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May 27, 2009

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

Re: *Application of Countervailing Duty Law to Imports from Vietnam:*  
Request for Comments on the Polyethylene Retail Carrier Bags from Vietnam

Dear Ms. Tillman:

On behalf of the Vietnam Plastics Association, enclosed please find our response to the U.S. Department of Commerce's invitation to submit comments on the Department's initiation of a countervailing duty case against Vietnam while the Department's continues to designate of Vietnam as a non-market economy.<sup>1</sup> The Vietnam Plastics Association appreciates the opportunity to submit comments on this critical issue.

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<sup>1</sup> *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. 19064, (April 27, 2009).

Barbara E. Tillman, Director  
May 27, 2009  
Page 2

In accordance with the Departments request for comments, we are filing an original and 8 copies of this submission with the Department, as well as a copy of the submission on CD-ROM. Please contact the undersigned if you have any questions regarding this submission.

Sincerely,



William H. Barringer  
Daniel L. Porter  
Valerie Ellis

*Counsel on behalf of Vietnam Plastics Association*

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**PUBLIC CERTIFICATE OF SERVICE**

I hereby certify that a complete copy of the foregoing public submission has been served this day, by hand, upon the following persons:

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Dated: May 27, 2009

**Before the United States Department of Commerce  
International Trade Administration**

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**Comments of the Vietnam Plastics Association  
On the Applicability of the Countervailing Duty Law to Vietnam**

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May 27, 2009

**TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY ..... 1

I. VIETNAM'S ECONOMY AND POLITICAL STATUS IS MARKEDLY DIFFERENT FROM CHINA AND CALLS FOR DIFFERENT TREATMENT BY THE DEPARTMENT..... 1

II. IF IT CONTINUES TO TREAT VIETNAM AS A NON-MARKET ECONOMY FOR ANTIDUMPING PURPOSES, THE DEPARTMENT HAS NO LEGAL AUTHORITY TO IMPOSE CVD DUTIES AGAINST VIETNAM..... 3

    A. In *Georgetown Steel* the CAFC Definitively Ruled That, Under the Statutory Scheme, the CVD Law Was Not Intended To Be Applied Against Countries..... 3

        1. Statutory language ..... 6

        2. Congressional action..... 6

        3. Presence of other trade provisions to address NME imports..... 7

        4. The impracticability of investigating subsidies in NME countries..... 7

    B. Congressional Action Subsequent To The Federal Circuit's Opinion In *Georgetown Steel* Solidified A Statutory Scheme That Does Not Allow The Application Of The CVD Law To NME Countries..... 9

        1. Congress left intact the basic CVD statute as originally conceived in 1897 ..... 10

        2. In amending the statutory scheme, Congress acted with the understanding that the CVD law does not apply to NME countries, debated whether to give Commerce discretion in this area, but chose not to do so..... 11

        3. Rather than grant Commerce discretion, Congress codified a definition of “nonmarket economy country” inextricably linked to Commerce’s justification not to apply the CVD law to NMEs..... 13

        4. Congress continued to enhance those specific statutory provisions under the antidumping law addressing NMEs ..... 15

    C. The Dual Application Of CVD Duties And The NME AD Methodology Leads To Double Remedies..... 17

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III. THE DECISION TO APPLY THE CVD DUTIES AGAINST VIETNAM REQUIRES THE DEPARTMENT TO RE-EVALUATE WHETHER TO TREAT VIETNAM AS A NON-MARKET ECONOMY IN AD CASES ..... 20

IV. AT THE VERY LEAST, IF THE DEPARTMENT INTENDS TO APPLY THE CVD  
LAW TO VIETNAM WITHOUT GRADUATING VIETNAM TO MARKET  
ECONOMY STATUS, FUNDAMENTAL FAIRNESS REQUIRES THE  
DEPARTMENT TO CHANGE ITS NME AD METHODOLOGY.....22

CONCLUSION.....23

## INTRODUCTION AND SUMMARY

On behalf of the Vietnam Plastics Association, we submit these comments on the applicability of the countervailing duty ("CVD") laws to the Socialist Republic of Vietnam ("Vietnam"). This submission is in response to the Department's invitation for public comment included in the initiation notice for the CVD investigation of polyethylene retail carrier bags from Vietnam. *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. 19064, (April 27, 2009). The Vietnam Plastics Association appreciates this opportunity to comment on the Department of Commerce's (the Department) next steps in deciding whether it is appropriate to apply the CVD laws to Vietnam.

### **I. VIETNAM'S ECONOMY AND POLITICAL STATUS IS MARKEDLY DIFFERENT FROM CHINA AND CALLS FOR DIFFERENT TREATMENT BY THE DEPARTMENT**

When the Department was first asked to apply the CVD laws to China, it was facing a situation that is readily distinguishable from the situation presented by the CVD petition against imports from Vietnam. When the first CVD case against China was filed in 2006, the United States had just completed an exhaustive review of China's economy and had determined that, despite some evidence of reform, the economy was not sufficiently market-oriented to warrant its graduation from non-market economy ("NME") status. Additionally, political pressure had been intensifying in 2006, the year the petition was filed, to address perceived unfairness in the Chinese trading system, including allegations that China manipulated its currency and erected significant import barriers to protect its domestic industries from competition. See e.g., Report to Congress on International Economic and Exchange Rate Policies, U.S. Department of Treasury, May 2006. None of these same conditions are in any way applicable to Vietnam.

