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## **1 ARTICLE 9**

### **1.1 Text of Article 9**

#### **Article 9**

##### *Imposition and Collection of Anti-Dumping Duties*

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

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

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

- 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.<sup>20</sup> Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

*(footnote original)*<sup>20</sup> It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

- 9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

- 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 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,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

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. 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.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

## 1.2 General

1. In *US – Customs Bond Directive*, the Panel examined a claim that an enhanced bond requirement (EBR) for certain shrimp, imposed pursuant to the Amended Customs Bond Directive (Amended CBD) was inconsistent with Article 9. The Appellate Body upheld the Panel's finding that bonds provided under the Amended CBD are not anti-dumping duties or countervailing duties, fall outside the scope of Articles 9 of the Anti-Dumping Agreement and 19 of the SCM Agreement, and consequently are not inconsistent as such with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Agreement nor with Articles 19.2, 19.3 and 19.4 of the SCM Agreement:<sup>1</sup>

"A bond under the Amended CBD secures the payment of a duty. A bond, by itself, is not a duty as it does not entail any transfer of money from the importer to the government. Therefore, the EBR imposed pursuant to the Amended CBD cannot be characterized as a 'duty' within the meaning of Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*."<sup>2</sup>

<sup>1</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 281.

<sup>2</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 280.

2. As the text of certain provisions in Article 19 of the SCM Agreement parallels the text of provisions in Article 9 of the Anti-Dumping Agreement, see also the Section on Article 19 of the SCM Agreement.

### 1.3 Article 9.1

3. The Appellate Body in *EC – Fasteners (China)* observed that the second sentence of Article 9.1 expresses a "preference ... for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry. To express such a preference, Article 9.1 uses the expression 'it is desirable'."<sup>3</sup>

4. The Panel in *EU – Footwear (China)* stressed that while Article 9.1 clarifies that WTO Members may choose to impose anti-dumping duties at levels below the margin of dumping, neither this provision nor Article 3.1 of the Agreement prescribes the basis on which the lesser duty level will be calculated:

"We agree with the European Union, and 'of a duty at a level adequate to remove the injury is clearly contemplated by Article 9.1, this does not limit the basis on which an investigating authority may choose to apply a duty less than the full amount of the margin of dumping. Even assuming that, as in this case, an investigating authority's stated basis for application of a lesser duty is to impose a duty at a level adequate to 'eliminate the material injury to the ... industry caused by the dumped imports without exceeding the dumping margins',<sup>4</sup> this does not, in our view, establish that Article 3.1 is relevant to the establishment of the level of lesser duty to be applied. There is, in our view, no basis in the text of Article 3.1 for the conclusion that it requires any particular approach to the calculation of a level of duty that will be sufficient to remove the injury determined to exist."<sup>5</sup>

5. See also paragraph 46 below.

### 1.4 Article 9.2

#### 1.4.1 General; mandatory nature of Article 9.2

6. In *EC – Fasteners (China)*, the Appellate Body summarized its interpretation of Article 9.2:

"Article 9.2 of the *Anti-Dumping Agreement* requires investigating authorities to specify an individual duty for each supplier, except where this is impracticable, when several suppliers are involved. We reach this conclusion by reading the first sentence of Article 9.2 in conjunction with the second sentence of Article 9.2. The first sentence requires investigating authorities to collect anti-dumping duties in the appropriate amounts in each case and on a non-discriminatory basis on imports from all sources—that is, suppliers—while the second sentence requires investigating authorities to name the supplier or suppliers of the product concerned. We also consider that the exception in the third sentence of Article 9.2 does not allow the imposition of a single country-wide anti-dumping duty in investigations involving NMEs where the imposition of individual duties is alleged to be 'ineffective', but is not 'impracticable'."<sup>6</sup>

7. The Appellate Body in *EC – Fasteners (China)* interpreted Article 9.2: "It is ... clear from the wording of this provision, which uses the auxiliary verb 'shall', that the collection in appropriate amounts of anti-dumping duties and the naming of the supplier are of a mandatory nature."<sup>7</sup>

8. The Panel in *EU – Footwear (China)* stated that Article 9.2 was a predecessor to the more detailed rules in Article 6.10 concerning the basic principle of individual treatment of exporters:

<sup>3</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 336.

<sup>4</sup> Definitive Regulation, Exhibit CHN-3, recital 288.

<sup>5</sup> Panel Report, *EU – Footwear (China)*, para. 7.927.

<sup>6</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 354.

<sup>7</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 336.

