**WORLD TRADE ORGANIZATION**

**WT/DS404/R**
11 July 2011

(11-3293)

Original: English

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

## *Report of the Panel*

**TABLE OF CONTENTS**

## LIST OF ANNEXES

### ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES



### ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS



### ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

## ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR
EXECUTIVE SUMMARIES THEREOF



## ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN
SUBMISSIONS OF THE PARTIES



## ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE
MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF



## ANNEX G

REQUESTS FOR CONSULTATIONS AND THE
ESTABLISHMENT OF A PANEL

## TABLE OF CASES CITED IN THIS REPORT

| Short Title | Full Case Title and Citation |
|---|---|
| *Argentina – Footwear* | Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575 |
| *Australia – Salmon* | Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327 |
| *Canada – Dairy (Article 21.5 – New Zealand and US II)* | Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213 |
| *Canada – Wheat* | Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817 |
| *China – Audiovisual Products* | Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R |
| *EC – Bananas III (Guatemala and Honduras)* | Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695 |
| *EC – Bed Linen* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049 |
| *EC – Fasteners (China)* | Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R, circulated to WTO Members 3 December 2010 [adoption/appeal pending] |
| *EC – Hormones* | Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 |
| *EC – Salmon (Norway)* | Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3 |
| *Guatemala – Cement II* | Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295 |
| *Japan – Film* | Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 |
| *Korea – Dairy* | Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3 |
| *Mexico – Anti-Dumping Measures on Rice* | Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007 |

| Short Title | Full Case Title and Citation |
|---|---|
| *Thailand – Cigarettes (Philippines)* | Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, circulated to WTO Members 15 November 2010 [adoption/appeal pending] |
| *US – Anti-Dumping Measures on PET Bags* | Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010 |
| *US – Carbon Steel* | Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779 |
| *US – Continued Zeroing* | Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009 |
| *US – Corrosion-Resistant Steel Sunset Review* | Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 |
| *US – DRAMS* | Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521 |
| *US – Hot-Rolled Steel* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697 |
| *US – Oil Country Tubular Goods Sunset Reviews* | Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257 |
| *US – Orange Juice (Brazil)* | Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, circulated on 25 March 2011 [adoption/appeal pending] |
| *US – Shrimp (Ecuador)* | Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425 |
| *US – Softwood Lumber V* | Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875 |
| *US – Softwood Lumber V (Article 21.5 – Canada)* | Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087 |
| *US – Stainless Steel (Mexico)* | Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513 |
| *US – Stainless Steel (Mexico)* | Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599 |
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323 |
| *US – Zeroing (EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417 |

| Short Title | Full Case Title and Citation |
|---|---|
| *US – Zeroing (EC)* | Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521 |
| *US – Zeroing (EC) (Article 21.5 – EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009 |
| *US – Zeroing (EC) (Article 21.5 – EC)* | Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW |
| *US – Zeroing (Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3 |
| *US – Zeroing (Japan)* | Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97 |
| *US – Zeroing (Japan) (Article 21.5 – Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009 |

# I. INTRODUCTION

## A. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.1 On 1 February 2010, Viet Nam requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") with regard to determinations in the U.S. anti-dumping proceedings on *Certain Frozen Warmwater Shrimp from Vietnam* (hereafter "*Shrimp*"), and certain related actions, laws, regulations, administrative procedures, practices and methodologies of the United States.[1]

1.2 On 7 April 2010, Viet Nam requested, pursuant to Article XXIII:1 of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement, that the Dispute Settlement Body ("DSB") establish a panel.[2]

1.3 At its meeting on 18 May 2010, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Viet Nam in document WT/DS404/5.

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/DS404/5 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 14 July 2010, Viet Nam requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 26 July 2010, the Director-General accordingly composed the Panel as follows[3]:

Chairman: Mr. Mohammad Saeed

Members: Ms Deborah Milstein
Mr. Iain Sandford

[1] WT/DS404/1. See Annex G-1.
[2] WT/DS404/5. See Annex G-2.
[3] WT/DS404/6.

1.7 China, the European Union, India, Japan, Korea, Mexico and Thailand reserved their rights to participate in the Panel proceedings as third parties.

B. PANEL PROCEEDINGS

1.8 Following consultation with the parties, the Panel adopted its working procedures (including additional procedures for the protection of business confidential information) and timetable on 20 August 2010.

1.9 On 13 September 2010, as part of its first written submission, the United States submitted requests for preliminary rulings. In its requests, the United States argued that certain of the measures challenged by Viet Nam are outside the terms of reference of this Panel, are not subject to the Anti-Dumping Agreement, and/or are not subject to WTO dispute settlement because they purport to include future measures. The Panel's rulings on these requests are set forth in its findings below.

1.10 The Panel met with the parties on 20, 21 October and on 14, 15 December 2010. It met with the third parties on 21 October 2010. The Panel issued its Interim Report to the parties on 7 April 2011. The Panel issued its Final Report to the parties on 19 May 2011.

## II. FACTUAL ASPECTS

2.1 The present dispute concerns the imposition of anti-dumping ("AD") duties in the U.S. proceedings on *Shrimp*. The U.S. Department of Commerce ("USDOC") initiated the original investigation in January 2004, issued an anti-dumping duty order in February 2005, and has since undertaken periodic reviews and a sunset review.

2.2 Specifically, Viet Nam makes claims with respect to the USDOC's final determinations in the second and third administrative reviews under the *Shrimp* anti-dumping order, and with respect to the "continued use", by the USDOC, of certain practices in successive proceedings under the same order.[4] The "practices" challenged by Viet Nam are the following[5]:

(a) The USDOC's use of zeroing in the calculation of dumping margins;

(b) The application of a "country-wide rate" based on adverse facts available to certain Vietnamese exporters or producers that could not establish that they act independently from the Vietnamese Government in their commercial and sales operations;

(c) The USDOC's limitation of the number of exporters or producers selected for individual investigation or review.

2.3 In addition, Viet Nam makes claims with respect to the "all others" rate applied by the USDOC in the second and third administrative reviews.

2.4 Finally, Viet Nam also makes claims with respect to the USDOC's "zeroing methodology", as such.[6]

[4] Viet Nam's first written submission, para. 101; Viet Nam's second written submission, para. 1.
[5] Viet Nam's first written submission, paras. 1-15; Viet Nam's second written submission, para. 2.
[6] See *infra* section VII.B for a more detailed overview of the measures and claims at issue in this dispute.

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

### A. VIET NAM

3.1 Viet Nam requests the Panel to find that[7]:

(a) The application of zeroing to individually-investigated respondents in the second and third administrative reviews, and its continued application in the subsequent reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(b) The USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(c) The use of margins of dumping determined using the zeroing methodology to calculate the "all others" rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.

(d) Application of an "all others" rate that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an anti-dumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.

(e) The application of an anti-dumping duty based on adverse facts available to the Vietnam-wide entity in the second and third administrative reviews, and its continued application in subsequent reviews, is inconsistent with Articles 6.8, 9.4, 17.6(i) and Annex II of the Anti-Dumping Agreement.

(f) The USDOC's determinations in the second and third administrative reviews, and on a continuing basis, to limit the number of individually-investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

3.2 Viet Nam requests that the Panel recommend that the United States immediately bring the relevant measures into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.[8]

### B. UNITED STATES

3.3 The United States requests that the Panel grant its requests for preliminary rulings and reject Viet Nam's claims that the United States has acted inconsistently with the covered agreements.[9]

## IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and

[7] Viet Nam's second written submission, para. 144.
[8] Viet Nam's second written submission, para. 146.
[9] United States' first written submission, para. 222; United States' second written submission, para. 167.

their oral statements, or executive summaries thereof, are attached to this Report as annexes (see List of Annexes, pages vi-vii).

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties are set out in their written submissions and oral statements. Third parties' written submissions and oral statements, or executive summaries thereof, are attached to this Report as annexes (see List of Annexes, pages vi-vii).[10]

## VI. INTERIM REVIEW

### A. INTRODUCTION

6.1 On 7 April 2011, the Panel submitted its Interim Report to the parties. On 21 April 2011, the parties submitted written requests for review of precise aspects of the Interim Report. On 5 May 2011, Viet Nam submitted written comments on the United States' requests for interim review. The United States did not comment on Viet Nam's requests for review.

6.2 As explained below, the Panel has modified aspects of its findings in light of the parties' comments where it considered appropriate. Due to these changes, the numbering of certain paragraphs and footnotes in the Final Report has changed from the Interim Report.

### B. VIET NAM'S REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.3 Viet Nam suggests that the Panel make a number of clerical changes to the Interim Report to correct typographical errors and to add a reference to an exhibit in a footnote. We have amended the Interim Report to address Viet Nam's suggestions.

### C. UNITED STATES' REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.4 The United States takes issue with the statement in paragraph 7.14 of the Interim Report (unchanged in the Final Report) that when zeroing is applied, negative comparison results "are not taken into consideration in calculating the overall margin of dumping". The United States considers that negative comparison results are, in fact, taken into consideration when zeroing is applied. However, the United States argues, these negative comparison results are considered to be valued at zero. In addition, the United States submits that zeroing affects only the comparison results that are aggregated in the *numerator* of the dumping margin calculation. The United States notes that the value of all sales is aggregated in the *denominator* of the dumping margin calculation. The United States requests that the Panel amend paragraph 7.14 accordingly. For similar reasons, the United States requests that the Panel amend paragraph 7.93, paragraph 7.111 (subject to its other request in respect of this paragraph, discussed below), footnote 113 to paragraph 7.80 (footnote 114 in the Final Report), and footnote 168 to paragraph 7.114 (footnote 172 in the Final Report) to reflect the fact that zeroing sets the value of any negative comparison results to zero, rather than "disregard[ing]" or "discard[ing]" such results.

6.5 Viet Nam opposes these U.S. requests. Viet Nam considers that the Interim Report correctly describes the effects of the zeroing methodology. Furthermore, Viet Nam notes that the Interim Report does not comment on the use of *sales* in the denominator to calculate the final dumping margin, but rather on the failure to use the *negative comparison results* in calculating the numerator.

[10] China, India and Thailand did not submit third-party written submissions. Mexico and Thailand did not make third-party oral statements.

6.6 The Panel does not agree with the United States' suggestion that the Interim Report improperly describes the zeroing methodology. First, the Panel fails to see any distinction, from a mathematical point of view, between "disregard[ing]" a number in the aggregation of a series of numbers, and setting that number at zero. Second, the Panel considers that the changes suggested by the United States would not add to the factual accuracy of its description of the zeroing methodology applied by the United States. The evidence before the Panel – in particular Exhibit Viet Nam-33, the accuracy of which the United States does not contest – is to the effect that the programming instructions applied by the USDOC exclude negative comparison results from the calculation of the dumping margin, not that they set them zero. Incidentally, the Panel notes that the United States is not requesting any modification to paragraph 7.78 of the Interim Report (unchanged in the Final Report), which summarizes the relevant portions of this exhibit. For this reason, the Panel declines to amend paragraphs 7.14, 7.93, 7.111, footnote 113 (114 in the Final Report) to paragraph 7.80, and footnote 168 (172 in the Final Report) to paragraph 7.114 as requested by the United States.

6.7 In addition, we agree with Viet Nam that our description of the zeroing methodology focuses on whether all comparison results are taken into account in the numerator, and that it does not suggest that certain *sales* are disregarded in the denominator. Nevertheless, the Panel has added a new footnote (footnote 115) to make it clear that zeroing does not affect the denominator when the USDOC calculates the dumping margin as a percentage.

6.8 The United States requests that the Panel amend paragraph 7.75 of the Interim Report (unchanged in the Final Report). The United States submits that while it did not contest the accuracy of the evidence submitted by Viet Nam with respect to the USDOC's use of zeroing in the proceedings at issue, it argued that given the zero and *de minimis* margins of dumping calculated in the administrative reviews at issue, Viet Nam failed to demonstrate that the USDOC assessed any duties in excess of the margin of dumping. Viet Nam opposes the U.S. request. Viet Nam considers that the language that the United States proposes to add summarizes the United States' *legal* argument, and has no relevance to the *factual* question of whether the USDOC applied zeroing in the proceedings at issue, which is the question addressed in the paragraphs at issue. The Panel notes that the United States did not at any time during its proceedings challenge Viet Nam's allegation that the USDOC used zeroing in the proceedings at issue. For this reason, the Panel considers that paragraph 7.75 accurately reflects the United States' arguments in these proceedings. Furthermore, as Viet Nam notes, paragraph 7.75 concerns the question whether the USDOC used zeroing in the proceedings at issue (rather than whether or not duties were assessed). Finally, the language suggested by the United States is already included in paragraph 7.82 and footnote 114 of the Interim Report (footnote 116 of the Final Report). For this reason, we do not consider it necessary to amend paragraph 7.75 as requested by the United States. Nonetheless, to ensure greater clarity, we have inserted, in a new footnote, a reference to this paragraph and footnote.

6.9 The United States requests that we reflect, in paragraph 7.103 of the Interim Report (unchanged in the Final Report), its argument that Viet Nam for the first time made arguments with respect to its "as such" claim against the "zeroing methodology" in response to a written question of the Panel. Viet Nam opposes the change proposed by the United States. Viet Nam notes that the United States proposes adding language in the section summarizing the United States' legal arguments, but that the paragraph that the United States suggests adding does not explain or summarize any legal argument made by the United States. Rather, Viet Nam submits, the paragraph merely identifies the timing of events during the course of the Panel proceedings. We have added a new footnote to this paragraph to reflect the argument of the United States in respect of this issue.

6.10 The United States submits that paragraphs 7.111 and 7.122 of the Interim Report (unchanged in the Final Report) incorrectly state that the content of the alleged norm, and whether it is attributable to the United States, is not in dispute. Moreover, the United States argues that since these statements form an essential part of the basis for the Panel's conclusion in paragraph 7.122 with respect to

Viet Nam's "as such" claim against the "zeroing methodology", the Panel's conclusion in respect of that claim cannot be sustained and the relevant findings should be stricken from the Report. Viet Nam opposes this U.S. request on the ground that the sentences of concern to the United States are found in a section discussing the Panel's evaluation, not a section devoted a summary of U.S. arguments, and that the United States has not commented on any improper inclusion or omission in the section summarizing its arguments. In addition, Viet Nam submits that the Panel is correct that the United States did not offer any substantive argument on either the content of the alleged norm or attribution of the norm to the United States. The Panel has amended paragraphs 7.111 and 7.122 to ensure that they accurately reflect the United States' arguments on this issue. Specifically, the relevant paragraphs now reflect the United States' statement, in its second written submission, that Viet Nam has failed to provide evidence to establish the content of the alleged norm, and that it is attributable to the United States. We have amended paragraph 7.222 to reflect the Panel's view that Viet Nam has effectively established these two criteria. For this reason, the Panel has not modified its finding with respect to the existence of the "zeroing methodology" as a rule or norm of general and prospective application.

6.11 The United States submits that paragraph 7.113 of the Interim Report (unchanged in the Final Report) does not accurately reflect its position with respect to the evidence put forward by Viet Nam in support of its "as such" claim. The United States indicates that while it did not contest the accuracy of the evidence presented, it did contest that such evidence was sufficient to establish that the challenged measure is inconsistent with the provisions of the Agreement. The Panel has amended paragraph 7.113 as suggested by the United States.

6.12 The United States suggests that paragraphs 7.242 and 7.248 of the Interim Report be deleted. The United States submits that contrary to what these paragraphs suggest, it did not argue that the Working Party Report on Viet Nam's accession permits an investigating authority to apply a rate to a non-market economy entity that is not consistent with the requirements of Article 9.4 of the Anti-Dumping Agreement. Viet Nam opposes this U.S. request, as it considers that paragraph 7.242 accurately reflects the arguments made by the United States with respect to the rate applied to the Vietnam-wide entity. We have amended the Interim Report to address the United States' concerns.

6.13 The United States also suggests that the Panel make a number of clerical changes to the Interim Report to correct typographical errors. In some instances, the United States also suggests modifying the language used in the Report in order to enhance its clarity. In the absence of any objection by Viet Nam, we have amended the Interim Report to address these suggestions.

### D. OTHER CHANGES FROM THE INTERIM REPORT

6.14 In addition to the typographical and other non-substantive errors identified by the parties, we have also made a number of changes to the Report to improve its readability or ensure its accuracy.

## VII. FINDINGS

### A. RELEVANT PRINCIPLES REGARDING TREATY INTERPRETATION, THE APPLICABLE STANDARD OF REVIEW, AND BURDEN OF PROOF

#### 1. Standard of review

7.1 Article 11 of the DSU provides the standard of review applicable in WTO panel proceedings in general. This provision imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", both factual and legal. Article 11 of the DSU provides, in relevant part:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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."

7.2 Further, Article 17.6 of the Anti-Dumping Agreement sets forth a special standard of review applicable to disputes under the Anti-Dumping Agreement. It provides:

> "(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 we will apply with respect to the factual and the legal aspects of the present dispute.

### 2. Rules of treaty interpretation

7.4 Article 3.2 of the DSU requires us to apply customary rules of public international law on the interpretation of treaties. It is generally accepted that these rules can be found in Articles 31-32 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention"). Article 31(1) of the Vienna Convention provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.5 Under the Anti-Dumping Agreement, the Panel is generally to follow the same rules of treaty interpretation as in any other dispute. However, under Article 17.6(ii) of the Anti-Dumping Agreement (cited above), where a relevant provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, a panel has to uphold a measure that rests upon one of those permissible interpretations. The Appellate Body has indicated that Article 17.6(ii) contemplates a sequential analysis. The Appellate Body explained that:

> "The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies."[11]

[11] Appellate Body Report, *US – Continued Zeroing*, para. 271. (emphasis original)

### 3. Burden of proof

7.6 The general principles regarding 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 by another Member assert and prove its claim. In *US – Wool Shirts and Blouses* the Appellate Body stated that:

> "… we find it difficult … to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[12]

7.7 Furthermore, in *Canada – Dairy (Article 21.5 – New Zealand and US II)* the Appellate Body stated that:

> "… as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[13]

7.8 A *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.[14] Viet Nam, as the complaining party, must make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes, which the United States must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for the United States to provide evidence supporting the facts which it asserts.

## B. INTRODUCTION TO THE PANEL'S FINDINGS – FACTUAL BACKGROUND

7.9 Viet Nam requests the Panel to find that the United States acted inconsistently with its obligations under the GATT 1994 and the Anti-Dumping Agreement by reason of certain actions of the USDOC in its proceedings concerning imports of *Shrimp* from Viet Nam. As noted above, Viet Nam's claims pertain to:

(a) The USDOC's zeroing methodology, as such, and as applied in the proceedings at issue.

---

[12] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[13] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. (emphasis original)

[14] Appellate Body Report, *EC – Hormones*, para. 104.

(b) The USDOC's decisions, in the proceedings at issue, to limit the number of individually-examined companies.

(c) The "all others" rate imposed by the USDOC in the proceedings at issue.

(d) The rate assigned by the USDOC to the Vietnam-wide entity in the proceedings at issue.

7.10 Before we proceed to analyse Viet Nam's claims, we consider it useful to provide a brief overview of relevant USDOC practices. We therefore provide, in this introductory section, background information on: (i) the U.S. retrospective duty assessment system; (ii) zeroing; (iii) the USDOC's procedures for the selection of companies for individual examination; (iii) the USDOC's assignment of margins of dumping to respondents not individually examined. In addition, we also provide a brief summary of the USDOC's determinations in the *Shrimp* proceedings.

7.11 The summary of relevant facts in this section reflects our understanding of those facts before us which are not in dispute and is without prejudice to our legal findings in subsequent sections of this Report. To the extent that there is a disagreement between the parties with respect to a relevant fact before us, we address that controversy in the relevant section below.

## 1. Relevant USDOC practices in anti-dumping proceedings

(a) The U.S. retrospective anti-dumping system

7.12 The United States operates what is referred to as a "retrospective" duty assessment system. Under this system, an anti-dumping duty liability arises, and a security (in the form of a cash deposit) is collected at the time of importation, but duties are not assessed at that time. The U.S. authorities[15] determine the amount of dumping that actually took place, and the amount of duties actually due, at a later date, in the context of a periodic, or "administrative", review. Interested parties may request such a review once a year, during the anniversary month of the order, to determine the amount of duties – if any – owed on entries made during the previous year.[16] In an administrative review, the USDOC assesses the importer's liability for anti-dumping duties on a retrospective and transaction-specific basis. The USDOC calculates an importer-specific duty assessment rate, which is applied to the value of the importer's imports to determine the correct total amount of duties owed; if no review is requested, the duty is assessed at the rate established for the cash deposits. In addition, the USDOC also determines an exporter-specific margin of dumping, which is used to derive a new cash deposit rate applicable to imports from that exporter going forward.[17]

7.13 Five years after the publication of an anti-dumping duty order, the U.S. authorities conduct an expiry ("sunset") review to determine whether revocation of the order would be likely to lead to a continuation or recurrence of dumping and injury. Specifically, the USITC determines whether revocation of the order would be likely to lead to the continuation or recurrence of material injury whereas the USDOC determines whether revocation of the order would be likely to lead to a

[15] Three agencies of the U.S. Government are involved in anti-dumping proceedings: the U.S. Department of Commerce ("USDOC") determines the existence and level of dumping by foreign exporters/producers, while the U.S. International Trade Commission ("USITC") determines whether the U.S. domestic industry is materially injured or threatened with material injury by reason of the dumped imports. U.S. Customs and Border Protection ("USCBP") is responsible for the collection of duties.

[16] The period of time covered by the review is normally twelve months; however, in the case of the first administrative review, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[17] United States' first written submission, paras. 15-24; Viet Nam's first written submission, paras. 24-39.

continuation or recurrence of dumping. In making this "likelihood-of-dumping" determination, the USDOC takes into consideration the dumping margins established in the original investigation and administrative reviews, as well as the volume of imports for the periods before and after the issuance of the anti-dumping order.[18]

(b) "Zeroing" in the calculation of margins of dumping

7.14 Generally, the existence of dumping is determined by comparing prices of sales by the exporter to the importing country ("export price") to the price of sales of the same product in the exporter's domestic market ("normal value") during a reference period. Dumping exists if the export price is less than the normal value.[19] The issue of zeroing arises whenever multiple such comparisons between the export price and the normal value are performed and then need to be aggregated. In such cases, some comparisons may reflect export prices below normal value (i.e. dumping), while others may reflect the opposite (export prices above normal value). Zeroing is the practice, when performing the aggregation of multiple comparisons, of treating the results of comparisons where export prices are above normal value as "zero" (treating them as "undumped" rather than assigning them a negative value). Thus, when zeroing is applied, negative comparison results are not taken into consideration in calculating the overall margin of dumping and are not permitted to offset the results of comparisons where export prices are below normal value.

7.15 Viet Nam makes claims with respect to the alleged use by the USDOC of zeroing in the context of original investigations and of periodic reviews. Viet Nam alleges, first, that the USDOC applied "model zeroing" in calculating margins of dumping in the original investigation. Viet Nam describes the USDOC's "model zeroing" methodology as follows: In calculating the margins of dumping of individually-investigated exporters in the original investigation, the USDOC makes model-specific intermediate comparisons of the weighted average export price to the weighted average normal value ("weighted-average-to-weighted-average" comparisons). Where the intermediate comparison produces a negative dumping margin for a particular model, the USDOC refuses to allow the negative dumping margin for that model to offset positive dumping margins calculated for other models. Thus, Viet Nam submits, when aggregating the dumping margin for all models, the USDOC only includes those models that produced a positive dumping margin; the negative dumping margins are set to zero and have no impact on the overall dumping margin.[20]

7.16 Viet Nam also makes claims with respect to "simple zeroing" in the context of periodic reviews. Viet Nam submits that in periodic reviews, the USDOC compares the export price of individual transactions to a weighted average normal value for comparable merchandise ("weighted-

[18] USDOC Determinations in Recently Completed Sunset Reviews, Exhibit Viet Nam-64; Preliminary Determination and Issues and Decision Memorandum in the Sunset Review, Exhibit Viet Nam-25. Where not otherwise specified, all references to USDOC determinations in the "original investigation", an "administrative review" or the "sunset review" are to the relevant USDOC determinations in the *Shrimp* proceedings.

[19] In investigations involving products from countries which it categorizes as non-market economies, the USDOC calculates the normal value on the basis of surrogate values taken from countries which it considers to be "market economies" rather than on the basis of the prices or costs of production actually incurred by the investigated producer. Specifically, for each exporter/producer, the USDOC relies on the quantities of the factors of production used by the exporter/producer concerned (e.g., labour, raw materials, energy) based on its actual production experience. The USDOC values each such factor of production on the basis of prices prevailing in the "surrogate" "market economy". The USDOC then applies ratios for overhead, selling, general and administrative expenses, and profit to the calculation resulting from the multiplication of each respondent's factors of production by the surrogate price. In the *Shrimp* proceedings, the USDOC considered that Viet Nam is a non-market economy and selected Bangladesh as the relevant surrogate country. (Viet Nam's first written submission, para. 26 and USDOC 2009 Anti-Dumping Manual Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 7).

[20] Viet Nam's first written submission, paras. 29-32.

average-to-transaction" comparison). Viet Nam explains that the USDOC then aggregates the results of these comparisons to calculate the reviewed company's overall dumping margin. Viet Nam alleges that in doing so, the USDOC disregards, or "zeroes", all negative comparison results, where the export price is higher than the normal value.[21]

(c) USDOC procedures with respect to the selection of respondents

7.17 United States law sets forth a general requirement that the USDOC shall determine an individual margin of dumping for each known exporter or producer.[22] Similar to Article 6.10 of the Anti-Dumping Agreement, however, U.S. law provides an exception to this general rule: If it is "not practicable" to make individual dumping margin determinations because of the large number of exporters or producers involved in the investigation or review, the USDOC may determine individual margins of dumping "for a reasonable number of exporters or producers" by limiting its examination to: (i) a statistically-valid sample of exporters, producers, or types of products; or (ii) exporters and producers "accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined".[23] In the proceedings at issue, the USDOC limited its examination to the latter.[24]

7.18 The USDOC selects exporters/producers for individual examination in the context of an administrative review as follows: On the anniversary month of the publication of the anti-dumping order, the USDOC publishes a notice informing interested parties – whether U.S. domestic producers or importers or foreign exporters – of the possibility to request an administrative review of individual producers and exporters covered by the order. The USDOC next publishes a notice of initiation, in which it lists all companies for which a review has been requested. The USDOC then analyses importation data for these companies using either data collected by the USCBP or questionnaire responses submitted by the companies, providing the quantity and value of their exports of the product under consideration during the period under review. The USDOC subsequently issues a "Respondent Selection Memorandum" in which it determines (1) whether individual examination of all companies for which a review has been requested would be practicable and (2) if not, the companies selected for individual examination for the relevant review ("mandatory respondents"). U.S. law provides companies not selected for individual examination the opportunity to be "voluntary respondents", i.e. to come forward and submit to the USDOC the data necessary for the calculation of an individual dumping margin. While the USDOC has a general obligation to determine individual margins for such "voluntary respondents", it may also refuse to do so where this would be impracticable.[25]

[21] Viet Nam's first written submission, paras. 36-38.
[22] 19 U.S.C. § 1677f-1(c)(1), Exhibit Viet Nam-52.
[23] 19 U.S.C. § 1677f-1(c)(2), Exhibit Viet Nam-52.
[24] See *infra* section VII.E.
[25] 19 C.F.R. §351.204(d)(1) and (2) (Exhibit Viet Nam-53).

(d) The USDOC's assignment of dumping margins to exporters not individually examined[26]

7.19 The USDOC's practice for imposing anti-dumping duties on imports from companies not individually examined differs depending on whether the imports originate from a country which the USDOC considers to be a "market economy", or one which the USDOC treats as a "non-market economy". In the proceedings at issue, the USDOC considered that Viet Nam is a non-market economy.[27]

7.20 In proceedings involving imports from non-market economies, the USDOC applies 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 anti-dumping duty rate.[28] Exporters wishing to rebut that presumption must file an application and demonstrate the absence of government control, both *de jure* and *de facto*, over their export activities, pursuant to a set of criteria established by the USDOC.[29] The "separate rate" respondents which satisfy these criteria are eligible to receive an individual margin. Where the investigating authority has limited its examination, they either receive an individual margin, if selected for individual examination, or an "all others" rate, if not selected for individual examination.

7.21 The "all others" rate[30] applied to non-selected respondents is generally based on the weighted average margins of dumping of the individually examined respondents, excluding rates that are zero, *de minimis* rates or rates entirely based on facts available. The all others rate is updated in each administrative review in order to reflect the individual dumping margins calculated in the review.[31]

7.22 The USDOC Anti-Dumping Manual does not explain how the NME-wide rate is to be calculated, other than to mention that the NME-wide rate determined in the original investigation 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 antidumping questionnaire", adding that "[i]n many cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise."[32] The Manual further indicates that "occasionally", the NME-wide rate "may be changed" through an administrative review. This happens when (i) the USDOC is reviewing the NME entity because the USDOC is reviewing an

[26] The USDOC uses the terms "exporter(s)", "company(ies)" and "respondent(s)" interchangeably. For this reason, we also use these terms interchangeably in discussing the entities in respect of which anti-dumping duties are assessed. Of relevance to this issue, the USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies indicates that the USDOC makes "separate rate" determinations (explained below) and assigns anti-dumping duties with respect to *exporters*. The Anti-Dumping Manual further indicates that the exporter-specific "separate rate" applied by the USDOC – whether individual margin or "all others" rate – is also specific to those producers that supplied the exporter during the period of investigation. The Anti-Dumping Manual refers to these as "combination rates" "because such rates apply to specific combinations of exporters and one or more producers" and explains that "[t]he cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the POI." (USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 5).

[27] We use the term "non-market economy" and the acronym "NME" to refer to the USDOC's own use of these term and acronym. In doing so, we express no opinion on the WTO-consistency of the USDOC's classification of certain countries, including Viet Nam, in such a category.

[28] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, p. 3.

[29] USDOC "Separate Rate" Application Used by the USDOC in Investigations Involving Imports from Viet Nam, Exhibit Viet Nam-50.

[30] The USDOC refers to the "all others" rate applied to such respondents as the "separate rate". To avoid confusion, in our findings, we usually prefer the term "all others" rate.

[31] See, *infra* section VII.F.

