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BY HAND DELIVERY

Barbara E. Tillman
Director, AD/CVD Operations, Office 6
Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Application Of The Countervailing Duty Law To Imports From The Socialist Republic Of Vietnam: Request For Comment

Dear Ms. Tillman:

These comments are submitted on behalf of the law firm of Stewart and Stewart in response to the Department's request for public comment on the application of the countervailing duty ("CVD") law to imports from the Socialist Republic of Vietnam.[1] For the reasons detailed below, we believe that the Department should determine that, while Vietnam has not evolved to the point where prices and costs in its economy are reliable for antidumping purposes, market forces have developed sufficiently to permit the Department to identify subsidies and to countervail those subsidies. Therefore, the Department should apply the CVD law to Vietnam, in order to ensure that the injury resulting from trade-

[1] *Polyethylene Retail Carrier Bags From the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation and Request for Public Comment on the Application of the Countervailing Duty Law to Imports From the Socialist Republic of Vietnam*, 74 Fed. Reg. 19,064, 19,067-19,068 (Apr. 27, 2009).

distorting subsidies provided in the country can be fully and effectively remedied under the law.

I. The Department's Practice Is to Determine Whether CVD Law Can Be Applied on a Case-By-Case Basis

The Department established its current practice regarding the potential application of the CVD law to countries that are designated as non-market economy ("NME") for antidumping purposes in *Coated Free Sheet Paper from China*.[2] In short, the Department determined that "it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that economy."[3] On March 29, 2007, the Department issued a memorandum assessing the differences between China's economy in 2006 (the relevant period of investigation) and the Soviet-style economies that were the subject of the Federal Circuit's decision in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).[4] The Department found that the Federal Circuit's decision, which affirmed Commerce's discretion in choosing not to apply the CVD law to the Soviet-style NMEs that existed in that era, erected no bar to the application of the CVD law to China, whose economy was very different from the economies examined in *Georgetown Steel*.

First, the Department noted that it had decided that subsidies could not be meaningfully identified in the Soviet-style NMEs of the 1980s, because those economies

[2] *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60645 (October 5, 2007).
[3] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China, (Oct. 17, 2007) ("*CFSP Final Decision Memorandum*") at 29
[4] *See* Memorandum to David M. Spooner, Assistant Secretary for Import Administration from the Office of Policy, Import Administration, *Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China: Whether the Analytical Elements of the Georgetown Steel Holding are Applicable to the PRC's Present-Day Economy*" (the "*Georgetown Memorandum*").

were "so integrated as to constitute, in essence, one large entity."[5] In such a situation, it was impossible to determine the necessary elements of a subsidy. The concept of financial contribution was meaningless, because subsidies were essentially "one arm of the government giving money to another arm."[6] The concepts of specificity and benefit were also meaningless, as "subsidies could not be separated out from the amalgam of government directives and controls," and "it made little sense to attempt to analyze the distribution of benefits" among sectors of the economy in such a situation.[7] The Department further noted the following salient characteristics regarding those economies:

> Prices are set by central planners. 'Losses' suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.[8]

By contrast, the Department noted that China's present-day economy is "one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans."[9] China's economy is more flexible than that of the Soviet-era economies, the private sector is allowed to exist and is indeed growing, and market forces have begun to emerge. Thus the Department found that "China's economy, though riddled with the distortions attendant to the extensive intervention of the PRC Government, is more flexible than these Soviet-style economies."[10] Government actions, though often distorting the private sector, can also provide incentives to the private sector and change their behavior. In China's mixed

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[5] *Id*. at 10.
[6] *Id*.
[7] *Id*.
[8] *Id.* at 4.
[9] *Id.* at 9.
[10] *Id.* at 5.

economy the Department found that the elements of financial contribution, specificity, and benefit do have meaning, and thus the necessary elements to identify a countervailable subsidy could be established.

II. Vietnam's Economy Has Evolved to a Point Where Subsidies Can Be Identified

The Department analyzed Vietnam's economy in 2002 in connection with its investigation of frozen fish fillets. Even in 2002, Vietnam's economy was substantially different from the Soviet-style economies at issue in *Georgetown Steel*.[11] Reforms in Vietnam's economy since 2002, while far from completing Vietnam's transition to a market economy, have allowed the private sector to emerge and market forces to operate to the point where the economy is sufficiently flexible that financial contribution, specificity, and benefit – and thus subsidies – can be identified.

In its 2002 analysis of Vietnam's economy, the Department found that although the transition to a market economy was far from complete, Vietnam had "made significant progress on a number of reforms," and had "taken substantial steps to open its market to the international community and to allow limited forces of supply and demand [to] affect the development of its economy."[12]

Vietnam has also enacted a number of reforms since 2002, many of which were precipitated by Vietnam's accession to the World Trade Organization ("WTO") in 2007. The Report on the Working Party on the Accession of Vietnam discusses many of the reforms Vietnam enacted prior to its accession, with the representative of Vietnam stating that "Viet

[11] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status, (November 8, 2002) ("*Vietnam NME Status Determination*"), *cited in Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 68 Fed. Reg. 4986, 4990 (Jan. 31, 2003).
[12] *Vietnam NME Status Determination* at 1.

