State Practice of Asian Countries in International Law

Vietnam

*Tran Viet Dung**

INTERNATIONAL ECONOMIC LAW – EXPROPRIATION –
INVESTOR-STATE DISPUTE SETTLEMENT – PROPERTY TAKING –
INVESTOR PROTECTION

Trinh Vinh Binh v. Socialist Republic of Vietnam (International Court of Arbitration – International Chamber of Commerce)

From 21 August 2017 to 27 August 2017, the International Court of Arbitration (ICA) begun the hearing between Mr. Trinh Vinh Binh, a Dutch-Vietnamese businessman, and the Socialist Republic of Vietnam. The case concerns the alleged breaches by Vietnam the 1994 Treaty between Vietnam and Netherlands on Encouragement and Reciprocal Protection of Investments (BIT).

The Trinh Vinh Binh v. Vietnam case was originally initiated in 2003 before the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce by Mr. Trinh. The case arose out of Mr. Trinh's investment in real estate, food processing and several tourism assets in Vietnam in the early 1990s. As the Law on Foreign Investment 1987 did not allow foreigners (including Vietnamese with foreign citizenship) to use their own names to buy house and receive transfer of land ownership, Mr. Trinh asked his family members to use their names to register ownership of the land, houses and a few Vietnamese businesses in order to justify these certificates *prima facie*.

In 1996, Mr. Trinh was arrested and prosecuted by the provincial competent authorities for many criminal charges, including violations of regulations on land rights, tax evasion and bribery. It was reported that until the time of being arrested, Mr. Trinh held the *de facto* ownership of 11 houses, 114 grounds and 2,847,745 meter square of land. Mr. Trinh was sentenced by the court of Ba Ria Vung Tau Province for 11 years of prisonment and all of his property was confiscated.

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In 2000, the Vietnamese authorities expelled Mr. Trinh to Cambodia. After returning to the Netherlands Mr. Trinh proceeded to sue the government of Vietnam in 2003, bringing the case to international arbitration based on the provisions of Article 9.4 of the BIT. Accordingly, he claimed that “he suffered illegal detention, torture and abuse at the hands of state officials, as well as the confiscation of assets amounting to more than \$100 million,” which all breached the terms of the BIT.¹

In 2006, the parties settled the dispute under a confidential agreement signed in Singapore.² However, the process of implementation of the said agreement by Ba Ria – Vung Tau Province was not appropriate.

In 2014, Mr Trinh initiated another arbitration against the government of Vietnam before the ICC to enforce the settlement agreement and demanded US\$1.25 billion in compensation.³ It is noticeable that in both cases filed in 2003 and 2015 in succession, Mr. Trinh Vinh Binh did not claim for the return of his assets but for the compensation from the host State government (respectively 100 million USD and 1.25 billion USD), showing a wise strategy from the investor to dodge the issue of whether there was a investment and, even more, a legal investment in case the domestic law is considered by the *lex loci proprietas*. So far there is no official announcement on the result of the case due to the nature of confidentiality of arbitration proceedings.

Besides other controversial disputes made by foreign investors such as Saigon Metropolitan and Recofi against the Vietnamese government, the case of Trinh Vinh Binh is considered a landmark one attracting much consideration and comments from not only Vietnam but also international community. Had the arbitral award been rendered in favour of the investor, the Vietnamese government may face a substantial burden of damages and the undermined reputation as a host State.