[32] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, pp. 7-8.

exporter that is part of that entity; and (ii) one of the calculated margins for a respondent is higher than the current NME-wide rate.[33]

## 2. USDOC determinations in the *Shrimp* proceedings

7.23 Below is a summary of the successive proceedings conducted by the USDOC under the *Shrimp* anti-dumping order. This summary is without prejudice to the Panel's analysis of whether any or all of these proceedings are within the Panel's terms of reference. We note, in this respect, that Viet Nam acceded to the WTO on 11 January 2007, meaning that certain of the USDOC proceedings mentioned here were initiated or completed prior to Viet Nam's accession. We further note that Viet Nam submitted its request for the establishment of a panel on 7 April 2010, i.e. before certain of the USDOC determinations listed below.[34]

### (a) Original investigation

7.24 The USDOC initiated on 20 January 2004 an anti-dumping investigation on certain frozen and canned warmwater shrimp from, *inter alia*, Viet Nam.[35] On 8 December 2004, the USDOC published its final determination in the original investigation[36], and on 1 February 2005, the USDOC published the anti-dumping order.[37] In the investigation, the USDOC treated Viet Nam as a non-market economy. The USDOC determined that it was impracticable to individually examine all the Vietnamese exporters/producers of the product under consideration. The USDOC selected for individual examination the four respondents accounting for the largest volume of exports during the period of investigation. Three of these "mandatory respondents", Camimex, Minh Phu and Minh Hai, cooperated with the investigation. For each of them, the USDOC calculated an individual dumping margin ranging from 4.30 to 5.24 per cent. The USDOC applied to the separate rate respondents not selected for individual examination a rate equal to the weighted average of the three individual margins of dumping, 4.57 per cent. Finally, the USDOC applied to those exporters which it considered had not demonstrated entitlement to a separate rate a Vietnam-wide rate of 25.76 per cent. The USDOC determined this rate on the basis of adverse facts available.[38]

### (b) First administrative review

7.25 The first administrative review covered imports of frozen warmwater shrimp from Viet Nam during the period 16 July 2004 to 31 January 2006. The USDOC issued its final determination in that review on 12 September 2007. The USDOC determined that it was impracticable to individually examine all Vietnamese companies covered by the review and selected three Vietnamese respondents

---

[33] USDOC Anti-Dumping Manual, Chapter 10, Non-Market Economies, Exhibit Viet Nam-31, pp. 7-8.

[34] Viet Nam indicates that the second and third administrative reviews were initiated and completed subsequent to Viet Nam's accession to the WTO on 11 January 2007 (Viet Nam's first written submission, para. 101). Indeed, these two administrative reviews are the only ones which were completed after Viet Nam's accession and before the submission by Viet Nam of its request for the establishment of a panel.

[35] Notice of Initiation of the Original Investigation, Exhibit Viet Nam-03.

[36] Final Determination and Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06.

[37] Amended Final Determination in the Original Investigation and Anti-Dumping Duty Order, Exhibit Viet Nam-07; Preliminary Determination in the Original Investigation, Exhibit Viet Nam-05. While the USDOC initiated an investigation on certain *frozen and canned* warmwater shrimp, the anti-dumping order was imposed only in respect of *frozen* warmwater shrimp, reflecting the USITC's negative injury determination with respect to imports of *canned* warmwater shrimp from Viet Nam.

[38] Respondent Selection Memorandum in the Original Investigation, Exhibit Viet Nam-04; Final Determination and Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06; Amended Final Determination in the Original Investigation and Anti-Dumping Duty Order, Exhibit Viet Nam-07.

for individual examination. Only one of these respondents, Fish One, cooperated. The USDOC calculated a margin of zero per cent for Fish One. The USDOC again applied a rate of 25.76 per cent to the Vietnam-wide entity. Since the rates for mandatory respondents included only Fish One's zero rate and the Vietnam-wide rate, which was entirely based on adverse facts available, the USDOC applied the same "all others" rate which it had applied in the original investigation, i.e. 4.57 per cent.[39]

(c) Second administrative review

7.26 The USDOC's final determination in the second administrative review, covering imports during the period 1 February 2006 to 31 January 2007, was issued on 9 September 2008. The USDOC again determined that it was impracticable to individually examine all Vietnamese exporters/producers. It selected two companies, Minh Phu and Camimex, for individual examination. The USDOC calculated a margin of zero per cent for Camimex and a margin of 0.01 per cent (*de minimis*) for Minh Phu. Since all individual margins were zero or *de minimis*, the USDOC applied to most "separate rate" respondents not individually examined the same 4.57 per cent "all others" rate which it had applied in the original investigation and the first administrative review. Where a more recent individual margin was on the record for a company, the USDOC applied that rate to the company concerned. The USDOC thus attributed zero rates to both Fish One and Grobest and a 4.30 per cent rate to Seaprodex. The USDOC also applied the same Vietnam-wide rate of 25.76 per cent that it had applied in the original investigation and first administrative review.[40]

(d) Third administrative review

7.27 The USDOC's final determination in the third administrative review, covering imports during the period 1 February 2007 to 31 January 2008, was issued on 19 September 2009. The USDOC again determined that it was impracticable to individually examine all Vietnamese exporters/producers. It selected three companies, Minh Phu, Camimex and Phuong Nam, for individual examination, and calculated a *de minimis* margin for each of these companies, ranging between 0.08 per cent and 0.43 per cent. The USDOC adopted the same approach with respect to the "all others" rate as in the second administrative review, applying an "all others" rate of 4.57 per cent, except where a more recent individual margin was on the record for a company. The USDOC also applied the same Vietnam-wide rate of 25.76 per cent rate it had applied in previous proceedings.[41]

(e) Fourth administrative review

7.28 The USDOC's final determination in the fourth administrative review, covering imports during the period 1 February 2008 to 31 January 2009, was issued on 9 August 2010. The USDOC selected two companies for individual examination, Minh Phu and Nha Trang. It calculated a dumping margin of 2.96 per cent for Minh Phu and a dumping margin of 5.58 per cent for Nha Trang.

---

[39] Notice of Initiation of the First Administrative Review and New Shipper Review, Exhibit Viet Nam-08; Respondent Selection Memorandum in the First Administrative Review, Exhibit Viet Nam-09; Preliminary Determination in the First Administrative Review, Exhibit Viet Nam-10; Final Determination and Issues and Decision Memorandum in the First Administrative Review and New Shipper Review, Exhibit Viet Nam-11. In addition, the USDOC applied a rate of zero to Grobest, a "new shipper" of the product under consideration.

[40] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12; Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13; Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14; Final Determination and Issues and Decision Memorandum in the Second Administrative Review, Exhibit Viet Nam-15.

[41] Notice of Initiation of the Third Administrative Review, Exhibit Viet Nam-16; Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17; Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18; Final Determination and Issues and Decision Memorandum in the Third Administrative Review, Exhibit Viet Nam-19.

The USDOC applied as "all others" rate the weighted average of these margins of dumping, i.e. 4.27 per cent. In addition, the USDOC applied to the Vietnam-wide entity the same 25.76 per cent rate as in previous proceedings.[42]

(f) Fifth administrative review

7.29 The USDOC's fifth administrative review, covering imports during the period 1 February 2009 to 31 January 2010, was initiated on 9 April 2010.[43] It was ongoing at the time of the Panel's proceedings. The USDOC selected three companies for individual examination, Minh Phu, Nha Trang and Camimex.[44]

(g) Sunset review

7.30 The USDOC on 4 January 2010 initiated a five-year "sunset" review of the *Shrimp* anti-dumping order. On 6 August 2010 the USDOC preliminarily determined that revocation of the order would be likely to lead to continuation or recurrence of dumping at margins of dumping ranging from 4.30 per cent to 25.76 per cent, corresponding to the margins of dumping calculated for various Vietnamese companies in the original investigation. On 7 December 2010, the USDOC issued its final likelihood-of-dumping determination, in which it confirmed these conclusions.[45]

C. TERMS OF REFERENCE

## 1. Introduction

7.31 Before addressing the substance of Viet Nam's claims, we first consider a number of issues pertaining to whether certain measures are properly before the Panel.

7.32 Viet Nam seeks "as applied" findings with respect to three measures: the USDOC's determination in the second administrative review, the USDOC's determination in the third administrative review, and the "continued use of challenged practices" in the successive *Shrimp* proceedings.[46] In addition, Viet Nam seeks findings with respect to the WTO-consistency, as such, of the U.S. "zeroing methodology".[47]

---

[42] Notice of Initiation of the Fourth Administrative Review, Exhibit Viet Nam-20; Respondent Selection Memorandum in the Fourth Administrative Review, Exhibit Viet Nam-21; Preliminary Determination in the Fourth Administrative Review, Exhibit Viet Nam-22; Final Determination and Issues and Decision Memorandum in the Fourth Administrative Review, Exhibit Viet Nam-23. We note that at the time of Viet Nam's panel request, the USDOC had not yet issued its final determination in the fourth administrative review.

[43] Notice of Initiation of the Fifth Administrative Review, Exhibit Viet Nam-26. We note that at the time of Viet Nam's panel request, the USDOC had not yet initiated the fifth administrative review.

[44] Respondent Selection Memorandum in the Fifth Administrative Review, Exhibit Viet Nam-27.

[45] Notice of Initiation of the Sunset Review, Exhibit Viet Nam-24, and Preliminary Determination and Issues and Decision Memorandum in the Sunset Review, Exhibit Viet Nam-25. Viet Nam did not submit the USDOC's final likelihood-of-dumping determination as an exhibit but provided a reference to the Federal Register Notice of that determination (Viet Nam's opening oral statement at the second meeting of the Panel, footnote 46 to para. 52, citing to *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order*, 75 Fed. Reg. 75965, 7 December 2010, available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt). We note that the documents submitted by Viet Nam only pertain to the USDOC's likelihood-of-dumping determinations, and that at the time of Viet Nam's panel request, the USDOC had only initiated the sunset review.

[46] Viet Nam's first written submission, para. 101; Viet Nam's second written submission, para. 144.

[47] Viet Nam's second written submission, para. 144.

7.33 The United States made requests for preliminary rulings with respect to certain of the measures challenged by Viet Nam in the context of its "as applied" claims. Specifically, the United States requests that we find that the following measures are not within our terms of reference:

(a) the USDOC's final determination in the original investigation;

(b) the USDOC's final determination in the first administrative review; and

(c) the measure characterized by Viet Nam as the "continued use of challenged practices".[48]

7.34 We first address the United States' request pertaining to the USDOC determinations in the original investigation and first administrative review.

## 2. U.S. request for a preliminary ruling with respect to the USDOC determinations in the original investigation and first administrative review

7.35 The United States requests that we find that the USDOC's final determinations in the original investigation and in the first administrative review, which are both identified as "measures" at issue in Viet Nam's panel request, do not fall within our terms of reference. In support of its request, the United States argues that the original investigation was initiated and completed before Viet Nam's accession to the WTO, and that the first administrative review was initiated prior to Viet Nam's accession to the WTO. As a result, the United States argues, the Anti-Dumping Agreement does not apply to these determinations.[49] Moreover, the United States argues that the original investigation was not included in Viet Nam's request for consultations, which it considers to be a prerequisite for its inclusion in the panel request and, and therefore, our terms of reference.[50]

7.36 Viet Nam indicates that it does not consider the USDOC's determinations in the original investigation and the first administrative review to be "measures at issue" and does not request that we make any findings with respect to the WTO-consistency of these determinations.[51] This being the case, we see no need to address the U.S. request for preliminary rulings with respect to these two determinations.

7.37 We note, however, that Viet Nam considers that the USDOC's actions in the original investigation impact upon the WTO-consistency of the USDOC determinations in the subsequent proceedings conducted by the USDOC under the *Shrimp* anti-dumping order.[52] This, Viet Nam

[48] United States' first written submission, paras. 71-98.

[49] United States' first written submission, paras. 76-80 and 85-86; United States' opening oral statement at the first meeting of the Panel, paras. 6-12; United States' second written submission, para. 135. The United States relies, in this respect, on Article 18.3 of the Anti-Dumping Agreement, which provides as follows:

> "Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

[50] United States' first written submission, paras. 81-84; United States' second written submission, para. 136; United States' response to Panel question 8.

[51] Viet Nam's response to the United States' request for preliminary rulings, paras. 3, 5-10. In fact, the United States itself recognizes that Viet Nam requests no findings with respect to these two determinations. (United States' first written submission, footnote 65 to para. 84 and footnote 69 to para. 86; United States' response to Panel question 8).

[52] Viet Nam's response to the United States' request for preliminary rulings, para. 3. Viet Nam indicates that it considers that the USDOC's determinations in the original investigation and the first administrative review are not within our terms of reference "except to the extent that the results of these segments of the

argues, is because the USDOC in the second and third administrative reviews applied an "all others" rate based on dumping margins calculated with zeroing in the original investigation.[53] We address this argument of Viet Nam in section VII.F below, in our analysis of Viet Nam's claims with respect to the "all others" rate.

### 3. U.S. request for a preliminary ruling with respect to the "continued use of challenged practices" measure

(a) Introduction

7.38 As we have noted above, in its submissions to the Panel, Viet Nam identifies as one of the measures at issue in this dispute the "continued use of challenged practices" in successive "segments" of the *Shrimp* anti-dumping proceeding. Viet Nam explains that this measure concerns a *continued* and *ongoing* conduct on the part of the USDOC, encompassing the use of three of the challenged practices (zeroing, Vietnam-wide rate, limitation of the number of respondents individually examined) in successive proceedings under the *Shrimp* anti-dumping order.[54] This includes not only proceedings that have been completed, but also ongoing and future ones, and therefore includes a prospective element.[55] Viet Nam explains that the measure it challenges is similar to the one challenged by the European Communities in *US – Continued Zeroing*, which concerned an ongoing conduct with prospective effect.[56]

7.39 The United States requests that we preliminarily determine that this "continued use of challenged practices" measure does not fall within our terms of reference. The United States argues that this "continued use" measure is not a "measure" within the Panel's terms of reference as: (i) it was not "identified" as a "measure at issue" in Viet Nam's request for the establishment of a panel, pursuant to Article 6.2 of the DSU[57]; and (ii) it is not a measure that is cognizable in WTO dispute settlement because it purports to include future measures.[58] Viet Nam asks us to reject the U.S. request for a preliminary ruling and to proceed to consider the merits of its claims in respect of that measure.[59]

7.40 We examine each of the United States' arguments in turn, starting with the U.S. argument that Viet Nam's panel request failed to identify the "continued use of challenged practices" measure as a measure at issue in this dispute.

---

proceeding bear on the results of those segments of the proceeding which occurred after Viet Nam's accession to the WTO".

[53] Viet Nam's response to the United States' request for preliminary rulings, paras. 6-10.

[54] Viet Nam's response to the United States' request for preliminary rulings, paras. 13-18; Viet Nam's second written submission, para. 2; Viet Nam's response to Panel question 1.

[55] Viet Nam's first written submission, para. 104. Viet Nam specifies that the "continued use" measure includes the fourth administrative review, the fifth administrative review, as well as the sunset review. The fifth administrative review was ongoing but not yet completed at the time of the drafting of this Report, whereas the USDOC issued a final likelihood-of-dumping determination in the context of the sunset review during the course of the Panel's proceedings. See *supra* section VII.B.2.

[56] Viet Nam's first written submission, paras. 98-99, 104-105 and 294-295; Viet Nam's response to the United States' request for preliminary rulings, paras. 13-18; Viet Nam's response to Panel question 1.

[57] United States' first written submission, paras. 88-95; United States' opening oral statement at the first meeting of the Panel, paras. 13-19.

[58] United States' first written submission, paras. 96-98; United States' opening oral statement at the first meeting of the Panel, paras. 20-22; United States' response to Panel question 12; United States' second written submission, paras. 157-159.

[59] Viet Nam's response to the United States' request for preliminary rulings, paras. 4, 30.

(b) Whether Viet Nam's panel request identifies the "continued use of challenged practices" as a "measure at issue" as required under Article 6.2 of the DSU

*(i) Main arguments of the parties*

United States

7.41 The United States asserts that Viet Nam's panel request identifies, as the measures at issue in this dispute, each proceeding under the *Shrimp* order that had already been initiated at the time of the panel request. Thus, the United States argues, Viet Nam's panel request limits the measures at issue to these determinations, and nowhere indicates that Viet Nam seeks to challenge a so-called "continued use" measure. The United States argues that Viet Nam would have the Panel infer from the identification of a selection of "as applied" measures that a "continuing measure" is also a subject of the dispute. The United States considers that such an inference is not permissible. The United States notes that by contrast, the European Communities' panel request in *US – Continued Zeroing* specifically and explicitly identified the "continued application" of the anti-dumping duties at issue as a measure at issue. In addition, the United States submits that not only is the "continued use" measure itself beyond the scope of Viet Nam's panel request, but the components that Viet Nam asserts are part of that "continued use" measure are themselves beyond the scope of the panel request. The United States submits in this respect that Viet Nam includes the fourth and fifth administrative reviews and the sunset review within the "continued use" measure whereas Viet Nam's panel request only includes the preliminary results of the fourth administrative review and the initiation of the sunset review and makes no mention of the fifth administrative review.[60]

7.42 In addition, the United States rejects Viet Nam's argument that the measures identified in the panel request are closely related to the "continued use" measure. The United States argues in this respect that Viet Nam's reliance on the reports of the *Japan – Film* and *Argentina – Footwear* panels, which both concerned measures not identified in the panel request, is inconsistent with its position that the "continued use" measure was identified in its panel request and is in any event inapposite.[61]

Viet Nam

7.43 Viet Nam considers that it properly and adequately identified the "continued use of challenged practices" measure in its panel request. Viet Nam asserts that its panel request identified its concern with the ongoing nature and the continued use of the challenged practices by identifying each segment of the proceeding that had been initiated at the time of its panel request. Viet Nam argues that it specifically included segments not yet finalized to ensure that the Panel and Members understood that it was concerned with the ongoing nature of the USDOC practices at issue.[62] Viet Nam argues that the findings of the Appellate Body in *US – Continued Zeroing* provide a useful framework for determining whether a complainant challenging a "continued use" measure has complied with Article 6.2. Viet Nam submits that consistent with the Appellate Body's findings in that dispute, its panel request included: (i) the identification of the anti-dumping order, which places the Panel and parties on notice for challenges to determinations that flow from imposition of the order; (ii) the most recently completed phases of the proceeding, which informs parties that the

[60] United States' first written submission, para. 88-94; United States' opening oral statement at the first meeting of the Panel, paras. 14-17; United States' response to Panel question 4; United States' second written submission, para. 137. The United States clarifies that it is not taking the position that Viet Nam was required to use, in its panel request, the same language used by the European Communities in *US – Continued Zeroing*. (United States' opening oral statement at the first meeting of the Panel, para. 18).

[61] United States' second written submission, paras. 146-153.

[62] Viet Nam's response to the United States' request for preliminary rulings, paras. 24, 27; Viet Nam's opening oral statement at the first meeting of the Panel, para. 28.

conduct is continuing and has not ceased; and (iii) that the claimed violations have occurred at multiple phases since imposition of the order.[63]

7.44 Viet Nam also argues that the requirement to identify the measures at issue under Article 6.2 must be informed by the context provided by other provisions of the DSU, namely Article 3.3 of the DSU, which calls for the "prompt settlement of disputes", and Article 9, which Viet Nam submits embodies "the DSU's philosophy of resolving all related issues together."[64] Moreover, Viet Nam contends that the reports of the panels in *Japan – Film* and *Argentina – Footwear* stand for the general proposition that the identification of a measure in the panel request suffices to place within a panel's terms of reference measures that are "subsidiary to", or "closely related" to that measure, or subsequent determinations made in connection with that measure. Viet Nam argues that its identification of the *Shrimp* anti-dumping order in its panel request placed parties on notice for subsequent determinations under that order.[65] Viet Nam also argues that the "continued use of challenged practices" measure does not expand upon the claims set forth in its panel request and that, as a result, denial of the United States' request would have a negligible substantive impact on the issues considered in this dispute.[66]

*(ii) Main arguments of the third parties*

7.45 Korea invites the Panel to review Viet Nam's panel request to see whether it can find in that request a description that is sufficient to indicate the nature of the "continued use of challenged practices", even though Viet Nam did not use these precise terms in its panel request. Moreover, Korea considers that the clear identification of the fourth administrative review and of the sunset review as measures at issue in Viet Nam's panel request should be taken into account, given that both measures are part of the "continued use of challenged practices".[67]

*(iii) Evaluation by the Panel*

7.46 Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It 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*." (emphasis added)

7.47 In *US – Continued Zeroing*, the Appellate Body summarized the jurisprudence with respect to Article 6.2 as follows:

> "There are two main requirements under Article 6.2 of the DSU, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint. Together, these elements comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under

[63] Viet Nam's response to Panel question 4 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 166).

[64] Viet Nam's response to the United States' request for preliminary rulings, para. 22 (referring to Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.32).

[65] Viet Nam's response to the United States' request for preliminary rulings, paras. 23-24, 27 (referring to Panel Report, *Argentina – Footwear*, paras. 8.35-8.45); Viet Nam's response to Panel question 6 (referring to Panel Report, *Japan – Film*, para. 10.8).

[66] Viet Nam's response to the United States' request for preliminary rulings, para. 28.

[67] Korea's third-party written submission, paras. 6-7; Korea's third-party oral statement, para. 4.

> Article 7.1 of the DSU. These requirements are intended to ensure that the complainant 'present[s] the problem clearly' in the panel request." [68]

7.48 The Appellate Body, in the same decision, also observed that the requirements in Article 6.2 of the DSU serve a dual purpose:

> "First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response."[69]

7.49 The Appellate Body indicated in the same decision that to ensure that these purposes are fulfilled, "[s]uch compliance must be 'demonstrated on the face' of the panel request, read 'as a whole'".[70]

7.50 The United States' arguments pertain to the first requirement under Article 6.2, namely the identification of the specific measures at issue. We note, with respect to this requirement, that a measure may be identified either by its form (e.g. name, number, date and place of promulgation of a law or regulation, etc.) or by its substance (e.g. by providing a narrative description of the nature of the measure).[71] The Appellate Body has indicated in *US – Continued Zeroing* that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[72] The Appellate Body further indicated that "so long as each measure is discernable in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU".[73]

7.51 We agree with the abovementioned guidance from the Appellate Body and various panels. With this guidance in mind, we now consider whether Viet Nam's panel request[74] identifies the "continued use of challenged practices" as a measure at issue in this dispute. In doing so, we note that Viet Nam has referred extensively to the Appellate Body's findings in *US – Continued Zeroing* in explaining the nature and scope of the "continued use of challenged practices" measure. In fact, Viet Nam has defined its "continued use" measure primarily in relation to the measure at issue in *US – Continued Zeroing*.

---

[68] Appellate Body Report, *US – Continued Zeroing*, para. 160. (footnotes omitted)

[69] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[70] Appellate Body Report, *US – Continued Zeroing*, para. 161 (citing to Appellate Body Report, *US – Carbon Steel*, para. 127 and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169, in turn quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

[71] Panel Report, *Canada – Wheat*, para. 6.10, subpara. 36; Panel Report, *China – Audiovisual Products*, para. 7.17; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.60.

[72] Appellate Body Report, *US – Continued Zeroing*, para. 169. The Appellate Body made this comment when explaining the difference between the *identification* of the specific measure(s) at issue pursuant to Article 6.2 and a demonstration of the *existence* of these measure(s). The Appellate Body explained that an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. For this reason, the Appellate Body "reject[ed] the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure." (*Idem*).

[73] Appellate Body Report, *US – Continued Zeroing*, para. 170.

[74] WT/DS404/5, Annex G-2.

7.52 In *US – Continued Zeroing*, the European Communities made claims in respect of an ongoing conduct, which the Appellate Body described as the USDOC's "use of the zeroing methodology in successive proceedings in each of the 18 cases [at issue] whereby anti-dumping duties are maintained."[75] The European Communities' panel request indicated that the measures at issue included, in addition to individual determinations:

> "The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure)."[76]

7.53 The Appellate Body found that the language of the European Communities' panel request was sufficient to identify a "continued use" measure, consistently with the requirements of Article 6.2 of the DSU. In particular, it found that through this language, the European Communities' panel request had properly identified the "continued application of the 18 duties" as a measure at issue.[77]

7.54 Viet Nam explains that similar to the measure at issue in *US – Continued Zeroing*, the "continued use" measure it challenges in the present dispute has both present and prospective components in the sense that it consists in the application of three of the four USDOC practices challenged by Viet Nam in both completed and future proceedings under the *Shrimp* anti-dumping order.[78]

7.55 The findings of the Appellate Body in *US – Continued Zeroing* clarify the Appellate Body's view that measures of the type of the "continued use" measure might properly be challenged in WTO dispute settlement proceedings.[79] However, the mere fact that a particular measure is *capable* of WTO challenge does not mean that it necessarily falls within a panel's terms of reference. Rather, as explained above, we must still establish whether or not Viet Nam's panel request actually identifies the "continued use of challenged practice" as a "measure at issue".

7.56 Having examined Viet Nam's panel request consistent with the guidance and principles set out above, we are bound to conclude that Viet Nam's panel request does not identify the "continued use of challenged practices" as a measure at issue. Viet Nam's panel request contains no indication that it sought to place any measure in the form of an ongoing conduct on the part of the USDOC, or any future USDOC determinations under the *Shrimp* anti-dumping order, before the Panel.

7.57 First, in this respect, we note that on its face, the only measures that Viet Nam's panel request identifies as "measures at issue" are those specifically referred to in the introductory paragraph to Section 2 of the panel request, namely the USDOC's final determinations in the original investigation and in the first, second and third administrative reviews, the USDOC's preliminary determination in

---

[75] Appellate Body Report, *US – Continued Zeroing*, para. 171.

[76] Appellate Body Report, *US – Continued Zeroing*, para. 163.

[77] Appellate Body Report, *US – Continued Zeroing*, paras. 159-174.

[78] See *supra*, para. 7.38 and Viet Nam's first written submission, para. 104. Viet Nam explains that the USDOC's use of the practices at issue in successive proceedings under the *Shrimp* anti-dumping order "is conclusive evidence, per the Appellate Body's guidance in *US – Continued Zeroing*, that the USDOC will continue to engage in this conduct in the future." (Viet Nam's response to Panel question 55).

[79] We note that in *US – Continued Zeroing*, the European Communities challenged the USDOC's ongoing conduct in proceedings under several anti-dumping orders, whereas in the instant dispute, Viet Nam's claims pertain to the USDOC's actions in proceedings under a single order.

the fourth administrative review, and the USDOC's notice of initiation of the sunset review. The introductory paragraph to Section 2 of Viet Nam's panel request reads as follows:

> "Summary of Facts and Legal Basis of Complaint
>
> The specific measures at issue are the anti-dumping order and subsequent periodic reviews conducted by the United States Department of Commerce (USDOC) on certain frozen and canned warmwater shrimp from Viet Nam. The following determinations constitute the measures at issue:
>
> 1. *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71005 (5 Dec. 2004)
>
> 2. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed. Reg. 52052 (12 Sept. 2007)
>
> 3. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52273 (9 Sept. 2008)
>
> 4. *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 47191 (15 Sept. 2009)
>
> 5. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review*, 75 Fed. Reg. 12206 (15 March 2010), including denial of all requests for revocation.
>
> 6. *Initiation of Five-Year ("Sunset") Review*, 75 Fed. Reg. 103 (4 January 2010)."

7.58 The sentence that introduces the list of determinations, which reads "The following determinations constitute the measures at issue", in our view provides a strong indication that the panel request is limited to these determinations.

7.59 We recall that a measure at issue can be identified not only by its form, but also by a narrative description of the nature of the measure. With this in mind, we observe that, in addition to setting out the six segments of the *Shrimp* proceedings as constituting "the measures at issue", Viet Nam also describes the "zeroing methodology" as a measure in relation to which it makes "as such" claims.[80] However, beyond identifying the zeroing methodology as a measure subject to "as such" claims, Viet Nam's panel request contains no language that would indicate an intention to include future segments of the anti-dumping proceedings as measures at issue within the Panel's terms of reference or that would otherwise identify a "prospective component" of the alleged continued use measure. As can be seen from the list of measures contained in the introductory paragraph to Section 2 of the panel

[80] In this regard, we observe that later in its panel request, Viet Nam speaks of a "zeroing methodology" which it describes as having certain characteristics and certain bases. Although Viet Nam does not include this zeroing methodology in its list purporting to constitute the measures at issue in this proceeding, reading the panel request as a whole, we are comfortable that Viet Nam has identified the zeroing methodology as a measure at issue, consistent with the requirements of Article 6.2 of the DSU. In addition, the United States has not argued that this measure is not properly within our terms of reference.

request, Viet Nam's panel request only includes measures in existence or ongoing at the date of the request – as exemplified by the reference to the USDOC's *preliminary* determination in the fourth administrative review or the USDOC's *initiation* of a sunset review – without any reference to upcoming developments in respect of these proceedings.[81] Nothing in the panel request justifies inferring from the inclusion of partially-completed measures that Viet Nam sought to challenge a measure consisting of the USDOC's continuing and ongoing use of certain practices in the proceedings under the *Shrimp* anti-dumping order.[82]

7.60 For the foregoing reasons, we are unable to agree with Viet Nam that either the introductory paragraph to Section 2 of its panel request or the listing of USDOC determinations as of the date of the panel request identified the "continued use of challenged practices" measure consistent with the requirements of Article 6.2 of the DSU.[83] We also note Viet Nam's argument that language in the section of the panel request concerning the "Sunset Review" "established Viet Nam's concerns

---

[81] Consistent with this, in each of the sections of the panel request laying out its *legal claims* ("Zeroing", "Country-Wide Rate Based on Facts Available", "Limiting the Number of Respondents Selected for Full Investigation or Review" and "Sunset Review") Viet Nam refers to the "USDOC's application of the above-mentioned laws and procedures *in the original investigation and periodic reviews here at issue*" (emphasis added) or similar references to USDOC actions "[i]n the antidumping proceedings at-issue". (Viet Nam panel request, WT/DS404/5, p. 3, chapeau to paras. 9-11 (zeroing claims); p. 4, chapeau to paras. 14-17, and p. 5, chapeau to paras. 18-19 ("country-wide rate"); p. 6, chapeau to paras. 27-28 (limitation of the number of respondents)).

[82] We note the United States' argument that through the "continued use" measure, Viet Nam seeks to extend the scope of that list to include the final determinations in the sunset review and the fourth administrative review and the initiation of the fifth administrative review. We agree with the United States that there is no basis in the panel request – whether independent identification of these determinations or identification of a "continued use" measure comprising them – to consider that these determinations are properly before the Panel.

