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May 27, 2009

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:

This submission is filed on behalf of Hilex Poly Co., LLC (“Hilex”) and Superbag Corporation (“Superbag”) 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 Hilex and Superbag are U.S. manufactures of polyethylene retail carrier bags (“PRCBs”) and together filed the CVD petition leading to the Department’s request for comments.

Hilex and Superbag are acutely aware of the injurious effects that subsidies conferred by the Government of Vietnam (“GOV”) can have on U.S. manufacturers and therefore support the

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).

application of the CVD law to Vietnam. The effects of GOV subsidy programs are apparent in Vietnam's plastic industry, which expanded by 30 percent or more in each year from 2004 to 2008.² Vietnam's success in the plastics industry is remarkable in light of the fact that the country has no competitive advantage.³ In fact, a draft report prepared by the World Trade Organization ("WTO") and GOV found government support to be the only "strength" the Vietnamese plastics industry enjoys.⁴

GOV subsidy programs were a particularly important issue during Vietnam's negotiations to accede to the WTO.⁵ As a result, Vietnam promised that upon accession it would revoke all subsidy programs prohibited by the WTO Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), except for two which would be phased out over a number of years.⁶ While the GOV may have revoked some of these subsidy programs prospectively, it

² Embassy of Denmark in Vietnam, "The Vietnamese Plastics Industry - Opportunities for Danish firms to invest in Vietnam through the privatisation of State Owned Companies" (2006) at 4; Embassy of Vietnam in Chile, "Plastics industry of Vietnam sets sights on US \$1 billion in exports in 2009 (Feb. 10, 2009).

³ UNCTAD/WTO International Trade Centre and the Vietnamese Trade Promotion Agency, "Export Potential Assessment in Viet Nam" (Draft) (Aug. 2005).

⁴ *Id.*

⁵ *See* Congressional Research Service, "Vietnam PNTR Status and WTO Accession: Issues and Implications for the United States," (Aug. 2, 2006) at 12 and 20; Office of the United States Trade Representative and the U.S. Department of Commerce, "Subsidies Enforcement Annual Report to the Congress" (Feb. 2007) ("Subsidies Enforcement Report") at 37.

⁶ *Id.* *See also* Vietnam's Draft Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures (Revision), WT/ACC/VNM42/Rev.1 ("*GOV 2006 Subsidy Notification*") at 6 (providing that the GOV will terminate a prohibited subsidy program upon accession, with benefits continuing an additional five years for enterprises already enjoying the subsidy).

ensured that companies already enjoying the benefits will continue to do so well into the future.⁷

The GOV also appears to have reinstated some of the prohibited subsidy programs, including discounted loans for exporters.⁸

Hilex and Superbag compete every day with subsidized products from Vietnam.⁹ Under U.S. law, industries being injured by foreign government subsidization are entitled to relief under the CVD law.¹⁰ The United States Court of International Trade has found that there is no legal bar to the application of the CVD law to a country considered a nonmarket economy (“NME”) for antidumping purposes.¹¹ As the Court explained:

Nothing in the language of the countervailing duty statute excludes NMEs. In fact “[a]t the time of the original enactment [of the countervailing duty statute] there were no nonmarket economies; Congress therefore had no occasion to address” whether countervailing duty law would apply to NMEs. *Georgetown Steel*, 801 F.2d at 1314. Although Plaintiffs allege that “[t]he CAFC has definitively ruled that the CVD law was not intended to be applied against NMEs” . . . the *Georgetown Steel* court did not go as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs. *Georgetown Steel*, 801 F.2d at 1318. Rather, the *Georgetown Steel* court only affirmed Commerce’s decision

⁷ See Decree No. 108/2006/ND-CP of September 22, 2006, *Detailing and Guiding the Implementation of a Number of Articles of the Investment Law* at Art. 20 (providing that any existing subsidy benefits will not decrease as a result of any subsequent change in the relevant law or policy).

⁸ See, e.g., “The Ministry of Industry and Trade has recommended lowering the interest rate on state-funded loans to exporters to 3 percent, the Vietnam Economic Times reported,” *Thanhniem News* (Feb. 19, 2009).

⁹ In 2008, Vietnam was the second largest exporter of plastic bags to the United States. See “Vietnam’s plastic bags under US lawsuit threat,” *Vietnam Business Finance* (Oct. 21, 2008).