"Article 9.2, which has remained unchanged since it was negotiated in the Kennedy Round, is a predecessor to the more detailed rules set out in Article 6.10, which was added to the AD Agreement following the Uruguay Round, and further elaborates on the basic principle of individual treatment established in the earlier provision. While the language is somewhat different, in our view, the similar structure of the two provisions supports the conclusion that they concern the same basic principle, that individual exporters and producers in anti-dumping investigations should be treated individually in the determination and imposition of anti-dumping duties. Moreover, we see nothing in the text of Article 9.2 of the AD Agreement, or in its context, that would suggest that the notion of 'impracticable' in that provision may relate to the effectiveness of anti-dumping measures imposed.

Thus, and for the same reasons as set out in more detail by the panel in *EC – Fasteners (China)*, we consider it clear that Article 9.2 is properly understood to require investigating authorities to name the individual suppliers on whom anti-dumping duties are imposed, except where the number of suppliers is so large that it would be impracticable to do so, in which case the supplying country may be named."<sup>8</sup>

9. See also the discussion of *EC – Fasteners (China)* under Article 6.10.

#### 1.4.2 "appropriate amounts"

10. The Panel in *Argentina – Poultry Anti-Dumping Duties* made the following observations concerning the relationship between Article 9.2 and Article 9.3:

"We note that Article 9.3 contains a specific obligation regarding the amount of anti-dumping duty to be imposed, whereas Article 9.2 employs far more general language in referring to the collection of duties in 'appropriate' amounts. In particular, Article 9.2 provides no guidance on what an 'appropriate' amount of duty may be in a given case. In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be 'appropriate' within the meaning of Article 9.2."<sup>9</sup>

11. The Panel in *EC – Salmon (Norway)* concluded that in order to comply with the Article 9.2 requirement that anti-dumping duties must be collected in the "appropriate amounts", "Members imposing minimum import prices (MIPs) on investigated parties must ensure that they do not exceed their respective normal values."<sup>10</sup> The Panel found important contextual support for this in Article 9.4:

"[T]he last sentence of Article 9.4 explicitly recognizes that the benchmark for a MIP applied to any individual exporter or producer that has provided information of the kind that could result in the calculation of an individual margin of dumping in accordance with Article 6.10.2, may be equivalent to its 'individual ... normal values'."<sup>11</sup>

12. The Panel in *EC – Salmon (Norway)*, found that the investigating authority did not act consistently with the obligation in Article 9.2 to ensure duties were collected in the "appropriate amounts":

"We recall that the MIPs established by the investigating authority were based on the 'non-injurious' MIPs, because these were found to be lower than the 'non-dumped' MIPs. To the extent that we have found that the 'non-dumped' MIPs calculated by the investigating authority were greater than the relevant normal values, greater than what they should have been or derived through the application of a flawed methodology, the investigating authority's finding that the 'non-injurious' MIPs were less than the 'non-dumped' MIPs rested on a flawed factual basis. Thus, in imposing

<sup>8</sup> Panel Report, *EU – Footwear (China)*, paras. 7.91-7.92.

<sup>9</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.

<sup>10</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.709.

<sup>11</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.707.

the MIPs on the investigated parties at the level of the 'non-injurious' MIPs, the investigating authority did not act consistently with the obligation to ensure that anti-dumping duties must be collected in the 'appropriate amounts', within the meaning of Article 9.2 of the AD Agreement."<sup>12</sup>

13. The Appellate Body in *EC – Fasteners (China)* found that the "appropriate amount" of an anti-dumping duty that can be imposed must be an individual one, not a country-wide rate:

"Article 6.10 of the *Anti-Dumping Agreement* contains an obligation to determine individual dumping margins for each exporter or producer, except when sampling is used or if a derogation is otherwise provided for in the covered agreements. We observe that, where an individual margin of dumping has been determined, it flows from the obligation contained in the first sentence of Article 9.2 that the *appropriate* amount of anti-dumping duty that can be imposed also has to be an individual one. We do not see how an importing Member could comply with the obligation in the first sentence of Article 9.2 to collect duties in the *appropriate* amounts in each case if, having determined individual dumping margins, it lists suppliers by name, but imposes country-wide duties. In other words, unless sampling is used, the *appropriate* amount of an anti-dumping duty in each case is one that is specified by supplier, as further clarified and confirmed by the obligation to name suppliers in the second sentence of Article 9.2."<sup>13</sup><sup>14</sup>