The United States has not conducted a comprehensive review of the market reforms in Vietnam since 2002. This fact is revealed in the petition, which repeatedly cites to the Department's 2002 determination (effective July 2001) that articulated the Department's reasons for treating the country as an NME. Yet, even a cursory review of the principal findings of that determination reveal that times have changed. Specifically, the Department stated that in 2002, "the Vietnamese currency, the dong, is not fully convertible. . ." whereas today, the Department itself has nearly nine years of published exchange rate data for the Vietnamese dong available on its web site – data which in turn are sourced from the Dow Jones Reuters Business Interactive LLC (trading as Factiva) (a fee-based service).. See <http://ia.ita.doc.gov/exchange/index.html>. Additionally, the Department cited to the lack of private land ownership in 2002, but since then, land management has undergone substantial reformation. The Department also cited at that time to extensive government control of industry, a fact belied by the Department's own experience administering cases against Vietnam, where it regularly finds a multitude of companies qualifying for separate rates under the NME antidumping (AD) methodology. See e.g., *Certain Frozen Warmwater Shrimp from Vietnam*, 73 Fed. Reg. 52273 (final results) (September 9, 2008). While these facts alone may not be sufficient evidence alone to graduate Vietnam to market economy status, they do serve to highlight that the Department's approach to U.S.-Vietnam trade is woefully out of date.

Vietnam trade has maintained a steady, sustainable level of trade with the United States, and has worked closely with the United States in moving its economy forward to a market-based system. Although U.S.-Vietnam trade has expanded in the past decade, this expansion has been due to the methodological removal by both countries of any significant trade barriers, and has not come as the result of unreasonably cheap or unfairly traded imports. Indeed, even under the

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Department of Commerce's NME methodology, it is rare to find an instance of Vietnamese exporters dumping merchandise in the U.S. market. See *id.* Recently, the two countries continued to strengthen their economic ties by engaging in the first round of bilateral investment treaty negotiations. Now is simply not the time for the United States to turn away from the strong economic alliance it has forged with Vietnam.

Given the unique situation presented by Vietnam, the Department should immediately rescind the initiation of the CVD investigation, and conduct a full inquiry into the market-orientation of Vietnamese economy.

**II. IF IT CONTINUES TO TREAT VIETNAM AS A NON-MARKET ECONOMY FOR ANTIDUMPING PURPOSES, THE DEPARTMENT HAS NO LEGAL AUTHORITY TO IMPOSE CVD DUTIES AGAINST VIETNAM**

Under the current statutory scheme, the Department may not apply the CVD law to a country designated as a non-market economy for purposes of a companion antidumping investigation. If the Department continues to adhere to its finding in 2002 that Vietnam has not sufficiently made the transition to a market economy, then it may not proceed with this countervailing duty investigation. Although the Department has elected to apply the CVD law to China notwithstanding the serious questions about legality that remain unresolved, it should take this opportunity to re-evaluate and reverse this decision with respect to Vietnam and elect instead to adhere to a logical and legally defensible practice that is consistent with the governing statutes and case law.

**A. In *Georgetown Steel* the CAFC Definitely Ruled That, Under the Statutory Scheme, the CVD Law Was Not Intended To Be Applied Against Countries**

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The relevant issue concerning the Department's legal authority is whether the statutory framework encompassing the AD and CVD provisions permits the Department to initiate CVD cases against NME countries. In 1986, the CAFC in *Georgetown Steel* addressed this very issue and definitively ruled that, under the statutory scheme that Congress created to address allegedly unfair imports, the CVD law does not apply to NME countries. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The Court of Appeals reached this conclusion after a very thoughtful and comprehensive analysis of the purpose of the statute and Congress' own treatment of the statute through legislative action.

We understand that the Commerce Department disagrees with this interpretation of *Georgetown Steel*, and maintains that the *Georgetown Steel* decision affirmed only “that the Department of Commerce has the discretion not to apply the CVD law to non-market economy countries.” See *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75507 (Dec. 15, 2006). Such interpretation lies at the center of the Department's stated legal justification for applying the CVD law to China, as set forth in its *Georgetown Steel* Applicability Memorandum issued in the *CFS Paper* case. See *Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy*, Memorandum for Assistant Secretary David M. Spooner (Mar. 29, 2007) (hereinafter "Georgetown Steel Applicability Memo"). The Department's *Georgetown Steel* Applicability Memorandum devotes pages and pages analyzing whether undisputed changes in the world since 1986 compel the Department to re-evaluate its “long-standing policy of not applying the CVD law to non-market economy countries, such as China.” *Id.* at 2. Interestingly, however, no where in the *Georgetown Steel* Applicability