¹⁰ See 19 U.S.C. § 1671.

¹¹ *Government of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int’l Trade 2007).

not to apply the countervailing duty law to the NMEs in question in that particular case and recognized the continuing “broad discretion” of the agency to determine whether to apply countervailing duty law to NMEs.¹²

The economy of Vietnam has progressed to the point where the application of the CVD law is warranted and necessary. Moreover, as explained below, Vietnam agreed to the application of countervailing duties in its WTO accession agreement. For all of these reasons, the Department should apply the CVD law to Vietnam.

I. VIETNAM AGREED TO BE BOUND BY SUBSIDIES DISCIPLINES WHEN IT ACCEDED TO THE WTO

In 2006, Vietnam and the United States concluded bilateral negotiations paving the way for Vietnam to join the WTO.¹³ The terms of this agreement required Vietnam to eliminate its prohibited subsidies, with the exception of two programs to be phased out over several years.¹⁴ Vietnam formally acceded to the WTO on January 11, 2007.¹⁵

The terms of its negotiated, multilateral accession agreement make clear that Vietnam is subject to countervailing duty investigations. In particular, Paragraph 255 of the Working Party Report on Vietnam’s WTO Accession specifies that “Article VI of the GATT 1994 . . . and the SCM Agreement shall apply in proceedings involving exports from Viet Nam”¹⁶ Further, in order to join the WTO Vietnam specifically agreed as follows:

¹² *Government of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int’l Trade 2007).

¹³ Subsidies Enforcement Report at 37.

¹⁴ *Id.*

¹⁵ *Id.* at 38.

¹⁶ *Vietnam Working Party Report* at paragraph 255.

In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies, the relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use alternative methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in Viet Nam may not be available as appropriate benchmarks.¹⁷

Thus, part of the price that Vietnam paid for admission to the WTO and the lower tariff barriers and other benefits membership provides was an agreement that as a WTO member it would be subject to subsidies disciplines. In recognition of this obligation, the GOV notified the WTO of certain subsidies programs it maintained at the time of accession.¹⁸ This notification contained information related to eighteen subsidies programs.¹⁹ These programs include preferential import tariffs, support for encouraged industrial products, incentives for exporters, import substitution programs, directed lending, and support programs for particular industries.²⁰

II. THERE IS NO BAR UNDER U.S. LAW TO APPLYING THE COUNTERVAILING DUTY LAW TO VIETNAM

Vietnam's status as an NME for antidumping purposes is not a bar to the application of the CVD law to the country's subsidized exports.²¹ While the Department previously had a policy not to apply countervailing duties to exports from NMEs, that policy was based on NMEs as they existed nearly a quarter century ago. Commerce explained that the economies of these

¹⁷ *Id.* Part V of the SCM Agreement is the section covering "Countervailing Measures."

¹⁸ *See GOV 2006 Subsidy Notification.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Government of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l Trade 2007).

Soviet-bloc countries were controlled by the government to the extent that even if they attempted to provide their producers with an economic incentive to increase production, the producers would have neither the motive nor the capacity to respond. In such systems, attempting to isolate a government financial contribution or, in the nomenclature of the time, a bounty or grant, was essentially impossible.²² The U.S. Court of Appeals for the Federal Circuit upheld the Department's discretion not to apply the CVD law to Soviet-style economies in the *Georgetown Steel* decision in 1986.²³

The world has changed considerably since the Department first instituted its policy not to investigate subsidies in Soviet-bloc countries in the mid-1980's. Most NMEs including Vietnam now have moved away from the Soviet economic model and undergone economic reforms sufficient to allow the Department to identify subsidies.

The Department recognized the changes affecting most NMEs in applying countervailing duties to subsidized goods from China in *Coated Free Sheet Paper*.²⁴ On March 29, 2007, the Department issued a memorandum assessing the differences between China's economy in 2006 and the Soviet-style economies that were the subject of *Georgetown Steel* (the "*Georgetown Memorandum*").²⁵ For the same reasons *Georgetown Steel* was no bar to the application of

²² See, e.g., *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,376, 19,377 (1984).

²³ *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) ("*Georgetown Steel*").

²⁴ *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60645 (October 5, 2007).