[83] The Panel asked Viet Nam the following question (Panel question 3):

> "(to Viet Nam) In paragraph 160 of its Report in *US – Continued Zeroing*, the Appellate Body stated that the requirements to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU are "intended to ensure that the complainant 'present[s] the problem clearly.'" Further, in para. 161 of its Report in the same dispute, the Appellate Body, referring to its previous decisions, said that compliance with Article 6.2 of the DSU must be demonstrated "on the face" of the panel request, read "as a whole".
> Bearing in mind that we must read Viet Nam's panel request "as a whole", where, on the face of the panel request does Viet Nam identify the "continued use" measure in a manner that presents the problem clearly."
>
> Viet Nam answered that it:
> "... presented the "continued use" measure in the opening line of Section 2 of the Panel Request, stating, "[t]he specific measures at issue are the anti-dumping order and subsequent periodic reviews conducted by the United States Department of Commerce (USDOC) on certain frozen and canned warmwater shrimp from Viet Nam." The sentence does not include the limitation of "completed" or "initiated" periodic reviews, plainly suggesting Viet Nam's concern with any future periodic review in which the USDOC continues to engaged in the challenged actions.
> The Panel Request next identified every segment of the proceeding that is a direct product, thus far, of the shrimp antidumping duty order to further clarify Viet Nam's concern with the ongoing nature of certain claims raised in the request. The determinations completed prior to Viet Nam's accession to the WTO and those segments not yet final were included for this purpose, illustrating that these violations continue to occur. Viet Nam's request made every effort to present as clearly as possible that the USDOC has continued to engage in the conduct throughout each segment of the antidumping proceeding stemming from imposition of the shrimp antidumping order."

regarding continued and ongoing practices".[84] The relevant paragraph of Viet Nam's panel request reads as follows:

> "The USDOC initiated a sunset review for these antidumping proceedings on 4 January 2010. ... Because of the circumstances described above with regard to the original investigation and the subsequent reviews, including USDOC's use of zeroing, the use of a country-wide rate, and the respondent selection methodology which prevented certain producers and exporters from having the opportunity to receive individual rates, the ongoing sunset review is inconsistent with the *Anti-Dumping Agreement*. Each of these practices has a substantial and possibly determinative impact on the USDOC's sunset review determination because of the effect on the dumping margins calculated during the administrative reviews. Accordingly, Viet Nam considers as a consequence of the inconsistencies set forth in Sections a-c above that the USDOC sunset review is inconsistent with Articles 11.2 and 11.3 of the Agreement."[85]

7.61 We read this paragraph as reflecting Viet Nam's intention to place the (then ongoing) sunset review within our terms of reference, and as expressing its concern with the cumulative effect of the challenged practices *on that sunset review*. In other words, the measure at issue in this paragraph appears to be the sunset review itself, not some continuing practice of the USDOC.[86]

7.62 Viet Nam has been unable to identify any other language in its panel request that would identify the "continued use" measure as a measure at issue. It was incumbent upon Viet Nam, if it wished to include a measure of the type which it has described in its submissions, to include in its panel request at least some indication that it was challenging not only USDOC determinations in completed proceedings under the *Shrimp* anti-dumping order, but also an ongoing conduct on the part of the USDOC, including USDOC actions in future proceedings under the order.

7.63 We recall that Viet Nam has referred extensively to the Appellate Body's findings in *US – Continued Zeroing*. We note that unlike Viet Nam's panel request, the European Communities' panel request in *US – Continued Zeroing* case referred not only to the definitive duties under each of the anti-dumping orders at issue, and to the most recent determinations under these orders, but also explicitly indicated the European Communities' intent to place before the panel a measure in the form of an ongoing conduct, which it defined as the "continued application" of the 18 duties at issue.[87] Viet Nam was not required to formulate its panel request by using terms identical or similar to those used by the European Communities in *US – Continued Zeroing*. However, the European Communities' formulation of the "continued application" measure in *US – Continued Zeroing* illustrates how a party *may* include a measure of this type in its panel request.[88] In contrast to that panel request, Viet Nam's panel request in the instant case does not signal – either directly, or even

[84] Viet Nam's response to the United States' request for preliminary rulings, para. 25.

[85] Viet Nam's panel request, p. 7 "(d) Sunset Review".

[86] We note, however, Viet Nam's indication in its response to Panel question 9 that it is not pursuing any claims in respect of the USDOC's determinations in the context of the sunset review.

[87] See *supra*, paras. 7.52-7.53.

[88] A recent illustration of a panel finding that a "continued use" measure was identified in a panel request in a manner meeting the requirements of Article 6.2 of the DSU is the report of the panel in *US – Orange Juice (Brazil)*. The panel in *US – Orange Juice (Brazil)* found that Brazil's panel request in that case was sufficiently precise to satisfy the requirements of Article 6.2 of the DSU. Brazil challenged a measure which it had described as follows in its panel request: "The continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil." (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.38-7.41). The report of the *US – Orange Juice (Brazil)* panel was issued shortly before the issuance of our Interim Report and had neither been appealed nor adopted at the time of the issuance of our Final Report to the parties.

indirectly, independently or in combination with other measures – any intention to place within the Panel's terms of reference a measure in the form of an ongoing conduct on the part of the USDOC, extending into the future. In sum, we reach the view that no "continued use" measure is discernable from Viet Nam's panel request.

7.64 In addition, we note that Viet Nam's request for *consultations* did identify a "continued use" measure, albeit in words that differ from those used by Viet Nam in its submissions to the Panel. Paragraph 3 of Viet Nam's request for consultations reads, in relevant part:

> "Vietnam believes that the United States has acted inconsistent with its WTO obligations specified in paragraph 2 above by applying so-called 'zeroing' in the determination of the margins of dumping in the reviews cited in paragraph 1 above, by repeatedly and consistently, failing to provide most Vietnamese respondents seeking a review an opportunity to demonstrate the absence of dumping by being permitted to participate in a review, and by requiring companies to demonstrate their independence from government control and applying an adverse facts available rate to companies failing to do so in all reviews. *Vietnam further believes that the US has an established practice with respect to each of these issues and will, therefore, continue to act inconsistent with its WTO obligations relating to these issues in ongoing and future reviews*, including the five year review provided under Article 18.1 of the Antidumping Agreement."[89]

7.65 The fact that the reference to a measure of this type in the consultations request was omitted from the panel request, and not replaced with other similar textual references to a "continued use" measure, or other measure taking the form of an ongoing conduct, confirms the view that the "continued use" measure was excluded from the text of Viet Nam's panel request.[90]

7.66 Finally, Viet Nam also argues that measures not identified in a panel request may nonetheless fall within the panel's terms of reference where they are "subsidiary or closely related to" those measures explicitly identified in the panel request.[91] In support of this argument, Viet Nam cites to the findings of the panels in *Japan – Film* and *Argentina – Footwear*.

7.67 We do not consider that the findings of the *Japan – Film* and *Argentina – Footwear* panels assist Viet Nam in the present case. Viet Nam is not arguing that the "continued use" measure is an amendment to the specific measures explicitly included in the panel request, as was the case in *Argentina – Footwear*. Nor can Viet Nam argue that the relationship between the "continued use" measure and the specific determinations included in its panel request is similar to the relationship between a basic framework law and implementing measures provided for in that law, or between two documents of a same series, as was the case in *Japan – Film*.[92] More importantly, the key

---

[89] Viet Nam's request for consultations, WT/DS404/1 (reproduced in Annex G-1), p. 3, para. 3. (emphasis added). Viet Nam confirmed during oral questioning and in its response to Panel question 2 that the closing sentence of this paragraph should be understood as a reference to a "continued use" measure.

[90] As a further contrast between the two requests, we note that the consultations request indicates Viet Nam's intention to launch consultations with respect not only to determinations already rendered by the USDOC (Viet Nam's request for consultations, p. 1, paras. 1(a)-(d)), but also with respect to what at that time were future measures, e.g. the preliminary and final results of "any administrative reviews or other reviews" under the *Shrimp* order published "after the date of this request for consultations" (request for consultations, p. 2, para. 1(e)) as well as any USDOC determination on remand from the US Court of International Trade (request for consultations, p. 2, para. 1(f)).

[91] We note the United States' argument that this line of argument is at odds with Viet Nam's position that its panel request does identify the "continued use" measure.

[92] The *Japan – Film* panel considered that where a basic framework law dealing with a narrow subject matter is specified in a panel request, implementing "measures" might be considered as effectively included in

rationale underlying the findings of the *Japan – Film* and *Argentina – Footwear* panels under Article 6.2 was their view that certain measures are so closely related to the measure identified explicitly in the panel request that identification of the latter provides sufficient notice that the complainant intends to challenge the former.[93] Accepting Viet Nam's arguments would effectively mean that a "continuing measure" is implicitly included in a panel's terms of reference whenever an individual determination is challenged. Yet we do not consider that the identification of specific instances of application of a given "practice" provides sufficient notice to the respondent and third parties that the complainant intends to make claims in respect of the responding Member's ongoing use of that same practice. Rather, as Viet Nam's own arguments demonstrate, measures in the form of an ongoing conduct are markedly different from individual manifestations of that conduct in specific instances.[94] For this reason, one would expect the complainant to identify such a measure explicitly in its panel request.[95]

7.68 In sum, after examining it as a whole, in light of the language used by Viet Nam therein, and taking as context Viet Nam's request for consultations, we conclude that Viet Nam's panel request fails to identify the "continued use of challenged practices" as a measure at issue. For this reason, we find that a measure consisting of the "continued use of challenged practices" is not within our terms of reference.

(c) Whether the "continued use of challenged practices" measure is amenable to WTO challenge

7.69 Given our conclusion that the "continued use" measure does not fall within our terms of reference because it is not identified as a "measure at issue" in Viet Nam's panel request, we do not need to examine the United States' request for a preliminary ruling that the "continued use" measure is a measure of a type that may not be challenged before a WTO dispute settlement panel. We recall, though, that the Appellate Body found in *US – Continued Zeroing* that the continued application of certain anti-dumping duties could be challenged in WTO dispute settlement proceedings.[96]

---

the panel request, in particular where the basic framework law "specifies the form and circumscribes the possible content and scope of implementing 'measures'". Panel Report, *Japan – Film*, paras. 10.8, 10.13. In addition, the panel considered that a report which was part of the same series of reports as one which had been explicitly included among the measures listed in the panel request fell within its terms of reference. *Id.*, para. 10.14. At issue in *Argentina – Footwear* was whether subsequent modifications of the definitive safeguard measure identified as the measure at issue in the panel request also fell within the panel's terms of reference. The panel considered that it was the measures in their substance rather than the legal acts in their original or modified legal forms that were most relevant for its terms of reference. Panel Report, *Argentina – Footwear*, para. 8.40.

[93] See also Panel Report, *EC – Fasteners* (adoption/appeal pending), para. 7.38:

> "It is now well established that a measure which is not identified in the complainant's panel request may nonetheless fall within a panel's terms of reference if it is sufficiently closely related to the measures identified in the panel request, such that the respondent can be found to have had adequate notice of the nature of the claims that the complainant might raise during the panel proceedings". (footnote omitted)

[94] Viet Nam argues that "continuing measures" fall in the "cross-section" between the measures that are the subject of "as such" claims and those that are the subject of "as applied" claims, adding that measures in the form of an ongoing practice are narrower than the former, but broader than the latter. (Viet Nam's response to the United States' request for preliminary rulings, para. 13, referring to Appellate Body Report, *US – Continued Zeroing*, para. 180).

[95] We add that, were Viet Nam correct on this point, there would have been no need for the Appellate Body to examine the issue of the identification of the "continued application" measure in *US – Continued Zeroing*.

[96] See *supra*, para. 7.55.

### 4. Conclusion with respect to the measures at issue in this dispute

7.70 We recall that, with respect to its "as applied" claims, Viet Nam only seeks to place before the Panel the USDOC's determinations in the second and third administrative reviews and the "continued use" measure.[97] In response to a question from the Panel, Viet Nam confirmed that "[i]f the Panel determines that the 'continued use' measure does not fall within its terms of reference, then the second administrative review and third administrative review are the only measures to which Viet Nam's claims of violations apply."[98] We further recall that Viet Nam makes "as such" claims in respect of another measure, the U.S. "zeroing methodology".[99] We have concluded that the "continued use" measure does not fall within our terms of reference. In consequence, the measures at issue in the instant dispute are the USDOC's determinations in the second and third administrative reviews and the U.S. "zeroing methodology".

## D. VIET NAM'S CLAIMS WITH RESPECT TO ZEROING

### 1. Introduction

7.71 Viet Nam requests that we find[100]:

(a) that simple zeroing, "as applied" in the second and third administrative reviews, is inconsistent with Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994[101]; and

(b) that the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[102]

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

### 2. Zeroing "as applied" in the administrative reviews at issue

#### (a) Introduction

7.73 Viet Nam requests that we find that the USDOC's use of simple zeroing to calculate the margins of dumping of individually-examined respondents in the second and third administrative reviews is inconsistent with Articles 9.3, 2.1, 2.4.2 and 2.4 of the Anti-Dumping Agreement and with Article VI:2 of the GATT 1994. We will first consider whether Viet Nam has demonstrated that the USDOC applied zeroing in these two administrative reviews. If we are satisfied that Viet Nam has met its burden of establishing its factual allegations in this respect, we will next consider whether, in doing so, the USDOC violated the provisions cited by Viet Nam.

---

[97] See *supra*, para. 7.32.

[98] Viet Nam's response to Panel question 7. We understand Viet Nam's response as only addressing the measures before the Panel with respect to Viet Nam's "as applied" claims.

[99] In *supra*, footnote 80, we explain why, in our view, this measure falls within our terms of reference.

[100] We have already found that the "continued use of challenged practices" measure does not fall within our terms of reference and for this reason do not consider Viet Nam's claims in respect of that measure. We consider Viet Nam's claims and arguments with respect to the alleged use by the USDOC of margins calculated with zeroing to calculate the "all others" rates in section VII.F below.

[101] Viet Nam's second written submission, para. 144(1); Viet Nam's opening oral statement at the second meeting, para. 59(1).

[102] Viet Nam's second written submission, para. 144(2); Viet Nam's opening oral statement at the second meeting, para. 59(2).

(b) Whether the USDOC applied zeroing in the administrative reviews at issue

*(i) Main arguments of the parties*

Viet Nam

7.74 Viet Nam submits that consistent with its practice in administrative reviews[103], the USDOC engaged in "simple zeroing" in the calculation of the margins of dumping for individually-examined exporters in the administrative reviews at issue.[104]

United States

7.75 The United States does not contest Viet Nam's allegation that the USDOC used simple zeroing in the administrative reviews at issue.[105]

*(ii) Evaluation by the Panel*

7.76 We now proceed to determine on the basis of the evidence submitted by Viet Nam whether the USDOC used "simple zeroing" in the calculation of individual margins in the second and third administrative reviews.

7.77 First, Viet Nam provides the Panel with printouts of the USDOC's computer programme "logs" and "outputs" showing the application of zeroing for two Vietnamese respondents selected for individual review in each of the second and the third administrative reviews, i.e. Minh Phu and Camimex.[106] The "logs" provide the computer programming language to execute the desired operations on the data, and show how the programme processed the data. The "outputs" provide sample dumping calculations and sample prints of databases that are run through the programme.[107]

7.78 Viet Nam also submits an affidavit by a trade analyst, Mr. Michael Ferrier, explaining the USDOC's use of zeroing in the original investigation and administrative reviews.[108] The affidavit

[103] For a summary of Viet Nam's description of "simple zeroing", as allegedly used by the USDOC, see *supra* para. 7.16.

[104] Viet Nam's first written submission, paras. 47-51. Because of its claims in respect of the "continued use" measure, Viet Nam submits evidence with respect to the use of simple zeroing in each of the four administrative reviews under the *Shrimp* anti-dumping order. In this section of our findings, we only consider the evidence pertaining to the second and third administrative reviews.

[105] As we note *infra*, para. 7.82 and footnote 116, the United States' arguments focus on the fact that in the measures at issue, the USDOC calculated zero and *de minimis* margins of dumping, and as a result did not assess any duties in respect of imports from selected respondents.

[106] USDOC Computer Programme Log for Minh Phu in the Second Administrative Review, Exhibit Viet Nam-36; USDOC Computer Programme Log for Camimex in the Second Administrative Review, Exhibit Viet Nam-37; USDOC Computer Programme Log for Minh Phu in the Third Administrative Review, Exhibit Viet Nam-38; USDOC Computer Programme Log for Camimex in the Third Administrative Review, Exhibit Viet Nam-39; Computer Programme Output for Minh Phu in the Second Administrative Review, Exhibit Viet Nam-44; Computer Programme Output for Camimex in the Second Administrative Review, Exhibit Viet Nam-45; Computer Programme Output for Minh Phu in the Third Administrative Review, Exhibit Viet Nam-46; Computer Programme Output for Camimex in the Third Administrative Review, Exhibit Viet Nam-47.

[107] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, para. 9.

[108] Affidavit by Michael Ferrier, Exhibit Viet Nam-33. The affidavit states that Mr. Ferrier is an international trade analyst with a law firm and formerly worked for the USDOC where, according to his affidavit, he analyzed computer responses of respondents, input the information from these responses into the USDOC's programme for determining anti-dumping duty margins, and calculated these margins. The affidavit also indicates that the "logs" and "outputs" were released by the USDOC to counsel for Minh Phu and

directs the Panel's attention to certain lines of computer code in the "logs" that implement the instruction to disregard negative comparison results in the calculation of the total anti-dumping duties of a reviewed exporter.[109] The affidavit further explains that corroboration for this removal by the computer programme of any comparison result of zero or below (i.e. comparisons for which the export price exceeds normal value) can be found in the "outputs" for Minh Phu and Camimex. These outputs record, for each of these two Vietnamese companies, the volume and value of sales that were below normal value, as well as the volume and value of each producer's total sales to the United States during the review period.[110] Finally, the affidavit also identifies the programming lines that exclude any comparison result below zero in the calculation of the importer-specific assessment rate.

7.79 Viet Nam also provides the Panel with the Issues and Decision Memoranda that accompany each of the USDOC's final determinations in the administrative reviews at issue. The memoranda confirm the USDOC's use of zeroing in these reviews. In the memorandum to the second administrative review, the USDOC states that it "has continued to deny offsets to dumping based on export transactions that exceed the normal value in this review".[111] In the memorandum to the third administrative review, the USDOC writes that "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."[112]

7.80 We recall that where a party adduces evidence sufficient to raise a presumption that what it claims is true, the burden shifts to the other party, who will fail unless it adduces evidence to rebut that presumption.[113] In the present instance, Viet Nam has put forward sufficient evidence to lead us to the view that, as Viet Nam alleges, the USDOC used simple zeroing in the calculation of the dumping margins of individually-examined exporters/producers. In the absence of any arguments or evidence on the part of the United States to rebut the presumption established by Viet Nam[114], we are satisfied that the USDOC used simple zeroing in its calculation of the margins of dumping of individually-examined producers in the second and third administrative reviews.[115]

---

Camimex. We note that in referring to Exhibit Viet Nam-33, we use the term "affidavit" which has been used in the exhibit and by the parties, without any comment on the status of the document as a matter of U.S. municipal law.

[109] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, paras. 27-56; Viet Nam's first written submission, para. 48.

[110] According to the figures provided, in each of two administrative reviews, the vast majority of Minh Phu's and Camimex' U.S. sales (in terms of both value and volume) were excluded because the export price was equal to or above normal value.

[111] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14.

[112] Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, p. 13. See also, *infra* paras. 7.115-7.116 for a more detailed discussion of the content of the Issues and Decision Memoranda.

[113] See, *supra* paras. 7.6-7.8.

[114] In its response to Panel question 54, para. 6, the United States comments on the Ferrier affidavit (Exhibit Viet Nam-33). The United States indicates that "[t]he evidence contained in Exhibit Viet Nam-33 does not appear to be factually incorrect." The USDOC does not comment on other evidence submitted by Viet Nam in support of its allegation.

[115] We note that the USDOC places the amount resulting from the aggregation of the various comparison results in the numerator when calculating the margins of dumping as a percentage of the total value of export transactions. The issue before us relates to this inclusion of comparison results in the numerator. Zeroing does not affect the denominator: the USDOC includes the value of all export transactions in the denominator of the equation.

(c) Whether the USDOC's application of zeroing in the administrative reviews at issue is inconsistent with the provisions cited by Viet Nam

*(i) Introduction*

7.81 We now proceed to consider whether the USDOC's application of zeroing to calculate the margins of dumping of selected respondents in the two periodic reviews at issue was inconsistent with the United States' obligations under the covered agreements.

7.82 As we discuss below, this is not the first time U.S. practices in relation to zeroing have come before a WTO panel. The facts before us are unusual, however, in that all of the margins of dumping in the second and third administrative reviews were either zero or *de minimis*. This raises the question whether the use of zeroing is WTO-inconsistent, even though no duties are actually assessed with respect to the selected respondents.[116]

7.83 Viet Nam makes claims of violation under Articles 9.3, 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[117] We examine each of Viet Nam's claims, starting with the alleged violation of Article 2.4 of the Anti-Dumping Agreement.[118]

*(ii) Viet Nam's claim under Article 2.4 of the Anti-Dumping Agreement*

Main arguments of the parties

Viet Nam

7.84 Viet Nam asserts that the "fair comparison" language in the first sentence of Article 2.4 creates an independent obligation for the investigating authority to make a "fair comparison" between export price and normal value.[119] Viet Nam argues that the use of a zeroing methodology in periodic reviews violates this obligation, particularly as it systematically eliminates certain transactions from the comparison. Viet Nam notes that the Appellate Body has found that zeroing is inconsistent with Article 2.4 because it distorts the prices of certain export transactions, since export transactions made at prices above normal value are not considered at their real value, and because it artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.[120] Viet Nam argues that the violation of Article 2.4 resides in

[116] The United States argues that given the zero and *de minimis* dumping margins, Viet Nam has not demonstrated that the USDOC assessed any duties with respect to imports from the selected respondents (United States' first written submission, paras. 106-109 and United States' second written submission, para. 31). Viet Nam admits that under the U.S. procedures for the conduct of administrative reviews, if an exporter obtains a zero margin or a *de minimis* margin, it necessarily follows that as a result of that same review, no importer will be assessed any duties in respect of imports from that exporter (Viet Nam's response to Panel question 50). In light of these clarifications from the parties, we consider it an undisputed fact that no duties were assessed with respect to the selected respondents as a result of the two administrative reviews at issue.

[117] Viet Nam's second written submission, para. 144(1).

[118] We recall that a panel is entitled to structure its analysis in the manner most appropriate to facilitate the analysis of the issues presented to it. (Panel Report, *US – Zeroing (EC)*, para. 7.13; Panel Report, *US – Zeroing (Japan)*, para. 7.14 and footnote 641; see also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277).

[119] Viet Nam's response to Panel question 51 (citing to Appellate Body Report, *US – Zeroing (EC)*, para. 146).

[120] Viet Nam's second written submission, paras. 28-30; Viet Nam's response to Panel questions 17 and 51 (citing to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 138-140 and 142; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 146-147); Viet Nam's closing oral statement at the second meeting of the Panel, para. 8.

this unfair comparison. Viet Nam therefore considers that the use of zeroing to calculate dumping margins in the periodic reviews at issue is inconsistent with Article 2.4 notwithstanding the fact that the calculations produced zero and *de minimis* margins.[121]

United States

7.85 The United States argues that Article 2.4 concerns the issue of the comparability of the export price and normal value, including the need for any adjustments, prior to the investigating authority conducting the comparison between the two. Thus, the United States argues, Article 2.4 does not speak to the issue of how the results of these comparisons are to be treated and does not require their aggregation. As a consequence, Article 2.4 does not prohibit zeroing.[122] The United States argues that the Appellate Body's statements, in prior disputes, that zeroing is inconsistent with Article 2.4 were either dependent on findings of violation under Article 2.4.2 or Article 9.3, or pertained to zeroing in different contexts.[123] In addition, the United States argues, where the margins of dumping calculated are zero or *de minimis*, they cannot be characterized as "artificially inflated" or "inherently unfair" and zeroing does not lead to the collection of duties in excess of the dumping margin under Article 9.3 of the Anti-Dumping Agreement.[124]

7.86 The United States argues that higher or lower dumping margins are not inherently fair or unfair, and therefore a methodology cannot be said to be unfair merely because it produces higher margins. The United States submits that the text of Article 2.4 does not resolve whether any particular assessment of anti-dumping duties exceeds the margin of dumping because Article 2.4 does not resolve whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Thus, the text of Article 2.4 does not resolve whether zeroing is "fair" or "unfair". The United States submits that a number of panels have rejected the expansive interpretation of the "fair comparison" requirement advocated by Viet Nam.[125]

Main arguments of the third parties

India

7.87 India urges the Panel follow the Appellate Body's prior decisions on the issue of zeroing. India notes that the Appellate Body has ruled in *US – Zeroing (Japan)* that zeroing in the context of periodic reviews is inconsistent with the "fair comparison" requirement in Article 2.4.[126]

---

[121] Viet Nam's response to Panel question 51; Viet Nam's comments on the United States' response to Panel question 49 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 137).

[122] United States' second written submission, paras. 21-29. United States' opening oral statement at the second meeting of the Panel, paras. 16-18; United States' comments on Viet Nam's response to Panel question 51.

[123] United States' second written submission, paras. 30-37 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 168, Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 135-138); United States' response to Panel question 49.

[124] United States' second written submission, paras. 31-32.

[125] United States' second written submission, paras. 34-37 and United States' opening oral statement at the second meeting of the Panel, paras. 19-23 (referring to Panel Report, *US – Zeroing (Japan)*, para. 7.155, 7.158; Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.74; Panel Report, *US – Zeroing (EC)*, para. 7.260).

[126] India's third-party oral statement, paras. 10, 12; India's response to Panel question 2 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 167-169).

Japan

7.88 Japan argues that the use of zeroing violates Article 2.4 of the Anti-Dumping Agreement irrespective of its impact, because by using zeroing, the investigating authority fails to carry out a fair comparison, irrespective of the outcome of that comparison.[127] Japan asserts that the Appellate Body has held that there is an inherent bias in a zeroing methodology and that as a way of calculating margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because it necessarily excludes any negative comparisons results.[128]

Korea

7.89 Korea argues that it is now settled that zeroing makes an investigating authority methodically fail to take into account all export transactions for the product as a whole, and therefore inevitably leads to an "unfair comparison."[129]

Evaluation by the Panel

7.90 Viet Nam alleges that the USDOC's use of zeroing in the second and third administrative reviews violates the "fair comparison" requirement set forth in the first sentence of Article 2.4 of the Anti-Dumping Agreement. This sentence provides:

> "A fair comparison shall be made between the export price and the normal value."

7.91 The Appellate Body has previously indicated that the use of zeroing to calculate dumping margins is inherently inconsistent with this "fair comparison" requirement.[130] We refer in this regard to the findings of the Appellate Body in *US – Corrosion Resistant Steel Sunset Review*, *US – Softwood Lumber V (Article 21.5 – Canada)*, and *US – Zeroing (Japan)*. We note, in particular, the findings of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* that:

> "First, the use of zeroing under the transaction-to-transaction comparison methodology when aggregating the transaction-specific comparisons for purposes of calculating the 'margins of dumping', distorts the prices of certain export transactions because export transactions made at prices above normal value are not considered at their real value. The prices of these export transactions are artificially reduced when zeroing is applied under the transaction-to-transaction comparison methodology. As the Appellate Body explained in the original dispute, '[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are.'
>
> Secondly, the use of zeroing in the transaction-to-transaction comparison methodology, as in the weighted average-to-weighted average methodology, tends to

[127] Japan's third-party written submission, para. 49; Japan's third-party oral statement, para. 2; Japan's response to Panel question 3.

[128] Japan's third-party written submission, paras. 30-31, 49; Japan's response to Panel question 3 (referring to, *inter alia*, to Appellate Body Report, *US – Zeroing (Japan)*, para. 146, in turn quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; and to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135).

[129] Korea's response to Panel question 2.

[130] Regarding the U.S. argument concerning the scope of the first sentence of Article 2.4 (described, *supra* para 7.85), we note that the Appellate Body has already confirmed that the first sentence of Article 2.4 creates an independent obligation, the scope of which is not exhausted by the remainder of that provision (see, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 146, affirming, on this point, the interpretation of the panel in the same dispute, paras. 7.253-7.258; and Appellate Body Report, *EC – Bed Linen*, para. 59).

result in higher margins of dumping. As the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, the use of zeroing:

> ... will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. ... Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[131]

7.92 The Appellate Body concluded that:

> "... the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of 'margins of dumping', on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the 'fair comparison' requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement*."[132]

7.93 We agree with the above reasoning of the Appellate Body, and adopt it as our own. Even in cases where no anti-dumping duties are assessed, the application of zeroing distorts the prices of certain export transactions, because export transactions made at prices above normal value are not considered at their real value. Indeed, Viet Nam has demonstrated that, in the two administrative reviews at issue, the USDOC disregarded the results of the export price/normal value comparison for the vast majority of the selected respondents' export transactions.[133] In doing so, the USDOC, without any justification under the Anti-Dumping Agreement, effectively reduced the export prices for the relevant export transactions, treating these prices as equal to the normal value, even though in reality they were not.

7.94 Since it is an integral part of the price comparison undertaken by the USDOC, we consider that the USDOC's artificial reduction of the export price of transactions in the second and third administrative reviews is sufficient to render the price comparison inconsistent with the first sentence of Article 2.4, even though no anti-dumping duties are ultimately assessed.

7.95 Furthermore, as the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, there is an *inherent* bias in the zeroing methodology, because it *tends* to artificially inflate the dumping margins calculated.[134] The clear implication of the Appellate Body's approach is that zeroing is incompatible with the requirement of a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement, irrespective of whether duties are actually assessed.

---

[131] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 139-140 (citing to Appellate Body Report, *US – Softwood Lumber V*, para. 101 and *US – Corrosion-Resistant Steel Sunset Review*, para. 135). (emphasis original, footnotes omitted)

[132] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142. See also Appellate Body Report, *US – Zeroing (Japan)*, paras. 146 and 167-169.

[133] See *supra* footnote 110.

[134] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135, cited *supra* para. 7.91.

7.96 For these reasons, we reject the United States' argument that where the margins of dumping calculated are zero or *de minimis*, as they are here, there can be no violation of Article 2.4.[135]

7.97 On the basis of the foregoing, we conclude that the United States acted inconsistently with Article 2.4 of the Anti-Dumping Agreement as a result of the USDOC's use of zeroing to calculate the dumping margins of individually-examined exporters in the second and third administrative reviews.