#### 1.4.3 "all sources"

14. The Appellate Body in *EC – Fasteners (China)* upheld a Panel finding interpreting the term "sources" in Article 9.2 as referring to individual exporters or producers, and not to the country as a whole:

"Article 9.2 of the *Anti-Dumping Agreement* requires that anti-dumping duties be collected on a non-discriminatory basis from 'all sources' found to be dumped and causing injury, except from 'those sources' from which price undertakings have been accepted. We agree with the Panel that the term 'sources', which appears twice in the first sentence of Article 9.2, has the same meaning and refers to individual exporters or producers and not to the country as a whole. This is indicated by the fact that price undertakings mentioned in the first sentence of Article 9.2 are accepted, according to Article 8 of the *Anti-Dumping Agreement*, from individual exporters and not from countries. Therefore, the requirement under Article 9.2 that anti-dumping duties be collected in appropriate amounts in each case and from all sources relates to the individual exporters or producers subject to the investigation."<sup>15</sup>

15. The Panel in *EC – Fasteners (China)* drew a contrast between Article 9.2 and "the parallel provision of the SCM Agreement, Article 18, which specifically provides for the acceptance of undertakings from the government of the exporting Member to eliminate or limit the subsidy, or take other measures concerning its effects. In our view, this difference reflects the fact that subsidization is a matter of government action, while dumping is, in general, a consequence of pricing decisions by commercial enterprises."<sup>16</sup>

#### 1.4.4 "The authorities shall name the supplier or suppliers of the product concerned"

16. The Appellate Body in *EC – Fasteners (China)* also found that "the obligation to name individual suppliers in the second sentence of paragraph 2 is closely related to the imposition of

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<sup>12</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.727.

<sup>13</sup> (*footnote original*) The requirement in Article 9.2 to specify duties by individual suppliers is also consistent with the obligation in that provision not to discriminate in the collection of duties on imports from all sources found to be dumped and causing injury. In this case, if an individual dumping margin has been determined for each exporter or producer consistently with Article 6.10, the principle of non-discrimination requires that each exporter or producer obtains an anti-dumping duty that corresponds to its individual dumping margin.

<sup>14</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 339.

<sup>15</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 338.

<sup>16</sup> Panel Report, *EC – Fasteners (China)*, fn 279 to para. 7.103.

individual anti-dumping duties and ... the requirement to name suppliers that are subject to imposition and collection of anti-dumping duties should be interpreted as a requirement to specify duties for each supplier."<sup>17</sup>

#### **1.4.5 Third sentence of Article 9.2**

17. In *EC – Fasteners (China)*, the Appellate Body discussed whether the exception in the third sentence of Article 9.2 would justify imposition of country-wide rates on suppliers that are all related to the State in order to avoid circumvention. The Appellate Body observed that "Article 9.2, third sentence, allows Members to name the supplying country concerned only when it is impracticable to name individual suppliers; it does not permit naming the supplying country when the imposition of individual duties is ineffective because it may result in circumvention of the anti-dumping duties."<sup>18</sup>

#### **1.5 Article 9.3**

##### **1.5.1 "de minimis" test**

18. The Panel in *US – DRAMS* concluded that "Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures. As Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures, it certainly cannot require Members to apply a particular *de minimis* standard in such procedures."<sup>19</sup>

19. The Panel in *US – DRAMS* further stated:

"A *de minimis* test in the context of an Article 9.3 duty assessment will not remove an exporter from the scope of the order. Thus, the implication of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly."<sup>20</sup>

20. The Panel in *US – DRAMS* discussed the different functions of the *de minimis* test in Article 5.8 and Article 9.3.<sup>21</sup>

##### **1.5.2 Variable duties**

21. The Panel in *Argentina – Poultry Anti-Dumping Duties* addressed the argument that variable anti-dumping duties are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established *at the time of collection* (i.e., the difference between a "minimum export price", or reference normal value, and actual export price), rather than by reference to the margin of dumping established during the investigation. Brazil argued that from the moment the anti-dumping duty is imposed until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the margin assessed in the investigation, and found in the final determination. The Panel rejected this argument and concluded that Article 9.3 does not prohibit the use of variable anti-dumping duties:

"In addressing this claim, we note that nothing in the *AD Agreement* explicitly identifies the form that anti-dumping duties must take. In particular, nothing in the *AD Agreement* explicitly prohibits the use of variable anti-dumping duties. Brazil's Claim 29 is based on Article 9.3 of the *AD Agreement*. As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed

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<sup>17</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 341.

