

Catfish, Shrimp, and the WTO: Vietnam Loses Its Innocence

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ABSTRACT

This Article explores the advantages that WTO membership brings to Vietnam in connection with antidumping disputes. In particular, this Article examines the trade relationship between Vietnam and the United States, including disputes over catfish and shrimp, prior to Vietnam's accession to the WTO. The Article concludes that Vietnam's WTO membership and experience with catfish and shrimp will serve exporters well when new trade disputes arise. Vietnamese exporters will better understand their options and will be better equipped to defend themselves in antidumping disputes.

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In 2007, the Socialist Republic of Vietnam became a member of the World Trade Organization (WTO),¹ an event that brought both opportunities and challenges. As a WTO member, Vietnam must ensure that its legal system is consistent with the organization’s regulations,² and other WTO members may challenge Vietnam if its laws and policies are inconsistent with their own rights and obligations under WTO Agreements.³ Vietnam must treat goods and services from other WTO members equally and no less favorably than Vietnamese goods and services; in return, Vietnam is entitled to require other WTO members to accord the same treatment to Vietnamese goods and services.⁴

1. *Member Information: Viet Nam and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm (last visited Oct. 13, 2010).

2. *See Understanding the WTO: The Organization*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Oct. 13, 2010) (emphasizing the commitment to following specific rules and regulations upon accepting WTO membership).

3. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

4. These are the basic requirements of most favored nation treatment and national treatment under the WTO regulations. *See* General Agreement on Trade in Services arts. II, XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (demanding transparency from member nations regarding any measures the nation takes that may affect its involvement, and requiring all members to treat other members no less favorably than other members treat their own services and suppliers); *see generally* General

In 2000, Vietnam and the United States signed a Bilateral Trade Agreement (BTA).⁵ As a result, the export of Vietnamese aquaculture products to the United States increased significantly, and some of these products began to compete with American aquaculture products, most notably catfish and shrimp. Consequently, the Catfish Farmers Association of America (in 2001) and the Southern Shrimp Alliance (in 2004) filed petitions against Vietnamese exporters.⁶ These petitions alleged that Vietnamese catfish and shrimp products were being dumped in the U.S. market.⁷ After investigating the allegations, the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) found that dumping had occurred, causing injury to American catfish and shrimp farmers.⁸ The DOC imposed heavy antidumping duties on Vietnamese catfish and shrimp companies.⁹

American antidumping laws and the processing of the antidumping cases by the DOC and ITC were widely criticized. However, at that time, Vietnam was not yet a member of the WTO. Therefore, Vietnam could not challenge the antidumping decision under WTO regulations. This is no longer the case, however, because Vietnam has joined the WTO. On February 2, 2010, upon request of the Vietnam Association of Seafood Exporters and Producers (VASEP), the Vietnamese government sent a request to the commercial representative of the United States at the WTO and initiated a WTO adjudication procedure with respect to the U.S. antidumping tariffs on Vietnamese frozen shrimp.¹⁰

This Article argues that WTO membership advantages Vietnam in antidumping disputes. Part I provides background on dumping. Part II summarizes BTA regulations that relate to dumping and analyzes the catfish cases and the shrimp cases. Part III studies the challenges to Vietnamese exporters and producers in antidumping

Agreement on Tariffs and Trade 1994 arts. I, III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (enumerating the terms of the agreement and clarifying which provisions it includes).

5. *Chronology of Key Events in U.S.–Viet. Relations*, U.S.–VIETNAM TRADE COUNCIL, <http://www.usvtc.org/us-vietnam/Chronology/Chronology%20of%20US-VN%20Relations%2022May08.pdf> (last modified May 22, 2008).

6. *See infra* Part III.

7. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III.

10. Ngoc Hung, *Vietnam May Beat U.S. on Anti-Dumping Duty Case: VASEP*, SAIGON TIMES, Feb. 9, 2010, <http://english.thesaigontimes.vn/Home/business/vietnam-economy/8769/>; *De xuat kien My ra WTO, thu truong Bo Cong Thuong Le Danh Vinh: “Chung toi da can nhac rat ky”* [Proposition to Start Proceedings Against the U.S. at the WTO, Deputy Minister of the Ministry of Industry and Trade, Le Danh Vinh: “We have thought carefully”], TUOI TRE ONLINE (June 2, 2010), <http://www.tuoi-tre.com.vn/Tianyon/Index.aspx?ArticleID=362850&ChannelID=11>.

disputes. Part IV and Part V analyze WTO antidumping regulations and discuss which parts of WTO antidumping regulations Vietnam may rely upon in future antidumping cases.

I. BACKGROUND ON DUMPING

A. *Definition of Dumping*

The term “dumping” refers to price discrimination in international business transactions.¹¹ A classical analysis defined dumping as “price differentiation in the form of price discrimination.”¹² One form of dumping occurs when an exporter sells goods at a lower price in a foreign country than in its domestic market.¹³ This type of dumping often occurs when the domestic market and the foreign market are geographically isolated or when there is a difference in the demand between these two markets.¹⁴ A second form of dumping involves the sale of goods below the cost of production.¹⁵ This type of dumping occurs when producers sell goods at a price below production cost and make profits later, when they achieve market dominance.¹⁶

Dumping is different from subsidization. Dumping is an activity of the private sector, while subsidies are provided by governments.¹⁷ This difference leads to a distinction between dumping policies and subsidization policies. An exporting company’s government may not be directly involved in antidumping cases. On the other hand, measures dealing with subsidies often involve diplomacy.¹⁸

B. *Classification of Dumping*

Generally, dumping can be classified as sporadic dumping, intermittent dumping, or continuous dumping. Sporadic dumping occurs when exporters sell an overstock in a foreign market at a price below the domestic price in order to maintain a domestic price

11. RICHARD DALE, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER* 1–2 (1980).

12. RAINER M. BIERWAGEN, *GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTIDUMPING LAWS* 8 (1990).

13. GABRIELLE MARCEAU, *ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE TRADE AREAS* 11 (2004).

14. *Id.* at 11–12; MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 398–99 (2d ed. 2006).

15. MARCEAU, *supra* note 13, at 13.

16. MATSUSHITA ET AL., *supra* note 14, at 397–98.

17. John H. Jackson, *Dumping in International Trade: Its Meaning and Context*, in *ANTIDUMPING LAW AND PRACTICE* 1, 3–4 (John H. Jackson & Edwin A. Vermulst eds., 1989).

18. *Id.*

structure.¹⁹ Sporadic dumping often occurs when an exporter sells perishable goods.²⁰ Intermittent dumping occurs “steadily and systematically for a period of limited duration,”²¹ and it may be used when an exporter wants to gain access to a foreign market by setting prices below production costs.²² Continuous dumping occurs when companies produce a large number of items to reach an economy of scale in order to maintain their domestic price structure.²³ Their underlying strategy is to sell their goods in foreign markets at prices below the domestic price to assure overall profits.²⁴

C. Consequences of Dumping

Dumping may benefit exporters, but it causes misallocation of resources in the exporter’s own country.²⁵ Dumping may injure the markets of third-party countries as well as those of the importing market.²⁶ Dumping in the importing market harms competing producers and may cause misallocation of resources.²⁷ Dumping also can cause the loss of market opportunities for producers in the importing market.²⁸ The potential harm extends to producers of alternative goods, producers who use dumped products in their own production process, and manufacturers of components for local production.²⁹ If competing producers from third-party countries export similar products but do not dump, they may suffer injury as well.

On the other hand, dumping may benefit consumers in the importing countries because consumers can buy goods at a lower price.³⁰ However, whether the benefit to consumers in the importing country outweighs, at a macro level, the damages suffered by the importing country’s industries depends on the type of dumping. In sporadic dumping, the benefit to consumers perhaps outweighs the

19. Bart S. Fisher, *The Anti Dumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL’Y INT’L BUS. 85, 88 (1973).

20. See *id.* (describing the relationship between dumping and marginal costs, and defining sporadic dumping as a product of one’s desire to unload overstock to keep its own country’s price structure the same while regarding the good’s marginal cost as zero, thereby increasing the willingness to accept lower prices).

21. JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 31 (1923).

22. Michael Kabik, *Dilemma of Dumping from Nonmarket Economy Countries*, 6 EMORY INT’L L. REV. 339, 348–49 (1992).

23. *Id.* at 349.

24. Fisher, *supra* note 19, at 87.

25. *Id.* at 90.

26. Kabik, *supra* note 22, at 349.

27. *Id.* at 349–50.

28. *Id.* at 350.

29. *Id.* at 349–50.

30. EDWIN VERMULST, *THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY* 2–3 (2005).

injury suffered by producers in the importing country.³¹ In intermittent dumping, the damages to importing producers are potentially greater and more lasting than the benefits to consumers.³² In the case of continuous dumping, the effect is controversial. If related industries in importing countries can adjust themselves, continuous dumping may provide beneficial competition.³³ However, continuous dumping can cause unemployment in importing countries, and this negative effect may outweigh other benefits.³⁴ Generally, dumping is favorable to consumers and importers in the importing country and promotes competition, but dumping can result in predatory discrimination against local producers.³⁵

II. THE UNITED STATES–VIETNAM BILATERAL TRADE AGREEMENT (BTA)

A. *Overview of the United States–Vietnam Trade Relationship and the BTA*

From the end of the Vietnam War until 1994, there was virtually no trade between Vietnam and the United States because of the U.S. embargo of Vietnam.³⁶ In July 1993, international financial organizations, including the International Monetary Fund and the World Bank, resumed activities in Vietnam.³⁷ In February 1994, as a result of the positive attitude of the Clinton Administration, the U.S. trade embargo was lifted.³⁸ However, because of the application of the Jackson–Vanik Amendment to Vietnam, the United States did not grant most favored nation status (MFN status) to Vietnam.³⁹

The lack of MFN status was crucial to Vietnam. It created a trade barrier that impaired the competitiveness of Vietnamese goods in the U.S. market.⁴⁰ In March 1998, in an effort to further

31. Kabik, *supra* note 22, at 351.

32. *Id.*

33. *Id.*

34. Fisher, *supra* note 19, at 91–92.

35. DALE, *supra* note 11, at 40.

36. Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 219, 238 (John S. Odell ed., 2006).

37. *Chronology of Key Events in U.S.–Vietnam Relations*, *supra* note 5, at 1.

38. *Id.* at 2.

39. Yen D. Chu, *The Making of a Quagmire: The Inadequacies of Applying the Jackson–Vanik Amendment to Vietnam’s Transitional Economy*, 35 *COLUM. J. TRANSNAT’L L.* 453, 453–54 (1997).

40. For example, MFN status enabled the average U.S. tariff rates applied on Vietnamese export products to decrease from 40 percent to less than 3 percent. MARK E. MANYIN, *CONG. RESEARCH SERV.*, RL 30416, *THE VIETNAM–U.S. BILATERAL TRADE AGREEMENT 8* (2001), <http://www.usvtc.org/info/crs/CRS-BTA-Dec01.pdf>.

normalize trade relations between the two countries, President Clinton waived the Jackson–Vanik Amendment’s application to Vietnam. This waiver was renewed annually until December 2006, when the United States formally granted Vietnam permanent normal trade relations (PNTR), which replaced MFN status in U.S. trade.⁴¹ The BTA was signed on July 13, 2000 and entered into force on December 10, 2001.⁴² As a result, Vietnam obtained access to the U.S. market under PNTR, and in exchange, Vietnam agreed to reduce trade barriers to goods, grant access to U.S. service companies, and develop domestic laws and regulations to protect intellectual property rights.⁴³ The agreement also guaranteed direct investment and transparency.⁴⁴ The BTA was intended to promote the well being of Vietnam and strengthen U.S. foreign policy.⁴⁵

B. *The Regulation of Antidumping in the BTA*

Antidumping regulations in the BTA were brief. Article 6.4 sets out the only bilateral antidumping provision:

The Parties acknowledge that the elaboration of the market disruption safeguard provisions in this Article is without prejudice to the right of either Party to apply its laws and regulations applicable to trade in textiles and textile products, and its laws and regulations applicable to unfair trade, including antidumping and countervailing duty laws.⁴⁶

The language of Article 6.4 lacks detail and substance on antidumping. Instead, it merely assumes that the domestic antidumping laws of each country will be used where dumping is seen to occur.

Furthermore, some considered the BTA to be an important preparatory step in anticipation of Vietnam joining the WTO.⁴⁷ Although the BTA’s structure is similar to the structure required by the WTO, the BTA does not include a formal dispute settlement mechanism.⁴⁸ A Joint Committee on Development of Economic and

41. *Id.* at 5; *see also* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, § 5003, 112 Stat. 685, 789 (1998) (replacing the term “most-favored-nation” with “normal trade relations” to reflect a nondiscriminatory policy towards trading partners).

42. MANYIN, *supra* note 40, at 1.

43. Davis, *supra* note 36, at 239.

44. MANYIN, *supra* note 40, at 13.

45. Amalia R. Walton, *Catfish Wars: Vietnam’s Fight for Free Trade in the U.S. Court of International Trade*, 13 PAC. RIM L. & POL’Y J. 471, 478 (2004).

46. Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, U.S.–Viet., ch. I, art. 6.4, July 13, 2000, 2000 U.S.T. LEXIS 170 [hereinafter BTA].

47. MANYIN, *supra* note 40, at 7.

48. Davis, *supra* note 36, at 239–40.

Trade Relations between Vietnam and the United States was created to monitor implementation of the BTA and resolve problems that might emerge from the interpretation and implementation of the BTA.⁴⁹

III. DISPUTES BETWEEN THE UNITED STATES AND VIETNAM INVOLVING DUMPING

A. *Catfish Case*

After the normalization of trade relations between the United States and Vietnam, Vietnamese producers began to export significant quantities of catfish to the United States.⁵⁰ The Vietnamese catfish industry was highly competitive in the United States, and within a short time, Vietnam was producing 20 percent of the frozen catfish fillets sold in the United States.⁵¹ The Vietnamese technique of raising catfish in their natural habitat using underwater fish cages has a comparatively low production cost; the operating cost of U.S. catfish farms was about two times higher.⁵² The American catfish farmers ran an aggressive campaign, stating that the Vietnamese product was a “slippery catfish wannabe” and floated “around in Third World rivers nibbling on who knows what.”⁵³ A U.S. congressman asserted that the quality of Vietnamese catfish was not guaranteed because they “came from a place contaminated by so much Agent Orange.”⁵⁴ These comments seemed to have little impact on sales in the United States.⁵⁵ However, in 2002, the American catfish farmers successfully lobbied Congress to pass new legislation that prohibited producers and importers from using the name “catfish” on their products unless the fish was of the Ictaluridae family—a family of fish that lives only in North America.⁵⁶

On June 28, 2002, after its success in label lobbying, the Catfish Farmers Association of America initiated an antidumping petition

49. BTA, *supra* note 46, ch. VII, art. 5.

50. Walton, *supra* note 45, at 479.

51. Editorial, *Harvesting Poverty: The Great Catfish War*, N.Y. TIMES, July 22, 2003, at A18 [hereinafter *Harvesting Poverty*].

52. Walton, *supra* note 45, at 479–81.

53. *Harvesting Poverty*, *supra* note 51.

