

**IMPEDIMENTS TO THE VIETNAMESE SEAFOOD INDUSTRY BY THE U.S.
GOVERNMENT AND DOMESTIC INTERESTS**

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For over ten years there has been a plague of trade barriers foisted upon Vietnamese processors of seafood, namely frozen shrimp and frozen fish fillets (tra/basa). These have come in the form of prohibitions to using certain common commercial names in the U.S. market, antidumping actions and new certification and “equivalency” regulations by the United States Department of Agriculture (USDA). The net impact has been a significant decline in exports to the US and a financial drain on Vietnamese producers, exporters and their US customers in defending against these trade barriers, adjusting to new regulations and requirements and setting up protective measures to avoid further deterioration in U.S. market share.

After normalization of trade relations between Vietnam and United States with the signing of the Bilateral Trade Agreement (“BTA”) in 2000, trade between the two countries received a significant boost. Notably, there was a substantial rise in the US exports of seafood within a short time, particularly fish and shrimp. Vietnamese exports began adversely affecting the domestic market share of southern catfish and shrimp farmers, who were already ensnared by natural disasters and underprepared for competition due to a lack of innovation. Consequently, the affected US farmers began waging a high-voltage campaign to undermine the reputation of Vietnamese shrimp and fish fillets, levelling allegations of dumping and underpricing in the US market. Broadly, they have attempted to stall the Vietnamese exports in the following two ways:

1. **Tariff Barriers** – The U.S. Anti-Dumping (“AD”) duty Investigation proceeding, which commenced in 2001 for fish, and has been followed by twelve annual AD review proceedings. The U.S. AD Investigation on warm water shrimp, which began in 2002, followed by ten annual AD review proceedings.
2. **Non-Tariff Barriers** – For fish these have taken the form of outlawing the use of the commercial name “catfish” for any imported Vietnamese fish. Second, transferring oversight of fish processing from the Food and Drug Administration (“FDA”) to the United States Department of Agriculture (“USDA”) Food Safety and Inspection Service (“FSIS”) Inspection regime, involving strict USDA oversight and certification regimes. These regulations dictate the slaughtering and processing of fish, ostensibly to check for the use of chemicals and antibiotics. In essence, the USDA-FSIS regulation is a non-tariff trade barrier disguised as a food safety measure, conceived and designed to benefit a handful of domestic catfish growers in southern US states. This regulation went into effect on March 1, 2016, followed by an 18-month transitional period so that it will be fully enforced starting September 1, 2017.

ANTIDUMPING CASES:

In 2001, the US Catfish Farmers Association (“CFA”) filed an Anti-dumping petition against the Vietnamese exporters, alleging that Vietnamese frozen fish fillets were being dumped in the U.S. market and causing serious material injuries to the farmers. In course of the AD proceeding, on November 8, 2002, the Department determined that Vietnam will be treated as a non-market economy country for the purposes of antidumping and countervailing duty proceedings, effective July 1, 2001. Later, in 2003, the Ad Hoc Shrimp Trade Action Committee

filed an AD Petition on warm water shrimp from Vietnam alleging dumping and economic injury to the US industry. NME status was also conferred to Vietnam in the shrimp case.

After investigating the allegations and determining the normal value of goods based on a surrogate country and surrogate value methodology, the DOC and the U.S. International Trade Commission (“ITC”) confirmed dumping as well as material injury to American catfish farmers and proceeded to impose antidumping duties on Vietnamese frozen fish fillets. Specifically, DOC imposed AD duties varying from 36.84 % to 52.90 % on the four mandatory respondents (i.e. exporters whose data were individually examined), 44.66 % on all separate rate respondents (i.e. other exporters who could establish their *de jure* and *de facto* independence from the Vietnamese government) and 63.88 % on Vietnam wide entity (i.e. remaining exporters who had failed to establish their *de jure* and *de facto* independence from the Vietnamese government). In the shrimp case, the DOC imposed dumping duties on five mandatory respondents ranging from 4.30% to 25.76% with a 4.57% average rate assigned to all other respondents qualifying for separate rates treatment.

