

Legal news

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Trade

Anti-Subsidy, a Measure of Protecting Domestic Manufacture

By Nguyen Thanh Hang

Together with anti-dumping measures, anti-subsidy measure is an effective way of protecting domestic manufacturing industries. In the history of international trade, anti-subsidy measures were one of the first methods countries used to defend their domestic manufacturing interests. Anti-subsidy taxes have been applied since the late 19th century, preceding the widespread application of anti-dumping taxes and other self-defense approaches. Anti-subsidy taxes are officially recognised by the WTO as an effective way of assisting a country that is threatened with considerable damage from the import of subsidised goods. In compliance with international standards, as well as with self defense in sensitive circumstances involving international trade, the Standing Committee of the National Assembly of Vietnam recently issued Ordinance on Anti-Subsidy with respect to imported goods on August 20, 2004 which will go into effect on January 1, 2005.

The Ordinance on Anti-Subsidy governs subsidised goods imported into Vietnam. To some extent, dumped goods and subsidised goods are similar, in that both are imported into and sold on the Vietnamese market at a much lower price than the market will bear. The sale of both dumped and subsidised goods might cause considerable damage to relevant domestic manufacturers. Subsidised goods are those funded - either fully or partially - by governments or governmental agencies in the form of capital allotment, share transfer, loans at preferential interest or other allowances determined in defiance of international standards.

According to Article 4 of the Ordinance, there are two measures that can be used to cope with subsidies: 1) Application of an anti-subsidy tax. In principle, the anti-subsidy tax does not exceed the amount of subsidisation as determined in the conclusion of the investigation on the matter; 2) Admission of the undertaking of the foreign Government or the foreign organization or individuals on voluntary cancel of the subsidisation, decrease of the subsidise level, adjustment of the export price or other proper measures. Then, either anti-subsidy tax or undertaking shall be separately applied. Of the two measures, the undertaking may be considered as voluntarily give up such benefit stemmed from subsidy to the part of subsidizer or subsidizee. Therefore, the undertaking shall be prior applied. It means that after the imported goods are determined as to be subsidized, if the above entities undertake that the subsidy shall be ceased, the competent authority of Vietnam shall consider and may accept such undertaking. Consequently, the anti-subsidy tax shall not be applied. However, if it is found later that the measure of undertaking is futile, the Minister of Trade shall decide on application of anti-subsidy tax.

Application of anti-subsidy measures aims at preventing or restricting damage caused by imports of subsidised goods through eliminating economic benefits brought to individuals or organizations from financial assistance of governments or governmental agencies. It is financial assistance that has led to many goods being sold in Vietnam at artificially low prices, which is deemed unfair. In some cases, foreign goods imported into Vietnam are sold at a much lower price than in the country of origin. If this is true, such goods are determined to be not only dumped but also subsidised, and anti-

dumping and anti-subsidy measures may be simultaneously applied. To some extent, many factors contribute to goods being dumped, possibly including subsidisation from governments or governmental agencies. After an anti-dumping tax is applied, the price at which dumped goods are sold shall be equivalent to the customary price, which means that the application of anti-dumping taxes shall nullify the economic benefit brought about by subsidies. Therefore, it is unnecessary in this case to apply anti-subsidy taxes.

Actually, it is obvious that applying-subsidy measures is a rather sensitive issue, because it directly affects overseas governments and manufacturers, possibly resulting in foreign protests or retaliation. Therefore, the application of anti-subsidy measures must be in compliance with strict conditions, principles and procedures stipulated by the ordinance. One of the principles of application is that "anti-subsidy measures are applied only at a reasonable and necessary level, enough to prevent or restrict considerable damage caused to domestic manufacture." In other words, anti-subsidy measures shall not be automatically applied whenever imported goods are determined to be subsidised. The decision about whether or not anti-subsidy measures should be applied must be made by weighing the benefits and negative consequences derived from applying such measures. According to Clause 2, Article 5, of the ordinance, anti-subsidy measures should be applied only after the conclusion of an subsidisation investigation. Based on the requests of individuals or organizations representing domestic manufacturers, or at the decision of the Minister of Trade, investigations into suspected subsidised goods shall be undertaken by a professional investigation agency under the Ministry of Trade. Information related to subsidised goods imported into Vietnam may be collected through many channels, but most of the evidence should come through the business intuition of domestic enterprises. Upon receiving sufficient records related to requesting anti-subsidy investigations, the Minister of Trade would make a decision on the investigation. The maximum duration allowable for such an investigation is 12 months, and the investigation is required to clearly determine the nature of subsidisation, in addition to the actual or latent damage caused to domestic manufacturers. A preliminary conclusion on the investigation shall be made within 90 days from the beginning of the investigation. After completion of the investigation, the agency shall notify all concerned parties of the final decision.