Memorandum does the Department even attempt to explain why it believes it has the legal authority to conduct this re-evaluation. Rather, the ability to conduct this re-evaluation is premised entirely on the Department's *single sentence* interpretation that the CAFC's *Georgetown Steel* decision simply "affirmed the Department's discretion not to apply the CVD law to NME's." *Id.*

The Commerce Department's interpretation of *Georgetown Steel*, however, cannot be sustained. A simple reading of *Georgetown Steel* demonstrates that when the CAFC upheld the Commerce Department's own legal conclusion that the CVD law does not apply to NME's, it did so *not* because the Commerce Department's statutory interpretation was one reasonable interpretation among several. Rather, the CAFC found the Commerce Department's interpretation to be the *only* permissible interpretation of the statutory scheme. Indeed, the CAFC's holding does not reflect any deference to the expertise of the administering agency in interpreting the statute — although at that time DOC had consistently considered and rejected the notion that the CVD law could apply to non-market economies — but rather the CAFC's own careful legal analysis.

Such conclusion is readily apparent from the language of *Georgetown Steel*. At the outset we note that the Court of Appeals did not frame the relevant issue before it as whether the Commerce Department's statutory interpretation was permissible among several possibilities. Rather, in the very first sentence of the Court's decision, the Court stated as follows:

The substantive issue in this case, here on appeal from the Court of International Trade, is whether the countervailing duty provisions apply to alleged subsidies granted by countries with so-called non-market economies for goods exported to the United States.<sup>12</sup>

This is how the CAFC framed the issue before it: Whether the CVD law applies to NME countries.

The remainder of the CAFC's decision details why the CAFC answered this question with an unequivocal "no." The decision makes clear that the CAFC reached its conclusion after its thoughtful analysis of (i) the statutory language; (ii) Congressional action (and inaction); (iii) the presence of other provisions to address imports from NMEs; and (iv) the impracticability of investigating subsidies in NME countries.

### **1. Statutory language**

With respect to the statute, the court of appeals concluded that the history surrounding the U.S. statute governing countervailable subsidies confirmed that it was not intended to address non-market economies. The court stated:

In its relevant terms, section 303 is substantially unchanged from the first general countervailing duty statute Congress enacted as section 5 of the Tariff Act of July 24, 1897. At the time of the original enactment there were no nonmarket economies; Congress therefore had no occasion to address the issue before us.

801 F.2d at 1314. In light of these origins, the court refused to accept the "broadest possible" interpretation of the statute to find an intent by Congress to "cover as many beneficial acts [for the exporter] as possible." *Id.* The statute had a narrower scope.

### **2. Congressional action**

The Federal Circuit also highlighted the fact that section 303 of the Tariff Act had been reenacted by Congress on several occasions, but never changed to move beyond the basic foundation of the provision as crafted in 1897:

Since that time Congress has reenacted section 303 six times, without making any changes of significance to the issue before us. . . . That fact itself strongly suggests that Congress did not intend to change the scope or meaning of the provision it had first enacted in the last century.

*Id.* at 1314 (internal citation omitted). The court could not discern any legislative intent to alter the long-standing statutory scheme.

### 3. Presence of other trade provisions to address NME imports

Perhaps most importantly, the court found support for its conclusion in the fact that “Congress on several occasions in other statutes specifically dealt with exports from nonmarket economies.” *Id.* According to the court:

Those statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law would apply.

*Id.* at 1316. The court proceeded to discuss the implementation of the non-market economy provisions of the antidumping law, successive legislative history regarding those provisions, and any other legislative history concerning amendments to the countervailing duty law. *Id.* at 1316-18. Based on a review of all the amendments and legislative history, the court concluded:

**Congress . . . has decided** that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law. . . .If that remedy is inadequate to protect American industry from such foreign competition – a question we could not possibly answer – **it is up to Congress** to provide any additional remedies it deems appropriate.

*Id.* at 1318 (emphasis added). The court did not equivocate on this fundamental issue.

### 4. The impracticability of investigating subsidies in NME countries

Finally, the court placed all its analysis of the statute and legislative history in the broader context of the purpose of the countervailing duty law and the nature of non-market economies.

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The court found that in enacting the countervailing duty law Congress intended to address

“unfair competition” driven by subversion of the market process and the misallocation of resources in a market economy setting. *Id.* at 1315. It concluded, however, that:

In exports from a nonmarket economy . . . this kind of “unfair” competition cannot exist. Although a nonmarket state may engage in foreign trade through various entities, the state controls those entities and determines where, when and what they will sell, and at what prices and upon what terms.

...