Perhaps the greatest obstacle to fish and shrimp companies participating in these dumping reviews has been the inconsistent and often contradictory selection of different “surrogate countries” from which market economy prices are chosen to value the “factors of production” (“FOPs”) of the Vietnamese processing of fish and shrimp – raw materials, labor, energy and factory overheads. The DOC has flip-flopped regularly, originally choosing Bangladesh in both fish and shrimp cases, then shifting preliminarily to Philippines for the fish case in the 6th administrative review, before switching back to Bangladesh, then switching preliminarily to Indonesia in the 7th administrative review, before switching back to Bangladesh. In the 8th review of fish fillets the DOC switched over to Indonesia notwithstanding the

country's lack of economic comparability to Vietnam (acknowledged by the DOC's own internal policy memos) and lack of substantial production of the unique fish species grown and processed in Vietnam (*pangasius hypophthalmus*). The switch to Indonesia significantly raised the prices of whole live fish and the dumping duty rates skyrocketed to well over 100%. The Vietnamese respondents have been fighting this issue in the US courts now for over 4 years. Meanwhile the DOC continues to apply Indonesia as the primary surrogate country. In the shrimp case, the DOC has been applying Bangladesh as the surrogate country, although it has considered alternative countries. This consistent use of Bangladesh has at least resulted in relatively stable dumping duty rates in the fish administrative reviews over the past 10 years.

In recent AD proceedings, the Commerce department has created new obstacles for Vietnamese exporters by imposing stringent cost data reporting requirements.

As noted above, Commerce determines the normal value of Vietnamese fish fillets based on a factors of production methodology, aggregating the cost of all of the material and non-material inputs utilized in production of export goods, by applying a hybrid methodology – multiplying the real consumption factors of various inputs used by Vietnamese exporters by the hypothetical price data of such inputs from a surrogate country that is at a level of economic development comparable to that of the non-market economy country. Apart from persuading the US government to impose a new non-tariff barrier on fish fillet export – the new USDA-FSIS regulations – the CFA has also sought to ratchet up the tariff barriers by successfully persuading the Commerce Department to require Vietnamese exporters to report their factors of production under a new methodology. This new “CONNUM-specific FOP reporting” has emerged as the next scourge for Vietnamese exporters. A CONNUM is an acronym for Control Number, which is a set of variables corresponding to the key physical characteristics of the

subject merchandise that are commercially meaningful in the U.S. marketplace, and affect costs of production. In simple terms, the CONNUM may be understood as the product “model”. Vietnamese processors have historically and consistently only recorded material consumption, labor usage and energy consumption in the aggregate, based on all fish produced, regardless of the band-size of fillets, soaking methods, frozen form, etc. No company rationally tracks costs of these inputs on a product-specific basis. To do so would be overly onerous from a record- and accounting-keeping perspective. As a practical matter, on account of lacking the sophistication of multinational companies who are aided by sophisticated SAP/ERP software packages and absent an army of well-trained accountants, who are dedicated to controlling and accounting for the material and non-material inputs utilized solely in producing the CONNUM (model) comparable to the goods exported to the US market, none of the Vietnamese fish fillets exporters have been found to maintain separate accounts for each FOP utilized exclusively in producing the CONNUMs covering the subject merchandise exported to the US market. That is to say, the consumption of various FOPs are commingled, instead of being segregated by CONNUM or models of finished products. In the eleventh review period, under sustained pressure from the CFA, Commerce inexplicably reversed its longstanding position, requiring Vietnamese exporters to report the FOPs based on the particular CONNUM (model) of fish fillets exported to the US market. Obviously, none of the responding companies had prepared their FOPs in the new format and the FOPs were rejected, further increasing the dumping duties for both mandatory and voluntary respondents.