- 1 Dai Tamada, *Impact of Trans-Pacific Partnership Agreement and Investor-State Dispute Settlement on Vietnam and Japan*, 64 KOBE LAW JOURNAL 1, 4 (2014); Luke Eric Peterson, *BIT Claim Against Vitetnam Settled on Confidential Terms*, *Investment Treaty News*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 27, 2007), https://www.iisd.org/pdf/2007/itn_mar27_2007.pdf; see also Luke Eric Peterson, *The Future of Moral Damages in Investment Treaty Arbitration*, KLUWER ARBITRATION BLOG (Apr. 14, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/04/14/the-future-of-moral-damages-in-investment-treaty-arbitration>.
- 2 Về vụ ông Trịnh Vĩnh Bình kiện VN hơn 1 tỷ USD [About the Case, Mr. Trinh Vinh Binh Sued Vietnam over 1 Billion USD], BBC NEWS (Aug. 29, 2017), <https://www.bbc.com/vietnamese/vietnam-41087774.sin>.
- 3 Nguyễn Thanh Tuấn, *Vụ kiện Trịnh Vĩnh Bình vs. Chính phủ Việt Nam: Một số nhận định sơ bộ* [The Case Trinh Vinh Binh v. Vietnam Goverment: Some Preliminary Analysis], NGHIÊN CỨU QUỐC TẾ (Sept. 4, 2017), <http://nghienccuquocte.org/2017/09/04/vu-kien-trinh-vinh-binh-vs-chinh-phu-viet-nam>.

INTERNATIONAL ECONOMIC LAW – ENHANCING THE LEGALISATION AND COMPLIANCE WITH WTO LAW – LAW ON FOREIGN TRADE MANAGEMENT

The National Assembly of Vietnam on 12 June 2017 adopted the Law on Foreign Trade Management No. 05/2017/QH14 (LFTM) which has entered into force since 1 January 2018. The LFTM provides amendments, supplementation and abolishment of a number of articles under the current 2005 Commercial Law of Vietnam which has been criticized for considerable lack of international integration and complicated governmental management. The law also prescribes new regulations for foreign trade activities management and development, as well as solutions for dealing with disputes regarding the imposition of foreign trade management measure in line with commitments under international treaties to which Vietnam is a signatory.

LFTM contains 8 chapters with 113 articles. Regarding the scope and subject of application, the law regulates the State management measures involved in international trade of goods, including (i) prohibition from export and import, temporary suspension from export and import; (ii) restriction from export and import; (iii) management by export and import license and conditions; (iv) certificate of origin of goods; (v) certificate of free sale; and other measures for management of foreign trade activities, including: temporary import and re-export, temporary export and re-import and border gate transfer; (vi) transit of goods; (vii) agency for goods sale and purchase for foreign business entities, authorization and acceptance of authorization in export and import; (viii) processing goods for foreign business entities and having goods processed in foreign countries.

LFTM emphasizes three main principles as basis of its provision summarized as (i) upholding compliance with international treaties which Vietnam has entered into and (ii) ensuring transparency and non-discrimination amongst economic actors, as well as (iii) simplification of procedures.⁴ It is the first time a legislation in Vietnam expressly affirmed that the freedom to import and export of business entities is only restricted by prohibition or restrictive provisions, while the State only acts when the law permits.⁵ The rights of

4 Law on Foreign Trade Management art. 4 (Viet.) [hereinafter LFTM].

5 For example, as specified in LFTM Article 9, the requirements of management by export and import licenses and conditions are as follows: (i) the management by condition will only be imposed if it is necessary for reasons of social safety and order, social ethics, community health, fine customs and traditions and environment protection; (ii) the management by export and import license and conditions must ensure public disclosure and transparency and savings of time and costs for State administrative agencies and of business entities; and

foreign-invested and non-commercial presence business entities are respected pursuant to international treaties that Vietnam is a member, which is in line with Vietnam's Constitution, 2014 Investment Law and 2014 Business Entities Law.