Unlike the situation in a competitive market economy, the economic incentives the state [provides to exporting entities do] not enable those entities to make sales in the United States that they otherwise might not have made. 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. **[This is not] the kind of “bounty” or “grant” for which Congress in section 303 prescribed the imposition of countervailing duties.**

*Id.* at 1315. In essence, the court described the futility of even attempting to measure the unfair advantage conferred in a non-market economy through the countervailing duty law. It simply made no logical sense. The court concluded:

Based upon the purpose of the countervailing duty law, the nature of nonmarket economies and the actions Congress has taken in other statutes that specifically address the question of exports from those economies, we conclude that the economic incentives and benefits that [bestowed in nonmarket economies] do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended.

*Id.* at 1314.

That the Commerce Department has decided to change *its* own view on the issues does not negate the fact that the CAFC has already concluded that the statutory framework does not permit application of the CVD law to non-market economy countries.

**B. Congressional Action Subsequent To The Federal Circuit's Opinion In *Georgetown Steel* Solidified A Statutory Scheme That Does Not Allow The Application Of The CVD Law To NME Countries**

Congressional action since *Georgetown Steel* confirms that Commerce's new interpretation of the statute cannot be sustained. Since *Georgetown Steel*, Congress has reaffirmed a statutory scheme that unambiguously does not allow application of the CVD law to NMEs. This conclusion is supported not only by specific Congressional actions, but also by the fact that Congress took these actions with a full understanding of agency and judicial precedent, including *Georgetown Steel*. As such, this conclusion is supported by traditional tools of statutory construction.

It is well recognized that “statutory construction is a 'holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme . . . .’” *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). “Thus, it is not proper to confine interpretation to the one section to be construed.” 2A Norman J. Singer, *Sutherland, Statutes and Statutory Construction* § 46:5, at 190-201 (7<sup>th</sup> ed.). “Courts will not only consider the particular statute in question, but also the entire legislative scheme of which is a part.” *Id.* at 202-205.

It is also well settled that Congress’ awareness and understanding of a prevailing agency or judicial interpretation of a statute sheds light on its intent in subsequent legislative action. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change” or where it incorporates sections of a prior law into new law. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran*, 456 U.S. 353, 383 n.66 (1982) (quoting *Lorillard, A Division of Loew's Theaters, Inc. v. Pons*, 434 U.S. 575, 580 (1978)). When considering Congressional failure to act, courts have also found

that Congress acquiesced to judicial or administrative interpretation of a law, particularly when the issue involved is significant or controversial. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Bob Jones University v. United States*, 461 U.S. 574, 601 (1983).

Finally, courts have found that, “the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Midatlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)). Such principle has added force when the proposed change involves altering the fundamental details of a regulatory scheme. *See Gonzalez v. Oregon*, 126 S. Ct. 904, 921 (2006) (citing *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001), and *Brown & Williamson Tobacco*, 529 U.S. at 160). “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.” *Whitman*, 531 U.S. at 468 (citing *MCI Telcomms. Corp. v. AT&T*, 512 U.S. at 231 and *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-60).

**1. Congress left intact the basic CVD statute as originally conceived in 1897**

Since *Georgetown Steel*, Congress has undertaken two comprehensive overhauls of the U.S. antidumping and countervailing duty statutes, including the 1988 Trade Act, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (“1988 Trade Act”), and the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4813 (1994) (“URAA”). Throughout this period Commerce consistently maintained its interpretation that, as a matter of law, it lacked the authority to apply the CVD law to NMEs. Congress’ response was to leave intact the basic CVD statute, as it was originally conceived in 1897, for a seventh and eighth consecutive time.

Specifically, Title I, Subtitle C, Part 2 of the 1988 Trade Act, covering sections 1311 to 1337, was entitled “Improvement in the Enforcement of the Antidumping and Countervailing Duty Laws.” 1988 Trade Act, 102 Stat. at 1184. Presumptively and actually aware of the great significance attributed by Commerce and the Federal Circuit to the fact that Congress had not changed the CVD law since its inception in 1897, Congress left section 303 of the Tariff Act of 1930 undisturbed.

Six years later the URAA implemented the trade agreements concluded as part of the Uruguay Round of multilateral trade negotiations. *See* S. Rep. No. 103-412, at 6-7 (1994). Although the URAA repealed section 303 of the Tariff Act of 1930, as noted by this Court and previously discussed Congress did not materially alter the specific statutory provision governing the application of countervailing duties. For purposes of continuing the analysis in *Georgetown Steel*, therefore, there was no change in the scope of the specific statutory provision, which continues to make no reference to NMEs. *See* 19 U.S.C. §§ 1671 and 1677(5).