54. *Id.*

55. Bao Anh Thai, *An Analysis of “Lessons Learned” from “Catfish” and “Shrimp” Anti-Dumping Cases*, BAO LAW FIRM 13 (May 2005), http://www.baolawfirm.com.vn/dmdocuments/an_analysis_of_lessons_learned_from_anti_dumping_case.pdf. The volume of catfish imported from Vietnam in 2002 was about thirty-six million pounds, higher than that of 2001 (twenty-six million pounds). *Id.* Both the value and volume of catfish imported from Vietnam increased in the period between 2000 and 2002. *Id.*

56. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107–171, § 10806, 116 Stat. 134, 526–27 (codified at 21 U.S.C. § 321d (2006)).

with the DOC and the ITC against Vietnamese catfish exporters.⁵⁷ American domestic producers frequently use these antidumping petitions to respond to competition from foreign producers.⁵⁸ Upon receiving an antidumping petition, the DOC must determine whether the petitioned product is being dumped, and the ITC must determine whether the domestic industry has been injured.⁵⁹

In investigating the complaint, the DOC determined that Vietnam is a “nonmarket economy,”⁶⁰ defined as an economy where, *inter alia*, the government substantially influences the means of production, the allocation of resources, and the price and output decisions of companies.⁶¹ On June 17, 2003, the DOC imposed heavy antidumping margins on Vietnamese catfish products.⁶² The margins ranged from 36.84 percent to 52.90 percent for the compulsory respondents to the antidumping investigation, 44.66 percent for producers who responded to the investigation questionnaire, and 63.88 percent for all other Vietnamese catfish producers and exporters.⁶³

In the first administrative review, which occurred in 2006, the DOC imposed a final antidumping margin of 6.81 percent on Vinh Hoan Company, Ltd.⁶⁴ Can Tho Agricultural and Animal Products Import Export Company (CATACO) withdrew its business proprietary information from the record.⁶⁵ As a result, the DOC determined that CATACO had not acted to the best of its ability to comply with a request for information, and CATACO received a separate rate of 80.88 percent.⁶⁶ Other Vietnamese companies that exported catfish to the United States received the industry-wide rate of 63.88 percent.⁶⁷ In the second administrative review, which occurred in 2007, one respondent, QVD Food Company, Ltd. (QVD),

57. *Fact Sheet: Preliminary Determination in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from Vietnam*, DEP'T OF COM., http://www.ita.doc.gov/media/FactSheet/0103/catfish_fs_012703.html (last visited Oct. 13, 2010) [hereinafter *Preliminary Fact Sheet*].

58. Kerrilee E. Kobbeman, *Hook, Line and Sinker: How Congress Swallowed the Domestic Catfish Industry's Narrow Definition of this Ubiquitous Bottomfeeder*, 57 ARK. L. REV. 407, 427–28 (2004).

59. Walton, *supra* note 45, at 485.

60. *Preliminary Fact Sheet*, *supra* note 57.

61. 19 U.S.C. § 1677(18)(B)(iv)–(v) (2006).

62. *Fact Sheet: Final Determination in the Antidumping Duty Investigation of Certain Frozen Fish Fillets from Vietnam*, DEP'T OF COM., http://www.ita.doc.gov/media/FactSheet/0603/catfish_final_061703.html (last visited Oct. 13, 2010) [hereinafter *Final Fact Sheet*].

63. *Id.*

64. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 71 Fed. Reg. 14,170, 14,172 (Dep't of Commerce Mar. 13, 2006).

65. *Id.*

66. *Id.*

67. *Id.*

was assigned an antidumping rate of 21.23 percent.⁶⁸ The rate for CATACO and Vietnam-wide entities remained unchanged.⁶⁹ In the third administrative review, which occurred in 2008, QVD and East Sea Seafoods Joint Venture Co., Ltd. received an antidumping margin of zero.⁷⁰ The rates for CATACO and Vietnam-wide entities remained unchanged.⁷¹ Finally, in the fourth administrative review, which occurred in 2009, QVD, Agifish, and Anvifish were assigned a separate rate of 0.52 percent.⁷² The industry-wide rate remained at 63.88 percent.⁷³

On September 4, 2009, the DOC issued a Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review.⁷⁴ New shippers are companies that sold catfish in the United States during the period of review but were not investigated and consequently were not assessed antidumping duties in the original antidumping decision of the DOC.⁷⁵ The fifth administrative review reduced the antidumping margins applied to QVD and Vinh Hoan to zero.⁷⁶ The review also determined that two new shippers, Samefico and Cadovimex, had not dumped their catfish in the United States.⁷⁷ Agifish and East Sea were assigned a rate of 0.02 percent.⁷⁸ The antidumping rate of Vietnam-wide entities for the fifth review period was preliminarily determined to be 2.11 percent, a significant reduction.⁷⁹ Although still subject to a final decision, this low rate is explicable. Among the twenty exporters and two new shippers under review, six exporters have been assigned separate rates.⁸⁰ The petitioning American catfish companies and organizations⁸¹ withdrew requests for review of thirteen exporters,

68. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 72 Fed. Reg. 13,242, 13,245 (Dep't of Commerce Mar. 12, 2007).

69. *Id.*

70. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 73 Fed. Reg. 47,885, 47,887 (Dep't of Commerce Aug. 11, 2008) (notice of amended results third admin. review).

71. *Id.*

72. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 74 Fed. Reg. 17,816, 17,817 (Dep't of Commerce Apr. 9, 2009).

73. *Id.*

74. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 74 Fed. Reg. 45,805 (Dep't of Commerce Sept. 4, 2009).

75. *See generally id.* (summarizing the case history of the new shipper reviews).

76. *Id.* at 45,810.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 45,805 n.2 ("The Catfish Farmers of America and individual U.S. catfish processors, America's Catch, Consolidated Catfish Companies, LLC dba Country Select Catfish, Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company LLC (Petitioners)').")

and the administrative reviews of these thirteen exporters were cancelled.⁸² On March 17, 2010, the DOC issued the Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, which contained margin calculations substantially similar to those contained in the preliminary results issued on September 4, 2009.⁸³ Both the labeling requirement and the DOC's original decision were widely criticized, even within the United States. Many assert that the decision protects only a specific interest group and overlooks benefits to American consumers.⁸⁴ Furthermore, the decision, which arrived soon after the BTA came into effect, impaired the general feeling of good faith that existed in Vietnam towards the United States. In the words of Senator John McCain:

In fact, of the 2,500 species of catfish on Earth, this amendment allows the FDA to process only a certain type raised in North America—specifically, those that grow in six Southern States. The program's effect is to restrict all catfish imports into our country by requiring they be labeled as something other than catfish, an underhanded way for catfish producers to shut out the competition. With a clever trick of Latin phraseology and without even a ceremonial nod to the vast body of trade laws and practices we rigorously observe, this damaging amendment . . . literally bans Federal officials from processing any and all catfish imports label[ed] as they are—catfish. . . . It patently violates our solemn trade agreement with Vietnam, the very same trade agreement the Senate ratified by a vote of 88 to 12 only 2 months ago. The ink was not dry on that agreement when the catfish lobby and its congressional allies slipped the catfish amendment into a must-pass appropriations bill.⁸⁵

The president of the American Seafood Distributors Association also pointed out the protectionism issue:

Changing the name of Vietnamese catfish to basa should have been sufficient grounds to protect the market name of the domestic catfish producers and thus give them the product differentiation that should have ruled out the need to pile on with a dumping suit as well. The fact that we are here today to perform the alchemy of turning basa back into catfish strikes me and the organization that I lead as nothing short

82. *Id.* at 45,806 & n.4.

83. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 75 Fed. Reg. 12,726, 12,728 (Dep't of Commerce Mar. 17, 2010).

84. See Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L. & BUS. 315, 317 (2005) (describing the contention that the ability of special interest groups to mobilize the federal government to act in their own interest, against the benefit to national consumers and industries, as an example of U.S. constitutional failure).