Nam was shifting from a system of central planning to a market-based economy."[13] The report notes that the WTO members "appreciated the significant reforms already undertaken and encouraged Viet Nam to continue the policies towards market-orientation, liberalization and transparency." [14] Moreover, in addition to Vietnam being subject to the subsidies disciplines contained in the WTO agreements as a WTO Member, Vietnam's Protocol of Accession reserves the right of WTO Members to use external benchmarks in their domestic CVD proceedings to measure the benefit conferred by subsidies on goods from Vietnam where prevailing terms and conditions within Vietnam are not available as benchmarks.[15]

Some specific reforms to Vietnam's economy are reviewed in more detail below.

Prices: The Department found in its 2002 analysis that "most price controls had been abolished" in Vietnam.[16] While Vietnam's Government Pricing Committee maintained discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies, " the trend toward price liberalization continued forward, as the GOV rolled back its dual pricing system and voiced its commitment to eliminate such price discrimination against foreign invested enterprises (FIEs) altogether."[17] In the Working Party Report for its accession to the WTO, Vietnam's representative stated that " since 2003, his Government had applied price controls only on petrol, electricity, postal and telecommunications services, air fares between Hanoi and Ho Chi Minh City, and potable water."[18]

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[13] Report of the Working Party on the Accession of Vietnam, (Oct. 27, 2006), WT/ACC/VNM/48 ("*Vietnam Working Party Report*"), at 14 paragraph 52.
[14] *Id.* at 2 paragraph 7.
[15] *Vietnam Working Party Report* at paragraph 255.
[16] *Vietnam NME Status Determination* at 30-31.
[17] *Id.*
[18] *Vietnam Working Party Report* at 25-26 paragraph 96, *Petition* at Exhibit III-16. Further, the Vietnamese representative stated that "The Ordinance on Price, which had come into effect on 1 July 2002 and Decree No.

Access to foreign currency: As early as 2002, Vietnam had already made the shift away from complete currency controls to a system where currency was available for trade purposes, albeit with significant government oversight. At the time, the dong was not yet fully convertible for current account purposes.[19] Vietnam has since assumed International Monetary Fund ("IMF") Article VIII obligations requiring full convertibility on the current account.[20] Foreign exchange approval is no longer required for the conversion of the dong, and the country's foreign exchange surrender requirement was lifted in 2003. Foreign investors are permitted to purchase foreign currency at authorized banks to finance current and capital transactions and other permitted transactions.[21] In 2008, the State Bank of Vietnam (the "State Bank") adjusted the official exchange rate (reference rate) and expanded the trading band for dollar and Vietnamese dong exchange transactions.[22]

170/2003/ND-CP of 25 December 2003 guiding in detail the implementation of a number of Articles of this Ordinance, confirmed that direct State intervention in pricing would be limited. His Government would use measures directly affecting prices only (i) in case of dumping or abuse of monopoly position, (ii) to stabilize the socio-economic environment, or (iii) to protect the legitimate interests of producers, consumers and the State. These government-imposed prices, the enterprises and individual businesses subject to price control, and the implementing period, were published widely in the media (television, newspapers and the Internet) in Viet Nam." *Id*.

[19] *Vietnam NME Status Determination* at 9.

[20] *IMF Country Report No. 07/387, Vietnam: 2007 Article IV Consultation—Staff Report; Staff Supplement and Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Vietnam*, (Washington, DC: International Monetary Fund, December 2007) ("*2007 IMF Staff Report*"), *Petition* at Exhibit III-17 at Annex I page 3, stating that "Vietnam has accepted the obligations of Article VIII, sections 2, 3 and 4 of the Articles of Agreement, and maintains an exchange system free of restrictions on the making of payments and transfers for current international transactions, except for exchange restrictions maintained for security reasons that have been notified to the Fund pursuant to Executive Board Decision No. 144-(52/51)."

[21] U.S. Department of Commerce, "Doing Business in Vietnam: 2009 Country Commercial Guide for U.S. Companies" (March 3, 2009) ("*2009 Country Commercial Guide: Vietnam*"), Chapters 5 and 7, *Petition* at Exhibit III-18.

[22] *See 2009 Country Commercial Guide: Vietnam*, *Petition* at Exhibit III-18. Discussion in Chapter 6 provides that "[i]n 2008, the State Bank of Vietnam adjusted the official exchange rate (reference rate) and expanded the trading band for dollar and Vietnamese dong exchange transactions several times, effectively devaluing the dong by 7.25 percent. The trading band for dollar and Vietnamese dong is currently set at + 3 percent. Commercial banks are allowed to determine the differential between currency selling and buying prices within the set trading band."