Concerning the responsibilities of the government in foreign trade management, LFTM prescribes that competent authorities should follow the "one specific measure for one specialized authority" principle. The measures are sorted in five categories, including: (i) procedural measures (Chapter II), (ii) technical and sanitary measures (Chapter III), (iii) trade defense measures (Chapter IV), (iv) emergency controlling measures (Chapter V) and foreign trade development measures (Chapter VI). There are three notable changes of the foreign trade law in this section of LFTM. First, the foreign trade measures are prescribed to be applied once for each special custom zone in order to simplify administrative procedures to gain benefits from such areas which are border gate economic and seaport zones. Second, the purpose of providing technical and sanitary measures is to facilitate export activities and the State's risk management.⁶ LFTM also categorizes types of goods as subjects of specific measures with the aim to harmonize the need for foreign trade management, domestic industry protection and export encouragement.⁷ Third, the trade defense measures provisions are codified from and basically reiterates the three separate Ordinances issued by the Standing Committee of the National Assembly, namely Ordinance on Antidumping No. 20/2004/PL-UBTVQH11

(iii) the management by export and import license and conditions shall comply with international treaties to which the Socialist Republic of Vietnam is a signatory.

6 LFTM art. 60 prescribes:

1. The imposition of technical and quarantine measures aims to ensure the quality of products and the safety of human health; protect animals, plants, ecological environment and biodiversity; prevent epidemics and ensure the national security and interests.
2. The imposition of technical and quarantine measures shall comply with the following principles:
 - a. The imposition shall be transparent, not discriminate and avoid creating unnecessary barriers to foreign trade activities, especially to exports;
 - b. Measures for risk management shall be imposed within the allowable conditions and in accordance with the management requirements and international treaties to which the Socialist Republic of Vietnam is a signatory;
 - c. The imposition shall ensure other principles in accordance with regulations of law on the quality of products, products, technical standards and regulations, food safety, measurements, phytosanitary measures and plant protection, veterinary medicine and prevention of infections.

7 Article 62 on the imposition of sanitary measures on animals and animal products, *id.* art. 62; Article 63 on the imposition of phytosanitary measures, *id.* art. 63; and Article 64 on the imposition of border health quarantine measures, *id.* art. 64.

dated 29 April 2004, Ordinance on Countervailing Duty No. 22/2004/PL-UBTVQH₁₁ dated 20 August 2004 and Ordinance on Safeguard Measures No. 42/2002/PL-UBTVQH₁₀ dated 11 June 2002.⁸ However, while the application period of the anti-dumping and countervailing duties is consistent with the relevant provisions of the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,⁹ the LFTM provides for an application period of maximum 10 years (inclusive of the original period of four years and any extensions thereof) with respect to safeguard measures.¹⁰ In previous regulations the maximum period for application of safeguard was 8 years only. This new regulation of LFTM reflects the S&D regulations of the WTO's Agreement on Safeguards applicable for developing countries. It should be noted that the LFTM also provides notable supplements regarding anti-evasion of trade remedies¹¹ and how to deal with investigation invoked by foreign authorities.¹²

LFTM shall take effect from 1 January 2018 and replace a number of laws and regulations on foreign trade, including (i) Ordinance No. 42/2002/PL – UBTVQH₁₀ on trade remedies for imports; (ii) Ordinance No. 20/2004/PL-UBTVQH₁₁ on anti – dumping; (iii) Ordinance No. 22/2004/PLUBTVQH₁₁ against commodity subsidies, excluding the cases handled by the state authorities before 01/01/2018; (iv) and Article 28.3, Article 29.3, Article 30.3, Articles 31, 33, 242, 243, 244, 245, 246 and 247 of the Commercial Law in 2005.

Overall, the adoption of LFTM has demonstrated the relentless effort of Vietnam in ensuring the transparency, publicity, equality and simplification of administrative procedures, as well as securing legal rights and benefits of the State and business entities in all economic sectors.

8 Accordingly, trade remedy duties are in addition to normal import duties (if any), and are applied only after an investigation into the matter has been properly conducted and has resulted in an affirmative determination. The lesser duty rule is also applied. That is, the application of the trade remedy duties should be limited only to adequately remove the injury to the domestic industry.

9 LFTM, *supra* note 4, arts. 81.3(d), 89.3(d).

10 *Id.* art. 95.2(d) (regulating “[t]he total duration of the safeguard measure including the duration of the provisional measure, the official measure and extension thereof shall not exceed 10 years”).

