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**UNITED STATES – ANTI-DUMPING MEASURES ON  
CERTAIN SHRIMP FROM VIET NAM**

REPORT OF THE PANEL

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## CASES CITED IN THIS REPORT

Short title	Full case title and citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Panel Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Continued Zeroing</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

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<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report WT/DS268/AB/R, DSR 2004:VIII, p. 3421
<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Section 129(c)(1) URAA</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, p. 2581
<i>US – Shrimp (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW, DSR 2006:XII, p. 5147
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, p. 599
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117



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<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
<i>US – Zeroing (Japan)</i> <i>(Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441
<i>US – Zeroing (Japan)</i> <i>(Article 21.5 – Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW, DSR 2009:VIII, p. 3553

## EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Title
VN-04	USDOC Final Determination and accompanying Issues and Decision Memorandum for Original Investigation (8 December 2004) ("final determination and Issues and Decision Memorandum in the original investigation")
VN-06	USDOC Initiation Notice for Fourth Administrative Review (26 March 2009) ("notice of initiation for the fourth administrative review")
VN-07	USDOC Respondent Selection for Fourth Administrative Review (11 June 2009) ("Respondent Selection Memorandum in the fourth administrative review")
VN-08	USDOC Initiation of Five-Year Sunset Review (4 January 2010) ("notice of initiation for the sunset review")
VN-09	USDOC Preliminary Results for Fourth Administrative Review (15 March 2010) ("preliminary determination in the fourth administrative review")
VN-10	USDOC Initiation Notice of Fifth Administrative Review (9 April 2010) ("notice of initiation for the fifth administrative review")
VN-11	USDOC Respondent Selection for Fifth Administrative Review (30 July 2010) ("Respondent Selection Memorandum in the fifth administrative review")
VN-12	USDOC Preliminary Determination of Five-Year Sunset Review (6 August 2010) ("preliminary likelihood-of-dumping determination in the sunset review")
VN-13	USDOC Final Results and accompanying Issues and Decision Memorandum for Fourth Administrative Review (9 August 2010) ("final determination and Issues and Decision Memorandum in the fourth administrative review")
VN-14	USDOC Final Results of Five-Year Sunset Review (7 December 2010) ("final likelihood-of-dumping determination and Issues and Decision Memorandum in the sunset review")
VN-15	USDOC Preliminary Results for Fifth Administrative Review (4 March 2011) ("preliminary determination in the fifth administrative review")
VN-16	USDOC Initiation Notice for Sixth Administrative Review (31 March 2011) ("notice of initiation for the sixth administrative review")
VN-17	USDOC Respondent Selection for Sixth Administrative Review (17 June 2011) ("Respondent Selection Memorandum in the sixth administrative review")
VN-18	USDOC Final Results and accompanying Issues and Decision Memorandum for Fifth Administrative Review (15 September 2009) ("final determination and Issues and Decision Memorandum in the fifth administrative review")
VN-19	USDOC Preliminary Results for Sixth Administrative Review (7 March 2012) ("preliminary determination in the sixth administrative review")
VN-20	USDOC Final Results and accompanying Issues and Decision Memorandum for Sixth Administrative Review (11 September 2012) ("final determination and Issues and Decision Memorandum in the sixth administrative review")
VN-22	USDOC Amended Final Results for Sixth Administrative Review (18 October 2012) ("amended final determination in the sixth administrative review")
VN-24	Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual ("USDOC Antidumping Manual, Chapter 10")
VN-25	Affidavit of Anya Naschak and supporting documentation ("Naschak affidavit")
VN-31	Section 129, 19 U.S.C. §3538
VN-32	"Approval and entry into force of Uruguay Round Agreements", 19 U.S.C. §3511 ("Section 101(a)(2) of the URAA, 19 U.S.C. § 3511(a)(2)")
VN-33	"Relationship of agreements to United States law and State law", 19 U.S.C. §3512 ("Section 102(d) of the URAA, 19 U.S.C. § 3512(d)")
VN-34	Relevant Section 129 Excerpts of Uruguay Round Agreements, Statement of Administrative Action, H.Doc 103-316(I), 103d Cong, 2d Sess. (27 September 1994) ("Statement of Administrative Action")
VN-36	<i>Corus Staal BV v. United States</i> , Court No. 07-00270, Slip Op. 07-140 (Ct. Int'l Trade) (19 September 2007)
VN-37	<i>Tembec v. United States</i> , 441 F. Supp. 2d 1302 (Ct. Int'l Trade, 2006)
VN-42	USDOC Section 129 Compilation
VN-47	"Administrative review of determinations", 19 U.S.C. §1675 ("Section 751 of the Tariff Act of 1930")
VN-55	<i>Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification</i> , 77 Fed. Reg. 8101 (14 February 2012)
VN-58	"Revocation of orders; termination of suspended investigations", 19 C.F.R. §351.222 ("19 C.F.R. 351.222(b)")

Panel Exhibit	Title
VN-59	<i>Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders</i> , 77 Fed. Reg. 29875 (21 May 2012)
VN-61	<i>Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Third Administrative Review</i> , 74 Fed. Reg. 10009 (9 March 2009)
VN-62	USDOC Final Results and accompanying Issues and Decision Memorandum for First Administrative Review (12 September 2007) ("final determination and Issues and Decision Memorandum in the first administrative review")
VN-63	USDOC Final Results and accompanying Issues and Decision Memorandum for Second Administrative Review (9 September 2008) ("final determination and Issues and Decision Memorandum in the second administrative review")
VN-64	USDOC Final Results and accompanying Issues and Decision Memorandum for Third Administrative Review (15 September 2009) ("final determination and Issues and Decision Memorandum in the third administrative review")
VN-66	Import Administration Policy Bulletin Number 05.1 (5 April 2005) ("Policy Bulletin 05.1")
VN-72	Federal Register Notices and Decision Memoranda of the Original Investigation and First, Second, and Third Administrative Reviews ("final determinations and Issues and Decision Memoranda in the original investigation and the first, second and third administrative reviews")
VN-79	Documentation on Individual Revocation Procedures of Australia, Brazil, and India
VN-81	Requests for Administrative Reviews Submitted by Domestic Interested Parties – Fourth, Fifth, and Sixth Administrative Reviews
VN-82	Request for Revocation in the Third Administrative Review ("Fish One's request for revocation in the third administrative review")
VN-83	Requests for Revocation in the Fourth Administrative Review ("requests for revocation submitted in the fourth administrative review")
VN-84	Requests for Revocation in the Fifth Administrative Review ("requests for revocation submitted in the fifth administrative review")
US-04	Section 751 of the Tariff Act of 1930, as amended (19 U.S.C. 1675) ("Section 751 of the Tariff Act of 1930")
US-08	<i>Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results of Antidumping Duty Administrative Review</i> , 75 Fed. Reg. 61,122 (4 October 2010) ("amended final determination in the fourth administrative review")
US-09	<i>Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Amended Final Results and Final Partial Rescission of Antidumping Duty Administrative Review</i> , 76 Fed. Reg. 64,307 (18 October 2011) ("amended final determination in the fifth administrative review")
US-10	Section 123 of the URAA, 19 U.S.C. § 3533
US-11	<i>Order, Grobest &amp; I Mei Industrial (Vietnam) Co., Ltd., v. United States</i> , Consol. Court No. 10-00238 (13 September 2012)
US-12	<i>Grobest &amp; I Mei Industrial (Vietnam) Co., Ltd., v. United States</i> , 853 F.Supp.2d 1352 (Ct. Int'l Trade, 2012)
US-13	Successor to Grobest & I-Mei Industrial (Vietnam) Co., Ltd., <i>Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part</i> (12 December 2012)
US-14	Response to 15 January 2013 Supplemental Questionnaire in Reexamination of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. Voluntary Responses (29 January 2013)
US-15	Response by Successor to Grobest & I-Mei Industrial (Vietnam) Co., Ltd., to Department's Supplemental Questionnaire and Petitioners' Objection to Rescission (13 February 2013)
US-16	<i>Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Reconducted of Administrative Review of Grobest &amp; I-Mei Industrial (Vietnam) Co., Ltd. and Intent Not to Revoke: 2008-2009</i> , 78 Fed. Reg. 57,352 (18 September 2013)
US-18	<i>Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind</i> , 77 Fed. Reg. 46,024 (2 August 2012)
US-19	<i>Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part</i> , 77 Fed. Reg. 46,377 (3 August 2012), unchanged in 78 Fed. Reg. 9,364 (8 February 2013)
US-20	<i>Purified Carboxymethylcellulose from Finland: Notice of Preliminary Results of Antidumping Duty Administrative Review</i> , 77 Fed. Reg. 47,036 (7 August 2012)
US-26	19 C.F.R. § 351.401

Panel Exhibit	Title
US-27	Antidumping Manual, Chapter 1, Department of Commerce, p. 1 ("USDOC Antidumping Manual, Chapter 1")
US-29	<i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, Preliminary Results of Antidumping Duty Administrative Review, 2011-2012</i> , 78 Fed. Reg. 15,699 (12 March 2013) ("preliminary determination in the seventh administrative review")
US-30	<i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, Final Results of Antidumping Duty Administrative Review, 2011-2012</i> , 78 Fed. Reg. 56,211 (12 September 2013) ("final determination in the seventh administrative review")
US-38	<i>Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification</i> , 71 Fed. Reg. 77,722 (27 December 2006)
US-39	<i>Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification</i> , 77 Fed. Reg. 8,101 (14 February 2012) ("Final Modification")
US-40	<i>Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review; 2011-2012</i> , 78 Fed. Reg. 34,337 (7 June 2013)
US-41	<i>Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011</i> , 77 Fed. Reg. 73,415 (10 December 2012)
US-42	<i>Low Enriched Uranium From France: Final Results of the Expedited Second Sunset Review of the Antidumping Duty Order</i> , 78 Fed. Reg. 21,100 (9 April 2013)
US-43	<i>Certain Hot-Rolled Carbon Steel Flat Products From India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine; Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders</i> , 78 Fed. Reg. 15,703 (12 March 2013)
US-44	<i>Lemon Juice From Argentina: Final Results of the Expedited First Sunset Review of the Suspended Antidumping Duty Investigation</i> , 77 Fed. Reg. 73,021 (7 December 2012)
US-45	<i>Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, Poland, People's Republic of China and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders</i> , 77 Fed. Reg. 70,140 (23 November 2012)
US-46	<i>Honey From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order</i> , 77 Fed. Reg. 59,896 (1 October 2012)
US-47	<i>Certain Activated Carbon From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order</i> , 77 Fed. Reg. 33,420 (6 June 2012)
US-64	<i>Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value</i> , 73 Fed. Reg. 47,587 (14 August 2008)
US-65	<i>Steel Wire Garment Hangers from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value</i> , 73 Fed. Reg. 53,188 (15 September 2008)
US-66	<i>Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine</i> , 67 Fed. Reg. 55,785 (30 August 2002)
US-67	<i>Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus</i> , 68 Fed. Reg. 9,055 (27 February 2003)
US-68	<i>Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the Russian Federation</i> , 67 Fed. Reg. 35,490 (20 May 2002)
US-69	<i>Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania</i> , 65 Fed. Reg. 39,125 (23 June 2000)
US-73	Separate Rate Certification for Firms Previously Awarded Separate Rate Status
US-81	Vietnam Constitution, Chapt. II, Art. 15 (partial document)
US-84	N. Gregory Mankiw, <i>Principles of Microeconomics</i> (South-Western Centage Learning 2012) (partial document)
US-85	Paul R. Gregory & Robert C. Stuart, <i>Comparing Economic Systems in the Twenty-First Century</i> (Houghton Mifflin Company 2004) (partial document)
US-90	<i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Final Results of Re-Conducted Administrative Review of Grobest &amp; I-Mei Industrial (Vietnam) Co., Ltd and Intent Not To Revoke; 2008-2009</i> , 79 Fed. Reg. 15309 (19 March 2014)
US-91	19 C.F.R. § 351.216
US-95	19 U.S.C. § 1677m

Panel Exhibit	Title
US-96	Letter from Counsel for Seaprodex Minh Hai to Secretary of Commerce (31 July 1999)
US-97	<i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Reopening of the First Five-Year "Sunset" Review of the Antidumping Duty Order, 79 Fed. Reg. 15310 (19 March 2014)</i>

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of GATT 1994
BCI	Business Confidential Information
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
NME	Non-Market Economy
POI	Period of investigation
POR	Period of review
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPB	Sunset Policy Bulletin
URAA	Uruguay Round Agreements Act
United States	United States of America
USCBP	United States Customs and Border Protection
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Viet Nam	Socialist Republic of Viet Nam
Viet Nam's Protocol of Accession	Protocol on the Accession of the Socialist Republic of Viet Nam, WT/L/662 (15 November 2006)
Viet Nam's Working Party Report	Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48 (27 October 2006)
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by Viet Nam

1.1. On 22 February 2012, Viet Nam requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement") with respect to certain anti-dumping measures imposed by the United States in the context of the US anti-dumping proceedings on *Certain Frozen Warmwater Shrimp from Vietnam* (hereinafter "*Shrimp*") as well as with respect to certain US laws and US Department of Commerce ("USDOC") methodologies and practices.<sup>1</sup>

1.2. Consultations were held on 28 March 2012 but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.3. On 20 December 2012, Viet Nam requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference.<sup>2</sup> At its meeting on 27 February 2013, the Dispute Settlement Body ("DSB") established a panel pursuant to the request of Viet Nam in document WT/DS429/2/Rev.1 and Corrigenda 1 & 2, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Viet Nam in document WT/DS429/2/Rev.1 and Corrigenda 1<sup>4</sup> and 2<sup>5</sup> and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5. On 12 July 2013, the parties agreed that the panel would be composed as follows:

Chairperson: Mr Simon Farbenbloom

Members: Mr Adrian Makuc  
Mr Abd El Rahman Ezz El Din Fawzy

1.6. China, Ecuador, the European Union, Japan, Norway and Thailand notified their interest in participating in the Panel proceedings as third parties.<sup>6</sup>

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>7</sup> on 5 August 2013 and its timetable on 6 August 2013. On 9 August 2013, the Panel revised its Working Procedures and adopted Additional Working Procedures Concerning Business Confidential Information ("BCI").<sup>8</sup> The Panel revised its timetable on 16 December 2013 and on 31 March 2014.

1.8. The Panel held a first substantive meeting with the parties on 10 and 11 December 2013. A session with the third parties took place on 11 December 2013. The Panel held a second

<sup>1</sup> WT/DS429/1 (hereafter "Viet Nam's consultations request").

<sup>2</sup> WT/DS429/2, revised on 17 January 2014 in WT/DS429/2/Rev.1 and Corr. 1 & 2 (hereafter "Viet Nam's panel request").

<sup>3</sup> See WT/DSB/M/329.

<sup>4</sup> In French only.

<sup>5</sup> In English and Spanish only.

<sup>6</sup> WT/DS429/3.

<sup>7</sup> See Annex A-1.

<sup>8</sup> See Annex A-2.



substantive meeting with the parties on 25-26 March 2014. On 6 May 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 16 July 2014. The Panel issued its Final Report to the parties on 4 September 2014.

### 1.3.2 Preliminary ruling

1.9. On 31 July 2013, the United States submitted to the Panel a request for preliminary rulings in which it asked that the Panel find that certain measures and claims referenced in Viet Nam's panel request were not properly within the Panel's terms of reference.<sup>9</sup> Viet Nam responded to the United States' request on 5 August 2013.<sup>10</sup> The United States replied to Viet Nam's response on 13 August 2013, and two third parties, the European Union and China, filed observations regarding the United States' request on 14 August 2013.<sup>11</sup> On 16 August 2013, Viet Nam provided comments on the United States' reply.<sup>12</sup>

1.10. On 26 September 2013, the Panel issued a Preliminary Ruling addressing the United States' request, and indicated that the Ruling would become an integral part of its Final Report, subject to any changes that may be necessary in light of comments received from the parties at the interim review stage. The Preliminary Ruling was circulated to the parties and to the third parties to the dispute and is included as Annex A-3 of this Report.

## 2 FACTUAL ASPECTS

2.1. This dispute concerns certain US laws, methodologies and practices with respect to the imposition of anti-dumping duties as well as certain USDOC actions and determinations in the *Shrimp* proceedings.

2.2. The United States operates a "retrospective" duty assessment system. Under this system, the USDOC determines whether the imposition of anti-dumping measures is justified by conducting an original investigation. In the investigation, the USDOC determines whether dumping exists during the period of investigation. The United States International Trade Commission ("USITC") concurrently determines whether the relevant US industry is injured by reason of the dumped imports. When the USDOC finds dumping and the USITC finds that dumped imports caused injury to the domestic industry, the USDOC issues an anti-dumping "order" imposing final measures. The anti-dumping order provides the United States Government with the authority to require cash deposits at a rate equivalent to the margin of dumping calculated for each known producer/exporter at the time of importation and, as described below, to subsequently assess anti-dumping duties on imports of the subject merchandise and eventually collect such duties ("liquidation").<sup>13</sup>

2.3. The definitive amount of anti-dumping duty liability is determined subsequently, after the importation of the merchandise, as a result of an annual "administrative review" which the USDOC initiates upon request from interested parties. In the administrative review, the USDOC calculates assessment rates with respect to the "entries" (imports) under review, and determines the cash deposit that will be required as a security on future entries, until subsequent administrative reviews are conducted with respect to those entries. At the conclusion of the administrative review process, the USDOC instructs US Customs and Border Protection ("USCBP") to liquidate the entries consistent with its determination; if the definitive duties owed are less than the level of the cash deposits, USCBP returns the excess with interest to the importer. If the definitive duty liability is greater than the cash deposits, the importer must pay the additional amount. In the event that no administrative review is requested, entries are liquidated at the cash deposit rate applicable at the time of importation. Moreover, final assessment or collection ("liquidation") may be delayed by

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<sup>9</sup> United States' request for preliminary rulings (Annex C-5).

<sup>10</sup> Viet Nam's response to the United States' request for preliminary rulings (Annex B-5).

<sup>11</sup> United States' reply to Viet Nam's response to the US request for preliminary rulings (Annex C-6); China's submission on the United States' request for preliminary rulings (Annex D-6); European Union's comments on the US request for a preliminary ruling (Annex D-7).

<sup>12</sup> Viet Nam's response to the United States' reply for the request for preliminary rulings (Annex B-6).

<sup>13</sup> Viet Nam's first written submission, paras. 30-33 and 215-216 (quoting from, and referring to, Panel Report, *US – Section 129(c)(1) URAA*, paras. 2.5-2.8 and footnotes 10 and 11); United States' first written submission, paras. 8-10. The US duty assessment system is also described in detail in Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.12-7.13.



challenges before US courts given that in such proceedings, parties may obtain an injunction against liquidation for the duration of the court proceeding.<sup>14</sup>

2.4. The USDOC initiated its *Shrimp* investigation in January 2004 and issued an anti-dumping order in February 2005. At the time of these Panel proceedings, it had completed seven administrative reviews and conducted a first sunset review<sup>15</sup> in which it determined that revocation of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping.<sup>16</sup>

2.5. In the *Shrimp* proceedings, because Viet Nam has been designated by the USDOC as a non-market economy ("NME"), the USDOC applied a rebuttable presumption that all companies within Viet Nam are essentially operating units of a single government-wide entity and, thus, should receive a single anti-dumping duty rate (the "Viet Nam-wide entity rate"). Vietnamese producers/exporters had to pass a "separate rate test" to receive a rate that was separate from the Viet Nam-wide entity rate. Those producers/exporters that did not establish that they were separate from the Viet Nam-wide entity received the Viet Nam-wide entity rate.

2.6. In addition, in the original investigation and in each of the administrative reviews, in light of the large number of Vietnamese respondents involved, the USDOC limited its examination and determined individual dumping margins for a limited number of companies. The USDOC assigned the companies who were not selected for individual examination and who demonstrated sufficient independence from government control a "separate rate". In the original investigation, it assigned a single "Viet Nam-wide entity" rate to the Vietnamese respondents who did not demonstrate independence from government control. The Viet Nam-wide entity rate was determined on the basis of information contained in the petition. The USDOC continued to apply the same Viet Nam-wide entity rate in each of the administrative reviews.

2.7. Without prejudice to which segments of the *Shrimp* proceedings fall within the Panel's terms of reference, the following table summarizes the rates that were assigned by the USDOC to the Vietnamese producers/exporters involved:

Proceeding, date of final determination, period of investigation or review	Dumping margins <sup>17</sup>		
	Mandatory and voluntary respondents	Separate-rate respondents	Viet Nam-wide entity
<b>Original investigation</b> 8 December 2004 (amended 1 February 2005) POI: 1 April 2003 to 30 September 2003	4 mandatory respondents, 3 cooperated: · CAMIMEX: 5.24% · Minh Phu: 4.38% · Seaprodex Minh Hai: 4.30%	4.57% (weighted-average of margins for mandatory respondents)	25.76% (calculated on the basis of facts available)
<b>First administrative review and first new shipper review</b> 12 September 2007 POR: 16 July 2004 to 31 January 2006	3 mandatory respondents, only one cooperated: Fish One: 0%	4.57% (the separate rate was based on the separate rate in the original investigation) Except: · Grobest: 0.00% (new shipper review rate)	25.76%

<sup>14</sup> Viet Nam's first written submission, paras. 30-33 and 215-216 (quoting from, and referring to, Panel Report, *US – Section 129(c)(1) URAA*, paras. 2.5-2.8 and footnotes 10 and 11; United States' written submission, paras. 8-10; response to Panel question No. 68.

<sup>15</sup> The United States refers to these as "segments" of the *Shrimp* proceeding.

<sup>16</sup> Final likelihood-of-dumping determination and Issues and Decision Memorandum in the sunset review, Exhibit VN-14. Viet Nam's claims only pertain to the USDOC's likelihood-of-dumping determination. Although Viet Nam asserts that the order was continued, it only submits to the Panel the USDOC's likelihood-of-dumping determination, and does not provide references to either the USITC's likelihood-of-injury determination or the continuation of the order by the USDOC as a result of the USDOC and USITC determinations.

<sup>17</sup> The margins are those in the final determination or, where applicable, the amended final determination.

<b>Second administrative review</b>  9 September 2008  <u>POR:</u>  1 February 2006 to 31 January 2007	2 mandatory respondents: · Minh Phu: 0.01% · CAMIMEX: 0.00%	4.57% Except: · Grobest: 0.00% · Fish One: 0.00% · Seaprodex Min Hai: 4.30% (USDOC applied the same separate rate as in the investigation, except for separate rate respondents which had previously received an individual margin)	25.76%
<b>Third administrative review</b>  15 September 2009  <u>POR:</u> 1 February 2007 to 31 January 2008	3 mandatory respondents: · Minh Phu: 0.43% · CAMIMEX: 0.08% · Phuong Nam: 0.21%	4.57% Except: · Fish One: 0.00% · Grobest: 0.00% · Seaprodex Min Hai: 4.30% (USDOC applied the same separate rate as in the investigation, except for separate rate respondents which had previously received an individual margin).	25.76%
<b>Fourth administrative review</b>  9 August 2010 (amended 29 September 2010)  <u>POR:</u> 1 February 2008 to 31 January 2009	2 mandatory respondents: · Minh Phu: 2.95% · Nha Trang: 4.89%	3.92% (simple average of margin for mandatory respondents)	25.76%
<b>Fifth administrative review</b>  12 September 2011 (amended 18 October 2011)  <u>POR:</u> 1 February 2009 to 31 January 2010	3 mandatory respondents: · CAMIMEX: 0.80% · Minh Phu: 1.15% · Nha Trang: <i>de minimis</i>	1.03% (weighted-average of margins for mandatory respondents, excluding <i>de minimis</i> margin)	25.76%
<b>Sixth administrative review</b>  11 September 2012 (amended 18 October 2012)  <u>POR:</u> 1 February 2010 to 31 January 2011	2 mandatory respondents: · Minh Phu: 0.53% · Nha Trang: 1.23%	0.88% (simple average of margins for mandatory respondents)	25.76%
<b>Seventh administrative review</b>  12 September 2013  <u>POR:</u> 1 February 2011 to 31 January 2012	2 mandatory respondents and one voluntary respondent: · Minh Phu: 0.00% · Nha Trang: 0.00% · Quoc Viet (voluntary respondent): 0.00%	0.00% (weighted-average of margins for mandatory respondents)	25.76%

2.8. The relevant facts are described in more detail in our findings.

2.9. Viet Nam makes claims with respect to the USDOC's final determinations in the fourth, fifth and sixth administrative reviews. Viet Nam's claims regarding these three administrative reviews concern: (i) the use of zeroing in the calculation of dumping margins; (ii) the rate that was assigned to certain Vietnamese producers who did not demonstrate sufficient independence from government control and thus were deemed by the USDOC to be part of the so-called "Viet Nam-wide entity"; and (iii) the USDOC's failure to revoke the anti-dumping order with respect to certain respondent Vietnamese producers/exporters.<sup>18</sup> Moreover, Viet Nam also makes claims with respect to the USDOC's likelihood-of-dumping determination in the context of the sunset review.

2.10. In addition, Viet Nam also makes "as such" claims with respect to the following measures:

<sup>18</sup> With respect to the latter, Viet Nam also challenges the USDOC's treatment of a request for revocation in the context of the third administrative review. (Viet Nam's response to Panel question No. 49). The United States argues that the third administrative review is not a measure at issue in this dispute (United States' second written submission, para. 34 and footnote 32.) The Panel addresses the United States' objection below, in paras. 7.356. -7.361.

- a. The USDOC's "simple zeroing methodology"<sup>19</sup> as applied in administrative reviews;
- b. The USDOC's practice with respect to the rate that is assigned to certain producers/exporters who do not demonstrate sufficient independence from government control (the "NME-wide entity rate") in anti-dumping proceedings involving imports from NMEs;
- c. Section 129(c)(1) of the US Uruguay Round Agreements Act ("URAA").

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### 3.1. Viet Nam requests that the Panel find as follows:<sup>20</sup>

- a. The USDOC's simple zeroing methodology, as it applies in administrative reviews is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;
- b. The USDOC's application of the simple zeroing methodology in the calculation of dumping margins in the fourth, fifth and sixth administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;
- c. The USDOC's practice, in anti-dumping proceedings involving imports from NMEs, with respect to the rate assigned to the "NME-wide entity" comprised of producers/exporters who do not demonstrate sufficient independence from government control is, as such, inconsistent with Articles 6.10, 9.2, 9.4 and 6.8 of the Anti-Dumping Agreement;
- d. The rate assigned by the USDOC in the fourth, fifth and sixth administrative reviews to the "Viet Nam-wide entity" comprised of Vietnamese producers/exporters who did not demonstrate sufficient independence from government control is inconsistent with Articles 6.10, 9.2, 9.4 and 6.8 of the Anti-Dumping Agreement;
- e. Section 129(c)(1) of the URAA is inconsistent, as such, with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement;
- f. The USDOC's reliance on margins of dumping calculated with zeroing and failure to properly establish the facts and conduct an objective evaluation in the first sunset review is inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement;
- g. The USDOC's failure to revoke the anti-dumping duty order with respect to companies that have demonstrated the absence of dumping is inconsistent with Articles 11.1 and 11.2 of the Anti-Dumping Agreement.<sup>21</sup>

3.2. Viet Nam requests that the Panel exercise its discretion under Article 19.1 of the DSU to suggest that the United States revoke the anti-dumping duty order: (i) in its totality, to comply with all the Panel's findings, and (ii) with respect to Minh Phu and Camimex, should the Panel find

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<sup>19</sup> Viet Nam describes the "simple zeroing methodology" as the methodology by which the USDOC, when calculating dumping margins on the basis of a comparison of a weighted-average normal value to individual export transactions, disregards negative comparison results. (Viet Nam's first written submission, para. 54.)

<sup>20</sup> Viet Nam first written submission, para. 356; second written submission, para. 139.

<sup>21</sup> In addition, Viet Nam included a number of other claims in its request for the establishment of a panel which it did not pursue in its submissions to the Panel. In particular, Viet Nam's panel request included claims with respect to the USDOC's limitation of the number of Vietnamese respondents selected for individual examination in the proceedings at issue (see Viet Nam's panel request, pp. 5-7), which Viet Nam did not pursue before the Panel. Moreover, while with respect to certain claims Viet Nam's panel request referred both to the USDOC's use of practices in the fourth, fifth and sixth administrative reviews and to "the continued application" or the application on a "continued and ongoing basis" of these practices "throughout the full course of the shrimp anti-dumping proceeding", Viet Nam did not pursue any claims with respect to the latter in its submissions. See also the Panel's Preliminary Ruling, in which the Panel notes Viet Nam's indication that it would not pursue certain other claims set forth in its panel request.

that the USDOC acted inconsistently with Articles 11.1 and 11.2 in its treatment of these companies' requests for revocation.<sup>22</sup>

3.3. The United States requests that the Panel reject Viet Nam's claims that the United States has acted inconsistently with the covered agreements.<sup>23</sup>

#### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3 and B-4 and C-1, C-2, C-3 and C-4).

#### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of China, the European Union, Japan, Norway and Thailand<sup>24</sup> are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes D-1, D-2, D-3, D-4, and D-5). Ecuador did not submit written or oral arguments to the Panel.

#### 6 INTERIM REVIEW

6.1. On 16 July 2014, the Panel submitted its Interim Report to the parties. On 28 July, the United States submitted a written request for the review of precise aspects of the Interim Report. Viet Nam did not submit any request for review and did not submit comments on the United States' request for review. No meeting with the Panel was requested.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the United States' request made at the interim review stage. The Panel modified aspects of its Report in the light of the United States' comments where it considered it appropriate, as explained below. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes in this section relate to this Report, except as otherwise noted.

6.3. The United States requested that the Panel revise the last sentence of paragraph 7.249 and the first sentence of footnote 399, and add language to paragraph 7.344 to more accurately reflect arguments it made before the Panel. The Panel amended the relevant paragraphs and footnote to more completely reflect the arguments made by the United States.

6.4. The United States noted that in footnote 334, the Panel briefly discusses the decision of the US Court of International Trade in *Tembec v. United States*. In light of the fact that the Panel addresses Viet Nam's arguments concerning this decision in more detail in two other footnotes and to avoid confusion, the United States requested that the Panel delete footnote 334 and rely on its more complete discussion of the case in these other footnotes. In light of the United States' comments, the Panel has moved footnote 334 and has reworded it to shorten it and to refer to the more complete discussion of the same issue in footnotes 373 and 398.

6.5. The United States requested that the Panel delete footnote 391 of the Interim Report because, it submits, this footnote appears to be based on an inaccurate characterization of its argument and, moreover, is superfluous to the Panel's reasoning and to the resolution of the dispute. Given that footnote 391 of the Interim Report was not necessary to the Panel's resolution of Viet Nam's claim, the Panel has deleted it as requested by the United States.

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<sup>22</sup> We note that Viet Nam included both requests under Article 19.1 of the DSU in its first written submission (Viet Nam's first written submission, para. 356). In its second written submission, Viet Nam only included the request that the Panel suggest the revocation of the order in its totality (Viet Nam's second written submission, para. 139), but did not indicate that it was abandoning its request with respect to Minh Phu and Camimex. Moreover, Viet Nam initially made the second request with respect to Minh Phu, Camimex and Nha Trang Seafood. However, Viet Nam subsequently indicated that the inclusion of Nha Trang Seafood in the request was an error. (See Viet Nam's response to Panel question No. 73(e), para. 51.)

<sup>23</sup> United States' first written submission, para. 275; second written submission, para. 119.

<sup>24</sup> Thailand did not submit written or oral arguments to the Panel but submitted responses to questions from the Panel.

6.6. Finally, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical errors, certain of which were suggested by the United States.

## 7 FINDINGS

### 7.1 Introduction

#### 7.1.1 General principles of treaty interpretation, the applicable standard of review and burden of proof

##### 7.1.1.1 Standard of review

7.1. Pursuant to Article 11 of the DSU, a panel has to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". As to the establishment of the facts in a case, this "objective assessment" has been understood as mandating neither a *de novo* review (i.e. the complete repetition of the fact-finding conducted by national authorities) nor "total deference" to domestic authorities (i.e. the simple acceptance of their determination).<sup>25</sup>

7.2. Although Article 11 of the DSU sets forth a general standard of review for all covered agreements, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.3. Taken together, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute.

7.4. Several panels and the Appellate Body have addressed the use of this standard of review in cases where a panel is assessing whether competent authorities have complied with obligations in agreements that require governments to set forth their reasoning and determinations in written reports.

7.5. In *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Appellate Body stressed that Article 11 requires panels to engage in a critical and searching analysis and that a panel must not limit itself to assessing whether the investigating authority's findings are not unreasonable.<sup>26</sup> In this regard the Appellate Body mentioned:

The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took

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<sup>25</sup> Appellate Body Report, *EC – Hormones*, para. 117.

<sup>26</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 113-140.

proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".<sup>27</sup>

7.6. The Appellate Body also recalled its indication in *US – Countervailing Duty Investigation on DRAMS* that a panel must "consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation".<sup>28</sup>

7.7. Moreover, Article 17.5(ii) of the Anti-Dumping Agreement makes clear that a panel is to examine the matter referred to it by the DSB "based upon ... the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Thus, the Panel must only consider evidence that was before the investigating authorities in reviewing the authorities' analysis and conclusions. The Appellate Body has explained that in doing such an analysis a panel should:

bear in mind its role *as a reviewer* of agency action, rather than as *initial trier of fact*. Thus, a panel, examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions.<sup>29</sup>

7.8. In sum, a panel reviewing the determination of the investigating authority must evaluate the determination being reviewed on the basis of what the investigating authorities knew at the time, and determine whether the investigating authority has provided a reasoned and adequate explanation of its conclusions, without conducting a *de novo* review or giving complete deference to the investigating authority.

#### 7.1.1.2 Treaty interpretation

7.9. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), in particular, are such customary rules.

7.10. As mentioned above, Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations. According to the Appellate Body, Article 17.6(ii) contemplates a sequential analysis whereby the panel applies the customary rules of interpretation to the treaty and only *after* engaging in this exercise will a panel determine whether the second sentence of Article 17.6(ii) applies.<sup>30</sup> The Appellate Body recognised that:

<sup>27</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis original)

<sup>28</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 157. (emphasis original)

<sup>29</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188. (italics original; underline added; footnotes omitted)

<sup>30</sup> Appellate Body Report, *US – Continued Zeroing*, para. 271.

the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.<sup>31</sup>

7.11. However, the Appellate Body has considered that the permissible range of interpretations cannot include mutually contradictory results. In the Appellate Body's view "[i]t would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions".<sup>32</sup>

### 7.1.1.3 Burden of proof

7.12. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>33</sup> Therefore, as the complaining party, Viet Nam bears the burden of demonstrating that the measures at issue taken by the United States are inconsistent with the provisions of the Anti-Dumping Agreement and of the GATT 1994 invoked by Viet Nam. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>34</sup> Finally, it is generally for the party asserting a fact to provide proof for its assertions.<sup>35</sup>

## 7.2 Preliminary ruling

7.13. On 31 July 2013, the United States submitted to the Panel a request for preliminary rulings objecting to the inclusion of certain claims and measures in Viet Nam's panel request. Specifically, the United States requested that the Panel find that the following measures and claims were not within the Panel's terms of reference: (i) the sixth administrative review, as it was not listed as a measure at issue in Viet Nam's request for consultations;<sup>36</sup> (ii) the "use of zeroing in original investigations, new shipper reviews and changed circumstances reviews"<sup>37</sup>, as they were not listed in Viet Nam's request for consultations; (iii) the claim set forth in Viet Nam's panel request under Article 31 of the Vienna Convention, as the Vienna Convention is not a covered agreement;<sup>38</sup> and (iv) the claim set forth in Viet Nam's panel request relating to the US Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, because the SAA does not have any legal effect independent of an applicable US statute or regulation and is thus not a measure susceptible to dispute resolution.<sup>39</sup> The United States requested that the Panel issue preliminary rulings before the filing of the first written submissions of the parties.<sup>40</sup>

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<sup>31</sup> Appellate Body Report, *US – Continued Zeroing*, para. 272.

<sup>32</sup> Appellate Body Report, *US – Continued Zeroing*, para. 273.

<sup>33</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>34</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>35</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>36</sup> United States' request for preliminary rulings, para. 6.

<sup>37</sup> United States' request for preliminary rulings, para. 7.

<sup>38</sup> United States' request for preliminary rulings, paras. 9-10.

<sup>39</sup> United States' request for preliminary rulings, paras. 11-16.

<sup>40</sup> United States' request for preliminary rulings, para. 21.



7.14. Viet Nam responded to the United States' request for preliminary rulings on 5 August 2013, and each party submitted further written comments to respond to each other's comments on the US request.<sup>41</sup> The Panel also invited the third parties to submit any written comments they might have in response to the views expressed by the parties.<sup>42</sup>

7.15. In its response to the United States' request and in its comments, Viet Nam asked the Panel to find that the sixth administrative review was within its terms of reference.<sup>43</sup> With respect to the other objections raised by the United States, Viet Nam indicated that it was not pursuing the remaining claims cited in the US request for preliminary rulings, namely those with respect to the USDOC's use of zeroing in original investigations, new shipper reviews and changed circumstances reviews;<sup>44</sup> the claim under Article 31 of the Vienna Convention;<sup>45</sup> and the claim relating to the SAA.<sup>46</sup>

7.16. The Panel issued its Preliminary Ruling to the parties and third parties on 26 September 2013 and indicated that, subject to comments that parties may submit at the interim review stage, the ruling would form an integral part of its Final Report. In its Preliminary Ruling, the Panel dismissed the US request that it find that the sixth administrative review is outside its terms of reference.<sup>47</sup> The Panel declined to make any findings with respect to the three remaining objections raised by the United States, in light of Viet Nam's indication that it was not pursuing the corresponding claims.<sup>48</sup> While the Panel reserved its right to revisit the decisions contained in the preliminary ruling during the course of proceedings, the parties have not asked it to do so. Accordingly, the Panel maintains its resolution of the United States' objections as contained in the preliminary ruling, which is attached as Annex C of this Report.

### 7.3 Viet Nam's claims with respect to zeroing

#### 7.3.1 Introduction

7.17. Viet Nam's claims with respect to zeroing pertain to the "simple zeroing" methodology used by the USDOC in the context of administrative reviews. Viet Nam alleges that the USDOC, when calculating dumping margins on the basis of a comparison of a weighted-average normal value to individual export transactions, disregards negative comparison results (those for which the individual export transaction price exceeds the weighted-average normal value).<sup>49</sup>

7.18. Viet Nam requests the Panel to find that:<sup>50</sup>

- a. The USDOC's "simple zeroing" methodology in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994; and
- b. The application by the USDOC of the "simple zeroing" methodology in the fourth, fifth and sixth administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>51</sup>

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<sup>41</sup> United States' reply to Viet Nam's response to the US request for preliminary rulings (13 August 2013); Viet Nam's response to the United States' reply for the request for preliminary rulings (16 August 2013). The Preliminary Ruling, at para. 1.2, incorrectly states that Viet Nam submitted its response to the United States' reply on 19 August 2013.

<sup>42</sup> China and the European Union submitted comments on the United States' preliminary rulings request on 14 August 2013.

<sup>43</sup> Viet Nam's response to the United States' request for preliminary rulings, paras. 9-10; response to the United States' reply for the request for preliminary rulings, paras. 4-7.

<sup>44</sup> Viet Nam's response to the United States' request for preliminary rulings, para. 3.

<sup>45</sup> Viet Nam's response to the United States' request for preliminary rulings, para. 4.

<sup>46</sup> Viet Nam's response to the United States' request for preliminary rulings, para. 5.

<sup>47</sup> Preliminary Ruling, Annex A-3, para. 6.1.

<sup>48</sup> Preliminary Ruling, Annex A-3, para. 6.2.

<sup>49</sup> Viet Nam's first written submission, para. 54.

<sup>50</sup> Viet Nam's panel request included a challenge against the zeroing methodology "as such and as applied in a continued and ongoing basis" (Viet Nam's panel request, p. 3). However, Viet Nam has not developed or pursued a claim against the application of the zeroing methodology on a "continued and ongoing basis" in its submissions to the Panel. We therefore limit our analysis to the "as such" and "as applied" claims developed by Viet Nam.



7.19. We examine each claim in turn, starting with Viet Nam's "as such" claim.

### 7.3.2 Zeroing "as such"

#### 7.3.2.1 Introduction

7.20. We start with Viet Nam's claim that the zeroing methodology used by the USDOC in administrative reviews is, "as such", inconsistent with 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>52</sup>

7.21. In examining Viet Nam's claim, we shall first examine whether Viet Nam has established the existence of the zeroing methodology as a measure that may be challenged "as such". If we are satisfied that Viet Nam has properly established the existence of such a measure, we shall then evaluate the parties' arguments regarding the WTO-consistency of that measure.

#### 7.3.2.2 Whether Viet Nam has established the existence of the zeroing methodology as a measure which may be challenged as such

##### 7.3.2.2.1 Main arguments of the parties

###### 7.3.2.2.1.1 Viet Nam

7.22. Viet Nam submits that various panel and Appellate Body reports have found that the zeroing methodology is an established norm which may be the subject of an "as such" claim and that the Appellate Body has concluded at least twice that the use of zeroing in administrative reviews is "as such" inconsistent with the Anti-Dumping Agreement.<sup>53</sup> Viet Nam further argues that a measure found by the Appellate Body to be "as such" inconsistent with a covered agreement is not specific to the facts of any particular dispute; by their nature, "as such" claims are of general and prospective application and an Appellate Body finding of violation in respect of such a claim concerns the authority's on-going failure to bring the practice into conformity with clearly established obligations.<sup>54</sup>

7.23. According to Viet Nam, the zeroing methodology still exists as a measure which may be challenged "as such" despite the fact that the USDOC modified its calculation methodology. Viet Nam contends that panels do make rulings on measures that have been modified or repealed and refers to the panel in *US – Poultry (China)* as an example of a panel making such a ruling. Viet Nam also argues that the USDOC could easily re-start applying the zeroing methodology in administrative reviews because it has the authority to do so under US law. Finally, Viet Nam contends that the United States continued to use the zeroing methodology after Viet Nam requested consultations with the United States in this dispute, in the final results of the sixth administrative review, published on 11 September 2012.<sup>55</sup>

###### 7.3.2.2.1.2 United States

7.24. The United States replies that Viet Nam has failed to demonstrate as a matter of fact that the United States maintains a measure of general and prospective application that requires the use of zeroing. According to the United States, Appellate Body and panel findings in prior disputes regarding the existence, "as such", and precise content of the zeroing measure cannot constitute conclusive evidence for the purpose of this dispute. Moreover, the facts underlying this dispute are different from the facts in prior disputes because the USDOC has changed its calculation methodology for determining dumping margins and now grants offsets for non-dumped comparisons.<sup>56</sup> The United States submits that, by the time Viet Nam requested the establishment

<sup>51</sup> Viet Nam's first written submission, para. 356; second written submission, para. 139.

<sup>52</sup> Viet Nam's first written submission, para. 91; second written submission, para. 4.

<sup>53</sup> Viet Nam's first written submission, paras. 67-68 (referring to Panel Reports, *US – Continued Zeroing*, para. 7.175; *US – Zeroing (Japan)*, para. 7.58; *US – Stainless Steel (Mexico)*, para. 7.97; Appellate Body Reports, *US – Zeroing (Japan)*, paras. 88, 166, and 169; *US – Stainless Steel (Mexico)*, paras. 133-136).

<sup>54</sup> Viet Nam's first written submission, para. 69.

<sup>55</sup> Viet Nam's response to Panel question No. 4, paras. 10-15; opening statement at the second meeting of the Panel, para. 19.

<sup>56</sup> United States' first written submission, paras. 205-209.

of this Panel, there was no "zeroing" measure as found in previous WTO reports and nothing that required the use of that methodology. According to the United States, the USDOC has, since April 2012, issued numerous determinations in which it has granted offsets equal to the amount by which normal value is less than export price on non-dumped sales, including in the most recent administrative review under the *Shrimp* order.<sup>57</sup>

7.25. The United States also contests Viet Nam's argument that the USDOC could easily re-impose the zeroing methodology. It notes that the USDOC's changes in methodology were made after extensive consultations with appropriate congressional committees, private sector advisory committees, and public comment regarding the proposed modifications. The United States adds that Viet Nam has not provided a single example of a USDOC practice that was found to be WTO-inconsistent and changed pursuant to section 123(g) being subsequently "easily re-imposed". The United States also submits that the situation before this Panel is different from the situation in *US – Poultry (China)* where the panel decided to rule on the repealed measure because it recognized that that measure could allow the repetition of potentially WTO-inconsistent conduct.<sup>58</sup>

#### 7.3.2.2.2 Main arguments of the third parties

7.26. The **European Union** submits that its experience indicates that the United States no longer systematically resorts to zeroing in all cases since April 2012, but considers that the Panel's resolution of this question will ultimately depend on a close analysis of all the evidence before the Panel.<sup>59</sup>

7.27. **Japan** submits that the Panel should examine whether the modified calculation methodology also applies to remaining unliquidated entries. Japan also notes that in the Federal Register notice announcing the modification of its calculation methodology, the USDOC indicated that it "retains the discretion on a case-by-case basis, to apply an alternative methodology, as appropriate".<sup>60</sup>

7.28. **Thailand** submits that even if the zeroing methodology used prior to 2012 has changed and thus can no longer be challenged "as such" in dispute settlement proceedings, it is possible that the old methodology has now been replaced by a new zeroing methodology that could, in itself, be challenged "as such" in dispute settlement proceedings. The Panel may also wish to consider whether, if it finds that the old practice or methodology no longer exists, there is a new practice or methodology that would separately meet the test for being susceptible to challenge on an "as such" basis.<sup>61</sup>

#### 7.3.2.2.3 Evaluation by the Panel

7.29. Viet Nam's claim raises the issue of when, and under what conditions, an unwritten rule or norm may be challenged "as such". Neither the DSU nor the Anti-Dumping Agreement establishes criteria for determining when measures can be challenged "as such". However, we can find relevant guidance in previous WTO dispute settlement decisions where claims of this nature have been considered. Thus, we believe it is useful, before analysing whether the zeroing methodology can be challenged "as such" in the present dispute, to recall how "as such" challenges have been examined in previous WTO dispute settlement cases. The following summary will also be relevant for our subsequent consideration of Viet Nam's "as such" claims concerning the NME-wide entity rate practice and concerning Section 129(c)(1).

7.30. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body concluded that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement, and noted that, in WTO dispute settlement, panels have examined not only particular acts applied in specific situations, but also "acts setting forth rules or norms

<sup>57</sup> United States' opening statement at the first meeting of the Panel, paras. 39-41.

<sup>58</sup> United States' second written submission, paras. 102-104.

<sup>59</sup> European Union's response to Panel question No. 2, para. 12.

<sup>60</sup> Japan's response to Panel question No. 2, paras. 2-3. Japan refers to requests for the establishment of a panel submitted by Korea in WT/DS464/4, dated 6 December 2013; and by China in WT/DS471/5, dated 16 December 2013.

<sup>61</sup> Thailand's response to Panel question Nos. 1 and 2, p. 1.

that are intended to have general and prospective application".<sup>62</sup> The Appellate Body explained that, allowing claims against measures "as such" protects "the security and predictability needed to conduct future trade" and also "serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated".<sup>63</sup> In the same dispute, the Appellate Body also considered whether there are any limitations as to the types of measures that may be the subject of an "as such" challenge under the DSU or the Anti-Dumping Agreement. Recalling its reasoning in *US – 1916 Act* that panels have jurisdiction to consider legislation "as such" under both agreements, the Appellate Body found that, although most of the measures subject "as such" to dispute settlement were legislation, a broad range of measures could be submitted "as such" to dispute settlement.<sup>64</sup> The Appellate Body considered that the language in Article 17.3 of the Anti-Dumping Agreement contains "no threshold requirement ... that the measure in question be of a certain type" and that the phrase "laws, regulations and administrative procedures" in Article 18.4 of the Anti-Dumping Agreement encompasses "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings".<sup>65</sup> Following this analysis, the Appellate Body concluded that there is "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'".<sup>66</sup>

7.31. Subsequently, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body further clarified that the relevant issue is not whether the measure subject to an "as such" challenge is a binding legal instrument within the domestic legal system of a Member, but, rather, whether it is "a measure that may be challenged within the WTO system".<sup>67</sup> In that dispute, the Appellate Body considered that the USDOC's Sunset Policy Bulletin (SPB) was a measure which could be challenged "as such" in spite of its non-binding character:

In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm – once again – that the SPB, as such, is subject to dispute settlement.<sup>68</sup>

7.32. The Appellate Body further observed that:

By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.<sup>69</sup>

7.33. In *US – Zeroing (EC)*, the Appellate Body considered whether unwritten rules or norms could be challenged "as such". Recalling its findings in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* regarding the types of measures that could be challenged "as such", the Appellate Body found that there is no basis to conclude that rules or norms can be challenged "as such" only if they are expressed in the form of a written instrument.<sup>70</sup> The Appellate Body cautioned, however, that "a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application,

<sup>62</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82.

<sup>63</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>64</sup> The Appellate Body recalled, in this respect, its statement in *Guatemala – Cement I* that, in the practice established under the GATT 1947, a "measure" may be "any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 85, referring to Appellate Body Report, *Guatemala – Cement I*, footnote 47 to para. 69.)

<sup>65</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 86-87.

<sup>66</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>67</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

<sup>68</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187. (footnotes omitted)

<sup>69</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

<sup>70</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 193.

especially when it is not expressed in the form of a written document".<sup>71</sup> The Appellate Body explained that, when a challenge is brought against a rule or norm that is not expressed in the form of a written document, "the very existence of the challenged 'rule or norm' may be uncertain".<sup>72</sup> The Appellate Body indicated that the complainant must establish the following to meet the particularly high burden of establishing the existence of a rule or norm of general and prospective application that is not expressed in a written document:

In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.<sup>73</sup>

7.34. This reasoning has been subsequently applied by panels considering "as such" challenges in *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *US – Shrimp (Viet Nam)*.<sup>74</sup> Those panels further observed that a measure may be found to have general and prospective application if it reflects a deliberate policy, going beyond the mere repetition of the application of that measure in specific instances.<sup>75</sup>

7.35. In this dispute, following the guidance of those prior decisions, we shall consider whether Viet Nam has met its burden of proof with respect to the existence of the unwritten zeroing methodology as a rule or norm which can be challenged "as such". In particular, we shall consider whether Viet Nam has established: (i) that the zeroing methodology is "attributable" to the United States, (ii) the "precise content" of the zeroing methodology, and (iii) that the zeroing methodology does have "general and prospective application".