**2. In amending the statutory scheme, Congress acted with the understanding that the CVD law does not apply to NME countries, debated whether to give Commerce discretion in this area, but chose not to do so**

The legislative history of the 1988 Trade Act confirms that Congress understood the then-prevailing agency interpretation of the statute -- that the CVD law does not apply to NMEs - - to reflect the unambiguous terms of the statute. Of particular importance, in April 1987 the House Ways and Means Committee marked-up H.R. 3, a bill that was the predecessor to H.R. 4848 which ultimately became law on August 23, 1988 under the short title “Omnibus Trade and Competitiveness Act of 1988.” Congressional action on H.R. 3 is telling. As reported by the House Ways and Means Committee, section 157 of H.R. 3 would have amended sections 303 and 701 of the Tariff Act of 1930 to:

provide for the application of the countervailing duty law to non-market economy countries *to the extent that* a subsidy can reasonably be identified and measured by the administering authority. **The provision is intended to allow the administering authority discretion in determining, on a case-by-case basis, whether a particular subsidy can, as a practical matter, be identified and measured in a particular non-market economy country.**

H.R. Rep. No. 100-40, pt. 1, at 138 (1987) (emphasis added). The Committee's discussion of this amendment to the CVD law specifically noted the *Georgetown Steel* decision:

In a recent court case . . . the U.S. Court of Appeals for the Federal Circuit upheld the Department of Commerce's refusal to apply the countervailing duty law in two investigations of carbon steel wire rod imports from Poland and Czechoslovakia, by **holding that the countervailing duty law does not apply to nonmarket economy countries.**

H.R. Rep. No. 100-40, pt. 1, at 138 (1987) (citing *Georgetown Steel*) (emphasis added). Thus, the House Ways and Means Committee explicitly expressed its understanding of the *Georgetown Steel* opinion as interpreting the unambiguous terms of the statute.

The House Ways and Means Committee's Report was adopted by the full House, which passed H.R. 3, including section 157. The measure was then considered by House and Senate lawmakers in conference. The conference committee's report is also significant. First, the conference committee report expresses the conferees' understanding of the state of the law; namely, that "the Federal Circuit held that the countervailing duty law does not apply to nonmarket economy countries." See H.R. Rep. No. 100-576, at 628 (1988) (Conf. Rep.). Second, the conference committee report indicates that Congress decided to eliminate Section 157 of the House bill. *Id.* That the Committee with principal jurisdiction over U.S. trade remedy legislation, the full House, *and* a conference committee of House and Senate lawmakers would all agree that *Georgetown Steel's* decision reflected a correct interpretation of the statutory

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scheme, but then decide to drop an explicit provision granting Commerce discretion to apply the CVD law to NME countries, provides important guidance on Congressional understanding and intent in the aftermath of the *Georgetown Steel* opinion.

Whether construed as re-enactment or acquiescence, this Congressional expression of its understanding of agency and judicial interpretation with respect to the CVD law continued with the URAA. Congress adopted the SAA that explicitly acknowledged and reaffirmed the decision in *Georgetown Steel*. In discussing the definition of a subsidy, the SAA commented that *Georgetown Steel* stood for the “reasonable proposition that the CVD law cannot be applied to imports from nonmarket economies.” SAA, H.R. Doc.103-316, 103d Cong., 2d Sess. (1994) at 926 (emphasis added).

**3. Rather than grant Commerce discretion, Congress codified a definition of “nonmarket economy country” inextricably linked to Commerce’s justification not to apply the CVD law to NMEs**

In addition to subsequent Congressional decisions not to apply the CVD law to NME countries, amendments made to the antidumping law after *Georgetown Steel* are also critical for discerning Congressional intent. Among the most important amendments was the introduction of a specific statutory definition for “nonmarket economy country,” *see* 19 U.S.C. § 1677(18)), which was added as part of the 1988 Trade Act. Pub. L.100-418, § 1316(b). Through this definition Congress codified the same conceptual understanding of NMEs as articulated by Commerce under its then prevailing interpretation that the CVD law does not and cannot apply to NMEs.

Specifically, Commerce's historical definition of an NME was as follows:

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{T}he economy of a country is an NME whenever it operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country or to countries other

than the United States do not reflect the market value of the merchandise.

*Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370, 19,374 (May 7, 1984)

(hereinafter "*Wire Rod from Czechoslovakia*"). The 1988 Trade Act promulgated the following statutory definition, where none before had existed:

The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

19 U.S.C. § 1677(18). The Commerce and statutory definitions are effectively indistinguishable.

To understand the significance of this codification, reference must again be made to the legislative history of the 1988 Trade Act. As noted above, House conferees engaged Senate lawmakers in conference with a House-passed bill containing a provision granting explicit discretion to Commerce to apply the CVD law to nonmarket economy countries. The corresponding Senate proposal contained no such provision. *See* H.R. Rep. No. 100-576, at 628 (1988) (Conf. Rep.). On the other hand, the Senate proposal contained a provision defining “nonmarket economy country” as discussed above, whereas the House-passed legislation contained no such provision. *Id.* at 591. **The House receded on both counts**, agreeing to drop its provision granting discretion to Commerce to apply the CVD law to NMEs and agreeing to adopt the Senate provision codifying the definition of “nonmarket economy country.” *Id.* at 591 and 628. This debate and its resolution reflect a continuing Congressional intent to address imports from NMEs under the NME provisions of the antidumping law, not the CVD law.