11 *Id.* art. 72.2 (specifying “[t]he trade remedy being imposed will be expanded if the investigating authority discovers the evasion of trade remedy”).

12 *Id.* art. 76.1 (stating “[i]f a Vietnamese trader is subject to trade remedy investigation, at the request of the relevant association or trader, the Ministry of Industry and Trade will take charge and cooperate with Ministries, ministerial authorities and competent authorities in the provision of the following assistance for the trader within its duties and powers”).

**INTERNATIONAL ECONOMIC LAW – IMPORT-EXPORT – TRADE
REMEDIES – WTO DISPUTE SETTLEMENT**

Imposition of Anti-Dumping Measures against Imported H-Shaped Steel Products from the People's Republic of China

(Including Hong Kong)

On 20 March 2017, the Vietnam Ministry of Industry and Trade (MOIT) issued the Decision No.957/QĐ-BCT on Imposition of Provisional Anti-Dumping Measure on H-Shaped Steel Products imported from the People's Republic of China (including Hong Kong). Results of the investigation conducted from 1 April 2015 to 31 March 2016 showed that, based on the import volume of subject merchandise into Vietnam with the dumping margin ranging from 21.18 percent to 36.33 percent, deferred imposition of provisional anti-dumping measure would significantly obstruct the establishment of Vietnamese domestic manufacturing industries and that it is difficult to handle the anti-dumping status. Hence, pursuant to the Decision, the provisional anti-dumping measure would come into force after 15 days from the date of promulgation of the Decision on imposition of provisional anti-dumping measure, i.e., 5 April 2017. The provisional anti-dumping measure shall be imposed within duration of 120 days, i.e., up to 2 August 2017. The provisional anti-dumping measure shall be lifted at the end of the investigation period.

At the end of the review period, based on the findings of the investigation, Vietnam Trade Remedies Authority may propose to the MOIT one of the following options: (i) continue to apply anti-dumping measures in accordance with the current regulations; (ii) adjust anti-dumping measures in line with the results of the review; or (iii) terminate the application of anti-dumping measures.

Termination of the Investigation Regarding the Alleged Dumping of Wind Towers Exported to Australia from the Socialist Republic of Vietnam

The Anti-Dumping Commission of Australia (ADC) initiated an investigation into the alleged dumping of certain wind towers under HS Code 7308.20.00, 7308.90.00 and 8502.31.10 exported to Australia from Vietnam on 8 June 2017, following an application lodged by Australian wind tower manufacturers Keppel Prince Engineering Pty Ltd and Ottoway Fabrication Pty Ltd in 2014.

The investigation examined transactions that took place from 1 January 2015 to 31 December 2016, with the ADC estimating a dumping margin of 15.7 per cent on Vietnam's wind towers.

On 7 August 2017, the ADC temporarily decided not to apply anti-dumping duties on wind towers imported from Vietnam as there were not sufficient grounds to establish that the goods are dumped or to establish a causal link between dumped goods and material injury for the Australian industry.¹³

Initiation of Safeguard Investigation Against Imported Fertilizer Products by the Vietnam Ministry of Industry and Trade

The Vietnam Ministry of Industry and Trade has officially issued Decision No. 1682A/QĐ-BCT to initiate safeguard investigation on diammonium phosphate (DAP) and monoammonium phosphate (MAP) fertiliser products imported into Vietnam on 12 May 2017. On 17 May 2017, Vietnam also notified the WTO's Committee on Safeguards that it initiated on 12 May 2017 a safeguard investigation on mineral or chemical fertilizers.