85. 147 CONG. REC. S13426–27 (daily ed. Dec. 18, 2001) (statement of Sen. McCain).

of a convoluted action to serve only one master. It's protectionism, pure and simple.⁸⁶

B. *Shrimp Case*

Due to cheap labor and progress in shrimp rearing technology (Vietnamese farmers raise shrimp in ponds, while American farmers largely catch shrimp in the sea), Vietnamese shrimp is cheaper than American shrimp; some say that Vietnamese shrimp is also more uniform and better in quality.⁸⁷ From 2000 to 2002, the growth in demand for shrimp in the United States led to a large increase in shrimp imports: in 2002, Americans consumed 1,046 million pounds of shrimp, of which 908 million pounds were imported.⁸⁸ Shrimp prices in the United States decreased significantly, which led to a fall in the incomes of domestic shrimp producers.⁸⁹ American shrimp producers, represented by the Shrimp Trade Action Committee, struggled to protect their profits.⁹⁰ In December 2003, the Shrimp Trade Action Committee brought a DOC dumping action against Vietnam and five other countries.⁹¹ The scope of the antidumping investigation included "certain warm water shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not-deveined, cooked or raw, or otherwise processed in frozen form."⁹² In the final determination of the DOC, the dumping margins levied on Vietnamese shrimp producers and exporters ranged from 4.13 percent to 25.76 percent.⁹³

In the first administrative review, which occurred in 2007, only two Vietnamese companies, Grobest & I-Mei Industrial (Vietnam)

86. *Certain Frozen Fish Fillets from Vietnam: Hearing Before the U.S. Int'l Trade Comm'n*, Inv. No. 731-TA-1012, 147 (2003) (statement of Wally Stevens, president of the American Seafood Distributors Association).

87. *See* Cho, *supra* note 84, at 327 (focusing on the differences between the American and Vietnamese catfish and shrimp, both in production and final product).

88. *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, USITC Pub. 3748, Inv. No. 731-TA-1063-1068, IV-5 (Jan. 2005).

89. *See* Stephanie Showalter, *The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?*, 29 VT. L. REV. 847, 847 (2005) (citing the statistics related to the decrease in shrimp prices in the United States).

90. *See id.* at 847-48 (noting the Shrimp Trade Action Committee's petitioning of the ITC).

91. *Id.* at 848-49.

92. *Fact Sheet: Amended Final Determinations and Issuance of Antidumping Orders: Imports of Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China, and the Socialist Republic of Vietnam*, DEP'T OF COM., http://www.ita.doc.gov/media/FactSheet/0105/shrimp_012605.html (last visited Oct. 13, 2010).

93. *Id.*

Co., Ltd., and Vietnam Fish One Co., Ltd., sent comments on the preliminary results of the first administrative and new shipper review.⁹⁴ As a result of the first administrative review, these two companies received a final dumping margin of zero.⁹⁵ Following the review, the dumping margins applied to other Vietnamese exporters remained the same as those fixed in the final determination of the DOC in the initial investigation.⁹⁶

In the second administrative review, which occurred in 2008, many Vietnamese exporters submitted review requests.⁹⁷ However, because the DOC did not have the resources to examine all of them, only two exporters (Minh Phu and Camimex) were selected as mandatory respondents.⁹⁸ The twenty-six export companies that timely responded to requests made by the DOC were considered to be cooperative separate-rate respondents.⁹⁹ In the final results of the second administrative review, the two mandatory respondents, Camimex and Minh Phu, were assigned final dumping margins of zero and 0.01 percent respectively.¹⁰⁰ Most of the cooperative separate-rate respondents received final dumping margins of 4.57 percent.¹⁰¹ The industry-wide rate for other export companies was 25.76 percent.¹⁰² The third administrative review, which took place in 2009, resembled the second administrative review. The antidumping margin for cooperative separate-rate respondents was 4.57 percent and the industry-wide rate was 25.76 percent.¹⁰³ On March 15, 2010, the DOC issued the Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review.¹⁰⁴ According to these preliminary results, a separate rate of 3.27 percent was applied to Minh Phu Group, and the antidumping margin applied to Nha Trang Seafoods was 2.50 percent.¹⁰⁵ Other separate-rate respondents received antidumping margins of 2.89 percent.¹⁰⁶ The industry-wide rate remained

94. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 72 Fed. Reg. 52,052, 52,053 (Dep't of Commerce Sept. 12, 2007).

95. *Id.* at 52,054.

96. *Id.*

97. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 73 Fed. Reg. 52,273, 52,274 (Dep't of Commerce Sept. 9, 2008) (final results and partial rescission).

98. *Id.*

99. *Id.*

100. *Id.* at 52,275.

101. *Id.*

102. *Id.*

103. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 74 Fed. Reg. 53,701, 53,702 (Dep't of Commerce Oct. 20, 2009) (amended final results).

104. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 12,206 (Dep't of Commerce Mar. 15, 2010).

105. *Id.* at 12,215.

106. *Id.*

unchanged.¹⁰⁷ The government of Vietnam alleged that relevant U.S. laws and decisions of the DOC in the shrimp case were inconsistent with WTO regulations, especially the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement).¹⁰⁸ On April 7, 2010, Vietnam requested the establishment of a WTO dispute settlement panel.¹⁰⁹

IV. CHALLENGES TO VIETNAMESE EXPORTERS IN ANTIDUMPING CASES

A. *Reasons Peculiar to Vietnamese Exporters and Producers*

In recent years, and due to the *doi moi* (opening and reformation) policy, Vietnam has achieved success. Vietnam's work force is better trained, the production of Vietnamese industry is more streamlined, and Vietnamese companies have more experience in marketing their products.¹¹⁰ Vietnamese exports such as rice, coffee, shrimp, and garments have established a firm position in foreign markets.¹¹¹ However, one reason why Vietnamese products face heavy antidumping margins is that Vietnamese exporters possess limited knowledge and experience in dealing with antidumping laws. Vietnamese exporters have shown ignorance in antidumping cases. First, Vietnamese exporters have not been active in researching and gathering information in antidumping investigations.¹¹² Second, when the antidumping cases arose, many companies relied heavily on the government and the Vietnamese Ministry of Commerce (now the Ministry of Industry and Trade) because they considered the issue to be a diplomatic matter rather than an economic matter.¹¹³ Many were and are unaware of how to prevent, mitigate, or respond to antidumping investigations.¹¹⁴ Third, Vietnamese companies have not cooperated with each other and with professional associations to strengthen their ability to deal effectively with antidumping petitions from foreign companies.¹¹⁵ Fourth, many Vietnamese exporters do

107. *Id.*

108. Request for Establishment of a Panel by Viet Nam, *United States—Antidumping Measures on Certain Shrimp from Vietnam*, WT/DS404/5 (Apr. 9, 2010).

109. *Id.*

110. See generally BRIAN VAN ARKADIE & RAYMOND MALLON, VIETNAM: A TRANSITION TIGER? (2003) (providing an overview of *doi moi* and its economic success).

111. *Id.* at 181–86.

112. CUC QUAN LY CANH TRANH—BO THUONG MAI VIET NAM [DEPARTMENT OF COMPETITION MANAGEMENT—VIETNAMESE MINISTRY OF TRADE], CHU DONG UNG PHO VOI CAC VU KIEN CHONG BAN PHA GIA TRONG THUONG MAI QUOC TE [ACTIVELY DEALING WITH ANTIDUMPING PROCEEDINGS IN INTERNATIONAL TRADE] 146 (2006) [hereinafter VIETNAMESE MINISTRY OF TRADE].