7.36. With respect to the precise content of the alleged norm or rule, and attribution to the United States, we recall that Viet Nam refers to the calculation of dumping margins in administrative reviews, whereby the USDOC, in aggregating intermediate comparison results to determine the numerator, "zeroes" or disregards all negative results where export price is higher than normal value.<sup>76</sup> Viet Nam also posits that the zeroing methodology is applied by the USDOC, which forms part of the United States Government. The United States does not contest that Viet Nam has established the content of the zeroing methodology, and that that methodology is attributable to the United States.

7.37. Turning to the issue of whether Viet Nam has demonstrated that the zeroing methodology has "general and prospective application", we note that Viet Nam refers to previous disputes in which panels or the Appellate Body found that the zeroing methodology in administrative reviews was a norm or practice that could be subject to an "as such" claim.<sup>77</sup> Viet Nam argues that "[a]n inconsistency found by the Appellate Body to be an as such violation relates to the authority's use of the practice itself and is not specific to the facts of any particular dispute".<sup>78</sup> Viet Nam also submits that the United States bears the burden of demonstrating that the panel's factual findings

<sup>71</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 196.

<sup>72</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 197.

<sup>73</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original)

<sup>74</sup> Panel Reports, *US – Zeroing (Japan)*, paras. 7.47-7.59; *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97; and *US – Shrimp (Viet Nam)*, paras. 7.110-7.111.

<sup>75</sup> Panel Reports, *US – Zeroing (Japan)*, para. 7.52; *US – Stainless Steel (Mexico)*, paras. 7.40 and 7.95; *US – Shrimp (Viet Nam)*, para. 7.112.

<sup>76</sup> Viet Nam's first written submission, para. 54.

<sup>77</sup> Viet Nam's first written submission, paras. 67-68 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, paras. 88, 166 and 169; *US – Stainless Steel (Mexico)*, paras. 133-136; and Panel Reports, *US – Zeroing (Japan)*, para. 7.175; and *US – Stainless Steel (Mexico)*, para. 7.97).

<sup>78</sup> Viet Nam's first written submission, para. 69.

and conclusions in *US – Shrimp (Viet Nam)* with respect to the WTO-inconsistency of this methodology, which the United States did not appeal, are in error.<sup>79</sup>

7.38. As an initial matter, Viet Nam appears to be claiming that findings of panels and the Appellate Body in previous disputes are sufficient to establish, in the present dispute, the existence of the zeroing methodology as applied in administrative reviews as a norm of general and prospective application, and that the burden has now shifted to the United States, which should demonstrate that these previous factual findings are not applicable in the present dispute.

7.39. We are not persuaded by this argument. We recall that it is a well-established rule in WTO dispute settlement proceedings that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof".<sup>80</sup> Hence, in our view, the factual findings in previous decisions do not relieve a complainant of the burden of establishing the facts in a subsequent dispute it initiated. We note that the Appellate Body reached a similar conclusion in a prior zeroing dispute, when it found that a complaining party may not discharge its burden of proof with respect to the establishment of the facts simply by referring to past decisions. The Appellate Body observed:

As an initial matter, we note the European Communities' reference to adopted panel and Appellate Body reports in which the existence of the United States' zeroing methodology, as an unwritten norm of general and prospective application, was found to exist in the context of both original investigations and periodic reviews. Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute.<sup>81</sup>

7.40. We further note that the panel in *US – Shrimp (Viet Nam)* similarly considered that the factual findings of prior panels and the Appellate Body did not "alleviate Viet Nam's burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application".<sup>82</sup>

7.41. Viet Nam further argues that "the extent of [the burden of proof] and the party bearing this burden will vary based on the particular circumstances of a proceeding" and that it does not "bear[] the burden of establishing for a second time the facts on which the findings and conclusions of the panel in [*US – Shrimp (Viet Nam)*] were based". According to Viet Nam, it is now up to the United States, which did not appeal the findings and conclusions of the panel in *US – Shrimp (Viet Nam)*, to demonstrate that those findings and conclusions "are not correct or are not applicable in the instant proceeding".<sup>83</sup>

7.42. We disagree with Viet Nam. In our view, the fact that the panel in *US – Shrimp (Viet Nam)* found that Viet Nam had established the existence of the zeroing methodology as a measure of general and prospective application under the same anti-dumping order does not affect the fundamental rule regarding allocation of the burden of proof in the present dispute. Viet Nam is therefore bound to provide relevant evidence proving the facts it asserts in the present dispute and cannot rely on previous panel and Appellate Body decisions to establish, as a matter of fact, the existence of the zeroing methodology as a norm or rule of general and prospective application.

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<sup>79</sup> Viet Nam's response to Panel question No. 2, para. 2.

<sup>80</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14. See also above, Section 7.1.3, "Burden of Proof".

<sup>81</sup> Appellate Body Report, *US – Continued Zeroing*, para. 190. (emphasis added, footnote omitted)

<sup>82</sup> Panel Report, *US – Shrimp (Viet Nam)*, footnote 163.

<sup>83</sup> Viet Nam's opening statement at the first meeting of the Panel, paras. 2-3.

7.43. In addition to relying on findings in previous disputes, Viet Nam also submits factual evidence in support of its allegation that the zeroing methodology applied by the USDOC in administrative reviews is a rule or norm of general and prospective application. First, Viet Nam provides the Panel with evidence that the zeroing methodology was used in administrative reviews one to six of the *Shrimp* order.<sup>84</sup> The United States does not contest that zeroing was used in the three administrative reviews at issue in the present dispute, reviews four to six.<sup>85</sup> Moreover, in response to a question by the Panel, the United States indicates that it "does not dispute that a number of the dumping margins derived in the original investigation and in the first three administrative reviews were calculated using the so-called 'zeroing' methodology".<sup>86</sup>

7.44. Second, Viet Nam provides the Panel with evidence indicating that the USDOC applies zeroing in anti-dumping proceedings more generally. Some of the Issues and Decision Memoranda submitted by Viet Nam contain statements pointing to the general and prospective nature of the zeroing methodology.<sup>87</sup> In addition, Viet Nam submits an affidavit from Ms Anya Naschak discussing the USDOC's use of zeroing in the three administrative reviews at issue. The affidavit also includes a general overview of the standard computer programme used by the USDOC in anti-dumping cases, indicating that the structure and language of this computer programme implement zeroing in original investigations and administrative reviews.<sup>88</sup> The United States has not contested the description provided in the Naschak affidavit.

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<sup>84</sup> Viet Nam submits the final determinations and Issues and Decision Memoranda in the original investigation and the first, second and third administrative reviews (Exhibit VN-72). The Issues and Decision Memoranda accompanying the final determinations in these three reviews indicate that the USDOC used zeroing to calculate margins of dumping (see first administrative review, Comment 3, pp. 14-15; second administrative review, Comment 5, pp. 12-13; and third administrative review, Comment 3, pp. 10-13). Finally, Viet Nam has put on the record the USDOC's final determinations in administrative reviews four to six, at issue in the present dispute, which confirm that the USDOC did not allow non-dumped sales to offset the amount of dumping found with respect to other sales (see Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, Exhibit VN-13, Comment 10, p. 33; Issues and Decision Memorandum accompanying the final determination in the fifth administrative review, Exhibit VN-18, Comment 3, p. 29; and Issues and Decision Memorandum accompanying the final determination in the sixth administrative review, Exhibit VN-20, Comment 3, p. 26). Viet Nam also submits evidence demonstrating that the USDOC used model zeroing in the original investigation (Issues and Decision Memorandum accompanying the final determination in the original investigation, Exhibit VN-04, p. 12).

<sup>85</sup> United States' first written submission, paras. 210-211, and opening statement at the first meeting of the Panel, paras. 42-44. As discussed below, the United States submits, however, that zeroing was not used in the seventh administrative review under the *Shrimp* order.

<sup>86</sup> United States' response to Panel question No. 37, para. 123.

<sup>87</sup> For instance, in the Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, the USDOC observed that "consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions", Exhibit VN-13, p. 35. In the Issues and Decision Memorandum accompanying the final determination in the fifth administrative review, the USDOC states that "[b]ecause no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of Section 771(35) of the Act" (Exhibit VN-18, p. 29). In the Issues and Decision Memorandum accompanying the final determination in the sixth administrative review, the USDOC states, *inter alia*, that "the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations" (Exhibit VN-20, p. 26).

<sup>88</sup> Naschak affidavit, Exhibit VN-25, paras. 5-6. In her affidavit, Ms Naschak introduces herself as an International Trade Analyst employed at the law firm of Curtis, Mallet-Prevost, Colt, and Mosle LLP, and who was previously employed as an analyst in the USDOC. Under the heading "Overview of the Standard Computer Programming for Antidumping Cases", Ms Naschak notes:

The USDOC requires foreign respondents to provide extensive sales and factors of production information for the specific period under examination. Data must be provided for both the U.S. and the factors of production. The USDOC has in place standard computer programs that manipulate these databases to execute every aspect of the USDOC's margin calculation. The USDOC's computer programs are divided into specific 'sections' of programming code, each of which executes a specific aspect of the USDOC's dumping margin calculations. The USDOC computer programs are all written and executed using SAS, which is both a software application and a computer programming language. The SAS programming language works only in the SAS software application, and it is the tool by which the programmer communicates the calculations and procedures that he or she wants the SAS application to execute. The structure and language of the computer programming the USDOC uses to derive the overall weighted-average dumping margin are basically the same in an original investigation and administrative

7.45. The United States submits, however, that the facts in this dispute are different from the facts in the *US – Shrimp (Viet Nam)* dispute because, effective April 2012, the USDOC changed its practice for calculating dumping margins in administrative reviews in response to Appellate Body findings, and now "grants offsets for non-dumped comparisons (i.e., does calculations without the 'zeroing' methodology) in various types of proceedings", including administrative reviews.<sup>89</sup> As evidence in support of this assertion, the United States submits a Notice of Final Modification in which the USDOC announces that it is modifying its calculation methodology, which "was challenged as being inconsistent with the WTO ... GATT 1994 and the ... Anti-Dumping Agreement in several disputes".<sup>90</sup> The United States further submits that, consistent with the Final Modification, the USDOC granted offsets for non-dumped transactions in the seventh administrative review of the *Shrimp* order<sup>91</sup> and that, since April 2012, it has issued "numerous determinations" under other anti-dumping orders in which it has granted such offsets in various contexts, including original investigations, administrative reviews, and sunset reviews.<sup>92</sup>

7.46. Viet Nam does not dispute that the USDOC modified its calculation methodology in administrative reviews. Nor does Viet Nam contest that the USDOC did not apply the zeroing methodology when calculating dumping margins in the seventh administrative review under the *Shrimp* order or in other administrative reviews under other orders.<sup>93</sup>

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reviews, although minor differences in language occur. These differences do not, however, affect the language and procedures used to implement what is commonly referred to as "zeroing".

<sup>89</sup> United States' first written submission, paras. 203, 206 and 208; opening statement at the first meeting of the Panel, paras. 39-41; second written submission, para. 99.

<sup>90</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification (hereafter "Final Modification"), Exhibit US-39, p. 8101.

<sup>91</sup> United States' first written submission, para. 208; opening statement at the first meeting of the Panel, para. 41. In its preliminary and final determinations in the seventh administrative review, the USDOC indicated that it "applied the assessment rate calculation method adopted in *Final Modification for Reviews*, i.e., on the basis of monthly average-to-average comparisons using only the transactions associated with that importer with offsets begin provided for non-dumped comparisons". (Preliminary determination in the seventh administrative review, Exhibit US-29, p. 15703; final determination in the seventh administrative review, Exhibit US-30, p. 56216.)

<sup>92</sup> United States' first written submission, para. 208; opening statement at the first meeting of the Panel, para. 40; response to Panel question No. 54, para. 4. The United States refers to a number of USDOC determinations in administrative reviews and sunset reviews which, it argues show that the USDOC acted consistently with the Final Modification by not zeroing in administrative reviews and by not relying on margins of dumping calculated with zeroing in likelihood-of-dumping determinations in the context of sunset reviews (United States' first written submission, footnote 274, referring to *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 Fed. Reg. 34,337 (7 June 2013), Exhibit US-40, p. 34337; *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 Fed. Reg. 73,415 (10 Dec. 2012); Exhibit US-41; and United States' first written submission, footnote 275, referring to *Low Enriched Uranium From France: Final Results of the Expedited Second Sunset Review of the Antidumping Duty Order*, 78 Fed. Reg. 21,100 (9 April 2013), Exhibit US-42; *Certain Hot-Rolled Carbon Steel Flat Products From India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders*, 78 Fed. Reg. 15,703 (12 March 2013), Exhibit US-43; *Lemon Juice From Argentina: Final Results of the Expedited First Sunset Review of the Suspended Antidumping Duty Investigation*, 77 Fed. Reg. 73,021 (7 Dec. 2012), Exhibit US-44; *Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, Poland, People's Republic of China and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders*, 77 Fed. Reg. 70,140 (23 Nov. 2012), Exhibit US-45; *Honey From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 77 Fed. Reg. 59,896 (1 Oct. 2012), Exhibit US-46; and *Certain Activated Carbon From the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 77 Fed. Reg. 33,420 (6 June 2012), Exhibit US-47.

<sup>93</sup> Viet Nam's response to Panel question No. 52, paras. 1-2. In its response, Viet Nam submits, however, that, in the preliminary determination in the eighth administrative review, the USDOC resorted to the alternative average-to-transaction methodology provided for in Article 2.4.2 of the Anti-Dumping Agreement and used zeroing, and notes that the Appellate Body has not ruled specifically on the application of zeroing in such a context. We note, however, that Viet Nam's claims are limited to the simple zeroing methodology and that Viet Nam does not challenge the use of zeroing in the context of the third methodology provided for under Article 2.4.2. Hence, we do not address the question of the consistency of zeroing in this context, and consider that even if Viet Nam demonstrated that the USDOC did use zeroing in applying the third methodology in the eighth administrative review, this would be irrelevant to our consideration of whether the simple zeroing methodology as used in administrative reviews is a measure of general and prospective application.

7.47. Viet Nam contends, however, that, despite the Final Modification and the fact that zeroing was not used in the seventh administrative review of the *Shrimp* order, "the USDOC's zeroing methodology still exists as a measure that can be challenged 'as such'".<sup>94</sup> Viet Nam also argues that panels routinely make rulings on measures that have been modified or repealed and submits that this dispute is similar to the *US – Poultry (China)* case where the panel decided to rule on a measure which expired two days before the complainant's first written submission, because it considered that the respondent Member had not conceded the WTO-inconsistency of the measure and the repealed measure could be easily re-imposed.<sup>95</sup> Viet Nam finally submits that the USDOC continued to use the zeroing methodology after the implementation of the Final Modification, since the final results of the sixth administrative review, published on 11 September 2012, utilized the zeroing methodology.<sup>96</sup>

7.48. In our view, Viet Nam's arguments are somewhat self-contradictory. On the one hand, Viet Nam argues that the measure "still exists as a measure that can be challenged 'as such'", thereby conveying that, in Viet Nam's view, zeroing in administrative reviews still exists as a measure of general and prospective application. On the other hand, Viet Nam contends that "[p]anel[s] routinely make rulings on measures that have been modified or repealed", thus suggesting that the measure does not exist any longer, having been modified or repealed.

7.49. We note that in the Final Modification submitted as evidence by the United States, the USDOC indicates, *inter alia*, that:

In reviews, except where the Department determines that application of a different comparison method is more appropriate, the Department will compare monthly weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate.<sup>97</sup>

7.50. In the Final Modification, the USDOC also observes that the methodology which it modifies was found inconsistent, both "as such" and "as applied", with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by the Appellate Body in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *US – Continued Zeroing (EC)*. It indicates that, following these adverse rulings, the USTR informed the WTO Dispute Settlement Body that the United States intended to comply with its WTO obligations in these disputes. The USDOC also explains that "[i]n adopting this *Final Modification for Reviews*, the Department's intention is to apply a comparison methodology in reviews that parallels the WTO-consistent methodology the Department currently applies in original investigations".<sup>98</sup>

7.51. In our view, Viet Nam's arguments fail to appreciate the significance of the Final Modification for its assertion that the zeroing methodology is a measure of general and prospective application. To us, the fact that the USDOC has modified its calculation methodology and ceased to apply the zeroing methodology in administrative reviews is a significant element to take into consideration because it speaks directly to the question of the very existence of this methodology as a measure of general and prospective application. The Final Modification indicates that the

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<sup>94</sup> Viet Nam's response to Panel question No. 4, para. 10.

<sup>95</sup> Viet Nam's response to Panel question No. 4, paras. 11-14. Viet Nam refers to the Panel Report in *US – Poultry (China)*, para. 7.55. Viet Nam also recalls that, while the *US – Poultry (China)* panel made findings concerning the WTO-inconsistency of the measure, it considered that it would not be appropriate to make recommendations.

<sup>96</sup> Viet Nam's response to Panel question No. 4, para. 15. In response to a question by the Panel, Viet Nam also indicates that the 2012 Final Modification did not apply to entries which remained unliquidated as of the date of its entry into force (i.e. 16 April 2012), as illustrated by the fact that it did not apply to entries subject to the sixth administrative review. (Viet Nam's response to Panel question No. 53, para. 3; comments on the United States' response to Panel question No. 53, para. 1.)

<sup>97</sup> Final Modification, Exhibit US-39, p. 8102. The Final Modification also announces a modification of the USDOC practice in sunset reviews, indicating that in sunset review determinations, the USDOC will no longer rely on dumping margins that were calculated using zeroing.

<sup>98</sup> Final Modification, Exhibit US-39, p. 8102. The USDOC modified its calculation methodology in original investigations, to eliminate zeroing under the weighted-average to weighted-average methodology, in 2006; see *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (27 December 2006), Exhibit US-38, referred to in United States' first written submission, footnote 273).



USDOC decided to apply a modified methodology, except where it determines that application of a different comparison method is more appropriate.<sup>99</sup> This decision took effect with respect to all reviews for which the preliminary determination is issued after 16 April 2012.<sup>100</sup> Viet Nam requested the establishment of a panel on 20 December 2012 and the Panel was established on 27 February 2013.<sup>101</sup> Hence, in our view, as of the date of Viet Nam's panel request and as of now, the USDOC's simple zeroing methodology, as used by the USDOC in administrative reviews, does not exist as a measure of general and prospective application.

7.52. The United States does not contest that, as argued by Viet Nam, dumping margins in the sixth administrative review were calculated using the zeroing methodology. However, the fact that the USDOC used zeroing in the final results of the sixth administrative review, i.e. after the Final Modification, does not in our view establish that the measure continues to exist as a measure of general and prospective application. We observe that, pursuant to the Final Modification, the modifications to USDOC practice took effect with respect to administrative reviews in which the preliminary determinations were issued after 16 April 2012.<sup>102</sup> Since the preliminary determination in the sixth administrative review was issued on 7 March 2012, the USDOC was still acting pursuant to its previous practice, consistent with the effective date established for its modified practice. We therefore remain of the view that, as of 16 April 2012, and, in any event, as of the present date, the USDOC's simple zeroing methodology, as used by the USDOC in administrative reviews, does not exist as a measure of general and prospective application.<sup>103</sup>

7.53. Concerning Viet Nam's reference to *US – Poultry (China)*, we note that the question at issue in that dispute was whether the panel should rule on the *consistency* with the covered agreements of the repealed measure. However, in that dispute, there was no controversy between the parties regarding the *existence* of the measure itself before it was repealed.<sup>104</sup> In the present dispute, the parties disagree as to whether the measure claimed by Viet Nam to be WTO-inconsistent is a rule or norm of general and prospective application which can be challenged "as such". This Panel is not, therefore, in the same situation as the panel in *US – Poultry (China)*: we are not trying to determine whether it would be appropriate for us to rule on the WTO-consistency of an expired measure, but rather, whether Viet Nam has established that this measure can be challenged "as such".

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<sup>99</sup> See Final Modification, Exhibit US-39, pp. 8101-8102:

Prior to this Final Rule and Final Modification for Reviews, the Department typically has compared normal value and export price using the average-to-transaction ("A-T") method, which involved a comparison of the weighted-average normal value to the export price of individual transactions for comparable merchandise. When aggregating the results of these comparisons to determine the weighted average margin of dumping in a review, the Department did not offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value. When determining importer-specific assessment rates in a review, the Department similarly aggregated the results of importer-specific comparison results and did not offset the comparison results for which export price was less than normal value by the comparison results for which export price exceeded normal value.

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After considering all of the comments submitted, the Department is adopting the proposed changes to its methodology for calculating weighted average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons when using monthly A-A comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. In reviews, except where the Department determines that application of a different comparison method is more appropriate, the Department will compare monthly weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate.

(footnotes omitted)

<sup>100</sup> Final Modification, Exhibit US-39, pp. 8101 and 8113.

<sup>101</sup> See above, para. 1.3.

<sup>102</sup> Final Modification, Exhibit US-39, p. 8101.

<sup>103</sup> Moreover, we refer to our finding below that the USDOC's use of zeroing in the three administrative reviews at issue is inconsistent "as applied" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. In our view, our findings of inconsistency with respect to the application of simple zeroing in the three administrative reviews at issue adequately address Viet Nam's concerns regarding the final results of the sixth administrative review.

<sup>104</sup> Panel Report, *US – Poultry (China)*, paras. 7.54-7.57.

7.54. In any event, we are not convinced that the zeroing methodology "can be easily re-imposed" by the USDOC. Viet Nam provides no evidence indicating that the USDOC intends to revert to this methodology. Moreover, the Final Modification shows that, as argued by the United States, the USDOC's changes in methodology were made after extensive consultations with different stakeholders, and in order to implement prior DSB rulings and recommendations.<sup>105</sup> This indicates to us that, contrary to what is argued by Viet Nam, such modifications are not easily made under the US system. In the absence of evidence to the contrary, we cannot assume that the United States will "easily re-impose" the use of simple zeroing in administrative reviews. Moreover, having modified its practice to comply with its WTO obligations, we must assume that the United States will continue to comply with its WTO obligations in good faith.

7.55. We conclude, therefore, that Viet Nam has failed to establish the existence of the alleged measure (simple zeroing methodology used by the USDOC in administrative reviews) as a rule or norm of general and prospective application. Consequently, we do not consider the parties' arguments concerning the consistency of the alleged measure with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.56. Therefore, we find that Viet Nam did not establish that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

### **7.3.3 Zeroing "as applied" in the administrative reviews at issue**

#### **7.3.3.1 Introduction**

7.57. Viet Nam requests the Panel to find that the application of the zeroing methodology to calculate dumping margins for the individually-examined respondents in the fourth, fifth and sixth administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>106</sup>

7.58. We shall first consider whether Viet Nam has demonstrated that the USDOC applied zeroing in the three administrative reviews at issue. If we find that Viet Nam has met its burden of proof in this respect, we shall then consider whether the application of the zeroing methodology in the fourth, fifth and sixth administrative reviews is inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994.

#### **7.3.3.2 Whether Viet Nam has established that the zeroing methodology was applied in the fourth, fifth and sixth administrative reviews**

##### **7.3.3.2.1 Main arguments of the parties**

###### **7.3.3.2.1.1 Viet Nam**

7.59. Viet Nam submits that the USDOC applied the zeroing methodology when calculating the dumping margins of the mandatory respondents in the fourth, fifth and sixth administrative reviews of the *Shrimp* order. Viet Nam indicates that the USDOC's final determinations in those reviews confirm that the zeroing methodology was applied. Viet Nam further argues that the affidavit prepared by Ms Naschak, provided by Viet Nam to the Panel, confirms the application of the zeroing methodology in those administrative reviews.<sup>107</sup> Viet Nam notes that the United States does not appear to dispute that the USDOC used the zeroing methodology in the administrative reviews at issue.<sup>108</sup>

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<sup>105</sup> United States' second written submission, para. 102. See also Final Modification, Exhibit US-39, pp. 8103-8113.

<sup>106</sup> Viet Nam's first written submission, para. 356; second written submission, para. 139.

<sup>107</sup> Viet Nam's first written submission, paras. 59-60.

<sup>108</sup> Viet Nam's second written submission, para. 3.

### 7.3.3.2.1.2 United States

7.60. The United States does not contest Viet Nam's allegation that the USDOC applied the zeroing methodology when calculating dumping margins at issue. The United States contends, however, that the application of zeroing is not inconsistent with the covered agreements.<sup>109</sup>

### 7.3.3.2.2 Evaluation by the Panel

7.61. We proceed to examine the evidence submitted by Viet Nam in support of its allegation that the USDOC applied the zeroing methodology in the calculation of dumping margins for mandatory respondents in the fourth, fifth and sixth administrative reviews.

7.62. As noted in the preceding section of this Report, the Naschak affidavit submitted by Viet Nam discusses the USDOC's use of zeroing in the three administrative reviews at issue, when calculating the margins of dumping for the mandatory respondents in those reviews – Minh Phu, Nha Trang and Camimex.<sup>110</sup> The affidavit attaches relevant excerpts of the USDOC's computer "logs" (printouts of the computer programming instructions) and "outputs" (printouts of the dumping calculations and of the databases that were run through the programme) for two of these respondents, Nha Trang and Minh Phu in the fourth, fifth and sixth administrative reviews. The affidavit explains, *inter alia*, that the programming language used in calculating the margins for both Minh Phu and Nha Trang shows that only positive comparison results were used to calculate the overall margins and directs the Panel's attention to certain lines of computer code in the "logs" that implement the instruction to disregard NV (normal value) – EP (export price) comparisons where the EP exceeds the NV, in the calculation of Nha Trang and Minh Phu's margins of dumping. The affidavit also directs the Panel to the relevant parts of the "logs" confirming that the negative comparison results were excluded in calculating the dumping margins, concluding in this respect that "no U.S. sales where the export price exceeded normal value were included in the calculation of the overall margin [of dumping]".<sup>111</sup>

7.63. Viet Nam has also provided the Panel with the Issues and Decision Memoranda that accompany each of the USDOC's final determinations in the three administrative reviews at issue. This evidence confirms that the USDOC applied the zeroing methodology in these reviews. In the Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, the USDOC states that "consistent with the Department's interpretation of the Act ... in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions".<sup>112</sup> Likewise, in the Issues and Decision Memorandum accompanying the final determination in the fifth administrative review, the USDOC observes that "[b]ecause no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales".<sup>113</sup> Finally, in the Issues and Decision Memorandum accompanying the final determination in the sixth administrative review, the USDOC refers to its "interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review", and indicated that "in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions".<sup>114</sup>

7.64. The United States does not challenge the evidence submitted by Viet Nam. We recall that, when a party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party who must adduce sufficient evidence to rebut the presumption.<sup>115</sup> In the present dispute, Viet Nam has submitted sufficient evidence indicating that

<sup>109</sup> United States' first written submission, paras. 210-211; opening statement at the first meeting of the Panel, paras. 42-44.

<sup>110</sup> Naschak affidavit, Exhibit VN-25, p. 1.

<sup>111</sup> Naschak affidavit, Exhibit VN-25, paras. 22, 34, and 46.

<sup>112</sup> Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, Exhibit VN-13, p. 35.

<sup>113</sup> Issues and Decision Memorandum accompanying the final determination in the fifth administrative review, Exhibit VN-18, p. 29.

<sup>114</sup> Issues and Decision Memorandum accompanying the final determination in the sixth administrative review, Exhibit VN-20, pp. 26-27.

<sup>115</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

the USDOC applied the zeroing methodology in the calculation of dumping margins of individually-examined respondents in the administrative reviews at issue. As the United States did not provide arguments or evidence to rebut the presumption raised by Viet Nam, we conclude that Viet Nam has demonstrated that the USDOC applied simple zeroing in the calculation of margins of dumping of individually-investigated respondents in the fourth, fifth and sixth administrative reviews.

### **7.3.3.3 Whether the application of zeroing in the fourth, fifth and sixth administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994**

#### **7.3.3.3.1 Introduction**

7.65. We now examine whether the application by the USDOC of the zeroing methodology to calculate margins of dumping of individually-examined respondents in the fourth, fifth and sixth administrative review is inconsistent the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994.

#### **7.3.3.3.2 Main arguments of the parties**

##### **7.3.3.3.2.1 Viet Nam**

7.66. Viet Nam submits that the Appellate Body has consistently found that the USDOC's use of zeroing in administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>116</sup> Viet Nam observes that the Appellate Body repeatedly rejected the same arguments that are again being made by the United States in this dispute and urges this Panel to follow the clear and consistent decisions by the Appellate Body.<sup>117</sup> Viet Nam argues that the GATT 1994 and the Anti-Dumping Agreement both define the concepts of "dumping" and "margin of dumping" with regard to the product under investigation as a whole and do not allow for differentiation among sub-groups or categories. According to Viet Nam, Article VI:2 of the GATT 1994, which defines dumping as when "products of one country are introduced into the commerce of another country at less than the normal value of the products", refers to the product as a whole. Furthermore, Article 2.1 of the Anti-Dumping Agreement, which applies to the entire Agreement, defines dumping with clear reference to the "product" that is subject to the proceeding. Viet Nam recalls that, based on these provisions, the Appellate Body has repeatedly found that the concepts of "dumping" and "margin of dumping" are defined in relation to the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.<sup>118</sup>

7.67. Viet Nam submits that Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole. This, according to Viet Nam, means that when the administering authority makes use of multiple comparisons at an intermediate stage, it must aggregate the results of all intermediate comparisons, including negative comparison results, for purposes of calculating the final dumping margin. Viet Nam argues that, by systematically disregarding negative comparison results, the USDOC's simple zeroing practice necessarily results in dumping margins that are greater than the margins for the product as a whole.<sup>119</sup>

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<sup>116</sup> Viet Nam's first written submission, paras. 79-91 and 93 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 133; *US – Zeroing (Japan)*, paras. 175-176; *US – Stainless Steel (Mexico)*, paras. 103, 109, and 139; *US – Continued Zeroing*, paras. 312 and 316; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 195 and 197); second written submission, paras. 12-17. We note that, in its first written submission, Viet Nam discusses the consistency of the zeroing methodology with the covered agreements in the context of its argumentation with respect to its "as such" claim and refers to that discussion in its "as applied" claim (see Viet Nam's first written submission, para. 93). In its second written submission, Viet Nam jointly discusses the legal consistency "as such" and "as applied" of the zeroing methodology (see Viet Nam's second written submission, paras. 12-17).

<sup>117</sup> Viet Nam's opening statement at the first meeting of the Panel, para. 27.

<sup>118</sup> Viet Nam's first written submission, paras. 71-78. Viet Nam refers in particular to the Appellate Body Reports in *US – Zeroing (Japan)*, para. 115 and *US – Softwood Lumber V*, paras. 93 and 96.

<sup>119</sup> Viet Nam's first written submission, paras. 79-84; opening statement at the first meeting of the Panel, paras. 24-27; second written submission, paras. 12-17.

### 7.3.3.3.2 United States

7.68. The United States argues that the text and context of the relevant provisions of the Anti-Dumping Agreement, interpreted in accordance with customary rules of interpretation, support its interpretation that the concepts of dumping and margins of dumping have meaning in relation to individual transactions and, therefore, there is no obligation to aggregate multiple comparison results in assessment proceedings to arrive at an aggregated margin of dumping for the product as a whole.<sup>120</sup> The United States contends that it is permissible to interpret the terms of "dumping" and "margin of dumping" as referring to specific export transactions, and not only to the "product as a whole".<sup>121</sup> The United States submits that Members' rights and obligations stem from the texts of the covered agreements, and not from panel or Appellate Body reports and urges the Panel to remain faithful to the text of the Anti-Dumping Agreement and to find that the US interpretation rests on a permissible interpretation of that Agreement.<sup>122</sup>

7.69. The United States argues that Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 do not require the provision of offsets in assessment proceedings and do not provide textual support for the concepts of "product as a whole" and "negative dumping".<sup>123</sup> The United States submits that the terms upon which Viet Nam's interpretation rests are absent from the text of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The United States is of the view that, as recognized by several panels, averaging of export prices is not required to calculate a margin of dumping under Article 9.3 and, therefore, an interpretation that permits the existence of transaction-specific margins of dumping is supported by the text of that provision. The United States is of the view that, as long as the margin of dumping is properly understood as applying at the level of individual transactions, there is no tension between the exporter-specific concept of dumping as a pricing behaviour and the importer-specific remedy of payment of dumping duties.<sup>124</sup>

### 7.3.3.3.3 Main arguments of the third parties

7.70. **China** submits that, in light of the consistent and well-founded decisions by the Appellate Body, to the extent that Viet Nam has established the use of the zeroing methodology in the three administrative reviews, the application of zeroing in those reviews is also inconsistent with the Anti-Dumping Agreement and the GATT 1994.<sup>125</sup>

7.71. The **European Union** submits that the issue of zeroing has been extensively litigated in the WTO and does not warrant repeated scrutiny. The Panel should therefore deal with it in a summary manner and uphold Viet Nam's "as applied" claims.<sup>126</sup>

7.72. Recalling previous Appellate Body jurisprudence with respect to zeroing in administrative reviews, **Japan** submits that the Panel should find that the zeroing methodology, as it relates to the use of simple zeroing in administrative reviews, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:3 of the GATT 1994.<sup>127</sup>

7.73. While not taking a position on the facts of this case, **Norway** agrees with Appellate Body rulings in previous cases that the use of all forms of zeroing in all forms of proceedings is inconsistent with the Anti-Dumping Agreement.<sup>128</sup>

<sup>120</sup> United States' first written submission, para. 210.

<sup>121</sup> United States' opening statement to the first meeting of the Panel, paras. 42-44. The United States refers in particular to Panel Reports, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Softwood Lumber V (Article 21.5)*, and *US – Stainless Steel (Mexico)*. See United States' first written submission, paras. 210-241, notably at footnote 285.

<sup>122</sup> United States' opening statement at the first meeting of the Panel, para. 44.

<sup>123</sup> United States' first written submission, paras. 219-232.

<sup>124</sup> United States' first written submission, paras. 234-240. The United States refers to Panel Reports, *US – Zeroing (EC)*, paras. 7.201, 7.204-7.207, and 7.220-7.223; *US – Zeroing (Japan)*, paras. 7.196, 7.198-7.199; and *US – Stainless Steel (Mexico)*, para. 7.124.

<sup>125</sup> China's third-party submission, para. 5.

<sup>126</sup> European Union's third-party submission, para. 6.

<sup>127</sup> Japan's third-party submission, paras. 3-12.

<sup>128</sup> Norway's third-party submission, paras. 13-32.

#### 7.3.3.3.4 Evaluation by the Panel

7.74. Our analysis begins with the text of the relevant provisions relied upon by Viet Nam in its claims. Article 9.3 of the Anti-Dumping Agreement reads, in relevant parts:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.75. Article VI:2 of the GATT 1994 provides as follows:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.76. Although formulated differently, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 impose similar obligations, as they both provide that the amount of the anti-dumping duty shall not exceed the margin of dumping. The main question that the Panel needs to address is whether the term "margin of dumping" referred to in both provisions must be calculated for the "product as a whole", as argued by Viet Nam, or whether it may be calculated on a transaction-specific basis, as submitted by the United States. As observed by parties and third parties, this controversy is not novel.

7.77. In prior disputes, the Appellate Body has consistently held that the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994, indicate clearly that the term "dumping" is used in relation to the product as a whole, and not in relation to individual export transactions. The Appellate Body has also found that the "margin of dumping" is used in relation to the dumped "product as a whole" and must be determined on the basis of all export transactions of a given exporter or foreign producer. The Appellate Body also stressed on various occasions that the terms "dumping" and "margin of dumping" are exporter-specific concepts.<sup>129</sup> The Appellate Body has clarified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, it is only on the basis of aggregating all these intermediate values that the investigating authority can establish margins of dumping for the product as a whole.<sup>130</sup>

7.78. We further note that, according to the Appellate Body, these definitions of "dumping" and of the "margin of dumping" apply throughout the Agreement, including under Article 9.3, and under Article VI:2 of the GATT 1994. It therefore follows that the amount of anti-dumping duties assessed pursuant to those provisions cannot exceed the margin of dumping as established for the "product as a whole". In other words, the margin of dumping established for an exporter or foreign producer operates as a ceiling on the total amount of anti-dumping duties that can be levied on the entries of the product from that exporter or producer.<sup>131</sup> Accordingly, the Appellate Body found that the zeroing methodology applied by the USDOC in administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and with Article VI:2 of the GATT 1994 because it results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping. The Appellate Body observed that:

when applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. Simple zeroing thus results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, as we have

<sup>129</sup> Appellate Body Reports, *US – Zeroing (EC)*, paras. 127-129; *US – Zeroing (Japan)*, paras. 111-112 and 150; *US – Stainless Steel (Mexico)*, paras. 83-95; and *US – Continued Zeroing*, paras. 282-283.

<sup>130</sup> Appellate Body Reports, *US – Softwood Lumber V*, paras. 92-100; *US – Zeroing (EC)*, para. 126; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122; *US – Zeroing (Japan)*, paras. 108-110, 115, and 151; *US – Stainless Steel (Mexico)*, paras. 97-99; and *US – Continued Zeroing*, paras. 276-287.

<sup>131</sup> Appellate Body Reports, *US – Zeroing (EC)*, para. 130; *US – Zeroing (Japan)*, paras. 155-156; *US – Stainless Steel (Mexico)*, paras. 96 and 102; and *US – Continued Zeroing*, paras. 286-287 and 314.



explained above, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.<sup>132</sup>

7.79. The Appellate Body has also held that Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii) of the Anti-Dumping Agreement, do not admit of another interpretation as far as the issue of zeroing is concerned and therefore that zeroing does not rest upon a "permissible interpretation" of the text of the relevant provisions.<sup>133</sup>

7.80. We have carefully considered and assessed the arguments made by the parties in the present dispute. We note that the very same arguments that the United States makes before us were rejected by the Appellate Body in prior disputes, in which it concluded that the very same measure which is now before us, namely the zeroing methodology as applied by the USDOC in administrative reviews, is inconsistent with Articles 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.<sup>134</sup> We are also mindful of the Appellate Body's admonition that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but it is what would be expected from panels, especially where the issues are the same".<sup>135</sup> In *US – Stainless Steel (Mexico)*, the Appellate Body explained:

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.<sup>136</sup>

Following an objective assessment of the matter, and after a careful review of the findings discussed above, we see no reason not to rely on the interpretation of the relevant provisions and on the reasoning developed by the Appellate Body in relation to the issue of zeroing in these prior disputes.

7.81. We find, therefore, that the application by the USDOC of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth and sixth administrative reviews of the *Shrimp* order is inconsistent with United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

## 7.4 Viet Nam's claims regarding the "NME-wide entity" rate practice

### 7.4.1 Introduction

7.82. Viet Nam makes claims with respect to what it terms the USDOC's "NME-wide entity rate practice". Viet Nam includes within this practice: (i) the USDOC's presumption, in anti-dumping proceedings – including original investigations and administrative reviews – involving imports from NMEs, that all companies within the designated NME country are essentially operating units of a

<sup>132</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133. See also Appellate Body Reports, *US – Zeroing (EC)*, paras. 132-133; and *US – Continued Zeroing*, paras. 315-316.

<sup>133</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 189.

<sup>134</sup> Appellate Body Reports, *US – Zeroing (EC)*, para. 133; *US – Zeroing (Japan)*, para. 176; *US – Stainless Steel (Mexico)*, para. 139. Moreover, in two of those disputes, the Appellate Body also ruled that the zeroing methodology applied by the USDOC in administrative reviews was "as such" inconsistent with Articles 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. See Appellate Body Reports, *US – Zeroing (Japan)*, para. 166 and *US – Stainless Steel (Mexico)*, paras. 133-134.

<sup>135</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

<sup>136</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

single, government-wide entity and the assignment of a single anti-dumping duty rate to that entity; and (ii) the manner in which this anti-dumping rate is determined, distinct from the separate rate, on the basis of facts available. Viet Nam also challenges the application of this NME-wide entity rate practice in the fourth, fifth, and sixth administrative reviews. Specifically, Viet Nam claims that:

- a. the USDOC's "NME-wide entity rate practice" is inconsistent "as such" with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement; and
- b. the application by the USDOC of the "NME-wide entity rate practice" in the fourth, fifth and sixth administrative reviews is inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement.

7.83. In its request for the establishment of a panel, Viet Nam also included a challenge to "the treatment of the Vietnam-wide entity in the original investigation and the first, second, third, fourth, fifth, and sixth administrative reviews, ... to the extent that these determinations demonstrate the USDOC's continued and ongoing use of this practice throughout the full course of the shrimp anti-dumping proceeding".<sup>137</sup> In its first written submission, Viet Nam claimed that "the United States' application of the Vietnam-wide entity practice on a continued and ongoing basis through the course of the shrimp anti-dumping proceedings is inconsistent with the Anti-Dumping Agreement".<sup>138</sup> As Viet Nam has not further developed the claim regarding "continued and ongoing use" of the practice in question in its arguments to the Panel, we shall not consider it in this Report and make no findings in this respect.

7.84. The United States asks the Panel to reject all of Viet Nam's claims of inconsistency.<sup>139</sup>

7.85. We shall start our analysis with Viet Nam's claims that the NME-wide entity rate practice is inconsistent "as such" with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement. We shall then turn to Viet Nam's claims that the application of the NME-wide entity rate practice in the fourth, fifth and sixth administrative reviews is inconsistent with those same provisions.

## **7.4.2 Claims with respect to the NME-wide entity rate practice "as such"**

### **7.4.2.1 Introduction**

7.86. Viet Nam claims that the "NME-wide entity rate practice" is a measure which may be challenged "as such" and which is inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement.<sup>140</sup> The United States submits that Viet Nam has failed to establish the existence of the NME-wide entity rate practice as a measure of general and prospective application that may be challenged "as such" under the Anti-Dumping Agreement.<sup>141</sup> The United States also asks the Panel to reject Viet Nam's claims of inconsistency.<sup>142</sup>

7.87. In view of the parties' disagreement on this issue, we need to first determine whether Viet Nam has established that the "NME-wide entity rate practice" it has defined is a measure of general and prospective application which is susceptible to an "as such" challenge. If we are satisfied that Viet Nam has done so, we shall then turn to Viet Nam's claims that this rule or norm is, as such, inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement.

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<sup>137</sup> Viet Nam's panel request, p. 5.

<sup>138</sup> Viet Nam's first written submission, para. 42.

<sup>139</sup> United States' first written submission, para. 275; second written submission, para. 119.

<sup>140</sup> Viet Nam's first written submission, paras. 94 and 356; opening statement at the first meeting of the Panel, paras. 8-9; second written submission, para. 19.

<sup>141</sup> United States' first written submission, para. 145; opening statement at the first meeting of the Panel, para. 22; second written submission, para. 66.

<sup>142</sup> United States' first written submission, para. 145; second written submission, para. 68.



#### 7.4.2.2 Whether Viet Nam has established the existence of the NME-wide entity rate practice as a measure which may be challenged "as such"

##### 7.4.2.2.1 Main arguments of the parties

###### 7.4.2.2.1.1 Viet Nam

7.88. Viet Nam argues that the USDOC's standard practice is articulated in its Antidumping Manual, which demonstrates that, in anti-dumping proceedings involving NME countries, the USDOC starts with the rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single anti-dumping duty rate, the NME-wide rate. According to Viet Nam, the USDOC retains broad discretion on the method for calculating the NME-wide entity rate, but in most investigations and administrative reviews, the USDOC finds that the NME-wide entity did not cooperate, thus justifying the use of adverse facts available. Firms seeking a "separate" (or "all others") rate, based on the weighted-average of the rates for the individually-investigated respondents, must pass a "separate rate test" whereby they must establish an absence of government control, both in law and in fact, with respect to exports. Hence, unlike cases involving market economy countries where all non-investigated firms receive the "all others" rate, non-investigated firms in NME may receive the "all others" rate only if they satisfy established criteria. According to Viet Nam, the Antidumping Manual makes it clear that the USDOC's NME-wide practice is applied on a generalized and prospective basis.<sup>143</sup>

7.89. Viet Nam further submits that Policy Bulletin 05.1, on *Separate-Rates Practices and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, articulates the same presumption for NME countries as the Antidumping Manual and also sets forth a requirement that exporters affirmatively demonstrate independence from government control in order to be eligible for a rate that is separate from the NME-wide entity. Viet Nam submits that Policy Bulletin 05.1, which sets forth the USDOC's policy, is of general and prospective effect, as its purpose is to provide certainty and predictability to NME exporters on the requirements for a separate rate.<sup>144</sup> Viet Nam further argues that the determinations relevant to the *Shrimp* order, from the original investigation to the sixth review, also constitute relevant evidence because they describe the "long-standing policy" of presuming government ownership of all firms in NME investigations.<sup>145</sup> In Viet Nam's view, the evidence regarding the NME-wide entity policy is more compelling than in the zeroing disputes, because the Panel has before it multiple written documents explaining the exact nature of the policy, as well as its general and prospective effect.<sup>146</sup> Viet Nam clarifies that it is not challenging the Antidumping Manual and Policy Bulletin 05.1 as measures themselves, but considers that both documents serve as evidence that the practice or policy in question amounts to a measure of general and prospective application.<sup>147</sup>

###### 7.4.2.2.1.2 United States

7.90. The United States replies that Viet Nam has not established that the alleged NME-wide entity rate practice exists as a measure which can be challenged "as such". Viet Nam does not explain how a "practice" can set out a rule or norm of general and prospective application, and has not demonstrated that the USDOC invariably applies the alleged practice. According to the United States, the Antidumping Manual stipulates, *inter alia*, that it is "for the internal training and guidance of Import Administration (IA) personnel only" and that it "cannot be cited to establish DOC practice", which means that it cannot serve as a basis to argue that the USDOC has adopted an approach that must be followed for any particular future proceeding. The United States argues that the use of the Manual is not required under domestic law or under the WTO Agreements and, thus, Viet Nam is attacking a non-required step undertaken by the United States to promote transparency. The United States contends that Viet Nam has not pointed to a principle of US law

<sup>143</sup> Viet Nam's first written submission, paras. 95-106; opening statement at the first meeting of the Panel, para. 9; response to Panel question No. 7(b), para. 22; second written submission, para. 19.

<sup>144</sup> Viet Nam's opening statement at the first meeting of the Panel, para. 10; response to Panel question No. 7(b), para. 23.

<sup>145</sup> Viet Nam's opening statement at the first meeting of the Panel, para. 11; response to Panel question No. 7(b), para. 24.

<sup>146</sup> Viet Nam's second written submission, para. 19; response to Panel question No. 7(b), paras. 20-24.

<sup>147</sup> Viet Nam's response to Panel question No. 7(b), para. 19; opening statement at the second meeting of the Panel, para. 6.

that supports the conclusion that the Antidumping Manual requires the USDOC to do something; in fact, Viet Nam itself acknowledges that the USDOC retains broad discretion on the method for calculating the NME-wide entity rate. According to the United States, the Antidumping Manual does not require calculating that rate on the basis of facts available. The United States concludes that Viet Nam has failed to make a *prima facie* case that the so-called NME-wide entity rate is a measure that can be challenged "as such".<sup>148</sup>

7.91. The United States further argues that, since Viet Nam has made clear that it is not alleging that either the Antidumping Manual or Policy Bulletin 05.1 are themselves measures that Viet Nam challenges "as such", the issue is solely whether Viet Nam has shown the existence of an *unwritten* measure that may be challenged "as such", based on an alleged practice adopted by the United States. According to the United States, Viet Nam has failed to establish the existence of such an unwritten norm.<sup>149</sup> The United States also notes that Policy Bulletin 05.1 applies only to original investigations initiated on or after the date of publication of the notice announcing this policy (5 April 2005). As a consequence, the Bulletin did not require the USDOC to follow the approaches set forth therein during the covered reviews or generally during administrative reviews of products from NME countries.<sup>150</sup>

#### 7.4.2.2.2 Main arguments of the third parties

7.92. **China** submits that the form of the measure is not decisive when considering whether a measure may be subject to an "as such" challenge. In this dispute, the NME-wide entity rate practice is expressed in written documents, in particular in Policy Bulletin 05.1, which leaves no uncertainty as to the content of the NME-wide entity rate practice. Moreover, this document is identical in its material effects to the Sunset Policy Bulletin that the Appellate Body found to be a norm of general and prospective application in prior disputes.<sup>151</sup>

7.93. The **European Union** submits that, in the light of the Appellate Body report in *EC – Fasteners (China)*, the Panel will have to consider, in particular, whether Viet Nam has demonstrated the existence and precise content of the "as such" measure at issue, as well as the existence of a presumption.<sup>152</sup>

#### 7.4.2.2.3 Evaluation by the Panel

7.94. Neither party contests, and it is well-established in WTO dispute settlement practice, that it is possible to challenge certain measures "as such", i.e. independently of their application in specific instances. The United States argues, however, that Viet Nam has not established that the alleged NME-wide entity rate practice exists as a measure of general and prospective application.

7.95. In the present dispute, Viet Nam challenges a "practice" or "policy" of the USDOC, an agency of the United States Government. According to the United States, an administrative practice standing alone is not itself a measure for the purpose of the DSU, but it may be relevant evidence in a dispute settlement proceeding. The United States also submits that the Appellate Body has not, to date, pronounced upon the issue of whether a "practice" may be challenged, as such, as a measure in WTO dispute settlement.<sup>153</sup>

7.96. We note that the USDOC itself uses alternatively the words "practice" and "policy" when referring to the existence of an NME-wide entity and to the single rate assigned to that entity.<sup>154</sup> In our view, however, the particular terms used to describe the alleged measure are not determinative<sup>155</sup> and it does not matter whether the alleged measure is a "practice" or a "policy".

<sup>148</sup> United States' first written submission, paras. 140-145; opening statement at the first meeting of the Panel, paras. 24-27; second written submission, paras. 66 and 68.

<sup>149</sup> United States' second written submission, paras. 64-66.

<sup>150</sup> United States' second written submission, para. 67.

<sup>151</sup> China's third-party statement, paras. 3-7.

<sup>152</sup> European Union's third-party written submission, para. 22.

<sup>153</sup> United States' response to Panel question No. 3, paras. 1 and 3.

<sup>154</sup> See, for instance, Issues and Decision Memorandum accompanying the final determination in the original investigation, Exhibit VN-04, pp. 29-30. The USDOC also refers to the NME-wide entity rate as a "methodology" (see also USDOC Antidumping Manual, Chapter 10, Exhibit VN-24).

<sup>155</sup> The Appellate Body has observed that the scope of "laws, regulations and administrative procedures" challenged in WTO dispute settlement "must be determined for purposes of WTO law and not simply by

Rather, what we need to assess is whether Viet Nam has demonstrated, *in casu*, that the alleged measure is a norm or rule of general and prospective application that can be challenged "as such" in the WTO dispute settlement system.