*(iii) Viet Nam's claims of violation under Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

7.98 In addition to its claim under Article 2.4, Viet Nam also considers that the USDOC's use of zeroing in the second and third administrative reviews violates Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

7.99 The United States asks us to reject Viet Nam's claims under these provisions. The United States argues, *inter alia*, that the prohibition of zeroing in periodic reviews under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, if there is one, is triggered by the imposition of duties *in excess* of the margin of dumping, such that there can be no violation when no duties are assessed[136]; that Article 2.1 of the Anti-Dumping Agreement is purely definitional and does not impose any independent obligation upon the investigating authority[137]; and that Article 2.4.2 of the Anti-Dumping Agreement applies only in the context of original investigations, and imposes no obligation with respect to periodic reviews.[138]

7.100 In *US – Shirts and Blouses*, the Appellate Body stated that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[139] The Appellate Body has also stated in *Australia – Salmon* that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."[140]

7.101 We have already found that the USDOC's use of zeroing in the calculation of the margins of dumping of selected respondents in the second and third administrative reviews was inconsistent with Article 2.4 of the Anti-Dumping Agreement. Finding a violation of any of the other provisions invoked by Viet Nam would add nothing to the resolution of this dispute, nor would it aid in any potential implementation. Accordingly, we consider it appropriate to exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

---

[135] United States' response to Panel question 49, para. 3. We note that shortly before we issued our interim report, another panel issued its Report in which it arrived at a similar conclusion. See Panel Report, *US – Orange Juice (Brazil)* (adoption/appeal pending), paras. 7.137-7.161.

[136] United States' first written submission, paras. 104, 106-109; United States' opening oral statement at the first meeting of the Panel, para. 26; United States' response to Panel questions 14 and 19; United States' second written submission, paras. 7-10; United States' opening oral statement at the second meeting of the Panel, paras. 7-8.

[137] United States' second written submission, paras. 21-37 and 49-54; United States' opening oral statement at the second meeting of the Panel, para. 11 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).

[138] United States' second written submission, paras. 38-48; United States' opening oral statement at the second meeting of the Panel, paras. 12-14; United States' comments on Viet Nam's response to Panel questions 52 and 53A.

[139] Appellate Body Report, *US – Shirts and Blouses*, p. 19.

[140] Appellate Body Report, *Australia – Salmon*, para. 223.

### 3. Zeroing "as such"

(a) Introduction

7.102 We now consider Viet Nam's claims with respect to the U.S. "zeroing methodology". Viet Nam argues that the zeroing methodology is a rule or norm of general and prospective application that may be subject to an "as such" claim, even though it is not set forth in any written document.[141] Viet Nam requests us to find that this rule or norm, insofar as it relates to the calculation of dumping margins in periodic reviews is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[142]

7.103 The United States asks us to reject Viet Nam's claims. While the United States does not deny that unwritten rules or norms of general and prospective application may be challenged "as such", the United States submits that Viet Nam has failed to establish as a matter of fact, based on the evidence put forward in this proceeding, that the alleged zeroing methodology constitutes a norm of general and prospective application.[143]

7.104 Viet Nam's claims raise issues regarding the circumstances in which an unwritten rule or norm of general and prospective application may be challenged in WTO dispute settlement proceedings. While it is now established[144] that such measures are susceptible to challenge, the Appellate Body has indicated that their unwritten nature means that panels must exercise particular care in determining whether or not the complaining Member has properly established their existence. Accordingly, we will first examine whether or not Viet Nam has properly established the existence of the zeroing methodology as a rule or norm of general and prospective application. If we find Viet Nam has properly established the existence of such a measure as a matter of fact, we will then evaluate the parties' arguments concerning the WTO-consistency of that measure.

---

[141] See, e.g. Viet Nam's second written submission, para. 20; Viet Nam's opening oral statement at the second meeting of the Panel, para. 10; Viet Nam's response to Panel question 54B; Viet Nam's comments on the United States' response to Panel question 50(ii). While Viet Nam requests findings in respect of the "zeroing methodology", in its arguments, Viet Nam interchangeably uses the terms "zeroing methodology" and "zeroing procedures". In our findings, we use the term "zeroing methodology" used by Viet Nam in its request for findings.

[142] Viet Nam's second written submission, para. 144(2). Viet Nam notes that the Appellate Body, in *US – Zeroing (Japan)*, para. 88, affirmed the finding of the panel in that case that "'zeroing procedures' under different comparison methodologies, and in different stages of the anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm". (Viet Nam's second written submission, para. 18). That said, we note that Viet Nam's requests for findings are limited to the application of that methodology in the context of U.S. administrative reviews and that Viet Nam's arguments focus on the precise context of the use of the weighted-average-to-transaction comparison methodology in such reviews.

[143] The United States notes that Viet Nam's first written submission made no reference to any "as such" claim and that during oral questioning in the first meeting of the Panel, Viet Nam indicated that it was not pursuing an "as such" claim in this dispute. The United States submits that Viet Nam for the first time articulated the bases of its "as such" claim against the zeroing methodology in response to a written question from the Panel (Panel question 11). (United States' second written submission, para. 11).

[144] See, e.g. Appellate Body Report, *US – Zeroing (EC)*, paras. 192-193.

(b) Whether Viet Nam has established the existence of the zeroing methodology as a rule or norm of general and prospective application

*(i) Main arguments of the parties*

Viet Nam

7.105 Viet Nam submits that prior panels and the Appellate Body have concluded that the U.S. zeroing methodology is an established norm or practice that may be subject to an as such claim.[145] Viet Nam asserts that the zeroing procedures, as described in the affidavit it submitted as Exhibit Viet Nam-33, are unchanged from the procedures that were found to constitute a general rule or norm in these past disputes.[146] Viet Nam argues that the Panel may take judicial notice of the facts underlying these findings by previous panels and the Appellate Body of the existence of the zeroing methodology as a rule or norm of general and prospective application. Viet Nam submits that doing so would be consistent with the objective of Article 3.2 of the DSU of achieving security and predictability in the mulilateral trading system. Further, Viet Nam argues that doing so would be consistent with the approach adopted by the *US – Shrimp (Ecuador)* and *US – Antidumping Measures on PET Bags* panels. Viet Nam argues that these panels relied on the facts as set forth in prior reports to establish the facts in the dispute before them. Thus, Viet Nam considers that citation to the report of a previous panel is sufficient to place the factual findings and the legal conclusions related to such factual findings on the record of this proceeding.[147]

7.106 In any event, Viet Nam considers that it has met its burden of proof with respect to the existence of the zeroing methodology. Viet Nam notes that it has provided, in the Ferrier affidavit (Exhibit Viet Nam-33), a detailed analysis of the zeroing methodology to calculate dumping margins generally and as used by the USDOC in the specific context of the *Shrimp* anti-dumping proceedings.[148] Viet Nam further cites to statements made by the USDOC in the four administrative reviews conducted by the USDOC in the *Shrimp* anti-dumping proceedings, in which the USDOC sought to justify its practice of zeroing with language that confirms its general and systematic application of this practice.[149] Thus, Viet Nam argues, all evidence on the record of this proceeding indicates the systematic application of zeroing in administrative reviews.[150]

7.107 Viet Nam further submits that the establishment of the relevant facts is not wholly the responsibility of the complaining party. Viet Nam considers that it has met its burden of establishing a *prima facie* case of the existence of the zeroing methodology as a general rule or norm. As a result, Viet Nam submits, the burden of proof has shifted to the United States. Viet Nam argues that the

[145] Viet Nam's second written submission, para. 18 and Viet Nam's comments on the United States' response to Panel question 50(ii) (referring to Panel and Appellate Body Reports, *US – Zeroing (Japan)* and Panel and Appellate Body Reports, *US – Stainless Steel (Mexico*); Viet Nam's comments on the United States' response to Panel question 50(ii).

[146] Viet Nam's opening oral statement at the second meeting of the Panel, para. 10.

[147] Viet Nam's response to Panel question 54A; Viet Nam's comments on the United States' response to Panel question 50A (referring to Panel Report, *US – Shrimp (Ecuador)*, para. 7.28; and Panel Report, *US – Anti-Dumping Measures on Polyethylene Carrier Bags from Thailand*, para. 7.7).

[148] Viet Nam's comments on the United States' response to Panel question 50(i).

[149] Viet Nam's comments on the United States' response to Panel question 50(iii) (referring to Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, pp. 15-16; Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, pp. 12-13; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, pp. 33-34).

[150] Viet Nam's response to Panel question 50(iii).

United States fails to submit any evidence to rebut Viet Nam's case. Viet Nam asks the Panel to treat the United States' silence in this respect as an acknowledgment that no such evidence exists.[151]

United States

7.108 The United States argues that Viet Nam has not placed before the Panel sufficient evidence to support a finding as to the existence of the alleged zeroing methodology as a measure which may be challenged "as such" before a WTO panel consistent with the findings of the Appellate Body in *US – Zeroing (EC)*.[152] The United States notes that Viet Nam cites to prior panel and Appellate Body reports with respect to the "zeroing methodology". The United States asserts that argument regarding another dispute, or mere citation to the findings of another panel or the Appellate Body, is insufficient to place such facts before the Panel. The United States notes that in *US – Continued Zeroing*, the Appellate Body indicated that factual findings in prior disputes regarding the existence of the zeroing methodology as a rule or norm are not binding in subsequent disputes.[153] The United States argues that while in *US – Continued Zeroing* the Appellate Body indicated that 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, it is necessary to actually adduce the evidence and point to any such admissions, which Viet Nam has not done with respect to the existence of the alleged zeroing methodology.[154]

7.109 The United States submits that the evidence presented by Viet Nam to the Panel falls short of the evidence described by the Appellate Body in previous disputes.[155] The United States argues that the present Panel has before it evidence of, at most, the alleged application of "zeroing" in four administrative reviews of one product, an "expert opinion" that does not even purport to demonstrate the existence of the "zeroing methodology" as a measure of general and prospective application attributable to the United States, and portions of the USDOC's Anti-Dumping Manual that are not relevant to the question of zeroing and do not include the "standard computer programs" used by the USDOC to calculate dumping margin. The United States argues that this evidence does not establish "systematic application" of zeroing in administrative reviews and that the absence of any evidence to that effect on the record before the Panel supports a conclusion that Viet Nam has failed to establish such a systematic application.[156]

*(ii) Evaluation by the Panel*

7.110 In *US – Zeroing (EC)*, the Appellate Body indicated 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 the form of a written document".[157] The Appellate Body reasoned that the

[151] Viet Nam's response to Panel questions 54A and 54B; Viet Nam's comments on the United States' response to Panel questions 49 (ii) and (iv).

[152] United States' second written submission para. 16; United States' opening oral statement at the second meeting of the Panel, para. 27; and United States' response to Panel question 54(iii) (all referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 196-198).

[153] United States' second written submission para. 19; United States' opening oral statement at the second meeting of the Panel, para. 28; United States' response to Panel question 54A; United States' comments on Viet Nam's response to Panel question 54A (all referring to Appellate Body Report, *US – Continued Zeroing*, para. 190).

[154] United States' opening oral statement at the second meeting of the Panel, para. 28, comments on Viet Nam's response to Panel questions 54A and 54B; see also response to Panel question 54A.

[155] United States' response to Panel question 54(iii) (referring to the Appellate Body Reports on *US – Zeroing (EC)* and *US – Zeroing (Japan)*).

[156] United States' response to Panel question 54(iii).

[157] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

existence and content of such a rule or norm may be more uncertain than where the rule or norm is expressed in the form of a written document.[158] The Appellate Body observed that:

> "... 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."[159]

7.111 The above reasoning was applied by the panels in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*.[160] Like those panels, we are guided by the above reasoning of the Appellate Body. In the present instance, the parties' disagreement focuses on whether the evidence before the Panel properly establishes that the zeroing methodology is a rule or norm of general and prospective application. We note that the United States argues that Viet Nam has pointed to no evidence and made no argument that would "clearly establish" that the alleged rule or norm is attributable to the United States, and the precise content of that norm.[161] We disagree. In our view, Viet Nam has presented evidence sufficient to establish both the content of the norm, and that it is attributable to the United States. First, we note that the United States has not contested the content of the alleged norm – i.e. that the USDOC, in calculating dumping margins in the context of periodic reviews, disregards any intermediate comparison result where the export price is equal to, or greater, than the normal value – as described by Viet Nam in its submissions and supporting exhibits. Second there can in our view be no question that if there is a norm, it is attributable to the United States. We recall that the USDOC forms part of the United States Government and that Viet Nam alleges that the norm at issue finds application in connection with the application by the United States of its anti-dumping law.[162]

7.112 With guidance from relevant case law[163], we consider that the zeroing methodology may be found to have general and prospective application if the USDOC is shown to have a deliberate policy of applying that methodology, going beyond the simple repetition of the application of that methodology in specific cases.[164] Given the unwritten nature of the alleged rule or norm at issue, our conclusions in this respect may rest on inferences drawn from evidence in the form, *inter alia*, of

---

[158] Appellate Body Report, *US – Zeroing (EC)*, para. 197.

[159] Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original, footnote omitted)

[160] Panel Report. *US – Zeroing (Japan)*, paras. 7.47-7.59; Panel Report, *US – Stainless Steel (Mexico),* paras. 7.28-7.42 and 7.84-7.97. The findings of the *US – Zeroing (Japan)* panel with respect to the existence of a rule or norm of general and prospective application were upheld in Appellate Body Report, *US – Zeroing (Japan)*, para. 88. The findings of the *US – Stainless Steel (Mexico)* panel on the issue were not appealed.

[161] United States' second written submission, paras. 17-20.

[162] Viet Nam's response to Panel question 54B.

[163] We refer in this regard to the reports of the panels and the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, and the report of the panel in *US – Stainless Steel (Mexico)*. To be clear, we consider these findings relevant to determine the legal framework that we must apply in examining Viet Nam's factual assertions and claims; however, we do not consider that the factual findings of these prior panels and the Appellate Body alleviate Viet Nam's burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application.

[164] Panel Reports, *US – Zeroing (Japan)*, para. 7.52; *US – Stainless Steel (Mexico)*, paras. 7.40, 7.95.

expert opinions, statements by the authorities concerned, or other evidence which indirectly supports the view that the application by the authorities of the methodology at issue reflects a "deliberate policy".[165]

7.113 We now turn to consider the evidence placed on our record by Viet Nam.[166] In this respect, we first note Viet Nam's reliance on the USDOC's use of zeroing in each of the anti-dumping proceedings undertaken pursuant to the *Shrimp* order. Evidence submitted by Viet Nam – the accuracy of which is not contested by the United States – demonstrates that the USDOC applied "simple zeroing" not only in the second and third administrative reviews, but also in each of the additional administrative reviews conducted under the *Shrimp* order.[167]

7.114 Viet Nam also submits to the Panel evidence to the effect that the USDOC applies zeroing in all anti-dumping proceedings where it is required to calculate a margin of dumping. In particular, the Ferrier affidavit submitted by Viet Nam includes a general overview of the standard programming used by the USDOC, which indicates that the USDOC uses a standard computer programme in calculating margins of dumping, and that the USDOC consistently includes instructions to disregard negative comparison results in this programme.[168] We note that the United States objects that the

---

[165] Our evaluation of the evidence before us is guided by the Appellate Body's indication that panels should engage in a cumulative evaluation of the evidence. The Appellate Body stated that a panel has a duty, under Article 11, "to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence and in relation to each other, even if no piece of evidence is by itself determinative of an asserted fact or claim". (Appellate Body Report, *US – Continued Zeroing*, para. 336).

[166] We note that Viet Nam invites us to take judicial notice of the findings of prior panels and of the Appellate Body as to the existence and WTO-inconsistency of the U.S. "zeroing methodology", in particular those in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*, in which the U.S. zeroing methodology, as it relates to the use of the weighted-average-to-transaction comparison method ("simple zeroing") in periodic reviews was found to be WTO-inconsistent. (Viet Nam's second written submission, para. 19; Viet Nam's response to Panel question 11). Viet Nam argues that we should apply an approach similar to that of the panels in *US – Shrimp (Ecuador)* and *US – Anti-Dumping Measures on PET Bags*. We note, though, that while the complainants in these disputes were allowed to rely on prior legal findings regarding the WTO-inconsistency of an identical measure in an earlier proceeding, the complainants were not dispensed from establishing, as a matter of fact, the existence of that measure. In addition, we note that the Appellate Body has cautioned, in *US – Continued Zeroing*, that findings of facts in one dispute are not binding in another dispute. (Appellate Body Report, *US – Continued Zeroing*, para. 190).

[167] Viet Nam refers us to the Issues and Decision Memoranda in each of the four administrative reviews completed under the *Shrimp* order. In each of these Memoranda, the USDOC states that it does not, in the review at issue, allow the amount by which the price exceeds normal value in certain transactions to offset the amount of dumping found in respect of other transactions. (Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, p. 15; Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 14; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, p. 13; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, p. 35; all are quoted in Viet Nam's first written submission, para. 47). In addition, Viet Nam also provides computer programme outputs and logs of the USDOC's dumping margin calculations for individually examined respondents in the administrative reviews at issue. In addition to the logs and outputs discussed above, paras. 7.77-7.78, pertaining to the USDOC's calculations in the second and third administrative reviews, Viet Nam also provides the logs and outputs for individual respondents in the fourth administrative review. (Viet Nam's first written submission, para. 48, referring to Computer Programme Log with respect Minh Phu in the Fourth Administrative Review, Exhibit Viet Nam-41; Computer Programme Output with respect to Minh Phu in the Fourth Administrative Review, Exhibit Viet Nam-49; Computer Programme Log with respect Nha Trang in the Fourth Administrative Review, Exhibit Viet Nam-69; Computer Programme Output with respect to Nha Trang in the Fourth Administrative Review, Exhibit Viet Nam-70).

[168] See Exhibit Viet Nam-33, paras. 6-7:

> "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

Ferrier affidavit "does not even purport to be an 'expert opinion' demonstrating the existence of the 'zeroing methodology' as a measure of general and prospective application attributable to the United States", but that, rather, "it is, as stated in paragraph 8 thereof, merely an analysis of 'the USDOC's computer programs used to determine the antidumping duty margins ... in the original investigation and the second, third, and fourth administrative reviews".[169] We are not persuaded by the United States' argument. In our view, the precise purpose for which the affidavit was prepared has no bearing on the probative value of Mr. Ferrier's evidence.[170] Thus, even though the Ferrier affidavit may have been prepared with a focus on the application of zeroing in the *Shrimp* proceedings, we have identified extracts from the affidavit that address the standard programme generally used by the USDOC, and therefore the use of zeroing in the calculation of margins of dumping more generally.[171] We note that the United States has not contested the accuracy of Mr. Ferrier's statement with respect to the standard programme generally used by the USDOC.[172]

7.115 Significant evidence of the general and prospective nature of the zeroing methodology is also found in a number of statements made by the USDOC in the Issues and Decision Memoranda accompanying the final determinations in the four completed administrative reviews of the *Shrimp* order. We consider that these statements demonstrate that the USDOC maintains a practice of zeroing in administrative reviews, going beyond the simple application of zeroing in individual instances, and that this practice reflects a deliberate policy. For instance, the Issues and Decision Memorandum accompanying the USDOC's final determination in the second administrative review states that, outside the context of weighted-average-to-weighted-average comparisons in original investigations, the USDOC interprets the definition of "dumping margin" in the U.S. anti-dumping statute to mean that:

> "a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales."[173]

---

> and administrative 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'.
> The programming language addresses many aspects of the dumping margin calculation. The manner and order in which procedures and calculations are executed by the USDOC's programs are intrinsically linked to the U.S. antidumping laws and the USDOC's policies interpreting those laws. The USDOC cannot alter the structure of key components of the calculation procedures in the standard computer programs without risking violating its laws or changing its policies interpreting those laws."

[169] United States' response to Panel question 54(i), para. 6. The United States makes a similar argument in para. 17 of its second written submission.

[170] We note that the Appellate Body has indicated in the past that panels are entitled to examine all evidence placed on the record before them, including evidence submitted by the defending party, regardless of the purpose of the party introducing the evidence. See Appellate Body Report, *Korea – Dairy*, paras. 136-137. In *Korea – Dairy*, the Appellate Body rejected an argument of Korea that the panel in that dispute had impermissibly relied on evidence submitted by Korea, for a purpose other than that for which Korea had submitted the evidence, and used it to reach conclusions contrary to Korea's interests.

[171] Affidavit by Michael Ferrier, Exhibit Viet Nam-33, paras. 6-7, cited *supra* footnote 168.

[172] To be clear, we do not view any line of computer code as a practice or methodology in itself, but consider that the consistent presence of a line of computer code to discard negative comparison results can be regarded as manifestation of a zeroing practice maintained by the USDOC.

[173] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 13.

7.116 The Memorandum adds that the U.S. Court of Appeals for the Federal Circuit "has held that this is a reasonable interpretation of the statute". The abovementioned Issues and Decision Memorandum further explains, in reaction to arguments by Vietnamese interested parties citing to WTO precedents finding that the zeroing methodology employed by the USDOC in periodic reviews is WTO-inconsistent, that WTO reports are without effect under U.S. law, unless and until they have been adopted pursuant to the specified U.S. statutory scheme. The Memorandum further provides that "[w]hile the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews." The USDOC then concludes that, consistent with its interpretation of the U.S. anti-dumping statute, the USDOC continued to "deny offsets" in its final determination in the periodic review at issue.[174] Similar statements appear in the Issues and Decision Memoranda accompanying the USDOC's final determinations in each of the other administrative reviews under the *Shrimp* order.[175]

7.117 In our view, the import of these statements extends beyond the administrative reviews of the *Shrimp* order. The general references to interpretation of the applicable statute, and the calculation of margins of dumping under that statute, indicate that whenever the USDOC calculates a margin of dumping in the context of administrative reviews, the USDOC will never allow non-dumped sales to offset the amount of dumping with respect to other sales. In other words, the USDOC will always apply zeroing.

7.118 We recall the Appellate Body's indication that a panel should not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, particularly where the rule or norm at issue is not expressed in written form, and that a complaining party making a challenge against such a measure "must *clearly* establish" (our emphasis), *inter alia*, that the alleged "rule or norm" does have general and prospective application.[176] The Appellate Body itself has indicated that the complaining party bringing such a challenge faces a "high threshold".[177]

7.119 In our view, the evidence put forward by Viet Nam meets the "high threshold" referred to by the Appellate Body in *US – Zeroing (EC)*. This evidence in our view demonstrates that the USDOC's application of zeroing in administrative reviews extends well beyond the mere repetition of a practice in specific cases and rather substantiates Viet Nam's allegation that the USDOC maintains a deliberate policy to this effect.

---

[174] Issues and Decision Memorandum for the Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, pp. 13-14.

[175] See Issues and Decision Memorandum for the Final Determination in the First Administrative Review, Exhibit Viet Nam-11, p. 16, which states that "[b]ecause no change has yet been made with respect to the issue of 'zeroing' in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review"; Issues and Decision Memorandum for the Final Determination in the Third Administrative Review, Exhibit Viet Nam 19, pp. 12-13, cited in part in Viet Nam's first written submission, para. 49; Issues and Decision Memorandum for the Final Determination in the Fourth Administrative Review, Exhibit Viet Nam-23, pp. 33-35. See also Issues and Decision Memorandum for the Final Determination in the Original Investigation, Exhibit Viet Nam-06, p. 11, which primarily pertains to the USDOC zeroing "methodology" as it applies to original investigations, but in which the USDOC nevertheless mentions the application of that methodology in the context of administrative reviews ("... in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable."). Although only the second and third administrative reviews are "measures at issue" upon which we must pronounce, documents issued by the USDOC in other proceedings under the *Shrimp* order may serve as evidence of Viet Nam's factual assertions concerning the existence of the alleged "zeroing methodology".

[176] Appellate Body Report, *US – Zeroing (EC)*, para. 198, cited *supra* para. 7.110.

[177] Appellate Body Report, *US – Zeroing (EC)*, para. 198, cited *supra* para. 7.110.

7.120 Mindful of the rules governing the allocation of the burden of proof and of the Appellate Body's indication that panels should exercise particular care in examining the evidence supporting the existence of an unwritten norm, we nevertheless expressly sought the view of the United States on the evidence before us.[178] Although we provided the United States with an opportunity to identify any evidence that might rebut the evidence submitted by Viet Nam in support of its claim that the USDOC zeroing methodology is a rule or norm of general and prospective application, the United States declined to put forward any such evidence.[179] This being the case, we conclude that Viet Nam has established that the U.S. zeroing methodology is a norm which may be challenged "as such."

7.121 We emphasize that we reach this conclusion solely on the basis of the evidence placed before us. We note, however, that our conclusion as to the facts before us is consistent with that reached by panels and the Appellate Body in prior decisions in which they have found that the United States maintains a norm of general and prospective application by virtue of which it applies the zeroing methodology in performing dumping margins calculations, notably in the context of using the weighted-average-to-transaction methodology in periodic reviews.[180]

---

[178] We are, in particular, guided by the Appellate Body's indication that "[p]articular 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" and that, "[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". Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original)

[179] We asked the United States "What evidence is there on the record that might support a conclusion that there is not a systematic application of zeroing in administrative reviews?" (Panel question 54(iii)). The United States answered that "Vietnam has the burden to offer evidence sufficient to substantiate its claim, and Vietnam has failed to put forward the requisite evidence to support an as such claim with respect to the so-called 'zeroing methodology.'" The United States also argued that it is insufficient for Viet Nam to rely on the facts, rationale, and findings in other disputes and that the evidence presented by Viet Nam "falls far short of the evidence as described by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*." The United States also argued that the evidence before the Panel does not establish a "systematic application of zeroing in administrative reviews."

We also asked the following question to the United States: "If the Panel were to find that Viet Nam has discharged its initial burden of establishing that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such', the onus would shift to the United States to refute the existence of that measure. What evidence would the United States rely on to do so?" (Panel question 54 (iv)). The United States answered that:

> "The U.S. response would depend upon how Vietnam established that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such.' Because Vietnam has not done so in this dispute, it is unclear how the United States would refute the existence of such a measure or norm, and we are not in a position to speculate on our response to evidence that Vietnam has not presented to the Panel.
>
> Hypothetically, if the Panel were to determine that Vietnam has discharged its initial burden of establishing that the 'zeroing methodology' constitutes a rule or norm that may be challenged 'as such,' the United States could respond, for example, by supplying evidence that calls into question whether Vietnam's evidence in fact supports that conclusion."

The rest of the United States' answer concerns the WTO-consistency of the zeroing methodology, in the event that the Panel found that Viet Nam has established the existence of that measure.

[180] Because we are of the view that the evidence discussed above suffices to meet the criteria set forth by the Appellate Body in *US – Zeroing (EC)*, we need not consider the other evidence cited by Viet Nam, in particular the USDOC's Anti-Dumping Manual. In any event, we agree with the United States that on their face, the chapters of the USDOC Anti-Dumping Manual submitted by Viet Nam relate only to the USDOC's NME methodology and to sunset reviews (United States' response to Panel question 54(iii)). For the same reason, we need not decide whether Exhibit Viet Nam-74, a recent Notice issued by the USDOC seeking comments from interested parties on a proposed rule change, is admissible evidence, given its late submission by Viet Nam (USDOC, "Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings" (28 December 2010), Exhibit Viet Nam-74).

7.122 In light of the foregoing, we uphold Viet Nam's arguments that the U.S. zeroing methodology has general and prospective application. Since, as indicated above, we are satisfied that Viet Nam has established the content of that rule or norm and that it may be attributed to the United States, we conclude that Viet Nam has properly established the existence of the zeroing methodology as a measure that may be challenged "as such." We now turn to Viet Nam's claim that the zeroing methodology measure is as such WTO-inconsistent.

(c) Whether the zeroing methodology is inconsistent, as such, with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.123 Viet Nam claims that the USDOC's zeroing methodology is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT.[181]

7.124 The United States asks us to reject Viet Nam's claims.

*(i) Main arguments of the parties*

Viet Nam

7.125 Viet Nam argues that the Appellate Body has repeatedly found zeroing in administrative reviews to be inconsistent with the Anti-Dumping Agreement.[182] In particular, Viet Nam notes, the Appellate Body twice held that the precise zeroing methodology at issue in this dispute is inconsistent, as such, with Articles 9.3 of the Anti-Dumping Agreement and VI:2 of the GATT 1994.[183] Viet Nam considers that the findings of the Appellate Body in previous disputes are determinative in this dispute and that the Panel should follow these precedents.[184] Viet Nam submits that while recognizing the need to reach decisions on a dispute-specific basis, the Appellate Body has made clear that following its decisions in prior disputes "is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[185] Viet Nam further argues that Article 3.2 of the DSU requires security and predictability in the dispute settlement process and that refusing to recognize prior determinations involving identical factual situations would frustrate these goals.[186]

7.126 Relying on these precedents, Viet Nam argues that Articles VI of the GATT 1994 and 2.1 of the Anti-Dumping Agreement both define "dumping" and "margin of dumping" with regard to the product under investigation as a whole, and not in relation to models or categories that are subsets of the product. Viet Nam considers that the U.S. zeroing methodology does not produce a margin of dumping based on all intermediate comparisons and therefore fails to calculate a margin of dumping for the product as a whole. Viet Nam further argues that the arguments raised by the United States in this dispute – that dumping may be found at the individual, transaction level and that a margin of dumping need not be calculated for the product as a whole, have been repeatedly rejected by the

[181] Viet Nam's second written submission, paras. 17-21 and 144(2); Viet Nam's opening oral statement at the second meeting of the Panel, para. 59(2).

[182] Viet Nam's first written submission, paras. 115-120, 151-157 and Viet Nam's second written submission, para. 11 (referring to Appellate Body Reports in *US – Zeroing (EC)*, para. 133; *US – Zeroing (Japan)*, para. 176, *US – Stainless Steel (Mexico)*, para. 139; *US – Continued Zeroing*, para. 316; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 195 and 197).

[183] Viet Nam's second written submission, paras. 11 and 19 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 166, 169; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 133-136).

[184] Viet Nam's second written submission, para. 20; Viet Nam response to Panel question 55.

[185] Viet Nam's first written submission, para. 119 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

[186] Viet Nam's opening oral statement at the second meeting of the Panel, paras. 11, 57.