USDA ISSUES FOR FISH FILLETS:

In 2015, after heavy lobbying by the CFA, the U.S. Department of Agriculture (USDA) issued a final rule for transferring jurisdiction for catfish to the USDA from the FDA -- which

has since the inception of catfish processing for the US market overseen Vietnamese (and US) processing of fish fillets. The formal oversight by the USDA of fish fillet imports from Vietnam began on March 1, 2016, however the 18 month transition period allowed a grace period, under which both the Government of Vietnam and individual processor were provided time to implement the stringent new “equivalency” regulatory requirements under the USDA regime. Between March 1, 2016 and September 1, 2017 the USDA will regulate imported catfish, but producers can continue to process using the pre-existing FDA requirements and HACCP procedures. After September 1, 2017, however, unless an application from a foreign government is already submitted and under review, importers can only enter foreign catfish if the USDA has held that the foreign government’s regulatory program covering catfish to be *equivalent* to the USDA/FSIS regulatory program, and certified it as such.

The differences between the former FDA and current USDA regulations are stark. The latter are draconian in comparison. For instance, the FDA does not require approval of a country’s regulations or a facility’s operations before it can export to the United States; rather, the manufacturer must merely certify that it complies with all the FDA’s requirements, including implementing the FDA-sanctioned HACCP plan and making sure the product is not adulterated or misbranded. FDA verifies compliance on entry through random inspections of the product. It is commonly understood that less than 6% of the catfish imported from Vietnam are randomly sampled by the FDA.

In contrast, under the USDA-FSIS regime, a USDA official is in-residence at the U.S. catfish manufacturing facility, constantly inspecting the processing of the fish to verify conformity to strict USDA regulations. A USDA inspector must be present or the facility cannot

process the catfish. Once the product is inspected, it is officially stamped by USDA as having passed inspection.

For foreign-manufactured products, the FSIS undertakes a three-step process before it will allow products to be imported into the United States. First, the foreign country's government must apply to the FSIS for it to make a formal determination whether its inspection regime and HACCP requirements are equivalent to those of the United States. FSIS normally undertakes an in-depth analysis of the foreign country's regulations and administration of those regulations. Thereafter, the FSIS undertakes a stringent in-country audit to ensure that the new regulations are in conformity with those in place in the US, essentially "equivalent" in protocol and procedure. If the FSIS determines that the foreign country's regulations and processes are equivalent to those in force in the U.S., the foreign country's regulatory authorities then must, in turn, certify the individual processing factories that are intending to export products to the United States. These certification processes must be the equivalent to those in the US, requiring a complete overhaul of HACCP processes and reporting. A list of these factories is maintained by FSIS and posted on its website.

Next, every export from a certified factory must be accompanied by an "import certificate" issued by the foreign country's pre-certified regulatory body. This import certificate includes critical information such as the product name, manufacturer number, list of ingredients, and identification marks.

Finally, under the USDA regime, the FSIS will re-inspect each shipment at a U.S. import facility that is approved by the USDA. This inspection is intensive, requiring an official FSIS inspector to visually inspect the product, analyze the documents (i.e., certifications), and also the label/markings for compliance. FSIS may conduct additional examinations or testing by sampling

to ensure compliance. When the product finally passes re-inspection, it is stamped with a USDA mark and permitted to enter U.S. domestic commerce. If a product does not ultimately pass this stringent post-importation re-testing it is marked “U.S. Refused Entry” and must be shipped back or destroyed.

These new and very stringent USDA equivalency requirements and processes require significant input and assistance by the Vietnamese government and must be followed by each Vietnamese processor wishing to export fish fillets to the U.S. The certifications for USDA require testing of raw material and monitoring of all farming activities as well, in conformity with USDA regulatory requirements, or their equivalent in Vietnam.

It is the consensus of many professionals in this area that neither the Vietnamese government nor individual processors will be able to comply to these strict new USDA regulations, certainly not for some time. As such, this may be the final, fatal non-tariff barrier that fells the once-thriving exportation of Vietnamese catfish to the U.S.