

Application of US CVD Law to Vietnam

On September 4, 2009, the US Department of Commerce (DOC) issued a preliminary determination in its first countervailing duty (CVD) case against a product from Vietnam. The product involved is polyethylene retail carrier bags (thin plastic bags given away by retail stores and restaurants to customers for carrying purchases home). This determination is significant because it is the first time that DOC declared that it will apply the US CVD law to imports from Vietnam.

Background

As it does with China, DOC treats Vietnam as a non-market economy (NME) country in antidumping cases. Prior to 2006, DOC had a long-standing policy of not applying the US CVD law to imports from countries it considered to be NMEs, based on the theory that, in centrally planned economies, it was not possible to identify the subsidies that can be offset (“countervailed”) on imports under the CVD law.

However, DOC determined in 2006 that it could apply the CVD law to China, even though China is considered an NME. DOC reasoned that China’s economy had changed to such a degree since the 1980s that the rationale for not applying the CVD law to China was no longer valid. DOC has now used this same reasoning to apply the CVD law to Vietnam.

Under CVD law, “countervailing duties” are applied to imports in order to offset the advantages from certain subsidies. Like anti-dumping (AD) cases, CVD cases begin with the filing of petitions with the DOC and the International Trade Commission (ITC). The DOC investigates whether a government or public body provided “benefits” to a “specific” enterprise, industry or group of industries, through subsidies and calculates a duty rate to offset those subsidies. The ITC investigates whether the competing US industry is materially

injured, or is threatened with material injury, as a result of the imports benefiting from those subsidies.

If there is a final affirmative finding by both agencies, the DOC issues a CVD “order” that typically covers all imports of the product from the targeted country. The importer of record of the merchandise covered by a CVD order must post estimated CVD duties at the time of Customs entry equal to the CVD rate found by the DOC. The mere filing of a petition requesting a CVD investigation can be disruptive, often leading to either an increase in the price of the product or the supplier being forced out of the US market. CVD petitions are often filed together with companion AD petitions, so companies must respond to both cases at once.

The 2009 Vietnam Applicability Decision

The analysis in the DOC’s decision memorandum on whether to apply the CVD law to Vietnam is limited to whether Vietnam’s economy is substantially different from the “Soviet-style” economies that were at issue in the DOC’s initial decision not to apply the CVD law to NMEs. The DOC notes that Vietnam has been integrated into the world economy, and that: economic space has been created for domestic private and foreign-invested enterprises; state-owned enterprises have been significantly reformed, with increased control over their own business operations; prices and supply of production inputs (including land use and credit) have been significantly deregulated; and the government monopoly on trade has ended. Thus, “Vietnam is no longer a classic Soviet-style, centrally-planned economy ...”

Based on these developments, the DOC concluded that it is now possible to identify whether the government of Vietnam has bestowed a “benefit” upon a Vietnamese producer; to determine whether

such a benefit is “specific” to a given enterprise, industry or group of industries; and to measure the extent of such benefits so as to offset them with countervailing duties. Therefore, DOC determined that the CVD law can be applied to Vietnam.

The DOC also determined that the “date of applicability” of the CVD law to Vietnam is January 11, 2007, the date of Vietnam’s accession to the WTO. This is the date from which the DOC will identify and measure subsidies in Vietnam for purposes of the CVD law. DOC will not countervail benefits received prior to this date. In explaining the choice of effective date, the DOC points to the relationship between Vietnam’s WTO membership and the economic reforms described above. DOC also notes that, at Paragraph 255 of the WTO’s *Report of the Working Party on the Accession of Viet Nam*, Vietnam agreed to certain provisions regarding the use of benchmarks to value subsidy benefits in CVD cases. Thus, DOC reasons, subsidies and disciplines on subsidies (such as CVD duties) could be seen as meaningful in Vietnam, at least as of its accession.

Practical Implications

This change in DOC policy signals the need for exporters from Vietnam to be alert to the possible trade implications of the many measures that may now be deemed countervailable subsidies.

“Non-market” CVD cases are attractive to petitioners and can be expected to increase. Although the decision to apply the CVD law to China, and the methodologies used to do so, are still being disputed in US courts and at the WTO, petitioners have been greatly encouraged by DOC’s decision to apply the CVD law to NME countries. They regularly bring combination AD/CVD cases against Chinese products, and can be expected to follow the same pattern against Vietnam. The ability to file a CVD case on the same product also makes it more attractive to bring AD cases. Moreover, both the special methodologies DOC uses for CVD cases involving NME countries and the greater involvement of the government in the economy in such cases will likely allow petitioners to obtain higher import duties. And as the number of countries doing NME CVD cases increases, so does the pressure for still more countries, which have not

yet begun to actively use the CVD law against imports from NME countries, to adopt such a policy.

Imports from China are a key concern in the United States and other countries. Any attempt to treat Vietnam differently than China with respect to either the decision to accept CVD cases or the choice of methodologies used to permit the calculation of a CVD margin could threaten the viability of positions being taken with respect to China. Thus, it is likely that China cases will continue to have a significant impact on worldwide practices with respect to the conduct of CVD cases involving other NME countries such as Vietnam.

“Government subsidies” come in many forms. In evaluating your company’s exposure to a potential CVD case, it is important to realize that “government” for CVD purposes is not only the national government, and that countervailable subsidies are not only grants of money. Countervailable benefits may also include preferential loans, preferential tax treatment, free or reduced land use rights or utilities, and preferential access to inputs. The benefits may be provided by national, regional or local governments, or through other “public bodies” deemed to be under significant government influence, such as government-controlled banks. Subsidies to a company providing inputs to your company may be declared “upstream subsidies” that benefit your products. Petitioners may also allege that subsidies to other companies related to yours, benefit your company as well.

Executives seeking venture partners in sensitive export areas, as well as government officials, should be “CVD-aware” when publicly advertising the benefits available to limited groups of companies in their industrial park, city, etc. In an Internet age, information on these “micro-level” subsidies, as well as information on macro-level programs such as national five-year plans, are now readily available to petitioners trolling for subsidy targets. Additional claims of possible subsidies, moreover, can be submitted well after a case is initiated.

A law providing for a subsidy need not be expressly limited to certain companies or industries for the subsidy to be deemed specific and thus countervailable. If one set of documents establishes that there is a government policy to preferentially promote some

industries, that policy can be used as evidence of preferential treatment constituting a benefit based on other documents. For example, loans by state-owned banks to such specially “targeted” industries may be alleged to be “preferential loans.” Even a subsidy that began its life before Vietnam’s WTO accession may still be found countervailable as a “new subsidy” if the measure or the underlying rules have been renewed or amended after the January 11, 2007 cutoff date. Finally, purchasers of Vietnamese companies should be aware that how the sale transaction is structured and implemented will determine whether past subsidies received by the Vietnamese company “flow-through” and continue to be countervailable.

Preparing and responding are critical. As with AD cases, if a CVD case is filed against your company, it is critical to respond. Companies that are identified as mandatory respondents due to the large volume of their exports of the affected product to the United States can be assigned an adverse rate based on petitioners’ allegations if they fail to cooperate and provide a full response.

For more information about any of the issues raised in this Client Update, please consult with your regular Mayer Brown contact, or any of the following lawyers.

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