Appellate Body.[187] Viet Nam recalls 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, Viet Nam argues, means that where 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 margin of dumping. 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.[188]

United States

7.127 The United States argues that the text of the Anti-Dumping Agreement, interpreted in accordance with the customary rules of interpretation, does not support a general prohibition of zeroing that would apply in the context of assessment proceedings under Article of the 9.3 of the Anti-Dumping Agreement and that at a minimum, the USDOC's methodology to calculate anti-dumping duties in administrative reviews rests on a permissible interpretation of the Anti-Dumping Agreement under Article 17.6(ii) of the Agreement.[189]

7.128 Specifically, the United States argues that Viet Nam's claims depend on interpreting the terms "margins of dumping" and "dumping" as relating exclusively to the "product as a whole". The United States argues that there is no basis in Article VI of the GATT 1994 or in the Anti-Dumping Agreement for such a proposition. The United States argues that "dumping" as defined under Article 2.1 of the Anti-Dumping Agreement is a transaction-specific concept.[190] The United States further argues that the obligation set forth in Article 9.3 – to assess no more in anti-dumping duties than the margin of dumping – is similarly applicable at the level of individual transactions. The United States notes that in Viet Nam's view, a Member breaches Article 9.3 and Article VI:2 of the GATT by failing to provide offsets, because Members are required to calculate dumping margins on an exporter-specific basis for the "product as a whole" and, consequently, a Member is required to aggregate the results of all "intermediate comparison results". The United States argues that so long as the margin of dumping is understood to apply 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 anti-dumping duties. The United States adds that it is only when an obligation to aggregate transactions under Article 9.3 is improperly inferred that any perception of conflict arises.[191]

7.129 The United States invites the Panel to make an objective assessment of the matter before it, reach the same conclusion as the panels in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US –*

[187] Viet Nam's second written submission, paras. 40-47 (referring to Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 99, 106; Appellate Body Report, *US – Zeroing (Japan)*, para. 115; Appellate Body Report, *US – Zeroing (EC)*, paras. 127, 132; Appellate Body Report, *US – Continued Zeroing*, para. 283). While this is not totally clear from Viet Nam's submissions, we understand Viet Nam to make these arguments not only with respect to its "as applied" claims, but also with respect to "as such" claims. See also Viet Nam's first written submission, paras. 121-128.

[188] Viet Nam's first written submission, paras. 144-157 (referring to Appellate Body Reports on *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, *US – Continued Zeroing*, *US – Zeroing (Japan) (Article 21.5 - Japan)*).

[189] United States' first written submission, paras. 110-116; United States' second written submission, para. 13. In para. 13 of its second written submission, the United States incorporates by reference its arguments in paras. 110-138 of its first written submission, which it made in response to Viet Nam's "as applied" claim. We therefore reproduce these arguments here and take them into consideration in our analysis.

[190] United States' first written submission, paras. 117-123; United States' second written submission, paras. 51-53.

[191] United States' first written submission, paras. 117-138.

*Stainless Steel (Mexico)*, which agreed with the interpretation it puts forward, and reject Viet Nam's claims.[192]

*(ii) Main arguments of the third parties*

7.130 Every one of the third parties that commented on Viet Nam's claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 – China, European Union, India, Japan, Korea, and Mexico – supports Viet Nam's arguments and invites the Panel to follow the reasoning of the Appellate Body in prior disputes in which it has found zeroing in periodic reviews to be inconsistent with these provisions.[193]

*(iii) Evaluation by the Panel*

7.131 Viet Nam's claim against the zeroing methodology, as such, is based on Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Article 9.3 of the Anti-Dumping Agreement reads:

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

7.132 Article VI:2 of the GATT 1994 provides:

> "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."

7.133 Although formulated differently, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 impose similar obligations. Both provide that the amount of the anti-dumping duty shall not exceed the margin of dumping.

7.134 The parties' arguments regarding the WTO-consistency of the U.S. zeroing methodology raise a number of important issues of treaty interpretation, the most fundamental of which is whether the "margin of dumping" referred to under Articles 9.3 and VI:2 must be calculated for the "product as a whole", and in respect of an exporter (Viet Nam's position), or whether it may be calculated on a transaction-specific basis (the United States' position). These issues raised by Viet Nam's claims are, however, not novel. The Appellate Body has had the opportunity to consider these issues of interpretation in several prior WTO dispute settlement proceedings.

7.135 In these prior cases, the Appellate Body has consistently held that "dumping", as this term is defined under the Anti-Dumping Agreement and under Article VI:1 of the GATT 1994, necessarily relates to the product under consideration as a whole, and not to individual export transactions. Consequently, the Appellate Body has found that the "margin of dumping" must necessarily be determined on the basis of all export transactions of a given exporter. Thus, if the investigating authority conducts multiple comparisons for individual transactions or for groups of transactions, it must aggregate the results of all such intermediate comparisons, including those where the export

---

[192] United States' first written submission, paras. 115-116; United States' opening oral statement at the first meeting of the Panel, paras. 28-31.

[193] China's third-party oral statement, pp. 2-3 (this statement contains no paragraph numbering); European Union's third-party written submission, paras. 6-168; European Union's third-party oral statement, paras. 2-7; India's third-party oral statement, paras. 1-2 and 8-12; Japan's third-party written submission, paras. 8-50; Japan's third-party oral statement, para. 2; Korea's third-party written submission, paras. 9-16; Korea's third-party oral statement, paras. 5-9; Mexico's third-party written submission, paras. 4-29.

price exceeds the normal value".[194] Related to this, the Appellate Body has consistently held that dumping necessarily is an exporter-specific concept.[195] Thus, the Appellate Body has indicated that dumping can only be determined for the exporter, and in connection with the product under consideration as a whole, rather than on a transaction-specific basis.

7.136 The Appellate Body has found that 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. Therefore, the Appellate Body has reasoned, the "margin of dumping" calculated in accordance with Article 2 – in relation to the exporter, and in connection with the product under consideration as a whole – operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. Thus, if the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some of these comparisons, while disregarding others.[196]

7.137 On this basis, the Appellate Body has found that "simple zeroing" in periodic reviews – as it is applied by the USDOC – is inconsistent with Article 9.3 of the Anti-Dumping Agreement and with Article VI:2 of the GATT 1994. The Appellate Body has held that zeroing results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping. This, the Appellate Body has explained, is because when the USDOC applies 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 cash deposit rate for the exporter and the duty assessment rate for the importer concerned.[197] We note, however, that the Appellate Body has made it clear that its rulings with respect to zeroing in periodic reviews concern the amount of anti-dumping duty that can be levied in accordance with Article 9.3 of the Anti-Dumping Agreement, and not the issue of how this amount is to be collected from the importers. Specifically, the Appellate Body has clarified that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry to determine the duty liability, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole.[198]

7.138 In the present dispute, the United States asserts that the Anti-Dumping Agreement and the GATT 1994 do not prohibit zeroing in the context of periodic reviews. In particular, the United States argues that it is possible to interpret the terms or concepts of "dumping" and "margin of dumping" as

---

[194] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-100; *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 122; Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-110, 115, 151; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 97-99; Appellate Body Report, *US – Continued Zeroing*, paras. 276-287.

[195] Appellate Body Report, *US – Zeroing (EC)*, paras. 128-129; Appellate Body Report, *US – Zeroing (Japan)*, paras. 111-112, 150; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-95; Appellate Body Report, *US – Continued Zeroing*, paras. 282-283.

[196] Appellate Body Report, *US – Zeroing (EC)*, para. 130; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155-156; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96; Appellate Body Report, *US – Continued Zeroing*, paras. 286-287, 314.

[197] Appellate Body Report, *US – Zeroing (EC)*, paras. 132-135; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155, 166; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 133-139; Appellate Body Report, *US – Continued Zeroing*, paras. 315-316. The Appellate Body has also noted that if zeroing in periodic reviews were allowed under Article 9.3 of the Anti-Dumping Agreement, this would allow Members to circumvent the prohibition under Article 2.4.2 on zeroing in original investigations. (See, e.g. Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109).

[198] Appellate Body Report, *US – Zeroing (EC)*, para. 131; Appellate Body Report, *US – Zeroing (Japan)*, para. 156; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 111-114; Appellate Body Report, *US – Continued Zeroing*, para. 291.

referring not only to the product as a whole, but also to specific export transactions. The United States also rejects the notion that dumping is necessarily an exporter-specific concept, and argues that dumping may also be determined for individual importers. While we have carefully reviewed and considered these arguments of the United States, we note that the Appellate Body has considered, and rejected, these very same arguments in prior dispute settlement proceedings. Indeed, in two such prior cases – *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* – the Appellate Body found that zeroing in the context of administrative reviews is, as such, inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[199]

7.139 In considering the merits of the parties' arguments, and performing our own objective assessment of the matter at hand, we are mindful of the Appellate Body's view that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same" and that "[t]his is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."[200]

7.140 We further recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body considered that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[201] We also note the concurring opinion expressed in the Appellate Body Report in *US – Continued Zeroing* that, on the question of zeroing, the Appellate Body has spoken definitively, the Appellate Body's decisions have been adopted by the DSB, and the membership of the WTO is entitled to rely upon these outcomes.[202]

7.141 We recall that the findings of the Appellate Body in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* discussed above[203] addressed the very same question which is now before us, i.e. the consistency with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 of the zeroing methodology, as such, in the context of administrative reviews. Following an objective assessment of the matter, and a thorough review of the abovementioned reasoning expressed by the Appellate Body, we agree with that reasoning and adopt it as our own.

7.142 Based on the foregoing considerations, we find that the U.S. zeroing methodology, as such, as it relates to the use of simple zeroing in periodic reviews, is inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

## E. VIET NAM'S CLAIMS CONCERNING THE LIMITATION OF THE NUMBER OF SELECTED RESPONDENTS

### 1. Introduction

7.143 Viet Nam makes a number of claims in relation to the limitation by the USDOC of the number of Vietnamese respondents for which it determined an individual dumping margin in the second and in the third administrative reviews. Viet Nam requests that we find that:

---

[199] Appellate Body Report, *US – Zeroing (Japan)*, para. 166; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 134.

[200] Appellate Body Report, *US – Continued Zeroing*, para. 362.

[201] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

[202] Appellate Body Report, *US – Continued Zeroing*, para. 312. We note, however, that the Appellate Body has not had to pronounce itself on the consistency with the Anti-Dumping Agreement and the GATT 1994 of zeroing as applied in the context of the use of the weighted average-to-transaction methodology to address "targeted dumping" pursuant to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

[203] *Supra*, para. 7.138.

> "The USDOC's determinations in the second and third administrative reviews ... to limit the number of individually investigated respondents such that they restrict certain substantive rights under the Anti-Dumping Agreement is inconsistent with Articles 6.10, 6.10.2, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement"[204]

7.144 Viet Nam's claims concern the USDOC's application of Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement. These Articles provide, in relevant part:

> "6.10 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.
>
> ....
>
> 6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."

7.145 Viet Nam also alleges a violation of Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement. Article 9.3 provides that:

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

7.146 Articles 11.1 and 11.3 provide that:

> "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."
>
> "11.3 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

[204] Viet Nam's second written submission, para. 144(6); Viet Nam's first written submission, para. 235. Viet Nam makes similar claims in respect of the "continued use of challenged practices" measure. We have already determined that this measure is not within our terms of reference.

> be likely to lead to continuation or recurrence of dumping and injury.[205] The duty may remain in force pending the outcome of such a review."

7.147 In each of the proceedings it conducted under the *Shrimp* anti-dumping order, including in the second and third administrative reviews, the USDOC limited the number of Vietnamese respondents for which it determined an individual margin of dumping. In each instance, the USDOC determined that it was impracticable to examine all respondents for which an administrative review had been requested and determined to limit its examination to "...exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined". In the second administrative review, the USDOC determined that it could reasonably investigate two Vietnamese exporters, accounting for 34 per cent of the total exports of exporters seeking individual review.[206] In the third administrative review, the USDOC selected three respondents for individual review.[207] The USDOC explained its decision to limit the number of respondents with almost identical language in both administrative reviews. The USDOC considered that:

> "In selecting respondents for review, the Department carefully considers its resources including its current and anticipated workload and deadlines coinciding with the segment in question. After careful consideration of our resources, we believe [conclude][208] that it would not be practicable in this review to examine all producers/exporters of the subject merchandise for whom a review was requested [for which we have a request for review]. AD/CVD Operations Office 9, the office to which the administrative review is assigned, does not have the resources to examine all such exporters/producers. This office is conducting numerous concurrent antidumping proceedings which place a constraint on the number of analysts that can be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide and/or overlap with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import Administration, we do not anticipate receiving any additional resources to devote to this antidumping proceeding.
>
> Therefore, after careful consideration of our resources, we believe that it would not be practicable in this administrative review to examine all producers/exporters of subject merchandise for whom a review has been requested. In light of our resource constraints, we believe it is practicable to examine two [three] of these companies."[209]

7.148 Of relevance to Viet Nam's claims, U.S. law provides an opportunity for individual exporters or producers to seek revocation of the anti-dumping order on an individual basis. The relevant U.S. regulations, 19 C.F.R. §351.222, provide that in making a determination whether to revoke an anti-

---

[205] 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. (original footnote)

[206] Exhibit Viet Nam-13, Respondent Selection Memorandum in the Second Administrative Review.

[207] Exhibit Viet Nam-17, Respondent Selection Memorandum in the Third Administrative Review. The USDOC's Respondent Selection Memorandum in the Third Administrative Review does not indicate what percentage of Viet Nam's exports of shrimp to the United States, or of the exports of respondents seeking review, these three respondents accounted for.

[208] The underlined text is that of the Respondent Selection Memorandum in the Second Administrative Review; the text in square brackets is that of the Respondent Selection Memorandum in the Third Administrative Review.

[209] Respondent Selection Memo in the Second Administrative Review, Exhibit Viet Nam-13, pp. 3-4, quoted in Viet Nam's first written submission, para. 238; and Respondent Selection Memo in the Third Administrative Review, Exhibit Viet Nam-17, pp. 2-3.

dumping order in part, the USDOC is to take into account, *inter alia*, whether the exporter or producer concerned has sold the product under consideration at undumped prices for at least three consecutive years.[210] In the proceedings at issue, certain Vietnamese exporters sought company-specific revocations of the anti-dumping order. In their requests for revocation, certain of these companies requested that the USDOC assign them an individual margin of dumping. More details on these requests are provided below.

7.149 Also of relevance to Viet Nam's claims is the fact that the USDOC, when conducting its likelihood-of-dumping determination in the context of a sunset review, takes into consideration the margins of dumping established in the original investigation and in administrative reviews.[211]

7.150 Viet Nam challenges two aspects of the USDOC's actions in the determinations at issue: First, Viet Nam considers that the USDOC applied Article 6.10 in a manner that deprived Vietnamese respondents of substantive rights under Article 6.10 itself and under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement. Second, Viet Nam argues that the USDOC acted inconsistently with Article 6.10.2 of the Anti-Dumping Agreement by discouraging Vietnamese exporters from submitting voluntary responses, and by refusing to consider such voluntary responses when they were made. We consider each in turn.

## 2. Viet Nam claims under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement

### (a) Introduction

7.151 We first consider Viet Nam's claims under Articles 6.10, 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

7.152 Viet Nam claims that the USDOC applied the limited examination exception provided for in Article 6.10 in a manner that deprived Vietnamese exporters and producers of substantive rights (that depend on the existence of individual margins) under Articles 6.10[212], 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.[213]

7.153 The United States asks us to reject Viet Nam's claims.

### (b) Main arguments of the parties

#### *(i) Viet Nam*

7.154 Viet Nam argues that the USDOC has effectively turned the general rule in the first sentence of Article 6.10 (i.e. that an individual margin should be determined for each exporter/producer) into an exception, and the exception under the same provision into a general rule.[214] According to Viet Nam, the USDOC's repeated use of limited examinations renders the individual margin rule provided for in the first sentence of Article 6.10, and additional requirements in Articles 9.3, 11.1

[210] 19 C.F.R. § 351.222, "Revocation of orders; termination of suspended investigations", Exhibit Viet Nam-56.

[211] See, *supra* para. 7.13.

[212] Viet Nam at times includes, and at other times, omits, Article 6.10 itself from the list of provisions, or rights or principles which the USDOC's application of the Article 6.10 exception infringes upon.

[213] Viet Nam's second written submission, para. 119.

[214] Viet Nam's first written submission, paras. 238, 255. Viet Nam argues that the USDOC applies the exception provided for under Article 6.10 as a rule, and *vice versa*, not only in the *Shrimp* proceeding, but in virtually every other recent investigation or review. Viet Nam's first written submission, para. 269 (referring to Exhibit Viet Nam-65, List of Ten Most Recently Completed USDOC Administrative Review Results (as of 12 August 2010)).

and 11.3 that are dependent on the existence of individual margins, meaningless. Viet Nam contends that an authority cannot use the exception provided in Article 6.10 to avoid that authority's obligations under other provisions of the Agreement.

7.155 With respect to Article 9.3, Viet Nam argues that the USDOC's refusal to individually examine certain respondents means that the USDOC fails to ensure that the amount of duties assessed on these respondents does not exceed their margin of dumping.[215] Viet Nam interprets Article 11.1 as providing a self-standing right for an individual exporter/producer to obtain a company-specific revocation of the order upon a showing that it has ceased dumping. Viet Nam argues that non-selected Vietnamese respondents are prevented from exercising their rights under this provision and under the U.S. regulation providing for company-specific revocations. This, Viet Nam argues, is because in the absence of individual margins of dumping, non-selected respondents are unable to demonstrate that they have ceased dumping.[216] Viet Nam argues that the USDOC is also required, under Article 11.3, to make company-specific likelihood-of-dumping determinations, using each respondent's individual margin of dumping, and that under U.S. law and practice, in order to obtain a termination of the order in the context of a sunset review, respondents must demonstrate that they have ceased dumping and that their exports to the United States have continued at levels comparable to those in the period preceding the order.[217] Viet Nam considers that the USDOC's refusal to determine an individual margin for each respondent means that these respondents are unable to demonstrate the absence of dumping, and are therefore unable to meet the relevant standard in the context of a sunset review.[218]

7.156 Viet Nam asserts that it is the responsibility of the authority to apply the exception in Article 6.10 in a manner which is consistent with the authority's obligations under other provisions of the Anti-Dumping Agreement. Viet Nam argues that, to do so, the authority may be required to deviate from standard practices applied in proceedings in which the authority does not limit its investigation. Viet Nam argues that the USDOC made no effort in the proceedings at issue to balance its right to conduct limited examinations with the interests and rights of Vietnamese respondents to have duties assessed based on individual margins and to obtain a company-specific review in order to demonstrate the absence of dumping. Viet Nam asserts that in these proceedings, the Vietnamese respondents suggested an alternative which would have allowed the USDOC to determine individual margins of dumping for those companies requesting them with limited additional effort given the small variations in normal value between companies in an NME context. According to Viet Nam, the same objective could have been achieved by applying to non-selected respondents the zero and *de minimis* margins calculated for the selected respondents.[219]

---

[215] Viet Nam's opening oral statement at the first meeting of the Panel, para. 71; Viet Nam's second written submission, paras. 120, 132.

[216] Viet Nam's first written submission, paras. 260, 283; Viet Nam's opening oral statement at the first meeting of the Panel, para. 72; Viet Nam's second written submission, paras. 121, 130; Viet Nam's opening oral statement at the second meeting of the Panel, paras. 42-49; Viet Nam's response to Panel questions 45-48.

[217] Viet Nam's first written submission, para. 262 (citing to USDOC Anti-Dumping Manual, Chapter 25, Sunset Reviews, pp. 7-8, and Chapter 10, Non-Market Economies, Exhibit Viet Nam-31; and Five Most Recently Completed Sunset Review Determinations, Exhibit Viet Nam-64); Viet Nam's opening oral statement at the first meeting of the Panel, para. 73 (citing to Preliminary Results of Sunset Review and Issues and Decision Memorandum, Exhibit Viet Nam-25); Viet Nam's response to Panel question 45; Viet Nam's second written submission, paras. 121-122.

[218] Viet Nam's first written submission, para. 261-263, 284; Viet Nam's second written submission, paras. 122, 131.

[219] Viet Nam's first written submission, paras. 253-254; Viet Nam's second written submission, para. 137; Viet Nam's response to Panel question 65.

*(ii) United States*

7.157 The United States asserts that there is no limit to the number of times that an investigating authority may limit its examination. Rather, the United States submits, Article 6.10 permits the investigating authority to limit its examination whenever the conditions for doing so are met, i.e. where the number of exporters/producers makes determinations of individual margins for all exporters/producers "impracticable."[220] The United States notes that Viet Nam is not alleging that the USDOC violated Article 6.10 by failing to select the largest number of exporters/producers that "reasonably" could be examined, and that Viet Nam is also not arguing that the USDOC should have or could have investigated all respondents requesting reviews in each of the reviews. Thus, the United States argues, Viet Nam has provided no basis to support its claim that the United States acted inconsistently with any obligation under Article 6.10.[221]

7.158 The United States considers that Viet Nam's claims under provisions other than Article 6.10 are necessarily dependent on its claim under that provision. The United States submits that it cannot be found to have acted inconsistently with one provision of the Anti-Dumping Agreement due to the proper exercise of its rights under a separate provision of the same Agreement.[222] The United States also argues that the obligations under the other provisions cited by Viet Nam are unrelated to an investigating authority's determination to limit its examination and to the application of anti-dumping duties to companies not individually examined.[223]

7.159 The United States addresses each provision cited by Viet Nam as follows: Firstly, the United States argues that Viet Nam's interpretation of Article 9.3 reads the second sentence of Article 6.10, and all of Article 9.4, out of the Anti-Dumping Agreement. The United States argues that there could, in the proceedings at issue, be no connection between the anti-dumping duty assigned to non-selected respondents and these respondents' margin of dumping, given that no margin of dumping was determined for these respondents.[224]

7.160 Secondly, the United States argues that Article 11.1 does not impose any independent or additional obligation on Members, but merely informs Articles 11.2, which Viet Nam does not invoke, and 11.3. The United States further submits that the obligations in Article 11 apply to the anti-dumping order as a whole, and do not concern the particular anti-dumping duties applied to individual companies. The United States submits that, even assuming, *arguendo*, that there were an obligation under Article 11 to provide company-specific opportunities for revocation, under Article 11.4 of the Agreement, the provisions of Article 6.10, authorizing the authority to limit its examination, would also apply to such a review. The United States further notes that Viet Nam's arguments focus on the U.S. regulation permitting the revocation of an anti-dumping order with respect to an individual company. The United States argues that there is no obligation under the Anti-Dumping Agreement to revoke an order on a company-specific basis, let alone an obligation to do so where the exporter receives three successive zero margins, and that it cannot be found to have

[220] United States' first written submission, paras. 194-195; United States' opening oral statement at the first meeting of the Panel, para. 43.

[221] United States' first written submission, para. 193-19; United States' opening oral statement at the first meeting of the Panel, para. 42; United States' response to Panel questions 39-41; United States' second written submission, paras. 117-119; United States' opening oral statement at the second meeting of the Panel, paras. 82-84; United States' comments on Viet Nam's response to Panel question 64.

[222] United States' second written submission, para. 127; United States' opening oral statement at the second meeting of the Panel, paras. 95-95; United States' comments on Viet Nam's response to Panel question 64.

[223] United States' opening oral statement at the second meeting of the Panel, para. 92.

[224] United States' opening oral statement at the second meeting of the Panel, para. 94.

acted inconsistently with the Anti-Dumping Agreement for failing to take action that the Agreement does not require.[225]

7.161 Thirdly, the United States argues that the sunset review under the *Shrimp* anti-dumping order (i.e. the Article 11.3 review) is not within the Panel's terms of reference and that for this reason, Viet Nam's claim under Article 11.3 fails. In addition, the United States argues that the USDOC does not necessarily base its sunset review determinations solely upon the existence of dumping margins in administrative reviews, noting that interested parties are permitted to place any information they choose on the record.[226]

7.162 In addition, the United States rejects Viet Nam's suggestion that the USDOC could have employed alternative methodologies to assign individual margins to more exporters. The United States submits that the Anti-Dumping Agreement imposes no obligation in this respect. In any event, the United States submits, the methodologies suggested by Viet Nam would not have allowed the calculation of margins of dumping for non-selected exporters.[227]

(c) Evaluation by the Panel

7.163 Before proceeding with our evaluation, we recall that the first sentence of Article 6.10 of the Anti-Dumping Agreement provides that, "as a rule, the investigating authority shall determine an individual margin of dumping for each known exporter or producer". To do so, the investigating authority would have to individually examine each known exporter or producer. As a result of the difficulty of performing individual examinations of all known exporters and producers in certain cases, the second sentence of Article 6.10 provides for an exception to the rule set forth in the first sentence. In particular, the investigating authority may limit the scope of its examination "[i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such [individual] determination[s] impracticable." In such cases of limited examination, the authority must examine either "a reasonable number of interested parties or products by using samples", or "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

7.164 In examining Viet Nam's claims, we note that Viet Nam is not challenging the USDOC's decision to conduct limited examinations in the second and third administrative reviews.[228] In other words, Viet Nam is not challenging the USDOC's determination that it was "impracticable" to examine all known exporters and producers. Nor is Viet Nam challenging the number of exporters or producers which the USDOC included in its limited sample. Instead, Viet Nam is claiming that the USDOC's repeated use of limited examination in the second and third administrative reviews caused the USDOC to undermine the rights of exporters and producers provided for in other provisions of the Anti-Dumping Agreement that are dependent on each exporter or producer having individual margins of dumping.

7.165 Since Viet Nam is not claiming that the USDOC's use of limited examinations in the second and third administrative reviews was inconsistent with the second sentence of Article 6.10, we

[225] United States' first written submission, para. 199-203; United States' response to Panel questions 45 and 47; United States' second written submission, paras. 129-132; United States' opening oral statement at the second meeting of the Panel, para. 97.

[226] United States' first written submission, paras. 204-208.

[227] United States' second written submission, paras. 121-122; United States' response to Panel question 41; United States' opening oral statement at the second meeting of the Panel, para. 85; United States' comments on Viet Nam's response to Panel question 65.

[228] Viet Nam's response to Panel question 64; Viet Nam's opening oral statement at the first meeting of the Panel, para. 75; Viet Nam's second written submission, paras. 119 and 135; and Viet Nam's opening oral statement at the second meeting of the Panel, para. 50.

proceed on the basis that the USDOC's use of limited examinations in those reviews was consistent with the abovementioned criteria set forth in that provision. Accordingly, we understand Viet Nam's argument to be that, even though the USDOC undertook limited examinations in a manner consistent with the second sentence of Article 6.10, the USDOC violated other provisions of the Anti-Dumping Agreement because, in undertaking limited examinations, the USDOC failed to provide non-selected respondents with individual margins of dumping.

7.166 We are not persuaded by Viet Nam's claims. In our view, the use of limited examinations is governed exclusively by the second sentence of Article 6.10. Viet Nam has not identified any other provision in the Anti-Dumping Agreement governing the use of limited examinations. In particular, Viet Nam has not identified any text in either the first sentence of Article 6.10, or Articles 9.3, 11.1 and 11.3, concerning the use of limited examinations.

7.167 Viet Nam's claims are premised on the view that Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement require the determination of individual margins[229], notwithstanding the legitimate use of a limited examination. To interpret these other provisions of the Anti-Dumping Agreement in this way would render the second sentence of Article 6.10 meaningless. Indeed, Viet Nam would effectively have us interpret the first sentence of Article 6.10, and Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, in isolation, as if the second sentence of Article 6.10 did not exist. There is no doubt that, generally, there is a preference for individual margins to be determined for each known exporter and producer. This is the very essence of the first sentence of Article 6.10. However, the exception provided for in the second sentence of Article 6.10 makes it clear that, despite the general preference for individual margins, investigating authorities need not determine individual margins for all known exporters and producers in all cases. Since neither the first sentence of Article 6.10, nor Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement, impose any additional restrictions on the use of limited examinations, there is no basis for us to find that the USDOC's legitimate (i.e. consistent with the second sentence of Article 6.10) use of limited examinations is inconsistent with those provisions.

7.168 For the foregoing reasons, we reject Viet Nam's claims of violation of Articles 6.10, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

### 3. Claims under Article 6.10.2 of the Anti-Dumping Agreement

(a) Introduction

7.169 Viet Nam claims that the USDOC in the second and third administrative reviews acted inconsistently with the U.S. obligations under Article 6.10.2 of the Anti-Dumping Agreement. Article 6.10.2 provides as follows:

> "In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual

[229] The parties disagree whether, irrespective of the use of limited examinations, some or all of these provisions require the determination of individual margins. We need not address this issue, since in any event the second sentence of Article 6.10 provides expressly that individual margins need not be determined in all cases.

examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."[230]

7.170 Viet Nam's arguments in support of its claim(s) under Article 6.10.2 evolved during the course of the Panel's proceedings. At first, Viet Nam only argued that the USDOC failed to comply with the standard set out under the first sentence of Article 6.10.2 of the Anti-Dumping Agreement because voluntary responses made by non-selected parties were rejected by the USDOC.[231] In its subsequent submissions, Viet Nam also claimed that the USDOC had discouraged voluntary responses, contrary to the requirement in the second sentence of Article 6.10.2 that "[v]oluntary responses shall not be discouraged".

7.171 The United States opposes Viet Nam's claims under both the first and second sentences of Article 6.10.2.

(b) Main arguments of the parties

*(i) Viet Nam*

Arguments with respect to the first sentence of Article 6.10.2

7.172 Viet Nam argues that Article 6.10.2 imposes a different test, and requires a distinct determination, than the determination to limit the investigation under Article 6.10. Viet Nam argues that the relevant consideration under Article 6.10.2 is the number of voluntary responses, not the overall number of exporters and producers subject to the duty. Viet Nam argues that rejection of voluntary responses can only take place in exceptional circumstances.[232] In its first written submission, Viet Nam argued that the USDOC acted inconsistently with this requirement under Article 6.10.2 by repeatedly rejecting voluntary responses in the context of the USDOC's decision to limit the number of individually investigated or reviewed respondents and not on the basis of the number of voluntary respondents and the incremental workload entailed in reviewing the number of voluntary respondents involved.[233] Viet Nam later clarified that it considers that the USDOC acted in violation of Article 6.10.2 in refusing to consider a request for voluntary response treatment submitted by Fish One in the third administrative review. Viet Nam asserts that counsel for Fish One met with the USDOC to request inclusion of its client as a mandatory respondent following the selection of exporters and producers for individual examination and to inform the USDOC that it would provide all necessary documents to the USDOC with the intention of demonstrating the absence of dumping. Viet Nam indicates that Fish One renewed this request in a letter of 28 October 2008, again informing the USDOC that it would provide any necessary information to obtain an individually calculated margin of dumping.[234]

[230] We note, in addition that the last sentence of Article 9.4 reads: "The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6."

[231] Viet Nam's first written submission, para. 287.

[232] Viet Nam opening oral statement at the first meeting of the Panel, para. 74; Viet Nam's response to Panel questions 37-38; Viet Nam's second written submission, para. 123.

[233] Viet Nam's first written submission, paras. 285-288.