Even with the final decision still pending, anti-subsidy measures may still be temporarily applied, based on the preliminary conclusion. The Minister of Trade shall decide whether or not to apply anti-subsidy measures based on the final conclusion, in addition to a proposal from the board to settle the application of anti-subsidy measures.

These are some of the main ideas of the Ordinance on Anti-Subsidy. The issuance of such an ordinance shows Vietnam's willingness to apply international standards to the national law system and commercial policy. Subsidisation, especially by developed countries or trade blocs such as the US, Japan and the EU, could adversely affect developing countries. Recently, the US, under the jurisdiction of the WTO, was accused by Brazil of subsidizing cotton and it finally lost the lawsuit. Of course, Vietnam is not a member of the WTO and, therefore, is not capable of protesting the subsidy policies of developed countries through the international mechanism of the WTO. As such, the Ordinance on Anti-Subsidy shall create a legal basis for Vietnam to protect itself against unfair competition practices.

Furthermore, the ordinance shall protect Vietnam even when the economic integration process compels it to cut or eliminate some traditional measures of protection such as import duties or quotas.

Other recently issued documents:

- On September 22, 2004 the Government issued Decree 169/2004/ND-CP, on the regulations on administrative sanctions on violations in the fields of prices.
- On September 24, 2004 the Minister of Trade issued Decision 1371/2004/QD-BTM, promulgating the Regulation on supermarkets, trading centres.
- On October 10, 2004 the Government issued Decree 175/2004/ND-CP, on sanctions on administrative violations in the fields of trading.

Industrial property

Unfair competition relating to Industrial Property in Vietnam

By Nguyen Thanh Hang

Competition has long been known as the law as well as the motivation for the growing up of the market economy. The greatest purpose and typical character of the competition is to make goods/services provided by particular business best-selling on the market and in a broader point of view, it is the benefit that businesses desire to gain during their manufacturing and trading.

Since the renovation was implemented and following to establishment of socialist-oriented market economy, Vietnamese enterprises have been gradually drawn into the impact of the laws of competition. It is noted that in addition to modes of competition that are legitimate and in line with business morality, there are so many tactics of bad faith in trading have been used as a way of competition. In recent years, it is clearly increasing of the tendency of unfair competition relating to industrial property. However, the law on Industrial Property in Vietnam now are generally not enough for creating a really effective mechanism for preventing as well as imposing appropriate sanctions on such violation.

Conforming to Article 10bis of Paris Convention, the Decree No 54 dated 3 October 2000 has pointed out some typical expressions of unfair competition relating to Industrial Property. Particularly as followings:

1. Using trade instructions to mislead awareness of and information on the business entity, business establishment, business operation, goods or services aimed at:

Taking advantage of the prestige or good reputation of another production or business entity during its own business or production;

Causing any damage to the prestige or good reputation of another production or business entity during its own business or production;

Confusing consumers as to the origin, method of manufacture, nature, quality or other specifications of goods or services; terms of supply of goods or provision of services, and so forth, when they are aware of, or choose, goods, services or business activities.