113. *Id.*

114. *Id.*

115. *Id.*

not understand the importance of the onshore investigation and fail to take advantage of it.¹¹⁶

Moreover, the accounting systems of many Vietnamese exporters are inadequate and insufficient. Few Vietnamese companies have either audited reports or an efficient accounting system that meets even the Vietnamese accounting requirements, and few of these audited reports meet international accounting standards.¹¹⁷ Antidumping authorities in importing countries allege that the accounting systems of Vietnamese exporters are unclear and inadequate; consequently, the authorities do not accept evidence provided by Vietnamese exporters and instead use other available information, which may be unfavorable to the Vietnamese companies.¹¹⁸

In addition, the amount of time allowed for antidumping investigations is very short.¹¹⁹ This restriction is intended to ensure that investigating authorities do not prolong antidumping cases and request unnecessary and complicated information that may impair international trade activities.¹²⁰ However, this time restriction substantially disadvantages exporters from developing economies. Exporting companies must provide very complicated information in a short time and in unfamiliar formats.¹²¹ In fact, Vietnamese exporters often request extra time to complete questionnaires and return answers to antidumping authorities, and these requests frequently occur within the last days of the extra time allotted.¹²² Failure to answer the questionnaires and provide data in time results in the rejection of evidence, and exporters lose the chance to protect themselves from tariffs.¹²³

The catfish case was Vietnam's first antidumping case in the United States.¹²⁴ Catfish exporters had to gain knowledge about U.S. antidumping laws quickly and had to prepare to deal with technical issues during the antidumping investigations.¹²⁵ In fact, the Vietnamese Association of Seafood Exporters and Producers asked the DOC to extend the due date for nearly all exporters.¹²⁶ In the end, the DOC concluded that only eleven Vietnamese catfish companies provided sufficient data for the investigation, and it

116. *Id.* at 152.

117. *Id.* at 147.

118. *Id.* at 147.

119. *Id.* at 148–49.

120. *Id.* at 149.

121. *Id.*

122. *Id.* at 150.

123. *Id.* at 150–51.

124. Thai, *supra* note 55, at 15.

125. *Id.*

126. *Id.* at 15–16.

determined separate dumping margins for only those companies.¹²⁷ Other companies were regarded as having failed to meet the requirements of the antidumping investigation and had to bear the more burdensome Vietnam-wide rates.¹²⁸

Vietnamese exporters still struggle to answer antidumping questionnaires and to keep proper records that can be used as evidence in antidumping investigations.¹²⁹ For example, many Vietnamese exporters negotiated contracts with foreign partners by e-mail and deleted the e-mails after the contracts were completed.¹³⁰ As a result, these companies could not provide suitable evidence that they had independently negotiated international sale contracts without assistance from the Vietnamese government.¹³¹ In many cases, information was not kept in the required manner. For example, antidumping questionnaires often require hourly wages of employees, but employees may be paid by the piece and not by the hour.¹³² Many Vietnamese exporters found it difficult to understand the questionnaires because they are complicated and in English, require large amounts of detail, and discuss technical issues.¹³³ These limitations will reemerge if other antidumping cases are filed.

B. Policy Differences for “Nonmarket Economies”

U.S. antidumping laws distinguish countries with a market economy (MEs) from countries with a nonmarket economy (NMEs). Under U.S. antidumping laws, an NME is a “foreign country that the administering authority determines does not operate 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.”¹³⁴ To determine whether a country operates as an NME, antidumping authorities must consider:

- (i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
- (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
- (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
- (iv) the extent of government ownership or control of the means of production;

127. *Id.* at 16.

128. *Final Fact Sheet*, *supra* note 62.

129. VIETNAMESE MINISTRY OF TRADE, *supra* note 112, at 151.

130. *Id.* at 152.

131. *Id.* at 151.

132. *Id.* at 148.

133. *Id.* at 151.

134. 19 U.S.C. § 1677(18)(A) (2006).

- (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises;
- (vi) and such other factors as the administering authority considers appropriate.¹³⁵

These factors have been criticized.¹³⁶ There is no methodology to reach a conclusion with respect to each factor, there is no guidance on the importance of each factor, there are no quantitative criteria, and the last factor is vague.¹³⁷ Therefore, the factors confer unreasonably high discretion on antidumping authorities. Based on these factors, the DOC could determine that a country is or is not an NME by interpreting the same source data in different ways.¹³⁸ For example, consider the DOC's decision that Vietnam is an NME:

The Vietnamese currency, the dong, is not fully convertible, with significant restrictions on its use, transfer, and exchange rate. Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalized for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatization of SOEs and the state-dominated banking sector has been slow, thereby excluding the private sector from access to resources and insulating the state sector from competition. Finally, private land ownership is not allowed and the government is not initiating a land privatization program.¹³⁹

U.S. antidumping laws treat MEs and NMEs differently. In a typical antidumping case applied to an exporter from an ME, the DOC determines dumping by trying to determine whether a foreign exporter sells products to the United States at a price that is less than fair value.¹⁴⁰ The DOC compares the price of the imported goods to the price of like products in the exporter's home market.¹⁴¹ If this comparison cannot be made because there are no sales or offers for sale of like products in the exporter's domestic market, the DOC compares the price of the imported goods to the constructed value or the price of like products sold to a third country.¹⁴² If the price of the

135. *Id.*

136. See Joshua Startup, Note, *From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of "Free Trade" as a Non-Market Economy*, 90 IOWA L. REV. 1963 (2005) (discussing the view that the "such other factors" provision is needlessly vague).

137. MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 49 (1999).

138. See Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 EMORY INT'L L. REV. 593, 637 (1996) (noting that the vagueness of the statute leads to inconsistent determinations).

139. DEPT OF COMMERCE, PUB. DOC. NO. A-552-801, *ANTIDUMPING DUTY INVESTIGATION OF CERTAIN FROZEN FISH FILLETS FROM THE SOCIALIST REPUBLIC OF VIETNAM—DETERMINATION OF MARKET ECONOMY STATUS 2* (2002).

140. 19 U.S.C. § 1673(1) (2006).

141. *Id.* § 1677b(a)(1).

142. *Id.*

goods imported into the United States is lower than the compared price, dumping has occurred, and if evidence is discovered of material injury or threat of material injury to a U.S. domestic industry, antidumping measures will be imposed to offset the difference and to protect American producers.¹⁴³ However, if an exporter's country is considered to be an NME, U.S. law deems prices and production costs to be unreliable.¹⁴⁴ Depending on the adequacy of available information, the DOC can determine the normal value of the investigated product based on the price of a like product in the importing country,¹⁴⁵ or the DOC can determine the constructed value.¹⁴⁶ The DOC may also substitute the prices of an ME at the same perceived level of development as the NME.¹⁴⁷ This is usually called the "surrogate country approach."¹⁴⁸ The use of different methods for MEs and NMEs is widely criticized. First, in reality, there are no pure market economies.¹⁴⁹ Second, it is unfair to differentiate between market economies and nonmarket economies for the purpose of antidumping regulations: a slight difference between the methods used to calculate dumping margins can prevent NME exporters from exporting to the United States because of high dumping duties.¹⁵⁰ Third, the regulations that relate to NMEs are vague,¹⁵¹ which gives antidumping authorities wide discretion. The determination of whether a country is an ME or an NME largely depends on interpretations made by the DOC.¹⁵²

Fourth, the determination of a surrogate country is complicated and almost never exact because MEs and NMEs are inherently different from each other. Although the notion of a surrogate country

143. Charlene Barshefsky, *Non-Market Economies in Transition and the US Antidumping Law: Remarks on the Need for Reevaluation*, 8 B.U. INT'L L.J. 373, 374 (1990).

144. Startup, *supra* note 136, at 1972.

145. 19 U.S.C. § 1677b(a)(1).

146. *Id.* § 1677b(c)(1).

147. Barshefsky, *supra* note 143, at 374–75.

148. Kabik, *supra* note 22, at 361–63.

149. See William Alford, *When Is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other 'Nonmarket Economy' Nations*, 61 S. CAL. L. REV. 79, 132 (1987) ("[E]conomic principles, whether those of nations classified as having market or nonmarket economies, are not unassailable and immutable rules of science that dictate particular actions, but human constructs that can be manipulated.").

