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ALERT

Commerce Confirms that Vietnam Remains a Non-Market Economy

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DECISION BENEFITS U.S. INDUSTRIES AND WORKERS WHO DEPEND ON ANTIDUMPING LAWS

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On August 2, 2024, the U.S. Department of Commerce (the Department) determined that the Socialist Republic of Vietnam (Vietnam) continues to function as a non-market economy (NME) and will continue to be treated as such for the purpose of U.S. antidumping duty laws. Many domestic industries and workers across the United States will consider this to be an important victory, as it ensures that the Department will have the necessary legal tools to address distortions in the Vietnamese economy when calculating dumping margins. These tools are critical for U.S. manufacturers trying to maintain a level playing field and support opportunities for growth and fair trade in the United States. Further, this determination cannot be appealed to U.S. courts, which means that Vietnam will remain an NME unless and until it is able to demonstrate that its economy truly operates on market-based principles.

The Department's determination was made pursuant to a request by the Government of Vietnam (GOV) on September 8, 2023, that its NME status be reconsidered. Vietnam was first designated as an NME in 2002 as part of the first antidumping duty case against Vietnam (Frozen Fish Fillets), wherein the Department observed that the Vietnamese economy did not operate on free market principles due to the GOV's heavy intervention. The Department's practice recognizes, consistent with the World Trade Organization's Antidumping Agreement, that where there is significant government intervention in a domestic economy, prices and costs can mask unfair trading practices and therefore cannot be reliably used to calculate accurate dumping margins. Accordingly, an NME designation allows the Department to use third-country market-based prices and costs to evaluate the level of dumping from NME countries. Through its request, the GOV was seeking to have Vietnam graduated to a market economy, thereby eliminating the tools available to the Department to adjust for certain economic distortions when calculating antidumping duties.

As a result, the GOV's request was strongly opposed by a wide range of domestic industries, including catfish, aluminum extrusions, steel, solar, hardwood plywood, wood mouldings, and wind towers, as well as trade organizations and workers' unions, among others. Of the more than 36,000 pages of comments received by the Department, many consisted of information documenting the GOV's expansive control over the Vietnamese economy and highlighting the significant negative impact on domestic manufacturing that would result from treating Vietnam as a market economy.

In conducting its review, the Department examined the economic conditions in Vietnam within the context of six statutory criteria: (1) currency convertible; (2) labor and free bargaining; (3) the presence of foreign investment; (4) government ownership of the means of production; (5) government control over resources and prices; and (6) other factors the Department deems appropriate. The Department found that each of these factors supported the conclusion that Vietnam remains an NME. Specifically:

- The GOV continues to maintain convertibility restrictions on its currency, the dong, and Vietnam's central bank is not an independent entity.
- The GOV does not legally recognize independent unions and its control of labor organizations has compromised the ability of workers to organize and bargain collectively for higher wages. Moreover, the presence of child and forced labor remains a significant concern in Vietnam.
- The GOV maintains excessive restrictions on foreign investment and creates numerous challenges for foreign direct investment, including general market access barriers, red tape, lack of transparency in regulatory processes, and failure to protect intellectual property rights.
- State-owned enterprises (SOE) continue to play a significant role in the Vietnamese economy, with a presence in several sectors, such as manufacturing, without clear justification. Vietnamese SOEs continue to receive preferential treatment from the GOV, and corporate governance over SOEs is poor, with significant government involvement. The GOV also continues to own all land in Vietnam, and restrictions on individual land rights give the GOV considerable control over land use and market outcomes.
- The GOV continues to exert significant controls over resource allocation, with more pervasive price controls than in other Asian countries, significant control over the banking sector, and state-directed planning that provide the basis for the GOV to allocate resources at its own discretion.
- Vietnam continues to suffer from high-level and widespread corruption and a lack of judicial independence.

Based on these factors, the Department determined that extensive and pervasive government involvement in Vietnam's economy persists, which distorts Vietnamese prices and costs and prevents the country from operating on free market principles. Consequently, the Department concluded that Vietnam continues to operate as an NME.

The Department's decision represents a significant victory for domestic industries. Imports from Vietnam have grown significantly over the past decade, increasing from $24.4 billion in 2013 to $112.4 billion in 2023, making Vietnam one of the United States' top import sources. Thus, equipping domestic industries with adequate tools to combat unfair trade is critical to confronting such surges. Moreover, Vietnam has become a major export platform for companies in the People's Republic of China seeking to avoid antidumping duties, countervailing duties, and other tariffs imposed on Chinese imports. If the Department had graduated Vietnam to a market economy and thereby deprived industries in the United States from having important tools to combat unfair trade, Chinese companies would have had increased incentives to ramp up their activities in Vietnam to gain greater access to the U.S. market.

Robust trade remedy laws are critical to U.S. manufacturers and their workers that seek to combat unfairly traded imports. The Department's confirmation that Vietnam is an NME will help keep the playing field level for U.S. manufacturers and workers and will support the growth and prosperity of U.S. industries and their surrounding communities nationwide.

Wiley's International Trade Practice can assist with any questions relating to international trade compliance and litigation. For more information about these issues, please contact one of the attorneys listed on this alert.

Zachary Roten, an International Trade Specialist at Wiley Rein LLP, contributed to this alert.