Given the similarity between Commerce's own definition and the new statutory definition of “nonmarket economy country,” there can be little doubt that Congress fully understood (when it adopted this definition) Commerce's then-conclusion that the CVD law could not be applied to

NME countries. Any other reading would ignore the substantial history associated with the term “nonmarket economy” both at the agency level and before the Federal Circuit. The plain meaning of the new statutory definition also supports this conclusion. There is no way to construe the plain meaning of the term “nonmarket economy country” except with reference to a country that for practical purposes has no markets. Simply put, if there are no markets, there can be no market distortions to measure under the CVD law. Or, as explained by Commerce, “{s}ubsidies in market economy systems are exceptional events. They can be discerned from the background provided by the market system. No such background exists in an NME.” *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19371.

#### **4. Congress continued to enhance those specific statutory provisions under the antidumping law addressing NMEs**

In addition, subsequent to *Georgetown Steel* Congress continued to enhance and refine the particular NME AD methodology, thereby continuing a Congressional action which the Federal Circuit found particularly compelling, namely, that only in the NME antidumping provisions did Congress address imports from NMEs in express terms. *See Georgetown Steel*, 801 F.2d at 1316-17.

Among the more important refinements was Congress' instruction to Commerce (set forth in the legislative history of the 1988 Trade Act) concerning the adoption of appropriate surrogate values for determining dumping by an NME exporter. Specifically, Congress instructed Commerce, when valuing factors of production under NME antidumping methodology, to “avoid using any prices which it has reason to believe or suspect may be dumped or subsidized.” Trade Act of 1988, H.R. Conf. Rep. No. 100-576, at 590 (1988). The instruction made clear Congress' intent that the NME antidumping provisions in fact constituted a hybrid remedy addressing both aspects of dumping and distortions, however manifested.

The Court of International Trade reached a similar conclusion in a case addressing this very Congressional instruction. In affirming Commerce's decision to reject market purchases by an NME respondent from a country determined to have subsidized the merchandise in question, the Court noted:

{G}iven that the overarching purpose of the antidumping and countervailing duty law is to counteract dumping and subsidies, the court cannot conclude that Congress would condone the use of any value where there is “reason to believe or suspect” that it reflects dumping or subsidies.

*China Nat'l Mach. vs. United States*, 264 F. Supp. 2d. 1229, 1238 (C.I.T. 2003). The Court's language makes clear that it associated the purpose of the NME antidumping provisions with the counteraction of *both* dumping and subsidies, a formulation that mirrors Congress' intent that the NME antidumping provisions constitute a comprehensive remedy, separate and mutually exclusive with the “market economy” trade remedies for the CVD law and normal AD rules. Any other reading would make little sense given that the market economy AD provisions of the statute provide no similar adjustment for subsidized inputs, and the CVD law prohibits countervailing foreign inputs. *See* 19 U.S.C. §1677-1 (upstream subsidies must be bestowed by an authority on an input product used in the same country as the authority) and 19 C.F.R. § 351.527 (subsidy does not exist where the funding is from a government other than the government under investigation).

In sum, Congressional changes in the CVD and AD laws since *Georgetown Steel* only reinforce the correctness of the CAFC's conclusion in *Georgetown Steel* that CVD duties cannot be lawfully imposed against NME countries. The most important among these subsequent changes was the Congressional codification of Commerce's definition of “non-market economy” in 1988. Congress made explicit and unambiguous that there is only one type of nonmarket

economy country -- one that “does not operate on market principles of cost or pricing.” This definition is virtually identical to the understanding of nonmarket economy discussed by the CAFC in *Georgetown Steel* and upon which the CAFC stated it is impossible to measure countervailable subsidies in a nonmarket economy. Moreover, Congress chose to amend the AD law by adopting this definition *at the same time* that it decided not to grant Commerce the authority to impose CVD duties against NME countries. Such action confirms Congress' understanding that the CVD law is not intended to be applied against NME countries.

### **C. The Dual Application Of CVD Duties And The NME AD Methodology Leads To Double Remedies**

Another significant problem with Commerce applying the CVD law to NME countries is that it results in the imposition of double remedies. By “double remedies,” we refer to when AD and CVD duties provide overlapping remedies for the same alleged unfair conduct, such as purchasing a material input from a government-owned supplier or obtaining a loan from a government owned bank. The duplicative effect of the CVD law and the specific NME AD provisions, where the conceptual overlap in methodologies and remedies is unmistakable, confirms that they were never intended to be applied simultaneously.

This conclusion is evident from the respective purposes of the AD and CVD laws and understanding their interaction when applied to market economy countries. The antidumping law offsets unfairly low prices in the U.S. market. By comparison the CVD law offsets unfair economic advantage bestowed by a government, however manifested, whether in price, production cost, or some other competitive benefit. Notwithstanding that these remedies address different types of behavior, the statute provides safeguards to prevent the threat of overlapping remedies when the AD and CVD laws are applied in tandem.