150. VIETNAMESE MINISTRY OF TRADE, *supra* note 112, at 123.

151. See 19 U.S.C. § 1677(18)(A) (defining an NME as "any foreign country that the administering authority determines does not operate 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"); Startup, *supra* note 136, at 1971 ("Critics argue that, while the current version of the statute offers more guidance on the definition of an NME, it still grants the government 'wide discretion . . . to determine what is [an NME] and what surrogates can be used' to determine a fair value price.").

152. VIETNAMESE MINISTRY OF TRADE, *supra* note 112, at 125–26.

sounds plausible, the surrogate countries and the exporting countries, in fact and in practice, are often not truly comparable.¹⁵³ Therefore, it is impossible to determine an accurate price substitute for the purpose of antidumping investigations.¹⁵⁴

Fifth, the surrogate country approach is totally unpredictable. For a producer, the price-setting method is both unknown and unforeseeable: there is no benchmark for NME producers to calculate export prices to avoid dumping.¹⁵⁵ Moreover, the producers of like products in a surrogate country often compete with producers and exporters in the exporting country.¹⁵⁶ Therefore, producers or exporters in a surrogate country are often unwilling to provide relevant data for antidumping investigations, or they may provide skewed information that disadvantages the exporter from the NME.¹⁵⁷ The Vietnamese catfish case, whose scenario seems to repeat in the shrimp case,¹⁵⁸ provides evidence in support of the conclusion that the use of a surrogate country is flawed. In the catfish case, some accused the DOC of abusing its discretion in the way it used the surrogate method to apply a high dumping margin to Vietnamese exporters.¹⁵⁹ The DOC concluded that the data available to determine product prices and production costs in Vietnam was likely to be unreliable.¹⁶⁰ As a result, the DOC used data from Bangladesh to attempt to fix a normal value for Vietnamese products because Bangladesh supposedly has a level of economic development similar to that of Vietnam.¹⁶¹

However, the DOC's computation of a surrogate value contained many shortcomings. First, unlike their counterparts in Vietnam, two Bangladesh shrimp companies used by the DOC did not raise their own shrimp.¹⁶² Second, the DOC's data was comprised entirely of information that the Bangladeshi companies provided voluntarily.¹⁶³ Because much of the information necessary for the investigation was not available from Bangladesh companies, the DOC also used data from Indian companies.¹⁶⁴

153. Kabik, *supra* note 22, at 365 n.90.

154. VIETNAMESE MINISTRY OF TRADE, *supra* note 112, at 127.

155. *Id.* at 366.

156. *Id.* at 155.

157. *Id.* at 127.

158. Startup, *supra* note 136, at 1983.

159. See, e.g., *id.* at 1978–79 (claiming that the process “effectively ‘neuters’ the NME’s comparative advantage” (quoting Wang, *supra* note 138, at 621)).

160. Cho, *supra* note 84, at 331.

161. Startup, *supra* note 136, at 1977.

162. Cho, *supra* note 84, at 331.

163. See Startup, *supra* note 136, at 1973 & n.67 (citing Alford, *supra* note 149, at 94) (noting that the surrogate selection process requires the DOC to rely on the cooperation of foreign companies, often competitors of parties to the case).

164. Cho, *supra* note 84, at 331–32.

C. *The Protectionist Characteristic of U.S. Policy*

In theory, the purpose of an antidumping law is to protect domestic companies from unfair competition by foreign exporters. However, U.S. antidumping law appears to be driven by domestic special interest groups. These special interest groups are often protected from competition while the DOC ignores the benefits that both American consumers and other American companies receive from foreign imports.¹⁶⁵

In the catfish and shrimp cases, the Legislative and Executive Branches were both called upon to protect the benefits of American catfish and shrimp farmers.¹⁶⁶ In terms of legislative power, antidumping laws seem reasonable when used against predatory or systematic dumping. However, if foreign exporters are small businesses, antidumping measures are a means of protectionism¹⁶⁷ and undermine the accepted economic rule of comparative advantage.¹⁶⁸

In terms of executive power, the way the ITC dealt with the catfish case is inconsistent with the labeling policy that Congress previously adopted. Under the pressure of American catfish interest groups and with inadequate scientific evidence, Congress promulgated new legislation to prevent Vietnamese exporters from labeling their product as “catfish.”¹⁶⁹ For labeling purposes, Vietnamese catfish were considered different from catfish raised in the United States and had to be labeled with a Vietnamese name, *tra* or *basa*.¹⁷⁰ Subsequently, the ITC ignored this distinction (previously considered crucial to American producers) and considered Vietnamese catfish a “like product” to American catfish.¹⁷¹

165. N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 FOREIGN AFF. 107, 107 (2005).

166. Cho, *supra* note 84, at 317.

167. *See id.* at 325 (arguing that protectionism is the only explanation for invoking antidumping laws against small businesses as these exporters cannot implement international predatory pricing).

168. *Id.* at 326.

169. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10806, 116 Stat. 134, 526-27 (2002) (limiting the use of the term “catfish” to fish within the Ictaluridae family); Startup, *supra* note 136, at 1974 (noting that Congress promulgated this legislation “despite the fact that the Food and Drug Administration, which has jurisdiction over food labeling, found no basis for this distinction”).

170. Startup, *supra* note 136, at 1974.

171. Kara L. Petteway, *Free Trade vs. Protectionism: The Case of Catfish in Context*, 30 N.C. J. INT'L L. & COM. REG. 473, 477 (2004).

D. *The Lack of an International Mechanism to
Resolve Dumping Cases*

The decisions of the U.S. antidumping authorities in the catfish and shrimp cases, which adversely affected Vietnamese producers and exporters,¹⁷² were conclusive. At that time, Vietnam was not a member of the WTO; therefore, Vietnamese producers could not require the Vietnamese government to resort to the WTO dispute resolution mechanism to challenge the U.S. antidumping decisions.¹⁷³

V. WTO REGULATIONS ON ANTIDUMPING

Governments use antidumping laws to protect domestic industries from imported foreign goods.¹⁷⁴ Antidumping is a frequently used remedy.¹⁷⁵ As a result of member commitments to the WTO, normal import tariffs have gradually been lifted and provide a less effective means to protect domestic goods.¹⁷⁶ Antidumping remedies provide an alternative method of protecting domestic producers. Antidumping is more sophisticated but no less effective than tariffs, as shown by the sizeable impact of antidumping laws on Vietnamese aquaculture producers. Domestic antidumping remedies may injure foreign exporters and become barriers to trade. The WTO has provisions that regulate members' antidumping remedies and balance the benefits between domestic and foreign producers. These provisions include Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Antidumping Agreement.¹⁷⁷ WTO regulations permit certain types of antidumping actions, but antidumping duties may be used only if

172. See *supra* Part III.

173. Walton, *supra* note 45, at 472.

174. MATSUSHITA ET AL., *supra* note 14, at 401.

175. JAMES P. DURLING & MATTHEW R. NICELY, UNDERSTANDING THE WTO ANTIDUMPING AGREEMENT: NEGOTIATING HISTORY AND SUBSEQUENT INTERPRETATION 2 (2002); MICHAEL J. TREBICOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 252 (3d ed. 2005).

176. For example, as part of its WTO commitments, Vietnam has to implement import tariff reduction within five to seven years of its accession into the WTO. Report of the Working Party on the Accessions of Vietnam, *Schedule CLX—Viet Nam: Part 1—Schedule of Concessions and Commitments on Goods*, WT/ACC/VNM/48/Add.1 (Oct. 27, 2006); Runckel & Associates, *What Impact Vietnam's New WTO Membership Will Have and What Vietnam Has Committed*, BUSINESS-IN-ASIA.COM, http://www.business-in-asia.com/wto_vietnam_impacts.html (last visited Oct. 13, 2010).