[234] Viet Nam's response to Panel question 42 and Viet Nam's second written submission, paras. 129 and 134, all referring to Fish One's "Request for the Department to Comply with its Regulations Regarding Revocation of Antidumping Duty Orders", Exhibit Viet Nam-62, p. 6.

Arguments with respect to the second sentence of Article 6.10.2

7.173 Viet Nam argues that the last sentence of Article 6.10.2 imposes an obligation – that the authority's actions not deter a company from submitting voluntary responses – that is distinct from the obligation in the first sentence of Article 6.10.2 that the authority consider voluntary responses. Viet Nam argues that this requirement in the final sentence of Article 6.10.2 addresses the conduct of the authority even prior to submission of a voluntary response or a formal request for treatment as a voluntary response. Viet Nam argues that discouraging behaviour in violation of this obligation may take the form of either action or inaction on the part of the authority. Viet Nam provides, as example of the latter, the hypothetical case of an authority that passively complied with a regulation prohibiting the acceptance of voluntary responses.[235]

7.174 Viet Nam argues that the standard applied by the USDOC under Article 6.10 forecloses the possibility of voluntary responses and thus "constructively" discourages such voluntary responses: Viet Nam argues that where the USDOC determines that it would be impracticable to individually investigate all exporters and producers, in virtually no instances could the USDOC later accept a voluntary respondent under the "undue burden" standard in the first sentence of Article 6.10.2. Viet Nam explains that the USDOC's Respondent Selection Memoranda in the second and third administrative reviews indicated that it did not have the resources to examine more than two or three companies. Viet Nam reasons that an authority's statement that it cannot and will not examine more than an identified number of companies will dissuade companies from seeking examination on a voluntary respondent basis as these companies will lack any reason to believe that the authority would consider examination of a submitted response.[236]

7.175 In addition, Viet Nam argues that the USDOC's actions in the treatment of certain requests by Vietnamese exporters/producers in the administrative reviews at issue "discouraged" voluntary responses. Viet Nam asserts that in the third administrative review, Fish One, one of the Vietnamese exporters, requested treatment as voluntary respondent and offered to provide the USDOC all necessary information to calculate an individual margin of dumping. Viet Nam argues that Fish One made repeated efforts, through formal meetings with the USDOC and formal submissions to the USDOC, to gain some assurances that data submitted to the USDOC would be accepted by the USDOC for purposes of the anti-dumping margin calculation. Viet Nam further asserts that the USDOC refused to directly address this request and to provide an answer to Fish One until forced to do so in the preliminary determination. Viet Nam submits that completing a full questionnaire response requires significant financial and time commitments and that under the circumstances that prevailed in the proceedings at issue, a rational business actor would be discouraged from completing a full anti-dumping questionnaire response.[237]

[235] Viet Nam's response to Panel question 67.

[236] Viet Nam's opening oral statement at the first meeting of the Panel, para. 74; Viet Nam's response to Panel question 43; Viet Nam's second written submission, paras. 123 and 133; Viet Nam's opening oral statement at the second meeting of the Panel, para. 40. In its first written submission, Viet Nam relied on a statement made by the United States in its first written submission, para. 214. Later, in its response to Panel question 67, Viet Nam cited to statements of the USDOC in the Respondent Selection Memoranda in the proceedings at issue (Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13, p. 4; and Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17, p. 3).

[237] Viet Nam's second written submission, para. 138; Viet Nam's opening oral statement at the second meeting of the Panel, para. 41; Viet Nam response to Panel question 68.

*(ii) United States*

Arguments with respect to the first sentence of Article 6.10.2

7.176 The United States argues that the USDOC could not have acted inconsistently with the requirements of the first sentence of Article 6.10.2 in the second and third administrative reviews, as no exporter or producer made the voluntary submission of "necessary information" that would have triggered the application of that provision. The United States explains that in the second administrative review, no company requested voluntary respondent status. The United States notes that in the third administrative review, one company requested voluntary respondent status, but subsequently did not submit any data.[238]

Arguments with respect to the second sentence of Article 6.10.2

7.177 The United States argues that there is no basis for Viet Nam's assertion that the USDOC acted inconsistently with the last sentence of Article 6.10.2. The United States argues that Viet Nam offers no evidence of so-called "discouraging behaviour" other than the USDOC's determinations that it was impracticable to examine all respondents, which the United States argues are consistent with the requirements of Article 6.10. The United States rejects as unfounded Viet Nam's assertion that the United States clarified that the USDOC will never consider voluntary respondents where it has already limited the number of respondents individually examined. The United States argues that no such clarification can be found in the record of the administrative reviews at issue. The United States further notes that the USDOC has, in the past, accepted and relied on voluntary submissions to determine dumping margins on numerous occasions. The USDOC did so, for example, when one of the exporters initially selected for individual examination withdrew its request, or the exporter ceased cooperating with the examination, in which case it became practicable to individually investigate another respondent. The United States argues that Viet Nam's interpretation of the phrase "shall not be discouraged" would deprive Members of the right to limit the examination under Article 6.10. In particular, the United States argues, under Viet Nam's proposed interpretation, an investigating authority, in order to act consistently with Article 6.10.2 and not impliedly "discourage" voluntary responses, would need to preserve its ability to accept and consider voluntary responses, and to do so would be required to act inconsistently with Article 6.10, by examining some percentage of the volume of exports that is less than the largest percentage that can reasonably be examined in order to reserve additional resources for possible voluntary responses. The United States argues that the USDOC cannot be found to have acted inconsistently with one provision of the Anti-Dumping Agreement by virtue of its proper application of another provision of the same Agreement.[239]

7.178 Furthermore, the United States argues that the obligation in the last sentence of Article 6.10.2 is framed as a prohibition on *action* on the part of the authorities. The United States argues that the USDOC took no action to discourage voluntary responses in the second and third administrative reviews. The United States notes that Viet Nam offers as evidence only one letter from the record of the third administrative review which, in the U.S. opinion, fails to show any action taken by the USDOC to discourage a voluntary response by Fish One or any other company. The United States argues that in that letter, Fish One is not asking to be treated as a voluntary respondent, but is asking for a revocation review, and, if required by the USDOC to obtain such a review, to be selected as a

[238] United States' first written submission, paras. 210-214; United States' opening oral statement at the first meeting of the Panel, paras. 44-45; United States' response to Panel questions 37-38 and 42; United States' second written submission, paras. 123-126; United States' opening oral statement at the second meeting of the Panel, para. 88; United States' response to Panel question 67.

[239] United States' opening oral statement at the second meeting of the Panel, para. 89; United States' response to Panel questions 43, 67; United States' comments on Viet Nam's response to Panel questions 67-68. The United States cites, as evidence, the Preliminary Determination in the Administrative Review on Certain Activated Carbon from the Peoples' Republic of China, Exhibit US-8.

mandatory respondent. The United States argues that this letter does not reference a possible voluntary submission of a full questionnaire. Furthermore, the United States argues that even if Fish One had sought some indication of the USDOC's intent early in the proceeding, the USDOC's inability to respond at that time with any commitment one way or the other cannot be viewed as discouraging.

(c) Main arguments of the third parties

*(i) European Union*

7.179 The European Union considers that both the overall number of exporters involved and the number of voluntary responses is relevant under Article 6.10.2. The European Union does not, however, take a position on whether the requirements of Article 6.10.2 were met in view of the specific facts before the Panel.[240]

(d) Evaluation by the Panel

7.180 We begin by addressing Viet Nam's claim under the first sentence of Article 6.10.2.

*(i) Viet Nam's claim under the first sentence of Article 6.10.2*

7.181 In cases where an investigating authority's examination is limited to certain selected exporters or producers, consistent with Article 6.10, the first sentence of Article 6.10.2 provides that the authority shall nevertheless also determine individual margins of dumping for non-selected exporters or producers that "submit[] the necessary information in time for that information to be considered during the course of the investigation", unless the authority determines that the number of exporters or producers is so large that individual examinations would be unduly burdensome and prevent timely completion of the investigation. Thus, the application of the first sentence of Article 6.10.2 is only triggered if non-selected exporters or producers make so-called voluntary responses. If no such voluntary response is submitted, there is no obligation on the investigating authority to take any action under the first sentence of Article 6.10.2.

7.182 At the first substantive meeting, the United States asserted that the application of the first sentence of Article 6.10.2 was never triggered in the second or third administrative reviews, since in neither of those reviews did any Vietnamese respondent make the requisite voluntary response.[241] During oral questioning by the Panel at the first substantive meeting, Viet Nam confirmed that no Vietnamese respondents had submitted voluntary responses pursuant to the first sentence of Article 6.10.2. Furthermore, in response to a written question from the Panel inviting Viet Nam to "provide any relevant information with respect to the submission of voluntary responses", Viet Nam failed to identify any instance in the second or third reviews where voluntary responses had been submitted by Vietnamese exporters or producers.[242]

7.183 In light of the absence of any evidence indicating that any voluntary response was ever submitted by non-selected exporters or producers in the second or third administrative reviews, we find that the obligations in the first sentence of Article 6.10.2 were never triggered in those reviews. Accordingly, we reject Viet Nam's claim that the USDOC acted inconsistent with the first sentence of Article 6.10.2.

---

[240] European Union's third-party written submission, paras. 187-188; European Union's response to Panel question 15.

[241] United States' opening oral statement at the first meeting of the Panel, para. 45.

[242] Viet Nam's response to Panel question 42.

*(ii) Viet Nam's claim under the second sentence of Article 6.10.2*

7.184 We recall that the second sentence of Article 6.10.2 provides that "[v]oluntary responses shall not be discouraged". While the parties disagree on the precise meaning of the term "discourage", and the issue of whether or not "discouragement" requires active conduct on the part of the investigating authority, we consider that the facts of the present case do not require us to explore this legal issue in any detail.

7.185 Viet Nam formulated its claim under the second sentence of Article 6.10.2 somewhat late in the Panel process.[243] In order to fully understand the factual basis for Viet Nam's claim, after the second substantive meeting, the Panel asked Viet Nam to "explain what evidence Viet Nam has placed on the record to substantiate a claim under the last sentence of Article 6.10.2".[244] In response, Viet Nam cited to:

> "the standard applied by the USDOC for the selection of mandatory respondents in support of the claim made under the last sentence of Article 6.10.2. The standard applied by the USDOC to limit the number of respondents selected for review violates Article 6.10.2 of the Anti-Dumping Agreement by foreclosing the possibility of voluntary respondent treatment and thus dissuading companies from attempting to participate as voluntary respondents. As noted, the USDOC's respondent selection memoranda in the second and third administrative reviews explained that it would not be 'practicable to examine' more than two or three companies, respectively. In other words, the USDOC determined and expressly stated that it did not have the resources to examine more than two or three companies. An authority's explicit statement that it cannot and will not examine more than the identified number of companies will of course dissuade companies from seeking examination on a voluntary respondent basis. The company lacks any reason to believe that the authority would consider examination of a submitted response where all evidence indicates the contrary."[245]

7.186 Thus, as evidence of the alleged discouragement of voluntary responses, Viet Nam cites to the fact that the USDOC determined that it would not be practicable to examine more than two or three exporters or producers in the second and third administrative reviews. Despite the very direct nature of the Panel's request, Viet Nam does not cite to any other evidence indicating that the USDOC discouraged voluntary responses.[246]

7.187 We recall that, in accordance with Article 6.10 of the Anti-Dumping Agreement, an authority may limit its examination in cases where the number of exporters, producers, importers or types of products involved is so large as to make [individual margin] determination[s] impracticable". The USDOC availed itself of this right in the second and third administrative reviews. The justification for doing so was provided for in the Respondent Selection Memoranda. In the memoranda, the USDOC discusses its resource constraints, and concludes "that it would not be practicable in this

---

[243] Viet Nam's second written submission, para. 133.

[244] Panel question 68.

[245] Viet Nam's response to Panel question 68, para. 82.

[246] We note that the Respondent Selection Memorandum in the Original Investigation (Exhibit Viet Nam-04) contains a section addressing whether the USDOC should investigate voluntary respondents, in the event that it were to receive voluntary responses. The USDOC indicates that it would not be in a position to individually examine companies other than the four mandatory respondents, unless some of these mandatory respondents decided not to cooperate in the investigation. We note that Viet Nam does not rely on this memorandum or any statement of the USDOC contained therein. In any event, Viet Nam makes no request for findings in respect of the original investigation, which it accepts is outside our terms of reference.

review" to individually examine all producers and exporters, and that, in light of resource constraints, "it is practicable to examine two [or three] of these companies".[247]

7.188 We recall that Viet Nam has not alleged that the USDOC failed to meet the substantive criteria of Article 6.10 in limiting its examination. In other words, Viet Nam has not challenged the USDOC's determination that it would not be practicable to examine all exporters and producers in the second and third administrative reviews. For this reason, there is no basis for the Panel to conclude that the USDOC limited its examination in a manner inconsistent with Article 6.10.

7.189 In our view, the USDOC's legitimate exercise of its right to limit its examination under Article 6.10 cannot suffice, in and of itself, to constitute evidence of a violation of the second sentence of Article 6.10.2. That is to say, the USDOC's determination that it would not be practicable to investigate all exporters and producers cannot constitute evidence that the USDOC discouraged voluntary responses.

7.190 We stress that Viet Nam has adduced no other evidence of alleged discouragement of voluntary responses by the USDOC. In its second written submission, Viet Nam asserted that the USDOC had initially refused to respond to a request for treatment as a voluntary respondent by Fish One, a non-selected exporter, in the third administrative review. Viet Nam appeared to allege that the USDOC's initial refusal to respond to Fish One's request could be construed as "discouragement" of voluntary responses. Fish One's alleged request for voluntary respondent treatment was submitted as Exhibit Viet Nam-62. In response to a question from the Panel regarding the evidence needed to make out a claim under the second sentence of Article 6.10.2, the United States asserted:

> "In the second and third administrative reviews, Commerce took no action to discourage voluntary responses. Indeed, we note that Vietnam does not cite to any record evidence from the second administrative review with regard to this claim. Vietnam offers as evidence only one letter from the record of the third administrative review, dated October 8, 2008. In that letter, the respondent party at issue, Fish One, is not asking to be treated as a voluntary respondent, but is asking for a specific revocation review, and, if required by Commerce to obtain such a review, to be selected as a mandatory respondent. This letter *does not reference* a possible *voluntary* submission of a full questionnaire, concluding as follows: "Fish One stands ready, even now, to fully participate in this review *as a mandatory respondent* and take the same time as the other mandatory respondents to answer the questionnaires." Fish One, to be treated as a voluntary respondent, needed to actually submit the necessary information by the applicable deadlines. Even if Fish One had sought some indication of Commerce's intent early in the proceeding, Commerce's inability to respond at that time with any commitment one way or the other cannot be viewed as discouraging. This evidence by Vietnam fails to show any action taken by Commerce to discourage a voluntary response by Fish One or any other company."[248]

7.191 In its Comments on the United States' Response, Viet Nam did not challenge the U.S. interpretation of Fish One's alleged request for voluntary respondent treatment. Upon examination of the relevant document, we see no reason to disagree with the United States' interpretation of Fish One's request. In particular, we see no reason to treat that request as evidence that Fish One sought

---

[247] Respondent Selection Memorandum in the Second Administrative Review, Exhibit Viet Nam-13, pp. 3-4, and Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17, pp. 2-3, quoted *supra* para. 7.147.

[248] United States' response to Panel question 67, para. 63 (citing to Fish One's "Request for the Department to Comply with its Regulations Regarding Revocation of Antidumping Duty Orders", Exhibit Viet Nam-62, pp. 7-8). (emphasis original)

treatment as a voluntary respondent in the third administrative review. Instead, the relevant document details Fish One's attempts to be treated as a mandatory respondent. In these circumstances, we do not consider that the document submitted as Exhibit Viet Nam-62 supports Viet Nam's claim under the second sentence of Article 6.10.2.

7.192 For the above reasons, we reject Viet Nam's claim under the second sentence of Article 6.10.2 of the Anti-Dumping Agreement.

## F. VIET NAM'S CLAIMS CONCERNING THE "ALL OTHERS" RATES APPLIED TO NON-SELECTED EXPORTERS

### 1. Introduction

7.193 We now turn our attention to Viet Nam's claims with respect to the "all others" rates applied by the USDOC in the second and third administrative reviews.[249]

7.194 Article 9.4 of the Anti-Dumping Agreement imposes disciplines with respect to the rate which an investigating authority may apply to non-selected exporters/producers, in a case in which it has limited its examination pursuant to the second sentence of Article 6.10 of the Agreement.[250] The rate so established is referred to as the "all others" rate. 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 or,
>
> ...
>
> 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."

7.195 As can be seen from its text, Article 9.4 does not prescribe any specific method that WTO Members must use in establishing an "all others" rate that is applied to exporters or producers that are not individually examined. Rather, Article 9.4 simply provides that any "all others" anti-dumping duty *shall not exceed* a certain maximum or ceiling. In other words, Article 9.4 provides for the maximum allowable rate that may be applied. Sub-paragraph (i) of Article 9.4 states the general rule that this maximum allowable "all others" rate is equal to the weighted average of the margins of dumping established with respect to individually-examined exporters. However, the clause beginning with "provided that" qualifies this general rule. It mandates that, "for the purpose of this paragraph", investigating authorities shall disregard zero and *de minimis* margins of dumping, as well as "margins

---

[249] As previously noted, in the determinations at issue, the USDOC refers to the "all others" rate applied to such respondents as the "separate rate". In our findings, however, we use the terminology "all others" rate.

[250] Article 9.4 applies only "[w]hen the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6", i.e. with respect to duties imposed on imports from cooperating exporters that have made themselves known to the investigating authorities. Consequently, Article 9.4 does not govern the duties applied in respect of exporters that have not yet exported the product and exporters that have not come forward to the investigating authorities. See Panel Report, *EC – Salmon (Norway)*, para. 7.431; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.159; Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, footnote 916.

established under the circumstances referred to in paragraph 8 of Article 6", i.e. margins of dumping established on the basis of facts available.[251]

7.196 Article 9.4 of the Anti-Dumping Agreement does not explicitly address how the maximum allowable "all others" rate should be calculated when each of the margins of the selected exporters is zero, *de minimis*, or based on facts available. The Appellate Body has referred to this as a *lacuna* in Article 9.4. In *US – Hot Rolled Steel*, the Appellate Body explained that the *lacuna* arises because "while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation, under [these] prohibitions".[252] The principal question raised by Viet Nam's claims is that of the disciplines, if any, that govern the imposition of the "all others" rate in such a situation. This question arises because, as we explain below, all respondents selected for individual examination in the second and third administrative reviews received a zero or a *de minimis* margin of dumping.

7.197 In its preliminary determination in the second administrative review, the USDOC noted that its practice in administrative reviews is to apply the provision of U.S. law concerning the calculation of the "all others" rate in original investigations. This provision instructs the USDOC to assign an "all others" rate equal to the weighted average of the rates of selected respondents, excluding zero and *de minimis* margins and margins based entirely on adverse facts available. The USDOC noted that it had preliminarily determined *de minimis* margins of dumping for both selected respondents, Minh Phu and Camimex. The USDOC decided to apply to the 27 "separate rate" companies not selected for individual examination an "all others" rate equal to the weighted average of these individual margins, i.e. a *de minimis* rate, but invited interested parties to comment on the methodology it should apply in its final determination.[253]

7.198 In its final determination, the USDOC noted that it had received comments from interested parties. The USDOC also indicated that U.S. law contemplated that it may use an average of the zero, *de minimis* and total facts available rates determined in an investigation and that in the review at issue, it had assigned margins based on adverse facts available to the 35 companies it considered to be part of the Vietnam-wide entity. The USDOC noted however that it had available information that would not be available in an original investigation, namely rates from prior administrative and new shipper reviews. The USDOC further noted that it had, in another case, assigned an "all others" rate based on the weighted average of zero and *de minimis* rates, but noted that in that case, there had been no rates based entirely on adverse facts available.[254] In view of these considerations and of the comments received from interested parties, and because the circumstances were unchanged from those in the first administrative review, the USDOC considered that a "reasonable method" was to assign the

---

[251] The Appellate Body has found that this includes margins established in totality or in part on the basis of facts available. Appellate Body Report, *US – Hot Rolled Steel*, para. 122.

[252] Appellate Body Report, *US – Hot Rolled Steel*, para. 126. (emphasis original)

[253] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14, pp. 12133 and 12135-12136. The USDOC invited interested parties to address, in particular, the following factors:

> "(a) The Department has limited its examination of respondents ... (b) [U.S. law] provides that, with some exceptions, the all-others rate in an investigation is to be calculated excluding any margins that are zero, *de minimis* or based entirely on facts available, and (c) the [Statement of Administrative Action] states that with respect to the calculation of the all-others rate in such cases, 'the expected method will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods."

[254] Final Determination in the Second Administrative Review, pp. 52274-52275, and Issues and Decision Memo, pp. 18-20, Exhibit Viet Nam-15.

4.57 per cent "all others" rate applied in the original investigation and first administrative review. The USDOC considered that this constituted "a reasonable method which is reflective of the range of commercial behaviour demonstrated by exporters of the subject merchandise during a very recent period"[255] and that "there is no reason to find that it is not reasonably reflective of potential dumping margins for the non-selected companies".[256] However, where a separate rate respondent had received an individual margin in a prior proceeding (e.g. as a selected respondent in the original investigation or first administrative review), the USDOC applied that rate to the respondent. As a result, the USDOC assigned the following rates: (i) a rate of zero to both Grobest and to Fish One as the individual rate most recently calculated for each of these companies; (ii) a rate of 4.30 per cent to Seaprodex, as the individual rate most recently calculated for that company; and (iii) a general "all others" rate of 4.57 per cent to the other "separate rate" companies, which formed the vast majority of non-selected respondents.[257]

7.199 The USDOC calculated margins of dumping above *de minimis* for all three selected companies in its preliminary determination in the third administrative review. As a result, in that preliminary determination, the USDOC assigned to these companies an "all others" rate equal to the weighted average of these margins, 4.26 per cent.[258] However, the USDOC revised these individual margins in its final determination. As a result, all individual margins of dumping became *de minimis*. The USDOC indicated that it "must, again, look to other reasonable means to assign separate rate margins to non-reviewed companies eligible for a separate rate in this review" and determined, like in the second administrative review, that "a reasonable method" was to assign to non-selected companies the most recent rate calculated for them, i.e., the 4.57 per cent "all other" rate initially applied in the original investigation. As in the second administrative review, however, the USDOC also applied "individual" rates to companies for which it had previously determined an individual margin. As a result, it applied a rate of zero to both Grobest and Fish One, and a rate of 4.30 per cent to Seaprodex.[259]

7.200 Viet Nam's claims pertain to the 4.57 per cent "all others" rate applied by the USDOC to most non-selected respondents in both reviews. Viet Nam requests that we find that:

(a) The use of margins of dumping determined using the zeroing methodology to calculate the all others ("separate") rate in the second and third administrative reviews is, as applied, inconsistent with Articles 9.4, 9.3, 2.4.2 and 2.4 of the Anti-Dumping Agreement.[260]

(b) The application of an all others ("separate") rate that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an anti-dumping duty prejudicial to companies not selected for individual investigation is, as applied in the second and third administrative reviews, inconsistent with Articles 9.4, 17.6(i), and 2.4 of the Anti-Dumping Agreement.[261]

7.201 The United States asks us to reject Viet Nam's claims.

---

[255] Final Determination in the Second Administrative Review, p. 52275, Exhibit Viet Nam-15; see also Issues and Decision Memo in the Second Administrative Review, p. 19, also Exhibit Viet Nam-15.

[256] Issues and Decision Memo in the Second Administrative Review, p. 19, Exhibit Viet Nam-15.

[257] See Final Determination in the Second Administrative Review, pp. 52274-52275, and Issues and Decision Memo, pp. 19-20. Exhibit Viet Nam-15.

[258] Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18, pp. 10016-10017.

[259] See Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, pp. 47195-47196.

[260] Viet Nam's second written submission, para. 144(3).

[261] Viet Nam's second written submission, para. 144(4).

7.202 Thus, Viet Nam challenges the "all others" rate applied in the second and third administrative reviews on two grounds – the USDOC's reliance on dumping margins calculated with zeroing and its reliance on dumping margins calculated in a prior proceeding, where all individual margins in the current proceeding are zero or *de minimis* – and under five distinct provisions of the Anti-Dumping Agreement, Articles 9.4, 9.3, 2.4.2, 2.4 and 17.6(i).

7.203 We first examine Viet Nam's claims under Article 9.4, before addressing Viet Nam's claims under the other provisions it cites. In addressing Viet Nam's claims under Article 9.4, we first focus on Viet Nam's argument that the USDOC impermissibly, under that provision, relied on dumping margins calculated with the use of zeroing.

## 2. Whether the USDOC's reliance on dumping margins calculated with zeroing in establishing the "all others" rate applied in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement

(a) Main arguments of the parties

*(i) Viet Nam*

7.204 Viet Nam asserts that the USDOC used "model zeroing" under the weighted-average-to-weighted-average comparison methodology to calculate the dumping margins of selected respondents in the original investigation.[262] Viet Nam argues that, as the Appellate Body has repeatedly found, and as the United States has conceded in other disputes, the USDOC's model zeroing methodology does not produce a dumping margin for the product as a whole and as a result is inconsistent with Article 2.4.2.[263] In its first written submission, Viet Nam argues that Article 9.4 requires that dumping margins calculated in a manner consistent with Article 2 serve as the basis for the administering authority's calculation of the "all others" rate.[264] In its second written submission, Viet Nam further argues that as a result of its use of the model zeroing methodology, the USDOC's original investigation produced margins of dumping for the selected respondents in excess of these respondents' margins of dumping, as properly calculated. Viet Nam argues that an "all others" rate based on zeroing necessarily overstates the margin of dumping as properly calculated under Article 2 and therefore by definition exceeds the (properly calculated) weighted average margin of dumping for mandatory respondents, and therefore violates the requirements of Article 9.4.[265]

7.205 Viet Nam responds to the argument of the United States that the Panel should not consider the actions of the USDOC in the original investigation because it was completed prior to Viet Nam's accession to the WTO. Viet Nam clarifies that it is not requesting the Panel to make findings in respect of the USDOC's determinations in the original investigation.[266] Viet Nam argues that the final results of the original investigation remain relevant only because of the actions taken by the USDOC in subsequent proceedings. Viet Nam also submits that under the reasoning advocated by the United States, the USDOC could continue to apply indefinitely WTO-inconsistent determinations, so long as the determinations remained unchanged since Viet Nam's accession to the WTO. Viet Nam also submits that the United States' citation to *US – DRAMS* is incongruent with the facts of the present dispute, where, in the second and third administrative reviews, the USDOC fully investigated the issue of the "all others" rate, and issued separate new determinations in this respect, distinct from those made in the original investigation. Viet Nam notes that by contrast, in *US – DRAMS*, the scope

[262] Viet Nam's first written submission, paras. 40-46, 141-143, 208-215.
[263] Viet Nam's first written submission, paras. 120, 129-139; Viet Nam's second written submission paras. 52-53.
[264] Viet Nam's first written submission, para. 209.
[265] Viet Nam's second written submission, paras. 50-54 and 60-62.
[266] Viet Nam's response to the United States' request for preliminary rulings, para. 3.

determination was never re-examined after the original investigation and was passively re-applied in subsequent stages of the proceeding.[267]

*(ii) United States*

7.206 The United States argues that the "all others" rates imposed by the USDOC in the second and third administrative reviews could not be found to be inconsistent with Article 9.4. This, the United States contends, is because Article 9.4 does not prescribe any methodology for assigning a *rate* to non-selected companies, and neither Article 9.4 nor any other provision of the Anti-Dumping Agreement specify the *maximum rate* in a situation where all the dumping margins calculated for selected companies fall into the three categories to be disregarded. The United States considers that the Appellate Body erred when, in *US – Zeroing (EC) (Article 21.5 – EC)*, it reversed the finding of the panel that Article 9.4 imposes no obligation regarding the maximum "all others" rate that may be applied in such a situation. The United States further notes that the Appellate Body in that dispute provided no indication as to what specific methodologies could be used or what legal standard would apply in assessing the consistency of an investigating authority's actions with Article 9.4 in a *lacuna* situation.[268]

7.207 The United States further argues that Article 9.4 of the Anti-Dumping Agreement does not prohibit zeroing and that even if the challenged measures were found to be inconsistent with other provisions of the Agreement, that would not mean that, as a consequence, they are also inconsistent with Article 9.4.[269] The United States adds that Viet Nam's claims of violation are dependent on the Panel finding that the "all others" rates applied in the second and third administrative reviews were inconsistent with the covered agreements when they were originally calculated. The United States notes, however, that the WTO Agreement did not apply between the United States and Viet Nam at the time of the original investigation, meaning that the "all others" rate calculated in the original investigation could not be WTO-inconsistent at the time it was calculated. Moreover, the United States argues that the Agreement does not apply to the "all others" rates determined in the second and third administrative reviews because in those reviews, the USDOC merely continued to apply the rate determined in the original investigation, prior to the entry into force of the Agreement for Viet Nam. The United States relies for this argument on the findings of the panel in *US – DRAMS*. The *US – DRAMS* panel found that pursuant to Article 18.3, the Anti-Dumping Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. The United States asserts that the USDOC made no dumping margin calculations in the second and third administrative reviews in order to determine the "all others" rate, and did not recalculate or otherwise re-examine the "all others" rate applied in the original investigation. As a result, the United States argues, USDOC also did not use zeroing during these reviews and cannot be found to have acted inconsistently with the U.S. obligations under the Anti-Dumping Agreement.[270]

[267] Viet Nam's second written submission para. 62; Viet Nam's response to Panel question 18.

[268] United States' first written submission, paras. 176-184, 187; United States' opening oral statement at the first meeting of the Panel, paras. 49-51; United States' opening oral statement at the second meeting of the Panel, paras. 31-33; United States' response to Panel questions 20 and 21.

[269] United States' opening oral statement at the second meeting of the Panel, para. 32.

[270] United States' first written submission, paras. 99-103 and 168-175; United States' opening oral statement at the first meeting of the Panel, paras. 6-10, 54-58; United States' second written submission, paras. 21-48 and 63-76 and 83-89; United States' opening oral statement at the second meeting of the Panel, paras. 31-50, and 65-66. The United States cites to the Panel Report on *US – DRAMS*, paras. 6.14, 6.16.

