and land
- State-owned entities as public bodies capable of making the required “financial contribution” to constitute a subsidy and to provide inputs at “less than adequate remuneration”
- Double counting under new legislation and WTO DS379