177. GATT 1994 art. VI; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement].

dumping actions have already caused or threatened to cause material injury to a domestic industry.¹⁷⁸ In addition, antidumping duties must not exceed the dumping margin, which is normally determined by the difference between the prices of goods in the exporting country and the prices of goods in the importing country.¹⁷⁹

A. *Determination of Whether Dumping Has Occurred*

Dumping occurs when “products of one country are introduced into the commerce of another country at less than the normal value of the products.”¹⁸⁰ Article 2 of the Antidumping Agreement provides that:

[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.¹⁸¹

The normal value and the export price must be compared fairly,¹⁸² which means that the comparison must be made “at the same level of trade” and, if possible, with regard to transactions made at nearly the same time.¹⁸³ If there is evidence that the export price does not reflect the market price of the product because the exporter and the importer are dependent on one another, the export price may be determined based on the price at which the product is first resold to an independent party.¹⁸⁴

To determine the normal value, sales transactions are required to meet four conditions.¹⁸⁵ First, the sale must be made in the “ordinary course of trade.”¹⁸⁶ The Antidumping Agreement does not define “ordinary course of trade”; however, the Appellate Body ruled that “[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal

178. MICHAEL PRYLES ET AL., INTERNATIONAL TRADE LAW COMMENTARY AND MATERIALS 969 (2d ed. 2004).

179. *Id.*

180. GATT 1994 art. VI.1.

181. Antidumping Agreement art. 2.1.

182. Panel Report, *Egypt—Definitive Antidumping Measures on Steel Rebar from Turkey*, ¶ 7.335, WT/DS221/R (Aug. 8, 2002).

183. Antidumping Agreement art. 2.4; MATSUSHITA ET AL., *supra* note 14, at 407.

184. Antidumping Agreement art. 2.3.

185. *See id.* art. 2.1 (determining if there have been sales below the normal value in the importing country by comparing sales (1) in the ordinary course of trade (2) of a like product (3) “destined for consumption in the exporting country” (4) to a comparable price in the importing country).

186. *Id.*

for sales of the foreign like product.”¹⁸⁷ If the product is sold in the exporting country at a price below the production cost, that price cannot be used to determine the dumping margin if antidumping authorities determine that “such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.”¹⁸⁸ Second, goods produced in the importing country and goods produced in the exporting countries must be like products.¹⁸⁹ The Antidumping Agreement provides that:

Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.¹⁹⁰

The definition of a “like product” has not been discussed in any antidumping case; however, in other WTO contexts, the Appellate Body holds that there are no general rules to determine whether two products are alike, and this issue must be decided on a case-by-case basis.¹⁹¹

Third, the goods must be “destined for consumption in the exporting country.”¹⁹² Fourth, the price must be comparable.¹⁹³ The dumping margins must be determined, first, from the difference between the export price and the price of the like product sold in the exporting country.¹⁹⁴ If like products are not sold in the exporting country, the dumping margins may be determined based on the difference between the prices of the product in the market to which it is exported and the price of the same or like products exported to an appropriate third country.¹⁹⁵ Alternatively, the dumping margin may be determined by comparison to a price constructed from the cost of production in the exporting country “plus a reasonable amount to cover administrative costs, selling costs, general costs,” and profits.¹⁹⁶

187. Appellate Body Report, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 139, WT/DS184/AB/R (July 24, 2001) (emphasis omitted).

188. See Antidumping Agreement art. 2.2.1 (noting that such sales may be treated as “not being in the ordinary course of trade” and the price “may be disregarded in determining normal value”).

189. *Id.* art. 2.1.

190. *Id.* art. 2.6.

191. MATSUSHITA ET AL., *supra* note 14, at 408.

192. Antidumping Agreement art. 2.1.

193. See *id.* (“[A] product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price . . . when destined for consumption in the exporting country.”).

194. *Id.*

195. *Id.* art. 2.2.

196. *Id.*

This constructed value is calculated from information provided by “the exporter or producer under investigation.”¹⁹⁷ If the antidumping authorities cannot determine the constructed value on that basis, the amounts may be determined from:

(i) the actual amounts incurred and realized by the exporter or producer [under investigation] in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products [of any] of the same general category in the domestic market of the country of origin.¹⁹⁸

The weighted average must be determined from data obtained from more than one exporter or producer.¹⁹⁹ The dumping margins may be determined by comparing the normal value established on a weighted average basis to the “weighted average of all comparable export transactions.”²⁰⁰ The dumping margins may also be fixed by comparing the normal value to the “export prices on a transaction-to-transaction basis.”²⁰¹ However, antidumping authorities may disallow use of the weighted average and use the price of individual export transactions to make a comparison if they have appropriate evidence of “a pattern of export prices which differ[s] significantly among different purchasers, regions or time periods.”²⁰² In addition, the dumping margins must be determined for the product under investigation as a whole, rather than for certain types of the product.²⁰³

If the exporting country is a nonmarket economy, Article VI of the GATT provides that:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability . . . and in such cases importing contracting parties may find it necessary to take into account the

197. *Id.* art. 2.2.1.1.

198. *Id.* art. 2.2.2(i)–(iii).

199. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 74, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *European Communities*].

200. Antidumping Agreement art. 2.4.2.

201. *Id.*

202. *Id.*

203. *European Communities*, *supra* note 199, ¶ 53.

possibility that a strict comparison with domestic prices in such a country may not always be appropriate.²⁰⁴

The Antidumping Agreement fails to further explain antidumping procedure for nonmarket economies. As a result, domestic antidumping authorities can freely choose to use the constructed value method, as stipulated under the Antidumping Agreement, or another method, such as the surrogate country method.²⁰⁵

B. *Determination of Injury*

A dumping action results in antidumping duties if it “causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.”²⁰⁶ Although “material injury” is not defined,²⁰⁷ the standard to prove material injury in antidumping cases is not as high as the standard to prove serious injury in the Agreement on Safeguards.²⁰⁸ A finding of material injury requires evidence of the volume of the dumped product and its effect on prices in the importing market for like products, as well as the effect of the dumped “imports on domestic producers of like products.”²⁰⁹

When determining the volume of a dumped import, antidumping authorities must assess whether there is a significant increase (absolute increase or relative increase in comparison with the production or consumption in the importing country) in the volume of the dumped products.²¹⁰ With respect to the price, investigating authorities must determine whether the dumped product undercuts or depresses the prices of like products in the importing country or prevents the domestic price from increasing.²¹¹ With regard to the effect of the dumped products on the industry of the importing country, the antidumping authorities must evaluate:

all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash

204. General Agreement on Tariffs and Trade, Annex I, art. VI.1.2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

205. JUDITH CZAKO ET AL., WORLD TRADE ORGANIZATION, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS 35 (2003).

206. GATT 1994 art. VI.1.

207. MATSUSHITA ET AL., *supra* note 14, at 418.

208. Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 124, WT/DS177/AB/R (May 1, 2001).

209. Antidumping Agreement art. 3.1.

210. *Id.* art. 3.2.

211. *Id.*

flow, inventories, employment, wages, growth, ability to raise capital or investments.²¹²

When determining injury, domestic antidumping authorities must evaluate all of the factors listed above.²¹³ If an antidumping investigation assesses the activities of more than one exporting country, the antidumping authorities may evaluate the impact of all imports from all of the investigated countries, given that certain specified conditions are met.²¹⁴ Moreover, antidumping measures require a finding, based on all available evidence, that the dumping activities cause the injury to the domestic industry.²¹⁵ The antidumping authorities must also examine the possibility that factors other than dumped imports cause injury to the domestic industry, and the injury caused by these other factors must be separated from the injury caused by the dumped imports.²¹⁶

When determining whether there is a threat of material injury, as opposed to an actual material injury, antidumping authorities must base their conclusions on comprehensive factual evidence rather than “allegation, conjecture or remote possibility.”²¹⁷ The threat must be foreseeable and imminent.²¹⁸ There are several types of legitimate factual evidence:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

212. *Id.* art. 3.4.

