

DATE: May 7, 2013  
FM: Fred Burke, Governor  
SUBJ: WTO Trade Policy Review – AmCham Comments

Yesterday morning (Monday, May 6<sup>th</sup>), on behalf of AmCham, we met with the Trade Policy Review ("TPR") team from the Secretariat of the World Trade Organization ("WTO") in Hanoi to discuss Vietnam's first trade policy review since its accession to the WTO in [Jan] 2007. The team is on a fact-finding mission to get information regarding the implementation of Vietnam's WTO commitments, as well as information regarding the WTO issues Vietnam faces in its major export markets.

### **Participants**

The two members of the WTO TPR Team we met with were Counselors Mr. John Finn and Mr. Sergios Stamnas. John is an Australian agriculture sector expert who, according to his bio on the WTO website, worked on the last US TPR. Sergios is a Counselor in the Asia Pacific Section of the Trade Policy Review Division. He did the South Korea Review last year.

Our part, the AmCham representatives included myself, Simon Taylor, Thuy Nguyen and Giles Cooper. Our meeting followed the VCCI's. It lasted for nearly two hours, though it was originally scheduled for just one hour.

### **TPR Process**

We asked about the formal process for submitting any written follow up, and we were told we could send any written follow up by the end of next week by email (we have their email addresses). The team explained that they gather information mainly from the position papers and websites of stakeholder organizations, as well as counterparty trade negotiators. Nevertheless, the team was open-minded and receptive to any follow-up comments we might have to clarify, amplify or add to our discussion points.

For more information on the TPR process see [http://www.wto.org/english/tratop\\_e/tpr\\_e/tpr\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm)

### **Summary**

A brief summary of the main points of our discussion follows.

#### **Ceiling vs. Floor**

First we noted two general themes regarding Vietnam's implementation of its WTO commitments. The first is the traditional "ceiling versus floor" argument about how the commitments should be applied. In a nutshell, we reported that recently, there seems to be some progress in the direction of understanding the WTO commitments as a floor, or minimum, rather than as a ceiling, or maximum. However, we noted the commonly held view (especially at lower levels of the approval authority) to treat the commitments in the services schedule as the only points of market access allowed for foreign investors.

#### **What is "Foreign Invested" ... ?**

Second, we explained the issue that remains regarding the definition of foreign investment enterprise for purposes determining when the limitations on market access and national treatment in the services schedule apply. Here we noted the Mekophar case among others as examples of where foreign investment of very small amounts nevertheless resulted in the designation of the target company as a foreign investment company for purposes of market access restrictions. The team expressed the view, unofficially of course, that this could not have been the negotiators' intention and that a more standard rule of thumb internationally would be a level of foreign investment that genuinely connotes control.

#### **Non-Tariff Barriers**

We noted recent progress in certain specific areas, including the recent suspension of "automatic

import licensing" and the so-called "three port rule" under Notice 197. These are positive developments, perhaps enabled by Vietnam's improving current account surplus. However, we also discussed certain remaining points on which the WTO commitments have not been seen in their implementation to be what they were expected to be. One example here is in the area of foreign investments in securities companies, where now foreign investors can now invest 100%, but they cannot invest anywhere between 49% and 99%.

### **Stakeholder Consultation and Transparency**

We also noted the issue of stakeholder consultation and transparency, noting here that the main issue is the adequacy of time given to stakeholders to formulate considered comments on new and pending legislation. We would urge a more institutionalized process, we said.

Speaking of pending legislation, we discussed some concerns regarding the draft IT Services Decree and the Internet Content Decree and several market access issues with respect to each.

### **Trading and Distribution**

In respect to trading, among other things, we mentioned the new Circular No. 08 from the MOIT and some of the good points that it will introduce. These good points include the expansion of import-export rights for foreign investors companies, and the exemption of the economic needs test ("ENT") for retail establishments that are less than 500 m<sup>2</sup> in size and located in constructed facilities which have been planned for goods sale and purchase activities. We also noted the devolution of the authority to determine the economic needs test to provincial committees, noting however that the procedures for them to administer these new responsibilities are as yet unknown.

Along the same lines, we noted that, pending a long awaited Circular from the Ministry of Health, foreign pharmaceutical trading companies have still not been issued licenses to engage in import trading even though that was one point that was opened up under the WTO commitment.

### **Customs**

We talked at length about customs, and the issue of transparency and accountability and corruption at this important point of first entry for all goods. We noted on the positive side the ongoing professionalism of the customs service, and that the draft Law on Customs includes provisions for advance rulings as to HS classifications. We also noted the positive movement toward self certification as to country of origin (COO) rules. We suggested that there were several proposals on the table to improve the efficiency and transparency of custom operations around the country on these measures. These might include for example the disclosure of the processing time for customs at different provincial level custom offices.

### **Movement of Natural Persons**

We also discussed the movement of natural persons in relation to trade and investment, noting the concern that work permit are becoming increasingly difficult to get for foreigners even at managerial levels. This was seen as a disincentive to investment, given the importance for most direct investors of being able to chose their own senior management.

### **State Owned Enterprises**

We discussed the continuing role of state enterprises and the good and bad points they bring into the picture. In regard to the specific area of energy, we discussed the need for technical assistance to fill in gaps to enable alternative energy such as geothermal, solar and wind energy were apparent.

### **Technical Assistance**

On the larger topic of technical assistance, we noted the extremely important contributions that technical assistance from various sources has played in Vietnam in developing a legal system for international trade and investment. We noted that notwithstanding the continuing challenges of that process, much had been achieved in a relatively short historical time.

## IT/C

We also discussed telecommunications and media, noting the new regulations on pay TV, and subtitling requirements. Discussion of film distribution arose, with questions arising on the number of screens allowed and other potential nontariff barriers sector.

## YOUR INPUT SOUGHT

All in all it was a very balanced and constructive conversation. Am Cham would like to collect more input and pass it on by way of written input back to Geneva. That goal in mind, they said that the deadline for submitting our comments would be the end of next week. **That does not give us much time to collate our members input, so it would be appreciated if you could send any feedback before Monday May 13<sup>th</sup> to [Fred.Burke@Bakermckenzie.com](mailto:Fred.Burke@Bakermckenzie.com).**

Thanks and Best regards,

Fred Burke  
AmCham HCMC Board of Governors, Legal and VBF Liaison