²⁵ See Memorandum to David M. Spooner, Assistant Secretary for Import Administration from the Office of Policy, Import Administration, *Countervailing Duty Investigation of Coated*

countervailing duties to subsidized exports from China, it is no bar to the application of the CVD law to Vietnam.

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*.²⁶ Vietnam's current economy is sufficiently "flexible" to determine whether the government has bestowed a benefit upon a producer and whether any such benefit is specific. Reforms in Vietnam's economy since 2002, while far from completing Vietnam's transition to a market economy, only reinforce the difference between Vietnam's present-day economy and Soviet-style economies. Vietnam's economy, both in 2002 and 2008, significantly mirrors China's economy and is as least as different from the Soviet-style economies at issue in *Georgetown Steel* as China's economy was found to be in 2006.²⁷

A. The Vietnamese Economy In 2008 Meets The Criteria Set Out In The *Georgetown Steel Memorandum For The Application Of The CVD Law*

In order to determine whether the CVD law could be applied to imports from China, the Department defined those characteristics of the economies at issue in *Georgetown Steel* that precluded the application of the CVD law. In the *Georgetown Memorandum*, the Department

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*").

²⁶ 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).

²⁷ See the *Georgetown Memorandum*.

referred back to both the *Georgetown Steel* opinion as well as the Department's original 1984 policy:

To determine that a countervailable subsidy had been bestowed, the Department needed to establish that: (a) the NME government had bestowed a “bounty or grant” on a producer; and (b) that the bounty or grant was specific. The Soviet-style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In such a situation, subsidies could not be separated out from the amalgam of government directives and controls. “Bounties or grants” in Soviet-style economies had no meaning because, given the pervasive role of NME governments in the economy in general, and those industries in particular, an alleged subsidy essentially involved one arm of the government giving money to another arm. The Federal Circuit recognized this, explaining that “even if one were to label these incentives as a ‘subsidy,’ in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves.” *Georgetown Steel*, 801 F.2d at 1316. In light of this, subsidies would have no meaning in such an economy. Similarly, in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test (emphasis added).²⁸

Thus, the first part of the standard is whether the economy is “essentially comprised of a single entity,” *i.e.*, the government, and thereby characterized by an “absence of market forces.” Alternatively, to use language quoted in the *Georgetown Memorandum*: Is the economy characterized by “the deliberate and almost complete severance between market forces and allocation and use of resources”?²⁹

Aspects of the economy that evidence such a rift were delineated by the *Georgetown Steel* court and cited by the Department:

²⁸ *Id.* at 10.

²⁹ *Id.* at 4.

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.³⁰

Few economies in the world today could be characterized by such a monolithic government presence coupled with a complete absence of market forces. The *Georgetown Memorandum* provides further elucidation of the standard through an examination of China's economy, which the Department characterized as “one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans.”³¹ Given the presence of market forces and entrepreneurship (albeit constrained), it followed naturally that the Department would find 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.”³²

One view of such “flexibility” is the ability of an economy to spontaneously react to, or accommodate, a change in the economic environment. This characteristic can be measured on a continuum. For example, a price may react to some extent to demand in the market, but demand may be artificially suppressed or heightened by non-market, government intervention. In such a case, the price is not meaningless; the enterprise purchasing a good at that price must contend with, and accommodate its business plans to, the price. At the same time, such a price is not a market-based measure of the worth of the good, *i.e.*, price formation was distorted by excessive government influence over the market. Viewed in this light, the extent of “flexibility” in the

³⁰ *Id.*

³¹ *Id.* at 9.

³² *Id.* at 5.

economy, both *de jure* and *de facto*, could be considered key to the Department's NME determinations. This is in contrast to the ossified Soviet-style economies which never reacted spontaneously, but only responded lockstep to the mandates of government fiat. As discussed below, prices in both Vietnam and China are clearly still mired in the transition between “meaningless” and “market-based and meaningful,” but nevertheless evidence sufficient flexibility in the economy to separate out economic activity from the amalgam of government directives and controls that previously defined the entire economy.

Analysis of the economic parameters addressed in the *Georgetown Memorandum* demonstrates that Vietnam's economy, much like China's, is sufficiently “flexible” to determine whether the GOV has bestowed a benefit upon a producer and whether any such benefit is specific.