(b) Main arguments of the third parties

*(i) European Union*

7.208 The European Union rejects the United States' suggestion that the reasoning of the panel in *US – DRAMS* applies in the present case. The European Union explains that the issue before the Panel in the present dispute concerns the use of the "all others" rate in actions taken by the United States after Viet Nam's accession, not whether those "all others" rates continue after Viet Nam's accession. The European Union argues that if the Panel concludes that the USDOC used zeroing when determining the dumping margins in the original investigation, the use of those dumping margins and the application of the "all others" rates from the original investigation in subsequent determinations amount to a new and separate measure which is subject to the present panel proceedings.[271]

*(ii) India*

7.209 India considers that the second and third administrative reviews are measures in their own right, distinct from the original investigation, and that the findings of the *US – DRAMS* panel can be distinguished from the facts and circumstances of the present dispute. India agrees with Viet Nam that an "all others" rate calculated by using WTO-inconsistent "model zeroing" in the original investigation violates Article 9.4 of the Anti-Dumping Agreement. For this reason, Viet Nam considers the "all others rate" applied in the second and third administrative reviews is inconsistent with Article 9.4.[272]

*(iii) Japan*

7.210 Japan submits that the "all others" rate must always – even in a *lacuna* situation – be based on WTO-consistent margins of dumping. Japan considers that this conclusion follows from the text of Article 9.4, and that the term "margins of dumping" in Article 9.4 refers to margins of dumping that are WTO-consistent at the time when they are used to calculate the "all others" rate. In Japan's view, it is the determination of the "all others" rate in the second and third administrative reviews that is rendered WTO-inconsistent, not the determinations of the dumping margins in the original investigation. For this reason, Japan rejects the U.S. argument that the "all others" rates applied in the second and third administrative reviews are shielded from review because they are based on margins that were calculated in the original investigation.[273]

*(iv) Mexico*

7.211 Mexico considers that the "all others" rates determined by the USDOC in the second and third administrative reviews are distinct determinations from the rates determined in the original investigation and are properly subject to review by the Panel. Mexico submits that the reasoning of the *US – DRAMS* panel does not apply in the present dispute. Mexico reasons that unlike the product scope in an anti-dumping proceeding, which is determined only once in the original investigation, the "all others" rate changes in each administrative review. Thus, Mexico submits that the "all others" rates applied in the two reviews at issue are subject to the disciplines of the Agreement, and the

[271] European Union's third-party written submission, paras. 179-180; European Union's response to Panel questions 5-6.

[272] India's third-party oral statement, paras. 9-10, 13-16; India's response to Panel question 6.

[273] Japan's third-party written submission, paras. 70-79; Japan's third-party oral statement, para. 3; Japan response to Panel question 7.

United States may not rely on dumping margins established in a WTO-inconsistent manner, irrespective of the fact that the margins were established in the original investigation.[274]

(c) Evaluation by the Panel

7.212 We first consider Viet Nam's argument that reliance by an investigating authority on margins of dumping calculated with zeroing in the determination of an "all others" rate is inconsistent with the disciplines of Article 9.4, irrespective of the fact that all the margins determined for selected exporters are zero, *de minimis*, or based on facts available.[275]

7.213 We find guidance in the WTO jurisprudence with respect to sunset reviews. In particular, we note the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body found that should investigating authorities choose to rely upon dumping margins in making a likelihood-of-dumping determination under Article 11.3 of the Anti-Dumping Agreement, the margins of dumping relied upon must be ones that were calculated consistently with Article 2 of the Agreement.[276] The Appellate Body added that "[w]e see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[277] We read these statements of the Appellate Body as standing for a more general proposition that any "margin of dumping" calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2 and its various paragraphs. Of relevance to this question, we further note that the Appellate Body has repeatedly held that the definition of the phrase "margin of dumping" under Article 2.1 applies to the entire Agreement.[278] Accordingly, we consider that any individual margin of dumping which the investigating authority relies upon in determining the maximum allowable "all others" rate must of necessity have been calculated in conformity with the provisions of Article 2.[279, 280] This is true irrespective of whether or not all individual margins are zero, *de minimis* or based on facts available.

7.214 We observe that this conclusion is consistent with the statements of the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)*, in which it commented on the disciplines that apply under Article 9.4 in a *lacuna* situation. The panel in that case had found that, in a *lacuna* situation,

---

[274] Mexico's third-party written submission, paras. 39-42; Mexico's response to Panel question 6.

[275] We note that neither party questions the applicability of Article 9.4 of the Anti-Dumping Agreement in the context of periodic reviews. Accordingly, our findings below proceed on the assumption that Article 9.4 governs the imposition of "all others" rates in the context of U.S. administrative reviews.

[276] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127, cited with approval in Appellate Body Report, *US – Zeroing (Japan)*, para. 183, Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 390.

[277] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[278] We refer to our summary of the Appellate Body's jurisprudence on this issue, *supra* para. 7.136.

[279] While authorities have the right to apply "all others" rates that are less than the maximum allowable amount, few authorities do so in practice (outside of the context of the lesser-duty rule). For this reason, investigating authorities generally do not make separate determinations of (i) the maximum allowable rate, and (ii) the rate that will actually be applied. Instead, authorities generally simply determine the "all others" rate to be applied. In our view, a determination of the maximum allowable "all others" rate is always implicit in such a determination, since the "all others" rate applied by the authority must necessarily be equal to or below the maximum allowable "all others" rate. In other words, an authority that determines an "all others" rate of x per cent implicitly determines that the maximum allowable "all others" rate is at least x per cent.

[280] We also see confirmation for our interpretation of Article 9.4 in the Appellate Body's interpretation of Article 9.3, of which Article 9.4 is an exception. The Appellate Body has found that the margin of dumping established for an exporter *in accordance with Article 2* operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. See, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 130; Appellate Body Report, *US – Zeroing (Japan)*, paras. 155-156; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96; Appellate Body Report, *US – Continued Zeroing*, paras. 286, 314 (discussed, *supra*, para. 7.137).

"Article 9.4 simply imposes no prohibition, as no *ceiling* can be calculated" and that, as a consequence, "there would be no legal basis for a panel to conclude that the 'all others' rate actually established is inconsistent with Article 9.4".[281] The Appellate Body disagreed. The Appellate Body indicated that, notwithstanding the *lacuna*, Article 9.4 nevertheless imposes certain residual disciplines. In particular, the Appellate Body found that:

> "[T]he fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available."[282]

7.215 Although the Appellate Body did not elaborate on the nature of the boundaries that might apply to the investigating authority's discretion in the *lacuna* situation[283], we note the Appellate Body's view that some form of boundary nevertheless applies. We interpret the Appellate Body's statement in *US – Zeroing (EC) (Article 21.5 – EC)* to mean that if an investigating authority limits its investigation and applies an "all others" rate to non-selected exporters, its discretion in doing so is not unlimited. In our view, one limitation under Article 9.4 is that the margins of dumping which are used to establish the maximum allowable "all others" rate must be ones which, at the time the "all others" rate is applied, conform to the disciplines of the Agreement.

7.216 In the present dispute, Viet Nam alleges that the USDOC relied upon margins of dumping calculated with the use of zeroing in determining the "all others" rate applied in each of the measures at issue. We recall that the Appellate Body has consistently found that the use of zeroing renders "margins of dumping" inconsistent with Article 2 of the Anti-Dumping Agreement. Specifically, the Appellate Body has found that "model zeroing", as it was applied by the USDOC, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[284] Significantly in our view, the United States has not taken issue with Viet Nam's argument that zeroing is inconsistent with that provision. We also recall our earlier findings that the application of simple zeroing in a periodic review renders the comparison inconsistent with the first sentence of Article 2.4.[285] For the same reasons, we are of the view that the use of "model zeroing" in the context of an original investigation would be inconsistent with that same provision.[286]

7.217 Based on the foregoing considerations, we consider that an investigating authority that determines the maximum allowable "all others" rate on the basis of dumping margins calculated with the use of zeroing acts inconsistently with Article 9.4. We now examine Viet Nam's factual allegation

---

[281] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.283. (emphasis original, footnote omitted)

[282] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453. (emphasis original)

[283] In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body considered that as the parties had not suggested specific alternative methodologies to calculate the maximum allowable "all others" rate, and that as the measures at issue were no longer in effect, it did not need to make findings concerning the European Communities' claim under Article 9.4.

[284] See, e.g. Appellate Body Report, *US – Softwood Lumber V*, para. 102.

[285] See *supra*, paras. 7.93-7.97.

[286] In addition, we note that the findings of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*, on which we rely in our findings under Article 2.4, pertained to the use of zeroing under the transaction-to-transaction methodology in original investigations.

that the USDOC, in the administrative reviews at issue, imposed an "all others" rate determined on the basis of dumping margins calculated using "model zeroing".

7.218 Before doing so, however, we note the United States' argument that, as a result of Article 18.3 of the Anti-Dumping Agreement[287], the "all others" rates applied in the second and third administrative reviews are not subject to the disciplines of the Agreement because they were calculated in the original investigation, which was initiated and completed prior to Viet Nam's accession to the WTO. The United States contends that these "all others" rates do not become subject to the Anti-Dumping Agreement merely because they continued to be applied on or after the date of entry into force of the WTO Agreement for Viet Nam.

7.219 We note, first, that despite some ambiguity in the formulation of its claims and arguments, Viet Nam has clarified that it is not requesting us to make any findings in respect of the rates determined by the USDOC in the original investigation. Rather, Viet Nam explains that it is seeking findings only with respect to the USDOC's final determinations in the second and third administrative reviews.[288] It is not in dispute that the USDOC's determinations in these two administrative reviews are subject to the disciplines of the Anti-Dumping Agreement.

7.220 The United States argues that, because the "all others" rate was never recalculated, the USDOC never revisited its decision to apply that all others rate. According to the United States, the USDOC merely *continued to apply* the "all others" rate initially applied in the original investigation during the second and third administrative reviews. The United States relies, in particular, on the findings of the panel in *US – DRAMS*. That panel, applying Article 18.3 to the facts before it, considered that the scope of application of the Agreement was determined by the scope of post-WTO reviews, such that the Agreement only applied to those parts of a pre-WTO measure that were covered by a post-WTO review. According to the United States, because the USDOC merely continued to apply the "all others" rate from the original investigation, which pre-dated Viet Nam's accession to the WTO, in the period following Viet Nam's accession to the WTO, the "all others" rate is not subject to WTO review.

7.221 We are unable to accept the United States' argument which, in our view, is not supported by the findings of the panel in *US – DRAMS*. In *US – DRAMS*, the determination at issue – that of the product coverage of the Anti-Dumping measures at issue – was determined once, before the entry into force of the WTO Agreement, and never subsequently reconsidered. By contrast, the evidence before us shows that the USDOC made a new and distinct "all others" rate determination in each of the administrative reviews which are before us. We note in particular that, in its preliminary determination in the second administrative review, the USDOC initially applied a *de minimis* "all others" rate that reflected the weighted average of the selected respondents' dumping margins. The USDOC then invited interested parties to comment on the methodology that it should apply in its final determination and, on the basis of those comments, eventually decided to apply the "all others" rate calculated and applied in the original investigation.[289] These facts squarely contradict the suggestion by the United States that the USDOC merely continued to apply the "all others" rate from the original investigation in the two reviews at issue. On the contrary, they show that in the second administrative review the USDOC actively considered and analysed the question of which "all others" rate to apply and, on the basis of the specific margins calculated in that review, made a new

[287] Article 18.3 provides, in relevant part, that the provisions of the Anti-Dumping Agreement "shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

[288] See *supra*, section VII.C.

[289] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14; and Final Determination and Issues and Decision Memorandum in the Second Administrative Review, Exhibit Viet Nam-15, discussed *supra* paras. 7.197-7.198.

determination in which it decided to apply the same "all others" rate which it had applied in the original investigation. The mere fact that the "all others" rate ultimately applied was not recalculated does not change the extent of the analysis inherent in the USDOC's new determination to continue to apply that rate. In the third administrative review, the USDOC preliminary determined an "all others" rate of 4.26 per cent.[290] Only when the margins of examined exporters were revised in the final determination did a "*lacuna* situation" present itself, in response to which the USDOC decided to apply the "all others" rate from the original investigation. Again, this shows that in the third administrative review, the USDOC gave full and renewed consideration to the question of the "all others" rates to be applied.

7.222 In sum, the evidence before us shows that the "all others" rates applied in each of the administrative reviews at issue were subject to full consideration by the USDOC in each case. The "all others rate" applied by the USDOC in each instance was a direct result of the margins calculated by the USDOC in *that review*. It is only because the USDOC determined that all such margins could not relied upon that the USDOC *decided* to apply the same "all others" rate as had been applied in the original investigation. Accordingly, the United States' citation to the findings of the panel in *US – DRAMs* is inapposite.

7.223 For these reasons, we reject the United States' argument that the "all others" rates applied by the USDOC in the second and third administrative review are shielded from challenge under the Anti-Dumping Agreement by virtue of Article 18.3.

7.224 Turning to the substance of Viet Nam's claim, we recall that the "all others" rate of 4.57 per cent initially applied by the USDOC in the original investigation, and later applied again in the administrative reviews at issue, was the weighted average of the individual margins calculated for the three selected respondents in that investigation.[291] Viet Nam argues that the USDOC had, in the original investigation, applied "model zeroing" in calculating these margins of dumping.[292] Viet Nam supports this allegation with evidence similar to that which it provided in support of its claim that the USDOC applied "simple zeroing" in the calculation of individual margins in the second and third administrative reviews: Viet Nam provides the Panel with the USDOC's programming logs and computer programme outputs with respect to Minh Phu and Camimex, two Vietnamese respondents selected for individual examination in the investigation.[293] Viet Nam also again relies on the Ferrier affidavit, which describes how the computer programme used by the USDOC in the original investigation implemented the USDOC's model zeroing methodology.[294] The affidavit identifies certain lines of computer code in the "logs" that implement the instruction to disregard negative comparison results in the calculation of the total anti-dumping duties of the selected respondents. The affidavit also refers to the "outputs", which corroborate this removal by the computer programme of any comparison result of zero or below.

---

[290] Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18; and Final Determination in the Third Administrative Review, Exhibit Viet Nam-19, discussed *supra*, para. 7.199.

[291] Final Determination in the Original Investigation, p. 71009 and Issues and Decision Memorandum, pp. 28-29, Exhibit Viet Nam-06; Amended Final Determination in the Original Investigation, Exhibit Viet Nam-07, pp. 5153-5154.

[292] Viet Nam's first written submission, paras. 29-32; Viet Nam's second written submission, para. 58. See *supra*, para. 7.15 for Viet Nam's description of the U.S. "model zeroing" methodology.

[293] Viet Nam's first written submission, para. 45, referring to USDOC Computer Programme Log for Minh Phu in the Original Investigation, Exhibit Viet Nam-34; USDOC Computer Programme Log for Camimex in the Original Investigation, Exhibit Viet Nam-35; Computer Programme Output for Minh Phu in the Original Investigation, Exhibit Viet Nam-42; Computer Programme Output for Camimex in the Original Investigation, Exhibit Viet Nam-43.

[294] Ferrier affidavit, Exhibit Viet Nam-33, paras. 11-26. This is the same affidavit discussed *supra*,para. 7.78.

7.225 Finally, Viet Nam also refers us to the Issues and Decision Memorandum published with the final results of the original investigation, in which the USDOC indicates that, in calculating the margins of dumping of individually investigated exporters:

> "[W]e made model-specific comparisons of weighted average export prices with weighted-average normal values of comparable merchandise. ... We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin".[295]

7.226 The United States neither seeks to rebut Viet Nam's assertion that the USDOC applied model zeroing in the original investigation, nor provides any evidence contradicting the evidence put forward by Viet Nam. In these circumstances, we are satisfied that the evidence submitted by Viet Nam establishes that the USDOC: (i) applied model zeroing when calculating the margins of dumping for selected respondents in the original investigation, and (ii) in the second and third administrative reviews, determined the maximum allowable "all others" rate on the basis of these margins of dumping, which had been calculated with zeroing in the original investigation. In doing so the USDOC implicitly determined that the maximum allowable "all others" rate could be based on dumping margins calculated with zeroing.

7.227 Since, in the second and third administrative reviews, the USDOC applied an "all others" rate (and therefore implicitly also a maximum allowable "all others" rate) on the basis of margins of dumping that had been calculated with zeroing in the original investigation, we find that the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement in these reviews.[296]

### 3. Viet Nam's argument with respect to the USDOC's reliance on margins of dumping from a prior proceeding and Viet Nam's claims under Articles 2.4, 2.4.2, 9.3, 17.6(i) of the Anti-Dumping Agreement

7.228 We recall Viet Nam's second argument under Article 9.4, namely that the USDOC acted inconsistently with the United States' obligations under that provision because it imposed, in the second and third administrative reviews, an "all others" rate determined on the basis of margins of dumping that had been calculated in a prior proceeding, which "all others" rate was prejudicial to non-selected respondents. Moreover, we recall that in addition to its claims under Article 9.4, Viet Nam makes claims of violation under Articles 9.3, 2.4.2, 2.4 and 17.6(i) of the Anti-Dumping Agreement.[297]

---

[295] Issues and Decision Memorandum in the Original Investigation, Exhibit Viet Nam-06, p. 12, cited by Viet Nam in its first written submission, para. 43 and in its second written submission, para. 57. We note that the evidence submitted by Viet Nam shows that subsequent to the original investigation in this proceeding, the USDOC altered its anti-dumping methodology in original investigations: The USDOC announced, in a notice published on 27 December 2006 that going forward, it would "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons." (*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 27 December 2006, Exhibit Viet Nam-66, cited in Viet Nam's first written submission, para. 34)

[296] Our findings concern the USDOC's *reliance* on dumping margins calculated not in accordance with Article 2 of the Anti-Dumping Agreement *to establish the "all others" rate applied in each of the administrative reviews here at issue*. We are not, however, making any findings with respect to the consistency, with the U.S. obligations under the Anti-Dumping Agreement, of the USDOC's actions and determinations in the original investigation. Nor should our findings be read as suggesting that those actions and determinations were subject to the disciplines of the Anti-Dumping Agreement.

[297] See, *supra* para. 7.200.

7.229 We are of the view that our findings above that the United States acted inconsistently with its obligations under Article 9.4 of the Anti-Dumping Agreement suffice to resolve the dispute between the parties with respect to the measures at issue. In our view, making additional findings under the same provision or making findings under other provisions of the Anti-Dumping Agreement would not contribute to the resolution of the dispute between the parties or assist in any potential implementation. For these reasons, we do not consider Viet Nam's argument that the United States acted inconsistently with Article 9.4 by virtue of the USDOC's application of an "all others" rate "that fails to consider the results of the individually-investigated respondents in the contemporaneous proceeding and produces an antidumping duty prejudicial to companies not selected for individual investigation", and we exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.4.2, and 2.4 of the Anti-Dumping Agreement.

7.230 With respect to Article 17.6(i), as the United States notes[298], Viet Nam's panel request makes no reference to this provision. For this reason, we consider that Viet Nam's claim of violation of Article 17.6(i) of the Anti-Dumping Agreement is not within our terms of reference.

## G. VIET NAM'S CLAIMS CONCERNING THE RATE ASSIGNED TO THE VIETNAM-WIDE ENTITY

7.231 Viet Nam challenges the rate assigned to the Vietnam-wide entity in the second and third administrative reviews. Viet Nam's claims concern (i) the USDOC's failure to assign to the Vietnam-wide entity an "all others" rate, and (ii) the assignment instead to the Vietnam-wide entity of a rate based on facts available. Viet Nam's claims are based on Articles 6.8, 9.4, 17.6(i), and Annex II, of the Anti-Dumping Agreement.

7.232 The United States asks us to reject Viet Nam's claims.

### 1. Introduction

7.233 Before addressing Viet Nam's claims, we first set out the relevant facts in light of which the issues raised by Viet Nam's claims must be examined.

7.234 We recall that, in the two reviews at issue, the USDOC limited its examination in the manner provided for in the second sentence of Article 6.10 of the Anti-Dumping Agreement, because of the large number of firms involved.[299] The second sentence of Article 6.10 provides:

> "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."

7.235 Thus, while the second sentence of Article 6.10 allows authorities to limit the scope of their examination, that provision also ensures that, in cases where authorities do so, a minimum number of exporters or producers (or "respondents") are nevertheless examined individually.[300] Whereas the maximum anti-dumping rate to be applied to selected exporters is determined by their individual margins of dumping (in accordance with Article 9.3 of the Anti-Dumping Agreement), the question

[298] United States' second written submission, para. 75.
[299] See, *supra* para. 7.147.
[300] We refer to those respondents selected for individual examination as "selected" respondents. We refer to those respondents not selected for individual examination as "non-selected" respondents.

arises as to the maximum allowable amount of any "all others" rate assigned to non-selected exporters. This issue is addressed by the relevant part of Article 9.4 in the following terms:

> "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. …"

7.236 As noted above, the USDOC limited its examinations in the second and third administrative reviews in the manner envisaged by the second sentence of Article 6.10. Having done so, the USDOC was therefore required to select a minimum number of respondents for individual examination.

7.237 We recall that the USDOC treated Viet Nam as a non-market economy. As a result, the USDOC applied a rebuttable presumption that all shrimp exporting companies are controlled by the Government of Viet Nam, such that they may be treated as operating units of a single, government-controlled, Vietnam-wide entity, rather than individual exporters in their own right. Exporting companies that could establish their eligibility for a separate rate, on the basis of their independence from government control, were either selected for individual examination, or assigned the "all others" rate (we refer to these companies as "separate rate" companies). All remaining exporting companies (which we refer to as "non-separate rate" companies) were subject to the rate assigned to the Vietnam-wide entity. In other words, the "all others" rate was only assigned to separate rate respondents, excluding therefore the Vietnam-wide entity and its constituent parts. In this regard, the USDOC's notice of initiation of the second administrative review stated that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents."[301]

7.238 In the second administrative review, the USDOC selected two separate rate companies for individual examination. The USDOC selected three separate rate companies for individual examination in the third administrative review. The USDOC did not select any non-separate rate companies for individual examination. The rates assigned to the selected (separate rate) respondents were based on their individual margins of dumping (all of which were zero or *de minimis*). Other separate rate respondents received an "all others" rate of 4.57 per cent. All non-separate rate respondents received the Vietnam-wide entity rate, set at 25.76 per cent on the basis of facts available (i.e. the highest rate calculated in the petition that could be corroborated).[302]

7.239 We begin by examining Viet Nam's claim under Article 9.4 of the Anti-Dumping Agreement, which concerns the USDOC's failure to assign an "all others" rate to the Vietnam-wide entity. After reviewing the text of that provision, we consider the possible impact of the Working Party Report of Viet Nam's Accession to the WTO. We also consider whether, because all the margins of dumping for individually examined respondents in the second and third administrative reviews were zero or *de minimis*, the USDOC could be considered to have violated any obligations under Article 9.4 in

[301] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.
[302] United States' first written submission, para. 160.

those reviews. We subsequently examine whether the USDOC was entitled to assign a facts available rate to the Vietnam-wide entity, instead of an "all others" rate, because of non-cooperation by certain exporting companies treated as operating units of the Vietnam-wide entity.

7.240 We recall that the USDOC conducted limited examinations, as envisaged by the second sentence of Article 6.10. It is for this reason that the issue of whether or not the USDOC should have assigned an "all others" rate, i.e. a rate for non-selected respondents, to the Vietnam-wide entity arises. It is also for this reason that issues regarding alleged non-cooperation by respondents at the sample selection stage arise.

### 2. The USDOC's failure to assign the "all others" rate to the Vietnam-wide entity, viewed in light of Article 9.4 of the Anti-Dumping Agreement

(a) Main arguments of the parties

*(i) Viet Nam*

7.241 Viet Nam's basic argument is that Article 9.4 governs the rate that should be applied to all companies not selected for individual examination, whether or not they are eligible for a separate rate. Viet Nam's argument is based on the word "any" in the second line of Article 9.4. Viet Nam interprets the use of this word to mean that Article 9.4 governs the assessment of anti-dumping duties to "any" company not selected for individual examination, without exception.[303] Viet Nam contends that Article 9.4 is absolute, in the sense that, where an investigating authority has limited its examination, it must calculate an anti-dumping duty for all companies not individually investigated, irrespective of any question of their eligibility for a separate rate, 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.

*(ii) United States*

7.242 In response, the United States notes that, in the second and third administrative reviews, the margins of dumping calculated for the two selected respondents were zero or *de minimis*. The United States asserts that Article 9.4 does not provide for any maximum allowable "all others" rate in such a *lacuna* situation.[304] According to the United States, therefore, the USDOC could not be found to have violated Article 9.4 in the second or third administrative reviews.

(b) Main arguments of the third parties

7.243 While some third parties expressed the view that the USDOC was entitled to treat separate legal entities as part of the Vietnam-wide entity, provided the structural and commercial relationship between the State and exporting companies was properly examined, only China addressed whether or not the USDOC was entitled not to have applied an "all others" rate to the Vietnam-wide entity. China argues that the rate applied to the Vietnam-wide entity is inconsistent with Article 9.4 because non-investigated exporters should necessarily receive the "all others" rate. China argues that the provisions of the Anti-Dumping Agreement never require non-selected companies to first demonstrate that they should be assigned an "all-others" rate.[305]

---

[303] Viet Nam's second written submission, para. 110; Viet Nam's response to Panel question 27, para. 74.

[304] The United States makes this argument, for example, at para. 78 of its opening oral statement at the second meeting of the Panel.

[305] China's third-party oral statement, pages 1-2.

(c) Evaluation by the Panel

7.244 As indicated above, we begin by considering the text of Article 9.4, which is set forth above.

*(i) The text of Article 9.4*

7.245 On its face, the text of Article 9.4 seems clear in requiring that, in the context of limited examinations envisaged by the second sentence of Article 6.10, any rate assigned to non-selected respondents should not exceed the maximum allowable amount provided for in that provision. This suggests that any exporter not selected for individual examination should be assigned an "all others" rate that does not exceed that maximum allowable amount. There is nothing in the text of Article 9.4 suggesting that authorities are entitled to render application of an "all others" rate conditional on the fulfilment of some additional requirement.[306]

*(ii) Article 9.4 in light of Viet Nam's Protocol of Accession and the Working Party Report*

7.246 In its first written submission, the United States asserts that:

> "During Vietnam's accession negotiations, Members expressed concern about the influence of the Government of Vietnam on its economy and how such influence could affect cost and price comparisons in antidumping duty proceedings. Paragraph 254 of the Working Party Report reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping and countervailing duty investigations, and that a strict comparison with Vietnamese costs and prices might not always be appropriate. Indeed, the Working Party Report indicates that a dumping comparison using domestic costs and prices in Vietnam is not required for imports from Vietnam *unless and until* investigated producers demonstrate that market conditions exist in the industry producing the like product. In light of the Working Party Report and the commitments made therein, Members are free to determine that, absent a demonstration to the contrary by Vietnamese producers, government influence will prevent market principles from functioning in the Vietnamese industry manufacturing the product under investigation."[307]

7.247 Initially, we had understood the United States to argue that, because government influence over the Vietnam-wide entity prevented that entity from functioning on the basis of market principles, the USDOC was allowed by the provisions of the Working Party Report on the Accession of Viet Nam to the WTO ("Working Party Report") not to apply an "all others" rate to that entity. At the interim review, however, the United States clarified that, to the extent its argument relied on the Working Party Report, it was only as confirmation of the permissibility of treating the Vietnam-wide entity as a single exporter or producer. Accordingly, the United States does not rely on the Working Party Report to argue that the provisions thereof allowed the USDOC not to apply an "all others" rate to the Vietnam-wide entity. Nevertheless, as explained below, certain provisions of the Working Party Report address the application of the Anti-Dumping Agreement in the context of anti-dumping

[306] The additional requirement to which we refer concerns the separate rate criterion, whereby application of an "all others" rate was made dependent on eligibility for separate rate status ("Only those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents." (Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100)). For present purposes, we do not consider it necessary to examine in greater detail the substantive basis for the distinction made by the USDOC between separate rate and non-separate rate respondents, including in particular the question of whether or not the USDOC was entitled to presume state control of shrimp exporting companies absent their showing of separate rate status.

[307] United States' first written submission, para. 146. (emphasis original)

proceedings involving imports from non-market economies. For this reason, it is appropriate for us to consider the interpretation of Article 9.4 in light of the Working Party Report.

7.248 Viet Nam submits that there is nothing in Viet Nam's Protocol of Accession, including the Working Party Report, that would provide for an alternative interpretation of Article 9.4 in the context of imports from NME countries. Viet Nam contends that neither the Protocol of Accession nor the Working Party Report provide any basis for differential treatment to a company because of government ownership.[308]

7.249 We note that, in negotiating Viet Nam's accession to the WTO, some Members did identify certain difficulties that might arise in anti-dumping proceedings involving imports from Viet Nam because that country had not yet transitioned to a full market economy. In this regard, we note that paragraph 254 of the Working Party Report provides:

> "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."[309]

7.250 Paragraph 255 of the Working Party Report explains that, in light of such difficulties:

> "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 the like product

[308] Viet Nam's second written submission, para. 95.
[309] Working Party Report, WT/ACC/VNM/48, para. 254.

> with regard to manufacture, production and sale of that product."[310]

7.251 Thus, because of difficulties resulting from the fact that Viet Nam was still continuing the process of transition towards a full market economy, Members agreed that investigating authorities need not necessarily calculate normal value on the basis of domestic prices in Viet Nam, as would otherwise be required by Article 2 of the Anti-Dumping Agreement. However, we see nothing in paragraphs 254 and 255 of the Working Party Report, or any other provision thereof, indicating that the interpretation and/or application of any other provision of the Anti-Dumping Agreement, including Article 9.4, should be modified to accommodate any special difficulties that might arise in a proceeding involving imports from Viet Nam. In particular, there is nothing in the Working Party Report indicating that an investigating authority is entitled to render application of an "all others" rate subject to some additional requirement not provided for in Article 9.4. Furthermore, whereas sub-paragraphs (i) and (ii) of paragraph 255 allow an investigating authority to modify its investigation depending on whether "producers under investigation" can or cannot "clearly show that market economy conditions prevail" in the relevant industry, the investigating authority may only do so in respect of price comparability. Sub-paragraphs (i) and (ii) of paragraph 255 do not allow an investigating authority to assign "all others" rates to non-selected respondents on the basis of whether or not market conditions prevail. Accordingly, the Working Party Report has no bearing on our evaluation of Viet Nam's claim under Article 9.4 of the Anti-Dumping Agreement.

7.252 We next consider the United States' argument regarding the fact that a so-called *lacuna* situation arose in the second and third administrative reviews.