2. Appropriating or using any investment achievement of another entity without the permission of such entity.

Until now, it is traditionally supposed that Industrial Property's objects are divided into two groups: 1/ Industrial invention; and 2/ commercial indications. According to Article 4 of the Decree 54, the terms "Trade Instructions" and "Investment achievement" are understood as "symbols or information which provide trade guidelines of goods or services, including trademarks, trade names, business logos, trade slogans, geographical instructions, designs of containers of goods, labels of goods, and so forth"; "Investment achievement means knowledge or information in the form of technology, inventions, utility solutions, technical know-how, trade secrets, and so forth, derived from financial or intellectual investment activities". Currently, due to the fact that industrial inventions (belongs to connotation of the definition "Investment achievement") are normally rather complex technical solutions and application thereof is rather difficult and requires financial investment as well. Thus, only a few illegal use of Investment achievement occurred and found.

Meanwhile, illegal use of trade instructions tends to dramatically increase. In general, trademark is the trade instruction that is most popularly used in almost cases of unfair competition. Previously, infringer used to imitate and make such trade instructions identical to protected trademarks. For the time being, infringement become more sophisticated. The infringers no longer use trade instructions that are identical to protected trademarks of other businesses but they may imitate the main part of such trademarks. For example, the trademark RedBull and Device of T.C Pharma is rather widely used in Vietnam for beverage products. In fact, infringers in Vietnam usually offend ownership rights over such trademark through the way of imitating the device of two red bulls but name of product is changed to "Red buffalo" or "Red Dinosaur", etc in lieu of "RedBull". Another way, infringers may make sample of products' label, packaging with letters, device or colour so similar with genuine trademarks that consumers may be confused on the origin of products.

Such type of infringement has become increasingly popular, especially in circulation of plant protection products. Certain companies were even granted registration certificate for its trademark. Nevertheless, in actual use, such trademark could be made similar with prior protected and widely used trademark of other companies. Example 1: Company X has its trademark TILUSA protected under the registration certificate granted by the National Office of Intellectual Property of Vietnam. In actual use, this trademark was presented in the manner of two separate parts as "Til" and "USA". With such arrangement, the word "Til" is highly similar with the prior protected trademark "Tilt" of Syngenta Participation AG. Additionally, the word USA may make consumer confused on origin of products bearing the trademark. Example 2: Company Y register with the Department of Plant Protection for circulation of products bearing the trademark FORWANVIL. In actual use, such trademark was designed with two rather separate parts as "Forw ANVIL". It is easy to recognize that such design of the trademark reflected a clear intention of company Y in drawing consumers' attention to the word ANVIL. However, such element is quite identical to prior protected trademark of Syngenta Participation AG, the trademark ANVIL.

The foregoing are some examples among variety of diversified expression of unfair competition related to industrial property. According to Article 25 and 27 of the Decree No.54, "Any organization or individual suffering or likely to suffer any damage caused by unfair competition in relation to industrial property shall be entitled to request the authorized State body to compel any entity which has conducted the unfair competition to cease such unfair competition and to compensate for damage; to penalize administratively or prosecute the entity which has conducted the unfair competition for criminal liability" "Any organization or individual conducting unfair competition in relation to industrial property shall, depending on the nature and seriousness of such act, be penalized administratively or prosecuted for criminal liability; shall compensate for any damage in accordance with law". As a matter of fact, legitimate owners of such trade instruction still confront with so many difficulties to defend their legitimate rights and interest. Following are some notable points:

In order to proceed any procedure against the unfair competition, Owner of trade instruction should have to obtain confirmation on such illegal action from the National Office of Intellectual Property of Vietnam. Due to the fact that determination of unfair competition is rather complicated and sensitive and that NOIP may have a careful consideration prior to making final conclusion. Consequently, it often takes a rather long time to do so and certainly adversely affect the process of anti-unfair competition.

Due to the lack of legal base, competent authority may be reluctant to force individuals or organizations that commit the unfair competition to be imposed appropriate administrative sanction.

Unfair competition has not been criminalized in the Criminal Code, it is impossible to force the infringer to bear criminal liability.

Another matter that enterprises coping with unfair competition related to industrial property especially concern and complain is that although the settlement of unfair competition is rather costly, they still not gain any amount of money from infringers as a compensation for the loss caused to trademark owner by the unfair competition. Reason of such state is simply comprehended that "there are not any particular laws and regulations".