213. Appellate Body Report, *Thailand—Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 128, WT/DS122/AB/R (Mar. 12, 2001).

214. Antidumping Agreement art. 3.3.

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

Id.

215. *Id.* art. 3.5.

216. *Id.*

217. *Id.* art. 3.7.

218. *Id.*

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.²¹⁹

The antidumping measures in cases involving threat of injury to a domestic industry must “be considered and decided with special care.”²²⁰

C. Initiation of Investigation

A domestic industry may initiate an antidumping investigation by a written application.²²¹ The application must show evidence of dumping, injury to domestic industry, and causation between the dumping and injury.²²² It requires evidence of dumping, but it is not necessary to include analysis of that evidence.²²³ An investigation is initiated only if the application “has been made by or on behalf of the domestic industry.”²²⁴ When conducting the investigation, evidence of dumping and injury must be considered simultaneously.²²⁵ If antidumping authorities judge that the evidence of either the dumping or injury is insufficient, the investigation must be terminated.²²⁶ If antidumping authorities have evidence to “determine that the margin of dumping is *de minimis*” or that the quantity of dumped goods or the injury is insignificant, then the investigation must be terminated immediately.²²⁷ An investigation must normally be concluded within one year from its initiation and must not exceed eighteen months.²²⁸ Antidumping authorities must notify the interested parties of all essential facts uncovered by the investigation.²²⁹ Interested parties in an antidumping investigation have the right to present evidence in support of their position,²³⁰ and they are allowed access to information provided by other parties.²³¹

219. *Id.* art. 3.7(i)–(iv).

220. *Id.* art. 3.8.

221. *Id.* art. 5.1.

222. *Id.* art. 5.2.

223. Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ¶ 7.76, WT/DS132/R (Jan. 28, 2000) (“Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations.”).

224. Antidumping Agreement art. 5.4.

225. *Id.* art. 5.7.

226. *Id.* art. 5.8.

227. *Id.*

228. *Id.* art. 5.10.

229. *Id.* art. 6.9.

230. *Id.* art. 6.1.

231. *Id.* art. 6.1.2. However, this right is limited by a confidentiality protection. *Id.*

VI. THE EXTENT TO WHICH VIETNAMESE EXPORTERS
MAY BENEFIT FROM THE REGULATIONS AND RULINGS
OF THE WTO ON ANTIDUMPING

In recent years, the number of WTO challenges to antidumping measures has grown significantly.²³² Vietnamese exporters can learn a number of beneficial lessons from these challenges. First, the WTO Appellate Body has expressly ruled that the U.S. antidumping authorities cannot use “zeroing” methodology to determine that foreign companies are dumping goods in American markets.²³³ Zeroing methodology violates Article 2.4 of the Antidumping Agreement, which requires that antidumping authorities fairly compare the export price to the normal value.²³⁴ The European Union has stopped using zeroing methodology.²³⁵ The United States chose to retain the zeroing method, but if the United States continues to do so, relations between the United States and its trading partners will likely be impaired.²³⁶ The zeroing methodology has been found to be inconsistent with Article 9.3 of the Antidumping Agreement, GATT Article VI:2, and Article 11.3 of the Antidumping Agreement.²³⁷

Second, antidumping authorities of WTO member countries may use only those antidumping measures expressly listed in GATT Article VI and in the Antidumping Agreement, which measures include provisional measures, price undertakings, and antidumping duties.²³⁸ As a matter of principle, other antidumping measures are

232. DURLING & NICELY, *supra* note 175, at 3.

233. See Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 212(b), WT/DS244/AB/R (Dec. 15, 2003) (finding use of zeroing inconsistent with the Antidumping Agreement). Briefly, zeroing permits antidumping authorities to consider the difference between the normal value and the export price as zero, even if the former is higher; this practice prevents the overpriced products from offsetting underpriced products for the purpose of a dumping determination. Mankiw & Swagel, *supra* note 165, at 10.

234. *Id.* ¶ 134.

235. Jeffrey W. Spaulding, *Do International Fences Really Make Good Neighbors? The Zeroing Conflict Between Antidumping Law and International Obligations*, 41 NEW ENGL. L. REV. 379, 431 (2006).

236. See *id.* at 433 (noting that although the United States is not obligated to act on rulings by the WTO prohibiting zeroing, “continuing stubbornness” is a “foreboding sign” for trade relations).

237. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 198–99, WT/DS350/AB/R (Feb. 4, 2009).

238. Panel Report, *United States—Anti-dumping Act of 1916: Complaint by the European Communities*, ¶ 6.196, WT/DS136/R (Mar. 31, 2000). Price undertaking involves either raising prices or decreasing exports to remedy the dumping issue. Won-Mog Choi & Henry S. Gao, *Procedural Issues in Anti-Dumping Regulations of China: A Critical Review Under the WTO Rules*, 5 CHINESE J. INT’L L. 663, 673 (2006).

prohibited.²³⁹ Third, the imposition of an enhanced bond requirement, with respect to antidumping duties against shrimp products of a foreign exporter during an administrative review period, has been determined by the Appellate Body of the WTO to be “unreasonable.” An enhanced bond requirement is not allowed under the Ad Note to Article VI: 2 and VI:3 of the GATT unless: (i) there is a “likelihood’ of an increase in the margin of dumping of an exporter as a result of which there will be a significant additional liability to be secured,” and (ii) there is a “likelihood of default’ on the part of importers in respect of whom such additional liability is likely to arise.”²⁴⁰ Vietnam can challenge an enhanced bond requirement if it can demonstrate that neither condition exists. Fourth, WTO regulations on antidumping have been created to give special regard to developing countries:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.²⁴¹

Vietnam may be able to invoke this WTO policy in its negotiations with developed countries to reduce the period during which it is considered to be a nonmarket economy. Fifth, and perhaps most importantly, developing countries such as Vietnam may take advantage of the WTO’s dispute settlement mechanism when a developed country is guilty of discriminatory treatment of imported goods. As one scholar wrote:

First, the option to file a legal complaint allows developing countries to force a developed country to come to the negotiating table and discuss their request. Second, the DSU [Dispute Settlement Understanding] makes international trade law the standard for reaching an agreement. Third, use of shared legal rules facilitates finding allies with related interests to support the case. Fourth, the long-term economic interest in supporting the rules encourages compliance with rulings. Without the framework provided by the dispute settlement process, a developing country is likely to encounter refusal to negotiate by powerful countries, arbitrary standards, limited interest from third countries in their trade problem, and lack of leverage to bargain for concessions.²⁴²

In short, as a WTO member, Vietnam can use the WTO dispute resolution mechanism to protect its export companies in foreign

239. Antidumping Agreement art. 18.1.

240. Appellate Body Report, *United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 258, WT/DS345/AB/R (July 16, 2008) (emphasis omitted).

241. Antidumping Agreement art. 15.

242. Davis, *supra* note 36, at 223.

markets against practices and provisions in antidumping laws that are inconsistent with the GATT or the Antidumping Agreement.

VII. CONCLUSION

As trade relationships with other countries increase, Vietnamese exporters will probably face more antidumping disputes. The Vietnamese catfish and shrimp cases provided the country with valuable experience. Although there are still many challenges for Vietnamese exporters in antidumping cases in foreign markets, Vietnam's WTO membership and its experience in prior disputes will be valuable if future disputes occur. Vietnamese exporters should be more capable of defending themselves in future antidumping disputes, and they will be better informed of their options if unfavorable antidumping remedies are imposed. The ability of the Vietnamese government to challenge a foreign antidumping decision before the WTO is one such valuable option.