7.97. As we observed above<sup>156</sup>, neither the DSU nor the Anti-Dumping Agreement establishes criteria for determining when measures can be challenged "as such". However, this issue was considered in previous WTO dispute settlement cases, which have outlined criteria to assess whether a rule or norm amounts to a rule or norm of general and prospective application which can be challenged "as such". Thus, we recall that, while there is no threshold requirement that the measure challenged "as such" be of a certain type<sup>157</sup>, the burden of establishing the existence of a rule or norm of general application – which rests on the party alleging that such a measure exists – may be different depending on the type of measure at issue. This burden will be more easily discharged when the measure at issue is set forth in a legislative act than in situations where the existence of the alleged measure is not expressed in a written document. The Appellate Body has explained that this burden is particularly high in the latter case.<sup>158</sup>

7.98. Viet Nam challenges the NME-wide entity rate "practice" or "policy" as an unwritten rule or norm, rather than challenging a particular legislative or administrative act setting forth that practice or policy.<sup>159</sup> Written documents referred to by Viet Nam as describing the NME-wide entity rate practice – the Antidumping Manual and Policy Bulletin 05.1 – are to be used as relevant evidence in assessing the existence of the alleged measure, but are not themselves being challenged as measures. This being the case, consistent with the standard set out above<sup>160</sup>, we shall consider whether Viet Nam has established that: (i) this practice or policy is "attributable" to the United States, (ii) the "precise content" of this practice or policy, and (iii) that this practice or policy does have "general and prospective application".

7.99. With respect to the first criterion, i.e. attribution to the United States, we have already remarked above that the NME-wide entity rate is a practice or policy used by the USDOC, which is an agency of the United States Government. There appears to be no controversy between the parties that the practice or policy is "attributable" to the United States.

7.100. Viet Nam's arguments regarding the precise content of the NME-wide entity rate practice or policy pertain to two elements. The first element concerns the application by the USDOC in anti-dumping proceedings (e.g. original investigations and administrative reviews) involving NME countries of a rebuttable presumption that, in such countries, all companies belong to a single, NME-wide entity, and the assignment of a single rate to that entity. The second element concerns the manner in which the rate assigned to the NME-wide entity is determined, in particular the use of facts available. We note that, in its arguments to the Panel, Viet Nam has put more emphasis on the former than on the latter. We shall examine these two elements separately.

7.101. With respect to the first element, turning to the evidence submitted by Viet Nam, we first consider Chapter 10 of the Antidumping Manual, entitled "Non-Market Economies".<sup>161</sup> In Section III ("Separate Rates"), it provides that:

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reference to the label given to various instruments under the domestic laws of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.

<sup>156</sup> See paras. 7.29. -7.34. of this Report.

<sup>157</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88. Moreover, the Appellate Body found, at para. 81 that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement.

<sup>158</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>159</sup> We recall that Viet Nam clarified that it is not advancing claims against the Antidumping Manual or Policy Bulletin 05.1 *per se*. Viet Nam also suggests that the Panel should apply the legal standard used by the Appellate Body for determining when an unwritten rule or norm can be challenged "as such". (See Viet Nam's response to Panel question No. 7(a)-(b), para. 19; opening statement at the first meeting of the Panel, para. 8; and second written submission, para. 19.) We further note that the United States refers to the same standard in arguing that Viet Nam has failed to demonstrate the existence of a measure of general and prospective application. (United States' first written submission, paras. 141-145; opening statement at the first meeting of the Panel, para. 23; second written submission, para. 65.)

<sup>160</sup> See paras. 7.29. -7.34. of this Report.

<sup>161</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24.

Individual dumping margins are automatically assigned to exporters in market-economy country cases. In NME cases, however, exporters must pass a separate rate test to receive a rate that is separate from the NME-wide rate. Those exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate.<sup>162</sup>

7.102. The Antidumping Manual further explains that "[i]n proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate)".<sup>163</sup> Pursuant to the "separate rate test", exporters in NMEs are accorded separate, company-specific margins "if they can provide sufficient proof of an absence of government control, both in law and in fact, with respect to export activities".<sup>164</sup> In Section IV ("The NME-Wide Rate"), the Antidumping Manual states again that:

The Department begins with a rebuttable presumption that all companies within the NME country are essentially operating units of a single, government-wide entity and should receive a single anti-dumping rate.<sup>165</sup>

7.103. The description of the NME-wide entity rate and separate rates in Chapter 10 of the Antidumping Manual concerns anti-dumping "proceedings" or "cases". This suggests to us that this practice or policy applies to any of the various segments leading to an anti-dumping measure and subsequent implementation. Section IV describes the application of the rate in original investigations and administrative reviews.<sup>166</sup> Hence, pursuant to the Antidumping Manual, the NME-wide entity rate practice or policy applies throughout an anti-dumping proceeding.

7.104. In our view, Chapter 10 of the Antidumping Manual is evidence of the first element of the alleged NME-wide entity rate practice or policy, i.e. that in anti-dumping proceedings involving NMEs, the USDOC applies a rebuttable presumption that all exporters in the NME country are part of a single NME-wide entity and assigns a single anti-dumping duty rate to all exporters who do not rebut this presumption by establishing that they operate, *de jure* and *de facto*, independently from the government with respect to their export activities.

7.105. Turning to the question whether this element of the alleged measure has "general and prospective application", we first note that Chapter 10 of the Antidumping Manual uses the terms "practice" or "methodology" when referring to the treatment of NMEs in anti-dumping proceedings. Moreover, on its face, the Antidumping Manual appears to describe a generally applicable practice. Nothing in Chapter 10 suggests that there may be circumstances or situations in which the USDOC would not "start with a rebuttable presumption that all companies within a NME country" belong to a single, NME-wide entity and would not assign a single rate to that entity. The United States does not contest that the "practice" described in Chapter 10 of the Antidumping Manual is applied in all proceedings involving NME countries. Nor has the United States provided the Panel with a single example of an anti-dumping proceeding involving an NME where the USDOC did not start with the rebuttable presumption regarding the existence of an NME-wide entity and go on to assign to that entity a single anti-dumping duty rate. Chapter 10 of the Antidumping Manual suggests, in our view, that this "practice" or "methodology" has general and prospective application because it applies in all anti-dumping proceedings involving NMEs and makes it possible to anticipate the future conduct of the USDOC in such anti-dumping proceedings.

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<sup>162</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 3. (footnote omitted)

<sup>163</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 3.

<sup>164</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 4. In Section III, the Manual stipulates that evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: (i) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (ii) any legislative enactments decentralizing control of companies; and (iii) any other formal measures by the central and/or local government decentralizing control of companies. Furthermore, four factors are considered when evaluating whether a respondent is subject to *de facto* government control over its export activities: (i) whether the export prices are set by, or subject to the approval of, a governmental authority; (ii) whether the respondent has authority to negotiate and sign contracts and other agreements; (iii) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (iv) whether the respondent retains the proceeds of its export sales and makes independent decisions regard disposition of profits or financing of losses.

<sup>165</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 3.

<sup>166</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 8.

7.106. Referring to Chapter I of the Antidumping Manual, the United States submits, however, that the Manual clearly states that it is "subject to change without notice" and "cannot be cited to establish DOC practice".<sup>167</sup> According to the United States, the USDOC has explicitly alerted petitioners and respondents that the Antidumping Manual cannot serve as a basis to argue that the USDOC has adopted an approach that must be followed for any particular, future proceeding. The United States also submits that neither domestic law nor the WTO Agreement require that the Antidumping Manual be used. The United States concludes on the basis of these considerations that the Antidumping Manual cannot therefore, be considered as having general and prospective application, adding that allowing an "as such" finding against the Manual would discourage the promotion of transparency.<sup>168</sup>

7.107. We understand that, according to the United States, the Antidumping Manual is a non-mandatory instrument and, for this reason, cannot be challenged "as such". However, the status of the Antidumping Manual under domestic law is not determinative. Even assuming that the Antidumping Manual is not a mandatory instrument under US domestic law, this fact would not be dispositive of the issue of whether certain practices it describes, including the rebuttable presumption and assignment of a single rate, can be challenged "as such" in WTO dispute settlement proceedings.

7.108. We recall that, in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body rejected the US argument that a measure of a non-mandatory character, the Sunset Policy Bulletin (SPB), was not susceptible to "as such" challenge. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that there was "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'".<sup>169</sup> In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body observed that the relevant issue is not whether the measure subject to an "as such" challenge is a binding legal instrument within the domestic legal system of a Member, but, rather, whether it is a measure that may be challenged in WTO dispute settlement proceedings, i.e. whether it is an "act[] setting forth rules or norms that are intended to have general and prospective application". The Appellate Body answered this question in the affirmative in that dispute, on the basis that the SPB: (i) had "normative value", as it provided administrative guidance and created expectations among the public and among private actors; (ii) was intended to have general application, as it was to apply to all the sunset reviews conducted in the United States; and (iii) was intended to have prospective application, as it was intended to apply to sunset reviews taking place after its issuance.<sup>170</sup>

7.109. In the present dispute, Viet Nam refers to the Antidumping Manual as evidence that the unwritten practice or policy in question amounts to a measure of general and prospective application that can be challenged "as such".<sup>171</sup> Hence, the issue facing us is not whether the Antidumping Manual itself can be challenged "as such" as a rule or norm of general and prospective application, but whether it constitutes relevant evidence to establish the existence of a rule of norm of general and prospective application. In our view, the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and in *US – Oil Country Tubular Goods Sunset Reviews* is relevant in this regard. We believe that if a non-mandatory instrument can be found to be a measure of general and prospective application it can *a fortiori* constitute probative evidence of the existence of an unwritten measure of general and prospective application. Hence, we consider that the Antidumping Manual constitutes relevant and probative evidence of the existence of a norm of general and prospective application.

7.110. We turn now to the second piece of evidence submitted by Viet Nam, namely Policy Bulletin 05.1.<sup>172</sup> We observe that, in the "Statement of Issue", the Policy Bulletin explains that it "describes the Department's application process for separate rates status in non-market economy

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<sup>167</sup> United States' first written submission, para. 143, citing USDOC Antidumping Manual, Chapter 1, Exhibit US-27, p. 1. We note in this respect that the relevant paragraph reads as follows: "This manual is for the internal training and guidance of Import Administration (IA) personnel only, and the practise set out therein are subject to change without notice. This manual cannot be cited to establish DOC practice".

<sup>168</sup> United States' opening statement at the first meeting of the Panel, paras. 24-25.

<sup>169</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>170</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

<sup>171</sup> Viet Nam's response to Panel question No. 7(b), para. 19.

<sup>172</sup> Policy Bulletin 05.1, Exhibit VN-66.

("NME") investigations".<sup>173</sup> It further states that "[i]n an NME antidumping investigation, the Department presumes that all companies within the NME country are subject to government control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities".<sup>174</sup> According to Policy Bulletin 05.1, the USDOC "assigns separate rate status in NME cases only if an exporter can demonstrate the absence of both *de jure* and *de facto* government control over its export activities".<sup>175</sup> In our view, Policy Bulletin 05.1 is further evidence confirming the first element of the alleged measure. It clearly indicates that, in investigations involving NME countries, the USDOC will presume that all companies within the NME country are subject to government control and will receive a single anti-dumping duty rate and that exporters wishing to receive a separate rate must demonstrate the absence of *de jure* and *de facto* government control over their export activities.

7.111. Moreover, in the "Statement of Policy", Policy Bulletin 05.1 "clarifies" the Department's practice with respect to the application for separate rates and indicates, *inter alia*, that "the separate rate application does not change the long-established standard for eligibility for receiving a separate rate ... which remains whether a firm can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities".<sup>176</sup> The "Statement of Policy" section concludes by stating that "[the separate rate] practice will be effective for all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy".<sup>177</sup>

7.112. The language used in Policy Bulletin 05.1 conveys that the "practice" or "policy" (both terms are used) whereby the USDOC presumes that all NME exporters belong to a single, NME-wide entity and apply a single rate to that entity is applied in all anti-dumping investigations involving NMEs. There is no mention of instances in which the USDOC would not use that presumption and would not apply the single rate. Policy Bulletin 05.1 plainly states that it will apply to "all" NME anti-dumping investigations initiated "on or after the date of publication" in the Federal Register, thus evidencing that it has "general" and "prospective" application. With respect to the nature of the instrument, we also note that this Policy Bulletin is similar to the SPB which was at issue in *US – Corrosion-Resistant Steel Sunset Review* and in *US – Oil Country Tubular Goods Sunset Reviews*. In those two disputes, the Appellate Body concluded that the SPB could be challenged "as such" in WTO dispute settlement.<sup>178</sup> In the present dispute, Viet Nam does not challenge Policy Bulletin 05.1 itself "as such", but rather relies on it as evidence that the NME-wide entity rate practice amounts to a measure of general and prospective application that can be challenged "as such". Again, we consider that if the SPB could be found to constitute a measure of general and prospective application, Policy Bulletin 05.1 can *a fortiori* be considered to provide relevant and probative evidence of the existence of an unwritten measure of general and prospective application.

7.113. The United States submits that Policy Bulletin 05.1 applies only to original investigations, and moreover, only applies to investigations initiated after 5 April 2005. Consequently, the United States argues, the USDOC was not required to follow the approaches set forth in the Policy Bulletin in the covered reviews or generally during administrative reviews of products from NME countries.<sup>179</sup>

7.114. The notice of initiation of the anti-dumping investigation for the *Shrimp* order is dated 27 January 2004, i.e. before the entry into force of Policy Bulletin 05.1, and thus we agree with the United States that the Policy Bulletin did not apply to the original investigation underlying the *Shrimp* order. However, this does not undermine the relevance and probative value of Policy Bulletin 05.1 with respect to the general and prospective nature of the first element, i.e. the application by the USDOC in anti-dumping proceedings involving NME countries of a rebuttable presumption that, in such countries, all companies belong to a single, NME-wide, entity, and the

<sup>173</sup> Policy Bulletin 05.1, Exhibit VN-66, p. 1.

<sup>174</sup> Policy Bulletin 05.1, Exhibit VN-66, p. 1.

<sup>175</sup> Policy Bulletin 05.1, Exhibit VN-66, p. 2. Policy Bulletin 05.1 also describes the test used to determine *de facto* and *de jure* absence of government control over export activities.

<sup>176</sup> Policy Bulletin 05.1, Exhibit VN-66, pp. 3-4.

<sup>177</sup> Policy Bulletin 05.1, Exhibit VN-66, p. 6.

<sup>178</sup> See above, para. 7.108.

<sup>179</sup> United States' second written submission, para. 67 (referring to Policy Bulletin 05.1, Exhibit VN-66, pp. 6-7).

assignment of a single rate to that entity. Moreover, when it states that it "does not change the long-established standard for eligibility for receiving a separate rate", Policy Bulletin 05.1 supports the conclusion that essentially the same practice existed before its entry into force.<sup>180</sup>

7.115. In our view, therefore, both the Antidumping Manual and Policy Bulletin 05.1 provide relevant and probative evidence of the content of the first element of the alleged unwritten measure, i.e. that, in anti-dumping proceedings involving NME countries, the USDOC begins with a rebuttable presumption that all companies within the country belong to a single, NME-wide entity and assigns a single rate to that entity. Furthermore, these two instruments also provide relevant and probative evidence of the general and prospective character of the alleged measure. Notwithstanding their non-binding nature, these two instruments create expectations among the public and among private actors that the USDOC will follow this practice and/or apply this policy.

7.116. In addition, evidence of the general and prospective nature of this element of the alleged unwritten measure can be found in a number of statements made by the USDOC in the Notices issued under the *Shrimp* order. For example, in the Issues and Decision Memorandum accompanying the final determination in the original investigation, the USDOC explains that:

The Department has a long-standing policy in antidumping proceedings of presuming that all firms within an NME country are subject to government control and thus should all be assigned a single, country-wide rate unless a Respondent can demonstrate an absence of both *de jure* and *de facto* control over its export activities. ... In accordance with the separate-rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.<sup>181</sup>

In the same Issues and Decision Memorandum, the USDOC explains that the US Court of Appeals for the Federal Circuit had "agreed that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of government control".<sup>182</sup> The USDOC further observes that "[t]he Department's longstanding practice of assigning a country-wide rate to NME companies that do not qualify for a separate rate is reasonable and has been repeatedly affirmed by the courts".<sup>183</sup>

7.117. In the final determination in the fourth administrative review, the USDOC explains:

Because we begin with the presumption that all companies within a NME country are subject to government control, and because only the companies listed under the "Final Results of Review" section below have overcome that presumption, we are applying a single antidumping rate, *i.e.*, the Vietnam-wide entity rate, to all other exporters of subject merchandise.<sup>184</sup>

7.118. In the notice of initiation for the fifth administrative review, the USDOC explains:

In proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise

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<sup>180</sup> We also recall that Viet Nam's claim pertains to a practice or policy applicable in both original investigations and administrative reviews. Moreover, there appears to be no material difference in the content of the norm as it is applied in either type of proceeding.

<sup>181</sup> Issues and Decision Memorandum accompanying the final determination in the original investigation, Exhibit VN-04, p. 30.

<sup>182</sup> Issues and Decision Memorandum accompanying the final determination in the original investigation, Exhibit VN-04, pp. 30-31.

<sup>183</sup> Issues and Decision Memorandum accompanying the final determination in the original investigation, Exhibit VN-04, p. 31.

<sup>184</sup> Final determination in the fourth administrative review, Exhibit VN-13, p. 47773. We further note that, in the preliminary determination in the same review, the USDOC stated that: "[i]t is the Department's standard policy to assign all exporters ... in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control". (Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12210.)

subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.<sup>185</sup>

7.119. In the preliminary determination in the sixth administrative review, the USDOC explains again:

In NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. However, a company in the NME applying for separate rate status may rebut that presumption by demonstrating an absence of both *de jure* and *de facto* government control over its export activities.<sup>186, 187</sup>

7.120. Viet Nam also contends that similar language can be found in every anti-dumping determination involving an NME country<sup>188</sup>, but does not provide any evidence in other proceedings. We recall, however, that no example has been brought to our attention of an anti-dumping proceeding involving an NME in which the USDOC did not start with a rebuttable presumption that all companies belong to a single, government-wide entity.<sup>189</sup>

7.121. In our view, the significance of the above statements by the USDOC goes beyond the proceedings under the *Shrimp* order. These statements provide further confirmation that the application by the USDOC in anti-dumping proceedings on imports from NMEs of a rebuttable presumption that all companies belong to a single, NME-wide entity, and the assignment of a single rate to that entity amounts to a rule or norm of general and prospective application.

7.122. In light of the foregoing, we conclude that Viet Nam has established that, in anti-dumping proceedings involving NME countries, the USDOC starts with a rebuttable presumption that all companies within that NME country belong to a single, NME-wide entity and that a single rate is assigned to that entity, and, thus, to companies deemed to belong to that entity.

7.123. The second element of Viet Nam's challenge to the NME-wide entity rate practice relates to the determination of the rate assigned to the NME-wide entity. Viet Nam submits that the USDOC applies a punitive rate based on adverse facts available to the producers/exporters deemed to be part of the NME-wide entity.<sup>190</sup>

7.124. The United States replies that the only evidence cited by Viet Nam to support its allegation that the USDOC has a practice of determining the NME-wide rate based on facts available is two sentences from the Antidumping Manual, neither of which requires the USDOC to base the NME-wide rate on facts available. The United States observes that Viet Nam itself concedes that the USDOC "retains broad discretion on the method for calculating the NME-wide entity rate". Thus, according to the United States, even Viet Nam does not argue that this alleged practice exists and is invariably applied by the USDOC.<sup>191</sup>

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<sup>185</sup> Notice of initiation for the fifth administrative review, Exhibit VN-10, p. 18154.

<sup>186</sup> Preliminary determination in the sixth administrative review, Exhibit VN-19, pp. 13550-13551.  
(footnotes omitted)

<sup>187</sup> Viet Nam has also provided relevant evidence for the first administrative review (final determination and Issues and Decision Memorandum in the first administrative review, Exhibit VN-62), second administrative review (final determination and Issues and Decision Memorandum in the second administrative review, Exhibit VN-63) and third administrative review (final determination and Issues and Decision Memorandum in the third administrative review, Exhibit VN-64). Evidence submitted by the United States shows that the NME-wide rate was also applied in the seventh administrative review (final determination in the seventh administrative review, Exhibit US-30).

<sup>188</sup> Viet Nam's response to Panel question No. 7(b), para. 24 (emphasis original). Nevertheless, we can glean from various documents related to the *Shrimp* order that exporters from China are subject to the same practice. For example, the notice of initiation in the fifth administrative review requires that all firms from China and Viet Nam – the two NMEs subject to the *Shrimp* order – demonstrate the absence of both *de jure* and *de facto* government control. (Notice of initiation for the fifth administrative review, Exhibit VN-10, pp. 18155-18156).

<sup>189</sup> See para. 7.105. of this Report.

<sup>190</sup> Viet Nam's first written submission, para. 104 (referring to USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, pp. 7-8).

<sup>191</sup> United States' first written submission, para. 144; second written submission, para. 68.



7.125. Viet Nam presents only limited evidence as to how the NME-wide entity rate is calculated, and the evidence that it relies upon is inconclusive. In particular, Chapter 10 of the Antidumping Manual, referred to by Viet Nam, explains that the NME-wide rate:

*may be based on adverse facts available if, for example, some exporters that are part of the NME-wide entity do not respond to the anti-dumping questionnaire. In many cases the Department concludes that some part of the NME-wide entity has not cooperated in the proceedings because those that have responded do not account for all imports of subject merchandise.*<sup>192</sup>

7.126. In addition, Viet Nam does not refer to other NME investigations where NME-wide rates were determined using facts available, which could serve to establish the existence of a policy or practice in this respect. Moreover, as noted by the United States, Viet Nam itself casts some doubt on the consistency of USDOC's practice in determining a rate for an NME-wide entity when it asserts that "[t]he USDOC retains broad discretion on the method for calculating the NME-wide entity rate, but in most investigations and administrative reviews makes a finding that the generalized 'NME-wide entity' did not cooperate with the proceeding, justifying the use of facts available".<sup>193</sup>

7.127. In response to a question from the Panel, the United States refers to cases where the NME-wide entity rate was based on the weighted-average margin calculated for the mandatory respondents and, thus, the NME-wide rate was not based on facts available.<sup>194</sup> Viet Nam argues that, in those examples, the individually investigated exporters represented the entire universe of imports of subject merchandise into the United States and, thus, the rate assigned to the NME-wide entity was irrelevant because it had no practical use.<sup>195</sup>

7.128. In the first example cited by the United States, the USDOC applied a NME-wide rate corresponding to the "simple average" of (i) the weighted-average of the calculated rates for mandatory respondents, and (ii) "a simple average of petition rates based on US prices and normal values within the range of the U.S. prices and normal values calculated for [the two mandatory respondents]". It would thus appear that, contrary to the United States' representations, the NME-wide applied in that proceeding was largely based on facts available.<sup>196</sup> As noted by Viet Nam, in the other proceedings cited by the United States, there were no other exporters of the subject merchandise than the mandatory respondent(s), and in each of these proceedings, the USDOC applied a NME-wide rate based on the mandatory respondents' rate, apparently on the basis that the mandatory respondents accounted for the totality of exports of subject merchandise to the United States. Moreover, in three cases, the USDOC specified that the NME-wide rate "applies to all entries of the subject merchandise" except for entries from the mandatory respondents.<sup>197</sup> While it may have been that the NME-wide rate was actually not

<sup>192</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, pp. 7-8 (emphasis added). We note that Policy Bulletin 05.1 is silent as to the manner in which the USDOC determines the NME-wide entity rate in original investigations.

<sup>193</sup> Viet Nam's first written submission, para. 104.

<sup>194</sup> United States' response to Panel question No. 15(a), para. 47 (referring to *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 47,587 (14 Aug. 2008), Exhibit US-64; *Steel Wire Garment Hangers from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 53,188 (15 Sept. 2008), Exhibit US-65; *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 67 Fed. Reg. 55,785 (30 Aug. 2002), Exhibit US-66; *Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus*, 68 Fed. Reg. 9,055 (27 Feb. 2003), Exhibit US-67; *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the Russian Federation*, 67 Fed. Reg. 35,490 (20 May 2002), Exhibit US-68, p. 35490; and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania*, 65 Fed. Reg. 39,125 (23 June 2000), Exhibit US-69).

<sup>195</sup> Viet Nam's second written submission, para. 26.

<sup>196</sup> Information contained in the petition by definition constitutes facts available; moreover, the mandatory respondents' rates were partly based on facts available. (*Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 47,587 (14 Aug. 2008), Exhibit US-64; *Steel Wire Garment Hangers from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 53,188 (15 Sept. 2008), Exhibit US-65).

<sup>197</sup> *Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus*, 68 Fed. Reg. 9,055 (27 Feb. 2003), Exhibit US-67; *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the Russian Federation*, 67 Fed. Reg. 35,490 (20 May 2002), Exhibit US-68; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon*

applied with respect to any producer/exporter in these proceedings, we are not convinced that, for this reason, the NME-wide entity rate applied in these proceedings had "no practical use". In any event, the very nature of a rule or norm of general and prospective application is that it applies independently of the specific factual circumstances of a particular case. Hence, the fact that the USDOC may use a different method for determining a rate for the NME-wide entity depending on the circumstances suggests to us that the USDOC does not have a consistent practice of determining NME-wide rates using facts available.

7.129. We recall that a panel "must not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, especially when it is not expressed in a written document".<sup>198</sup> The Appellate Body also indicated that the party bringing a challenge against a rule or norm that allegedly constitutes a measure of general and prospective application must meet a "high threshold".<sup>199</sup>

7.130. Overall, taking into account the evidence cited by the United States, and Viet Nam's admission that the USDOC retains broad discretion concerning the method used to determine the NME-wide rate, we conclude that, while the evidence on the record does suggest that the USDOC often determines the rate for the NME-wide entity based on facts available, it does not establish that the USDOC consistently uses a certain defined methodology to determine the NME-wide entity rate or systematically bases that rate on facts available. We therefore conclude that, in relation to the second element of the alleged measure, Viet Nam has failed to establish the existence of any practice amounting to a rule or norm of general and prospective application.

7.131. In sum, we conclude that Viet Nam has established that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity amounts to a measure of general and prospective application which can be challenged "as such". However, we find that Viet Nam did not establish the existence of a USDOC practice with respect to the manner in which it determines the NME-wide entity rate, in particular concerning the use of facts available, amounting to a measure of general and prospective application, and which can therefore be challenged "as such".

#### **7.4.2.3 Whether the NME-wide entity rate practice is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement**

##### **7.4.2.3.1 Main arguments of the parties**

###### **7.4.2.3.1.1 Viet Nam**

7.132. Viet Nam argues that the plain language of Articles 6.10 and 9.2, read in context, precludes application of a single anti-dumping margin to multiple entities where those companies have not been found by the authority to constitute a single entity. Viet Nam argues that the first sentence of Article 6.10 requires the authority to determine an individual dumping margin for each known exporter or producer. According to Viet Nam, the use of "sampling", provided for in the second sentence of Article 6.10, is the only exception to the rule contained in the first sentence. Viet Nam further argues that the requirement contained in the first sentence of Article 6.10 is further reinforced by Article 9.2, the first sentence of which requires that the anti-dumping duty "shall be collected in the appropriate amounts". Viet Nam asks that the Panel take special note of the Appellate Body's ruling in *EC – Fasteners (China)* because it addressed a nearly identical legal and factual scenario to the measure at issue in the present dispute. Viet Nam argues that, in that dispute, the Appellate Body found that, under the Anti-Dumping Agreement, an investigating authority is not permitted to presume that in NME countries the state and exporters constitute a single entity, but is required to make an affirmative determination to that effect.<sup>200</sup>

7.133. Viet Nam argues that the USDOC's presumption of the existence of an NME-wide entity and application of an NME-wide entity rate does not comply with the requirement in Articles 6.10

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and Alloy Seamless Standard, Line and Pressure Pipe from Romania, 65 Fed. Reg. 39,125 (23 June 2000), Exhibit US-69.

<sup>198</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 196.

<sup>199</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>200</sup> Viet Nam's first written submission, paras. 121-142 (referring to Appellate Body Report, *EC – Fasteners (China)*); second written submission, paras. 29-31.

and 9.2 that authorities determine individual dumping margins and duties. According to Viet Nam, the NME-wide entity is not an individual exporter or producer, but a collection of exporters that the USDOC collapses into a single entity, without performing the required analysis to that effect. Instead, the USDOC presumes that all entities within the NME country are, in fact, a single entity under the control of the government, but does not establish, as a matter of fact, the existence of the single entity. Viet Nam is also of the view that the USDOC's practice does not fit within the single, limited exception provided for in Articles 6.10 and 9.2. Viet Nam requests, therefore, that the Panel find that the USDOC's practice is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>201</sup>

7.134. Viet Nam submits that the United States' reliance on Viet Nam's Protocol of Accession to the WTO and Working Party Report as a legal justification is unavailing. Viet Nam's Accession Protocol contains a single exception to the application of the disciplines of the Anti-Dumping Agreement, namely the use of an alternative methodology for the calculation of normal value. According to Viet Nam, the Working Party Report describes the prevailing economic conditions in Viet Nam at the time of the Report, but nowhere in the Report or the Accession Protocol does Viet Nam agree to generalised concessions based on those economic conditions. Thus, except for the determination of normal value, there is no language in Viet Nam's Protocol of Accession to the WTO which provides an investigating authority with the legal basis to treat Viet Nam, as an NME, differently from a market economy country. Viet Nam contends that the Appellate Body's reasoning in *EC – Fasteners (China)* with respect to China's Accession Protocol applies to the present dispute.<sup>202</sup>

7.135. According to Viet Nam, the United States attempts to turn the question of the legal justification for the USDOC's presumption into a question of facts; however, as observed by the Appellate Body, an authority cannot use a presumption to apply a single rate to multiple entities, regardless of the "evidence" cited by that authority. In Viet Nam's view, there is a significant difference between, on the one hand, an investigating authority making a determination on a case-by-case basis that several exporters belong to a single entity (as discussed in the panel report *Korea – Certain Paper*) and, on the other hand, the investigating authority beginning with the presumption that all exporters in the NME country are under the control of the government and should be assigned a single rate. In the latter case, the presumption is not based on any analysis of the exporters actually under investigation, but on general information about the economy as a whole, and is, therefore, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Viet Nam submits that the Panel does not need to discuss the criteria used by the USDOC to determine whether entities are sufficiently independent from the government because the starting point of the test, i.e. the presumption that all companies belong to a single NME-wide entity, is wrong.<sup>203</sup>

#### 7.4.2.3.1.2 United States

7.136. The United States<sup>204</sup> submits that Viet Nam has no basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. To the contrary, context in the Anti-Dumping Agreement, in particular footnote 11 to Article 4.1(i) and Article 9.5, indicates that whether producers are related to each other affects the investigating authority's analysis of those firms. According to the United States, Article 6.10 uses similar language and, where exporters or producers are sufficiently related, they are not economically independent and would not have individual margins. For the United States, depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based on their activities and relationships. The United States concludes

<sup>201</sup> Viet Nam's first written submission, paras. 143-147.

<sup>202</sup> Viet Nam's second written submission, paras. 35-37 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 290).

<sup>203</sup> Viet Nam's second written submission, paras. 38-41; opening statement at the second meeting of the Panel, paras. 7-11.

<sup>204</sup> The United States made arguments regarding the consistency of the measure at issue with Articles 6.10 and 9.2 of the Anti-Dumping Agreement primarily in respect of Viet Nam's "as applied" claims (United States' first written submission, paras. 146-155; second written submission, paras. 85-88). Because we understand the United States to have made the arguments with respect to both Viet Nam's "as applied" and "as such" claims, we nevertheless refer as appropriate to those arguments in assessing Viet Nam's claims that the measure at issue is inconsistent "as such" with the provisions cited by Viet Nam.

on this basis that Article 6.10 does not preclude the USDOC from treating multiple companies as a single entity, including, where appropriate, a Viet Nam-government entity.<sup>205</sup> The United States also argues that nothing in Article 9.2 prevents an authority from concluding that the relationship between multiple companies is sufficiently close to support treating them as a single entity and subject them to a single duty rate. According to the United States, an investigating authority must determine whether a group of companies are in a close enough relationship to support their treatment as a single entity before it can know how to calculate and apply duties to those companies' exports and Article 9.2 does not set out criteria for an investigating authority to examine before making that determination. The United States concludes that Article 9.2 does not preclude the USDOC from treating multiple companies as a single entity, including, where appropriate, a Viet Nam-government entity.<sup>206</sup> According to the United States, the question raised by Viet Nam's claim does not involve a pure question of legal interpretation, but is a mixed question of fact and law, and Viet Nam cannot point to any provision of the Anti-Dumping Agreement that specifies exactly how an authority is to decide whether different sets of exports are considered to be from one exporter or multiple exporters.<sup>207</sup>

7.137. According to the United States, Viet Nam's Working Party Report and Accession Protocol indicate that all Members were not convinced that market-economy conditions might prevail in Viet Nam. Viet Nam's Accession Protocol does not impose on Members any non-market economy characterization of Viet Nam, but allows Members to decide unilaterally on their understanding of Viet Nam's economy and the appropriate treatment for Vietnamese respondents on a case-by-case basis. The United States is of the view that the Accession Protocol provides important context in terms of deciding which entities in Viet Nam should be considered as a single entity for purposes of Article 6.10. The United States notes that paragraph 255 of Viet Nam's Working Party Report expressly provides importing Members the discretion to use an NME methodology when it is not clearly shown that market economy conditions prevail in Viet Nam. According to the United States, the understanding in Viet Nam's Accession Protocol that Viet Nam is not yet a market economy is in effect an understanding that prices for inputs and outputs are affected by the government which, in turn, is in effect an understanding that there remains government control over all firms. On the basis of this understanding, a single "government-controlled" rate is warranted, unless and until it is clearly demonstrated that market economy conditions prevail for the purpose of calculating dumping margins and assigning anti-dumping duty rates. For the United States, the 2002 USDOC determination that the Government of Viet Nam is legally or operationally in a position to control or materially influence the behaviour of firms is not in dispute; it is then logical for the USDOC to consider that the Government of Viet Nam simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export. The United States submits that the presumption underlying the Working Party Report, as incorporated in the Accession Protocol, that NME conditions prevail in Viet Nam is an integral part of the WTO agreements and justifies placing the burden of proof on Vietnamese respondents to demonstrate the appropriateness of a separate rate. For the United States, by not challenging the use by the USDOC of an NME methodology to calculate normal value, Viet Nam does not challenge the underlying presumption in paragraph 255 of its Accession Protocol that market economy conditions do not clearly prevail, which, in turn, has implications extending beyond the calculation of normal value.<sup>208</sup>

7.138. According to the United States, Articles 6.10 and 9.2 of the Anti-Dumping Agreement must be read in a manner consistent with paragraph 255 of the Working Party Report. The United States argues that the Appellate Body's conclusions in *EC – Fasteners (China)* that, underlying Article 6.10 is a presumption that every entity must first be recognized as an individual exporter or producer, lacks any support in the text of the Anti-Dumping Agreement and does not result in a reading of that provision that is consistent with paragraph 255 of Viet Nam's Working Party Report, especially where NME conditions prevail. According to the United States, where NME conditions do prevail, it is far more reasonable, as a starting point for an anti-dumping analysis, to

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<sup>205</sup> United States' first written submission, paras. 147-151.

<sup>206</sup> United States' first written submission, paras. 152-155.

<sup>207</sup> United States' second written submission, para. 69.

<sup>208</sup> United States' first written submission, paras. 156-169; second written submission, paras. 71-84; opening statement at the second meeting of the Panel, paras. 14-30.

think of entities as operating subject to government control until otherwise demonstrated, than to think of them as operating independently from government control.<sup>209</sup>

7.139. The United States further argues that, even if this Panel were to follow the Appellate Body's reasoning in *EC – Fasteners (China)*, the USDOC's determination regarding the Viet Nam-wide entity is consistent with Articles 6.10 and 9.2. First, an important difference with *EC – Fasteners (China)* is that neither Viet Nam nor any Vietnamese exporter requested, at any time during the proceedings, that the USDOC reconsider Viet Nam's non-market economy status. Hence, unlike in *EC – Fasteners (China)*, there is no question for the Panel to resolve as to whether Viet Nam is a non-market economy. The United States further argues that the USDOC's determination that a Viet Nam-government entity existed and that certain exporters, while legally separate, were in fact part of that entity, rested on adequate factual findings in the course of the relevant reviews. In *EC – Fasteners (China)*, the Appellate Body did not preclude an investigating authority from collecting and offering evidence to justify a presumption that a single government entity exists. The United States submits that, in the challenged proceedings, the USDOC afforded companies the opportunity to submit information about their relationship with the Viet Nam-government entity to demonstrate independence from the Government and the evidence sought by the USDOC is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggested should be probed to determine whether two or more exporters should be treated as a single entity. Finally, the United States argues that the USDOC's conclusion that multiple companies in Viet Nam are part of the Viet Nam-government entity is based on a permissible interpretation of Articles 6.10 and 9.2.<sup>210</sup>

#### 7.4.2.3.2 Main arguments of the third parties

7.140. **China** submits that the USDOC's separate rate test is materially identical to the European Union individual treatment test at issue in *EC – Fasteners (China)*, and requests that the Panel interpret Articles 6.10 and 9.2 in light of the Appellate Body's findings in that dispute. China observes that the question at stake is not whether authorities are allowed to treat two or more sufficiently related exporters as a single entity in certain situations, but whether authorities are allowed to presume that all the exporters in an NME country constitute a single entity.<sup>211</sup>

7.141. The **European Union** anticipates that the Panel will be guided by the clarifications provided by the Appellate Body in *EC – Fasteners (China)*. In particular, the Panel will have to consider whether or not the test applied by the United States is capable of establishing whether the exporting State and one or more exporters should be deemed to be a single entity. In this respect, the European Union agrees with the United States that Members are entitled to make single entity determinations based on the type of criteria referred to by the United States.<sup>212</sup>

7.142. **Thailand** agrees with the Appellate Body's ruling that Articles 6.10 and 9.2 do not preclude treating several companies as a single entity provided that it is not presumed, but based on available evidence.<sup>213</sup>

#### 7.4.2.3.3 Evaluation by the Panel

7.143. We recall our finding above that Viet Nam has successfully established that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity is a measure of general and prospective application which may be challenged "as such". We will now examine whether, as alleged by Viet Nam, this measure is inconsistent "as such" with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.144. We turn first to the text of the relevant legal provisions at issue. Article 6.10 provides that:

<sup>209</sup> United States' first written submission, paras. 172-175; opening statement at the first meeting of the Panel, paras. 33-37; second written submission, paras. 86-87.

<sup>210</sup> United States' first written submission, paras. 176-183;

<sup>211</sup> China's third-party submission, paras. 13-20; third-party statement, paras. 12-16.

<sup>212</sup> European Union's third-party submission, para. 22.

<sup>213</sup> Thailand's response to Panel question No. 7.

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

7.145. In *EC – Fasteners (China)*, the Appellate Body found that the use of the term "shall" in the first sentence of Article 6.10 indicates that this provision contains a mandatory rule to determine individual dumping margins for each known exporter or producer. In the Appellate Body's view, the term "as a rule" indicates that the obligation to determine individual dumping margins may be subject to derogations, such as the sampling exception in the second sentence of Article 6.10. The Appellate Body did not consider, however, that the "flexibility provided by the term 'as a rule' goes as far as providing Members with an open-ended possibility to create exceptions, which would erode the obligatory character of Article 6.10".<sup>214</sup> The Appellate Body concluded that:

The general rule, that is, the obligation to determine individual margins of dumping for each known exporter or producer, applies, unless derogation from it is provided for in the covered agreements.<sup>215</sup>

7.146. The Appellate Body "[did] not find any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of NMEs".<sup>216</sup> The Appellate Body concluded that Article 6.10 of the Anti-Dumping Agreement must be interpreted:

as expressing an obligation, rather than a preference, for authorities to determine individual margins of dumping. This obligation is qualified and is subject not only to the exception specified for sampling in the second sentence of Article 6.10, but also to other exceptions to the rule to determine individual dumping margins that are provided for in the covered agreements.<sup>217</sup>

7.147. Turning to Article 9.2, we note that it provides as follows:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

7.148. In *EC – Fasteners (China)*, the Appellate Body observed that the first two sentences of Article 9.2 are of a mandatory nature.<sup>218</sup> It also considered that the term "sources", which appears twice in the first sentence of Article 9.2, "has the same meaning and refers to the individual exporters or producers and not to the country as a whole".<sup>219</sup> The Appellate Body noted the complementarity between Articles 6.10 and 9.2 and recalled that Article 6.10 contains an obligation to determine individual dumping margins for each exporter or producer, except when sampling is used or if a derogation is otherwise provided for in the covered agreements. Hence:

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<sup>214</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 320.

<sup>215</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 320.

<sup>216</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 328.

<sup>217</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 329.

<sup>218</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 336.

<sup>219</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 338.

where an individual margin of dumping has been determined [in accordance with Article 6.10], it flows from the obligation contained in the first sentence of Article 9.2 that the *appropriate* amount of anti-dumping duty that can be imposed also has to be an individual one. We do not see how an importing Member could comply with the obligation in the first sentence of Article 9.2 to collect duties in the *appropriate* amounts in each case if, having determined individual dumping margins, it lists suppliers by name, but imposes country-wide duties. In other words, unless sampling is used, the *appropriate* amount of an anti-dumping duty in each case is one that is specified by supplier, as further clarified and confirmed by the obligation to name suppliers in the second sentence of Article 9.2.<sup>220</sup>

The Appellate Body considered that the obligation to "name" the supplier(s) of the product concerned, in the second sentence, when read in the light of the first sentence and in the overall context of Article 9 as a whole, "is closely related to the imposition of individual anti-dumping duties" and, thus, "should be interpreted as a requirement to specify duties for each supplier".<sup>221</sup> The Appellate Body concluded that Article 9.2 of the Anti-Dumping Agreement "requires investigating authorities to specify an individual duty for each supplier, except where this is impracticable, when several suppliers are involved".<sup>222</sup> The Appellate Body also observed that the third sentence of Article 9.2 provides for an exception to the obligations contained in the first and second sentences, which allows Members "to specify duties for the supplying country concerned, where specification of individual duties is 'impracticable'".<sup>223</sup>

7.149. In our view, the reasoning of the Appellate Body highlighted above is highly persuasive as to the correct interpretation of these provisions and thus provides a proper legal standard for our examination of Viet Nam's claims of inconsistency under Articles 6.10 and 9.2 of the Anti-Dumping Agreement. We therefore adopt it as the basis for our analysis in this dispute.

7.150. The issue we need to resolve is whether, under Articles 6.10 and 9.2 of the Anti-Dumping Agreement, the United States is entitled to presume that all exporters within an NME belong to a single, NME-wide entity under the control of the government, and assign a single rate to that entity.

7.151. We recall that, pursuant to Article 6.10, investigating authorities have an obligation to determine individual margins of dumping for each known exporter or producer. This obligation flows from the first sentence of Article 6.10 which provides that the authorities "shall" determine an individual dumping margin for each known exporter or producer concerned of the product under investigation. The term "as a rule" in this same sentence indicates that this obligation may be subject to certain exceptions. It is subject, in particular, to the exception contained in the second sentence of Article 6.10 which applies in situations where the investigating authority decides to limit its examination to a reasonable number of interested parties or products (so-called "sampling"). Moreover, as stated by the Appellate Body, the obligation contained in the first sentence of Article 6.10 may be subject to other exceptions, as long as these exceptions are provided for in the covered agreements.<sup>224</sup>

7.152. We have found above that in proceedings involving NME-countries, the USDOC starts "with a rebuttable presumption that all companies within the NME country are essentially operating units of a single, government-wide entity and should receive a single anti-dumping rate".<sup>225</sup> Exporters must pass a "separate rate test" in order to receive a rate that is "separate from the NME-wide rate", which can be either an individual rate (for exporters who were individually examined) or, in cases in which the USDOC resorted to "sampling", the separate rate (for exporters not individually examined). Only exporters that have passed the separate rate test by demonstrating the absence of government control, both *de facto* and *de jure*, over their export activities will receive an individual rate or a rate that is generally based on the weighted-average of the rates individually calculated for the mandatory respondents, excluding zero and *de minimis* rates, as well as rates

<sup>220</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 339. (emphasis original)

<sup>221</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 340-341.

<sup>222</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 354.

<sup>223</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 342.

<sup>224</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 329.

<sup>225</sup> USDOC, Antidumping Manual, Chapter 10, Exhibit VN-24, p. 7.

based on facts available (i.e. a separate rate).<sup>226</sup> The USDOC calculates a single NME-wide anti-dumping margin and imposes a single NME-wide duty rate for all those exporters which are deemed to belong to the NME-wide entity because they failed – or did not attempt – to pass the separate rate test. In other words, the USDOC's practice at issue establishes a presumption that individual exporters in NME countries are not entitled to an individual rate, unless they successfully demonstrate independence from the government with respect to their export activities. Such a practice runs directly counter to the obligation contained in Article 6.10 of the Anti-Dumping Agreement whereby an investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned".

7.153. The United States argues that, depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single exporter or producer based on their activities and relationships.<sup>227</sup> We agree that, under the Anti-Dumping Agreement, an investigating authority may treat separate entities as a single exporter or producer for the purpose of calculating dumping margins. We recall that the panel in *Korea – Certain Paper* found that, pursuant to Article 6.10, separate legal entities that were in a sufficiently close structural and commercial relationship could justifiably be treated as a single exporter or producer.<sup>228</sup> That panel considered, however, that an investigating authority could not treat distinct legal entities as a single exporter or producer without justification, but had to "determine", on the basis of the record of the particular investigation, that entities are in such a close relationship.<sup>229</sup>

7.154. In the *EC – Fasteners (China)* dispute, the Appellate Body also accepted that "in principle there may be situations where nominally distinct exporters may be considered as a single entity for the purpose of determining individual dumping margins and anti-dumping duties under Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, due to [the] State's control or material influence in and coordination of these exporters' pricing and output".<sup>230</sup> The Appellate Body explained that:

In our view, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output.<sup>231</sup>

<sup>226</sup> The Antidumping Manual contrasts the situation of, respectively, market and non-market economy countries as follows: "Individual dumping margins are automatically assigned to exporters in market-economy country cases. In NME cases, exporters must pass a separate rate test to receive a rate that is separate from the NME-wide rate". (USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 3).

<sup>227</sup> United States' first written submission, para. 150.

<sup>228</sup> In *Korea – Certain Paper*, the panel found that Article 6.10 could be interpreted as allowing the treatment of separate legal entities as a single supplier "in circumstances where the structural and commercial relationship between the companies in question is sufficiently close to be considered as a single exporter or producer". (Panel Report, *Korea – Certain Paper*, paras. 7.162 and 168).

<sup>229</sup> Panel Report, *Korea – Certain Paper*, para. 7.161:

While Article 6.10 does not by its terms require that each separate legal entity be treated as a single "exporter" or "producer", neither does it allow a Member to treat distinct legal entities as a single exporter or producer without justification. Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.

<sup>230</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 382. The Appellate Body also described three different situations in which such a single entity might be found to exist (*ibid.*, para. 376).

<sup>231</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 376.



7.155. The Appellate Body stressed however that, under Articles 6.10 and 9.2 of the Anti-Dumping Agreement:

it is the investigating authority that is called upon to make an objective affirmative determination, on the basis of the evidence that has been submitted or that it has gathered in the investigation, as to who is the known exporter or producer of the product concerned. It is, therefore, the investigating authority that will determine whether one or more exporters have a relationship with the State such that they can be considered a single entity and receive a single dumping margin and a single anti-dumping duty.<sup>232</sup>

7.156. The separate rate test used by the USDOC in anti-dumping proceedings involving NME countries operates differently, however. The USDOC *presumes* that all exporters and producers are not independent from the State and, therefore, belong to the NME-wide entity. Each exporter or producer must then rebut the presumption of affiliation with the State in order to be eligible for an individual dumping margin and an individual anti-dumping duty. In other words, in proceedings involving NME countries, the USDOC does not make an "objective affirmative determination" as to who is the known exporter or producer, but presumes from the start the existence of this exporter or producer in the form of a NME-wide entity. Thus, pursuant to the separate rate test, not only does the USDOC place the burden on exporters to rebut the presumption that they are not independent from the State, but it then does not make a factual determination in that regard.

7.157. We also note that the USDOC makes "single entity determinations" (pursuant to a "single entity test") to determine whether legally distinct companies constitute a single entity for purposes of calculating a dumping margin in both market economy and NME investigations.<sup>233</sup> Pursuant to the Antidumping Manual, a single entity determination "is specific to the facts presented in each review and is based on several considerations, including the structure of the affiliated entities, the level of control between/among affiliates, and the level of participation by each affiliates in the proceeding"; moreover, the single entity will obtain a single anti-dumping duty rate.<sup>234</sup> The single entity determination is distinct from the separate rate test and in fact, both may be applied in the same anti-dumping proceeding.<sup>235</sup> In our view, the existence of the single entity test, as distinct from the separate rate test, shows that the USDOC's treatment of the NME-wide entity is a matter entirely separate from the question of determining whether different exporters are so closely related that they constitute a single entity. The fundamental difference between the two tests is that, under the single entity test, the USDOC presumes that all exporters are entitled to an individual rate and makes an affirmative finding, based on the facts of the case, that two or more legally distinct companies constitute a single entity, while under the separate rate test, the USDOC begins with the presumption that legally distinct companies (i.e. NME exporters) are part of a NME-wide entity, and, thus, should not be assigned an individual dumping margin and an individual anti-dumping rate.

7.158. We find, therefore, that the USDOC's policy or practice whereby it presumes, in anti-dumping investigations involving NMEs, that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity is inconsistent with the obligations contained in Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

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<sup>232</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 363.

<sup>233</sup> 19 C.F.R. § 351.401(f), Exhibit US-26, and USDOC Antidumping Manual, Chapter 10, Section V, Exhibit VN-24, p. 8.

<sup>234</sup> USDOC Antidumping Manual, Chapter 10, Section V, Exhibit VN-24, p. 10.

<sup>235</sup> For instance, the USDOC made single entity determinations in the fifth and sixth administrative reviews. In the fifth review, the USDOC determined that Nha Trang and certain affiliates should be treated as a single entity. Similarly, in the sixth review, the USDOC treated Minh Phu and Hau Giang as a single entity. See United States' response to Panel question No. 10(b), paras. 20-22. The United States also argues that the two tests differ in focus, in the sense that the single entity determination examines possible relationships among private persons or enterprises, while the separate rate test examines possible relationships between private persons or enterprises and the State. (United States' response to Panel question No. 10(a), para. 17.) We are of the view that, as a matter of principle, nothing would prevent the United States from establishing different tests for determining relationships among private persons or enterprises vs. private persons/enterprises and the State. However, any such test must be consistent with the Anti-Dumping Agreement.