<sup>18</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 348.

<sup>19</sup> Panel Report, *US – DRAMS*, para. 6.89.

<sup>20</sup> Panel Report, *US – DRAMS*, para. 6.90.

<sup>21</sup> See also the Section on Article 5 of the Anti-Dumping Agreement.



in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected. Our understanding that Article 9.3 is concerned primarily with duty assessment is confirmed by the fact that the broadly equivalent provision in the *SCM Agreement* (i.e., Article 19.4) refers to the 'lev[y]ing' of duties, and footnote 51 to that provision states that ' "levy" shall mean the definitive or final legal **assessment or collection** of a duty or tax' (emphasis added).<sup>22</sup> When viewed in this light, it is not obvious that – as Brazil effectively argues – Article 9.3 prohibits variable anti-dumping duties by ensuring that anti-dumping duties do not exceed the margin of dumping established during 'the investigation phase' pursuant to Article 2.4.2. Neither the ordinary meaning of Article 9.3, nor its context (i.e., sub-paragraphs 1-3), supports that view. If Article 9.3 were designed to prohibit the use of variable customs duties, presumably that prohibition would have been clearly spelled out."<sup>23</sup>

22. The Panel also pointed to Article 9.3.1 dealing with retrospective duty assessment as support for its view that duties may be collected on the basis of a margin of dumping established after the end of the investigation.<sup>24</sup> Similarly, the Panel considered that the Article 9.3.2 refund mechanism in the case of a prospective duty assessment would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected and drew the following conclusions:

"This therefore further undermines Brazil's argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty *refund* is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty *collection*. Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer. While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant to the issue before us. Accordingly, we see no reason why it is not permissible for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection."<sup>25</sup>

23. The Panel in *Canada – Welded Pipe* found that the ceiling for the collection of anti-dumping duties under Article 9.3 is not necessarily the margin calculated in the original investigation and that it can also be a margin calculated subsequent to the completion of the investigation, provided it has been calculated on the basis of data pertaining to the relevant exporter:

"We agree with this finding. If an updated, 'actual' margin of dumping is determined with respect to particular imports at some time after the original investigation has been completed, that updated margin of dumping serves as the ceiling for the amount of anti-dumping duty that may be imposed or assessed on those imports. In other words, the ceiling for the imposition or collection of anti-dumping duties is the exporter-specific margin of dumping prevailing at any given time. However, recognizing that an exporter's margin of dumping may change over time is very different from allowing a particular exporter's margin of dumping to be ignored, and the duty ceiling for that exporter to be established by reference to some other exporter's data.

In this case, we are not dealing with a situation where the margins of dumping established for the relevant exporters determined during the investigation were

<sup>22</sup> (footnote original) The Tokyo Round *AD Agreement* is also instructive, since Article 8.3 of that Agreement stated "[t]he amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. **Therefore**, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible" (emphasis added). This provision clearly demonstrates that the general requirement that anti-dumping duties shall not exceed the margin of dumping is concerned with duty assessment.

<sup>23</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.355.

<sup>24</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.

<sup>25</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.



replaced by updated, 'actual' margins of dumping established for those same exporters. Nor did Canada use normal values determined for those exporters in establishing a duty rate for imports of new models or types of the product from those exporters. Rather, the CBSA established a duty rate for such imports from these two exporters based on data collected during the original investigation from a different exporter. The CBSA thereby failed to preserve the fundamental link, established by the *chapeau* to Article 9.3, between the amount of the anti-dumping duty imposed or collected in respect of a given exporter and a margin of dumping established for that exporter."<sup>26</sup>

24. The Panel in *Canada – Welded Pipe* found that the *chapeau* of Article 9.3 had application independently of its subparagraphs:

"In the context of a retrospective assessment system, the Appellate Body has stated that 'Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty 'shall not exceed the margin of dumping as established under Article 2' of that Agreement'. We consider that this statement applies equally in respect of Article 9.3.2. If the refund mechanism provided for in sub-paragraph 1 and 2 of Article 9.3 remains 'subject to' the 'overarching requirement' of the *chapeau*, the *chapeau* must have application independently of those refund mechanisms.