B. Vietnam's Economy Is Significantly Different From The Soviet-Style Economies At Issue In *Georgetown Steel* And Closely Mirrors China's Present-Day Economy

In the *Georgetown Memorandum*, the Department recalls the stark characteristics of the “Soviet-style economies” forged in the Cold War period. The government was virtually in complete control of every aspect of the economy, owning and operating all major economic sectors. The government commanded the allocation of resources strictly in line with Party goals and directly set prices for nearly everything, including capital and labor.

In contrast, much like China, Vietnam has moved away from this level of command and control. For example, 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.”³³

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 Department has previously chosen to rely on China's date of WTO accession as the date after which the Department “will identify and measure subsidies in the PRC for purposes of the CVD law.”³⁴ The Department has acknowledged that “there was not a single moment or single reform law that suddenly permitted the Department to find subsidies in the PRC” and that “the statute does not differentiate between countries that have acceded to the WTO and those that have not.”³⁵ Rather, the Department “selected this date because of the reforms in the PRC’s economy in the years leading up to its WTO accession and the linkage between those reforms and the PRC’s WTO membership,”³⁶ citing to the Report of the Working Party on the Accession of China. The Department further explained that “the changes in the PRC’s economy that were brought about by those reforms permit the Department to determine whether countervailable

³³ *Vietnam NME Status Determination* at 1.

³⁴ Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China, (May 29, 2008) (“*CWP Final Decision Memorandum*”) at comment 2, page 41 as cited in *Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 31966 (June 5, 2008).

³⁵ *Id.* The only statutory difference in treatment for WTO member and non-member countries relates to injury determinations and is therefore not relevant to the Department’s analysis of subsidization.

³⁶ *Id.*

subsidies were being bestowed on Chinese producers.”³⁷ The changes cited by the Department were the elimination of price controls on most products, permitting the development of a private industrial sector since the 1990s, and abolishing the mandatory credit plan in 1997.³⁸ As discussed below, these are all reforms that the Department has found Vietnam to have enacted, and a comparable analysis and conclusion are warranted here.

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 Nam was shifting from a system of central planning to a market-based economy.”³⁹ 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.”⁴⁰ Some of the reforms to Vietnam’s legal structure which had taken place prior to accession are presented below.

1. Wages and prices

As described by the Department in the *Georgetown Memorandum*, prices for nearly all commodities and services in Soviet-style economies were set administratively by pricing committees or other state agents without deference to supply and demand, serving as an “accounting device between supplier and consumer enterprises.”⁴¹ Price setting extended to

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Petition* at Exhibit III-16. 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.,

⁴⁰ *Id.* at 2 paragraph 7.

⁴¹ *See Georgetown Memorandum* at 5.

wage scales; and government agencies were responsible for labor allocation and mandating labor productivity targets.⁴²

In the Department's Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, the Department explained the importance of prices to its reasoning in 1984, and with respect to China in 2006. The Department stated that it had reached its conclusions in the 1984 *Georgetown Steel* cases,

in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. The Department explained that “this is the background that does not allow us to identify specific NME government actions as bounties or grants.” *Id.* Thus, the Department based its decision upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, “although price controls and guidance remains on certain ‘essential’ goods and services in China, the PRC Government has eliminated price controls on most products....” See *Georgetown Steel Applicability Memorandum*. Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in these Wire Rod cases is not a significant factor with respect to China's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from China.⁴³

With respect to Vietnam, the Department found in its 2002 analysis that “most price controls had been abolished.”⁴⁴ Much like China, however, Vietnam had not achieved market-based prices. The Government Pricing Committee maintained discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies, including such

⁴² *Id.*

⁴³ *CWP Final Decision Memorandum* at 26.

⁴⁴ *Vietnam NME Status Determination* at 30-31.

commodities as steel and cement.⁴⁵ Nevertheless, in 2002, “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.”⁴⁶ In the Working Party Report, 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.”⁴⁷

In contrast to the rigid, government-set wage scales of the Soviet-style economies, the Department found in 2002 that wages in Vietnam's private sector were “largely determined by free bargaining between labor and management.”⁴⁸ Vietnam had promulgated a legal framework that established “the basis for free bargaining over wages and other terms and conditions of employment.”⁴⁹ While mandatory wage scales were still set by Vietnam's government for state-owned enterprises (“SOEs”), the Department found that the difference in pay levels across SOEs suggested that a major determinant of SOE actual wages was the level of reported profit of the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *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. 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.*

⁴⁸ *Vietnam NME Status Determination* at 1.

