Client Alert | International Trade

Helping China-owned companies in Vietnam in the era of rising tariffs, changing rules, and increased enforcement

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Exporters and US importers of goods claiming Vietnamese origin face increasing risk. President Trump recently indicated his administration will pay close attention to goods exported from Vietnam, including those suspected of circumvention or evasion of existing duty orders on those goods when originating from countries other than Vietnam. In the current volatile trade environment, even companies that work hard to comply with US customs and country-of-origin rules face significant risks when exporting third-country goods containing non-domestic parts and components. Exporters affiliated with China-based companies or using China-made inputs are at particular risk. Even purely domestic Vietnamese companies may face new risks in today's environment. US Customs and Border Protection (CBP) and the US Department of Commerce (DOC) can pursue on-site audits, and adverse rulings can result in severe duties and penalties. Therefore, producers and exporters operating in these circumstances should consider implementing a risk-mitigation plan to lawfully protect themselves from potential adverse duty liability, while preserving their market share in the United States.

Our international trade team is able and ready to help manage these risks to ensure full compliance with US customs law, while leveraging available opportunities to benefit from duty savings under applicable free trade agreements (FTAs) despite their potential pitfalls.

Higher duties on China-origin goods and parts

As the US-China trade conflict has intensified, the United States has increased duties on many China-origin products. The United States, under a variety of domestic laws identified below, has imposed increased tariffs on a wide range of goods:

- Section 301 (Unfair Practices) (25 per cent tariffs in four stages covering most goods)

- Section 232 (National Security) (*e.g.* steel and metals, autos and auto parts)
- Section 201 (Safeguards) (*e.g.* solar products, washing machines)
- Increased use of anti-dumping (AD) and countervailing duty (CVD) actions, including special "non-market economy" rules for China-origin products, which inflate duties

Trend of expanding supply chains beyond China

Many companies with manufacturing facilities in China are trying to adjust to the higher duties and protect their US market share by shifting some or all of their production from China to third countries, particularly those in the Association of Southeast Asian Nations (ASEAN) region, and then exporting products from those countries to the United States. The process offers both rewards and risks. The ASEAN countries stand to benefit from higher levels of investment and employment, and companies can take advantage of the extensive network of bilateral and regional FTAs in the region. In the case of Vietnam, these include the newly implemented Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the ASEAN-Hong Kong FTA, and the pending EU-Vietnam FTA. The risks arise from the complexity of the rules that determine a product's origin, and from the aggressive enforcement environment developing in many countries. Preferential country-of-origin rules under such agreements differ from US country-of-origin rules for non-preferential duties and for AD/CVD duty purposes. Failing to understand and to correctly use these different country-of-origin rules can lead to audits, investigations, fines and other penalties.

Goods at risk when produced in ASEAN and other third countries

When production facilities in third countries use non-domestic parts and components, which might include China-origin parts, the finished goods from the third country might be subject to investigation and possible severe penalties in the United States, especially if doubt arises as to whether the goods originated in such third countries. Such investigations could be launched under any one of a number of relevant laws, including:

- **Country-of-origin inquiry or penalty action by US CBP** – CBP, during importation into the United States, may investigate the accuracy of the country of origin (CoO) declarations attached to the third-country goods. In particular, CBP will check whether the processes in the country of production or assembly "substantially transformed" the non-domestic made parts and components sufficiently to shift the product's origin to that country for purposes of the above-described duties. CBP may not only demand underpaid duties, but also has the right to assess substantial penalties if CBP finds that CoO declarations were false. In some instances, CBP may detain, exclude or seize the goods.
- **Scope inquiry by US DOC** – If the non-domestic-made parts and components are subject to AD/CVD duties, or the finished product would be subject to such duties if originating in China, the US DOC may conduct its own CoO assessment, using its own rules, which do not rely on "substantial transformation" alone or interpret the phrase the same way as does CBP. Even if the CoO is correct for CBP purposes, DOC may still issue a conflicting determination while concluding that the goods are subject to the China AD/CVD duties. We note that such a determination can be applied retroactively.
- **Anti-circumvention inquiry by US DOC** – US DOC may also examine whether the third-country goods are circumventing US AD/CVD duties and should be subject to those duties, even if the goods are properly declared under CBP and US DOC CoO rules to have originated in the third country. An adverse finding would result if US DOC determined the third-country operations were minor and/or would otherwise "circumvent" such duties in the future.
- **Anti-evasion inquiry by US CBP** – Under the new Enforce and Protect Act (EAPA), CBP may investigate whether the third-country goods are "evading" AD/CVD duties when the importer's entry declarations provide false information, including CoO. In most EAPA cases, CBP checks whether the goods were actually produced in, not merely trans-shipped through, the third country. Even before it decides whether the importer made any false statements, CBP may demand AD/CVD cash deposits on entries made during the period of investigation.
- **Risk and opportunity for domestic companies that do not use third-country origin parts and components** – Even when local producers do not use parts from China or other third countries, they may nonetheless find themselves at increasing risk if other companies in Vietnam do use such parts. For

example, if exports of a particular type of good from Vietnam to the United States have increased significantly due to the migration of production out of China, then this could increase the risk of US countermeasures against Vietnam exports, even from domestic companies that do not source parts from China, and have not significantly increased their export volume to the United States. Such companies have new opportunities to increase market share, but also should be aware of and manage the increased risks in these circumstances.

Risk mitigation

In the current volatile trade environment, even companies that work hard to comply with US Customs and country-of-origin rules face significant risks when exporting third-country goods containing non-domestic parts and components. Exporters affiliated with China-based companies or using China-made inputs are at particular risk. Even purely domestic Vietnam companies may face new risks in today's environment. CBP and DOC can pursue on-site audits, and adverse rulings can result in severe duties and penalties. Therefore, producers and exporters operating in these circumstances should consider implementing a risk-mitigation plan to lawfully protect themselves from potential adverse duty liability, while preserving their market share in the United States.

White & Case is ready to help

Our team has market-leading experience helping clients manage the risks described above. Our experience includes assisting exporters and their importers in the United States to manage the US importation of goods produced in third countries that incorporate non-domestic parts and components. This service offering is critical for at-risk exporters because it helps to ensure compliance and predictability and to understand both the cost saving opportunities and potential pitfalls when utilising FTAs. We have particular expertise representing China-owned or China-affiliated production facilities located in ASEAN countries. Our team includes lawyers and trade experts with decades of trade risk management experience. Several are located in Asia and Washington, DC, with prior experience working for US regulatory authorities who are proficient in Mandarin Chinese. Most recently, we have been serving as counsel to a China-owned manufacturer and exporter in Thailand in the first actively defended case under the new EAPA law noted above.

Countries other than the United States also are becoming more suspicious of third-country goods containing non-domestic parts and components. Our seasoned team members in Brussels, Geneva and other locations around the world are ready to assist you in ensuring full compliance with applicable laws if issues or inquiries arise with regulatory authorities in countries other than the United States.

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