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A concrete example of double remedy (in market economy cases) occurs in the context of export subsidies. When a foreign government bestows a subsidy upon exports of a good, it increases the return to the company making the exports, thereby creating an incentive for export sales over domestic sales. In competitive markets, an export subsidy would be expected to result in a lower export price than a domestic price. When the U.S. imposes a countervailing duty in the amount of the export subsidy, it fully corrects for the subsidy. Imposition of antidumping duties in addition to countervailing duties -- imposing a second tax to offset the artificially low export price -- would double the corrective penalty.

The statute explicitly prohibits such a double remedy when it provides for an adjustment to the export price in the dumping calculation by adding the amount of any countervailing duty attributed to export subsidies. *See* 19 U.S.C. § 1677a(c)(1)(C). As Commerce has explained:

The basic economic theory underlying this provision is that in parallel antidumping and countervailing duty investigations, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market by the amount of any such export subsidy. Thus, the subsidy and dumping are presumed to be related, and the assessment of duties against both would in effect be "double-application" or imposing two duties against the same situation.

*Certain Cold-rolled Carbon Steel Flat Products from Korea: Notice of Final Determination of Sales at Less Than Fair Value*, 67 Fed. Reg. 62124, 62125 (Oct. 3, 2002). In other words, although AD and CVD remedies are intended to address distinct behavior, when they are both brought to bear on behavior that leads to the same underlying problem – such as a low export price – the statute prevents a double remedy.

In market economy AD cases, there is also no double-remedy problem for *domestic* subsidies because the respondent's own prices and costs (which reflect the domestic subsidies) are utilized in the AD margin calculation. Unlike export subsidies, which favor export sales over

domestic sales and are thus expected to create price discrimination between such sales, domestic subsidies are market neutral. In competitive markets, the subsidy will lower prices in both the export and domestic markets. Therefore, the subsidy does not create price discrimination and does not create a dumping margin. Rather, the United States will impose CVD duties in the amount of the subsidy, thereby fully offsetting the subsidy, and any dumping margin that also is found could properly be attributed to price discrimination, and not the effect of the CVD-remedied subsidy. Thus, where there are domestic subsidies in a market economy case, there is no double remedy if the United States levies both AD and CVD duties on imports of the product.

Herein lies the problem with simultaneous AD and CVD remedies involving NME countries: in application both remedies address the same underlying problem -- distortion of market prices from government influence. Given the special NME AD rules, the self-correcting mechanisms that prevent double-remedy penalties for domestic subsidies when the market economy AD methodology is used simply do not exist when the NME AD methodology is used. Specifically, under its NME methodology, Commerce does not utilize either actual sales prices in Vietnam or the Vietnamese producer's actual costs. Rather, Commerce completely ignores prices and costs in Vietnam, and instead restates the Vietnamese producer's costs based on information from a surrogate market-economy. *See* 19 U.S.C. § 1677b(c). Moreover, as detailed above, when Commerce restates the Vietnamese producer's costs, Congress has explicitly instructed Commerce to use only surrogate values that are subsidy free. As such, the NME normal value has been constructed in a way specifically designed to eliminate any distortions due to government interventions and/or subsidies in the NME by using subsidy-free and market-economy values to construct normal value.

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Calculating dumping margins utilizing normal values based on subsidy-free surrogate values from a third country results in an unfair dumping price comparison that punishes Vietnamese companies twice for the same allegedly "unfair" trading practice. The first penalty is the CVD to offset the alleged subsidy. The second penalty is when the allegedly subsidized export price is compared to a non-subsidized constructed normal value. Double remedies result because Commerce both measures the alleged subsidy benefit with reference to market benchmarks and at the same time measures dumping by using a factors of production analysis based on third-country prices for many of the very same inputs---interest expenses, material components, or utilities. Vietnamese producers are therefore being taxed twice, in the form of overlapping AD and CVD duties for the same purported offense: that the price they pay for certain inputs are purportedly not market-determined.

### **III. THE DECISION TO APPLY THE CVD DUTIES AGAINST VIETNAM REQUIRES THE DEPARTMENT TO RE-EVALUATE WEHTHER TO TREAT VIETNAM AS A NON-MARKET ECONOMY IN AD CASES**

There is an undisputed conceptual tension in U.S. law between application of the CVD law to Vietnam and continued application of the special AD methodology for non-market economy ("NME") countries. The fundamental premise of the NME AD methodology is that all industries, all markets and all producers and exporters are sufficiently controlled by the Vietnamese government such that it is not possible to utilize home market prices and costs in the AD calculation; instead third country surrogate values must be used

However, in its initiation notice, the Department stated that it has accepted the allegations set fort in the petition that Vietnam's economy has become sufficiently market oriented to allow application of the CVD law. Specifically, the Department noted with apparent approval the petition's claims that "Vietnam's economy significantly mirrors China's present-day economy"

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and therefore the Department would not have any difficulties in identifying and measuring alleged subsidies. *See* Department Initiation Notice, 74 Fed. Reg. at 19067. With regard to China's present-day economy (, we note that the Department has specifically found that “{t}he PRC Government has eliminated price controls on most products; and market forces now determine the prices of more than 90 percent of products in China.” *See* Commerce Department Memorandum dated March 29, 2007 Re: Whether the Analytical Elements of the *Georgetown Steel* Opinion Are Applicable to China’s Present-Day Economy, prepared for Inv. No. C-570-907. Arguably, if market forces determine the prices of more than 90 percent of home market sales in Vietnam (as implied by the petition), there is no longer any reason to apply the special NME methodology in AD cases.