7.159. Our finding in this respect is consistent with the report of the Appellate Body in *EC – Fasteners (China)*, where it concluded that:

placing the burden on NME exporters to rebut a presumption that they are related to the State and to demonstrate that they are entitled to individual treatment runs counter to Article 6.10, which "as a rule" requires that individual dumping margins be determined for each known exporter or producer, and is inconsistent with Article 9.2 that requires that individual duties be specified by supplier. Even accepting in principle that there may be circumstances where exporters and producers from NMEs may be considered as a single entity for purposes of Articles 6.10 and 9.2, such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation.<sup>236</sup>

7.160. The United States contends that the Appellate Body's reasoning in *EC – Fasteners (China)* is flawed. According to the United States, "[t]he presumption in *EC – Fasteners* that Articles 6.10 and 9.2 require Members to first recognize each entity as an individual exporter or producer ... was based on an improper interpretation because the Appellate Body created obligations that are not grounded in the text of these articles".<sup>237</sup> The United States argues, *inter alia*, that context in the Anti-Dumping Agreement, in particular footnote 11 to Article 4.1(i) and Article 9.5, indicates that whether producers are related to each other affects the investigating authority's analysis of those firms.<sup>238</sup>

7.161. Article 9.5 of the Anti-Dumping Agreement requires investigating authorities to determine individual dumping margins for exporters who have not exported the product during the period of investigation; those new exporters will receive an individual margin only if they can show that they are not related to any of the exporters that are subject to the anti-dumping duties. We noted, in paragraph 7.146. above that the obligation to determine individual dumping margins may be subject to certain exceptions, as long as these exceptions are provided for in the covered agreements. In our view, Article 9.5 sets out an exception to the general rule in Article 6.10 that individual dumping margins be specified for each known producer/exporter, and is, therefore, one of the possible departures from the general rule contained in Article 6.10.<sup>239</sup> Hence, Article 9.5 does not undermine our understanding of Article 6.10. Second, Article 4.1 of the Anti-Dumping Agreement contains a definition of the term "domestic industry" and footnote 11, referred to by the United States, describes the circumstances when "producers shall be deemed to be related to exporters or importers". We note that this provision does not deal with the determination of dumping margins for producers/exporters, but with the definition of the domestic industry; the "producers" referred to are domestic producers. In any event, we agree with the United States that whether producers are related to each other may justify treating them as a single producer/exporter under Articles 6.10 and 9.2; the tenor of our findings, and of the Appellate Body's findings in *EC – Fasteners (China)* is that such a "singularity" must be determined on the basis of positive evidence in the particular case, and cannot be presumed.

7.162. The United States also argues that this case is different from *EC – Fasteners (China)* because, according to the United States, the criteria underlying the "separate rate test" are different from those underlying the EU IT test at issue in that case. The United States submits that the USDOC's separate rate test "differs significantly from Article 9(5) of the EU's Basic

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<sup>236</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 364 (italics original; underlining added). The Basic AD Regulation at issue in *EC – Fasteners (China)* provided that, where the normal value for NME suppliers was determined on the basis of market economy third-country prices (or another method set forth in the Regulation), a single duty rate was specified for the supplying country concerned – the so-called "country-wide" duty – which applied to all suppliers and imports from that country. NME suppliers could, however, avoid the country-wide rate and be granted an individual rate if they satisfied the criteria of the so-called "IT test". In such case, the NME supplier would receive an individual rate which was determined by comparing the normal value from the market economy third country with the exporter's actual export prices. (See Appellate Body Report, *EC – Fasteners (China)*, paras. 275-277).

<sup>237</sup> United States' first written submission, para. 175.

<sup>238</sup> United States' first written submission, paras. 147-151.

<sup>239</sup> We note that, in *EC – Fasteners (China)*, the Appellate Body reached a similar conclusion. See Appellate Body Report, *EC – Fasteners (China)*, paras. 319 ("an exception permitting derogation from the rule requiring the determination of individual margins for new exporters is ... expressly provided for in Article 9.5") and 326.

AD Regulation", with respect to both the context in which the test is used as well as the criteria considered. In the view of the United States:

unlike the criteria that compose Article 9(5) ... the criteria that compose the "separate rate test" are effectively waived (and a separate rate assigned) when the exporter under investigation or review is owned wholly by entities located in market-economy countries or has been previously assigned a separate rate. And when they do apply, they focus, unlike the criteria of Article 9(5), strictly on exporter-specific activities.<sup>240</sup>

7.163. In the view of the United States, the evidence sought under the US test is consistent with the factors that, according to the Appellate Body, could signal that legally distinct entities are in such a relationship that they should be treated as a single entity.<sup>241</sup>

7.164. According to Viet Nam, a discussion of the criteria used for the separate rate test is irrelevant for the Panel's analysis. Viet Nam submits that a practice whereby the USDOC would begin with the presumption that all exporters are assigned an individual rate and would apply the separate rate test to determine whether a single entity exists may be consistent with the Anti-Dumping Agreement. However, the fact that the NME-wide entity policy is based on a reversal of that presumption makes it inconsistent with the Agreement.<sup>242</sup>

7.165. We recall that, in order to be accorded a separate rate, exporters from NMEs must demonstrate absence of government control, both in law and in fact, with respect to export activities. Pursuant to Chapter 10 of the Antidumping Manual, the USDOC considers three factors in evaluating whether there *de jure* is absence of government control over export activities.<sup>243</sup> The USDOC considers four factors in evaluating whether a respondent is subject to *de facto* governmental control over its export functions.<sup>244</sup>

7.166. We have carefully considered the criteria constituting the separate rate test, as well as the arguments of the United States. However, we are not persuaded that the alleged differences between the IT test at stake in *EC – Fasteners (China)* and the separate rate test at issue in the present dispute are sufficient in themselves to make the US practice consistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.167. We observe, first, that exporters owned wholly by entities located in market economy countries are also required to fill out the separate rate application; although the certification process may be arguably "lighter", it still requires that the firm in question establish, although in a different way (i.e. through affiliation with a foreign-owned company), independence from the NME government in order to receive an individual rate. The second category referred to by the United States, exporters located in the NME country and which have been previously assigned a separate rate, refers to those exporters that have successfully rebutted the presumption (at least in the original investigation) that they are part of the NME-wide entity in order to be eligible for a

<sup>240</sup> United States' response to Panel question No. 11, paras. 23-38 (the quoted extract is from para. 28). See also United States' first written submission, para. 181.

<sup>241</sup> United States' first written submission, para. 181 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 376). The criteria referred to by the United States are quoted above, in para. 7.154. See also United States' response to Panel question No. 11, paras. 28 and 32.

<sup>242</sup> Viet Nam's second written submission, para. 41. See also Viet Nam's response to Panel question No. 11, paras. 34-36.

<sup>243</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 4. See also Policy Bulletin 05.1, Exhibit VN-66, p. 2. These three factors are: (i) an absence of restrictive stipulations associated with an individual exporter's business and export licences; (ii) any legislative enactments decentralizing control of companies; and (iii) any other formal measures by the central and/or local government decentralizing control of companies.

<sup>244</sup> USDOC Antidumping Manual, Chapter 10, Exhibit VN-24, p. 4. See also Policy Bulletin 05.1, Exhibit VN-66, p. 2. The four factors are: (i) whether the export prices are set by, or subject to the approval of, a governmental authority; (ii) whether the respondent has authority to negotiate and sign contracts and other agreements; (iii) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (iv) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. We note that, in the latter document, the third factor is worded slightly differently ("whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management").

separate rate.<sup>245</sup> Hence, in our view, the two examples provided by the United States do not support its argument that certain categories of exporters are not subject to the presumption.

7.168. Second, we do not believe that we need to pronounce on the relevance and/or consistency with the covered agreements of the criteria used by the USDOC, in the context of the separate rate test, in evaluating *de jure* and *de facto* absence of government control. Nor do we need to pronounce on whether these criteria are consistent with the factors identified by the Appellate Body in *EC – Fasteners (China)* and referred to by the United States. First, we recall that Viet Nam does not challenge the criteria composing the separate rate test. More importantly, these criteria are not used to establish whether several exporters are sufficiently *integrated* with each other or with the State so as to justify being treated as a single NME-wide entity. The purpose of this test is to determine whether exporters are sufficiently *distinct* from the State so as to overcome the presumption that they are part of the NME-wide entity. Thus, even if we were to find, *arguendo*, that some or all of the criteria used by the USDOC in its separate test are relevant or appropriate to effectively determine that the State controls or materially influences exporters such that they can be found to constitute a single entity, the very starting point of the separate rate test, the rebuttable presumption that a NME-wide entity exists, and the evidentiary burden placed on exporters to overcome that presumption, gives rise to an inconsistency with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>246</sup> Therefore, the criteria used under the separate rate test cannot save the measure from being found inconsistent with Articles 6.10 and 9.2, even if, *per se*, they might be relevant or appropriate for determining that two or more exporters are sufficiently related among themselves or with the government so that they constitute a single entity.<sup>247</sup>

7.169. In light of the above, we maintain our conclusion that the policy or practice whereby in anti-dumping proceedings involving NME countries, the USDOC applies a rebuttable presumption that, in such countries, all companies belong to a single, NME-wide entity and assigns a single rate to that entity is inconsistent with the obligations contained in Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.170. However, before concluding our analysis of the consistency of the measure at issue with Articles 6.10 and 9.2 of the Anti-Dumping Agreement, we turn to the question whether Viet Nam's Accession Protocol provides a legal basis for the rebuttable presumption that, in Viet Nam, all companies are part of a single, Viet Nam-wide entity and should be assigned a single rate. We discuss the role of Viet Nam's Protocol of Accession here for the sake of a complete discussion of Viet Nam's arguments in support of its "as such" claim. We note, however, that the role of Viet Nam's Protocol of Accession is equally, if not more, relevant in the context of Viet Nam's "as applied" claim. Therefore, any conclusions we reach with respect to Viet Nam's Protocol of Accession in this context will be applicable *mutatis mutandis* to our analysis of Viet Nam's "as applied" claims below.

7.171. The United States argues that Viet Nam's Working Party Report provides "legal (as well as factual) support" for treating multiple companies in Viet Nam as part of a Viet Nam-wide entity for the purpose of determining a margin of dumping.<sup>248</sup> Viet Nam submits that its Accession Protocol and Working Party Report provide that the provisions of the GATT 1994 and the Anti-Dumping Agreement "shall apply" in anti-dumping proceedings involving exports from Viet Nam, subject to

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<sup>245</sup> Separate Rate Certification for Firms Previously Awarded Separate Rate Status, Exhibit US-73. We also observe that the Separate Rate Certification indicates, *inter alia*, that "completion of this Certification does not guarantee separate rate status for this POR" and "companies who had changes to corporate structure, ownership, or to the official company name may not file a Separate Rate Certification but must instead file a Separate Rate Application" (Exhibit US-73, p. 2). We also note that, under the Separate Rate Certification, firms must also certify absence of *de jure* or *de facto* government control. While wholly foreign-owned entities are not requested to respond to most questions related to *de jure* control, they are required to respond to certain questions related to *de facto* government control. See Exhibit US-73, pp. 8-9.

<sup>246</sup> Viet Nam does not contest the criteria relied upon by the USDOC. Viet Nam even concedes that "if ... the USDOC began with the presumption that all exporters are assigned individual rates and then applied the 'separate rate test', to exporters to determine if they are part of a single entity, the practice may be consistent with Articles 6.10 and 9.2". (Viet Nam's second written submission, para. 41.)

<sup>247</sup> We observe that, in *EC – Fasteners (China)*, the Appellate Body reached a similar conclusion with respect to the IT test under consideration in that dispute. See Appellate Body Report, *EC – Fasteners (China)*, para. 377.

<sup>248</sup> United States' second written submission, para. 70. The United States' arguments with respect to this issue are summarized above, paragraphs 7.137. - 7.138.

one special rule, namely the right for an investigating authority to use an alternate methodology when calculating normal value.<sup>249</sup>

7.172. China, as a third party, submits that paragraph 255 of Viet Nam's Working Party Report is similar in substance to Article 15 of China's Protocol of Accession. In China's view, the sole issue addressed by subparagraph (a) of each provision is the issue of whether to use domestic prices or costs in China/Viet Nam when determining price comparability in anti-dumping proceedings. According to China, it is clear that the Anti-Dumping Agreement, including Articles 6.10, 9.2, 9.4 and 6.8, applies in anti-dumping proceedings against imports from China/Viet Nam with the only exceptions explicitly stated in the subparagraph (a) of each provision. Hence, other WTO Members are not allowed to discriminate against imports from China/Viet Nam in anti-dumping proceedings, for purposes other than the determination of normal value. China is of the view that this understanding has been confirmed by the Appellate Body in *EC – Fasteners (China)*.<sup>250</sup>

7.173. Turning first to the relevant provisions of Viet Nam's Working Party Report, we observe that the Report indicates that, during Viet Nam's accession negotiations to the WTO, certain Members considered that the fact that Viet Nam had not yet transitioned to a full market economy might cause certain difficulties in anti-dumping proceedings involving imports from Viet Nam. This concern is reflected in paragraph 254 of the Working Party Report, which states that:

Several Members noted that Viet Nam was continuing the process of transition towards a full market economy. Those Members noted that under those circumstances, in the case of imports of Vietnamese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those Members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in Viet Nam might not always be appropriate.<sup>251</sup>

7.174. In light of such difficulties, paragraph 255 of the Working Party Report provides in relevant part:

The representative of Viet Nam confirmed that, upon accession, the following would apply – Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving exports from Viet Nam into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Vietnamese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing

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<sup>249</sup> Viet Nam's second written submission, paras. 36-37. Viet Nam's arguments with respect to this issue are summarized above, at paragraph 7.134.

<sup>250</sup> China's third-party written submission, paras. 36-36 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 290).

<sup>251</sup> Viet Nam's Working Party Report, para. 254.

the like product with regard to manufacture, production and sale of that product.

...

(d) Once Viet Nam has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire on 31 December 2018. In addition, should Viet Nam establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

7.175. Provisions contained in Accession Protocols are binding upon the parties and are therefore treaty text to be interpreted pursuant to customary rules of interpretation, in particular Articles 31 and 32 of the Vienna Convention. By virtue of paragraph 2 of Viet Nam's Accession Protocol, the commitment contained in paragraph 255 of its Working Party Report is incorporated by reference into the Accession Protocol and is therefore treaty language. In contrast, paragraph 254 is not referred to in Viet Nam's Accession Protocol and, therefore, is not treaty text.<sup>252</sup>

7.176. The introductory clause of paragraph 255 states, in relevant parts, that "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") ... shall apply ... consistent with the following". This introductory clause is then followed by four sub-paragraphs, two of which – paragraphs (a) and (d) – deal with the treatment of imports from Viet Nam in anti-dumping proceedings.<sup>253</sup> Hence, we understand that paragraph 255 of Viet Nam's Working Party Report confirms that Article VI of the GATT 1994 and the Anti-Dumping Agreement apply in anti-dumping proceedings involving imports from Viet Nam, subject to the provisions contained in sub-paragraphs (a) and (d).

7.177. Pursuant to paragraph 255(a), other WTO Members may, if the producers under investigation cannot clearly show that market economy conditions prevail in the relevant industry, determine the normal value on a basis other than domestic prices or costs in Viet Nam.<sup>254</sup> Thus, the derogation provided for under paragraph 255(a) is a limited one, which only concerns the determination of normal value, and does not extend to the determination of export price.

7.178. We observe that the second *Ad Note* to Article VI:1 of the GATT 1994 contains a similar recognition of the difficulties which may exist in determining price comparability in the case of imports from a country which has a complete or substantially complete monopoly over its trade and where all domestic prices are fixed by the State.<sup>255</sup> Like paragraph 255(a) of Viet Nam's

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<sup>252</sup> Paragraph 2 of Viet Nam's Protocol of Accession states, in relevant parts, that "[t]his Protocol, which shall include the commitments referred to in paragraph 527 of the Working Party Report, shall be an integral part of the WTO Agreement". Paragraph 255 of the Working Party Report is listed in paragraph 527, unlike paragraph 254. See Viet Nam's Accession Protocol, para. 2 and Viet Nam's Working Party Report, para. 527.

<sup>253</sup> Subparagraph (b) deals with proceedings under the Agreement on Subsidies and Countervailing Measures and subparagraph (c) concerns notifications to the Committee on Anti-Dumping Practices and to the Committee on Subsidies and Countervailing Measures. These two provisions are not at stake in this dispute and we shall not address them further.

<sup>254</sup> Paragraph 255(a) provides that, in determining price comparability, the importing WTO Member may use either of two methods to establish normal value, i.e. "Vietnamese prices or costs for the industry under investigation" or "a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam". Paragraph 255(d) sets forth different instances in which the special rule for the determination of price comparability in paragraph (a) will cease to apply: paragraph (a) shall terminate with respect to Viet Nam or particular sectors or industries in Viet Nam, once Viet Nam has established, under the national law of the importing country, that, respectively, "it is a market economy" or that "market economy conditions prevail in a particular industry or sector". Paragraph 255(d) indicates, moreover, that "the provisions of subparagraph (a)(ii) shall expire on 31 December 2018".

<sup>255</sup> The second *Ad Note* to Article VI:1 of the GATT 1994 states:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in

Working Party Report, the *Ad Note* allows investigating authorities to depart from a "strict comparison with domestic prices", thus suggesting that this provision provides flexibility with respect to the determination of normal value.<sup>256</sup> In *EC – Fasteners (China)*, the Appellate Body remarked that:

The recognition of special difficulties in determining price comparability in the second *Ad Note* to Article VI:1 does not mean that importing Members may depart from the provisions regarding the determination of export prices and the calculation of dumping margins and anti-dumping duties set forth in the *Anti-Dumping Agreement* and in the GATT 1994. While the second *Ad Note* to Article VI:1 refers to difficulties in determining price comparability in general, the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison. This is indicated by the operative part in the third sentence of this provision, which only allows importing Members to depart from a "strict comparison with domestic prices".<sup>257</sup>

7.179. In our view, neither the second *Ad Note* to Article VI:1 of the GATT 1994 nor paragraph 255 of Viet Nam's Working Party Report can be read as allowing WTO Members to treat Viet Nam differently for purposes other than the determination of normal value.

7.180. We further observe that, pursuant to subparagraph 255(a)(i), the importing WTO Member "shall use Vietnamese prices or costs" if the producers under investigation "clearly show" that market economy conditions prevail. If Vietnamese producers succeed in showing that market economy conditions prevail, the importing Member shall then use Vietnamese prices or costs when determining price comparability, i.e. in the determination of normal value. Conversely, when Vietnamese producers do not succeed in showing that market economy conditions prevail, the importing Member "may use a methodology that is not based on a strict comparison with domestic prices and costs in Viet Nam", pursuant to paragraph 255(a)(ii). In our view, a failure by Vietnamese producers to show that market economy conditions prevail in the industry producing the product under investigation only allows the importing Member to treat those producers differently with respect to the determination of normal value because the scope of the derogation conceded by Viet Nam in its Protocol of Accession concerns exclusively the determination of normal value. Hence, paragraph 255(a) of Viet Nam's Working Party Report does not authorize importing Members to treat Viet Nam differently for purposes other than the determination of normal value.

7.181. We find therefore that, in anti-dumping proceedings involving imports from Viet Nam, paragraph 255 of Viet Nam's Working Party Report, as incorporated in Viet Nam's Accession Protocol, authorizes WTO Members to treat Viet Nam differently from other Members with respect to the determination of price comparability in respect of domestic prices and costs in Viet Nam, that is, the determination of normal value. However, this provision does not provide for a general exception permitting different treatment of Vietnamese exporters for other purposes, such as the application of a presumption that, in Viet Nam, all companies belong to a single, Viet Nam-wide entity, and should receive a single rate.

7.182. Our reading of paragraph 255 of Viet Nam's Working Party Report comports with the Appellate Body's reading of virtually identical provisions contained in Section 15 of China's Protocol of Accession.<sup>258</sup> In *EC – Fasteners (China)*, in assessing the European Union's arguments on appeal under Articles 6.10 and 9.2 of the Anti-Dumping Agreement, the Appellate Body examined the extent to which China's Protocol of Accession allowed the European Union to apply different rules to China than to other Members in anti-dumping proceedings. The Appellate Body concluded:

In our view, therefore, Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the

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such cases importing Members may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

<sup>256</sup> Article 2.7 of the Anti-Dumping Agreement provides that Article 2 "is without prejudice to the second Supplementary Provision in paragraph 1 to Article VI in Annex I to GATT 1994".

<sup>257</sup> Appellate Body Report, *EC – Fasteners (China)*, footnote 460 to para. 285. (italics original, underlining added)

<sup>258</sup> The language of Section 15 of China's Accession Protocol is materially identical to that of paragraph 255.

determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value. We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the *Anti-Dumping Agreement* and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties.<sup>259</sup>

7.183. The United States discusses in detail various provisions and Annexes of Viet Nam's Working Party Report, which, in its view, provide evidence that Viet Nam is an NME and, thus, justify USDOC's treatment of Vietnamese producers and exporters.<sup>260</sup> The United States describes the specificities of market vs. non-market economy conditions, and submits that, in the latter, the role of the government in controlling resource allocation justifies the concerns expressed in Viet Nam's Working Party Report and, in turn, the application of a single government-entity rate or of a presumption that all companies in Viet Nam are controlled by the Government. According to the United States, the issue presented in the dispute is a "mixed question of fact and law" and "there is no clear dividing line between what amounts to 'factual' versus 'legal' support".<sup>261</sup> The United States also points to Viet Nam's Constitution<sup>262</sup> and to "many other examples [in Viet Nam's Working Party Report] confirming that Vietnam had not yet shifted completely away from a centrally planned economy to a market-based economy".<sup>263</sup> The United States concludes that, given the presumption that, in NME countries, the government effectively controls resource allocations, "it would make no sense to automatically assign individual dumping margins to different sets of exports that are all associated with Vietnamese companies under the government's control".<sup>264</sup>

7.184. Viet Nam submits that, while the Working Party Report describes the prevailing economic conditions present in Viet Nam at the time of the Report, nowhere in the Report or the Accession Protocol does Viet Nam make generalized concessions based on those economic conditions. Viet Nam argues that there is no textual basis in the Protocol which would allow Members to presume the existence of an NME-wide entity and that no legal basis can be assumed; hence, the Panel should conclude, like the Appellate Body in *EC – Fasteners (China)*, that Viet Nam's Protocol does not contain an open-ended exception that allows WTO Members to treat Viet Nam differently from a market economy country. Viet Nam also submits that the United States' attempt to turn the issue into a question of facts is a distraction from the fundamental issue which is, as in *EC – Fasteners (China)*, that an authority cannot use a presumption to apply a single rate to multiple entities because the covered agreements do not allow for the use of such a presumption.<sup>265</sup>

7.185. We have examined the factual evidence submitted by the United States regarding the characteristics of NMEs' economic systems in general and Viet Nam's economy in particular, and the concerns that these characteristics may raise in the WTO system. We believe, however, that the factual evidence presented by the United States with the aim of showing that Viet Nam is an NME is not relevant to the resolution of the legal question we need to address, namely whether the

<sup>259</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 290.

<sup>260</sup> United States' second written submission, paras. 71-74 (referring to Viet Nam's Working Party Report, paras. 52, 56, 57, 60, and 253-255; Annex 2, Table 4, para. 83; Annex 2, Tables 1 and 2).

<sup>261</sup> United States' second written submission, para. 70.

<sup>262</sup> Viet Nam Constitution, Chapt. II, Art. 15 (partial document), Exhibit US-81, Article 15.

<sup>263</sup> United States' second written submission, paras. 71-72. The United States refers in particular to certain paragraphs contained in the section of the Working Party Report discussing state-owned enterprises ("SOEs") and which show, according to the United States, that "the open-ended list of such enterprises ... is extensive and encompasses industries and sectors far beyond those normally considered national security-related or natural monopolies". See United States' second written submission, para. 72 (referring to Viet Nam's Working Party Report, paras. 52, 56, 57 and 60, and Annex 2, Table 4). The United States also points to "a long list of industries in which investment was prohibited, conditional or restricted" in Viet Nam. See United States' second written submission, para. 72, referring to Viet Nam's Working Party Report, Tables 1 and 2 in Annex 2. These tables contain a list of goods and services sectors where business is prohibited or subject to conditions. Viet Nam's Working Party Report, Annex 2, Tables 1 and 2.

<sup>264</sup> United States' second written submission, paras. 75-76 (referring to N. Gregory Mankiw, *Principles of Microeconomics* (South-Western Centage Learning 2012) (partial document), Exhibit US-84, pp. 10-11 and 84; and Paul R. Gregory & Robert C. Stuart, *Comparing Economic Systems in the Twenty-First Century* (Houghton Mifflin Company 2004) (partial document), Exhibit US-85, pp. 25-31).

<sup>265</sup> Viet Nam's second written submission, paras. 36-38.



United States is entitled to presume that, in Viet Nam, all companies belong to a single, Viet Nam-wide entity, and should be assigned a single rate.

7.186. We recall that our task is to assess the *legal* question of whether the treatment of NMEs by the USDOC in anti-dumping investigations under the challenged measure is consistent with the requirements of the Anti-Dumping Agreement. The *factual* information provided by the United States concerning the economic specificities of NME countries in general and of Viet Nam in particular must be distinguished from the legal question as to how, under the Anti-Dumping Agreement, an investigating authority may use that information in an anti-dumping proceeding. Whether an investigating authority is allowed, in an anti-dumping proceeding involving an NME, to presume that all exporters belong to a single, government-wide entity is a legal question. In our view, the factual evidence tabled by the United States, cannot, in and of itself, justify a WTO Member treating Vietnamese exporters differently from any other Member's exporters in the absence of a clear textual basis in Viet Nam's Accession Protocol. Hence, we also disagree with the United States' proposition that Viet Nam's Working Party Report contains an "underlying" presumption that NME conditions prevail in Viet Nam, which, in turn, would, according to the United States, justify the application of a single "government-entity" rate.<sup>266</sup>

7.187. We observe that, in *EC – Fasteners (China)*, the Appellate Body drew a similar distinction, finding that:

the economic structure of a WTO Member may be used as evidence before an investigating authority to determine whether the State and a number of exporters or producers subject to an investigation are sufficiently related to constitute a single entity such that a single margin should be calculated and a single duty be imposed on them. It cannot, however, be used to imply a legal presumption that has not been written into the covered agreements.

... the evidence submitted by the European Union concerning NMEs in general and China in particular is not relevant to the *legal* question of whether the European Union is permitted to presume under Article 9(5) of the Basic AD Regulation that the State and the exporters are a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. The review of this evidence reveals that it is possible that in specific circumstances an investigating authority may reach the conclusion that the State and certain exporters are so closely related that they constitute a single entity. However, the evidence submitted by the European Union cannot establish that the economic structure in China justifies a general presumption that the State and all the exporters in all industries that might be subject to an anti-dumping investigation constitute a single legal entity, where no legal basis for such a presumption is provided for in the covered agreements.<sup>267</sup>

7.188. We find that the evidence submitted by the United States regarding the economic characteristics of NMEs in general and Viet Nam in particular cannot justify a general presumption that, in NME countries (including in Viet Nam), all exporters belong to a single, government-wide entity, where no legal basis for such a presumption is provided for in the covered agreements. We conclude therefore, that the evidence submitted to the Panel regarding the operation of NMEs in general and Viet Nam in particular is not relevant to the legal question of whether the United States is entitled to presume the existence of an NME-wide entity and assign a single rate to that entity.<sup>268</sup>

7.189. The United States also argues that "price comparability", referred to in paragraph 255, is a central tenet of a dumping analysis.<sup>269</sup> The United States appears to derive two main inferences from the reference to "price comparability": (i) the term "price comparability" must be understood as making reference to both normal value and export price because both are necessary to ensure

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<sup>266</sup> United States' second written submission, paras. 74-76. See also United States' first written submission, para. 166.

<sup>267</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 367 and 369. (italics original, underline added)

<sup>268</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 370.

<sup>269</sup> United States' second written submission, para. 80; opening statement at the second meeting of the Panel, para. 25.

appropriate price comparability; and (ii) the need to ensure appropriate comparability between normal value and export price, in turn, provides a reasonable basis for the USDOC to presume that Vietnamese companies belong to the Viet Nam-wide entity.<sup>270</sup> The United States also argues that the presumption in paragraph 255 of the Working Party Report makes it "legally permissible" for the USDOC to presume government influence, which, in turn, also makes it legally permissible and in fact "the most logical step for purposes of price comparability", to presume that all companies belong to the Viet Nam-wide entity for purposes of the calculation of export price.<sup>271</sup>

7.190. Leaving aside the seemingly circular arguments and inferences made by the United States, our reading of the term "price comparability" in paragraph 255 of Viet Nam's Working Party Report is narrower than the reading proposed by the United States. We agree that "price comparability" for the purpose of a dumping analysis involves a comparison between normal value and export price. However, while paragraph 255 of Viet Nam's Working Party Report acknowledges that there may be certain difficulties in determining price comparability in respect of imports from Viet Nam, we have already found that the text of paragraph 255 clarifies that these difficulties can relate only to "Vietnamese prices or costs" (sub-paragraph 255(a)(i)) / "domestic prices or costs in Viet Nam" (sub-paragraph 255(a)(ii)). Hence, as we stated above, these difficulties can relate only to the determination of normal value. Therefore, the reference to "price comparability" in paragraph 255 cannot be interpreted to also include the right to resort to a different methodology with respect to the determination of export price.

7.191. The United States also submits that Viet Nam could have challenged, in the present dispute, the USDOC's decision to treat Viet Nam as an NME and/or the NME methodology used by the USDOC for calculating normal value, and the fact that it did not "supports the presumption" that each exporter is controlled by the government.<sup>272</sup> In our view, the fact that Viet Nam did not challenge before the Panel the 2002 USDOC decision to treat it as an NME for the purpose of anti-dumping proceedings cannot imply any kind of acknowledgement, on the part of Viet Nam, regarding the existence of a "Viet Nam-wide entity" or regarding any right for the United States to presume the existence of such an entity under the covered agreements. Viet Nam had no reason to challenge before the Panel USDOC's decision to treat it as an NME and to use a different methodology to calculate normal value since this possibility is specifically provided for in paragraph 255(a) of its Working Party Report.

7.192. Therefore, we also disagree with the United States that paragraph 255 "modifies" the obligations contained in Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>273</sup> As we stated above, paragraph 255 of Viet Nam's Working Party Report only allows importing Members to derogate from the disciplines of the Anti-Dumping Agreement with respect to the methodology used to calculate normal value. However, nothing in paragraph 255 indicates that this provision provides for a derogation from the obligations to assign an individual dumping margin pursuant to Article 6.10 and an individual anti-dumping duty rate pursuant to Article 9.2 of the Anti-Dumping Agreement.

7.193. We conclude, therefore, that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity is inconsistent "as such" with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement.

#### **7.4.2.4 Whether the NME-wide entity rate practice is inconsistent with Articles 9.4, 6.8 and Annex II of the Anti-Dumping Agreement**

7.194. We recall our finding above that, while the evidence on the record indicates that the USDOC often calculates the rate for the NME-wide entity based on facts available, it does not establish that the USDOC consistently uses a defined methodology to calculate the NME-wide entity rate or systematically bases that rate on facts available. Therefore, we concluded that Viet Nam had failed to establish that the USDOC's methodology used to calculate the NME-wide entity rate, in particular as it refers to the use of facts available, is a rule or norm that constitutes a measure of general and prospective application which can be challenged as such. This being the

<sup>270</sup> United States' opening statement at the second meeting of the Panel, para. 27.

<sup>271</sup> United States' opening statement at the second meeting of the Panel, para. 28.

<sup>272</sup> United States' first written submission, para. 162; response to Panel question No. 14(a), para. 41.

<sup>273</sup> United States' second written submission, para. 86.

case, we find that Viet Nam did not establish that the alleged measure is "as such" inconsistent with Articles 6.8 and 9.4, and Annex II of the Anti-Dumping Agreement.

### 7.4.3 Claims with respect to the application of the NME-wide entity rate practice in the administrative reviews at issue

#### 7.4.3.1 Introduction

7.195. Viet Nam claims that the Viet Nam-wide rate applied in the fourth, fifth and sixth administrative reviews under the *Shrimp* order is inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the Anti-Dumping Agreement. The United States requests that we reject Viet Nam's claims of inconsistency.

7.196. Before addressing Viet Nam's claims of inconsistency, we set out the relevant facts concerning the three administrative reviews at issue. We will then examine whether Viet Nam has demonstrated that one or more of the measures at issue is inconsistent with the provisions it cites.

#### 7.4.3.2 Factual background

7.197. In the fourth administrative review, the USDOC started with the rebuttable presumption that "all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate".<sup>274</sup> It selected two separate rate companies – Minh Phu and Nha Trang – for individual examination on the ground that they were "the largest exporters, by volume, of subject merchandise during the POR".<sup>275</sup> The rate assigned to the separate rate companies was based on the simple average of the individual margins calculated for the two mandatory respondents and amounted to 3.92%.<sup>276</sup> The USDOC further stated "we are applying a single antidumping rate, i.e. the Vietnam-wide entity rate, to all other exporters of subject merchandise from Vietnam" and set that rate at 25.76%. The USDOC did not explain how this rate was determined, other than to say that the rate assigned to the Viet Nam-wide entity is "the entity's current rate and only rate ever determined for the entity in this proceeding".<sup>277</sup>

7.198. In the fifth administrative review, the USDOC recalled that "[i]n proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and thus, should be assigned a single antidumping duty deposit rate".<sup>278</sup> It selected the three largest exporters as mandatory respondents, namely Camimex, Minh Phu and Nha Trang.<sup>279</sup> Twenty-seven companies successfully met the criteria for separate rate status and received a separate rate of 1.03%, calculated on the basis of the weighted-average margins determined for Camimex and Minh Phu.<sup>280</sup> With respect to non-separate rate companies, the USDOC observed that "no party has submitted evidence of the proceeding to demonstrate that ... government influence is no longer present or that our treatment of the NME entity is otherwise incorrect. Therefore, we are assigning the entity's current rate of 25.76%, the only rate ever determined for the Vietnam-wide entity in this proceeding".<sup>281</sup>

7.199. In the sixth administrative review, the USDOC again recalled that "[i]n NME countries, the Department begins with a rebuttable presumption that all companies within the country are

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<sup>274</sup> Notice of initiation for the fourth administrative review, Exhibit VN-06, p. 13178.

<sup>275</sup> Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12207. Minh Phu and Nha Trang received a final rate of, respectively, 2.95% and 4.89%. See amended final determination in the fourth administrative review, Exhibit US-08, p. 61123.

<sup>276</sup> Amended final determination in the fourth administrative review, Exhibit US-08, p. 61123.

<sup>277</sup> Final determination in the fourth administrative review, Exhibit VN-13, pp. 47773 and 47776; preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12211.

<sup>278</sup> Notice of initiation for the fifth administrative review, Exhibit VN-10, p. 18154.

<sup>279</sup> Preliminary determination in the fifth administrative review, Exhibit VN-15; final determination in the fifth administrative review, Exhibit VN-18.

<sup>280</sup> Amended final determination in the fifth administrative review, Exhibit US-09, p. 64309. In the final determination, the USDOC explains that "[t]he separate rate is determined based on the estimated weighted-average anti-dumping margins established for exporters and producers individually investigated, excluding zeroing and *de minimis* margins or margins based entirely on facts available". (Final determination in the fifth administrative review, Exhibit VN-18, p. 56160.)

<sup>281</sup> Preliminary determination in the fifth administrative review, Exhibit VN-15, p. 12059. See also final determination in the fifth administrative review, Exhibit VN-18.

subject to government control and thus should be assessed a single antidumping duty rate".<sup>282</sup> It selected the two largest exporters – Minh Phu and Nha Trang – as mandatory respondents.<sup>283</sup> The USDOC calculated a separate rate of 0.88%, corresponding to the simple average of the margins for the two mandatory respondents.<sup>284</sup> With respect to some 30 companies that did not demonstrate eligibility for a separate rate, the USDOC noted that "no party has submitted evidence of the proceeding to demonstrate that such government influence is no longer present or that our treatment of the NME entity is otherwise incorrect. Therefore, we are assigning the entity rate of 25.76%, the only rate ever determined for the Vietnam-wide entity in this proceeding".<sup>285</sup> The Viet Nam-wide entity rate of 25.76% was confirmed in the final determination.<sup>286</sup>

7.200. To sum up, in each of the reviews at issue, the USDOC began with a rebuttable presumption that all shrimp exporters and producers in Viet Nam are operating units of a single, Viet Nam-wide entity. Exporters and producers that established sufficient independence from government control with respect to their export activities qualified for "separate rate status". In each review, the USDOC decided to limit the number of respondents for individual examination and selected the largest producers/exporters as mandatory respondents on the basis of USCPB data. Mandatory respondents were assigned an individual dumping margin calculated on the basis of a surrogate normal value that the USDOC determined for Viet Nam and each exporter's own export prices. Exporters with separate rate status which were not selected as mandatory respondents received the "separate rate", a rate based on the simple or weighted-average of the rate of the mandatory respondents in each review. Vietnamese companies which did not successfully establish independence from the Vietnamese Government, or which did not apply for separate rate status, were assigned the Viet Nam-wide rate of 25.76% in each review.

#### **7.4.3.3 Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement**

##### **7.4.3.3.1 Main arguments of the parties**

###### **7.4.3.3.1.1 Viet Nam**

7.201. Viet Nam argues that the USDOC's presumption of the existence of a Viet Nam-wide entity in the proceedings at issue does not comply with the plain language of Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Viet Nam argues that, in the three administrative reviews at issue, the USDOC did not establish, as a factual matter, the existence of a single entity but, instead, relied on a presumption that all entities within Viet Nam belong to a single entity under the control of the government. Viet Nam refers to its arguments made in connection with its claim that the USDOC's practice of presuming that all exporters belong to a single, government-wide entity is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. According to Viet Nam, the USDOC's practice of presuming a Viet Nam-wide entity and assigning a single rate to that entity, as applied in the proceedings at issue, resulted in violation of the obligation, contained in Articles 6.10 and 9.2, that investigating authorities determine individual dumping margins and anti-dumping duties for exporters and producers.<sup>287</sup>

###### **7.4.3.3.1.2 United States**

7.202. The United States argues that treating related companies in the covered reviews as a single exporter or producer for the purpose of determining a dumping margin is consistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. According to the United States, the USDOC's conclusion that multiple companies in Viet Nam are part of a Viet Nam-government entity is based on a permissible interpretation of Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

<sup>282</sup> Preliminary determination in the sixth administrative review, Exhibit VN-19, p. 13550.

<sup>283</sup> Amended final determination in the sixth administrative review, Exhibit VN-22, p. 64102.

<sup>284</sup> Amended final determination in the sixth administrative review, Exhibit VN-22, pp. 64102-64103.

<sup>285</sup> Preliminary determination in the sixth administrative review, Exhibit VN-19, p. 13552.

<sup>286</sup> Final determination in the sixth administrative review, Exhibit VN-20.

<sup>287</sup> Viet Nam's first written submission, paras. 148-153. Viet Nam's arguments with respect to the WTO-consistency of the NME-wide entity rate with Articles 6.10 and 9.2 of the Anti-Dumping Agreement are set out in more details in Section 7.4.2.3.1 above.

The United States requests, therefore, that the Panel find that the USDOC's conclusions in the three administrative reviews at issue are not inconsistent with the Anti-Dumping Agreement.<sup>288</sup>

#### **7.4.3.3.2 Evaluation by the Panel**

7.203. The present claims raise the issue of whether, in the fourth, fifth and sixth administrative reviews, the application by the USDOC of a rebuttable presumption that all shrimp producers/exporters in Viet Nam are operating units of a single, Viet Nam-wide entity, and the determination of a single dumping margin for, and application of, a single anti-dumping rate to that entity, is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.204. We recall our finding above that, pursuant to Article 6.10, investigating authorities have an obligation to determine individual margins of dumping for each known producer/exporter. This obligation is subject to the exception contained in the second sentence of Article 6.10 and may be subject to other exceptions as well, as long as these exceptions are provided for in the covered agreements. We also found that, pursuant to Article 9.2, individual anti-dumping duties must be specified for each supplier, except where this is impracticable.<sup>289</sup>

7.205. We further recall our factual finding that, in each administrative review at issue in the present dispute, the USDOC began with a rebuttable presumption that all shrimp exporters and producers in Viet Nam are part of a single, Viet Nam-wide entity, and determined a single dumping margin for and applied a single anti-dumping rate to that entity. We also found that, in order to be eligible for an individual rate, Vietnamese exporters and producers were required to pass the "separate rate test" by demonstrating independence from the Government of Viet Nam.

7.206. Having concluded that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity is inconsistent "as such" with Articles 6.10 and 9.2<sup>290</sup>, we do not see how the application of that practice in the three administrative reviews at issue could be found consistent with those same two provisions.

7.207. We also recall our finding above that nothing in paragraph 255 of Viet Nam's Working Party Report, as incorporated into Viet Nam's Protocol of Accession, indicates that this provision provides for a derogation from the obligations to assign an individual dumping margin pursuant to Article 6.10 and an individual anti-dumping duty rate pursuant to Article 9.2 of the Anti-Dumping Agreement.<sup>291</sup> These conclusions are applicable *mutatis mutandis* to our consideration of Viet Nam's "as applied" claims.

7.208. Therefore, we conclude that the application by the USDOC, in the fourth, fifth and sixth administrative reviews, of a presumption of the existence of a Viet Nam-wide entity and application of a single rate to that entity is inconsistent Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

#### **7.4.3.4 Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue is inconsistent with Article 9.4 of the Anti-Dumping Agreement**

##### **7.4.3.4.1 Main arguments of the parties**

###### **7.4.3.4.1.1 Viet Nam**

7.209. Viet Nam argues that the USDOC's failure to assign the Viet Nam-entity a rate calculated pursuant to the methodology provided for in Article 9.4 of the Anti-Dumping Agreement amounts

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<sup>288</sup> United States' first written submission, paras. 146 and 183. The United States' arguments with respect to the WTO-consistency of the NME-wide entity rate are set out in more details above in Section 7.4.2.3.1. As noted above in footnote 204 of this Report, the United States argued more extensively with respect to the consistency with Articles 6.10 and 9.2 in its response to Viet Nam's "as applied" claims; however, because we first consider Viet Nam's "as such" claims, we considered it appropriate to provide a more complete summary of the United States' arguments in the section of the Report addressing those claims.

<sup>289</sup> See above paras. 7.148. -7.149.

<sup>290</sup> See above para. 7.193.

<sup>291</sup> See above paras. 7.170. -7.192.

to a violation of that provision. According to Viet Nam, in each of the three administrative reviews at issue, the USDOC limited the number of investigated companies, and then assigned two different rates to the companies not selected for individual examination, i.e. one rate to the so-called Viet Nam-wide entity, and a different rate to companies that qualified for a separate rate. Viet Nam submits that the difference between the two rates is substantial since the separate rate is based on a simple (in the fourth and sixth administrative reviews) or weighted (in the fifth administrative review) average of the rates the USDOC calculated for the mandatory respondents, whereas the Viet Nam-wide entity rate is based on facts available. According to Viet Nam, the text of Article 9.4 requires that, where an investigating authority has limited its examination, it must calculate an anti-dumping duty for all companies not individually investigated that is no greater than the weighted average margin of dumping of the selected companies, excluding rates that are zero, *de minimis* or based on facts available. Viet Nam agrees with the conclusions of the panel in *US – Shrimp (Viet Nam)* which found that "there is nothing in Article 9.4 suggesting that authorities are entitled to render application of an 'all others' rate conditional on the fulfilment of some additional requirement". Viet Nam submits that the Viet Nam-wide entity should have received a rate calculated pursuant to Article 9.4.<sup>292</sup>

7.210. According to Viet Nam, the record before the Panel clearly shows that, in each administrative review at issue, the USDOC conducted a limited examination within the meaning of Article 6.10 of the Anti-Dumping Agreement, and that the Viet Nam-wide entity was never selected for individual examination. Viet Nam contends that, since it was not individually examined, the Viet Nam-wide entity should have received an anti-dumping duty rate calculated in a manner consistent with Article 9.4. Viet Nam also submits that, contrary to what is asserted by the United States, requests for reviews were made in the three administrative reviews at issue for companies presumed to be part of the Viet Nam-wide entity. According to Viet Nam, by arguing that Article 9.4 does not apply to the Viet Nam-wide entity because the entity was assigned a rate in previous segments of the proceedings, the United States attempts to read into Article 9.4 exceptions that do not exist. Viet Nam initially argued that a Member may not apply more than one rate to producers/exporters which were not individually examined. Viet Nam later acknowledged that it may be possible for an authority to assign multiple different rates to companies not individually examined, but maintained that all such rates must comply with Article 9.4.<sup>293</sup> Viet Nam concludes that the USDOC's failure to assign to the Viet Nam-wide entity a margin consistent with Article 9.4 constitutes a violation of Article 9.4 of the Anti-Dumping Agreement.<sup>294</sup>

#### 7.4.3.4.1.2 United States

7.211. The United States submits that the rate assigned to the Viet Nam-wide entity is not an "all others" rate subject to the limit provided for in Article 9.4. In the United States' view, the Viet Nam-wide entity was not assigned a country-wide rate, but was individually examined and received its own rate, i.e. a rate based on facts available, after being included in the examination in the anti-dumping duty proceeding and failing to cooperate. This rate was assigned to the companies that had not claimed or established that they were free from government control and were thus properly considered to be parts of the single government entity that the USDOC identified as an "exporter" or "producer" consistent with Article 6.10 of the Agreement. According to the United States, Article 9.4 does not obligate Members to replace an existing WTO-consistent rate that was individually determined for an entity that had failed to cooperate in the proceeding, with a different rate that is based on an average rate of producers/exporters that fully cooperated. The United States further submits that Article 9.4 does not impose an obligation to calculate a "single" anti-dumping duty for producers/exporters not individually examined, but, as explained by the Appellate Body in *US – Hot Rolled Steel*, this provision simply identifies a maximum limit, or ceiling, which authorities shall not exceed in establishing an "all others" rate. According to the United States, the Anti-Dumping Agreement does not require that a particular label be assigned to the rate in effect for the Viet Nam-wide entity. The rate applied to the Viet Nam-government entity is not inconsistent with the obligations in the Agreement because it was the rate in effect, and neither the Viet Nam-government entity nor any Vietnamese companies that were part of the

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<sup>292</sup> Viet Nam's first written submission, paras. 158-174 (referring to Panel Report, *US – Shrimp (Viet Nam)*, para. 7.245).

<sup>293</sup> Viet Nam's first written submission, para. 159; second written submission, para. 51.

<sup>294</sup> Viet Nam's opening statement at the first meeting of the Panel, paras. 19-20; second written submission, paras. 51-53; opening statement at the second meeting of the Panel, paras. 15-17.



entity requested that the rate be changed. Because neither the Viet Nam-wide entity nor any constituent parts of the entity requested a change to the existing rate of the Viet Nam-wide entity, the USDOC's decision to apply that rate in the three administrative reviews at issue was not inconsistent with Article 9.4 of the Anti-Dumping Agreement.<sup>295</sup>

#### 7.4.3.4.2 Main arguments of the third parties

7.212. **China** concurs with the panel in *US – Shrimp (Viet Nam)* that nothing in Article 9.4 entitles authorities to render application of an "all others" rate conditional upon the fulfilment of some additional requirements, such as a separate rate test.<sup>296</sup> China opines that the Panel is not necessarily required to decide whether Article 9.4 requires a single "all others" rate, but will have to first determine whether the Viet Nam-wide entity was individually investigated. Should the answer be negative, the Panel could reach the conclusion that the United States acted inconsistently with Article 9.4 by assigning a rate based on facts available to the Viet Nam-wide entity.

7.213. The **European Union** is of the view that Article 9.4 does not require that there be a single "all others" rate. According to the European Union, Article 9.4 contains a ceiling on the amount of any rate applied, not on the number of different rates applied.<sup>297</sup>

7.214. **Thailand** submits that Article 9.4 does not require that there be a single "all others" rate provided that those rates are based on the different levels of cooperation established throughout the proceedings.<sup>298</sup>

#### 7.4.3.4.3 Evaluation by the Panel

7.215. Article 9.4 provides, in relevant part:

When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers ...

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

7.216. We note the link between Articles 6.10 and 9.4. Under the general rule set forth in Article 6.10, the investigating authorities must normally calculate an individual margin for "each known exporter or producer" (hereafter "producer/exporter") of the product at issue pursuant to Article 2 of the Anti-Dumping Agreement.<sup>299</sup> If the number of producers/exporters is too large for individual examination of each producer/exporter to be practicable, Article 6.10 allows the investigating authorities to "limit their examination" to a group of producers/exporters selected in accordance with the methods set out in Article 6.10 itself. In cases where the authority limits its examination under Article 6.10, an anti-dumping duty may nonetheless be applied to the producers/exporters not individually examined. Article 9.4 specifies that the rate of any such duty (commonly referred to as an "all others" duty rate) may not exceed a ceiling calculated pursuant to Article 9.4, i.e. the weighted average margin of dumping established for the selected, individually-examined producers/exporters, excluding zero, *de minimis* and facts available margins. It is noteworthy that, as the Appellate Body concluded in *US – Hot Rolled Steel*,

<sup>295</sup> United States' first written submission, paras. 189-200; second written submission, paras. 97-98; opening statement at the second meeting of the Panel, para. 34.

<sup>296</sup> China's third-party submission, paras. 21-24.

<sup>297</sup> European Union's response to Panel question No. 3, paras. 15-18.

<sup>298</sup> Thailand's response to Panel question No. 3, p. 1.

<sup>299</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 329.

Article 9.4 does not provide for a method to calculate an "all others rate", but establishes a "ceiling" for any such rate that may be applied to unexamined producers/exporters.<sup>300</sup>

7.217. The text of Article 9.4 provides that, when an investigating authority conducts a "limited examination" pursuant to the second sentence of Article 6.10, "any" rate assigned to non-investigated producers/exporters "shall not exceed" the ceiling calculated pursuant to Article 9.4. While we need not decide the issue, we observe that the word "any" may be understood to mean that there can be more than one rate assigned to non-investigated producers/exporters, and the parties do not disagree.<sup>301</sup> In addition, the use of the word "any" indicates that this limitation applies to all rates assigned to unexamined producers/exporters. Thus, in our view, Article 9.4 requires that the duty rate applied to all producers/exporters for which a dumping margin is not individually determined shall, without exception, not exceed the ceiling calculated pursuant to Article 9.4.