⁴⁹ *Id.* at 12.

enterprise.⁵⁰ The Department also found that “wages tend to vary geographically and across sectors,”⁵¹ which suggests that limited forces of supply and demand may have played a role in wage formation. Finally, the Department also noted that “the significance of any government’s involvement in the wage labor market is limited by the fact that 85 to 90 percent or more of the active labor force is self-employed and not subject to any government wage control.”⁵²

(emphasis added).

As noted above, the Department made very similar findings regarding pricing in China's economy.⁵³ With respect to wages, the Department described a number of institutional constraints on wage formation in China, *e.g.*, the *hukuo* system and the lack of independent trade unions, but nevertheless found that “enterprises generally are free to set wages and the majority of prices,” albeit “within the broader, distorted economic environment over which the PRC Government has not ceded fundamental control.”⁵⁴ Therefore, prices and wages in China are neither market-based nor administratively set by an omnipotent central government.

Prices and wages in Vietnam and China provide excellent examples of meeting the two-part *Georgetown Memo* standard described above. Based on the Department's findings, both the PRC Government and the GOV have ceded direct control over many, if not the majority, of prices and wages. As the Department correctly noted in the final determination in *Circular Welded Pipe*, flexibility in pricing is an important aspect of this analysis. It allows some

⁵⁰ *Id.* at 14.

⁵¹ *Id.*

⁵² *Id.* at 15.

⁵³ *Georgetown Memorandum* at 5.

⁵⁴ *Id.*

entrepreneurial discretion in, as well as responsibility for, negotiating wages, maintaining a work force in order to continue operations, and budgeting for prices and costs. However, while prices and costs are much more meaningful to the individual private domestic and foreign enterprises operating within Vietnam's and China's non-market economies of today, the process of price and wage formation still bears the legacy of its command and control past. Both governments continue to maintain a deliberate and distortive foothold in the broader economic environment through administrative “levers,” indirectly affecting prices and wages.

2. Access to foreign currency

Access to foreign currency was extremely circumscribed in Soviet-style economies. For example, the Soviet *ruble* was completely inconvertible and not permitted to be used in foreign trade.⁵⁵ As early as 2002, Vietnam had already made the shift away from such an isolating system to one where currency was available for trade purpose, albeit with significant government oversight. At the time, the *dong* was not yet fully convertible for current account purposes.⁵⁶

But reforms since 2002 have edged Vietnam towards greater convertibility. Vietnam has since assumed International Monetary Fund (“IMF”) Article VIII obligations requiring full convertibility on the current account.⁵⁷ The 2009 Country Commercial Guide notes that in

⁵⁵ *Id.* at 6.

⁵⁶ *Vietnam NME Status Determination* at 9.

⁵⁷ *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

Vietnam foreign exchange approval is no longer required for the conversion of the *dong* and that the 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.⁵⁸

At the time of the Department's 2002 analysis, the official exchange rate for the *dong* was established daily by the government based on the average of price quotes in a “thin and sometimes completely dormant” interbank market from the previous day.⁵⁹ In sum, the Department found that “convertibility of the *dong* is therefore limited by government intervention in the FOREX market, resulting in a highly managed exchange rate regime.”⁶⁰ Vietnam has loosened somewhat its tight hold on the exchange rate, and IMF staff recommended in their 2007 Article IV consultations that “this is a propitious time for a move towards a more flexible exchange rate regime.”⁶¹ 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.⁶²

maintained for security reasons that have been notified to the Fund pursuant to Executive Board Decision No. 144-(52/51).”

⁵⁸ 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.

⁵⁹ *Vietnam NME Status Determination* at 10.

⁶⁰ *Id.*

⁶¹ *2007 IMF Staff Report* at 14, *Petition* at Exhibit III-17.