*(iii) The application of Article 9.4 in a* lacuna *situation*

7.253 With regard to the United States' argument that the USDOC could not be found to have violated Article 9.4 because that provision does not provide for any maximum allowable "all others" rate in cases where the margins of all selected exporters are either zero, *de minimis*, or based on facts available, the text of Article 9.4, interpreted in the light of Viet Nam's Protocol of Accession and the accompanying Working Party Report, provides no legal basis for the USDOC not to have applied an "all others" rate to the Vietnam-wide entity. Thus, in those factual circumstances in which a maximum allowable "all others" rate may be determined pursuant to Article 9.4(i), there is no question that an "all others" rate should have been applied to both selected and non-selected respondents. The Panel acknowledges that where all margins calculated for individually examined exporters/producers are zero or *de minimis*, or result from application of facts available, it is not possible to determine the ceiling which the "all others" rate shall not exceed. It does not follow, however, from this *lacuna* that a Member is entitled to differentiate, in terms of the application of an all others rate, between exporters/producers that qualify for separate rate treatment and exporters/producers that fail to qualify for such treatment and are treated as part of the Vietnam-wide entity. If such differentiation is not permissible in cases where Articles 9.4(i) permits the calculation of the maximum allowable "all others" rate, it is unclear why such differentiation would be permissible in *lacuna* situations.[311] The Panel recalls in this respect that the Appellate Body has

[310] Working Party Report, WT/ACC/VNM/48, extract from para. 255. We note that, according to para. 2 of Part I of the Protocol on the Accession of Viet Nam to the WTO (WT/L/662), the commitments set forth in para. 527 of the Working Party Report, which include para. 255 thereof, shall be an integral part of the WTO Agreement. It is appropriate, therefore, that we read Article 9.4 of the Anti-Dumping Agreement in conjunction with para. 255 of the Working Party Report.

[311] Furthermore, we observe that the USDOC stated in its notice of initiation of the second administrative review that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents" (Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100). Even outside of a *lacuna* situation, therefore, the USDOC still would not have applied an "all others" rate to the Vietnam-wide entity.

specifically rejected the argument that Article 9.4 imposes no obligations in *lacuna* situations. Specifically, as we have noted above, in *US – Zeroing (EC) (Article 21.5 – EC)* the Appellate Body found that:

> "[T]he fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The *lacuna* that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available."[312]

7.254 We consider that our finding in response to the abovementioned U.S. argument is consistent with this finding by the Appellate Body. We note that the Appellate Body's finding does not concern the scope of respondents that should be assigned an "all others" rate. In other words, it does not suggest that the existence of the *lacuna* situation allows an investigating authority to not assign an "all others" rate to "non-investigated exporters" that would otherwise have been assigned such rate. The Appellate Body's finding merely concerns the maximum allowable rate that may be assigned to the non-selected respondents.

*(iv) Summary*

7.255 We have examined the text of Article 9.4, read in light of certain provisions of the Working Party Report. We have also considered the fact that, in the reviews at issue, the margins of selected respondents were zero or *de minimis*. Our analysis indicates that the USDOC's decision not to apply an "all others" rate to the Vietnam-wide entity is inconsistent with Article 9.4 of the Anti-Dumping Agreement.

7.256 We next consider the parties' arguments concerning Article 6.8 of the Anti-Dumping Agreement, and the potential relevance of that provision to our analysis under Article 9.4.

### 3. The USDOC's treatment of the Vietnam-wide entity viewed in light of Article 6.8 of the Anti-Dumping Agreement

(a) Main arguments of the parties

*(i) Viet Nam*

7.257 Viet Nam invokes Article 6.8 and Annex II as the basis for an affirmative claim against the USDOC's decision to assign a facts available rate to the Vietnam-wide entity. Viet Nam claims that the USDOC was not entitled to apply facts available in the second and third administrative reviews, because the USDOC failed to comply with the requirements of Article 6.8. In particular, Viet Nam submits that respondents did not fail to provide information that was "necessary" within the meaning of Article 6.8. In addition, Viet Nam submits that Article 6.8 only applies in respect of respondents selected for individual examination, and therefore has no application in respect of the rate applied to non-selected respondents.

7.258 Furthermore, Viet Nam submits that the USDOC's attempt to bring its actions within the ambit of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement by reliance on the

[312] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453. (emphasis original)

so-called quantity and value questionnaires is disingenuous. According to Viet Nam, the application of the Vietnam-wide rate had nothing to do with whether or not quantity and value information was provided by certain respondents. Rather it had to do with whether individual entities had demonstrated the absence of government control over their export activities.[313] Viet Nam therefore denies that Article 6.8 could justify the non-application of an "all others" rate to the Vietnam-wide entity. According to Viet Nam, the obligations in Article 9.4 are absolute, and therefore independent of the application of the Article 6.8 facts available mechanism in respect of non-cooperation at the sample selection stage.

*(ii) United States*

7.259 The United States denies that the USDOC failed to comply with the requirements of Article 6.8. The United States also argues that, in cases of non-cooperation by respondents at the time that the authority selects respondents for individual examination (in cases where the authority's examination is limited under Article 6.10), the authority is entitled to apply a facts available rate, rather than an "all others" rate, irrespective of the requirements of Article 9.4. The United States asserts that "[o]therwise, for example, if a company were aware that is was dumping at a high level and it was one of the largest exporters to the United States of subject merchandise, it would have no incentive to respond to the quantity and value questionnaire because it would receive a lower rate by not cooperating".[314]

(b) Evaluation by the Panel

7.260 We begin by addressing the parties' arguments regarding the interaction between Articles 6.8 and 9.4.

*(i) Interaction between Articles 9.4 and 6.8*

7.261 The USDOC found that 35 exporting companies had failed to respond to the USDOC's "quantity and value" ("Q&V") questionnaire. According to the USDOC, that data was necessary in order for the USDOC to determine which respondents to select for individual examination. The United States contends that, as a result of such non-cooperation, the USDOC was entitled to apply a facts available rate to the Vietnam-wide entity instead of an "all others" rate.

7.262 Article 6.8, which regulates the use of facts available, 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."

7.263 Regarding Viet Nam's argument that the Article 6.8 facts available mechanism does not apply in respect of non-selected respondents, we note that the first sentence of Article 6.8 envisages the use of facts available in cases of non-cooperation by "any" interested party. The reference to non-cooperation by "any" interested party suggests that Article 6.8 is of broad application. There is nothing in the text of Article 6.8 to suggest that the facts available mechanism only applies in respect of non-cooperation by a limited category of interested parties. In particular, there is no indication in the text to suggest that, in cases of limited examination (under Article 6.10), Article 6.8 only allows

[313] Viet Nam's opening oral statement at the second meeting of the Panel, para. 34.
[314] United States' first written submission, para. 160.

the use of facts available in respect of those interested parties that were selected for individual examination, as alleged by Viet Nam.

7.264 We recall that the USDOC purported to find non-cooperation at the time it sought to select respondents for individual examination. In principle, if a respondent fails to provide information that the investigating authority needs to determine the composition of the sample in cases of limited examination, the authority is unable to establish whether that respondent should be selected for individual examination, or placed in the residual category of non-selected respondents and assigned the all-others rate. In other words, the investigating authority would not be able to determine whether or not the non-cooperating respondent should be selected or non-selected for the purpose of applying Article 9.4. In these factual circumstances, we acknowledge that it would not necessarily be unreasonable for an investigating authority to assign a facts available rate to those respondents that failed to cooperate at the sample selection stage, provided the requirements of Article 6.8 are fulfilled.

7.265 We need not reach a firm conclusion on this issue, though, since we are not persuaded that the reason the USDOC did not assign an "all others" rate to the Vietnam-wide entity was non-cooperation by constituent parts of the Vietnam-wide entity at the sample selection stage. In this regard, we are struck by the fact that, already in its notice of initiation of the second administrative review, the USDOC had stated that "[o]nly those respondents with separate rate status will be included in the group receiving the weighted-average margin calculated from the selected respondents."[315] This statement indicates that, even before any questionnaire had been issued, and before any issue of non-cooperation could have arisen, the USDOC had already resolved not to apply an "all others" rate to the Vietnam-wide entity. We conclude from this statement that, even if the exporting companies had cooperated fully with the USDOC, the Vietnam-wide entity still would not have been assigned an "all others" rate.[316] In these circumstances, we do not consider that there is any reasonable basis on which the USDOC could subsequently refer to non-cooperation by non-separate rate respondents as the reason for not having applied an "all others" rate to the Vietnam-wide entity.[317]

7.266 As a result, there is not strictly any need for us to examine whether or not the USDOC's application of the Article 6.8 facts available mechanism met the requirements of that provision. We shall address this issue, though, in case the Appellate Body might disagree with our conclusion on appeal.

---

[315] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.

[316] In our view, this is a reflection of the fact that, under the U.S. regime for anti-dumping proceedings involving non-market economies, the Vietnam-wide entity, as a non-separate rate respondent, will inevitably be assigned the Vietnam-wide entity rate, rather than an "all others" rate calculated on the basis of the margins of dumping of separate rate respondents selected for individual examination. We note that, as the USDOC explained in its Notice of Initiation of the Second Administrative Review (p. 17099), "[i]t is the Department's policy" to assign a single anti-dumping duty rate to non-separate respondents. This statement of USDOC policy is consistent with the USDOC's Anti-Dumping Manual, which also states that "[t]hose exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate" (USDOC Anti-Dumping Manual, Chapter 10, Exhibit Viet Nam-31, Section III.A, page 3). The USDOC's Anti-Dumping Manual clearly distinguishes between the "NME-wide rate", addressed at Section IV of Chapter 10 of the Manual, and the "Separate Rates" (assigned to separate rate respondents), addressed at Section III of Chapter 10 of the Manual. See also our discussion of the USDOC's exclusion of non-separate rate respondents from selection for individual review, below at paras. 7.272-7.273. The USDOC effectively operates parallel systems for determining duties in anti-dumping dumping proceedings involving imports from non-market economies: one for separate rate respondents, and one for the remaining non-separate rate respondents.

[317] We agree in this regard with the finding by the panel in *Guatemala – Cement II* that: "Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner." (Panel Report, *Guatemala – Cement II*, para. 8.251)

*(ii) Whether the USDOC complied with the disciplines of Article 6.8 in applying a facts available rate to the Vietnam-wide entity*

7.267 Viet Nam claims that the USDOC's use of facts available to determine the dumping rate applied to the Vietnam-wide entity in the second administrative review was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.[318] Viet Nam contends that the Q&V data requested by the USDOC was not "necessary", such that the failure of entities to provide that information could not justify the use of facts available. Viet Nam submits that information is only "necessary" if it is needed to determine a margin of dumping for a selected exporter or producer. Viet Nam also asserts that the fact that the Q&V data requested by the USDOC was not "necessary" in the second administrative review is demonstrated by the fact that the USDOC did not need to request that data in the third administrative review, but instead obtained that data from another U.S. Government agency.

7.268 The United States asks the Panel to reject Viet Nam's arguments. The United States contends that the information sought by the USDOC from the 35 exporting companies was "necessary", and that the USDOC complied with all the requirements of Article 6.8 in assigning a facts available rate to the Vietnam-wide entity.

7.269 As explained above, we are examining whether or not the USDOC fulfilled the criteria of Article 6.8 when assigning a facts available rate to the Vietnam-wide entity. As a result of differences in the factual circumstances of the second and third administrative reviews, we address each review separately, starting with the second.

Second administrative review

7.270 In the second administrative review, the USDOC applied a facts available rate to the Vietnam-wide entity on the basis of non-cooperation by both the Vietnam-wide entity, and the 35 exporting companies subject to the Vietnam-wide entity rate. (Neither the Vietnam-wide entity, nor any of the 35 exporting companies found to constitute that entity, had been selected for individual examination.) In its preliminary determination, the USDOC found that the 35 exporting companies had failed to respond to the USDOC's Q&V and separate rate questionnaires, or the follow-up letters sent by the Department.[319] In its final determination, the USDOC found that the 35 exporting companies had failed to respond only to the USDOC's Q&V questionnaire.[320]

7.271 We recall that the text of Article 6.8 is set forth at paragraph 7.262 above. In accordance with the first sentence of Article 6.8, determinations may be made on the basis of facts available "[i]n cases where any interested parts refuses access to, or otherwise does not provide, necessary information". We shall begin by examining whether or not the USDOC properly found that the 35 exporting

[318] We note that, in its request for the establishment of a panel, Viet Nam refers to the application of the facts available Vietnam-wide entity rate to companies that "responded timely and fully to the questionnaires issued by USDOC" (WT/DS404/5, Annex G-2, page 4). In its response to Panel question 27 (para. 72), Viet Nam also refers to the possibility of a (cooperative) company providing information to the USDOC indicating that the company is not independent of government control, and therefore receiving the facts available Vietnam-wide entity rate. However, Viet Nam has not produced any evidence indicating that any such cooperative company was assigned the Vietnam-wide entity rate based on facts available. Rather, the evidence on the record regarding the second administrative review indicates that all 35 exporting companies subject to the facts available Vietnam-wide entity rate were found not to have responded to the USDOC's request for Q&V data.

[319] Preliminary Determination in the Second Administrative Review, Exhibit Viet Nam-14, p. 12131. (footnotes omitted)

[320] Final Determination in the Second Administrative Review, Exhibit Viet Nam-15, p. 52275. (footnote omitted)

companies treated as constituent parts of the Vietnam-wide entity had failed to provide "necessary" information, in the form of Q&V data.

7.272 The USDOC alleged that Q&V data was "necessary" in order for the USDOC to select respondents for individual examination. As explained above, it would not necessarily be unreasonable for an investigating authority to assign a facts available rate to those respondents that failed to cooperate at the sample selection stage, provided the requirements of Article 6.8 are fulfilled. One consideration in this regard would be whether or not the investigating authority had properly designated information that allegedly non-cooperative respondents failed to provide as "necessary" within the meaning of Article 6.8. As to whether or not the Q&V data requested by the USDOC was properly designated by the USDOC as "necessary", we recall that the USDOC stated in its notice of initiation of the second administrative review that "[b]ecause the Department intends to select the mandatory respondents by selecting the exporters/producers accounting for the largest volume of subject merchandise exported to the United States during the period of review, the Department will require all potential respondents to demonstrate their eligibility for a separate rate."[321] We consider this statement in light of the USDOC's assertion in the notice of initiation of the first administrative review that it would "allow only those respondents with separate rate status to be included in the sampling pool."[322] We further recall the USDOC's assertion, earlier in its notice of initiation of the second administrative review, that "[i]t is the Department's policy" to assign all non-separate rate respondents the NME-wide rate.[323] Taken together, we consider that these various statements by the USDOC make it clear that non-separate rate respondents would not be selected for individual examination.

7.273 This observation is supported by the distinction drawn between separate rate respondents and non-separate rate respondents in Chapter 10 of the USDOC's Anti-Dumping Manual ("Manual")[324], which addresses USDOC procedures in respect of anti-dumping proceedings involving non-market economies. Section III of Chapter 10 of the Manual deals with "Separate Rates". Part G of Section III explains how the USDOC selects separate rate respondents for individual examination in cases where it will conduct a limited examination. Section IV of Chapter 10 of the Manual deals with "The NME-Wide Rate". There is no explanation in that Section of how the USDOC might select non-separate rate respondents for individual examination. Instead, Section IV states 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 antidumping questionnaire." Section IV further provides that "[i]n many cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise." Thus, while Section III (Part G) of the Manual explains how separate rate respondents might be selected for individual examination, Section IV merely explains that the (NME-wide entity) rate assigned to non-separate rate respondents is often based on facts available.[325]

---

[321] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17100.

[322] Notice of Initiation of the First Administrative Review, Exhibit Viet Nam-08, p. 17818. Although the first administrative review is not one of the measures at issue, we consider it appropriate to consider this evidence as factual context for our review of the USDOC's treatment of non-selected respondents in the second and third administrative reviews.

[323] Notice of Initiation of the Second Administrative Review, Exhibit Viet Nam-12, p. 17099. This statement of USDOC policy is consistent with Chapter 10 of the USDOC's Anti-Dumping Manual ("Manual"), which also states that "[t]hose exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate" (USDOC Anti-Dumping Manual, Exhibit Viet Nam-31, Section III.A, p. 3).

[324] We note that Viet Nam has not advanced any claims against the USDOC's Manual "as such". We do not consider that the absence of any claim "as such" should preclude our consideration of the Manual as evidence in the context of Viet Nam's "as applied" claims.

[325] The Panel asked the United States how the USDOC would calculate the rate applied to the Vietnam-wide entity if: (i) the USDOC applied sampling but the Vietnam-wide entity was not selected for

The absence of any discussion of the potential selection of non-separate rate respondents for individual examination in Section IV of the Manual is a reflection, we believe, of the fact that that such respondents would not be selected for individual examination.

7.274 In light of these factors, taken together, we consider that the USDOC had determined[326] that non-separate rate respondents would not be selected for individual examination in the second administrative review before any question of non-cooperation by non-selected respondents could have arisen.[327] In these circumstances, we do not consider that the USDOC could properly have designated Q&V data from non-separate rate respondents as "necessary" in the meaning of Article 6.8 of the Anti-Dumping Agreement. Thus, the USDOC's application of facts available as a result of exporting companies' failure to provide that data could not have justified the use of facts available under that provision. Accordingly, the USDOC's application of a facts available rate to the Vietnam-wide entity in the second administrative review was not consistent with Article 6.8 of the Anti-Dumping Agreement.[328] In view of this finding, it is not necessary for us to consider Viet Nam's claim under Annex II of the Anti-Dumping Agreement.

Third administrative review

7.275 The United States asserts that the USDOC did not apply a facts available rate to the Vietnam-wide entity in the third administrative review. Instead, the United States asserts that the USDOC "applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because this was 'the only rate ever determined for the Vietnam-wide entity in this proceeding.'"[329]

7.276 Viet Nam notes the USDOC's decision to "assign[] the entity's current rate and only rate ever determined for this entity in this proceeding"[330]. According to Viet Nam, left unsaid in the USDOC's decision is the fact that the only rate ever applied to the Vietnam-wide entity was based upon adverse

---

individual examination; (ii) the use of facts available was not justified in respect of the Vietnam-wide entity; and (iii) a *lacuna* situation did not arise (Panel question 63C). The United States replied:

> "We would note that the factual situation described in the Panel's question was not present in either the second or third administrative review. In any event, Commerce determines the appropriate dumping rate to apply on a case-by-case basis, based on the particular facts and circumstances before it, and the arguments of the parties presented in proceeding. Accordingly, the United States is not in a position to speculate, in the absence of specific facts and arguments presented in the context of a particular case, on what determinations Commerce might make under such hypothetical circumstances."

[326] We asked the United States certain questions regarding the USDOC's treatment of non-separate rate respondents (questions 29, 61 and 63). The U.S. replies indicate that the USDOC is not precluded in U.S. law from selecting non-separate respondents for individual examination. Viet Nam's claim concerns the USDOC's application of U.S. law, rather than the U.S. law as such. Accordingly, our analysis need not consider the legal possibility that the USDOC might have selected non-separate rate respondents for individual examination. Instead, we focus on the fact that, in the second administrative review, the USDOC has determined not to do so.

[327] Viet Nam has not raised any claim under Article 6.10 of the Anti-Dumping Agreement regarding the USDOC's failure to consider non-separate rate respondents for individual review. However, the absence of any Article 6.10 claim does not preclude us from considering this issue when evaluating the USDOC's finding of non-cooperation by non-separate rate respondents.

[328] In view of this finding, we need not address Viet Nam's argument that the USDOC could not properly have found non-cooperation by the Vietnam-wide entity on the basis of non-cooperation by its constituent parts (for example, Viet Nam's response to Panel question 35, para. 88).

[329] United States' first written submission, para. 164. (footnote omitted)

[330] Viet Nam's opening statement at the second meeting of the Panel, para. 29 (citing to Preliminary Determination in the Third Administrative Review, Exhibit Viet Nam-18, pp. 10009, 10014 (unchanged in Final Determination)).

facts available. Viet Nam asserts that the fact that the USDOC had previously applied the rate to the Vietnam-wide entity does not alter the facts available nature of the rate.

7.277 The USDOC did not explicitly apply a facts available rate in the third administrative review. This is because, unlike in the second administrative review, the USDOC did not seek any Q&V data from any exporting entity in the third administrative review. Instead, the USDOC obtained the Q&V data it considered necessary for the purpose of selecting exporters for individual examination from the USCBP. If we were to take a formalistic approach regarding the third administrative review, we would conclude that the rate assigned to the Vietnam-wide entity in that review was not based on facts available. This is because there was no indication by the USDOC, at any time, that it was applying facts available. Under this approach, the question of the interaction between Articles 6.8 and 9.4 would not arise.

7.278 However, in performing our objective assessment of the matter, we consider it appropriate to take a less formalistic view of the USDOC's actions in the third administrative review. In this respect, we agree with Viet Nam's assertion[331] that there are essentially three types of rate that may be assigned under the Anti-Dumping Agreement: an individual rate consistent with Article 2, an "all others" rate consistent with Article 9.4, or a facts available rate consistent with Article 6.8. The United States has not characterised the rate assigned to the Vietnam-wide entity in the third administrative review as a rate determined under either Article 2 or 9.4 of the Anti-Dumping Agreement. Nor is there any evidence on the record to suggest that this was the case. Since the rate is not assigned under Articles 2 or 9.4, the only other basis under the Anti-Dumping Agreement for applying that rate would be Article 6.8 (which would result in a facts available rate).

7.279 Furthermore, although there was no formal application of facts available in the third administrative review, the rate ultimately assigned to the Vietnam-wide entity was exactly the same as the rates that had previously been assigned in the original investigation and preceding administrative reviews, and those rates had been determined on the basis of facts available. In these circumstances, we consider it appropriate to treat the 25.76 per cent rate assigned to the Vietnam-wide entity in the third administrative review as a facts available rate, founded on the same determination of non-cooperation made by the USDOC in the second administrative review. 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 that rate.

7.280 Regarding the application of the criteria set forth in Article 6.8 to what we consider to have been in substance a facts available rate assigned in the third administrative review, we note that the USDOC did not request Q&V data from any exporting entity in that review.[332] In these circumstances, there is no basis for any valid finding of non-cooperation, and therefore no basis for any valid application of facts available in the sense of Article 6.8. For this reason, we find that the rate assigned to the Vietnam-wide entity in the third administrative review was not consistent with Article 6.8 of the Anti-Dumping Agreement.[333]

### 4. Conclusion

7.281 We recall our analysis under Article 9.4, which indicates that the USDOC's decision not to apply an "all others" rate to the Vietnam-wide entity is inconsistent with that provision. We have

[331] Viet Nam's first written submission, paras. 164-187. The United States has not contested Viet Nam's description of the three types of rate that may be applied under the Anti-Dumping Agreement.

[332] See USDOC Respondent Selection Memorandum in the Third Administrative Review, Exhibit Viet Nam-17.

[333] In view of this finding, it is not necessary for us to consider Viet Nam's claim under Annex II of the Anti-Dumping Agreement.

considered whether our analysis of Article 9.4 should be modified on the basis of the USDOC's application of an Article 6.8 facts available rate to the Vietnam-wide entity. In light of the fact that the USDOC had decided not to apply an "all others" rate to the Vietnam-wide entity before any question of non-cooperation could have arisen, and in light of our findings that the USDOC in any event failed to comply with the requirements of Article 6.8, we see no reason to do so. Accordingly, we conclude that the USDOC's failure to assign an "all others" rate to the Vietnam-wide entity in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement. In light of our analysis under Article 6.8, we also conclude that the USDOC's assignment of a facts available rate to the Vietnam-wide entity in the second administrative review and a rate that is in substance a facts available rate in the third administrative review is not consistent with Article 6.8 of the Anti-Dumping Agreement.

### 5. Viet Nam's claims under Article 17.6(i) of the Anti-Dumping Agreement

7.282 While a certain ambiguity remains in this respect, Viet Nam appears to seek findings of inconsistency under Article 17.6(i) of the Anti-Dumping Agreement in relation to the rate assigned to the Vietnam-wide entity.[334] As the United States notes[335], Viet Nam's request for the establishment of a panel[336] does not provide for any claim under this provision. For this reason, insofar as Viet Nam can be understood to be making a claim under Article 17.6(i) of the Anti-Dumping Agreement, we find that any such claim falls outside our terms of reference.

## H. VIET NAM'S "CONSEQUENTIAL CLAIMS"

7.283 Viet Nam makes "consequential claims" of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.[337] Under these "consequential claims", Viet Nam argues that the USDOC's actions with respect to the conduct challenged under its other claims – zeroing, "country-wide" rate, limitation of the number of selected respondents and "all others" rate – will have a consequential impact on the USDOC's sunset review, such that the USDOC could not reach a final sunset review determination consistent with the Anti-Dumping Agreement.[338, 339] The United States

[334] Viet Nam's second written submission, para. 144(5).

[335] United States' second written submission, para. 75.

[336] WT/DS404/5, Annex G-2.

[337] Viet Nam's first written submission, paras. 289-291; Viet Nam's second written submission, paras. 142-143. We note that Viet Nam did not include these claims in the list of requests for findings included in its second written submission.

[338] For instance, Viet Nam explained that:

> "Viet Nam's consequential claim asserts that the USDOC's conduct in the completed administrative reviews is such that the USDOC cannot reach a final determination in the five-year sunset review that is consistent with the requirements of the Anti-Dumping Agreement. Specifically, the USDOC's conduct with regard to zeroing, the limited selection of mandatory respondents, the all others rate calculation methodology, and the treatment of the Vietnam-wide entity renders it impossible for the USDOC to comply with the Anti-Dumping Agreement. As a consequence of the USDOC's actions with respect to these practices, the final determination of the five year sunset review will violate United States WTO obligations.
>
> The factual basis for the claim is the resulting impact of the USDOC's actions on the ongoing five-year sunset review, demonstrated by the rules and practices that govern a USDOC five-year sunset review determination." (Viet Nam's response to Panel question 13(ii), paras. 24-25)

[339] In its opening oral statement at the second meeting of the Panel, Viet Nam provides a reference to the Federal Register Notice of the USDOC's final likelihood-of-dumping determination, made in the context of the sunset review, in which the USDOC concludes that revocation of the anti-dumping order is likely to lead to continuation or recurrence of dumping (Viet Nam's opening oral statement at the second meeting of the Panel, footnote 46 to para. 52, citing to *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam:*

argues, commenting on Viet Nam's consequential claims, that the final determination in the sunset review is not a measure within our terms of reference.[340] We note that Viet Nam has not argued that the sunset review does fall within our terms of reference. Viet Nam has also confirmed that it is not pursuing any claims with respect to the sunset review other than as part of its claims on the "continued use" measure[341], which, we have determined, is not within our terms of reference.[342]

7.284 In light of the foregoing, we find that Viet Nam's "consequential" claims pertain to a measure not within our terms of reference. For this reason, we make no findings with respect to Viet Nam's "consequential" claims of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement.

## VIII. CONCLUSIONS AND RECOMMENDATION

### A. CONCLUSIONS

8.1 For the reasons set out in the foregoing sections of this Report, we conclude as follows:

(a) A measure consisting of the "continued use of challenged practices" is not within our terms of reference.

(b) The United States acted inconsistently with Article 2.4 of the Anti-Dumping Agreement as a result of the USDOC's application of the zeroing methodology to calculate the dumping margins of selected respondents in the second and third administrative reviews under the *Shrimp* anti-dumping order; we exercise judicial economy in respect of Viet Nam's claims that the United States acted inconsistently with Articles 9.3, 2.1, and 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(c) The U.S. zeroing methodology, as such, as it relates to the use of simple zeroing in administrative reviews, is inconsistent with the United States' obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

(d) Viet Nam has not established that the USDOC's decisions to limit its examinations in the second and third administrative reviews are inconsistent with Articles 6.10, 9.3, 11.1, and 11.3 of the Anti-Dumping Agreement.

(e) Viet Nam has not established that the United States acted inconsistently with its obligations under the first sentence of Article 6.10.2 of the Anti-Dumping Agreement in the second and third administrative reviews.

---

*Final Results of the Five-Year "Sunset" Review of the Antidumping Duty Order*, 75 Fed. Reg. 75965, 7 December 2010, available at http://ia.ita.doc.gov/frn/summary/vietnam/2010-30664.txt). In the same oral statement, Viet Nam argues that the challenged USDOC practices have, therefore, effectively resulted in a sunset review determination which is inconsistent with the United States' obligations under Article 11.3 of the Anti-Dumping Agreement.

[340] United States' comments on Viet Nam's response to Panel question 69.

[341] Viet Nam's response to Panel question 9, para. 15.

[342] Moreover, we note that while Viet Nam's "consequential claims" appear to be very closely related to the "continued use" measure, Viet Nam has indicated that it considers them to be distinct and that it maintains its "consequential claims" regardless of our determination with respect to whether the "continued use" measure falls within our terms of reference. Viet Nam's response to Panel questions 13(iii) and 69.

(f) Viet Nam has not established that the United States acted inconsistently with its obligations under the second sentence of Article 6.10.2 of the Anti-Dumping Agreement in the administrative reviews at issue.

(g) The United States acted inconsistently with its obligations under Article 9.4 of the Anti-Dumping Agreement as a result of the USDOC's imposition, in the second and third administrative reviews, of an "all others" rate determined on the basis of margins of dumping calculated with zeroing; we exercise judicial economy in respect of Viet Nam's claims under Articles 9.3, 2.4.2, and 2.4 of the Anti-Dumping Agreement.

(h) Viet Nam's claims of violation under Article 17.6(i) of the Anti-Dumping Agreement in relation to the "all others" rate are not within our terms of reference.

(i) The USDOC's failure to assign an "all others" rate to the Vietnam-wide entity in the second and third administrative reviews is inconsistent with Article 9.4 of the Anti-Dumping Agreement.

(j) The USDOC's assignment of a facts available rate to the Vietnam-wide entity in the second administrative review and a rate that is in substance a facts available rate in the third administrative review is not consistent with Article 6.8 of the Anti-Dumping Agreement.

(k) Viet Nam's claims of violation under Article 17.6(i) of the Anti-Dumping Agreement in relation to the rate assigned to the Vietnam-wide entity are not within our terms of reference.

(l) Viet Nam's "consequential" claims of violation under Articles 9.3, 11.1 and 11.3 of the Anti-Dumping Agreement relate to a measure that is not within our terms of reference and we make no findings in respect of these claims.

## B. RECOMMENDATION

8.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with certain provisions of the Anti-Dumping Agreement and of the GATT 1994, it has nullified or impaired benefits accruing to Viet Nam under these agreements.

8.3 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with provisions of the Anti-Dumping Agreement and of the GATT 1994 as set out above, we recommend that the United States bring its measures into conformity with its obligations under those Agreements.