7.218. The main question we must address in order to resolve Viet Nam's claims under Article 9.4 of the Anti-Dumping Agreement is whether, in the three administrative reviews at issue, the United States was required by Article 9.4 to ensure that the duty rate applied to the Viet Nam-wide entity, and to any individual companies deemed to be part of that entity, did not exceed the ceiling calculated pursuant to that provision.

7.219. In each of the requests underlying the administrative reviews at issue, domestic producers listed companies which had been found to be part of the Viet Nam-wide entity in the previous administrative review.<sup>302</sup> This shows, in our view, that, in the fourth, fifth and sixth administrative reviews, US domestic producers requested a review of the rates applied to producers/exporters under the *Shrimp* order, including those applied to companies deemed to be part of the Viet Nam-wide entity. In addition, the notices of initiations for the three administrative reviews at issue indicate that each review was initiated with respect to most, if not all, Vietnamese producers/exporters, including those deemed to be part of the Viet Nam-wide entity.<sup>303</sup> The preliminary and final determinations show that each review was conducted with respect to the companies for which the review had been initiated, i.e. including companies deemed to be part of

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<sup>300</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 116.

<sup>301</sup> We note that Viet Nam's argumentation has evolved with respect to the number of rates that can potentially be assigned pursuant to Article 9.4. In its first written submission, Viet Nam argued that Article 9.4 "envisions the calculation of only a *single* anti-dumping duty for all producers/exporters not individually examined" (Viet Nam's first written submission, para. 159, emphasis original). The United States replied that Article 9.4 does not impose an obligation to calculate a "single" rate and that Viet Nam's interpretation would create a new obligation which is not present in that provision (United States' first written submission, para. 195). In its second written submission, Viet Nam concedes that "[i]t is possible for an authority to assign multiple duty rates to companies not individually investigated, but all rates must comply with the ceiling requirement of Article 9.4" (Viet Nam's second written submission, para. 51). We consider, therefore, that we do not need to rule on this issue.

<sup>302</sup> Requests for Administrative Reviews Submitted by Domestic Interested Parties – Fourth, Fifth and Sixth Administrative Reviews, Exhibit VN-81. Each request attaches an annex listing the Vietnamese producers/exporters for which the domestic producers request a review. A number of companies listed in these annexes are identified as belonging to the Viet Nam-wide entity in the final determination of the respective previous administrative review. Compare the requests for administrative review submitted by domestic interested parties in the fourth, fifth and sixth administrative reviews (Exhibit VN-81) with, respectively, the final determination in the third, fourth and fifth administrative reviews (Exhibits VN-72, footnote 19, p. 47197; VN-13, Appendix II, p. 47777; and VN-18, Issues and Decision Memorandum, Appendix II).

<sup>303</sup> See notice of initiation for the fourth administrative review, Exhibit VN-06, footnote 6 ("[i]f one of the below named companies does not qualify for a separate rate, all other exporters of shrimp from Vietnam who have not qualified for a separate rate are deemed to be covered by this review as part of the single Vietnam-wide entity of which the named exporters are a part"). A similar footnote is contained in the notice of initiation for the fifth administrative review (see Exhibit VN-10, footnote 4) and in the notice of initiation for the sixth administrative review, Exhibit VN-16, footnote 11. Note that there seems to be an error in this latter footnote which refers to the "PRC" while it is attached to "Socialist Republic of Vietnam ..." (p. 17831). Compare also the lists of Vietnamese companies contained in, respectively, (i) final determination in third administrative review (Exhibit VN-72, p. 47197, footnote 19) with notice of initiation for the fourth administrative review (Exhibit VN-06, pp. 13179-13182); (ii) final determination in the fourth administrative review (Exhibit VN-13, Appendix II) with notice of initiation for the fifth administrative review (Exhibit VN-10, pp. 18155-18158); and (iii) final determination in fifth administrative review (Exhibit VN-18, Issues and Decision Memorandum, Appendix II) with notice of initiation in the sixth administrative review (Exhibit VN-16, pp. 17381-17385).



the Viet Nam-wide entity.<sup>304</sup> We note that, in the preliminary determination in the fourth administrative review, the USDOC explicitly stated that "the Viet Nam-wide entity is now under review".<sup>305</sup> Finally, in each review, the USDOC assigned a cash deposit rate to the Viet Nam-wide entity and to the companies deemed to be part of that entity, i.e. the Viet Nam-wide entity rate of 25.76%.<sup>306</sup> Hence, it is clear to us that the three administrative reviews at issue covered the Viet Nam-wide entity *and* the companies deemed to be part of that entity.<sup>307</sup>

7.220. The evidence before the Panel further shows that in each review, the USDOC limited the number of producers/exporters for which it determined an individual margin, and that neither the Viet Nam-wide entity nor the companies deemed to be part of that entity were selected as mandatory respondents or otherwise individually examined under Article 6.10. In particular, the USDOC did not request information from the Viet Nam-wide entity or any of the companies deemed to be part of that entity in any of the reviews at issue.<sup>308</sup> Hence, the facts before us show that, in the fourth, fifth and sixth administrative reviews, the Viet Nam-wide entity and the companies deemed to constitute it were not individually examined and individual margins were not determined for them.

7.221. In light of the above, pursuant to Article 9.4, the Viet Nam-wide entity and the companies deemed to constitute that entity should have been assigned a rate not exceeding the ceiling calculated pursuant to this provision, namely a rate not exceeding the weighted-average margin of dumping established for the selected, individually-examined, exporters, excluding zero, *de minimis* and facts available margins.

7.222. We recall that, in each of the three administrative reviews at issue, unexamined Vietnamese exporters fell into two different categories. The first category, the "separate rate" companies, received a rate based on the simple or weighted average of the margins calculated for the mandatory respondents, excluding zero, *de minimis* or margins calculated using facts available. The separate rate was 3.92% in the fourth review, 1.03% in the fifth review and 0.88% in the sixth review. The separate rate applied in the fifth administrative review was equivalent to the ceiling calculated following the methodology set forth in Article 9.4,

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<sup>304</sup> The USDOC explains, in particular, that all companies for which the review was initiated were provided the opportunity to complete either the separate rate application or certification. See Preliminary determinations in fourth administrative review (Exhibit VN-09, p. 12209), fifth administrative review (Exhibit VN-15, p. 12059) and sixth administrative review (Exhibit VN-19, p. 13552).

<sup>305</sup> Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12209.

<sup>306</sup> In each review, the final determination reports this rate as the "Vietnam-wide Entity Rate". The final determination in the fourth administrative review indicates that "for all Vietnamese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnam-wide entity rate of 25.76 per cent" (Exhibit VN-13, p. 47777). A similar statement is found in the final determinations in the fifth and sixth administrative reviews (Exhibits VN-18, p. 56164 and VN-20, p. 55805, respectively). The final determinations in the fourth and fifth administrative reviews list the companies that constitute the Viet Nam-wide entity (Exhibits VN-13, Appendix II and VN-18, Issues and Decision Memorandum, Appendix II, respectively). The final determination in the sixth administrative review does not list the companies constituting the Viet Nam-wide entity, but indicates that 30 companies failed to demonstrate their eligibility for a separate rate and, therefore, were assigned the Viet Nam-wide entity rate of 25.76% (Exhibit VN-20, p. 55802).

<sup>307</sup> The United States seeks to draw a distinction between the Viet Nam-wide entity and its constituent parts. The United States suggests that for the rate applicable to the entity to be under review, a request for review must refer to both the constituent parts and the entity itself. (United States' comments on Viet Nam's response to Panel Question No. 62, para. 4: "Vietnam's response to Question 62 fails to demonstrate that the domestic interested party requested that Commerce change the amount of duty applicable to the Vietnam-government entity.") We note that the United States' own arguments indicate that the Viet Nam-wide entity is under review when a constituent part of that entity is under review, thus suggesting that no distinction is to be drawn between the entity and its constituent parts. See e.g. United States' response to Panel question No. 17(a) ("[b]ecause a part [i.e. Kim Anh Company Ltd] of the NME-government entity was selected for individual examination, the NME-government entity as a whole was under individual examination"); United States' response to Panel question No. 17(d)(i) ("[a] mandatory respondent ... may be either the Vietnam-government entity (if, for example, a company that is part of the Vietnam-government entity was selected for individual examination) or a company that is separate from that entity"); and United States' response to Panel question No. 19(a), para. 69) ("[t]he Vietnam-government entity was not selected as a mandatory respondent during any of the covered reviews. Notably, neither the Vietnam-government entity nor any of its constituent parts requested a review of the rate applicable to the Vietnam-government entity during the fourth, fifth or sixth administrative reviews"). The United States cannot have it both ways.

<sup>308</sup> Respondent selection memoranda in the fourth, fifth and sixth administrative reviews, Exhibits VN-07, VN-11, and VN-17.

given that it was calculated as the weighted average of the margins calculated for the mandatory respondents, excluding zero, *de minimis* or margins calculated using facts available.<sup>309</sup> The separate rates applied in the fourth and sixth administrative reviews were calculated as the simple, and not weighted, average of the margin calculated for the mandatory respondents in each case.<sup>310</sup> However, given that in each case the Viet Nam-wide entity rate exceeds by far the highest of the individual margins determined for mandatory respondents, it follows that it necessarily exceeds a weighted average of those rates, and thus the ceiling calculated pursuant to Article 9.4. In each of the three administrative reviews at issue, the Viet Nam-wide entity (and all of the companies deemed to be part of that entity in each review) was assigned a rate of 25.76%. Thus, in our view it is undisputable that, in the three reviews at issue, the rate applied to the Viet Nam-wide entity and its constituent companies exceeds the ceiling applicable under Article 9.4.

7.223. We find, therefore, that the duty rate applied to the Viet Nam-wide entity and the companies deemed to be part of that entity in the fourth, fifth and sixth administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement.

#### **7.4.3.5 Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement**

##### **7.4.3.5.1 Main arguments of the parties**

###### **7.4.3.5.1.1 Viet Nam**

7.224. Viet Nam argues that, pursuant to Article 6.8 of the Anti-Dumping Agreement, an investigating authority may make a determination on the basis of facts available only with respect to those interested parties from which necessary information was required. Viet Nam refers *inter alia* to the Appellate Body's statement that non-investigated exporters cannot, by definition, be "interested parties" pursuant to Article 6.8.<sup>311</sup> Viet Nam further submits that the necessary or essential information referred to in Article 6.8 is the information necessary to calculate an anti-dumping margin pursuant to Article 2 and can only be requested from parties individually investigated or reviewed by the investigating authority.<sup>312</sup> According to Viet Nam, in the three administrative reviews at issue, the USDOC applied a rate based on facts available with an adverse inference to companies which were not individually investigated and from which no necessary information was requested, thus acting inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.<sup>313</sup>

7.225. Viet Nam notes that the United States does not appear to dispute Viet Nam's legal interpretation of the obligations contained in Article 6.8, but reiterates the formalistic argument, rejected by the panel in *US – Shrimp (Viet Nam)*, that the rate applied to the Viet Nam-wide entity in subsequent reviews was not determined on the basis of facts available. Viet Nam asks the Panel to draw the same conclusion as the *US – Shrimp (Viet Nam)* panel and reject this argument because the USDOC had no factual basis to conclude that the Viet Nam-wide entity did not cooperate, since, as acknowledged by the United States, no information was requested from that entity. Second, the rate applied in each administrative review was the rate determined in the original investigation with adverse inference. Viet Nam also notes that the United States, while arguing that the Viet Nam-wide rate is not a facts available rate pursuant to Article 6.8, does not indicate pursuant to which provision that rate was calculated.<sup>314</sup>

<sup>309</sup> Final determination in the fifth administrative review, Exhibit VN-18, p. 56160.

<sup>310</sup> Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12211; preliminary determination in the sixth administrative review, Exhibit VN-19, p. 13552.

<sup>311</sup> Viet Nam's first written submission, paras. 175-178 (citing Appellate Body Report, *US – Zeroing (EC)*, para. 459).

<sup>312</sup> Viet Nam's first written submission, paras. 178-182 (referring to Panel Reports, *Argentina – Ceramic Tiles*, footnote 96 and *Egypt – Steel Rebar*, paras. 7.146 and 7.151).

<sup>313</sup> Viet Nam's first written submission, paras. 192-196.

<sup>314</sup> Viet Nam's first written submission, para. 189; opening statement at the first meeting of the Panel, paras. 21-23; second written submission, paras. 58-61; opening statement at the second meeting of the Panel, paras. 12-13.

#### 7.4.3.5.1.2 United States

7.226. The United States submits that Viet Nam's analysis is based on faulty facts because in the fourth, fifth and sixth administrative reviews the Viet Nam-wide entity was assigned the only rate it has ever received under this order. In the original investigation, the USDOC determined a Viet Nam-wide entity rate of 25.76% based on adverse facts available and continued to apply that rate to the entity in subsequent reviews. The United States argues that, as no party requested a review of the margin of dumping assigned to the Viet Nam-wide entity, the exporters subject to the Viet Nam-wide entity rate in effect expressed the view that the duties were appropriate. Hence, according to the United States, the USDOC's final duty assessment rate for exports by companies that are part of the Viet Nam-wide entity cannot be a facts available rate because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information during the covered reviews. It was based, instead, on the fact that the Viet Nam-wide entity and those companies that would be subject to the Viet Nam-wide entity rate did not seek a different rate, but accepted the existing rate of the Viet Nam-wide entity. Accordingly, the USDOC applied the existing rate of the Viet Nam-wide entity during the administrative reviews at issue, and was under no obligation to change the existing rate for final assessment purposes. The United States further submits that the panel in *US – Shrimp (Viet Nam)* misinterpreted Article 6.8 because this Article cannot apply when the USDOC did not make a finding based on facts available. According to the United States, the panel should have found that there was, in fact, no application of facts available. In the three reviews at issue in the present dispute, as in the third administrative review at issue in *US – Shrimp (Viet Nam)*, the USDOC made no findings on the basis of facts available, but it only applied to the Viet Nam-wide entity the only rate the entity had ever received. The United States submits that, when examination has been properly limited to fewer than all exporters, it is not inconsistent with the Anti-Dumping Agreement to apply a rate to unexamined exporters that is the only rate ever determined for those exporters.<sup>315</sup>

7.227. The United States also argues that Article 6.8 refers to "any interested party" and Article 6.11 defines "interested parties" as including, *inter alia*, "the government of exporting the exporting Member". Articles 6.8 and 6.11 thus expressly contemplate that an anti-dumping determination may be based on facts available whenever the government of an exporting Member does not cooperate during an investigation. The United States further submits that information held by the Government of Viet Nam was necessary for the proceedings at issue and that nothing in the Anti-Dumping Agreement prevents a Member from sending questionnaires to the government of an exporting Member. It is therefore fully consistent with the Anti-Dumping Agreement to use facts available if an NME government does not cooperate.<sup>316</sup>

#### 7.4.3.5.2 Main arguments of the third parties

7.228. **China** argues that, as in *US – Shrimp (Viet Nam)*, this Panel should reject the formalistic argument made by the United States that the Viet Nam-wide rate in the reviews at issue is not based on facts available, but is just the continuation of the rate assigned to the Viet Nam-wide entity in the original investigation.<sup>317</sup>

7.229. Referring to the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice*, the **European Union** argues that the Appellate Body did not find that facts available could never be used in the calculation of an "all others" rate. According to the European Union, this remains possible, provided that the investigating authority makes some additional effort to notify the producers/exporters to whom it applies this rate of the information required and the consequences of not providing it.<sup>318</sup>

#### 7.4.3.5.3 Evaluation by the Panel

7.230. The parties disagree as to whether, in the fourth, fifth and sixth administrative reviews, the USDOC made a determination on the basis of facts available within the meaning of Article 6.8 of the Anti-Dumping Agreement. We therefore address this question of fact first.

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<sup>315</sup> United States' first written submission, paras. 184-188; second written submission, paras. 95-96; opening statement at the second meeting of the Panel, para. 33.

<sup>316</sup> United States' second written submission, paras. 91-94.

<sup>317</sup> China's third-party submission, paras. 25-33.

<sup>318</sup> European Union's third-party submission, paras. 22-24.

7.231. We note, as recognized by both parties, that the Viet Nam-wide rate calculated during the original investigation was determined on the basis of facts available.<sup>319</sup> In the original investigation, the USDOC indicated that "the use of adverse facts available for the Vietnam-wide rate is appropriate" and that "as adverse facts available, we have applied a rate of 25.76%, a rate calculated in the initiation stage of the investigation from information provided in the petition ...".<sup>320</sup> Moreover, the rate calculated for the Viet Nam-wide entity during the second administrative review also appears to have been determined based on facts available.<sup>321</sup> In contrast, the record from the subsequent reviews contains no indication that the USDOC considered whether to use facts available or made a finding to the effect that it would use facts available to determine the rate for the Viet Nam-wide entity. In the third administrative review, the USDOC did not find that it was appropriate to apply facts available, but decided that it would "continue to assign the entity's current rate of 25.76%, the only rate ever determined for the Vietnam-wide entity in this proceeding".<sup>322</sup>

7.232. Similarly, the records of the fourth, fifth and sixth administrative reviews contain no reference to the USDOC having made a finding that the Viet Nam-wide entity or any of its constituent parts failed to provide information or to USDOC determining a rate based on facts available. In the fourth and fifth reviews, the final determinations indicate in essence that, since "no additional information" was placed on the record with respect to certain entities which "did not demonstrate that they operate free of government control", the USDOC is "applying a single antidumping rate, i.e., the Vietnam-wide entity rate to all ... exporters of subject merchandise from Vietnam".<sup>323</sup> In the final determination in the sixth administrative review, the USDOC also notes, with respect to the Viet Nam-wide entity, that 30 companies "failed to demonstrate their eligibility for a separate rate" and explains:

In NME proceedings, "'rates' may consist of a single dumping margin applicable to all exporters and producers". Therefore, we assigned the entity a rate of 25.76%, the only rate ever determined for the Vietnam-wide entity in this proceeding. We have not received any information since issuance of the *Preliminary Results* that provides a basis for reconsidering this determination, and will therefore continue to apply the entity rate of 25.76% to these 30 companies.<sup>324</sup>

7.233. Turning to the provision at issue in this claim, we note that Article 6.8 provides:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

It follows from the language of Article 6.8 that it imposes disciplines with respect to when, and under what conditions, "preliminary and final determinations, affirmative or negative may be made on the basis of facts available". The evidence on the record shows that, in the fourth, fifth and sixth administrative reviews, the USDOC did not resort to facts available, i.e. it did not make any

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<sup>319</sup> Viet Nam's first written submission, para. 109 and United States' first written submission, para. 185.

<sup>320</sup> Final determination and Issues and Decision Memorandum in the original investigation, Exhibit VN-04, p. 71008.

<sup>321</sup> In the notice from the second administrative review, the USDOC indicates that the Viet Nam-wide entity "did not cooperate to the best of its ability", and, therefore, the USDOC "continue[d] to find that it is appropriate to apply facts available with an adverse inference with respect to the Vietnam-Wide entity". (Final determination in the second administrative review, Exhibit VN-72, p. 52275.) In response to a question by the Panel, the United States clarifies that the rate in effect during the administrative reviews at issue "was based on the rate applied by Commerce to the Vietnam-government entity in the second review", i.e. the last review in which the USDOC made a finding of non-cooperation. (See United States' response to Panel question No. 56(a), para. 10.) The evidence on the record for the first administrative review does not allow us to determine whether the rate was calculated on the basis of facts available during that review. We make no judgment as to whether the rate assigned to the Viet Nam-wide entity in the original investigation and second administrative review was calculated in a manner consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

<sup>322</sup> Final determination in the third administrative review, Exhibit VN-72, p. 47195.

<sup>323</sup> Final determination in the fourth administrative review, Exhibit VN-13, p. 47773; final determination in the fifth administrative review, Exhibit VN-18, p. 56160.

<sup>324</sup> Final determination in the sixth administrative review, Exhibit VN-20, p. 55802. (footnote omitted)

"determination[], affirmative or negative ... on the basis of the facts available". While the USDOC continued to apply to the Viet Nam-wide entity "the entity's current rate and only rate ever determined for the entity in this proceeding"<sup>325</sup>, which rate was initially determined on the basis of facts available, we cannot conclude that the USDOC's actions in the three administrative reviews at issue constitute "preliminary and final determinations, affirmative or negative ... made on the basis of facts available" within the meaning of Article 6.8 of the Anti-Dumping Agreement. In our view, continuing to apply a rate determined in an earlier proceeding is not the same as making a determination in the later proceeding, and, therefore, does not give rise to a possible violation of Article 6.8.

7.234. We note that the panel in *US – Shrimp (Viet Nam)* was faced with a similar issue and reached a different conclusion. In that dispute, the panel acknowledged that, in the third administrative review under the *Shrimp* order, the USDOC "did not explicitly apply a facts available rate".<sup>326</sup> Observing that the rate ultimately assigned to the Viet Nam-wide entity in the third review was exactly the same as the rates that had previously been assigned in the original investigations and preceding administrative review, the panel considered, however, that "to fail to treat this rate as a facts available rate would elevate form over substance, and ignore the true factual circumstances surrounding the assignment of the rate".<sup>327</sup>

7.235. We respectfully disagree with the reasoning of the panel in *US – Shrimp (Viet Nam)*. As explained above, in our view, the application of Article 6.8 is triggered by an investigating authority resorting to "facts available" in the making of a determination. Given our view that, in the administrative reviews at issue, the USDOC did not make a determination within the meaning of Article 6.8, we are unable to find that the USDOC made a determination on the basis of facts available in the three administrative reviews at issue.

7.236. For the reasons set out above, we find that Viet Nam has failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth and sixth administrative review is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

## 7.5 Claims regarding Section 129(c)(1) of the US Uruguay Round Agreements Act

### 7.5.1 Introduction

7.237. Viet Nam claims that Section 129(c)(1) of the URAA is "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement.<sup>328</sup> Viet Nam argues that, by limiting the application of new, WTO-consistent, determinations made to implement adverse DSB recommendations and rulings to "entries" (imports) of subject merchandise made on or after the "implementation date" of the new determination, Section 129 precludes US authorities from implementing DSB recommendations and rulings with respect to any entries made prior to that date and that remain "unliquidated", which Viet Nam refers to as "prior unliquidated entries".<sup>329</sup> Specifically, Viet Nam argues that Section 129(c)(1) is inconsistent with:

- a. Article 1 of the Anti-Dumping Agreement, to the extent that Section 129(c)(1) results in the application of an anti-dumping measure despite the duty having been imposed pursuant to an investigation conducted in violation of the GATT 1994 and the Anti-Dumping Agreement.

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<sup>325</sup> See, for instance, preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12211. Similar language is found in the determinations for the fifth and sixth reviews.

<sup>326</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.277.

<sup>327</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.279.

<sup>328</sup> Viet Nam's first written submission, paras. 15, 42, 211-266, and 356. Although Viet Nam cites the GATT 1994 in respect of this claim in paras. 42 and 212 of its first written submission, Viet Nam has presented no arguments with respect to any claim of violation, on an independent basis, under the GATT 1994. Moreover, although Section 129 applies to the United States' implementation of DSB recommendations and rulings under the Anti-Dumping, SCM and Safeguard Agreements, Viet Nam only makes claims under the Anti-Dumping Agreement.

<sup>329</sup> Viet Nam defines "prior unliquidated entries" as imports made prior to the date on which the Section 129 determination takes effect (date of implementation) and for which there is no definitive assessment of anti-dumping duty liability (the final duty rate and duty have not yet been established) as of that date.

- b. Article 9.2 of the Anti-Dumping Agreement to the extent that Section 129(c)(1) results in the continued collection of anti-dumping duties at a level in excess of the "appropriate amount" (i.e., an amount determined consistently with the terms of the Anti-Dumping Agreement) on prior unliquidated entries,<sup>330</sup>
- c. Article 9.3 of the Anti-Dumping Agreement to the extent that Section 129(c)(1) results in the continued collection of anti-dumping duties at a level exceeding the margin of dumping established consistently with Article 2 of the Anti-Dumping Agreement on prior unliquidated entries,<sup>331</sup>
- d. Article 11.1 of the Anti-Dumping Agreement to the extent that Section 129(c)(1) results in the continued collection of anti-dumping duties with respect to prior unliquidated entries pursuant to anti-dumping duty orders that were revoked,<sup>332</sup>
- e. Article 18.1 of the Anti-Dumping Agreement, to the extent that Section 129(c)(1) results in the continued collection of duties amounts pursuant to an action that is performed without the authority provided in the GATT 1994.<sup>333</sup>

### 7.5.2 Factual background

7.238. Section 129 of the URAA (codified at 19 U.S.C. § 3538) sets forth a mechanism with respect to the implementation of DSB recommendations and rulings concerning anti-dumping and countervailing duty actions. Section 129(c)(1), the specific sub-paragraph challenged by Viet Nam, addresses the question of when revised determinations made pursuant to that mechanism ("Section 129 determinations") take effect. It provides that Section 129 determinations apply to entries made *on or after* the date on which the USTR directs the USDOC to revoke the order in totality or in part (in the case of a USITC Section 129 determination) or the date on which the USTR directs the USDOC to implement a USDOC Section 129 determination.<sup>334</sup> For ease of reference, we hereafter refer to these dates as the "implementation date".

7.239. Section 129 (codified at 19 U.S.C. § 3538) provides, in relevant part:

#### **§ 3538 Administrative action following WTO panel reports**

##### **(a) Action by the United States International Trade Commission**

###### **(1) Advisory report**

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 or title II of the Trade Act of 1974, as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body

<sup>330</sup> Viet Nam's first written submission, paras. 236-238.

<sup>331</sup> Viet Nam's first written submission, paras. 239-240.

<sup>332</sup> Viet Nam's first written submission, para. 241.

<sup>333</sup> Viet Nam's first written submission, paras. 212, 242-243; second written submission para. 85; response to Panel question No. 70.

<sup>334</sup> The USTR has authority to order implementation of all USDOC Section 129 determinations and to direct the USDOC to implement a revised USITC Section 129 determination by revoking the order in whole or in part. However, the USTR does not have authority to order implementation of a USITC Section 129 determination that does not result in at least partial revocation of the order. On the latter, see the discussion of the decision of the US Court of International Trade in *Tembec v. United States*, below in footnotes 373 and 398.

concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

...

**(3) Consultations on request for Commission determination**

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

**(4) Commission determination**

Notwithstanding any provision of the Tariff Act of 1930 ... or title II of the Trade Act of 1974... if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

**(5) Consultations on implementation of Commission determination**

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

**(6) Revocation of order**

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 ... or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

**(b) Action by administering authority<sup>335</sup>**

**(1) Consultations with administering authority and congressional committees**

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 ... is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

**(2) Determination by administering authority**

Notwithstanding any provision of the Tariff Act of 1930 ... the administering authority shall, within 180 days after receipt of a written

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<sup>335</sup> The USDOC is the "administering authority".

request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

**(3) Consultations before implementation**

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

**(4) Implementation of determination**

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

**(c) Effects of determinations; notice of implementation**

**(1) Effects of determinations**

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.]... that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

**(2) Notice of Implementation**

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930....

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974....

**(d) Opportunity for comment by interested parties**

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.<sup>336</sup>

7.240. In practice, the "implementation" of a Section 129 determination may result in: (i) the revocation of the order; or (ii) a change in the dumping calculation resulting in the USDOC

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<sup>336</sup> Section 129 of the URAA, 19 U.S.C. § 3538, Exhibit VN-31.



modifying the cash deposit rates that apply to entries of the subject product from the date of implementation going forward. Viet Nam refers to the cases in the first situation as "revocation" cases and to cases in the second as "modification" cases.

7.241. Although not challenged by Viet Nam, Section 123 of the URAA is also relevant to our consideration of Viet Nam's claims.<sup>337</sup> Section 123(g)(1) establishes a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practice to render them consistent with DSB recommendations and rulings.<sup>338</sup> Under that provision, the regulation or practice at issue may be amended, rescinded, or otherwise modified upon the fulfilment of a series of procedural steps, including consultations between the relevant agency, USTR, and the appropriate congressional committees. The changes go into effect no less than 60 days after the date on which the agency and USTR consult with the relevant congressional committees, unless the US President determines that an earlier date is in the national interest.

7.242. Also of relevance to Viet Nam's claims are the findings of the panel in an earlier dispute, *US – Section 129(c)(1) URAA*.<sup>339</sup> In that dispute, the panel considered and rejected claims by Canada that are similar to the claims of Viet Nam in the present dispute. Canada had claimed that Section 129(c)(1) was "as such" inconsistent with: (i) Articles VI:2, VI:3, and VI:6(a) of the GATT 1994; (ii) Articles 1, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement; (iii) Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement; and (iv) as a consequence of these violations, Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement, and Article XVI:4 of the WTO Agreement.<sup>340</sup> In its analysis, the panel considered the text of Section 129(c)(1), the Statement of Administrative Action that accompanied the URAA ("SAA"), as well as the application of Section 129(c)(1) by the United States Government as of that date. The panel found that Section 129(c)(1), on its face, does not address prior unliquidated entries, and only speaks to entries that take place on or after the implementation date. On this basis, it was clear to the panel that Section 129(c)(1) does not, by its express terms, require or preclude any particular action with respect to "prior unliquidated entries".<sup>341</sup> The panel further rejected Canada's arguments that Section 129(c)(1) had the effect of requiring and/or precluding certain actions with respect to prior unliquidated entries. The panel considered, *inter alia*, that it could not be inferred from the mere fact that a Section 129 determination establishing a new dumping margin or a new countervailable subsidy rate was not applicable to prior unliquidated entries that the USDOC would be required to retain excessive cash deposits collected on such entries, would be precluded from refunding such cash deposits, would be required to make administrative review determinations and assess definitive duties with respect to prior unliquidated entries on the basis of the previous, WTO inconsistent methodology, or would be precluded from making administrative review determinations and assessing definitive duties with respect to "prior unliquidated entries" on the basis of the new, WTO-consistent methodology.<sup>342</sup> The panel also reasoned that it could not be inferred from the mere fact that a revocation is not applicable to prior unliquidated entries that the

<sup>337</sup> Section 123 of the URAA, 19 U.S.C. § 3533, Exhibit US-10.

<sup>338</sup> The USITC is an independent agency of the United States Government; Section 123(g)(4) provides that Section 123(g) does not apply to any regulation or practice of the USITC.

<sup>339</sup> Panel Report, *US – Section 129(c)(1) URAA*.

<sup>340</sup> Canada alleged that Section 129(c)(1) "required", or had the effect of "requiring", the USDOC to:

- (a) conduct administrative reviews with respect to "prior unliquidated entries" after the implementation date pursuant to an anti-dumping or countervailing duty order found by the DSB to be WTO-inconsistent;
- (b) make administrative review determinations regarding dumping or subsidization, with respect to "prior unliquidated entries" after the implementation date pursuant to an anti-dumping or countervailing duty order found by the DSB to be WTO-inconsistent;
- (c) assess definitive duties with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent; and
- (d) retain cash deposits in respect of "prior unliquidated entries" after the implementation date at a level found by the DSB to be WTO-inconsistent.

Canada also alleged that section 129(c)(1) "precluded", or had the effect of "precluding", the USDOC from:

- (a) making administrative review determinations regarding dumping or subsidization with respect to "prior unliquidated entries" after the implementation date in a manner that was consistent with an adverse DSB ruling;
- (b) assessing definitive antidumping or countervailing duties with respect to "prior unliquidated entries" after the implementation date in a manner that was consistent with an adverse DSB ruling; and
- (c) refunding, after the implementation date, cash deposits collected on "prior unliquidated entries" pursuant to an antidumping or countervailing duty order found by the DSB to be WTO inconsistent.

(Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.31-6.32).

<sup>341</sup> Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.54-6.55 and footnote 101.

<sup>342</sup> Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.68-6.69.

USDOC would be required to retain cash deposits collected on such entries on the basis of the WTO-inconsistent order, would be precluded from refunding such cash deposits, would be required to conduct administrative reviews for such entries, would be required to make determinations with respect to such entries on the basis of the WTO-inconsistent order, or would be precluded from making such determinations and assessing definitive duties with respect to such entries in a manner consistent with WTO requirements. On this basis, the panel concluded that Canada had failed to establish that Section 129(c)(1) "mandated", as a matter of WTO law, the United States to take any of those actions or mandated it not to take any of those actions.<sup>343</sup> In light of these findings, the panel did not reach the issue of whether the actions alleged by Canada were inconsistent with the United States' obligations under the covered agreements.<sup>344</sup>

### 7.5.3 Main arguments of the parties

#### 7.5.3.1 Viet Nam

7.243. Viet Nam argues that Section 129 is the exclusive authority<sup>345</sup>, or the first point of inquiry<sup>346</sup>, under US law, for implementation of adverse DSB recommendations and rulings where implementation can be achieved by a new administrative determination without the need for statutory or regulatory amendment. Viet Nam notes that the Appellate Body has found that the date of liquidation, and not the date of entry, is the relevant parameter for assessing implementation of DSB recommendations and rulings.<sup>347</sup> Viet Nam argues that by providing that the determination takes effect only with respect to unliquidated entries made on or after the implementation date, Section 129(c)(1) prohibits the refund of duties on prior unliquidated entries and thus prevents the United States from implementing DSB recommendations and rulings with respect to those prior unliquidated entries.<sup>348</sup>

7.244. Viet Nam finds support for its interpretation of Section 129(c) as precluding implementation with respect to prior unliquidated entries in the SAA that accompanied the URAA<sup>349</sup> and in decisions of US courts – in particular the decision of the US Court of International Trade in *Corus Staal BV v. United States*.<sup>350</sup>

7.245. Viet Nam argues that the *US – Section 129(c)(1) URAA* panel erred in its interpretation of Section 129 and that this Panel has the benefit of several years of application of Section 129 which the previous panel did not have.<sup>351</sup> Viet Nam argues that the USDOC's application of Section 129 over these years shows a systematic and constant refusal by the USDOC to issue liquidation instructions that would extend the result of Section 129 determinations to prior unliquidated entries every time that the opportunity to do so arose, for both "modification" and "revocation" cases.<sup>352</sup>

7.246. Viet Nam submits that Sections 123 and 129 are distinct, and that Section 123 does not address and is not a remedy to the narrow legal effect of Section 129 determinations. Viet Nam argues that while it is possible for Section 123 and Section 129 to operate in sequence where a regulation or practice is first amended under Section 123 before it is applied to correct a specific action under Section 129, that is a "fact specific scenario that is neither automatic nor in any way

<sup>343</sup> Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.124-6.126.

<sup>344</sup> Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.127-6.128.

<sup>345</sup> Viet Nam's first written submission, paras. 211, 224-225; opening statement at the first meeting of the Panel, para. 28.

<sup>346</sup> Viet Nam's response to Panel question No. 26.

<sup>347</sup> Viet Nam's first written submission, para. 232 (citing to Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 261.

<sup>348</sup> Viet Nam's first written submission, paras. 211-252. In para. 213 of its first written submission, Viet Nam argues that Section 129(c)(1) "serves as an absolute legal bar to any refund of duties as prior unliquidated entries". In para. 223 of its first written submission, Viet Nam characterizes Section 129(c)(1) as an "express prohibition against duty refunds for prior unliquidated entries" and a "rule with no discretion at all" established by Congress.

<sup>349</sup> Viet Nam's first written submission, paras. 221-222 and 231 (referring to SAA, Exhibit VN-34).

<sup>350</sup> Viet Nam's first written submission, paras. 223-245; second written submission, paras. 62-67 (referring to *Corus Staal BV v. United States*, Court No. 07-00270, Slip Op. 07-140 (Ct. Int'l Trade, 19 Sept. 2007), Exhibit VN-36).

<sup>351</sup> Viet Nam's first written submission, para. 244.

<sup>352</sup> Viet Nam's first written submission, paras. 264-266; response to Panel question No. 50; second written submission, paras. 68-69.

diminishes Viet Nam's claim regarding the legal effect given Section 129 determinations". In addition, Viet Nam takes issue with the fact that, even in cases where Section 123 may bring implementation with respect to prior unliquidated entries, the USDOC retains excessive cash deposits well after the expiration of the "reasonable period of time" to comply with the DSB recommendations and rulings.<sup>353</sup> Likewise, Viet Nam considers that the fact that the United States might implement adverse DSB rulings and recommendations through future administrative reviews does not render Section 129 WTO-consistent.<sup>354</sup>

### 7.5.3.2 United States

7.247. The United States submits that Viet Nam's claims are without merit. The United States argues that Viet Nam fails to establish that Section 129(c)(1) mandates actions that are inconsistent with WTO obligations.<sup>355</sup>

7.248. Moreover, the United States contends that Viet Nam improperly assumes that implementation would necessarily be effectuated through Section 129, to the exclusion of other means of implementation, i.e. Section 123 or the adoption by Congress of a law having an impact on prior unliquidated entries. The United States argues that the US authorities have in the past assessed and liquidated prior unliquidated entries in a manner that is consistent with DSB recommendations and rulings by using these other mechanisms.<sup>356</sup> In addition, the United States argues that implementation could be effectuated through determinations in subsequent segments of the proceeding.<sup>357</sup> The United States explains that, for instance, the USDOC could change – and has in past instances changed – the methodology it applies in an administrative review conducted after the Section 129 implementation date (whether following action pursuant to Section 123 or not).<sup>358</sup> The United States argues that applying the mandatory/discretionary analytical approach to the facts at issue in this dispute, it is clear that nothing in Section 129(c)(1) mandates a breach of the US obligations under the covered agreements.<sup>359</sup> The United States contends that the same arguments that Viet Nam makes in this proceeding – that Section 129 is the exclusive authority under US law for the United States to comply with adverse DSB rulings, and that Section 129 is a legal bar against refunds for any WTO-inconsistent duties applicable to entries made before the implementation date – were rejected by the *US – Section 129(c)(1) URAA* panel.<sup>360</sup>

7.249. Finally, the United States submits that the provisions of the Anti-Dumping Agreement cited by Viet Nam do not impose any obligations with respect to the implementation of DSB recommendations and rulings. The United States considers that, in the anti-dumping context, the DSU is the only WTO agreement that addresses the obligation to implement DSB recommendations and rulings.<sup>361</sup>

### 7.5.4 Main arguments of the third parties

7.250. **China** agrees with Viet Nam that Section 129 is the only vehicle by which the United States implements adverse DSB recommendations and rulings regarding individual administrative reviews and that Section 129 is WTO-inconsistent for the reasons advanced by Viet Nam. China submits that the possibility that the US Congress may adopt new legislation cannot preclude other Members from establishing the WTO-inconsistency of existing US laws, practices, or particular measures. China further argues that, while the USDOC may change its regulations or practices pursuant to Section 123, this provision does not apply with respect to particular anti-dumping measures, and the United States cannot rely on broad policy changes

<sup>353</sup> Viet Nam's response to Panel question Nos. 26, 27, and 67.

<sup>354</sup> Viet Nam's response to Panel question No. 26 (referring, *inter alia*, to Appellate Body Report, *US – 1916 Act*, paras. 91 and 155).

<sup>355</sup> United States' first written submission, para. 104.

<sup>356</sup> United States' first written submission, paras. 96-97 and 109-112.

<sup>357</sup> United States' first written submission, para. 106.

<sup>358</sup> United States' first written submission, para. 120; second written submission, para. 39.

<sup>359</sup> United States' response to Panel question No. 30; second written submission, paras 47-52.

<sup>360</sup> United States' first written submission, paras. 94-95; second written submission, paras. 35-36.

<sup>361</sup> United States' first written submission, paras. 98-103; closing statement at the first meeting of the Panel, para. 3; second written submission, paras. 41-44.

under Section 123 as a means of avoiding its obligation to comply with DSB rulings in individual reviews under Section 129.<sup>362</sup>

7.251. Concerning the provisions cited by Viet Nam, China argues that a Member simultaneously bears obligations: (i) to conform with the covered agreements; and (ii) under Articles 19.4 and 21.1 and 21.3 of the DSU, when the DSB adopts a finding of inconsistency, to comply with the recommendations and rulings of the DSB. China argues that by failing to comply with the DSB rulings and recommendations, a Member not only violates the obligation under the provisions of DSU, but also remains in continued violation of the obligations under the relevant covered agreement.<sup>363</sup>

7.252. The **European Union** argues that the possibility of a municipal authority (e.g. the US Congress) revoking, modifying or countermanding the measure identified by the complaining Member exists in every case, and has no relevance to the WTO-consistency of the measure. The European Union considers that the possibility of US municipal authorities using another measure (Section 123) in order to ensure WTO-consistency may have some relevance to what the measure is. However, in the present dispute, the European Union is of the view that a consideration of Section 123 does not have any impact on the question of whether Section 129(c)(1) ensures compliance and is WTO-consistent.<sup>364</sup> The European Union also submits that "as such" claims require a higher threshold of evidence than "as applied" claims and recalls the Appellate Body's indication that the "mandatory/discretionary" distinction is not to be mechanically applied.<sup>365</sup> The European Union argues that the more mandatory (or less discretionary) something is, the more likely it is that it will lead to the WTO-inconsistent behaviour complained of, and the more likely it is that the measure itself is WTO-inconsistent. Conversely, the less mandatory something is, the less likely it is that it will lead to the WTO inconsistent behaviour complained of, and the less likely it is that the measure itself is WTO-inconsistent.<sup>366</sup>

7.253. Regarding the legal bases cited by Viet Nam for its claims, the European Union notes that the essence of Viet Nam's complaint is that Section 129(c)(1) does not ensure conformity with DSB recommendations and rulings. While Viet Nam might have been expected to make claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, or under Articles 3.7, 17.4, 21.1 or 21.3 of the DSU, the European Union considers that the type of claims made by Viet Nam can be framed differently, and the Panel has to consider whether or not the provisions cited by Viet Nam are adequate.<sup>367</sup>

7.254. **Japan** submits that Section 129 appears to be inconsistent "as such" with the Anti-Dumping Agreement. Japan argues that the text of Section 129 as a whole suggests that a Section 129 proceeding is meant to be the exclusive avenue pursuant to which the USDOC and USITC may bring anti-dumping measures into compliance with adopted recommendations and rulings. Japan adds that this interpretation is supported by the SAA and by US Court of International Trade findings that Section 129 precludes any relief with respect to prior unliquidated entries, even in revocation cases.<sup>368</sup> Japan argues that the United States' arguments regarding Section 123 and the possibility of Congressional action are unpersuasive. Japan argues that Section 123, by its terms, appears to apply only with respect to recommendations and rulings concerning a US regulation or practice and would not apply with respect to determinations in specific cases. Regarding the possibility that the US Congress could pass a new law that might have an impact on prior unliquidated entries, Japan submits that WTO Members always retain the ability to modify or abandon particular measures in the future. Japan contends, however, that that theoretical possibility does not preclude other Members from establishing that an existing law or practice is inconsistent with the covered agreements.

7.255. Japan argues that if, in certain specific circumstances, the statute pursuant to which a Member implements the recommendations and rulings of the DSB necessarily leads to a failure to comply after the expiration of the reasonable period of time, that statute would itself be

<sup>362</sup> China's third-party submission, paras. 39-46; response to Panel question No. 10.

<sup>363</sup> China's response to Panel question No. 12.

<sup>364</sup> European Union's response to Panel question No. 10.

<sup>365</sup> European Union's third-party submission, paras. 25-36.

<sup>366</sup> European Union's third-party submission, paras. 25-36; response to Panel question No. 11.

<sup>367</sup> European Union's response to Panel question No. 12.

<sup>368</sup> Japan's third-party submission, paras. 13-19 (referring to, *inter alia*, *Corus Staal BV v. United States*, Court No. 07-00270, Slip Op. 07-140 (Ct. Int'l Trade, 19 Sept. 2007), Exhibit VN-36).

inconsistent with the covered agreements. For this reason, Japan does not believe that Viet Nam must establish that Section 129(c)(1) necessarily leads to WTO-inconsistent action in all instances to succeed in its claim. Japan adds that the mandatory/discretionary distinction, which the Appellate Body cautioned should not be applied in a mechanistic fashion, does not come into play in the current dispute given that the United States only refers to the possibility that other, separate, measures (i.e. Section 123) may address prior unliquidated entries, rather than relying on the USDOC's possible discretion under Section 129 with respect to liquidation of prior unliquidated entries. Even if the Panel were to consider the "mandatory/discretionary" distinction relevant to Viet Nam's claim in this case, Japan believes that it would be sufficient for Viet Nam to demonstrate that the provision subject to challenge mandates, or leads to, WTO-inconsistent liquidation in certain specific circumstances.<sup>369</sup>

7.256. **Norway** recalls that the Appellate Body clarified in *US – Zeroing (Japan) (Article 21.5 – Japan)* that Members must comply with DSB rulings and recommendations no later than by the end of the reasonable period of time. Thus, for Norway, WTO-inconsistent measures affecting imports that entered an implementing Member's territory prior to the expiration of the reasonable period of time must be rectified by the end of that reasonable period of time.<sup>370</sup>

### 7.5.5 Evaluation by the Panel

7.257. We consider it appropriate to first examine whether Viet Nam has established, as a factual matter, that Section 129(c)(1) acts as a legal bar – or precludes – implementation of DSB recommendations and rulings with respect to prior unliquidated entries. If we find that Viet Nam has done so, we will consider whether this results in an inconsistency with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement. With respect to the latter, we note that Viet Nam relies on the finding of the Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* that the relevant date to assess implementation of DSB recommendations and rulings is the date on which the duty is assessed or collected, and that any action for the assessment or collection of duties after the expiry of the reasonable period of time must conform to the DSB's recommendations and rulings, irrespective of the date of importation.<sup>371</sup> Viet Nam relies on this finding to argue that when a US anti-dumping determination is found to be WTO-inconsistent, the United States must implement the DSB recommendations and rulings with respect to any entries that remain unliquidated as of the expiration of the reasonable period of time.

7.258. Before we turn to our consideration of Viet Nam's factual allegations concerning the operation of Section 129, it is important to highlight the fact that Viet Nam's challenge is limited to Section 129(c)(1). Viet Nam does not challenge any other provision of US law. As a result, we are not asked to consider whether other provisions of US law, by themselves or in combination with Section 129(c)(1), preclude US authorities from taking actions to comply with DSB recommendations and rulings with respect to prior unliquidated entries; we are only tasked with considering Viet Nam's contention that Section 129(c)(1) itself precludes such actions.

7.259. We begin our analysis of Viet Nam's claim with the text of Section 129(c)(1). Section 129(c)(1) sets out when revised determinations made pursuant to the Section 129 mechanism take effect. It defines the application of those determinations in terms of which entries are affected, providing that a Section 129 determination "shall apply with respect to unliquidated entries of the subject merchandise ... that are entered, or withdrawn from warehouse, for consumption *on or after*" the implementation date. As a result, Section 129 does not, on its face, have any effect with respect to prior unliquidated entries. Thus, it is clear to us, as it was to the *US – Section 129(c)(1) URAA* panel, that prior unliquidated entries are unaffected by a Section 129 determination. We agree with the conclusion reached by the *US – Section 129(c)(1) URAA* panel that Section 129(c)(1) "does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries".<sup>372</sup> It necessarily follows that

<sup>369</sup> Japan's third-party submission, paras. 13-19; third-party statement, paras. 3-8; response to Panel question Nos. 10-13.

<sup>370</sup> Norway's third-party statement, paras. 11-13 (citing Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 160-161).

<sup>371</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 153-197. See also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 286-355; and Panel Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 8.164-8.218; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 7.139-7.155.

<sup>372</sup> Panel Report, *US – Section 129(c)(1) URAA*, para. 6.55.

Section 129(c)(1) cannot be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries. The fact that, as alleged by Viet Nam, Section 129 may be the only explicit statutory provision governing the effective date of US Government determinations to implement DSB recommendations and rulings in our view cannot justify an interpretation of the statute that is unsupported by its terms.<sup>373</sup>

7.260. We note the *US – Section 129(c)(1) URAA* panel's view that it may well be the case that because Section 129(c)(1) limits the application of Section 129 determinations to entries that take place on or after the implementation date, prior unliquidated entries would remain subject to other provisions of US anti-dumping or countervailing duty laws which might, for instance, require the USDOC to assess definitive duties with respect to these prior unliquidated entries on the basis of an old, WTO-inconsistent methodology, or might preclude the USDOC from assessing duties with respect to such entries on the basis of the new, WTO-consistent methodology, but that, in such instances, it would not be because of Section 129(c)(1) that the USDOC would be required to take, or be precluded from taking, such actions, but because of those other provisions of US law.<sup>374</sup> We agree with this view, and recall once again that our mandate in this dispute is limited to examining the WTO-consistency of Section 129(c)(1).

7.261. Viet Nam also relies, in support of its interpretation of Section 129(c)(1), on the SAA, noting in particular the statement that "[u]nder 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the USTR's direction would remain subject to potential duty liability".<sup>375</sup> The SAA is an authoritative statement on the interpretation of the URAA, adopted by the US Congress at the time of the adoption of the latter.<sup>376</sup> It indicates, in respect of Section 129(c)(1), *inter alia*, that:

Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty

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<sup>373</sup> Viet Nam further argues that the US Congress' failure to provide the USTR with authority to implement modified USITC affirmative injury determinations would be odd if Congress, in enacting Section 129, was truly leaving open the possibility under US law to extend the relief provided by adverse DSB recommendations and rulings. (Viet Nam's first written submission, paras. 252-254.) Viet Nam argues in this respect that where an affirmative USITC determination is modified from a finding of present material injury to a finding of threat of material injury, it creates a situation where unliquidated provisional measure deposits should be refunded pursuant to US law and to Article 10.4 of the Anti-Dumping Agreement. Viet Nam submits that in the absence of any legal authority to implement the modified USITC determination, there is no basis under US law for the USDOC to instruct USCBP to make such refunds. Viet Nam argues that if Congress' intent was simply not to ensure compliance with respect to prior unliquidated entries, as opposed to precluding compliance, it would not have completely denied any authority to implement modified USITC injury determinations as it would otherwise be nonsensical to assume that Congress only created this limitation for USITC determinations and not USDOC determinations. (Viet Nam's first written submission, paras. 253-254). In making this argument, Viet Nam relies on a finding of the Court in *Tembec v. United States* that "section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at least partial revocation of a related AD, CVD, or safeguards order". However, as we discuss below in footnote 398, Viet Nam misreads this holding as implying that the USTR has no authority to order the refund of duties where a WTO-inconsistent finding of present injury is replaced, in a Section 129 determination, by a finding of threat of injury; the Court explicitly refrains from deciding this question. Even if Viet Nam's interpretation of Section 129 is correct, there is nothing in this argument by Viet Nam that addresses the basic shortcoming in its position identified above, namely that Section 129 has no effect with respect to prior unliquidated entries. While it may be that the United States fails to implement adverse DSB recommendations and rulings with respect to prior unliquidated entries, such an outcome would presumably result from the operation of other provisions of US law; it does not result from the operation of Section 129(c).