⁶² *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

Similarly, the Department found that China's currency is freely convertible on the current account today, with limitations on capital account convertibility.⁶³ Much like the GOV control over the *dong*, the Department found in the *Georgetown Memorandum* that China's central bank continues to manage the exchange rate, allowing only modest movements in the value of the currency.⁶⁴

In sum, in 2002, the Department found "positive advances in currency convertibility that evidence a gradual movement toward liberalization" in Vietnam.⁶⁵ Nevertheless, "overall, the FOREX regime remained shielded from exogenous market forces" and did not "meet the necessary requirements of a market-based foreign exchange."⁶⁶ While reforms since 2002 may be viewed as progress, remaining limitations on currency convertibility and exchange rates also evidence that the *dong* remains shielded from market forces. Similarly, with respect to China, the Department found that "while China's reforms to date do not ensure that the *renminbi* is truly market-based, neither is the currency completely insulated from market forces."⁶⁷

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."

⁶³ *Georgetown Memorandum* at 6.

⁶⁴ Memorandum from Office of Policy, Import Administration to David Spooner, Assistance Secretary for Import Administration, Antidumping Investigation of Certain Lined Paper from the People's Republic of China, China's Status as a Non-Market Economy, (August 30, 2006) ("*Lined Paper NME Memorandum*") at 11.

⁶⁵ *Vietnam NME Status Determination* at 11.

⁶⁶ *Id.*

⁶⁷ *Lined Paper NME Memorandum* at 13.

Therefore, while enterprises and citizens generally have access to foreign currency for trade purposes (in marked contrast with the Soviet-style economies), China's and Vietnam's reforms to date do not ensure that their currencies are truly market-based. Nevertheless, in both cases, these economies have made significant transitions away from the Soviet-style currency regimes in which neither the market nor private actors had any appreciable role. Specifically, "limited convertibility" is substantially more "flexible" than "inconvertible."

3. Personal property rights and private entrepreneurship

Personal property rights and the right to engage in private enterprise were extremely circumscribed in the Soviet-style economies at issue in *Georgetown Steel*. "Private enterprise was not officially permitted or tolerated in the Soviet Union until 1987, and then only in limited spheres of the economy."⁶⁸ Rather, the government controlled all aspects of the state-owned economy, delineating production plans, setting output targets, and creating performance indicators which bore no relation to any exogenous forces of supply and demand.

In contrast, although the Department found that Vietnam's *1997 Commercial Law* reserved a leading role for the state-owned sector, it also protected the rights of domestic and foreign private businesses to engage in competitive enterprises.⁶⁹ 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."⁷⁰ This finding could not tip the scales towards market economy status, however. Vietnam's private sector, much like China's, must operate within the footprint created by its government. Accordingly, the Department noted in its

⁶⁸ *Georgetown Memorandum* at 6.

⁶⁹ *Vietnam NME Status Determination* at 37.

⁷⁰ *Id.* at 38.

2002 analysis of Vietnam's economy 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.”⁷¹

Foreign direct investment (“FDI”) also brings an important non-state element to post Soviet-style economies such as Vietnam or China. The Department found in 2002 that FDI inflows in Vietnam were “limited” but that “the FDI that does take place has a relatively large economic impact from a GDP standpoint. Foreign Invested Enterprises (“FIEs”) now account for twelve percent of GDP and one-third of industrial output, but only one to three percent of the total labor force.”⁷² Further, by 2002, wholly-foreign owned enterprises were gaining ground. The Department found that “the government has recently been more willing to accept 100 percent foreign-owned enterprises in Vietnam, at least in the export sector and those which fulfill projects listed in the government’s plan for development.”⁷³ FDI inflows continue to grow; in 2008, Vietnam attracted the highest level of FDI commitments since 1988.⁷⁴

While increasing FDI levels may evidence a willingness to move toward reform, the Department also found that “the government continues to direct and control FDI in a manner consistent with its SOE development policies.”⁷⁵ Further, “Vietnam’s regulatory framework does not evidence a willingness to allow FDI to flow throughout the economy. Licensing and

⁷¹ *Id.* at 39.

⁷² *Id.* at 18.

⁷³ *Id.* at 20.

⁷⁴ U.S. Department of State, “Background Note: Vietnam.” available at <http://www.state.gov/r/pa/ei/bgn/4130.htm>.

⁷⁵ *Vietnam NME Status Determination* at 18.

registration procedures and limitations on choice of corporate form have been the means for directing FDI and implementing the government's economic development plan."⁷⁶

With respect to the state-owned sector, the GOV has stated publicly its intent to preserve an active and key role for SOEs in what it refers to as a "socialist-oriented market economy."⁷⁷ The Department found that SOEs in Vietnam enjoyed a number of advantages, not the least of which was greater access to credit.