In addition, if the *chapeau* of Article 9.3 were understood to allow the approach taken by Canada, any Member could impose an anti-dumping duty that is so high that imports effectively cease, and argue that it was not acting inconsistently with Article 9.3 because its refund mechanism ensured compliance. But the absence of imports would preclude any refund proceeding, and interested parties could be left without recourse under the Anti-Dumping Agreement."<sup>27</sup>

### 1.5.3 Conditions to carry out duty assessment and changed circumstances reviews

#### 1.5.3.1 Exhaustiveness of the conditions listed

25. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body held that the conditions to carry out duty assessment reviews and changed circumstances reviews listed in Articles 9.3.2 and 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement are exhaustive, and do not include a requirement to condition a review on a showing of representative volume of exports:

"[T]he above provisions ... require an investigating authority to undertake duty assessment reviews and changed circumstances reviews once the conditions set out in those provisions have been satisfied. In our view, these conditions are exhaustive; thus, if an agency seeks to impose additional conditions on a respondent's right to a review, this would be inconsistent with those provisions".<sup>28</sup>

26. The Appellate Body confirmed that the completion of judicial proceedings as a condition for carrying out duty assessment and changed circumstances reviews is not provided for in Articles 9.3.2 of the Anti-Dumping Agreement and 11.2 and Article 21.2 of the SCM Agreement.<sup>29</sup>

#### 1.5.3.2 When a duty becomes final

27. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice* agreed with the Panel that "a duty becomes 'definitive'—and therefore satisfies one of the conditions for a review set out in Articles 9.3 and 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement—at the time of the investigating authority's final affirmative determination" and that "a product is subject to a duty as soon as an investigation has been concluded and a final determination has

<sup>26</sup> Panel Report, *Canada – Welded Pipe*, paras. 7.157 and 7.159.

<sup>27</sup> Panel Report, *Canada – Welded Pipe*, paras. 7.163-7.164.

<sup>28</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 315.

<sup>29</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 350.

been made deciding to impose anti-dumping or countervailing duties."<sup>30</sup> The Appellate Body concluded that these provisions:

"[P]ermit agencies to require that duties be *imposed* on a product—in the sense that a final determination be made, following an original investigation, with respect to the anti-dumping/countervailing duty liability for entries of such product— as a condition of the right to a refund or review of duties ... Where duties *have been imposed*, and the remaining conditions of these treaty provisions satisfied, an investigating authority is not permitted to decline a request for a duty assessment or changed circumstances review."<sup>31</sup>

#### 1.5.4 Concept of "product as a whole" in reviews under Article 9 of the Anti-Dumping Agreement

28. Article 9 covers the "Imposition and Collection of Anti-Dumping Duties". The Panel in *US – Zeroing (Japan)* summarised the operation of the Article:

"Article 9.3 requires that the amount of the anti-dumping duty not exceed the margin of dumping as established under Article 2. Articles 9.3.1 and 9.3.2 specify certain rules to implement this requirement when the amount of the anti-dumping duty is assessed on a retrospective basis (Article 9.3.1) or on a prospective basis (Article 9.3.2). In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the final liability for payment of anti-dumping duties under Article 9.3.1 or for the purpose of determining the amount of anti-dumping duty that must be refunded under Article 9.3.2."<sup>32</sup>

29. The Appellate Body in *US – Zeroing (Japan)* set out its interpretation of Article 9 in relation to the practice of zeroing:

"As the Appellate Body has stated previously, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, investigating authorities 'are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter', in accordance with Article 2. Put differently, 'the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.' The Appellate Body has further emphasized that '[a]lthough Article 9.3 sets out a requirement regarding the amount of the assessed anti-dumping duties, it does not prescribe a specific methodology according to which the duties should be assessed.' In particular, the Appellate Body has underscored that 'a reading of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 does not suggest that final anti-dumping duty liability cannot be *assessed* on a transaction- or importer-specific basis, or that the investigating authorities may not use specific methodologies that reflect the distinct nature and purpose of proceedings governed by these provisions, for purposes of assessing final anti-dumping duty liability, provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping.'

... the Panel expresses its concern that, if a Member applies a retrospective duty assessment system, it 'may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value.' This concern is not well founded. The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping. At the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all

<sup>30</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 341-347.

<sup>31</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 348.