<sup>374</sup> Panel Report, *US – Section 129(c)(1) URAA*, footnotes 112, 123, and 126.

<sup>375</sup> Viet Nam's second written submission, para. 66 (referring to SAA, Exhibit VN-34).

<sup>376</sup> Section 101(a)(2) of the URAA, 19 U.S.C. § 3511(a)(2), Exhibit VN-32; Section 102(d) of the URAA, 19 U.S.C. § 3512(d), Exhibit VN-33.

order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.<sup>377</sup>

7.262. The SAA does not contradict our reading of Section 129(c)(1). Rather, it merely confirms that which is readily apparent from the text of Section 129(c)(1), i.e. that implementation through Section 129 determinations only has effects with respect to entries that are made after the implementation date. Nothing in the SAA suggests that Section 129(c)(1) concerns itself with in any way, or itself has any effect on, prior unliquidated entries.<sup>378</sup>

7.263. Viet Nam also finds support for its interpretation of Section 129(c)(1) in USDOC practice since Section 129(c)(1) came into effect.<sup>379</sup> Viet Nam argues that this USDOC practice demonstrates that the *US – Section 129(c)(1) URAA* panel's interpretation of the provision was in error, as the US authorities' application of Section 129 to date "reveals a systematic and consistent refusal by the USDOC to issue liquidation instructions that would extend the results of its Section 129 determinations to prior unliquidated entries".<sup>380</sup> Viet Nam adds that in every single instance, whether in revocation or modification cases, where an opportunity (according to the United States' interpretation) presents itself for the USDOC to extend the benefit of a DSB ruling to prior unliquidated entries, the United States Government foregoes that opportunity.<sup>381</sup> Specifically, Viet Nam argues that in every case in which a Section 129 determination resulted in a revocation, the USDOC continued to retain anti-dumping deposits after the implementation date and then conducted a subsequent administrative review covering prior unliquidated entries that resulted in the assessment of final duties on those entries, notwithstanding the revocation of the order as a result of the Section 129 determination.<sup>382</sup> Likewise, Viet Nam submits that, although in some instances one must "disentangle the normal operation of US trade remedy laws from the restrictions imposed by Section 129", in every modification case it is possible to identify a course of conduct that is consistent with an interpretation that Section 129(c)(1) prohibits extending the benefits of DSB rulings to prior unliquidated entries. Viet Nam adds that this is most often seen in the refusal to refund excessive deposits on entries prior to the implementation date, and in automatic liquidation instructions that call for assessments at the pre-Section 129 rate.<sup>383</sup>

7.264. The application of Section 129(c)(1) to date does suggest that the United States Government, following a Section 129 proceeding resulting in a determination to revoke or modify an anti-dumping order, typically has not extended the effect of that decision to prior unliquidated entries. That said, we fail to see how the "pattern" alleged by Viet Nam would, in and of itself, demonstrate that the USDOC legally *cannot* "extend the benefits of implementation" (to use Viet Nam's formulation) to prior unliquidated entries. More importantly, it does not establish that the United States Government is precluded from doing so *by Section 129(c)(1)*, which is the only provision of US law challenged by Viet Nam.<sup>384</sup> Hence, we cannot agree with Viet Nam's assertion that the "consistent pattern" of the US Government not extending the effect of Section 129

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<sup>377</sup> SAA, Exhibit VN-34.

<sup>378</sup> Like the *US – Section 129(c)(1) URAA* panel, we note that the SAA affirmatively states that "prior unliquidated entries" would remain subject to potential duty liability and that it is conceivable that administrative reviews would be conducted with respect to "prior unliquidated entries" and that administrative review determinations would be made with respect to such entries on the basis of a WTO-inconsistent determination. Also like that panel, we consider that such actions, if taken, would not be taken because they were required by section 129(c)(1), but because they were required or allowed under other provisions of US law. (Panel Report, *US – Section 129(c)(1) URAA*, para. 6.110.)

<sup>379</sup> Viet Nam alleges that the USDOC alone has issued 21 Section 129 determinations affecting more than 40 distinct anti-dumping or countervailing duty orders. For the sake of clarity, we recall that Viet Nam challenges Section 129(c)(1) "as such", i.e. independently of any application of that provision in any particular case. Viet Nam relies on the USDOC practice as evidence supporting its interpretation of Section 129(c)(1), and that is how we consider this evidence.

<sup>380</sup> Viet Nam's first written submission, para. 257.

<sup>381</sup> Viet Nam's first written submission, para. 264; second written submission, para. 68.

<sup>382</sup> Viet Nam's first written submission, para. 265; second written submission, para. 68.

<sup>383</sup> Viet Nam's first written submission, para. 266. Viet Nam adds that "even in cases where the Section 129 margin is higher, the USDOC never issues instructions that change the deposits or assessments for prior unliquidated entries". In Exhibit VN-42, Viet Nam provides the Panel with extensive examples of how the United States has applied Section 129 since 2001.

<sup>384</sup> In fact, it would appear that the treatment of prior unliquidated entries is merely a result of other provisions of US law and of the prior determinations continuing to produce effects with respect to those entries.



determinations to prior unliquidated entries suggests "more than just a practice, but a recognition that Section 129 demands such treatment as a matter of U.S. law".<sup>385</sup>

7.265. Moreover, we note that the United States asserts that the USDOC can "implement" DSB recommendations and rulings with respect to prior unliquidated entries. According to the United States:

- a. The US Congress may adopt new legislation or amend existing legislation in a manner that will mean that prior unliquidated entries are liquidated pursuant to a WTO-consistent methodology;
- b. The US Administration can use Section 123 to amend a WTO-inconsistent USDOC practice, and, in setting the effective date of the modification, can effectively implement with respect to prior unliquidated entries.
- c. The USDOC could adopt a WTO-consistent methodology in a subsequent administrative review, i.e. another segment of the proceeding, thus effectively "implementing" with respect to prior unliquidated entries.<sup>386</sup>

7.266. In this regard, we note that the United States has identified instances in which the United States Government has used certain of these approaches.<sup>387</sup> The evidence submitted by the United States satisfies us that the United States Government is not precluded from implementing DSB recommendations and rulings with respect to prior unliquidated entries. In particular, the United States effectively demonstrated that in a situation in which a Section 129 determination is implemented with respect to entries made after that determination, and an administrative review is conducted with respect to prior unliquidated entries, the relevant authority (USDOC or USITC) may, in that subsequent administrative review, act in accordance with the relevant DSB recommendations and rulings. This would be possible whenever a WTO-consistent approach suggested by the relevant DSB recommendations and rulings is permitted by the relevant applicable law or regulation, or where the United States Government modifies the regulation or practice pursuant to Section 123.<sup>388</sup> The United States identifies instances in which a modification to USDOC practice (with respect to the USDOC's use of the zeroing methodology) was effected through a Section 129 determination as well as a Section 123 rule modification, which itself was applied in subsequent administrative reviews with respect to some prior unliquidated entries.<sup>389</sup>

<sup>385</sup> Viet Nam's first written submission, para. 264; Viet Nam uses similar language in its opening statement at the first meeting of the Panel, para. 34.

<sup>386</sup> United States' response to Panel question No. 29, paras. 100-106.

<sup>387</sup> United States' first written submission, para. 120.

<sup>388</sup> Again, we agree with the *US – Section 129(c)(1) URAA* panel when it stated that:

we find convincing the argument of the United States that a distinction is to be drawn between the section 129 determination, which, e.g., establishes a particular dumping margin or countervailable subsidy rate, and the methodologies developed and applied in a section 129 determination. As we understand the terms of section 129(c)(1), they limit the application of section 129 determinations to entries that take place on or after the implementation date. We see nothing in section 129(c)(1) which would similarly limit the use of methodologies developed and applied in a section 129 determination to such entries. Thus, section 129(c)(1) does not have the effect of precluding the application of methodologies developed in a section 129 determination in administrative reviews of "prior unliquidated entries".

(Panel Report, *US – Section 129(c)(1) URAA*, para. 6.72).

<sup>389</sup> United States' first written submission, para. 120 (referring to USDOC Section 129 Compilation, Exhibit VN-42, Determination 19-1 (*Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act: Stainless Steel Plate in Coils From Belgium, Steel Concrete Reinforcing Bars From Latvia, Purified Carboxymethylcellulose From Finland, Certain Pasta From Italy, Purified Carboxymethylcellulose From the Netherlands, Stainless Steel Wire Rod From Spain, Granular Polytetrafluoroethylene Resin From Italy, Stainless Steel Sheet and Strip in Coils From Japan*, 77 Fed. Reg. 36,257 (18 June 2012)), p. 36260; *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification*, 77 Fed. Reg. 8101 (14 February 2012), Exhibit VN-55; *Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46,024 (2 Aug. 2012) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46,377 (3 Aug. 2012), unchanged in 78 Fed. Reg. 9,364 (8 Feb. 2013), Exhibit US-19; and *Purified Carboxymethylcellulose from Finland: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47,036 (7 Aug. 2012), Exhibit US-20).



Viet Nam does not dispute the accuracy of the examples cited by the United States, but merely contests their relevance.<sup>390</sup> That the United States authorities proceeded in this fashion in our view disproves Viet Nam's argument that the United States Government is in some general way precluded from "implementing" DSB recommendations and rulings with respect to prior unliquidated entries. Moreover, it further confirms our view that Section 129 does not itself preclude the United States from implementing adverse DSB recommendations and rulings with respect to prior unliquidated entries.

7.267. Viet Nam also argues that decisions of US courts support its argument that Section 129 precludes implementation with respect to prior unliquidated entries. Although it suggests that there are a number of relevant US court decisions, Viet Nam only refers to the decisions of the US Court of International Trade in *Corus Staal BV v. United States* and – but only in passing – in *Tembec v. United States*. Viet Nam argues that the ruling of the Court in *Corus Staal BV v. United States* stands for the proposition that "the statutory language of Section 129 'explicitly' prevents any duty refunds prior to the USTR implementation date, and thus an importer who has any entries prior to the effective date 'cannot obtain relief under the current statutory scheme'".<sup>391</sup> Viet Nam also asserts that:

appeals before U.S. courts seeking to give legal effect to revocations issued as a result of Section 129 determinations to address prior unliquidated entries have been consistently swept aside. U.S. courts have repeatedly explained that, *given the limited effective date of Section 129 determinations, there is no basis under U.S. law for finding an order invalid with respect to prior unliquidated entries*. The order remains valid as a matter of U.S. law and such entries are subject to potential liability regardless of the adverse DSB rulings and recommendations. This is true even though, as a matter of U.S. law, under normal circumstances where an order is found invalid all deposits would be refunded.<sup>392</sup>

7.268. We find it noteworthy that in this description of the US court rulings it purports to rely on, Viet Nam does not actually assert that Section 129 precludes refunds of duties with respect to prior unliquidated entries. Rather, the description of the rulings by Viet Nam suggests that they are consistent with our reading of Section 129(c) as having no effect on prior unliquidated entries. And indeed, in our view, they are. The gist of the US Court of International Trade's ruling in *Corus Staal*<sup>393</sup> is that Section 129(c) does not *mandate* the refund of duties on prior unliquidated entries. In other words, the Court affirms that the effect of a revocation effectuated through the Section 129 mechanism is limited to entries made after the date of implementation. However nowhere does the Court suggest that Section 129 itself *precludes* the refund of prior unliquidated duties. In its opening statement at our first meeting, Viet Nam argued that the holding of the Court in *Corus Staal* is that "[b]ut for the explicit effective date under Section 129, one might find relief for prior unliquidated entries under the normal operation of U.S. trade law".<sup>394</sup> The statement of the Court of International Trade cited by Viet Nam does recognize a difference between the general operation of US law, where revocation of an order by a domestic court provides a legal basis to seek a refund with respect to prior unliquidated entries, and the operation of Section 129, which provides no legal basis for such action.<sup>395</sup> However, it does not follow from the fact that it

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<sup>390</sup> Viet Nam submits that the examples cited by the United States were "WTO-consistent action by coincidence" and only were a consequence of the normal operation of US law in that the rule had been changed through Section 123 action, and the USDOC only followed the modified rule in administrative reviews subsequent to the date of implementation of the Section 129 determination, thereby affecting prior unliquidated entries. Viet Nam argues that all that the examples cited by the United States show is that in some instances where a new regulation or practice is brought about by Section 123, that modification can be applied in some subsequent administrative review determination that may affect certain prior unliquidated entries. Viet Nam also argues that the United States' claims of WTO-consistent action in subsequent administrative reviews do not address the fact that the United States continues to hold on to excessive deposits between the period of the Section 129 determination and completion of the review. (Viet Nam's opening statement at the first meeting of the Panel, paras. 38-44; opening statement at the second meeting, para. 27.)

<sup>391</sup> Viet Nam's first written submission, para. 250.

<sup>392</sup> Viet Nam's first written submission, para. 232. (emphasis added)

<sup>393</sup> *Corus Staal BV v. United States*, Court No. 07-00270, Slip Op. 07-140 (Ct. Int'l Trade, 19 Sept. 2007), Exhibit VN-36.

<sup>394</sup> Viet Nam's opening statement at the first meeting, para. 35.

<sup>395</sup> In its findings, the Court indicates that:

does not provide for such refunds that Section 129(c)(1) precludes them, as Viet Nam alleges. In the absence of Section 129(c)(1), Section 129 would simply be without any definition of the temporal scope of application of Section 129 determinations.<sup>396</sup> This would not, in our view, demonstrate that Section 129(c)(1) prohibits the refund of cash deposits on prior unliquidated entries.

7.269. The decision of the US Court of International Trade in *Tembec v United States*, which Viet Nam also refers to in passing<sup>397</sup>, also merely confirms that Section 129 has limited effects. It does not suggest that Section 129(c)(1) precludes the US authorities from "implementing" with respect to prior unliquidated entries.<sup>398</sup> Hence in our view, this decision does not support Viet Nam's position.

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As a general rule, [the USDOC] cannot impose antidumping duties without a valid determination of dumping. See §§ 1673 & 1673d(c); see also 19 C.F.R. § 351.212. However, the statute that governs implementation of a WTO panel report explicitly states that revocation of an antidumping order applies prospectively on a date specified by the USTR. See § 3538(c); Section 129 Determination, 72 Fed.Reg. at 25,261. (*Corus Staal BV v. United States*, Court No. 07-00270, Slip Op. 07-140 (Ct. Int'l Trade 19 Sept. 2007), Exhibit VN-36, p. 5).

<sup>396</sup> The *US – Section 129(c)(1) URAA* panel rejected a similar argument by Canada as follows: if there were no section 129(c)(1), there would be no effective date for the application of section 129 determinations which the USTR directs to implement. ... Even disregarding the issue of the effective date and accepting that, in the absence of section 129(c)(1), a revocation would apply to "prior unliquidated entries" as well, we fail to see how this would demonstrate that section 129(c)(1) has the effect of precluding the Department of Commerce from returning cash deposits on "prior unliquidated entries", declining to hold administrative reviews for such entries and declining to assess duties with respect to such entries. (Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.86-6.87).

<sup>397</sup> *Tembec v. United States*, 441 F. Supp. 2d 1302 (Ct. Int'l Trade, 2006), Exhibit VN-37. As we note above, footnote 373, in Viet Nam's view, *Tembec* illustrates that:

In situations where the USITC modified its affirmative injury determination, such as altering its theory from one of present material injury to threat of material injury, USTR has no authority to direct any action under Section 129.

Congress' failure to provide authority to USTR to direct implementation of modified USITC affirmative injury determinations would be odd if Congress, in enacting Section 129, was truly leaving open the possibility under U.S. law to extend the relief provided by adverse DSB rulings to prior unliquidated entries. Rather, this failure confirms the language "shall ... on or after" means what it says.

(Viet Nam's first written submission, paras. 252-253; see also Viet Nam's second written submission, para. 67).

<sup>398</sup> In its decision in *Tembec v. United States*, the Court of International Trade held that Section 129 does not grant the USTR the authority to order the USDOC to "implement" revised affirmative USITC injury determinations made pursuant to Section 129(a) unless it results in the revocation of the order, in whole or in part. In that case, the USTR had ordered the implementation of a Section 129 affirmative threat of injury determination to replace a prior threat of injury determination that had been found WTO-inconsistent. The Court found that the USTR's order to the USDOC to implement the Section 129 determination was *ultra vires* and void. In arriving at this conclusion, the Court distinguished between the narrower authority granted to the USTR under Section 129(a) with respect to USITC Section 129 determinations, pursuant to which the USTR can only order the USDOC to "revoke" the underlying order in whole or in part, and the broader authority granted to the USTR under Section 129(b), under which the USTR may order the USDOC to "implement" a revised determination. The Court considered that the United States Congress had used narrower "revocation" language in Section 129(a) to reflect the "yes-or-no" nature of USITC determinations, given that implementation of WTO recommendations and rulings with respect to a USITC determination would necessarily result in revoking all or part of an existing order, if implementation were necessary at all. Adoption of WTO recommendations with respect to an affirmative USDOC determination, in contrast, might lead to changes in the applicable anti-dumping or countervailing duty margins, thereby necessitating the broader "implementation" language contained in Section 129(b). The Court expressly avoided deciding the issue of whether relief in the form of refunds of cash deposits would be available following issuance of a Section 129 determination containing a finding of threat of material injury replacing a prior, WTO-inconsistent, finding of present injury. The reasoning of the Court however indicates that, assuming *arguendo* that such a relief would be permissible under US law (the Court posits that it might be construed as a form of retrospective relief unavailable under Section 129), the USTR's power to direct the USDOC to revoke an order "*in part*" could allow it to order such refunds: the Court reasons that the USDOC "could implement the determination by revoking the portion of the outstanding order requiring retention of cash deposits collected during the investigation period". Hence, the Court's decision does not support – and could even be read as contradicting – Viet Nam's argument that in situations where the USITC modified an affirmative injury determination, such as altering its theory from one of present material injury to threat of material injury, the USTR has no authority to direct any action under Section 129.

7.270. In light of the foregoing, having taken into consideration the text of Section 129(c)(1), the SAA, the United States Government's application of Section 129(c)(1) in the years since it was adopted, and the US Court of International Trade decisions cited by Viet Nam, we conclude that Viet Nam has failed to establish that Section 129(c)(1) precludes, or acts as a legal bar to, "extending the benefits of implementation" to prior unliquidated entries. We note that we have undertaken an independent examination of Viet Nam's claims and of Section 129(c)(1), but we have arrived at conclusions similar to those of the *US – Section 129(c)(1) URAA* panel.

7.271. Having concluded that Viet Nam has failed to establish its factual allegation that Section 129(c)(1) precludes implementation with respect to prior unliquidated entries, we need not, and do not, consider Viet Nam's arguments regarding the consistency of Section 129(c)(1) with the provisions of the Anti-Dumping Agreement cited by Viet Nam.<sup>399</sup>

7.272. In light of the foregoing, we find that Viet Nam has not established that Section 129(c)(1) of the URAA is "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement.

## 7.6 Claims with respect to the sunset review

### 7.6.1 Introduction

7.273. Viet Nam claims that the USDOC's affirmative likelihood-of-dumping determination in the first sunset review is inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement. Viet Nam's challenges:

- a. the USDOC's reliance on WTO-inconsistent margins of dumping, which Viet Nam argues was inconsistent with Article 11.3 and constituted an improper establishment of facts and prevented an unbiased and objective evaluation of the facts, inconsistent with that provision and Article 17.6; and
- b. the USDOC's reliance on a presumption with respect to the decline in import volumes, as opposed to other factors, in reaching its likelihood-of-dumping determination, which Viet Nam argues was not supported by the facts and is an improper evaluation of changes in volumes based on the facts of the review, inconsistent with Articles 11.3 and 17.6.

7.274. The United States asks the Panel to reject Viet Nam's claims.

### 7.6.2 Factual background

7.275. Before addressing Viet Nam's claims, we start by setting out the relevant facts pertaining to the first sunset review under the *Shrimp* order.

7.276. Under US law, five years after the publication of an anti-dumping duty order, the USDOC and the USITC conduct a "sunset review" to determine, respectively, whether revocation of the order would be likely to lead to a continuation or recurrence of dumping ("likelihood-of-dumping" determination) and the continuation or recurrence of material injury ("likelihood-of-injury" determination). The order is revoked unless both the USDOC and the USITC make affirmative "likelihood" determinations.<sup>400</sup>

7.277. Viet Nam's claims concern the USDOC's likelihood-of-dumping determination in the first sunset review under the *Shrimp* order.

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<sup>399</sup> Because we do not examine Viet Nam's arguments on the WTO-consistency of Section 129(c)(1), we do not consider it necessary to address the United States' argument that Viet Nam's claims are outside the Panel's terms of reference, because Viet Nam complains of the United States' failure to implement DSB recommendations and rulings, but fails to make claims under the DSU, where obligations with respect to the implementation of DSB recommendations and rulings in the anti-dumping context are found. Moreover, we note that the parties have debated the issue of the continued relevance of the mandatory/discretionary distinction, but we do not find it necessary to pronounce ourselves on the continued relevance of this distinction or on its application to the facts before us.

<sup>400</sup> Sections 751 and 752 of the US Tariff Act of 1930, codified at 19 U.S.C. §1675, Exhibit US-04.

7.278. On 4 January 2010, the USDOC initiated a sunset review of the *Shrimp* order.<sup>401</sup> On 6 August 2010, the USDOC preliminarily determined that revocation of the *Shrimp* order was "likely to lead to continuation or recurrence of dumping".<sup>402</sup> In the Issues and Decision Memorandum accompanying the preliminary determination, the USDOC indicated that, when making a likelihood-of-dumping determination, it considers "the margins established in the investigations and/or reviews conducted during the sunset review period, as well as the volume of imports for the periods before and after the issuance of the order". It further stated that the USDOC "normally will determine" that revocation of the order is likely to lead to continuation or recurrence of dumping if one of three scenarios occurs: (i) dumping continued at any level above *de minimis* after the issuance of the order; (ii) imports of the subject merchandise ceased after issuance of the order; or (iii) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.<sup>403</sup> The USDOC then noted, with respect to the extent of dumping during the period following the issuance of the order (2005-2009) (the sunset review period), that it had "assigned positive rates for many Respondents during the four completed administrative reviews", adding that "[t]herefore, the Department has found dumping of the subject merchandise to exist after the issuance of the order, and that the revocation of the antidumping order is likely to lead to a continuation of dumping".<sup>404</sup>

7.279. With respect to import volumes, the USDOC reviewed public US import data for 2003-2009 and found that imports of subject merchandise from Viet Nam during the relevant period, 2005 through 2009, were 42.1, 35.9, 37.9, 46.7, 40.1 million kilograms, respectively, while they totalled 56.3 million kilograms in 2003, the year preceding the year in which the original anti-dumping investigation was initiated. While acknowledging certain recoveries in import volumes following the issuance of the order, the USDOC concluded nevertheless that "with the discipline of the order, imports fell after the initiation of the original investigation, and did not return to pre-initiation levels in any of the individual years or as a whole (an average of 40.5 million kilograms during the sunset review period)".<sup>405</sup>

7.280. The final determination, issued on 7 December 2010, confirmed the conclusions reached by the USDOC in its preliminary determination. In the final determination, after recalling its approach to determining likelihood-of-dumping, the USDOC found that:

both the positive dumping margins found for numerous companies reviewed, and the decline in import volume during the sunset review period following the initiation of the original investigation, consistent with the language of the statute and reflective of our practice as discussed in the statute and the Statement of Administrative Action ("SAA"), are highly probative that dumping is likely to continue or recur".<sup>406</sup>

7.281. The USDOC then addressed, and rejected, a number of arguments raised by Vietnamese interested parties concerning its assessment of dumping margins during the sunset review period. First, the USDOC indicated that contrary to the assertion of Vietnamese respondents, it had considered the zero and *de minimis* margins calculated for some of the mandatory respondents during the first three administrative reviews, adding however that because it determines likelihood-of-dumping on an order-wide basis, the existence of zero or *de minimis* margins does not by itself require it to reach a negative likelihood determination. The USDOC further noted that while Vietnamese respondents repeatedly claimed that dumping did not continue following the issuance of the order, they also "carefully qualif[ied] that claim by stating that only the 'vast majority' of the imports were not dumped". Therefore, in the USDOC's view, "by their own admission, Vietnamese Respondents [did] not dispute there was some dumping that occurred". The USDOC also faulted the Vietnamese interested parties for failing to address the fact that the two mandatory respondents in the first administrative review chose not to participate in that

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<sup>401</sup> Notice of initiation for the sunset review, Exhibit VN-08.

<sup>402</sup> Preliminary likelihood-of-dumping determination in the sunset review, Exhibit VN-12.

<sup>403</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 4.

<sup>404</sup> Issues and Decision Memorandum accompanying the preliminary likelihood-of-dumping determination in the sunset review, Exhibit VN-12, p. 5; Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 4.

<sup>405</sup> Issues and Decision Memorandum accompanying the preliminary likelihood-of-dumping determination in the sunset review, Exhibit VN-12, p. 6.

<sup>406</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 4.

review and received an adverse facts available margin of 25.76%, as part of the Viet Nam-wide entity, as a result. The USDOC added that it had also found positive dumping margins for the mandatory respondents in the fourth administrative review, and that while Vietnamese respondents argued that the only reason these margins were positive was the application of the zeroing methodology, they had failed to provide any evidentiary support for this claim. The USDOC concluded by stating that zeroing is not contrary to US law and by rejecting arguments by the Vietnamese interested parties concerning the separate rates in the four administrative reviews, on the basis that these rates "are presumed to be correct".<sup>407</sup>

7.282. The USDOC also reaffirmed its findings with respect to the evolution of import volumes during the 2003-2009 period. In its consideration of comments by interested parties, the USDOC first stated that the Vietnamese respondents had failed to articulate any rationale that would compel it to depart from its established practice to look at the full year prior to initiation of the investigation as the base year for comparison. It continued that while it acknowledged that there were certain recoveries in import volume following the issuance of the order, the record demonstrated, and it continued to find, that imports had fallen after the initiation of the original investigation, and "did not return to pre-investigation levels in any of the individual years, or as a whole".<sup>408</sup>

7.283. With respect to arguments made by Vietnamese respondents concerning "other factors", the USDOC recalled that under its Regulations, the burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. In the instant proceeding, the USDOC did not consider such other factors on the ground that Vietnamese respondents did not demonstrate their relevance. The USDOC indicated that the Vietnamese Respondents "did not make a timely good cause argument for other factors" and provided incomplete market share information as they failed to submit data for the last year of the sunset review period (2009). The USDOC stated that "[w]hile the Vietnamese Respondents speculate that import volume could have been higher, if not for the margins assigned to the separate rate companies or supply and demand issues, they have not demonstrated how these factors could have affected import volumes". Hence, it concluded, the "other factor arguments do not outweigh the likelihood analysis based on the existence of margins and decline of imports".<sup>409</sup>

7.284. In light of its consideration of both dumping and import volumes, the USDOC:

continue[d] to find that the evidence on the record indicates that dumping of shrimp from Vietnam is likely to continue, or recur, absent the discipline of the antidumping order because dumping occurred after the issuance of the order, and import volumes fell and have not recovered to the levels prior to the initiation of the investigation. Moreover, we find that the other factors alleged by the Vietnamese Respondents do not affect this finding.<sup>410</sup>

As in the preliminary determination, the USDOC concluded that, in the event the order were to be revoked, dumping was likely to continue or recur at the margins calculated during the original investigation.<sup>411</sup>

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<sup>407</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, pp. 4-5.

<sup>408</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 5.

<sup>409</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, pp. 4-5.

<sup>410</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 6.

<sup>411</sup> The USDOC reports the margins likely to prevail to the USITC. The rates calculated during the original investigation were as follows: mandatory respondents: CAMIMEX (5.24%), Seaprodex Min Hai (4.30%), and Min Phu (4.38%); separate rate respondents not individually examined: 4.57%; and Viet Nam-wide rate: 25.76%. (Final likelihood-of-dumping determination in the sunset review, Exhibit VN-14.)

### 7.6.3 Main arguments of the parties

#### 7.6.3.1 Viet Nam

7.285. With respect to the USDOC's reliance on WTO-inconsistent margins of dumping, Viet Nam refers to prior decisions in which the Appellate Body found that reliance in an Article 11.3 sunset review on margins of dumping determined using a methodology inconsistent with Article 2 of the Anti-Dumping Agreement results in the likelihood-of-dumping determination also being inconsistent with Article 11.3 of the Anti-Dumping Agreement.<sup>412</sup> Viet Nam adds that the United States misrepresents the findings of the Appellate Body when it claims that only exclusive reliance on WTO-inconsistent margins renders the results of a sunset review inconsistent with Article 11.3. In Viet Nam's view, the mere fact that the USDOC relied on WTO-inconsistent margins is sufficient to find that the sunset review determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement.<sup>413</sup>

7.286. Viet Nam argues that, in the sunset review determination at issue, the USDOC relied on margins of dumping which are inconsistent with the Anti-Dumping Agreement, in particular: (i) individual margins calculated with zeroing throughout the course of the *Shrimp* proceeding, as found by the *US – Shrimp (Viet Nam)* panel and as argued by Viet Nam in this dispute; (ii) a separate rate that was not supported by any facts relevant to the period of the review, was found contrary to US law by the US Court of International Trade in *Amanda Foods*, and is inconsistent with Article 9.4 for the reasons discussed by the *US – Shrimp (Viet Nam)* panel; and (iii) a Viet Nam-wide entity rate based on adverse facts available and applied to unknown and unidentified companies, and which was also found to be WTO-inconsistent in *US – Shrimp (Viet Nam)*.<sup>414</sup>

7.287. Viet Nam admits that the USDOC relied on two properly calculated facts available rates in the first administrative review, but considers that these two rates must be evaluated in light of the particular circumstances of the first administrative review. Viet Nam explains in this regard that virtually all of the potential respondents for which petitioners had requested a review reached agreement with the petitioners for the petitioners to withdraw the request for a review in exchange for cash payments by each of the respondents. As a result, the USDOC was left to choose mandatory respondents from among marginal exporters which led to the selection of the two mandatory respondents which, because of their relative lack of interest in the proceeding or the US market, did not cooperate in the review.<sup>415</sup> Viet Nam contends that it demonstrated to the Panel that, except for these two respondents' positive margins, dumping ceased completely after the first review when dumping margins are calculated in a manner consistent with the Anti-Dumping Agreement.<sup>416</sup>

7.288. In addition, Viet Nam argues that the United States misrepresents Viet Nam's position when it claims that the statement by Vietnamese respondents before the USDOC that the vast majority of sales were not dumped was an admission that some dumping continued to occur; one of the reasons Vietnamese respondents were not in a position to definitely claim that there were no dumped sales was that the USDOC limited the number of individually-examined respondents.<sup>417</sup>

7.289. Viet Nam argues that the USDOC assumed that declining import volumes are an indication of the likelihood of continued dumping, and that this assumption is unsound for several reasons, related in particular to the inherent uncertainty affecting retrospective duty assessment systems, an uncertainty which is further compounded for NMEs.<sup>418</sup> Viet Nam acknowledges that the volume of dumped imports is, together with dumping margins, an important factor for determining the likelihood of dumping continuing or recurring. However, import levels must be given context and a

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<sup>412</sup> Viet Nam's first written submission, paras. 295-298 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 128) and 303-307.

<sup>413</sup> Viet Nam's second written submission, paras. 90 and 99-113; opening statement at the second meeting of the Panel, paras. 37-38.

<sup>414</sup> Viet Nam's first written submission, paras. 269-280; opening statement at the first meeting of the Panel, para. 46, 48-49.

<sup>415</sup> Viet Nam's first written submission, para. 276; opening statement at the first meeting of the Panel, paras. 54-55; second written submission, para. 106.

<sup>416</sup> Viet Nam's opening statement at the second meeting of the Panel, para. 39.

<sup>417</sup> Viet Nam's opening statement at the first meeting of the Panel, paras. 58-60.

<sup>418</sup> Viet Nam's first written submission, paras. 281-289; second written submission, para. 93.

simple assumption that a decline in imports of virtually any magnitude can alone support a likelihood determination is neither objective nor unbiased; as stated by the Appellate Body, an authority cannot mechanically apply such an assumption, but must assess the role of other factors on a case-by-case basis.<sup>419</sup>

7.290. Viet Nam submits that, in the *Shrimp* sunset review, the decline in volumes before and after the imposition of anti-dumping duties becomes less relevant, and possibly irrelevant, when one considers that all of the cooperating individually-examined producers/exporter had substantial negative, or "safety" margins when their dumping margins are calculated in a WTO-consistent manner, a fact which supports a conclusion that the decline in overall volume was due to factors other than dumping duties.<sup>420</sup> According to Viet Nam, the USDOC would have reached the conclusion that dumping had ceased and that there had been a moderate decline in import levels if it had used WTO-consistent margins. In addition, reliance on WTO-inconsistent margins prevented Vietnamese exporters from making a critical argument, namely that throughout the sunset review period, the margin of sales above normal value was substantial for all individually-examined respondents. In Viet Nam's view, the real reason for any decline in exports is the chilling effect that the US retroactive duty assessment system has on imports subject to anti-dumping duties.<sup>421</sup>

### 7.6.3.2 United States

7.291. The United States argues that Article 11.3 does not prescribe the exact methodologies that authorities must follow for purposes of the likelihood determination and that attempts to read into Article 11.3 substantive obligations contained in other provisions of the Anti-Dumping Agreement have been rejected in prior decisions.<sup>422</sup>

7.292. The United States submits that Viet Nam contradicts itself when it claims that the USDOC relied "exclusively" on WTO-inconsistent margins, while claiming elsewhere that "almost all" of the margins were WTO-inconsistent. In addition, the United States argues that the USDOC noted in its determination that Vietnamese respondents themselves did not dispute that some dumping occurred.<sup>423</sup> In any event, the United States does not agree that the dumping margins the USDOC relied on in the sunset review are WTO-inconsistent. It submits that, in its determination, the USDOC relied on positive anti-dumping duty rates applied to numerous exporters during the four completed reviews, including two companies listed as among the largest exporters during the first administrative review who received facts available rates because they failed to cooperate, which, in the United States' view, alone provides sufficient support for the USDOC's conclusion that dumping continued during the sunset review period.<sup>424</sup> According to the United States, Viet Nam acknowledges that the margin applied to those two companies was calculated in a WTO-consistent manner and has provided no evidence supporting its assertions that these two companies were "small".<sup>425</sup> Moreover, the United States submits that other margins also were not calculated with zeroing, in particular the rate assigned to an uncooperative company during the original investigation, the separate rate calculated in the second and third review, and the Viet Nam-wide entity rate in the second, third and fourth reviews.<sup>426</sup> The United States also argues that so-called "safety margins" are not relevant under the Anti-Dumping Agreement.

7.293. The United States notes that the USDOC found that import volumes fell in the year preceding the final determination and did not return to pre-initiation levels, which suggests that the exporters were unable to sustain pre-investigation import levels without dumping. Moreover, contrary to what Viet Nam asserts, the change in import volumes was significant as it represented

<sup>419</sup> Viet Nam's first written submission, paras. 299-301 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 177-178 and 208-209); opening statement at the first meeting of the Panel, para. 62; second written submission, para. 94.

<sup>420</sup> Viet Nam's second written submission, para. 111. By "safety margins", Viet Nam means the amount by which the export price exceeded the normal value, expressed in percentage terms.

<sup>421</sup> Viet Nam's opening statement at the second meeting of the Panel, paras. 40-43.

<sup>422</sup> United States' first written submission, paras. 244-246; second written submission, para. 106.

<sup>423</sup> United States' first written submission, paras. 248-250; opening statement at the first meeting of the Panel, paras. 46-47; second written submission, paras. 107-109.

<sup>424</sup> United States' first written submission, para. 251-261; second written submission, para. 110; opening statement at the second meeting of the Panel, para. 49.

<sup>425</sup> United States' second written submission, paras. 108-109 (referring to Viet Nam's response to Panel question No. 32, paras. 98 and 101, and No. 35, para. 114).

<sup>426</sup> United States' opening statement at the second meeting of the Panel, paras. 47-50.



a decline of about 28% compared to the year preceding the investigation. In addition, the United States submits, declining import volumes were a part of the evidence relied upon by the USDOC, but not the exclusive basis for finding likelihood.<sup>427</sup> The United States submits that the arguments that Viet Nam presents to the Panel with a view to explaining the decline in import volume are speculative and *post hoc* and in any case do not undermine the evidence relied on by the USDOC. Thus, in the United States' view, Viet Nam has failed to demonstrate that the decline in import volumes is due to factors other than the discipline of the anti-dumping duty order.<sup>428</sup>

7.294. The United States finally contends that the Appellate Body report in *US – Anti-Dumping Measures on Oil Country Tubular Goods* confirms that Article 11.3 allows for alternative ways of determining likelihood-of-dumping even where a WTO-inconsistent methodology has been used at some point in the calculation of a dumping margin. According to the United States, where an investigating authority has relied not only on WTO-inconsistent margins of dumping, but also on other, sufficient evidentiary bases, such that the likelihood determination can stand on its own after any factors based on a WTO-inconsistent methodology have been removed, the likelihood finding should be considered consistent with Article 11.3 of the Anti-Dumping Agreement.<sup>429</sup>

#### 7.6.4 Main arguments of the third parties

7.295. **China** refers to previous Appellate Body reports which have held that when investigating authorities choose to rely on dumping margins in making their sunset review determinations, the calculation of these margins must be consistent with the Anti-Dumping Agreement. China notes that the United States itself admits that the USDOC "relied on" margins of dumping which were calculated in a WTO-inconsistent manner. In China's view, this fact necessarily invalidates the sunset determination.<sup>430</sup>

7.296. The **European Union** argues that, consistent with the findings in prior disputes, a sunset review determination that relies on dumping margins that are WTO-inconsistent, notably because of the use of zeroing, is itself WTO-inconsistent. The European Union submits that the question of what the sunset determination would be absent reliance on such margins is not a matter for an original panel. Hence, the appropriate way forward is for the panel to make a finding of inconsistency, and for the defending Member to consider how it wishes to implement the rulings and recommendations in a WTO-consistent manner.<sup>431</sup>

7.297. **Japan** recalls that the Appellate Body has determined that if an investigating authority relies on margins calculated with zeroing in its likelihood determination, that determination is inconsistent with Article 11.3. Regarding Viet Nam's claim that the USDOC's reliance on the decline in import volume was not unbiased and objective, Japan submits that the Panel should examine whether the USDOC engaged in a "case-specific analysis of the factors behind [the] decline in import volumes".<sup>432</sup> According to Japan, it would be inappropriate for the Panel to try to determine, based on a counterfactual analysis, whether the USDOC would have reached the same conclusion had it relied only on WTO-consistent factors; such an exercise would amount to an impermissible *de novo* review of the evidence before the investigating authority.<sup>433</sup>

7.298. **Norway** argues that a margin calculated with zeroing can never be the foundation for an investigating authority's likelihood-of-dumping determination. Norway further submits that a panel's role is not to redo the investigation and make its own determination, but to assess whether the investigating authority relied upon WTO-inconsistent margins and not whether other factors may justify the determination.<sup>434</sup>

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<sup>427</sup> United States' first written submission, paras. 262-263; second written submission, paras. 113-114; opening statement at the second meeting of the Panel, para. 51.

<sup>428</sup> United States' first written submission, paras. 264-268; second written submission, paras. 115-118.

<sup>429</sup> United States' first written submission, paras. 269-270; opening statement at the first meeting of the Panel, para. 50; opening statement at the second meeting of the Panel, para. 52.

<sup>430</sup> China's third-party submission, paras. 49-51; response to Panel question No. 14, paras. 27-28.

<sup>431</sup> European Union's third-party submission, para. 39.

<sup>432</sup> Japan's third-party submission, paras. 22-26 (quoting from Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 177).

<sup>433</sup> Japan's response to Panel question No. 14, para. 12.

<sup>434</sup> Norway's response to Panel question No. 14, paras. 3-6.



7.299. **Thailand** submits that a likelihood-of-dumping determination can be found to be WTO-consistent when the investigating authority's consideration of relevant factors identified to support the determination is WTO-consistent.<sup>435</sup>

### 7.6.5 Evaluation by the Panel

7.300. In its requests for findings, Viet Nam claims that the USDOC's likelihood-of-dumping determination in the sunset review at issue is inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement, suggesting that it is making an independent claim of violation under each provision.<sup>436</sup> Yet, at times, Viet Nam appears to only allege a violation of Article 11.3.<sup>437</sup>

7.301. Article 17.6 provides that:

In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

7.302. Article 17.6 sets forth the relevant standard of review applicable to a panel's examination of the consistency with the Agreement of a Member's anti-dumping measures. While it may inform the obligations set forth under other provisions of the Agreement, it does not, in itself, impose obligations upon investigating authorities. For this reason, insofar as Viet Nam may be making an independent claim of violation under that provision, we reject this claim.

7.303. Turning to Article 11.3, we note that this provision reads as follows:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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<sup>22</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.304. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body concluded that Article 11.3 lays down a mandatory rule with an exception:

Members are required to terminate an anti-dumping duty within five years of its imposition "unless" the following conditions are satisfied: first, that a review be

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<sup>435</sup> Thailand's response to Panel question No. 14.

<sup>436</sup> Viet Nam's first written submission, para. 356; second written submission, para. 139.

<sup>437</sup> For instance, Viet Nam's second written submission, para. 113:

Based on the above, Viet Nam believes that the panel must find that the Sunset Review conducted by the USDOC of the antidumping duty order on Certain Frozen Warmwater Shrimp from Viet Nam was inconsistent with U.S. obligations under Article 11.3 of the Anti-Dumping Agreement in that; (1) it relied on WTO-inconsistent margins of dumping which constituted an improper establishment of the facts and prevented an unbiased and objective evaluation of the proper facts; and (2) it relied on a volume presumption which itself is not supported by the facts and its improper evaluation of changes in volume based on the facts of the review.

initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.<sup>438</sup>

7.305. In the same dispute, the Appellate Body noted that Article 11.3 does not prescribe any specific methodology to be applied in making a "likelihood" determination, and that this provision does not identify any particular factors that authorities must take into account in making such a determination.<sup>439</sup> However, the Appellate Body did provide some guidance to authorities. In particular, it indicated that when making a determination pursuant to Article 11.3, investigating authorities "must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated".<sup>440</sup> In addition, Article 11.3 assigns an active rather than a passive decision-making role to the authorities; according to the Appellate Body, the words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an "appropriate degree of diligence" and arrive at a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination". Moreover, in view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be *probable* if the duty were terminated — and not simply if the evidence suggests that such a result might be *possible* or *plausible*.<sup>441</sup> Finally, a firm evidentiary foundation is required in each case for a proper likelihood determination, and such a determination "cannot be based solely on the mechanistic application of presumptions".<sup>442</sup>

7.306. Of direct relevance to Viet Nam's claims in the present dispute is the conclusion of panels and the Appellate Body in prior disputes that, while there is no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in considering likelihood-of-dumping, should an investigating authority choose to rely upon dumping margins in making a likelihood-of-dumping determination, the calculation of those margins must conform to the disciplines of the relevant provisions of the covered agreements. Reliance on margins calculated in a manner inconsistent with relevant provisions of the covered agreements results in a violation not only of those provisions, but also of Article 11.3.<sup>443</sup> We agree with this interpretation of Article 11.3.

7.307. It is undisputed in this case that the USDOC relied, in its likelihood-of-dumping determination, on certain margins that had been calculated with zeroing.<sup>444</sup> In particular, it is not disputed between the parties that the USDOC relied on the margins of dumping calculated for the mandatory respondents in the fourth administrative review. We have found above that the USDOC used zeroing in calculating these dumping margins and that for this reason, these margins are inconsistent with Article 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994. Moreover, we note that the final determinations in the second and third administrative reviews indicate that the USDOC used zeroing in calculating the margins of dumping for mandatory respondents in these reviews.<sup>445</sup> However, the USDOC does not seem to have relied on these

<sup>438</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104. (emphasis original)

<sup>439</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

<sup>440</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

<sup>441</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

<sup>442</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

<sup>443</sup> Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 127, and *US – Zeroing (Japan)*, para. 185; Panel Report, *US – Continued Zeroing*, paras. 7.195–7.196 (upheld in Appellate Body Report, *US – Continued Zeroing*, paras. 394 and 395(v)).

<sup>444</sup> The preliminary and final determinations do not list each of the margins of dumping which the USDOC relied upon, but we read the USDOC's reference to the "positive rates for many respondents during the four completed administrative reviews" (Issues and Decision Memorandum accompanying the preliminary likelihood-of-dumping determination in the sunset review, Exhibit VN-12, p. 5) as indicating that the USDOC relied on all the non-zero and/or non-*de minimis* rates assigned in the first four administrative reviews. See also the USDOC's reference in its final determination to the "positive dumping margins found for many companies reviewed". (Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 5.)

<sup>445</sup> See above, footnote 84, and final determinations in the second and third administrative reviews, Exhibit VN-72; final determination in the fourth administrative review, Exhibit VN-13). The *US – Shrimp (Viet Nam)* panel reached a similar conclusion and found that the margins were inconsistent with Article 2.4 of

margins or on the margin calculated for Fish One in the first administrative review, as each of these margins was either zero or *de minimis*.<sup>446</sup>

7.308. The USDOC also relied on the separate rate applied by the USDOC in the various proceedings. Viet Nam asserts that the separate rate applied in each of the proceedings is inconsistent with the United States' obligations. Viet Nam relies, in particular on the findings of the United States Court of International Trade in *Amanda Foods* and on the findings of the *US – Shrimp (Viet Nam)* panel, which found that the separate rates applied in the second and third administrative reviews were inconsistent with, respectively, US law and Article 9.4.<sup>447</sup> However, a ruling by a domestic court of a Member, applying the domestic law of that Member, cannot establish an inconsistency with WTO obligations. Moreover, for reasons set out above<sup>448</sup>, we are reluctant to incorporate, without more scrutiny of the facts and parties' arguments, the factual findings reached by a panel in a prior dispute.

7.309. Viet Nam does also attempt to establish the WTO-inconsistency of the separate rate applied in the first three administrative reviews independently. We note that the separate rate of 4.57% applied in the original investigation corresponded to the weighted average of the margins of dumping for the three mandatory respondents in the investigation, which themselves had been calculated with zeroing.<sup>449</sup> The same rate was then applied in the first, second and third administrative reviews.<sup>450</sup> The separate rate of 3.92% applied in the fourth administrative review corresponded to the simple average of the margins for mandatory respondents, which were calculated with zeroing. We have sympathy for Viet Nam's argument that a separate rate calculated on the basis of margins calculated with zeroing would be WTO-inconsistent.<sup>451</sup> We note however that all margins for mandatory respondents in the first, second and third administrative reviews were either zero, *de minimis*, or based on facts available. In such a situation, Article 9.4 does not indicate how to calculate the relevant ceiling; the *lacuna* in Article 9.4 identified in prior panels and the Appellate Body reports arises.<sup>452</sup> In the absence of a more developed discussion by the parties as to the relevant disciplines applicable under Article 9.4 in such circumstances and as to whether the use of margins calculated with zeroing to derive a rate which is subject to the Article 9.4 ceiling results in an inconsistency with that provision, and because it is ultimately not necessary for us to determine the WTO-consistency of all the rates relied upon by the USDOC, we do not reach a final conclusion as to whether the separate rates applied in the four first administrative reviews were determined consistently with the provisions of the Agreement.<sup>453</sup>

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the Anti-Dumping Agreement. (Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.80, 7.97). The United States does not contest that the USDOC used zeroing in calculating the dumping margins for mandatory respondents in the original investigation and the first three administrative reviews (United States' response to Panel question No. 37, para. 123). Viet Nam admits that the margins of dumping for the two mandatory respondents in the first administrative review were established consistently with the disciplines of the Agreement.

<sup>446</sup> Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 4.

<sup>447</sup> Viet Nam's first written submission, para. 272 (referring to *Amanda Foods (Vietnam) Ltd. v. United States*, Slip Op. 09-106 (Ct. In'tl Trade, 17 June 2010) and *Amanda Foods (Vietnam) Ltd. v. United States*, Slip Op. 10-69 (Ct. In'tl Trade, 29 September 2009); *Amanda Foods (Vietnam) Ltd., et. al v. United States*, Court No. 08-00301 Slip Op. 10-69 (Ct. In'tl Trade, 17 June 2010): Final Results of Redetermination Pursuant to Court Remand; *Amanda Foods (Vietnam) Ltd. et. al v. United States*, Consol. Court No. 09-00431, 807 F. Supp. 2d 1332 (Ct. In'tl Trade, 2011) Final Results of Redetermination Pursuant to Court Remand, Exhibits VN-52-54); Viet Nam' second written submission, para 106 (referring to Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.218-7.227).

<sup>448</sup> See above, para. 7.39.

<sup>449</sup> Final determination in the original investigation, Exhibit VN-04, p. 71009.

<sup>450</sup> Final determination in the first administrative review, p. 52054, Exhibit VN-72; final determination in the second administrative review, p. 52275 and Issues and Decision Memorandum accompanying the final determination in the second administrative review, Comment 6, Exhibit VN-72; and final determination in the third administrative review, p. 47195, Exhibit VN-72.

<sup>451</sup> Viet Nam's second written submission, para. 106.

<sup>452</sup> Appellate Body Reports, *US – Hot Rolled Steel*, para. 126; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 452. The margins calculated by the USDOC with zeroing in the first, second and third administrative review were all zero, *de minimis*, or based on facts available.

<sup>453</sup> The panel in *US – Shrimp (Viet Nam)* found that the separate rates applied in the second and third administrative reviews were inconsistent with Article 9.4 because in these reviews, the USDOC determined the maximum allowable "all others" rate, which it applied as "all others rate" (i.e. separate rate), on the basis of margins of dumping that themselves had been calculated with zeroing in the original investigation. (Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.217 and 7.227.)

7.310. Finally the USDOC relied on the rate of 25.76% assigned to the Viet Nam-wide entity in the first four administrative reviews. We have found that the Viet Nam-wide rate of 25.76% applied in the fourth administrative review was inconsistent with Articles 6.10, 9.2, and 9.4. However, the parties have not engaged with the facts in the first, second and third administrative reviews and we are reluctant to conclude, without more, that the application of the same rate in those segments of the *Shrimp* proceedings was WTO-inconsistent.

7.311. In sum, in its likelihood-of-dumping determination, the USDOC relied on certain WTO-inconsistent margins of dumping or rates, in particular: (i) the margins of dumping for the mandatory respondents in the fourth administrative review which were calculated with zeroing and therefore inconsistent with Article 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT; and (ii) the Viet Nam-wide entity rate applied in the fourth administrative review, which is inconsistent with Articles 6.10, 9.2 and 9.4.