Personal property rights and private entrepreneurship: In 2002, the Department found that Vietnam's *1997 Commercial Law* reserved a leading role for the state-owned sector, but that it also protected the rights of domestic and foreign private businesses to engage in competitive enterprises.[23] Importantly, the Department found in 2002 that the private sector in Vietnam had become "the economic engine of Vietnam, with growth far exceeding that of the state-owned sector."[24] The Department also found that FDI inflows in Vietnam were "limited" and constrained by government policies, but that "the FDI that does take place has a relatively large economic impact from a GDP standpoint."[25] FDI inflows to Vietnam have continued to grow through 2008.[26] While state-owned enterprises retain an important role in Vietnam's economy, the country has taken steps towards reform of the state-owned sector, at least on paper. For example, under the 2003 Law on State-Owned Enterprises, "State-owned enterprises were subject to accounting, auditing, financial and statistical reporting obligations" and "required to comply with the same accounting standards as other enterprises."[27] The GOV has also explained that the country enacted the 2005 Law on Investment "with a view to further enhancing the investment environment for investors of all economic sectors."[28]

Foreign trading rights: Upon its accession to the WTO, Vietnam largely dismantled its state trading enterprise monopoly. The 2008 National Trade Estimate from USTR states

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[23] *Vietnam NME Status Determination* at 37.
[24] *Id.* at 38.
[25] *Id.* at 18.
[26] U.S. Department of State, "Background Note: Vietnam." available at http://www.state.gov/r/pa/ei/bgn/4130.htm.
[27] *Vietnam Working Party Report* at 17 paragraph 65, *Petition* at Exhibit III-16.
[28] *Id*. at 9 paragraph 32.

that "import rights are granted for all products, except for a limited number reserved for state trading enterprises and those subject to a phase-in period for importation by foreign firms."[29]

Allocation of financial resources: In 2002, the Department noted with regard to Vietnam that "since the government still has considerable control over interest rates and lending policies, [the private] sector is constrained from access to the necessary credit for continued growth in accordance with the principles of a market economy."[30] Vietnam's state-owned banks account for more than 70 percent of banking assets.[31] In 1999, they were given the legal ability to act as independent entities.[32] As of 2002, however, the Department found that the central bank still had control over the lending rates of SOCBs and that "SOCBs were clearly weakened by state-directed lending under non-commercial criteria and the extent of SOE non-performing loans were a serious cause for concern."[33] Private enterprises were afforded insufficient access to credit through the formal banking sector.[34] Despite noting a number of positive reforms that marked a gradual move towards a commercially viable banking sector, such as liberalizing lending and deposit rates for non-state commercial banks,

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[29] *See* Office of the United States Trade Representative, 2008 National Trade Estimate stating that "Vietnam has reserved the right of importation for state trading entities for the following categories: cigars and cigarettes; crude oil; newspapers, journals, and periodicals; and recorded media for sound or pictures (with certain exclusions). Under the phase-in, foreign firms and individuals are restricted, until January 1, 2009, from importing the following categories of products: pharmaceuticals; motion picture films; unused postage, printed cards and calendars; certain printed matter; machinery for typesetting and print machinery (excluding ink-jet printers); and certain transmission apparatus for radio-telephony (excluding mobile phones and consumer cameras)."

[30] *Vietnam NME Status Determination* at 39.

[31] 2007 *IMF Staff Report at* 15; "State-owned banks' market share narrowed," Vietnam.net (June 10, 2006) ("Statistics show that the capital mobilized by state-owned banks in Hanoi still accounts for 72.7% of the total funds raised in the first nine months of the year.").

[32] *Vietnam NME Status Determination* at 32, stating that " the 1999 *Decree on the Finance Regime of Credit Institutions* requires banks to be financially autonomous and independently responsible for their business, their obligations and their commitments.... The Decree differentiates between state-owned and nonstate-owned credit institutions, whereby the profit of state-owned credit institutions are directed into a number of funds, such as a business development fund. Profit distribution of nonstate credit institutions is to be decided by the institution itself, once the reserve requirements for the charter capital have been met."

[33] *Id.* at 61.

[34] *Id.* at 36.

the Department found that "Vietnam's banking sector has not yet reached the level of development required to function as a true financial intermediary in market economy." The Department cited to insufficient independence and "the exclusion of sufficient competition in the banking sector *via* state regulation" as Vietnam's primary roadblocks.[35]

III. Conclusion

In this case, the Department should apply its practice of assessing each NME on a case-by-case basis to determine whether Vietnam's economy has evolved to a point where subsidies can be identified even though prices and costs remain unreliable for anti-dumping purposes. As demonstrated above, though Vietnam has still not met the standards necessary to earn market economy status in antidumping proceedings, the emergence of a private sector, loosening of price controls, currency restrictions, and foreign trading rights barriers, and attempts to start reforming the country's financial sector have all contributed to the evolution of market forces within a more flexible economic environment. While these market forces are still controlled and distorted by a wide array of government interventions, they have developed to such a point that the Department can identify the legal elements of a subsidy in Vietnam.

[35] *Id.* at 33.

Where such subsidies can be identified, the statute requires that countervailing duties be applied to provide effective redress the injury such subsidies cause to U.S. manufacturers, farmers, ranchers, and workers. For all of these reasons, the Department should apply the CVD law to Vietnam.

Respectfully submitted,

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