The Working Party Report of the Accession of Vietnam indicates that several important laws have been enacted since 2002 with respect to economic activity in Vietnam. As is evident by the text of the Working Party Report, WTO Members certainly explored the details of these laws, with good reason. *De jure* reform does not necessarily mean that actual reform has taken place on the ground. Nevertheless, these laws indicate a movement in the direction of a more open and fair business environment. 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."⁷⁸ 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."⁷⁹ The law regulated all investment activities and the rights and obligations of all investors, regardless of nationality. Vietnam also enacted a Competition Law, which came into force in July 2005. The Vietnamese representative to the WTO stated that "the Law applied

⁷⁶ *Id.* at 22.

⁷⁷ *Id.* at 43.

⁷⁸ *Vietnam Working Party Report* at 17 paragraph 65, *Petition* at Exhibit III-16.

⁷⁹ *Id.* at 9 paragraph 32.

to all enterprises, whether State-owned, private, State-controlled, equitized or foreign-invested, and to trade associations,” recognizing “enterprises’ freedom to compete and protected the right to business competition.” The Vietnamese WTO representative added that the Competition Law prohibits state management agencies from unlawfully coercing enterprises or hindering their business operations.⁸⁰ As stated above, it is as of yet unclear what affect these laws will have the on the operating environment of enterprises in Vietnam.

Many parallels exist between the paths that Vietnam and China have taken in opening up the economy and allowing the private sector to operate. As the Department stated in the *Georgetown Memorandum*, China began to allow the private industrial sector to develop in the 1990s, which “today dominates most of the industries in which the PRC Government has not explicitly preserved a leading role for SOEs.”⁸¹ The limitations on the free growth of the private sector are quite similar to those in Vietnam, namely, limited access to bank credit and a difficult legal environment for business. Nevertheless, similar to Vietnam's burgeoning private sector, “entrepreneurship is flourishing in China, in stark contrast to the Soviet-style economies in the 1980s.”⁸² Further, with respect to FDI, the Department found that “ despite being quite open to

⁸⁰ *Id.* at 27, paragraph 105. Specifically, “it recognized enterprises' freedom to compete and protected the right to business competition. The Law prohibited anti-competitive acts and unfair competition. It also prohibited State management agencies from performing certain acts, such as forcing enterprises, organizations or individuals to buy or sell goods or provide services to designated enterprises (except for areas where the State held a monopoly or in emergency cases); discriminating between enterprises; forcing enterprises or trade associations to align with one another with a view to precluding, restricting, or preventing other enterprises from competing on the market; and performing any other act preventing the lawful business activities of enterprises.”

⁸¹ *Georgetown Memorandum* at 6-7.

⁸² *Id.* at 7.

foreign investment, as shown by large FDI flows over the past decade, China manages foreign investment to a significant extent, guiding foreign investment towards favored export-oriented industries and specific regions, while shielding certain domestic firms from competition,”⁸³ an economic policy nearly identical to Vietnam. Moreover, similar to the public statements of the GOV, the Department found that though “the PRC Government maintains the stated goal to preserve a leading role for SOEs in the ‘core industries’ of energy, defense, metals, motor vehicles, transport, and telecom, varying degrees of non-state participation is permitted even in these sectors.”⁸⁴

Given this overview of the public versus private sectors, the Department's finding in the *Georgetown Memorandum* with respect to China is equally true of Vietnam, that is “an economy that features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance.”⁸⁵ The burgeoning private sector of Vietnam is one of the clearest indicators of flexibility in Vietnam's economy. This sector has limited flexibility and independence to adapt and adjust to the economic environment. The private sector's prices and costs are not meaningful, market-based measures of value, but are nevertheless very real to their business operations. Certainly a private sector, however constrained by the non-market interventions of the government, could not be an “economic engine” in an economy characterized by a deliberate and almost complete severance between market forces and allocation and use of resources.

⁸³ *Lined Paper NME Memorandum* at 33.

⁸⁴ *Georgetown Memorandum* at 7.

⁸⁵ *Id.*

4. Foreign trading rights

In Soviet-style economies, all foreign trade was conducted through – and controlled by – the government. The government determined what and how much would be imported and exported. State Trading Enterprises (“STEs”) were the only economic intermediaries between domestic parties and the outside world.⁸⁶ In short, STEs were the foreign trading arm of the sole economic actor, the monolithic government of the Soviet-style economy.