7.312. In light of our understanding of the obligations under Article 11.3 as described above, the USDOC's reliance on these WTO-inconsistent margins renders its likelihood-of-dumping determination inconsistent with Article 11.3 of the Anti-Dumping Agreement.

7.313. In addition to arguing that the margins calculated with zeroing and the NME-wide entity rate are WTO-consistent, arguments which we have rejected above<sup>454</sup>, the United States' response to Viet Nam's arguments focuses on the fact that the USDOC relied on certain margins – those for the two mandatory respondents in the first administrative review – the WTO-consistency of which is not contested. Moreover, the United States relies on the alleged admission by Vietnamese producers/exporters before the USDOC that some dumping existed after the issuance of the order.<sup>455</sup>

7.314. In making this argument, the United States relies on the statement of the Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* that its finding in *US – Corrosion-Resistant Steel Sunset Review*:

does not stand for the proposition that a WTO-inconsistent methodology used for the calculation of a dumping margin will, in and of itself, taint a sunset review determination under Article 11.3. The only way the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority *relied upon* that margin of dumping to support its likelihood-of-dumping or likelihood-of injury determination.<sup>456</sup>

7.315. On its face, this statement merely confirms that it is the fact of relying on a WTO-inconsistent margin in the sunset review, rather than the mere calculation of a WTO-inconsistent margin in one of the underlying administrative reviews, that gives rise to a violation of Article 11.3.<sup>457</sup> We agree with this view.

7.316. We understand the United States to be arguing that the USDOC's reliance on certain WTO-inconsistent margins of dumping does not necessarily render its likelihood determination inconsistent with Article 11.3, and that we should uphold the determination if WTO-consistent factors relied upon by the USDOC in arriving at its determination "form an independent basis to demonstrate the continuing need for the discipline of the order".<sup>458</sup> The United States considers that irrespective of the USDOC's reliance on dumping margins that Viet Nam alleges are WTO-inconsistent, the determination stands on the basis of: (i) the alleged admission before the USDOC that some dumping continued after the imposition of the order; (ii) the presumably WTO-

<sup>454</sup> See above paras. 7.81. and 7.208.

<sup>455</sup> United States' first written submission, paras. 247-248; response to Panel question No. 35, para. 119.

<sup>456</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 181 (quoted in United States' first written submission, para. 270). (emphasis original)

<sup>457</sup> In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the panel found that, although the USDOC reported to the USITC the dumping margins at issue as "margins likely to prevail" in the event that the order were revoked, *it did not rely* on those margins in its likelihood determination, but rather relied on import volumes. The panel's findings are described in Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 174-175.

<sup>458</sup> United States' first written submission, footnote 355; response to Panel question No. 34(a), para. 116.

consistent margins for the two mandatory respondents in the first administrative review; and (iii) the USDOC's finding that import volumes fell after the initiation of the original investigation and did not return to pre-investigation levels.

7.317. We agree with the United States that an investigating authority's reliance on WTO-inconsistent factors may not always be fatal to the consistency of a likelihood-of-dumping determination with Article 11.3. This may be the case, for instance, if there are separate independent bases for a determination, at least one of which is not inconsistent with WTO obligations, and a reviewing panel can conclude that the challenged determination rested on each of those multiple independent bases. Here, however, the determination contains no indication that the USDOC considered that the rate applied to two uncooperative companies and the declining import volumes constituted an independent basis or bases for the USDOC's likelihood-of-dumping determination or that the determination rested on such basis or bases. To be sure, there is language (albeit qualified) in the USDOC's likelihood-of-dumping determination suggesting that, in general, the USDOC would reach an affirmative likelihood-of-dumping determination where any dumping continues after the imposition of the order, which suggests that the first two factors referred to by the United States in this regard could form the basis for an affirmative determination.<sup>459</sup> It is, however, clear from the determination itself that the USDOC's consideration of the existence of dumping in this instance rests upon all the different margins of dumping – margins for mandatory respondents, separate rate and Viet Nam-wide entity rate that – it had calculated in each of the reviews. The USDOC discusses these various dumping margins together, and does not consider the two margins for the uncooperative respondents separately, other than when rebutting an argument of Vietnamese interested parties.<sup>460</sup> Hence, we are unable to conclude in the present instance that the USDOC's determination rested upon WTO-consistent bases that were separate and independent from the WTO-inconsistent margins and rates upon which it relied.<sup>461</sup>

7.318. We arrive at a similar conclusion with respect to the United States' argument concerning the USDOC's evaluation of import volumes. The preliminary and final determinations indicate that the USDOC considered evolutions in import volumes together with dumping margins in an integrated manner.<sup>462</sup> There is no indication that the USDOC examined whether the changes in

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<sup>459</sup> The preliminary and final likelihood-of-dumping determinations indicate that:

The Department normally will determine that revocation of an antidumping duty order is likely to lead to continuation or recurrence of dumping where (a) dumping continued *at any level above de minimis after the issuance of the order*, (b) imports of the subject merchandise ceased after the issuance of the order, or (c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. *However* the SAA at 889-90, the House Report at 63, and the Senate Report at 52 state that, "*declining (or no) dumping margins, accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked*".

(Issues and Decision Memorandum accompanying the preliminary likelihood-of-dumping determination in the sunset review, Exhibit VN-12, p. 5; Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 2.) (italics added)

<sup>460</sup> We note that Viet Nam submits a lengthy argumentation regarding, *inter alia*, the reasons why the two mandatory respondents did not cooperate in the first administrative review and the existence of "safety" margins for mandatory respondents showing, according to Viet Nam, that dumping was unlikely to recur. (Viet Nam's first written submission, paras. 276-277, and opening statement at first substantive meeting, paras. 54-55.) In light of our findings, we do not consider it necessary to consider these arguments.

<sup>461</sup> We recall that our task is to determine whether the challenged likelihood-of-dumping determination is consistent with the Agreement; we are not to engage in speculation as to whether the USDOC could, or would, have reached the same result for different reasons.

<sup>462</sup> See Issues and Decision Memorandum accompanying the final likelihood-of-dumping determination in the sunset review, Exhibit VN-14, p. 4:

The Department determines that both the positive dumping margins found for numerous companies reviewed, and the decline in import volume during the sunset review period following the initiation of the original investigation, consistent with the language of the statute and reflective of our practice as discussed in the statute and the Statement of Administrative Action ("SAA"), are highly probative that dumping is likely to continue or recur.

See also p. 6 of Exhibit VN-14:

For these reasons, the Department continues to find that the evidence on the record indicates that dumping of shrimp from Vietnam is likely to continue, or recur, absent the discipline of the antidumping duty order because dumping occurred after the issuance of the order, and import volumes fell and have not recovered to the levels prior to the initiation of the investigation.

import volumes alone justified a determination of likelihood-of-dumping. For the same reasons as set out above, we cannot conclude that the USDOC's determination rested on its analysis of the evolution of import volumes independent of its consideration of dumping.

7.319. Given this conclusion, we do not consider it necessary or appropriate to address Viet Nam's argument that the USDOC's likelihood-of-dumping determination is inconsistent with Article 11.3 due to the USDOC's failure to carry out an unbiased and objective evaluation of the facts pertaining to the volume of imports, and for disregarding other factors in its analysis.<sup>463</sup>

7.320. In light of the foregoing, we find that the USDOC's likelihood-of-dumping determination in the first sunset review is inconsistent with the United States' obligations under Article 11.3 of the Anti-Dumping Agreement.

## 7.7 Claims with respect to company-specific revocations

### 7.7.1 Introduction

7.321. Viet Nam's claims concerns the denial, in the third, fourth, and fifth administrative reviews under the *Shrimp* order, of requests for company-specific revocations submitted by Vietnamese respondents.<sup>464</sup> Viet Nam claims that the United States acted inconsistently with Articles 11.1 and 11.2 of the Anti-Dumping Agreement due to the USDOC's refusal to revoke the *Shrimp* anti-dumping order with respect to the Vietnamese producers/exporters that submitted these requests.<sup>465</sup>

### 7.7.2 Factual background

7.322. Section 751(d) of the US Tariff Act of 1930, as amended (codified at 19 U.S.C. §1675 (d)), provides that the USDOC (which the statute refers to as the "administering authority") may "revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section". 19 U.S.C. §1675 subsection (a) governs the conduct of administrative reviews, whereas subsection (b) provides authority for the USDOC to conduct changed circumstances reviews.<sup>466</sup>

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Moreover, we find that the other factors alleged by the Vietnamese Respondents do not affect this finding.

<sup>463</sup> We note that the United States asserted in a comment on Viet Nam's closing statement at the second panel meeting made in the context of its comments on Viet Nam's responses to Panel questions after the second meeting of the Panel, that the USDOC has reopened the record of the sunset review based on new information of fraud that was not available at the time of the sunset review. (United States' comments on Viet Nam's responses to Panel questions after the second meeting, paras. 91-96 (referring to *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Reopening of the First Five-Year "Sunset" Review of the Antidumping Duty Order*, 79 Fed. Reg. 15310 (19 March 2014), Exhibit US-97). The United States asserted that it was introducing this new factual information before the Panel "[g]iven that Viet Nam has chosen to make an issue of the conduct of Vietnamese shrimp exporters" (Viet Nam had asserted in the context of its closing statement at the second meeting of the Panel that Vietnamese shrimp exporters had "played by the rules"). Because we do not consider that they are relevant to our examination of the consistency with Article 11.3 of the USDOC's first sunset review determination, we do not consider it necessary to decide whether the United States properly introduced these new facts before the Panel, but nevertheless note that para. 8 of the Panel's Working Procedures provides that, with certain exceptions – e.g. for purposes of rebuttal, answers to questions or comments the other party's answers – the parties were to submit all factual evidence to the Panel no later than during the first substantive meeting.

<sup>464</sup> Below, in paras. 7.356. -7.361. , we examine an objection raised by the United States to Viet Nam's claims with respect to the USDOC's actions in the third administrative review.

<sup>465</sup> Viet Nam's first written submission, para. 356. In its first written submission, Viet Nam asserted that absent revocation, individually-examined producers/exporters "are being denied their rights under Articles 2.1, 2.4.2, 9.3". However Viet Nam clarified that it is only pursuing claims of violation under Articles 11.1 and 11.2 (Viet Nam's response to Panel question No. 49, para. 168).

<sup>466</sup> Section 751 of the Act; 19 U.S.C. § 1675, Exhibit VN-47. 19 U.S.C. § 1675(b) provides, *inter alia*, that:

(b) Reviews based on changed circumstances

(1) In general

Whenever the administering authority [i.e. the USDOC] or the Commission [i.e. the USITC] receives information concerning, or a request from an interested party for a review of—

7.323. 19 C.F.R. §351.222 of the USDOC Regulations sets forth rules and procedures for the revocation of anti-dumping duty orders by the USDOC. At the time of the administrative reviews at issue<sup>467</sup>, an exporter or producer could request revocation of an order with regard to itself under Section 751(a) of the Act and Section 351.222(b) of the USDOC Regulations.<sup>468</sup> Section 351.222, "Revocation of orders; termination of suspended investigations", at the time provided as follows:

(a) *Introduction.* "Revocation" is a term of art that refers to the end of an antidumping or countervailing proceeding in which an order has been issued. "Termination" is the companion term for the end of a proceeding in which the investigation was suspended due to the acceptance of a suspension agreement. Generally, a revocation or termination may occur only after the Department or the Commission have conducted one or more reviews under section 751 of the Act. This section contains rules regarding requirements for a revocation or termination; and procedures that the Department will follow in determining whether to revoke an order or terminate a suspended investigation.

(b) *Revocation or termination based on absence of dumping.*

(1)(i) In determining whether to revoke an antidumping duty order or terminate a suspended antidumping investigation, the Secretary will consider:

(A) Whether all exporters and producers covered at the time of revocation by the order or the suspension agreement have sold the subject merchandise at not less than normal value for a period of at least three consecutive years; and

(B) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

(ii) If the Secretary determines, based upon the criteria in paragraphs (b)(1)(i)(A) and (B) of this section, that the antidumping duty order or suspension of the antidumping duty investigation is no longer warranted, the Secretary will revoke the order or terminate the investigation.

(2)(i) In determining whether to revoke an antidumping duty order in part, the Secretary will consider:

(A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;

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(A) a final affirmative determination that resulted in an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or in a countervailing duty order under this subtitle or section 1303 of this title,

(B) a suspension agreement accepted under section 1671c or 1673c of this title, or

(C) a final affirmative determination resulting from an investigation continued pursuant to section 1671c(g) or 1673c(g) of this title, which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority or the Commission (as the case may be) shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

...

(4) Limitation on period for review

In the absence of good cause shown—

...

(B) the administering authority may not review a determination made under section 1671d(a) or 1673d(a) of this title, or an investigation suspended under section 1671c or 1673c of this title, less than 24 months after the date of publication of notice of that determination or suspension.

<sup>467</sup> As noted below, the USDOC subsequently amended its regulations. However, Viet Nam's claim pertains to the USDOC's application and interpretation of Section 351.222(b) as it existed prior to these modifications and we therefore consider the statutory and regulatory scheme as it existed at the time of the USDOC actions at issue.

<sup>468</sup> Section 751(a) of the Act; 19 U.S.C. § 1675(a) and (d), Exhibit VN-47, 19 C.F.R. 351.222(b), Exhibit VN-58.

(B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and

(C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

(ii) If the Secretary determines, based upon the criteria in paragraphs (b)(2)(i)(A) through (C) of this section, that the antidumping duty order as to those producers or exporters is no longer warranted, the Secretary will revoke the order as to those producers or exporters.

(3) Revocation of nonproducing exporter.

In the case of an exporter that is not the producer of subject merchandise, the Secretary normally will revoke an order in part under paragraph (b)(2) of this section only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time-period that formed the basis for the revocation.

...

(d) *Treatment of unreviewed intervening years*

(1) *In general.* The Secretary will not revoke an order or terminate a suspended investigation under paragraphs (b) or (c) of this section unless the Secretary has conducted a review under this subpart of the first and third (or fifth) years of the three- and five-year consecutive time periods referred to in those paragraphs.

The Secretary need not have conducted a review of an intervening year (*see* paragraph (d)(2) of this section). However, except in the case of a revocation or termination under paragraph (c)(1) of this section (government abolition of countervailable subsidy programs), before revoking an order or terminating a suspended investigation, the Secretary must be satisfied that, during each of the three (or five) years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply.

(2) *Intervening year.* "Intervening year" means any year between the first and final year of the consecutive period on which revocation or termination is conditioned.

(e) *Request for revocation or termination*

(1) *Antidumping proceeding.*

During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension of an antidumping investigation, an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request:

(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review described in § 351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value;

(ii) The person's certification that, during each of the consecutive years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities; and



(iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation described in paragraph (b)(2)(iii) of this section.

...

(f) *Procedures.* (1) Upon receipt of a timely request for revocation or termination under paragraph (e) of this section, the Secretary will consider the request as including a request for an administrative review and will initiate and conduct a review under § 351.213.

(2) In addition to the requirements of § 351.221 regarding the conduct of an administrative review, the Secretary will:

(i) Publish with the notice of initiation under § 351.221(b)(1), notice of "Request for Revocation of Order (in part)" or "Request for Termination of Suspended Investigation" (whichever is applicable);

(ii) Conduct a verification under § 351.307;

(iii) Include in the preliminary results of review under § 351.221(b)(4) the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination are met;

(iv) If the Secretary decides that there is a reasonable basis to believe that the requirements for revocation or termination are met, publish with the notice of preliminary results of review under § 351.221(b)(4) notice of "Intent to Revoke Order (in Part)" or "Intent to Terminate Suspended Investigation" (whichever is applicable);

(v) Include in the final results of review under §351.221(b)(5) the Secretary's final decision whether the requirements for revocation or termination are met; and

(vi) If the Secretary determines that the requirements for revocation or termination are met, publish with the notice of final results of review under § 351.221(b)(5) notice of "Revocation of Order (in Part)" or "Termination of Suspended Investigation" (whichever is applicable).

(3) If the Secretary revokes an order in whole or in part, the Secretary will order the suspension of liquidation terminated for the merchandise covered by the revocation on the first day after the period under review, and will instruct the Customs Service to release any cash deposit or bond.

7.324. In 2012, the USDOC amended its regulations to eliminate 351.222(b)(2).<sup>469</sup>

7.325. Sections 351.216 and 351.222(g) of the USDOC Regulations, which were not affected by the 2012 modification, govern the conduct of changed circumstances reviews.<sup>470</sup> Section 351.222(g) provides as follows:

(g) *Revocation or termination based on changed circumstances.*

(1) The Secretary may revoke an order, in whole or in part, or terminate a suspended investigation if the Secretary concludes that:

(i) Producers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) or suspended investigation pertains have expressed a lack of interest in the order, in whole or in part, or suspended investigation (*see* section 782(h) of the Act); or

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<sup>469</sup> Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 77 Fed. Reg. 29875 (21 May 2012), Exhibit VN-59. The amendment took effect on 20 June 2012.

<sup>470</sup> 19 C.F.R. 351.216, Exhibit US-91; 19 C.F.R. 351.222(g), Exhibit VN-58.

(ii) Other changed circumstances sufficient to warrant revocation or termination exist.

(2) If at any time the Secretary concludes from the available information that changed circumstances sufficient to warrant revocation or termination may exist, the Secretary will conduct a changed circumstances review under § 351.216. ...

7.326. Section 351.216 sets forth the procedures applicable in changed circumstances reviews.<sup>471</sup>

7.327. For ease of reference, in our discussion below, we refer to revocation of the "duty" in its entirety (with respect to all foreign producers/exporters, including under Section 351.222(b)(1)) as an "order-wide" revocation and to revocation of a "duty" for an individual producer/exporter (including pursuant to Section 351.222(b)(2)) as a "company-specific" revocation.

7.328. In the third, fourth and fifth administrative reviews under the *Shrimp* order, a number of Vietnamese producers/exporters requested company-specific revocations pursuant to Section 751(a) of the Act and Section 351.222(b) of the USDOC Regulations. No requests for revocation under these provisions were made in the sixth administrative review.<sup>472</sup>

7.329. Fish One requested revocation of the order, as it concerned that company, in the context of the third administrative review<sup>473</sup>, based on its "likely" three consecutive years of sales "at not less than normal value". Fish One had received an individual margin of zero in the first administrative review, and was not selected as mandatory respondent but received a rate of zero as separate rate in the second administrative review.<sup>474</sup> Fish One's request stated that it was the USDOC's practice to treat companies that were not mandatory respondent in the interim period (here, the second review) the same as if they had obtained a zero margin for the period of review, and stated that it believed that it would again qualify for a zero margin in the third review.<sup>475</sup>

7.330. In its preliminary determination in the third administrative review, the USDOC determined not to revoke the order in respect of Fish One because Fish One had not been selected for individual examination.<sup>476</sup> The final determination confirmed the preliminary determination. In the Issues and Decision Memorandum accompanying its final determination, the USDOC stated that:

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<sup>471</sup> Order-wide revocation is also authorized under 19 U.S.C. § 1677m(h)(2) if producers accounting for substantially all of the production of the domestic like product express a lack of interest in the order (Exhibit US-95). Such revocation requests are examined in changed circumstances reviews.

<sup>472</sup> Notice of initiation for the sixth administrative review, Exhibit VN-16.

<sup>473</sup> Fish One's request for revocation in the third administrative review, Exhibit VN-82.

<sup>474</sup> This is because in the first, second and third administrative reviews, all mandatory respondents received a margin of zero, *de minimis*, or based on facts available. Since US law provided that the USDOC could not base the separate rate on these types of margins, but provided that the USDOC could resort to an alternative methodology, the USDOC decided to assign the most recent margin calculated as separate rate. For most separate rate respondents, this was the separate rate of 4.57% calculated in the original investigation. For Fish One, in the third administrative review, this was a rate of zero that had been calculated for that company in the first administrative review.

<sup>475</sup> Fish One's request for revocation in the third administrative review, Exhibit VN-82. Fish One's request, as well as each of the other requests submitted by Vietnamese producers/exporters, included a request to be included in the administrative review, and stated that they attached the certifications required by Section 351.222(e)(1) and, where relevant, the certifications required under the *Certain Fresh Cut Flowers from Colombia* procedure discussed below. Viet Nam provided the Panel with the text of the requests but only included in the documents submitted to the Panel the certifications provided by Camimex, Phuong Nam and Grobest/I-Mei in support of their requests for revocation in the fifth administrative review (requests for revocation submitted in the fifth administrative review, Exhibit VN-84).

<sup>476</sup> Preliminary determination in the third administrative review, Exhibit VN-61, p. 10011. The USDOC reasoned that: (i) the Act affords it broad discretion to limit the number of respondents selected for individual review when individual examination of all companies under review is impracticable, and (ii) although the Regulations setting out rules and requirements for revocation of an order were silent on their applicability in situations in which the USDOC limited its examination, the USDOC did not interpret them as requiring it to conduct an individual examination of Fish One given that it had limited its examination and Fish One was not one of the companies selected for individual examination. The USDOC added that to interpret the Regulations as Fish One proposed would undermine its authority under the Act to limit its examination in cases involving a large number of producers/exporters, and would require it to conduct individual reviews for any company requesting revocation.

For the final results of the instant review, we continue to find that our preliminary determination with respect to Fish One's revocation request is not contrary to the statute or Department policy. Because Fish One was not selected for individual review pursuant to 777A(c)(2)(B) of the Act, it was treated as a cooperative separate-rate respondent, and has received a separate rate pursuant to the statute and the Department's policy. The statute does not require the Department to select exporters for revocation purposes within the context of section 777A(c)(2)(B) of the Act. Rather, pursuant to that statutory provision, because of the large number of companies with revocation requests, the Department selected respondents for individual examination that could reasonably be examined. That Fish One requested revocation pursuant to the Department's regulations does not require the Department to individually review Fish One for revocation purposes, when the Department, as it did here, limits the individually reviewed companies under the statute.<sup>477</sup>

7.331. Seventeen Vietnamese respondents requested company-specific revocations in the context of the fourth administrative review:

- a. Fish One again requested a company-specific revocation of the order, based on its "likely four consecutive years of sales at not less than normal value". Fish One recalled that it had been selected for individual examination and had received a zero margin in the first administrative review, had not been selected for individual examination in the second and third administrative reviews, although it had received a margin of zero (as separate rate) in the second administrative review. In its request, Fish One stated that it was the USDOC's practice to treat companies that were not mandatory respondents in the interim period the same as if they had obtained a zero margin for the period of review, and indicated that it expected to receive again a zero margin in the third administrative review if selected for individual examination, and believed it would again qualify for a zero rate in the fourth administrative review.<sup>478</sup>
- b. Camimex and Minh Phu requested that the USDOC revoke the order with respect to them based on their likely three consecutive years of sales at not less than normal value. Their joint request stated that they both had been selected as mandatory respondents in the second and third administrative reviews, had received zero or *de minimis* margins in the second administrative review, and stated that they believed that they would again qualify to receive a zero or *de minimis* margin in the third administrative review, and if selected for individual examination in the fourth review, could demonstrate that they did not engage in dumping for three consecutive years.<sup>479</sup>
- c. In the same submission to the USDOC, 13 companies that had never been selected as mandatory respondents but received the separate rate in both the second and third administrative reviews also requested revocation from the order. In their request, these companies referred to a procedure for addressing requests for revocation by companies not selected as mandatory respondents developed by the USDOC in its

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<sup>477</sup> Issues and Decision Memorandum accompanying the final determination in the third administrative review, Exhibit VN-72, p. 62.

<sup>478</sup> Requests for revocation submitted in the fourth administrative review, Exhibit VN-83 (Fish One's request for revocation). Fish One's request stated that it attached certifications to the effect that it: (i) sold the subject merchandise in the United States at not less than normal value during the fourth review period; (ii) sold the subject merchandise in the United States in commercial quantities; and (iii) agreed to its immediate reinstatement in the anti-dumping order, should the USDOC conclude that it sold the subject merchandise at less than normal value subsequent to revocation.

<sup>479</sup> Requests for revocation submitted in the fourth administrative review, Exhibit VN-83 (request for revocation submitted by 15 respondents, including Minh Phu and Camimex). The request stated that it included certifications stating that Minh Phu and Camimex: (i) sold the subject merchandise in the United States at not less than normal value during the fourth review period; (ii) sold the subject merchandise in the United States in commercial quantities during the second, third and fourth review periods; and (iii) agreed to their immediate reinstatement in the anti-dumping order, should the USDOC conclude that they sold the subject merchandise at less than normal value subsequent to revocation.

proceeding on *Certain Fresh Cut Flowers from Colombia*. The request asserted that these 13 companies met the criteria set forth by the USDOC in that proceeding.<sup>480</sup>

- d. Grobest also requested revocation from the order, stating that it had requested to be reviewed but was not selected as a mandatory respondent in the second and third administrative reviews. Grobest also referred to the approach proposed by the USDOC in *Certain Fresh Cut Flowers from Colombia* for considering revocation of companies not selected for individual examination and stated that it met each criterion set forth by the USDOC in that proceeding.<sup>481</sup>

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<sup>480</sup> The request cited the following language from the USDOC's final determination in *Certain Fresh Cut Flowers from Colombia*:

we have decided to adopt the following procedure for addressing requests for revocation by small companies in this proceeding. We believe this procedure addresses many of the concerns raised by the parties and, at the same time, meets the resource constraints faced by the Department.

Under this procedure, companies that were not selected for examination in prior reviews (because of the large number of companies for which a review was requested) will have a mechanism for obtaining revocation on the basis of three consecutive years of sales at not less than normal value. The first opportunity for such a procedure will occur in the review of the period March 1, 1997 to February 28, 1998 (the eleventh review period). Companies that request a review for that period may also request revocation if they meet the following criteria: (1) a review was requested for the company in each of the two years immediately preceding the period of review in which revocation is requested, but the company was not selected for examination in either of those two preceding reviews; and 2) with the request for revocation the company (a) certifies that it sold subject merchandise at not less than normal value during the period described in 19 C.F.R. 351.213(e)(1) and for two consecutive years immediately preceding that period; (b) provides the certifications required under 19 C.F.R. 351.222(e)(ii) and (iii); and (c) submits a statement acknowledging that its entries are subject to assessment of AD duties at the non-selected respondent rate in one or both of the two preceding review periods. If a company meets these criteria, Commerce will examine the company's sales during the current period of review for purposes of determining a dumping margin in accordance with section 751(a) of the Act. In accordance with section 751(a)(2) of the Act, the results of that analysis will form the basis for any assessment of antidumping duties on entries during that period and for cash deposits. In addition, for the purposes of revocation only, Commerce will examine data for the two prior years to determine whether the company sold subject merchandise at not less than normal value. If Commerce determines that the company sold subject merchandise at not less than normal value in each of the three years examined and the other conditions of 19 CFR 351.222 are met, it will revoke the order with respect to that company.

The request states that the 13 companies requested reviews in each of the two years immediately preceding the period of review in which the revocation was requested (i.e. in the periods covered by the second and third administrative reviews). It attaches certifications for all 13 companies stating that they: (i) sold the subject merchandise in the United States at not less than normal value during the second, third and fourth review periods; (ii) sold the subject merchandise in the United States in commercial quantities during the second, third and fourth review periods; (iii) agreed to their immediate reinstatement in the anti-dumping order, should the USDOC conclude that they sold the subject merchandise at less than normal value subsequent to revocation; and (iv) acknowledged that their entries were subject to assessment of anti-dumping duties at the non-selected respondent rate set in the second and third administrative reviews. The request invited the USDOC to examine the companies' data for the two prior years to determine whether they companies sold subject merchandise at not less than the normal value. (Requests for revocation submitted in the fourth administrative review, Exhibit VN-83 (request for revocation submitted by 15 companies, including Minh Phu and Camimex)).

<sup>481</sup> Requests for revocation submitted in the fourth administrative review, Exhibit VN-83 (Grobest's request for revocation). The request stated that Grobest met each of the criteria set forth by the USDOC in *Certain Fresh Cut Flowers from Colombia*, that it attached the certification required under that procedure, and invited the USDOC to examine its data for the two prior years to determine whether it sold subject merchandise at not less than the normal value. Following litigation, Grobest obtained a court ruling that the USDOC individually examine it as voluntary respondent in the fourth administrative review. During the court-ordered individual examination, Grobest's successor in interest, I-Mei Frozen Foods, withdrew its request for individual review, including its request for revocation of the order. (Order, *Grobest & I Mei Industrial (Vietnam) Co., Ltd., v. United States*, Consol. Court No. 10-00238 (13 Sept. 2012), Exhibit US-11; *Grobest & I Mei Industrial (Vietnam) Co., Ltd., v. United States*, 853 F.Supp.2d 1352 (Ct. Int'l Trade, 2012), Exhibit US-12; Successor to Grobest & I-Mei Industrial (Vietnam) Co., Ltd., *Withdrawal of Request for Voluntary Respondent Review and Revocation of Antidumping Duty Order in Part* (12 Dec. 2012), Exhibit US-13; Response to 15 January 2013 Supplemental Questionnaire in Reexamination of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. Voluntary Responses (29 Jan. 2013), Exhibit US-14; Response by Successor to Grobest & I-Mei Industrial

7.332. The preliminary determination in the fourth administrative review indicated that of the Vietnamese respondents who initially requested revocation of the order, 13 subsequently withdrew their requests. The USDOC noted that of the companies that maintained their requests<sup>482</sup>, only Minh Phu was selected for individual examination. The USDOC preliminarily determined not to revoke the order with respect to Minh Phu as it had calculated a non-*de minimis* positive margin for the company in the review.<sup>483</sup> The remaining three companies received the separate rate. The USDOC preliminarily determined not to revoke the order with respect to them, for the reason that they had not been selected for individual examination.<sup>484</sup> The final determination maintained these decisions.<sup>485</sup> The Issues and Decision Memorandum accompanying the final determination further discussed the USDOC's determination not to revoke the order with respect to these respondents who were not selected for individual examination.<sup>486</sup> The USDOC explained that the procedure devised in *Certain Cut Flowers from Colombia*, through which non-individually-examined producers/exporters could obtain revocation, was actually never implemented in practice and was limited to that one proceeding and therefore was not applicable in the administrative review at issue. The USDOC also reiterated its interpretation of the Statute that its discretion to limit its examination was not limited by virtue of the provisions of the Regulations addressing revocations in the context of administrative reviews, adding:

That the non-selected revocation companies requested revocation pursuant to the Department's regulations does not require the Department to individually review these companies for revocation purposes, when the Department, as it did here, limits the individually reviewed companies under the statute.<sup>487</sup>

7.333. In the fifth administrative review, three companies requested company-specific revocations:

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(Vietnam) Co., Ltd., to Department's Supplemental Questionnaire and Petitioners' Objection to Rescission (13 Feb. 2013), Exhibit US-15). In its preliminary and final determinations in the re-conducted fourth administrative review, the USDOC rejected I-Mei's request for rescission of the individual examination, assigned a margin of 25.76% to I-Mei, found that the company did not meet the requirements of Section 351.222(b) and therefore determined not to revoke the order with respect to I-Mei. (*Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Re-conducted of Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd. and Intent Not to Revoke; 2008-2009*, 78 Fed. Reg. 57,352 (19 Sept. 2013) (Exhibit US-16); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Re-Conducted Administrative Review of Grobest & I-Mei Industrial (Vietnam) Co., Ltd and Intent Not To Revoke; 2008-2009*, 79 Fed. Reg. 15309 (19 March 2014), Exhibit US-90). The United States, citing I-Mei's request for rescission of the administrative review and withdrawal of the request for revocation, argues that Grobest withdrew its request. However, we note that Viet Nam's challenge concerns the USDOC's initial rejection of Grobest's request for revocation; as discussed below, the USDOC determined not to revoke the order with respect to Grobest on the basis that it was not individually examining Grobest. Moreover, the USDOC's determination in the court-ordered individual examination proceeding – which is not challenged by Viet Nam and therefore does not fall within our terms of reference – shows that the USDOC did not accept I-Mei's withdrawal of the request for revocation. Instead, as indicated above, the USDOC preliminarily rejected the request on the basis that it calculated a positive, non *de minimis*, margin of dumping for the company. This is also Viet Nam's reading of the evidence on record. (Viet Nam's response to Panel question No. 75.)

<sup>482</sup> In its determination, the USDOC indicated that five companies maintained their requests. However, only four companies actually maintained their request: Minh Phu Group, Camimex, Grobest, and Fish One. Seaprodex Minh Hai was listed as having maintained its revocation request in the preliminary and final determinations, but the Issues and Decision Memorandum accompanying the final determination (which preceded the final determination), footnote 86, indicates that Seaprodex Minh Hai should not have been listed. The United States clarified, in response to a question from the Panel, that Seaprodex Minh Hai had withdrawn its request for revocation (United States' response to Panel question No. 74, referring to Letter from Counsel for Seaprodex Minh Hai to Secretary of Commerce (31 July 1999), Exhibit US-96).

<sup>483</sup> Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12209.

<sup>484</sup> The USDOC's reasoning was essentially the same as in its decision rejecting Fish One's request in the third administrative review, namely that the USDOC is under no obligation to conduct individual examination of non-selected companies, or verify non-selected companies' data. (Preliminary determination in the fourth administrative review, Exhibit VN-09, p. 12209.)

<sup>485</sup> Final determination in the fourth administrative review, Exhibit VN-13, p. 47774.

<sup>486</sup> Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, Exhibit VN-13, pp. 15-17.

<sup>487</sup> Issues and Decision Memorandum accompanying the final determination in the fourth administrative review, Exhibit VN-13, pp. 16-17.

- a. In its request, Camimex stated that it had received a *de minimis* margin in the third administrative review but was not selected for individual examination in the fourth review. It referred to the USDOC's "policy and regulations" under 19 C.F.R. § 351.222(d) to treat companies that are not mandatory respondents in the interim period (in this case, the period of the fourth review) the same as if they had obtained a zero margin, and asserted its belief that it would obtain a zero or *de minimis* margin in the fifth review, in which case it would have demonstrated that it had sold the subject merchandise without dumping for at least three consecutive years.<sup>488</sup>
- b. In its request, Phuong Nam stated that it had been individually examined and received a *de minimis* margin in the third administrative review but was not selected for individual examination in the fourth review. Phuong Nam stated that it was the USDOC's policy to treat companies not selected for individual examination in the interim period (here, the fourth administrative review) the same as if they had obtained a zero margin, and that Phuong Nam believed that it would again qualify for a zero margin in the fifth review, in which case it would have demonstrated that it had sold the subject merchandise without dumping for at least three consecutive years.<sup>489</sup>
- c. In its request, Grobest noted that it had requested to be reviewed and cooperated in the third and fourth administrative reviews, but was not selected for individual examination; it also recalled its request for revocation in the fourth review, which remained unanswered. Grobest again referred to the procedure proposed by the USDOC in *Certain Fresh Cut Flowers from Colombia*, and asserted that it met the condition set forth by the USDOC in that proceeding.<sup>490</sup>

7.334. In its preliminary determination in the fifth administrative review, the USDOC noted that of the three companies requesting revocation, only Camimex was a mandatory respondent. The USDOC preliminarily determined not to revoke the order with respect to that company on the ground that it had calculated a positive, non-*de minimis*, dumping margin for Camimex in the review.<sup>491</sup> As in the third and fourth administrative reviews, the USDOC preliminarily determined not to revoke the order with respect to companies that it had not selected as mandatory respondents.<sup>492</sup> The final determination maintains these decisions.<sup>493</sup>

7.335. On the basis of the record before us, we understand that the USDOC determined not to revoke the order with respect to:

- a. Minh Phu (fourth administrative review) and Camimex (fifth administrative review), on the basis that it calculated a positive, non-*de minimis* margin for these companies in the corresponding administrative review; and

<sup>488</sup> Requests for revocation submitted in the fifth administrative review, Exhibit VN-84 (Camimex's request for revocation). Camimex's request included a certification stating that it: (i) sold the subject merchandise in the United States at not less than normal value during the fifth review period; (ii) sold the subject merchandise in the United States in commercial quantities during the third, fourth and fifth review periods; and (iii) agreed to its immediate reinstatement in the anti-dumping order, should the USDOC conclude that it sold the subject merchandise at less than normal value subsequent to revocation.

<sup>489</sup> Requests for revocation submitted in the fifth administrative review, Exhibit VN-84 (Phuong Nam's request for revocation). Phuong Nam's request attached certifications stating that it: (i) sold the subject merchandise in the United States at not less than normal value during the fifth review period; (ii) sold the subject merchandise in the United States in commercial quantities during the third, fourth and fifth review periods; and (iii) agreed to its immediate reinstatement in the anti-dumping order, should the USDOC conclude that it sold the subject merchandise at less than normal value subsequent to revocation.

<sup>490</sup> Requests for revocation submitted in the fifth administrative review, Exhibit VN-84 (Grobest's request for revocation). Grobest's request invited the USDOC to examine its data for the two prior years to determine whether it sold subject merchandise at not less than the normal value, consistent with the procedure developed by the USDOC in *Certain Fresh Cut Flowers from Colombia*. The request stated that Grobest met each criterion set forth by the USDOC in *Certain Fresh Cut Flowers from Colombia* and attached a certification pursuant to that procedure, which certification is included in the documentation provided by Viet Nam.

<sup>491</sup> Notice of initiation for the fifth administrative review, Exhibit VN-10; preliminary determination in the fifth administrative review, Exhibit VN-15, pp. 12057-12058; final determination in the fifth administrative review, Exhibit VN-18.

<sup>492</sup> Preliminary determination in the fifth administrative review, Exhibit VN-15, p. 12057.

<sup>493</sup> Final determination in the fifth administrative review, Exhibit VN-18, pp. 56160-56161.

- b. Fish One (third administrative review); Camimex, Grobest, and Fish One (fourth administrative review); and Grobest and Phuong Nam (fifth administrative review) on the basis that the requesting producer/exporter was not a mandatory respondent in the corresponding administrative review.<sup>494</sup>

### 7.7.3 Main arguments of the parties

#### 7.7.3.1 Viet Nam

7.336. Viet Nam is challenging the USDOC's rejection of requests for company-specific revocations submitted by Vietnamese producers/exporters in the administrative reviews at issue. Specifically, with respect to some of these company-specific requests, Viet Nam challenges the use of WTO-inconsistent margins of dumping in determining whether the producer/exporter at issue had ceased dumping for at least three consecutive years. With respect to others, Viet Nam challenges the USDOC's refusal to revoke the order in respect producers/exporters which it was not individually examining in the review at issue.<sup>495</sup>

7.337. Viet Nam indicates that with respect to Minh Phu and Camimex, which were individually examined in at least three consecutive reviews and had their requests rejected on the basis of the margins calculated for them, its claims pertain to the USDOC's reliance on dumping margins calculated with zeroing in rejecting the requests for revocation. Viet Nam invites the Panel to adopt the reasoning of the Appellate Body in disputes involving sunset review determinations, and to find that the USDOC's reliance on margins of dumping calculated with zeroing as a basis for rejecting requests for revocation was inconsistent with Articles 11.1 and 11.2 of the Anti-Dumping Agreement.<sup>496</sup>

7.338. Viet Nam's argumentation as it relates to the Vietnamese producers/exporters who were never individually examined or who were individually examined in fewer than three consecutive administrative reviews focuses on the fact that the USDOC refused to revoke the order in respect of these companies on the basis that they had not been selected for individual examination.<sup>497</sup> Viet Nam argues that the USDOC's failure to revoke the anti-dumping order with respect to companies that were denied the opportunity to demonstrate the absence of dumping because they were not individually examined violates Articles 11.1 and 11.2. Viet Nam further argues that the USDOC imposed a requirement that respondents be individually examined in three consecutive reviews to qualify for consideration for revocation, notwithstanding its determination that each such respondent was subject to a zero or *de minimis* separate rate in each of the reviews. In addition, Viet Nam argues that these companies would have been able to demonstrate the absence of dumping in three consecutive years if: (i) zeroing had not been used when calculating their individual margins (if and when they were individually examined), and (ii) the USDOC had applied a WTO-consistent separate rate in the administrative reviews at issue, i.e. a separate rate of zero or *de minimis*.<sup>498</sup>

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<sup>494</sup> Viet Nam confirms this understanding in its response to Panel question No. 73(c).

<sup>495</sup> Viet Nam's first written submission, para. 347; response to Panel question No. 50, para. 169; second written submission, para. 125.

<sup>496</sup> Viet Nam's first written submission, paras. 348-349; response to Panel question No. 43; second written submission, paras. 114, 116. Viet Nam states that it assumes, for the purpose of its claim, that the standard applied by the USDOC for company-specific revocations (i.e. absence of dumping for three consecutive years) is the appropriate standard under Article 11.2 (Viet Nam's first written submission, para. 347).

<sup>497</sup> Viet Nam's second written submission, para. 117. Viet Nam initially presented a distinct argumentation for three categories of exporters which requested revocation, namely: (i) exporters that were individually examined in three or more reviews, who would not have been found to have dumped in the reviews but for zeroing; (ii) exporters that were individually examined in less than three reviews and which believed they could demonstrate the absence of dumping for a period of three consecutive years; and (iii) exporters which were never individually examined but which believed they could demonstrate the absence of dumping for a period of at least three years. (Viet Nam's first written submission, paras. 325-327.) In its second submission, Viet Nam abandoned this categorization and as indicated above instead distinguished between Vietnamese producers/exporters whose requests were rejected on the basis that the USDOC calculated WTO-inconsistent positive margins for them and Vietnamese producers/exporters whose requests were rejected because they had not been individually examined.

<sup>498</sup> Viet Nam's response to Panel question No. 43.

7.339. In support of its claim, Viet Nam asserts that Article 11.2 imposes an obligation to revoke anti-dumping duties as to individual producers/exporters once the criteria set forth in that provision are met by those individual producers/exporters. Viet Nam argues in this respect that Article 11.1 seeks to limit the imposition of dumping duties both in terms of "time" ("only so long as") and scope ("to the extent necessary"), and notes that both Articles 11.2 and 11.3 address the time period during which anti-dumping duties may remain in effect. Viet Nam notes that Article 11.3, however, only addresses the issue of the "expiry" of duties and not "the extent" to which duties are continued. Viet Nam submits that "the extent" limitation not being addressed in Article 11.3, it must necessarily be addressed under Article 11.2. Viet Nam notes that this is contemplated by Article 11.2 in that it envisages duties not only being "removed" but also "varied". Viet Nam argues that, if they are to have meaning, both the terms "extent" and "varied" must be read as permitting changes in both the exporters and products subject to anti-dumping duties.<sup>499</sup> Viet Nam also argues that the reference to "any interested parties" in Article 11.2 supports its contention that Article 11.2 applies to individual producers/exporters.<sup>500</sup> In Viet Nam's view, the terms "any" and "varied" must both inform Article 11.2, so that the removal of the application of the duty with respect to any individual importers, exporters or foreign producers qualifies as "the duty" being varied.<sup>501</sup>

7.340. Viet Nam believes that footnote 21 further confirms its interpretation of Article 11.2. Viet Nam submits that the difference in the language of footnotes 21 and 22 recognizes the authority to terminate duties in part under Article 11.2 in contrast to the requirement of termination of the anti-dumping duties as a whole under Article 11.3.<sup>502</sup>

7.341. Viet Nam further argues that its interpretation of Article 11.2 is consistent with other provisions of the Anti-Dumping Agreement that address individual producers/exporters, in particular Article 5.8, which requires the immediate termination of the investigation in respect of exporters for which an individual margin of dumping of zero or *de minimis* is determined. Viet Nam argues that it would be nonsensical if a similar mechanism to avoid the application of anti-dumping duties did not exist for individual companies through revocation once the order is in place if they demonstrate that they are no longer dumping and that dumping is unlikely to recur.<sup>503</sup>

7.342. Viet Nam submits that its interpretation of Article 11.2 is confirmed by the "subsequent practice" of certain Members, including the United States, in the sense of Article 31(3)(b) of the Vienna Convention.<sup>504</sup>

7.343. Viet Nam argues that the "limited examination" exception under Articles 6.10 and 9.4 applies only in the context of original investigations, and through Article 9.4, in administrative reviews, and consequently does not apply in the context of Article 11.2 reviews.<sup>505</sup> Alternatively, Viet Nam argues, Members must interpret and apply the provisions of the covered agreements in a manner which gives meaning to all provisions. Accordingly, even if the exception were applicable, it would have to be applied in a manner that reconciles the investigating authority's resource limitations with individual producers/exporters' right to obtain company-specific revocations.<sup>506</sup>

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<sup>499</sup> Viet Nam's second written submission, paras. 132-133.

<sup>500</sup> Viet Nam's response to Panel question No. 41; opening statement at the second meeting of the Panel, paras. 48-51. (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 149-150, 152); response to Panel question No. 79, para. 59; comment on the United States' response to Panel question No. 79, para. 61.

<sup>501</sup> Viet Nam's opening statement at the second meeting of the Panel, para. 52.

<sup>502</sup> Viet Nam's response to Panel question No. 40.

<sup>503</sup> Viet Nam's second written submission, paras. 134-135; opening statement at the second meeting of the Panel, para. 54.

<sup>504</sup> Viet Nam's response to Panel question No. 38 (referring to Documentation on Individual Revocation Procedures of Australia, Brazil, and India, Exhibit VN-79).

<sup>505</sup> Viet Nam's second written submission, para. 122. In its response to Panel question No. 44, para. 160, however, Viet Nam states that its "position is not that the USDOC cannot use sampling. Rather, if it does use sampling, it must do so in a manner which also allows it to take actions consistent with its obligations under Article 11".

<sup>506</sup> Viet Nam's first written submission, paras. 340, 350-355; second written submission, paras. 120-125. Viet Nam argues that the USDOC has turned the "limited examination" exception under the second sentence of Article 6.10 into a rule, uses the exception to undermine Article 11.2 and that the application of the "limited examination" exception in cases where there is a large number of respondents would render Article 11.2 a nullity. Viet Nam suggests, *inter alia*, that the United States could rely on the separate



Hence, Viet Nam submits, the determination of the existence of the conditions for the application of the Articles 6.10/9.4 exception would have to be determined separately for each type of review.<sup>507</sup>

### 7.7.3.2 United States

7.344. The United States argues that Article 11.2 imposes no obligation on investigating authorities to consider or to provide company-specific revocations. The United States notes in particular that the Appellate Body has interpreted the term "duty" as it is used in Article 11.3 as referring to duties imposed on a product from a country, and not to the specific anti-dumping duties imposed or collected with respect to imports from an individual company. The United States argues that the term is most logically interpreted as having the same meaning in both provisions since they both set forth mechanisms to ensure that, as per Article 11.1, the duty remains in place only as long as necessary to counteract injurious dumping.<sup>508</sup> The United States further notes that Article 11.3 contains a cross-reference to Article 11.2, as it provides that an Article 11.2 review restarts the "five-year clock" for conducting a five-year sunset review, which strongly suggests that both types of review contemplate examination of the "duty" on a product (i.e. order-wide) basis. According to the United States, when viewed in light of this language, Viet Nam's interpretation of Article 11.2 yields an absurd result. The United States submits that if an investigating authority considers a request for company-specific revocation covering both dumping and injury in the fourth year after the imposition of the duty, it would automatically extend the duration of the duty (as it applies to all producers/exporters) by an additional five years without any obligation to conduct a sunset review under Article 11.3. If such company-specific reviews are requested by interested parties and conducted at least once every five years, "the duty" would continue indefinitely. In addition, the United States argues that the title of Article 11 and Article 11.5 confirm that Article 11 also applies to price undertakings under Article 8, *mutatis mutandis*. The United States submits that when the raising of export prices under a price undertaking eliminates dumping, pursuant to Viet Nam's interpretation of Article 11.2, this would lead to automatic termination of the duty. Thus, there would be no basis for review under Article 11.3 (after five years), which again is an absurd result. The United States also relies on the fact that the text of Article 11.2 makes no distinction between the likelihood-of-dumping determination and the likelihood-of-injury determination, both of which can provide the basis for termination of "the duty", and that the likelihood-of-injury determination inherently relates to all of the imports subject to "the duty". For the United States, it therefore follows that the likelihood-of-dumping determination under Article 11.2 is also product-wide.<sup>509</sup>

7.345. The United States argues that footnote 21 further demonstrates that the reviews provided for in Article 11.2 are with respect to the "duty" imposed on an order-wide basis. The United States notes that the footnote clarifies that Article 9.3 assessment reviews, do not, on their own, constitute Article 11.2-type of reviews, and in so doing contrasts the two types of reviews. The United States admits that the "by itself" language in footnote 21 implies that company-specific assessment reviews may play a role in product-wide reviews under Article 11.2, but argues that this role is as limited as in Article 11.3 sunset reviews: Members may take into account company-specific dumping margins from assessment reviews when conducting product-wide Article 11.3 sunset reviews.<sup>510</sup>

7.346. The United States takes issue with Viet Nam's argument concerning the "removed or varied" language in Article 11.2. The United States argues that this language pertains to injury, but not to dumping, and that in addition, the duty could be "varied" by decreasing the scope of products covered by an antidumping duty order, which would be product (not company)

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rate in considering revocation for non-examined producers/exporters (Viet Nam's second written submission, para. 137).

<sup>507</sup> Viet Nam's first written submission, para. 352.

<sup>508</sup> United States' second written submission, paras. 12-13; opening statement at the second meeting of the Panel, paras. 54-56 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 150).

<sup>509</sup> United States' first written submission, para. 77 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 140, 149, 150 and 154-155); opening statement at the first substantive meeting, paras. 53-55; response to Panel question 38; second written submission, paras. 8-11; comments on Viet Nam's response to Panel question No. 79.