From the above - mentioned actuality, it is supposed that in such state of increasing competition as now, companies should proceed self-defense approaches such as measures of market orientation, guidance for consumer., etc to protect legitimate rights and interest in lieu of absolutely depending on competent authority.

Other Sectors

Finance

- Decision 77/2004/QĐ-BTC dated September 28, 2004 of the Ministry of Finance, regulating the management of customs procedures on goods sold at duty free shops.
- The Ministry of Finance issued Circular 93/2004/TT-BTC, guiding the Regulation on establishment, organization and operation of the fund for guarantee of credit to small and medium sized enterprises.

- Decision 79/2004/QD-BTC dated October 11, 2004 of the Ministry of Finance, on the tariff fee for quota of textile and garment products exported to US market.
- Decision 80/2004/QD-BTC dated October 12, 2004 of the Ministry of Finance, on the supplementation to the List of projects, which borrow development credit from the State.
- On October 13, 2004 the Ministry of Finance issued Circular 96/2004/TT-BTC, guiding the management, payment, withdrawal and finalization of advanced capital of estimated budget of the next year applied to infrastructure project.

Banking

- The State Bank of Vietnam issued Circular 05/2004/TT-NHNN on September 15, 2004, guiding the implementation of a number of articles of Government's Decree 159/2003/ND-CP dated December 10, 2003, on issuance and usage of cheque.
- Decision 1232/2004/QD-NHNN dated September 24, 2004 of the State Bank of Vietnam, on the abolishment of regulations on receiving deposits and lend, applying for people's credit fund system in the experimentation period.
- Circular 06/2004/TT-NHNN on September 27, 2004 of State Bank of Vietnam, guiding the internal credit of co-operatives.
- On September 30, 2004 the State Bank of Vietnam issued Decision 1254/2004/QD-NHNN, on Vietnam dong basic interest rate.

Auditing

- On September 22, 2004 the Ministry of Finance issued Decision 76/2004/QD-BTC, promulgating the Regulation on selecting auditing companies for securities distributing organization, listed, or trading organizations.

Science & Technology

- On September 28, 2004 the Prime Minister issued Decision 171/2004/QD-TTg, on the approval of the project on management structure innovation on science and technology.

Electricity

- On October 05, 2004 the Prime Minister issued Decision 176/2004/QD-TTg, on the approval of Vietnam electricity development strategy for the period of 2004-2010, orientation to the year of 2020.

Transportation

- The Minister of Transportation issued Decision 17/2004/QD-BGTVT on September 30, 2004, promulgating the Regulation on speed, distance of means of transport. This is to replace Decision 4596/2001/QD-BGTVT dated December 28, 2001.

Construction

- The Ministry of Construction issued Circular 05/2004/TT-BXD on September 15, 2004, guiding the procedure and management of bidding certificate for foreign contractors operating in the fields of construction in Vietnam.

Healthcare

- Circular 09/2004/TT-BYT dated September 14, 2004 of the Ministry of Health, providing guidelines on amendment of and supplementation to a number of articles of Circular 01/2004/TT-BYT dated January 06, 2004 of the Minister of Health, on private practices in the fields of healthcare and medicine.

Miscellaneous

- On September 22, 2004 the Government issued Decree 170/2004/ND-CP, on arrangement, innovation and development of state-managed farms.
- On September 30, 2004 the Government issued Decree 173/2004/ND-CP, with detailed regulation on a number of articles of the Ordinance on Execution of civil judgement with regards to procedures, enforcement and administrative sanction in implementation of civil judgement.
- On October 02, 2004 the Judges council of the People's Supreme Court issued Resolution 03/2004/NQ-HDTP, guiding the implementation of the first part "General Provisions" of the Criminal Procedures Code 2003.
- The Prime Minister issued Decision 177/2004/QD-TTg on October 05, 2004, on the approval of Project on Vietnam automobile industry development to the year of 2010, orientation to the year of 2020.
- The Prime Minister issued Decision 179/2004/QD-TTg on October 06, 2004, on the approval of Strategy on applying and development of environment resources IC technology to the year of 2015 and orientation to the year.

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