It followed by the request of two Vinachem manufacturers operating in DAP fertiliser production on 31 March 2017, proposing that safeguard measures should be applied to a number of imported fertiliser products due to their negative impact on domestic industry. The investigation was carried out in accordance with the provisions of the World Trade Organisation (WTO) Agreement on Safeguards and Ordinance No.42/2002 on Safeguards against import products into Vietnam. On August 4th, the Ministry of Industry and Trade decided to apply temporary safeguard measures on some DAP and MAP fertiliser products imported into Vietnam, with the applied temporary safeguard tax being VND 1,855,790 per tonne, as the preliminary investigation concluded that the imported goods seriously harmed domestic fertiliser production. The decision was effective from 19 August 2017, to 6 March 2018. According to the schedule published by the MOIT, the decision to impose official safeguard measures was concluded on 2 March 2018.¹⁴

13 ANTI-DUMPING COMMISSION, STATEMENT OF ESSENTIAL FACTS NO. 405 – ALLEGED DUMPING OF WIND TOWERS EXPORTED TO AUSTRALIA FROM THE SOCIALIST REPUBLIC OF VIETNAM §§ 7.10, 8 (2017), https://www.industry.gov.au/sites/default/files/adc/public-record/029_-_report_-_statement_of_essential_facts_-_sef_405.pdf.

14 WTO Center, *Phân bón – Việt Nam điều tra áp dụng biện pháp tự vệ (SGo6)* [Fertilizer-Vietnam Safeguard Investigation (SGo6)], WTO CENTER VCCI TRUNG TAM WT (Dec. 5, 2017), <http://chongbanphagia.vn/phan-bon--viet-nam-dieu-tra-ap-dung-bien-phap-tu-ve-sgo6-n16646.html>.

**INTERNATIONAL ECONOMIC LAW – TRADE LIBERALISATION –
INTERNATIONAL ECONOMIC COOPERATION – THE TRANS-
PACIFIC PARTNERSHIP TRADE PACTS ADVANCES WITHOUT THE
UNITED STATES**

After the United States has formally withdrawn from the Trans-Pacific Partnership Agreement (TPP), Vietnam together with other members like Japan, Australia and New Zealand had actively persuaded other TPP negotiating members to continue the regional trade agreement without the United States.

On 9 November 2017, ministers of eleven TPP member countries held a private meeting to discuss the consigning of the TPP without the United States at the APEC Ministerial Meeting held in the city of Danang, Vietnam. Despite the facts that some delegates were concerned that some provisions of the agreement may negatively affect their domestic industries, such as the yarn-forward rules of origin in textile sectors and the investor protection mechanism, or that some countries showed preference for negotiation trade agreement with the United States, the countries agreed on the necessity to foster the establishment of a free trade area in Asia-Pacific.

On 11 November 2017, after two days of negotiation, the 11 countries announced to stick to the core elements of the TPP. The new deal – the Comprehensive and Progressive Agreement for the TPP (CPTPP) has suspended 20 provisions of the original TPP, mostly on intellectual property. Vietnam's Deputy Prime Minister Pham Binh Minh commented that the declaration achieved this year is stronger than ever, "[it would play a] crucial role in support[ing] a rules-based, free, open, fair, transparent, and inclusive multilateral trading system,"¹⁵ and "also note the importance of non-discriminatory, reciprocal and mutually advantageous trade and investment frameworks."¹⁶

The observers highly valued the role of Vietnam as chair, co-chair of the APEC committees and working groups. This event affirmed the active role of Vietnam in the APEC and marked an important milestone in the country's external policy of expansion, diversification and multilateralisation of relations

15 ASIA-PACIFIC ECONOMIC COOPERATION, *The 25th APEC Economic Leaders Cooperation Da Nang Declaration: Creating New Dynamism, Fostering a Shared Future* ¶ 20 (Nov. 11, 2017), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2017/2017_aelm.

16 See *id.* ¶ 14.

and international economic integration.¹⁷ Furthermore, as the CPTPP is open for later participation of other countries besides the 11 original members, by becoming an earlybird, Vietnam took the opportunities to voice its concern during the drafting negotiation and, therefore, successfully protected the country's essential priorities and interests.

¹⁷ *APEC 2017: Vietnam Affirms Active Role in APEC*, THE VOICE OF VIETNAM (Nov. 6, 2017), <https://english.vov.vn/apec-vietnam-2017/apec-2017-vietnam-affirms-active-role-in-apec-361817.vov>.