<sup>510</sup> United States' response to Panel question No. 40.

specific.<sup>511</sup> Further, in the United States' view, the reference to "interested parties" in Article 11.2 represents a procedural distinction from Article 11.3 that does not, contrary to Viet Nam assertion, inform the interpretation of "the duty"; rather, the term "interested parties" merely defines who can seek a review. The United States adds, in this regard, that neither Articles 11.2 nor 11.3 contain the term "margins" which, for the United States, might implicitly refer to individual exporters or producers.<sup>512</sup> The United States argues that had Members agreed to an obligation to examine company-specific revocation requests in Article 11.2, they would have included explicit language to that effect as they did in Articles 5.8 and 6.10. The United States also argues that to read "the duty" in the context of Article 11 as a company-specific reference would disregard the distinction between this term as used in Article 11 and the terms "individual duties" in Article 9.4 and "individual margin of dumping for each known exporter or producer" in Article 6.10.<sup>513</sup>

7.347. The United States further submits that its interpretation of Article 11.2 is confirmed by the preparatory work of Article 11.2 of the Anti-Dumping Agreement. The United States explains that during the negotiations, the Nordic countries proposed adding a company-specific reference to "dumping margins" in Article 11.2, but this proposed amendment was rejected.<sup>514</sup>

7.348. The United States also argues that even accepting, *arguendo*, that Article 11.2 imposes an obligation to consider company-specific revocations, Article 11.2 does not require Members to adopt tests based on the absence of dumping for three years. Hence, the United States submits, the provisions of US law and regulations providing for company-specific revocations on the basis of, *inter alia*, an absence of dumping for three consecutive years go beyond the requirements of Articles 11.1 and 11.2 by establishing a presumption that operates in favour of foreign producers/exporters. For this reason, even if the USDOC had found that some of the Vietnamese producers/exporters had zero margins for three years, it would not have been required under Articles 11.1 and 11.2 to revoke the order with respect to these companies.<sup>515</sup>

7.349. Moreover, the United States argues that, by virtue of Article 11.4, the limited examination exception under the second sentence of Article 6.10 would apply in the Article 11.2 context. The United States considers that the question of the individual examination of companies is governed by Article 6.10. It follows, argues the United States, that limiting the number of producers/exporters individually-examined consistently with Article 6.10 cannot provide a basis for a breach of Article 11.2 in the event that non-selected producers/exporters seek a company-specific revocation.<sup>516</sup> The United States notes that Viet Nam has not alleged that the USDOC's limitation of its examination in the fourth and fifth administrative reviews was inconsistent with Article 6.10.<sup>517</sup> In addition, the United States rejects as without basis in the Anti-Dumping Agreement Viet Nam's suggestion that investigating authorities must apply different standards, or must seek to balance individual producers/exporters' rights and the investigating authority's resource constraints if and when they limit their examination in a combined administrative review and Article 11.2 review proceeding.<sup>518</sup>

#### 7.7.4 Main arguments of the third parties

7.350. **China** considers that Article 11.2 provides individual producers/exporters the right to request reviews for the purpose of obtaining company-specific revocations and leaves the authorities no discretion to refuse to initiate an Article 11.2 review when an interested party has

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<sup>511</sup> United States' second written submission, paras. 14-16.

<sup>512</sup> United States' response to Panel question No. 79, paras. 81-84 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 149-150).

<sup>513</sup> United States' opening statement at the first meeting, para. 56; second written submission, para. 18.

<sup>514</sup> United States' response to Panel question 38, paras. 127-132 (quoting from Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-Dumping Code, MTN.GNG/NG8/W/76, p. 5).

<sup>515</sup> United States' second written submission, para. 23; and response to Panel question No. 45, para. 147 (all referring to Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.153, 7.159, 7.165-7.166, 7.174).

<sup>516</sup> United States' first written submission, paras. 86-89; second written submission, para. 7; response to Panel question No. 44, paras. 142-145 (quoting from Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.151-7.168).

<sup>517</sup> United States' first written submission, para. 87.

<sup>518</sup> United States' first written submission, para. 90.

met the conditions set out under that provision.<sup>519</sup> China argues that the term "duty" has a broader meaning under Article 11.2 than under Article 11.3 and refers to either the duty on a product-specific basis, or the duties on a company-specific basis, depending on the particular circumstances. China notes that the Appellate Body has concluded that Article 11.3 does not oblige investigating authorities to make company-specific likelihood determinations in a sunset review, partly on the basis that, in contrast to Article 11.2, Article 11.3 contains no express reference to "interested parties".<sup>520</sup> China also notes that unlike Article 11.3, which requires the authorities to review the likelihood of continuation or recurrence of both dumping and injury, Article 11.2 provides that interested parties may request authorities to review either dumping or injury, or both. Thus, it envisages that a duty may be terminated after a review only with respect to dumping, which is an exporter-specific concept.<sup>521</sup> Further, China submits that whereas Article 11.3 obliges the authorities to review only the likelihood of continuation or recurrence of dumping, Article 11.2 requires authorities to examine whether the continued imposition of the duty is necessary to offset dumping, which requires determining individual dumping margins.<sup>522</sup> China argues that the distinction between "duty" and "duties" is not absolute and that there is no "fixed collocation" between the terms concerned. In this sense, while China agrees with the United States that the term "duty" in Article 11.2 is different from the term "individual duties" in Article 9.4, China argues that this does not preclude that the former could refer to duties on exports by individual companies, depending on the particular circumstances.<sup>523</sup> China submits that even if the "limited examination" exception under Article 6.10 applies to Article 11.2 reviews, it should not be applied in a manner that deprives interested parties of the right to request a review and to demonstrate the absence of dumping, rendering Article 11.2 a nullity.<sup>524</sup>

7.351. The **European Union** argues that a request under Article 11.2 may relate only to dumping, only to injury, or to both, and the review must consider whether the need for the continued imposition of the duty at the various duty rates is necessary to offset dumping at these rates. The review may or not be conducted on a company-specific basis, but if it is, it may also take into account factors that relate to the industry as a whole in the exporting Member. The European Union adds that the fact that a firm has not been dumping for a particular period of time does not in itself require the termination of the duty with respect to that firm.<sup>525</sup> In addition, the European Union considers that the second sentence of Article 6.10 applies in the context of Article 11.2 reviews and therefore that limited examination may be used in such reviews.<sup>526</sup> The European Union considers that reliance on dumping margins calculated with zeroing in an Article 11.2 review violates Articles 11.1 and 11.2, and that the Panel could limit itself to finding that the determinations at issue are inconsistent with Articles 11.1 and 11.2 on that basis.<sup>527</sup>

7.352. **Japan** argues that Article 11.2 affords a company-specific right to request a review, and eventually obtain revocation, of the order. Japan notes that the Appellate Body in *US – Corrosion Resistant Steel Sunset Review* gave interpretive significance to the presence of the terms "any interested party" in Article 11.2, which it contrasted with the absence of any reference to individual exporters, producers or interested parties in Article 11.3. Japan argues that the reference to interested parties in Article 11.2 suggests that the drafters intended to impose obligations regarding individual producers/exporters under Article 11.2. Consequently, Japan argues, the term "duty" should be given a broader meaning under Article 11.2 than under Article 11.3 and also encompasses duties imposed on a company-specific basis.<sup>528</sup> Japan also

<sup>519</sup> China's third-party submission, para. 60 (quoting from Appellate Body Reports, *US – Zeroing (Japan)*, paras. 108–112, 114; *US – Stainless Steel (Mexico)*, paras. 87 and 94; and *Mexico – Anti-Dumping Measures on Rice*, paras. 308–316).

<sup>520</sup> China's response to Panel question No. 15, paras. 31–32 (quoting from Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 149).

<sup>521</sup> China's response to Panel question No. 15, paras. 33–34.

<sup>522</sup> China adds that the *US – DRAMS* panel found that Article 11.2 does not require immediate and automatic revocation as soon as an exporter is found to have ceased dumping, which China reads as implying that exporters are entitled to company-specific revocations under that provision. (China's response to Panel question No. 15, para. 34, referring to Panel Report, *US – DRAMS*, paras. 6.32–6.34.)

<sup>523</sup> China's response to Panel question No. 15, para. 36.

<sup>524</sup> China's third-party-submission, paras. 54–69; response to Panel question No. 15.

<sup>525</sup> European Union's third-party submission, paras. 43–47; response to Panel questions No. 15 and 17.

<sup>526</sup> European Union's third-party submission, paras. 46; European Union's response to Panel question No. 18, para. 56.

<sup>527</sup> European Union's third-party submission, paras. 43–47.

<sup>528</sup> Japan's response to Panel question Nos. 15 and 16, paras. 14–15 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 149, 152).

attaches significance to the fact that, unlike Article 11.3, Article 11.2 envisions that a duty may be terminated after a review of only the need for the duty to offset dumping.<sup>529</sup> Japan adds that it is relevant that Article 11 applies *mutatis mutandis* to price undertakings, which are necessarily company-specific, and that it would be anomalous if individual exporters could seek the removal of a price undertaking, but not of a duty.<sup>530</sup> Moreover, Japan argues that the term "varied" in Article 11.2 presupposes that the investigating authority can recalculate individual dumping margins and impose "the duty" at a different rate, which assumes that the term "the duty" is used in a company-specific sense.<sup>531</sup> Finally, Japan considers that, by virtue of Article 11.4, to the extent that it may be relevant in such a context, the limited examination exception in Article 6.10 applies in Article 11.2 reviews.<sup>532</sup>

7.353. **Norway** considers that Article 11.2 gives any interested party a right to a review where the conditions set forth under that provision are met. Norway relies in part of the Appellate Body's statement in *US – Corrosion Resistant Steel Sunset Review* that when the drafters of the Anti-Dumping Agreement intended to impose obligations regarding individual producers/exporters, they did so explicitly.<sup>533</sup> With respect to the application of the limited examination exception in the context of an Article 11.2 review, Norway considers that there can be no automatic rejection of a request for review, even if the Article 6.10 exception has been applied at a previous stage of the anti-dumping proceeding.<sup>534</sup>

7.354. **Thailand** argues that Article 11.2 refers to a specific interested party as it addresses the issue of "partial reviews" whereas Article 11.3 governs the review of an overall proceeding covering both dumping and injuries involving all interested parties concerned.<sup>535</sup>

## 7.7.5 Evaluation by the Panel

### 7.7.5.1 Introduction

7.355. Viet Nam's claims are two-fold: First, Viet Nam challenges the USDOC's refusal to grant company-specific revocation to Vietnamese producers/exporters who were not individually examined. Second, Viet Nam challenges the USDOC's reliance on dumping margins that were calculated inconsistently with the Anti-Dumping Agreement in its consideration and eventual rejection of the requests for revocation of certain Vietnamese producers/exporters. We examine each in turn. But before we turn to the substance of Viet Nam's claims, we consider the jurisdictional question of whether the USDOC's treatment of Fish One's request for revocation in the third administrative review falls within the Panel's terms of reference.

### 7.7.5.2 Whether the USDOC's treatment of Fish One's request for revocation in the third administrative review falls within the Panel's terms of reference

7.356. In its first written submission, Viet Nam discussed the USDOC's treatment of requests for revocations in the third, fourth, and fifth administrative reviews (no requests were made in the sixth review administrative review)<sup>536</sup>, and requested findings of inconsistency with respect to the USDOC's actions in the fourth, fifth and sixth administrative reviews.<sup>537</sup> Subsequently, however, in response to a question from the Panel, Viet Nam indicated that it is was making claims in respect of the USDOC's rejection of requests for revocation in the context of the fourth and fifth reviews as well as with respect to "the claim made in the third review".<sup>538</sup> Hence we understand Viet Nam to include in its claims the USDOC's treatment of Fish One's request for revocation in the third administrative review. The United States takes issue with Viet Nam's formulation of a claim in

<sup>529</sup> Japan's response to Panel question Nos. 15 and 16, para. 16 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 111).

<sup>530</sup> Japan's response to Panel question Nos. 15 and 16, para. 18.

<sup>531</sup> Japan's response to Panel question Nos. 15 and 16, para. 19.

<sup>532</sup> Japan's response to Panel question No. 18.

<sup>533</sup> Norway's response to Panel question Nos. 14 and 17, paras. 8-12 (quoting from Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 152).

<sup>534</sup> Norway's opening statement at the first meeting, paras. 8-10; response to Panel question Nos. 14 and 17.

<sup>535</sup> Thailand's response to Panel question No. 17.

<sup>536</sup> See Viet Nam's first written submission, paras. 325 and 326.

<sup>537</sup> See, *inter alia*, Viet Nam's first written submission, paras. 13 and 42.

<sup>538</sup> Viet Nam's response to Panel question No. 48, para. 167.

this respect, as it considers that the third administrative review was not included in either Viet Nam's request for consultations or its panel request.<sup>539</sup> In light of the United States' objection, we examine whether the USDOC's actions taken in the context of the third administrative review constitute a "measure at issue" in the present dispute, such that it falls within our terms of reference.<sup>540</sup>

7.357. Viet Nam's panel request defines the outer limit of our terms of reference – our terms of reference require us to examine, in the light of the relevant provisions of the covered agreements, the matter referred to the DSB by Viet Nam in its panel request. Viet Nam's panel request indicates that it is made "in particular but not exclusively" with respect to: "the imposition of anti-dumping duties and cash deposit requirements pursuant to the final results" of the fourth, fifth and sixth administrative reviews; the fourth, fifth, and sixth administrative reviews themselves insofar as they did not revoke the anti-dumping duty order with respect to certain respondents requesting or eligible for such revocation; the "continued application of the practices and conduct" described in the panel request in any other on-going or future administrative reviews and preliminary and final results thereof as well as any assessment instructions, cash deposits requirements, and revocation determinations issued pursuant to such reviews; the USDOC's likelihood-of-dumping determination in the sunset review; and, finally, Section 129 of the URAA.<sup>541</sup> This language suggests that only the USDOC's treatment of requests for company-specific revocations in the fourth, fifth, and sixth administrative reviews fall within the Panel's terms of reference.<sup>542</sup>

7.358. Moreover, as we discuss below, we are of the view that Viet Nam could in any event not have raised a claim with respect to the USDOC's treatment of requests for revocation in the third administrative review in its panel request.

7.359. As we noted in our 25 September 2013 preliminary ruling<sup>543</sup>, pursuant to the terms of Article 4<sup>544</sup> and of Article 6.2 of the DSU<sup>545</sup>, the request for consultations constitutes a prerequisite for the panel request and as a result circumscribes the scope of the panel request and, consequently, the panel's terms of reference.<sup>546</sup> As we also noted in our preliminary ruling:

The Appellate Body has indicated that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be

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<sup>539</sup> United States' second written submission, para. 34 and footnote 32.

<sup>540</sup> The Panel asked Viet Nam to react to the United States' objection, but in its response, Viet Nam did not address the question of the USDOC's treatment of Fish One's request in that determination. (Viet Nam's response to Panel question No. 81.)

<sup>541</sup> Viet Nam's panel request, WT/DS429/2/Rev.1, 18 January 2013, p. 2, point 2 ("Summary of facts and legal basis of complaint").

<sup>542</sup> The panel request further develops the factual and legal bases of Viet Nam's various claims. Two sections of the panel request are of relevance to Viet Nam's "revocation" claims, neither of which appear to place the USDOC's treatment of Fish One's request for revocation in the third administrative review within our terms of reference. Section (e) of the panel request, "Revocation in the absence of any evidence of dumping", states that "the anti-dumping duty order should be revoked in part with respect to individually investigated respondents having zero or de minimis margins of dumping in reviews two through five and two through six, *when the sixth review is completed*". (emphasis added) Section (c) of the panel request concerns the USDOC's limitation of the number of respondents selected for individual examination. Although Viet Nam has not pursued any claim in this respect, this section is of some relevance to Viet Nam's claims with respect to company-specific revocations. It states, in relevant part, that:

Viet Nam challenges the use of limited respondent selection in the original investigation and the first, second, third, fourth, fifth, and sixth administrative reviews, (1) to the extent that this practice impacted the USDOC's revocation and five-year "sunset" review determinations *in the measures at issue* and (2) to the extent that these determinations demonstrate the USDOC's continued and ongoing use of this practice throughout the full course of the shrimp anti-dumping proceeding. (emphasis added)

<sup>543</sup> Preliminary Ruling, Annex A-3, paras. 2.11-2.13.

<sup>544</sup> Article 4.4 provides, in particular, that:

Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

<sup>545</sup> Article 6.2 of the DSU provides, in relevant part:

The request for establishment of the panel ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

<sup>546</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

held, before a matter may be referred to the DSB for the establishment of a panel"<sup>547</sup>, and that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".<sup>548</sup> The Appellate Body has also held that Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".<sup>549</sup> Thus, the Appellate Body has indicated that:

As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request.<sup>550, 551</sup>

7.360. Hence, with respect to the correspondence between the measures included in the panel request and those included in the request for consultations, the relevant question is whether the "scope of the dispute" is expanded as a result of the inclusion of an additional measure in the panel request.<sup>552</sup> In relevant part, Viet Nam's consultations request sought consultations with respect to essentially the same measures as it subsequently listed in its panel request, with the exception that the consultations request does not expressly refer to the sixth administrative review, instead referring to "[a]ny other ongoing or future anti-dumping administrative reviews, and the preliminary and final results thereof, ... as well as any assessment instructions, cash deposit requirements, and revocation determinations issued pursuant to such reviews".<sup>553</sup> This language makes it clear that only the USDOC's treatment of requests for company-specific revocations in the context of the fourth, fifth, and ongoing future administrative reviews were included in the request for consultations.<sup>554</sup> More importantly, the consultations request concludes:

<sup>547</sup> Appellate Body Report, *Brazil – Aircraft*, para. 131.

<sup>548</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

<sup>549</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (original emphasis)

<sup>550</sup> Appellate Body Report, *US – Upland Cotton*, para. 293 (citing Appellate Body Report, *Brazil – Aircraft*, para. 132). (footnote omitted)

<sup>551</sup> Preliminary Ruling, Annex A-3, para. 2.12

<sup>552</sup> Preliminary Ruling, Annex A-3, para. 2.13 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 224, referring in turn to Appellate Body Report, *US – Upland Cotton*, para. 293; and to Panel Report, *US – Orange Juice (Brazil)*, para. 7.18).

<sup>553</sup> Viet Nam's consultations request, p. 1.

<sup>554</sup> Moreover, nothing in the remainder of the consultations request directly pertains to the USDOC's treatment of Fish One's request for revocation in the third administrative review. See, in particular, the following paragraphs of Viet Nam's consultations request, which are relevant to its claims with respect to company-specific revocations, and in which it indicates its intention to request consultations with respect to:

(3) in the *fourth and fifth administrative* reviews, the limited selection of respondents individually investigated, such that non-investigated companies are denied the opportunity to demonstrate the absence of dumping necessary to qualify for revocation of the anti-dumping duty order;

...

(6) in the *fourth and fifth administrative* reviews, the USDOC's determination to not revoke the anti-dumping duty order with respect to three respondents: Minh Phu Group, CAMIMEX, and Grobest, despite evidence demonstrating the absence of dumping in the fourth administrative review and the absence of any evidence of dumping by these respondents in any of the prior reviews conducted by the USDOC;

(7) the use of zeroing to calculate dumping margins and determine duty assessment in the final results of the original investigation and first, second, third, fourth, and fifth administrative reviews, to the extent that the USDOC's use of the zeroing methodology in those determinations impermissibly inflated assessed anti-dumping duties and consequentially impacted the USDOC's revocation and five-year "sunset" review determinations *in the measures at issue*;

...

(9) the use of limited respondent selection in the original investigation and first, second, third, fourth, and fifth administrative reviews, to the extent that this practice denied respondents not selected for individual review the opportunity to obtain revocation of the anti-dumping duty order *in the measures at issue* and impacted the USDOC's five-year "sunset" review determination;

...

(13) in all of the anti-dumping proceedings of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, the absence of any mechanism to provide individually investigated or non-individually investigated respondents the opportunity to establish the absence of dumping that is required for revocation of the antidumping duty order;

To avoid the apparent confusion that our inclusion of the original investigation caused the US in Vietnam's previous request for consultations and a panel involving Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, *we would like to clarify that while practices and determinations in the original investigation and the first, second, and third administrative reviews are referenced because they have had an effect on the fourth administrative review, the fifth administrative review, the five year "sunset review", and ongoing or future reviews, the practices and determinations are included in this request for consultations only to the extent that they have had or will have an effect on the fourth administrative review, the fifth administrative review, the five year sunset review, and subsequent reviews.* The underlying determinations, decision memoranda, and other memoranda and record evidence in the original investigation and the three reviews are thus necessary and relevant to the proceeding for which these consultations are requested.<sup>555</sup>

7.361. This last paragraph excludes, in our view, the possibility for Viet Nam to include within the panel request, and hence within our terms of reference, any claims regarding the USDOC's actions in the third administrative review. In light of this explicit exclusion, and notwithstanding the fact that the claims that Viet Nam seeks to make with respect to the USDOC's actions in the third administrative review pertain to USDOC actions that took place under the same overall anti-dumping proceeding and are of the same nature as actions challenged in the fourth and fifth administrative reviews, and that Viet Nam makes similar claims with respect to the USDOC's treatment of requests for revocation in each of these reviews, we conclude that a claim in its panel request in respect of such actions would have impermissibly expanded the scope of the dispute. This being the case, the USDOC's determination not to revoke the *Shrimp* order with respect to Fish One in the third administrative review does not fall within our terms of reference.

#### **7.7.5.3 General considerations with respect to the interpretation of Articles 11.1 and 11.2**

7.362. Article 11 of the Anti-Dumping Agreement concerns the "Duration and Review of Anti-Dumping Duties and Price Undertakings". Articles 11.1 to 11.5, which are directly relevant to Viet Nam's claims, provide as follows:

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.<sup>21</sup> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out

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(Viet Nam's consultations request, pp. 3-4, emphasis added)

<sup>555</sup> Viet Nam's consultations request, p. 5. (emphasis added)



expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

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<sup>21</sup> A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

<sup>22</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.363. Several prior panel decisions suggest that Article 11.1 does not impose independent obligations upon Members, but rather, establishes the general principle that duties may only continue to be imposed so long as they remain necessary, which principle is operationalized in Articles 11.2 and 11.3.<sup>556</sup> In the present dispute, Viet Nam itself argues that Article 11.1 sets forth an obligation which is operationalized in Articles 11.2 and 11.3<sup>557</sup>, and we do not understand Viet Nam to be arguing that the challenged USDOC actions violate Article 11.1 independently of Article 11.2. This being the case, our evaluation of Viet Nam's claims focuses on the language of Article 11.2, drawing on the context provided by, *inter alia*, Article 11.1, where relevant.

7.364. As just noted, Articles 11.2 and 11.3 operationalize the general principle in Article 11.1 that the duty only remain in force for as long as and to the extent necessary in order to counteract dumping which is causing injury. Article 11.2 and Article 11.3 provide for related, yet distinct, mechanisms to operationalize this general principle. Article 11.3 conditions the continuation of anti-dumping measures beyond a five year period on a review of the continuing need for "the duty", based on a determination of likelihood of continuation or recurrence of dumping and of injury. Article 11.2 imposes upon an investigating authority the obligation to conduct a review of the continuing need for "the duty" in the interval between the imposition of the measure and the five-year, "sunset", review.<sup>558</sup> Thus, each paragraph provides for a review of the continuing need for the duty, one at a specified point in time, on the investigating authority's own initiative or on the basis of a substantiated request by the domestic industry, in order to justify continuing the duty at all; the other available at any time, on the investigating authority's own initiative or on the basis of a substantiated request by an interested party (provided in the latter case that a reasonable period of time has elapsed since the imposition of the definitive duty) to examine the continued need for the duty.

7.365. In *Mexico – Anti Dumping Measures on Rice*, the Appellate Body concluded that Article 11.2 requires investigating authorities to conduct a review under that provision where the conditions set forth therein are met and that the authorities may not impose additional conditions in this respect.<sup>559</sup> The Appellate Body explained that:

Article 11.2 *requires* an agency to conduct a review, *inter alia*, at the request of an interested party, and to terminate the anti-dumping duty where the agency determines that the duty "is no longer warranted". The interested party has the right to request the authority to examine whether the continued imposition of the duty is

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<sup>556</sup> Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.113; and *US – DRAMS*, para. 6.41.

<sup>557</sup> For instance, in its first written submission, para. 329, Viet Nam writes that:

The relevant provisions related to the revocation of anti-dumping duties are provided in Article 11 of the Anti-Dumping Agreement. ... Article 11 does not only provide for revocation of anti-dumping duties as a result of required five year reviews under Article 11.3, it also provides for reviews under Article 11.2 in order to give effect to the general principle articulated in Article 11.1.

<sup>558</sup> As provided in Article 11.3, where the most recent Article 11.2 review covered both dumping and injury, the five year period runs from the date of that review.

<sup>559</sup> Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, paras. 314-315. At issue in that dispute was a provision of Mexican law providing that interested parties, e.g. an exporter, seeking a changed circumstances review had to satisfy the authorities that the volume of their exports to Mexico during the review period were representative.



necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Article 11.2 conditions this obligation on (i) the passage of a reasonable period of time since imposition of the definitive duty; and (ii) the submission by the interested party of "positive information" substantiating the need for a review. ... Where the conditions in Article 11.2 have been met, the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review, including consideration of whether the duty should be terminated in the light of the results of the review.<sup>560</sup>

7.366. With respect to the corresponding provision of the SCM Agreement (Article 21.2), in *US – Carbon Steel*, the Appellate Body noted that:

Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an *obligation* to review ("shall review") whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include "positive information substantiating the need for review."<sup>561</sup>

7.367. Also of relevance, because Article 11.2 uses the same terms, in *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body interpreted the terms "review" and "determine" in Article 11.3 as follows:

This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.<sup>562</sup>

7.368. Having reviewed relevant findings by prior panels and the Appellate Body, we now examine the constitutive elements of Article 11.2 in relation to requests made by an interested party.<sup>563</sup> In broad terms, Article 11.2 provides that if an investigating authority: (i) receives a request from an interested party; (ii) after a reasonable period of time has elapsed; (iii) requesting it to examine one of the three matters specified in the second sentence of Article 11.2 (need for the continued imposition of the duty on the basis of dumping, injury, or both); and (iv) accompanied by positive information substantiating the need for a review, then the authority must undertake a review of the need for the continued imposition of the duty. While the authorities must undertake the review where these conditions are met, Article 11.2 does not specify whether the review must be of the duty as a whole (i.e. on an order-wide basis) or of the duty as it applies to an individual producer/exporter (i.e. on a company-specific basis).

7.369. In our view the term "duty" as it is used in Article 11.2 can be interpreted to mean either a company-specific duty or an order-wide duty. While the Appellate Body has interpreted the term "duty", as it is used in Article 11.3, to refer to the duty as a whole, on an order-wide basis<sup>564</sup>, the term "duty" in Article 11.2 need not, in our view, be understood identically as it is in Article 11.3.

<sup>560</sup> Appellate Body Report, *Mexico – Anti Dumping Measures on Rice*, para. 314. (emphasis original, footnote omitted)

<sup>561</sup> Appellate Body Report, *US – Carbon Steel*, para. 108. (emphasis original)

<sup>562</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111. (emphasis original)

See also above, para. 7.305.

<sup>563</sup> Given the circumstances of this dispute, we do not need to consider the elements of Article 11.2 in relation to reviews undertaken by authorities on their own initiative.

<sup>564</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 149-150.

The reasons for this are, as discussed in more detail below, first, the different purposes of the provisions; second, the reference to "interested parties" in Article 11.2, the fact that Article 11.2 refers to the term "dumping" on its own (independently of the concept of injury) and the three different kinds of examinations that may be requested by an interested party under the second sentence of Article 11.2; and third, the reference to price undertakings in Article 11.5 and in the title of Article 11.

7.370. With respect to the first point, we note that although Articles 11.2 and 11.3 both implement the general "necessity" requirement contained in Article 11.1, the two provisions serve different purposes, and establish different mechanisms to implement that requirement. Thus, Article 11.1 refers not only to the duty's duration in time, but also to its "extent", providing that the duty "shall remain in force only *as long as and to the extent necessary* to counteract dumping which is causing injury". To us, this implies that Article 11.1 is concerned not only with the fact that an anti-dumping duty is in place with respect to imports from another Member generally, but also with the fact that duties are imposed on individual producers/exporters. Article 11.3 on the other hand, is concerned with the imposition of the measure with respect to imports from another Member as a whole and its duration in time. It makes no mention of the "extent" to which the measure is necessary to counteract dumping which is causing injury, as provided for in Article 11.1, suggesting that this aspect of Article 11.1 is operationalized in Article 11.2. This, in our view, finds confirmation in the term "or varied" in Article 11.2, which indicates that the outcome of an Article 11.2 review may be a modification of the individual duty rates imposed on individual producers/exporters.<sup>565</sup>

7.371. The reference to "interested parties" – which Article 6.11 makes clear includes foreign producers and exporters – and to "dumping" in Article 11.2 also in our view suggests that the drafters intended to impose obligations on the authorities with respect to individual producers/exporters. We note in this regard that in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body contrasted the texts of Articles 11.2 and 11.3, specifically with respect to the fact that the former referred to "interested parties", and the latter did not. This was one of the considerations that led the Appellate Body to conclude that the term "duty" in Article 11.3 refers to the duty as a whole, i.e. on an order-wide basis.<sup>566</sup> By the same reasoning, this difference suggests to us that the term "duty" in Article 11.2 can refer to the duty as applied to an individual producer/exporter.

7.372. With respect to the term "dumping", Article 11.2 gives an interested party the right to a review to examine "whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or

<sup>565</sup> It could also refer, for instance, to modifications in the scope of the duty, in terms of products covered, because some product types are no longer produced in the importing country or in the exporting country, meaning that the duty is no longer necessary to prevent injury to the domestic industry with respect to these product types, or other partial modification of the duty.

<sup>566</sup> See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 149 and 152: Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. This contrasts with Article 11.2, which does refer to "any interested party" and "[i]nterested parties". We also note that Article 11.3 does not contain the word "margins", which might implicitly refer to individual exporters or producers. On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations in the manner suggested by Japan.

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In contrast to Article 11.3, several provisions of Article 6 refer expressly or by implication to individual exporters or producers. Article 6 requires all interested parties to have a full opportunity to defend their interests. In particular, Article 6.1 requires authorities to give all interested parties notice of the information required and ample opportunity to present in writing evidence that those parties consider relevant. Articles 6.2, 6.4, and 6.9 provide other examples of the kind of opportunities that investigating authorities must give each interested party. These references suggest that, when the drafters of the *Anti-Dumping Agreement* intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly. These provisions of Article 6 apply to Article 11.3 by virtue of Article 11.4. They therefore confirm that investigating authorities have certain specific obligations towards each exporter or producer in a sunset review. However, these provisions of Article 6 are silent on whether the authorities must make a separate likelihood determination for each exporter or producer. (emphasis original)

both". Hence Article 11.2 allows an interested party to request an examination limited to the question whether the continued imposition of the duty is necessary to offset dumping. Since dumping results from the pricing behaviour of private entities<sup>567</sup> and is determined with respect to individual producers/exporters, it seems logical to understand Article 11.2 as providing for termination of the duty with respect to an individual producer/exporter if that duty is no longer necessary to offset dumping by that producer/exporter. This is in contrast to the situation under Article 11.3, which envisions a review of the need for the duty on the basis of both dumping and injury, and provides for termination unless both would continue or recur if the duty were removed. These considerations support the view that the term "duty" in Article 11.2 can be interpreted to refer either to the "duty" on an order-wide basis, or "the duty" on a company-specific basis. The fact that the term "duty" is used, rather than the more explicitly producer/exporter-specific term "dumping margins" used elsewhere in the Agreement is in our view not determinative; in numerous places – e.g. Articles 7.4, 9.1, 9.4, and 10.3 – the Agreement uses the term "duty" in the singular when referring to the duty in a company-specific sense.

7.373. Finally, we note that the title of Article 11 refers not only to anti-dumping duties, but also to price undertakings and that Article 11.5 states that Article 11.2 and the other paragraphs of Article 11 "shall apply *mutatis mutandis* to price undertakings accepted under Article 8". Because price undertakings are necessarily company-specific, this reference to price undertakings in Article 11.5 further supports our view that the term "duty" in Article 11.2 can be understood in either of the two senses.<sup>568</sup>

7.374. Our conclusion that the term "duty" in Article 11.2 can be read in either a company-specific or an order-wide sense is based on the ordinary meaning of the terms of Article 11.2, read in their context. We note the United States' argument relying on the negotiating history of Article 11.2. We do not consider it either necessary or appropriate to resort to supplementary means of interpretation, as in our view there is no lack of clarity as to the meaning of the terms of Article 11.2. In any event, the information submitted by the United States concerning the negotiating history of Article 11.2 does not in our view conclusively establish an intention on the part of the drafters that the term "duty" under Article 11.2 can only be understood as a reference to the anti-dumping measures on an order-wide basis.

7.375. Turning to the nature and character of the obligation imposed on the investigating authority, we note that like Article 11.3<sup>569</sup>, Article 11.2 does not prescribe any specific methodology for or criteria to be considered by the authority in determining whether there is a need for the "continued imposition of the duty". However, as noted above, the Appellate Body did indicate that Article 11.3 envisages a process combining both investigatory and adjudicatory aspects and assigns an active rather than a passive decision-making role to the authorities.<sup>570</sup> The same considerations apply, in our view, to the review provided for in Article 11.2, and when the conditions set therein are met, Article 11.2 imposes an obligation on the authority to undertake a review of the need for the continued imposition of the duty and to make a determination in that respect.

7.376. In light of our understanding of the term "duty" in Article 11.2, we consider that an authority has some – but not unlimited – discretion in deciding whether to undertake a review on an order-wide or on a company-specific basis. This discretion is fettered by the right of an

<sup>567</sup> See, for instance, Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

<sup>568</sup> As Japan notes (Japan's response to Panel question Nos. 15 and 16, para. 19), the effect of Article 11.5 is to give the right to a producer/exporter party to a price undertaking to "request the authorities to examine whether the continued imposition of the [price undertaking] is necessary to offset dumping, whether the injury would be likely to continue or recur if the [price undertaking] were removed or varied, or both". We share Japan's view that it would be anomalous if individual exporters could seek the removal of a price undertaking, but not of a company-specific duty.

<sup>569</sup> In *US – Corrosion Resistant Steel Sunset Reviews*, the Appellate Body agreed with the panel that: Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.

(Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123, footnotes omitted).

<sup>570</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

interested party to request an examination of certain matters pursuant to the second sentence of Article 11.2. The situation will be different in each case and will depend on both the specific request made by the interested party and the evidence submitted by that party substantiating the need for a review. For example, an investigating authority may decide, in response to a request to examine whether the continued imposition of the duty is necessary to offset dumping, that it only needs to undertake a review on a company-specific basis. Equally, the authority may decide to undertake a review of the duty on an order-wide basis. By contrast, if the request made by the interested party is for the examination of the need for the continued imposition of the duty with respect to both dumping and injury, then the authority in our view is required to undertake a review of the order as a whole, as the consideration of all dumped imports would be a necessary element of determining whether injury is likely to continue or recur if the duty were removed or varied. In any event, while Article 11.2 does not specify in what circumstances an authority should undertake a review on a company-specific basis and in what circumstances it should undertake a review on an order-wide basis, it does impose an obligation on the authority to undertake a review of the need for the continued imposition of the duty and to make a determination when an interested party submits a request meeting the requirements set therein.

7.377. With these general considerations in mind, we examine the claims made by Viet Nam with respect to the revocation requests presented by Vietnamese producers/exporters in the fourth and fifth administrative reviews. We will first examine whether the requests satisfy the requirements of Article 11.2 before examining the USDOC's treatment of those requests.

#### **7.7.5.4 Whether the revocation requests submitted by Vietnamese producers/exporters in the administrative reviews at issue satisfied the requirements of Articles 11.2**

7.378. As noted above, Article 11.2 imposes an obligation on an authority to conduct a review of the need for the continued imposition of the duty where the following conditions are met:<sup>571</sup>

- a. a request is submitted by an interested party;
- b. after a reasonable period of time has elapsed;
- c. requesting that the investigating authority examine one of the three matters specified in the second sentence of Article 11.2; and
- d. the request is accompanied by positive information substantiating the need for a review.

7.379. As set out above in our description of the factual background to this claim, a number of Vietnamese producers/exporters submitted requests for revocation in the fourth and fifth administrative reviews. Each Vietnamese producer/exporter that requested revocation of the *Shrimp* order with respect to itself was, by virtue of the definition of that term in Article 6.11, an "interested party", satisfying the first element.

7.380. The requests were submitted with respect to the fourth and fifth review periods. Given that this means the requests were submitted after the anti-dumping measure had been in place for several years, in our view, they satisfy the second element, that is, a reasonable period of time had elapsed before they were submitted.

7.381. Moreover, each of these requests was submitted under Section 351.222(e) of the USDOC's Regulations and was a request for the revocation of the order with respect to the individual Vietnamese exporter that submitted the request, pursuant to Section 751(a) of the Act and Section 351.222(b) of the Regulations, which at the time of the proceedings at issue, established procedures for the "[r]evocation or termination based on absence of dumping". Each request argued that the exporter qualified for revocation under these provisions, and requested that the USDOC terminate, pursuant to these provisions, the order with respect to the requesting company on the ground that it had ceased dumping for the required number of years. Finally, we recall that, pursuant to Section 351.222(b)(2), in addition to considering whether the exporter requesting

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<sup>571</sup> Article 11.2 also requires an authority to review the need for the continued imposition of the duty, where warranted, on their own initiative. As noted above at footnote 563, given the circumstances of this dispute, we do not need to consider the elements of Article 11.2 in relation to reviews undertaken by authorities on their own initiative.

revocation had ceased dumping for a period of three consecutive years and had made sales in commercial quantities, the USDOC was required to undertake a broader consideration of "whether the continued application of the antidumping duty order is otherwise necessary to offset dumping". This satisfies us that the requests that were submitted by Vietnamese producers/exporters in the fourth and fifth administrative reviews qualify as requests that the US authorities "examine whether the continued imposition of the duty is necessary to offset dumping" i.e., the first type of examination which may be requested by an interested party under Article 11.2.

7.382. Finally, as required under Section 351.222 of the USDOC Regulations, each request asserted, and attached certifications to the effect that, the company no longer engaged in dumping. This is in our view sufficient to meet the requirement that the request be accompanied by positive information substantiating the need for a review.

7.383. On the basis of the foregoing, we find that each of the requests submitted by Vietnamese producers/exporters in the context of the fourth and fifth administrative reviews constituted a request to the USDOC for it to examine "whether the continued imposition of the duty is necessary to offset dumping" within the meaning of Article 11.2.

#### **7.7.5.5 Whether the USDOC's treatment of requests for revocation by Vietnamese producers/exporters not individually examined is inconsistent with Articles 11.1 and 11.2**

7.384. We now consider the USDOC's treatment, in the fourth and fifth administrative reviews, of the requests for company-specific revocation submitted by Vietnamese producers/exporters who were not being individually examined in the review at issue.<sup>572</sup>

7.385. We recall that in the two proceedings at issue, with respect to each of the producers/exporters that requested revocation, the USDOC made a determination not to revoke the order. In each case, the reason for the USDOC's decision was that the producer/exporter was not a mandatory respondent in the administrative review at issue, and was therefore not individually examined. It is clear from the preliminary and final determinations, as well as the Issues and Decision Memoranda accompanying the final determinations, that the USDOC did not undertake any consideration of the need for the continued imposition of the duty to offset dumping by any of the requesting companies. The evidence before us clearly indicates that the USDOC's decisions not to revoke the order with respect to any of the requesting companies was based solely on the fact that the producers/exporters at issue were not being individually examined.

7.386. The United States argues that the Article 6.10 "limited examination" exception applies in the context of Article 11.2 reviews, such that the USDOC was not obligated to conduct a review where it was requested to do so by a producer/exporter that was not being individually examined.

7.387. We recall that the first sentence of Article 6.10 sets forth the principle that the authorities shall, "as a rule", determine an individual margin of dumping for each known producer/exporter. The second sentence of Article 6.10 provides that "[i]n cases where the number of exporters, producers, importers or types of products involved is so large" as to make such a determination of an individual margin of dumping for each known producer/exporter impracticable, the authorities may limit their examination pursuant to one of two methods. Hence, the "limited examination" exception in Article 6.10 concerns the possibility for a Member to limit the number of producers/exporters for which it calculates an individual margin.

7.388. Article 11.4 provides that the provisions of Article 6 regarding evidence and procedure apply to reviews conducted under Article 11.2. However, the Appellate Body has indicated (in the context of interpreting Article 11.3) that Article 11.4 does not import the requirements under

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<sup>572</sup> In its submissions, Viet Nam has made reference to a number of Vietnamese producers/exporters that did not submit a request for company-specific revocation, or that submitted such a request and subsequently withdrew their request. However, we do not understand Viet Nam to be pursuing any claim with respect to Vietnamese producers/exporters who did not submit and maintain a request for revocation. In any event, in the absence of a request for review, or in case such a request is withdrawn, there can in our view be no factual basis for a finding of inconsistency under Article 11.2, unless it is argued that the authority should have self-initiated a review. Viet Nam does not make the latter argument.

Article 6 into Article 11 wholesale.<sup>573</sup> As noted above, Article 11.2 provides little or no guidance for the authorities as to the methodology or criteria for the conduct of a review under that provision. We consider that, for the same reasons as led the Appellate Body to its conclusion regarding the interpretation of Article 11.3 in light of Article 11.4, nothing requires the authorities to calculate individual margins of dumping in the context of an Article 11.2 review. Moreover, in our view the reference in Article 11.4 to the "limited examination" exception in Article 6.10 does not allow an authority to refuse to conduct a review under Article 11.2 when the conditions set forth in that provision are otherwise fulfilled, on the basis that the producer/exporter requesting revocation is not being individually examined or was not individually examined in prior reviews or proceedings.

7.389. Even assuming that Article 6.10 applies in Article 11.2 reviews in the same way as it does in original investigations, the USDOC's decision not to undertake the requested reviews in the proceedings at issue cannot be justified on the basis of that Article. There is no indication that the USDOC considered whether – or determined that – initiating the reviews sought by Vietnamese producers/exporters was impracticable; rather, it preconditioned the review on the requesting producer/exporter having been selected for individual examination in the corresponding administrative review. Moreover, by requiring that only companies selected for individual examination were eligible to obtain a company-specific revocation, the USDOC imposed an additional condition, not foreseen under Article 11.2, on the initiation of reviews under that provision.

7.390. We note the United States' argument that Viet Nam's claims pertain to the USDOC's treatment of requests made under one of two alternative mechanisms available under US law to seek the revocation (in both cases, on a company-specific and/or order-wide basis) of anti-dumping duty orders. As described above, at the time of the determinations at issue, US law and regulations provided for two distinct mechanisms through which the USDOC could consider revoking the order with respect to an individual producer, i.e. the changed circumstances review mechanism provided for under Section 751(b) of the Act and Section 351.222(g) of the Regulations, and the mechanism for revocation in the context of administrative reviews, set forth under Sections 751(a) of the Act and Section 351.222(b) of the Regulations. However, in our view, this argument of the United States is inapposite: the existence, under the Member's legal system, of an alternative mechanism is not determinative of the consistency with the WTO Agreement of the Member's treatment of requests for review under the first mechanism.<sup>574</sup> It is irrelevant that the domestic law of the importing Member provides for more than one provision or mechanism which could have been used by the interested party to submit its request; an authority cannot decline to conduct a review under one mechanism, and justify that refusal on the basis that the interested party requesting it could have used another mechanism but did not. What matters is whether the interested party made a request that satisfies the requirements of Article 11.2, and the actions taken by an authority in response to that request.

7.391. On the basis of the above, we find that in its treatment of the requests for revocation submitted by Vietnamese producers/exporters that were not being individually examined, the USDOC acted inconsistently with the United States' obligations under Article 11.2 of the Anti-Dumping Agreement.<sup>575</sup> This being the case, and in the light of Viet Nam's argument that

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<sup>573</sup> In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body considered that Article 11.4 does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise) in a sunset review. As a consequence, the Appellate Body agreed with the Panel's view that "[t]he provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis". (Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 154-155, emphasis original.)

<sup>574</sup> We note that our approach in this respect differs from that of two prior panels. The *US – DRAMS* and *US – Anti Dumping Measures on Oil Country Tubular Goods* panels both considered, and rejected, claims under Article 11.2 challenging requirements under Section 351.222 of the USDOC Regulations and its predecessor. Both panels considered it relevant that US law provided a more general opportunity to request revocation through the changed circumstances review, which was not alleged to be inconsistent with Article 11.2 (Panel Reports, *US – Anti Dumping Measures on Oil Country Tubular Goods*, paras. 7.162-7.169; and *US – DRAMS*, para. 6.53).

<sup>575</sup> We note that Viet Nam also argues that the Vietnamese producers/exporters had demonstrated in repeated reviews that they were no longer dumping while maintaining a substantial level of exports, and thus had actually established that the continued imposition of the duty was no longer necessary to offset dumping by that producer/exporter (presumably independently of the requirement to demonstrate three years of no dumping under Section 351.222). (See, for instance, Viet Nam's opening statement at the first meeting of the

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Article 11.2 operationalizes the general principle set forth under Article 11.1, we do not consider it necessary to make separate findings under Article 11.1 of the Anti-Dumping Agreement.

**7.7.5.6 Whether the USDOC's determination not to revoke the order for certain Vietnamese producers/exporters on the basis that it had calculated a positive margin of dumping for these producers/exporters is inconsistent with Articles 11.1 and 11.2**

7.392. We now address Viet Nam's claims with respect to the Vietnamese producers/exporters – Minh Phu in the fourth administrative review and Camimex in the fifth administrative review – for which the USDOC determined not to revoke the order in part on the ground that they had positive dumping margins.<sup>576</sup> With respect to these producers/exporters, the basis for Viet Nam's claim is that the USDOC's determination not to revoke the order was based on its reliance on WTO-inconsistent margins of dumping.

7.393. As discussed in more detail in the section of our findings addressing Viet Nam's claims concerning the sunset review<sup>577</sup>, we share the view of other panels and the Appellate Body that if an authority decides to rely on margins of dumping in conducting its analysis in an Article 11.3 sunset review, those margins of dumping must have been established consistently with the provisions of the Agreement. We see no reason to adopt a different approach with respect to a review conducted pursuant to Article 11.2. As we have noted above, Article 11.2 does not necessarily require an investigating authority to determine the continued need for the imposition of the duty on the basis of dumping margins calculated for respondents. However, if the investigating authority elects to rely on the existence of dumping margins in the determination foreseen under Article 11.2, then, the margins it relies upon must be margins determined consistently with the disciplines of the Agreement and with Article VI:2 of the GATT 1994. As a consequence, to the extent that the USDOC relied on margins of dumping calculated inconsistently with the Anti-Dumping Agreement in its consideration of requests for revocation of certain companies, the USDOC acted inconsistently with the United States' obligations under Article 11.2.

7.394. The evidence before us establishes that, in the fourth administrative review, the USDOC determined not to revoke the *Shrimp* order with respect to Minh Phu on the basis that it had calculated a dumping margin for that producer/exporter. We have already determined that this dumping margin was calculated with simple zeroing, and for this reason, is inconsistent with Article 9.3 of the Anti-Dumping Agreement, as well as with Article VI:2 of the GATT 1994. Consequently, the USDOC's determination not to revoke the order with respect to Minh Phu on the basis of the dumping margin in the fourth administrative review is inconsistent with Article 11.2.

7.395. The evidence before us also establishes that, in the fifth administrative review, the USDOC determined not to revoke the *Shrimp* order with respect to Camimex on the basis that it had calculated a dumping margin for that producer/exporter. As was the situation regarding Minh Phu, this dumping margin was calculated with simple zeroing, and for this reason, contrary to Article 9.3 of the Anti-Dumping Agreement, as well as with Article VI:2 of the GATT 1994. Consequently, the USDOC's determination not to revoke the order with respect to Camimex in the fifth administrative review is inconsistent with Article 11.2 of the Anti-Dumping Agreement.

7.396. On the basis of the foregoing, we find that the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu, and in its determination, in the

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Panel, para. 64.) Viet Nam's argument invites us to engage in a *de novo* review of the evidence before the USDOC, to determine whether the evidence justified the revocation of the order. We recall that we are not to engage in any such *de novo* review of the evidence before the USDOC, and that our consideration of the WTO-consistency of the USDOC's determinations must proceed on the basis of the requests that were actually submitted to it, and of the reasons that it provided in its determinations. We also note that Viet Nam does not argue that the USDOC should have self-initiated a review (or reviews) under Article 11.2.

<sup>576</sup> Viet Nam argues that the issue of whether or not a WTO-inconsistent margin of dumping can be relied upon in the context of an Article 11.2 review is also an issue with respect to other respondents, i.e. presumably those discussed in the preceding section. (See Viet Nam's second written submission, para. 117.) However, the record before us shows that the only two producers for which the USDOC determined not to revoke the order because it calculated positive dumping margins for them were Minh Phu in the fourth administrative review and Camimex in the fifth administrative review.

<sup>577</sup> See above, para. 7.306.



fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex. In light of these findings, and in the light of Viet Nam's argument that Article 11.2 operationalizes the general principle set forth under Article 11.1, we do not consider it necessary to make findings under Article 11.1 of the Anti-Dumping Agreement.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Viet Nam has failed to establish that the simple zeroing methodology as used by the USDOC in administrative reviews is a measure of general and prospective application which can be challenged "as such". Therefore, we find that Viet Nam has not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;
- b. The United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order;
- c. The practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide, entity and assigns a single rate to these producers/exporters, is "as such" inconsistent with the United States' obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement;
- d. The United States acted inconsistently with its obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide, entity and assignment of a single rate to that entity;
- e. Viet Nam has failed to establish the existence of a measure with respect to the manner in which the USDOC determines the NME-wide entity rate, in particular concerning the use of facts available. Therefore, we find that Viet Nam has not established that the alleged measure is "as such" inconsistent with Articles 6.8 and 9.4, and Annex II of the Anti-Dumping Agreement;
- f. The United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order;
- g. Viet Nam has failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth and sixth administrative reviews is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement;
- h. Viet Nam has failed to establish that Section 129(c)(1) precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings. Therefore, we find that Viet Nam has not established that Section 129(c)(1) is "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement;
- i. The United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review;
- j. The United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement in the fourth and fifth administrative reviews as a result of its treatment of requests for revocation made by certain Vietnamese producers/exporters that were not being individually examined. We do not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the Anti-Dumping Agreement;



- k. The United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu, and with respect to its determination, in the fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex. We do not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the Anti-Dumping Agreement.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994 and the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Viet Nam under those Agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring the relevant measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.

8.4. Viet Nam requests that we exercise the discretion granted to WTO dispute settlement panels under Article 19.1 of the DSU to suggest that the United States implement this recommendation by revoking the anti-dumping duty order in its totality, and with respect to Minh Phu and Camimex, the latter as a consequence of eventual findings concerning the USDOC's treatment of these Vietnamese producers/exporters' requests for revocation.<sup>578</sup>

8.5. Article 19.1 of the DSU provides as follows:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted)

8.6. Thus, while a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement bring the relevant measure into conformity, it has discretion to ("may") suggest ways in which the responding Member could implement that recommendation. Previous panels have emphasized that Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation.<sup>579</sup> Although we have found that certain of the measures challenged by Viet Nam are inconsistent with the GATT 1994 and the Anti-Dumping Agreement, and recommend that the United States bring the relevant measures into conformity with its obligations under these Agreements, we decline to exercise our discretion under the second sentence of Article 19.1 in the manner requested by Viet Nam.

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<sup>578</sup> See above, para. 3.2.

<sup>579</sup> E.g. Panel Reports, *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.11.