We detail below just a couple of the *factual claims* about the Vietnamese economy of today that were set forth in the petition and accepted by the Department for initiation purposes.

- Regarding improved access to foreign currency since 2002, "Vietnam has since assumed International Monetary Fund ("IMF") Article VIII obligations requiring full convertibility on the current account....Foreign investors are permitted to purchase foreign currency at authorized banks to finance current and capital transactions and other permitted transactions." (Petition at 54-55.)
- "Foreign direct investment ('FDI') also brings an important non-state element to post Soviet-style economies...FDI inflows continue to grow; last year, Vietnam attracted the highest level of FDI commitments since 1988." (Petition at 58.)

The Vietnamese Plastics Association submits that such factual findings raise serious questions about the legality and propriety of the Commerce Department’s continued designation of Vietnam as an NME. Very simply, given that the Commerce Department itself has apparently already conceded that (1) the Vietnamese economy of today is vastly different from the “Soviet-style” non-market economy that existed when the NME AD methodology was designed, and (2) there is a sufficient market economy to determine whether the Vietnamese Government has

bestowed a countervailable benefit upon a Vietnamese producer, it makes no logical or economic sense for the Commerce Department to continue to designate Vietnam as an NME.

**The Vietnam Plastics Association therefore believes that the Department has sufficient justification to terminate its designation of Vietnam as a non-market economy and appropriately recognize China as a market economy country under U.S. antidumping law.**

**IV. AT THE VERY LEAST, IF THE DEPARTMENT INTENDS TO APPLY THE CVD LAW TO VIETNAM WITHOUT GRADUATING VIETNAM TO MARKET ECONOMY STATUS, FUNDAMENTAL FAIRNESS REQUIRES THE DEPARTMENT TO CHANGE ITS NME AD METHODOLOGY**

Even if the Department ultimately decides that (a) it is not able to graduate Vietnam to market economy status, but that (b) it will apply the CVD law to Vietnam, we submit that fundamental fairness compels Commerce to modify its NME methodology to allow (in some fashion) application of its market economy AD methodology.

Our fundamental fairness argument rests on the legal requirement that Commerce cannot abuse its discretion by acting in an arbitrary and capricious manner in adopting untenable positions. *Budd Co., Wheel & Brake Div. v. United States*, 746 F. Supp. 1093, 1099 (C.I.T. 1990)(“As a general matter, the Court of Appeals has emphasized that fairness is the touchstone of Commerce's duty in enforcing the antidumping laws.”), *quoting Melamine Chemicals v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984)(“{the} purpose {of the antidumping law} would be ill served by application of a mechanical formula to find LTFV sales and thus a violation of the antidumping laws, where none existed.”) **Applying both CVD duties and NME AD duties leaves Commerce in the untenable contradictory position of arguing, at the same time, that market prices both exist and do not exist in Vietnam.** If the Vietnamese economy has truly changed so sufficiently to allow measurement of market distortions caused by

government subsidies, then surely there must be an exporter or two for whom market economy AD methodology can be applied.

Very simply, the Department cannot have it both ways. In its justification for applying the CVD law to China (which the Department cites as support for applying the CVD law to Vietnam), the Department claimed that the law gives the Department the discretion to identify different types of NME countries. But that is precisely our point. If Vietnam is indeed a different type of NME country, then a different type of NME AD methodology should be applied. If the Department has truly determined that Vietnam is no longer a Soviet style NME country, and therefore the CVD law can be applied to Vietnam, then fundamental fairness requires that the Department change its NME AD methodology so that the same NME AD methodology designed for Soviet style NME countries will no longer be applied against Vietnam.

In sum, if the Department intends to apply the CVD law to Vietnam, but not graduate Vietnam to market economy status for AD cases, then the Department must adopt changes to its NME methodology.

### **CONCLUSION**

The Vietnam Plastics Association believes that the Department lacks the legal authority to initiate both an NME AD proceeding and a market-based CVD investigation against Vietnam. Therefore, we ask that the Department either rescind its initiation of the CVD case, or elect to graduate Vietnam to market economy status and treat it as such under the fair trade laws. To do otherwise would be an unfair and unnecessary step backward for U.S.-Vietnam trade. However, even if the Department's application of the CVD laws to Vietnam were not illegal per se, this punitive approach is entirely unwarranted given the strong economic ties between the two countries, and the United States' ongoing interest in moving the economy forward in a spirit of

cooperation and openness. Thus, at the very least, the Department must engage in a thoughtful, well reasoned analysis before it elects to apply the CVD laws to Vietnam.