As discussed above, Vietnam’s accession to the WTO in 2007 significantly changed its economy and marked a key turning point in its economic development. With the borders open to trade and the large number of economic reform commitments undertaken by the country, no longer could the central government operate anything even close to a Soviet-style centrally planned economy. Moreover, with its accession to the WTO, Vietnam has largely dismantled its STE monopoly. The 2008 National Trade Estimate states 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.”⁸⁷

Similarly, the Department found in the *Georgetown Memorandum* that, in accordance with its WTO Accession obligations, China had made substantial progress towards dismantling

⁸⁶ *Id.*

⁸⁷ 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).”

the effective monopoly previously held by its STEs, noting that China continues to maintain some import price controls through the use of STEs.⁸⁸

Vietnam's accession to the WTO and the continued liberalization of its foreign trade is further evidence of the Department's finding in 2002 that Vietnam has "taken substantial steps to open its market to the international community and to allow limited forces of supply and demand affect the development of its economy."⁸⁹

5. Allocation of financial resources

Allocation of credit in Soviet-style economies was generally achieved through the Central Bank, which also acted as a commercial bank, an investment bank, and clearing agent. The government directly controlled most investments, set interest rates, and established plans for the allocation of nearly all financial resources in accordance with central economic plans.⁹⁰

Although Vietnam's state-owned banks account for more than 70 percent of banking assets,⁹¹ in 1999, they were given the legal ability to act as independent entities.⁹² As of 2002, however, the Department found that the central bank still had control over the lending rates of

⁸⁸ *Georgetown Memorandum* at 7.

⁸⁹ *Vietnam NME Status Determination* at 1.

⁹⁰ *Georgetown Memorandum* at 8.

⁹¹ 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.").

⁹² *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."

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.”⁹³ Private enterprises were afforded insufficient access to credit through the formal banking sector.⁹⁴ 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, 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.⁹⁵ Independent analysis confirm that the problems identified by the Department in 2002 continued into the period of investigation.

Demand for bank loans is likely to increase due to [the] emerging private sector, though insufficient supply of financial services doesn’t seem to fulfill this demand. Moreover, most of the bank loans are directed towards State-Owned Enterprises (SOEs) as about 70% of banking assets are covered by four largest SOCBs (State-Owned Corporate Banks) with implicit and explicit government support for State-owned Enterprises (SOEs).⁹⁶

The Department cited to nearly identical problems with China's banking system in the *Georgetown Memorandum*. Overwhelming state ownership of the commercial banking sector provides the PRC government with means to guide the allocation of credit through non-direct

⁹³ *Id.* at 61.

⁹⁴ *Id.* at 36.

⁹⁵ *Id.* at 33.

⁹⁶ “Vietnam - Foreign Influence, Privatization Leading Bank Loans to Growth,” RNCOS (June 6, 2008).

measures, evidenced by non-performing loans and cycles of the government bailouts. Credit to private enterprises was found to represent a small, but growing, share of the total amount of credit.⁹⁷ Overall, the Department found that despite “potential for and evidence of state control over lending decisions . . . China’s banking system is nevertheless more flexible than the Soviet-style banking sectors, where central banks directly allocated all credit in accordance with the wishes of the party and the central planners.”⁹⁸

Given the overwhelming state ownership and the continued formal interventions in, and informal influence over, the banking sectors, the Department’s analysis of China’s and Vietnam’s financial sectors is nearly identical.

III. CONCLUSION

Similar to China, Vietnam’s current economy-in-transition is sufficiently flexible to permit the application of the CVD law. Moreover, the large number of subsidy programs in Vietnam and their injurious effects on competing U.S. companies and industries mandate the application of the CVD law to Vietnam. Thus, for all the reasons stated above, the Department should determine that Vietnam is not exempted from the CVD law. Any other decision would be contrary to law, would undercut the anticipated benefits of Vietnam’s WTO accession agreement commitments, and would contradict the economic analysis and legal precedents set out by the Department in prior cases.

⁹⁷ *Georgetown Memorandum* at 9.

⁹⁸ *Id.*

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May 27, 2009
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Please do not hesitate to contact the undersigned with questions or comments regarding this submission.

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