<sup>32</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.198.

export sales, including those occurring at above the normal value. However, in a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in *all* sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The same 'ceiling' applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems."<sup>33</sup>

30. The Appellate Body in *US – Stainless Steel (Mexico)* also ruled that zeroing is unacceptable under Article 9.3:

"A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time.... the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation."<sup>34</sup>

31. The Appellate Body in *US – Stainless Steel (Mexico)* noted, as it had in previous cases, that under Article 9.3 the margin of dumping established for an exporter operated as a ceiling for the total amount of anti-dumping duties that could be levied. The Appellate Body saw no basis for disregarding results of comparisons where the export price exceeded the normal value when calculating the margin of dumping for the exporter. In the view of the Appellate Body, when negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.<sup>35</sup> Nor did the Appellate Body believe that the text of the Anti-Dumping Agreement supported treating those transactions that occurred above normal value as "dumped" for the purposes of determining the existence and magnitude of dumping in original investigations, but "not dumped" for purposes of periodic reviews:

"First, as noted above, the transactions that are disregarded may well pertain to a model, type, or class that fell within the definition of the product under investigation and were treated as 'dumped' in the original investigation. By excluding these transactions at the duty assessment stage, a mismatch is created between the product considered 'dumped' and the product as defined by the investigating authority."<sup>36</sup>

32. The Appellate Body in *US – Stainless Steel (Mexico)* noted further that treating the same transaction differently in periodic reviews from original investigations would create a problem with the injury analysis:

"[T]his treatment is inconsistent with the manner in which injury was determined in the original investigation, where transactions that occurred at above the normal value were taken into account in order to calculate the volume of dumped imports for purposes of injury determination. Obviously, we do not suggest that there need be a fresh injury determination at the duty assessment stage; rather, we wish to point to the contradiction that arises when the same type of transactions are treated as 'dumped' for purposes of injury determination in the original investigation and as 'non-dumped' in periodic reviews for duty assessment."<sup>37</sup>

33. The Appellate Body in *US – Stainless Steel (Mexico)* was also concerned that providing for different treatment in the case of reviews would provide an opportunity to circumvent the prohibition on zeroing in original investigations under the first sentence of Article 2.4.2:

"In addition, as we see it, a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to

<sup>33</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

<sup>34</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.

<sup>35</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103.

<sup>36</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 107.

<sup>37</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 108.

circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. We further note that, if no periodic review is requested, the final anti-dumping duty liability for all importers will be assessed at the cash deposit rate applicable to the relevant exporter. When the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order."<sup>38</sup>

34. The Panel in *US – Shrimp (Viet Nam)* examined Viet Nam's claims regarding the use of zeroing in a periodic review. The Panel "recall[ed] that the findings of Appellate Body in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* 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."<sup>39</sup> The Panel found that the US zeroing methodology, as such, as it relates to the use of simple zeroing in periodic reviews, is inconsistent with Article 9.3 and Article VI:2.

### 1.5.5 Retrospective system: reviews and zeroing

35. The Appellate Body in *US – Zeroing (EC)* held that the United States' application of "zeroing" in certain administrative reviews was inconsistent with Article 9.3 and GATT Article VI:2; the Appellate Body noted that Article 9.3 "refers to the margin of dumping as established under Article 2."<sup>40</sup> Referring to its prior Appellate Body decisions on *EC – Bed Linen* and *US – Softwood Lumber V*, indicating that, under the Anti-Dumping Agreement and GATT Article VI, "dumping" and "margins of dumping" "must be established for the product under investigation as a whole",<sup>41</sup> the Appellate Body found that under Article 9.3 and Article VI:2, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole."<sup>42</sup> It then noted that under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding."<sup>43</sup>

36. However, the Appellate Body in *US – Zeroing (EC)* upheld the Panel's finding that zeroing, as applied by the DOC in the administrative reviews at issue, is not inconsistent with Articles 11.1 and 11.2.<sup>44</sup> In addressing this issue, the Appellate Body stated that the European Communities had not established that Articles 11.1 and 11.2 apply to the reassessment of the cash-deposit rate in the context of administrative reviews:

"[W]e fail to see how the reassessment of a cash-deposit rate to be applied to future entries could constitute a review of whether the continued imposition of the antidumping duty is necessary to counteract dumping that is causing injury."<sup>45</sup>

37. The Panel in *US – Anti-Dumping Methodologies (China)* found that the USDOC acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by using zeroing in an administrative review in connection with third comparison methodology provided for in Article 2.4.2.<sup>46</sup>

<sup>38</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.

<sup>39</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.141.

<sup>40</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 124.

<sup>41</sup> See the Section on Article 2 of the Anti-Dumping Agreement.

<sup>42</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 127.

<sup>43</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 130.

<sup>44</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 169.

<sup>45</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 168.

<sup>46</sup> Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.237-7.239.

### 1.5.6 Prospective normal value system: reviews and zeroing

38. The Panel in *US – Softwood Lumber V (Article 21.5 – Canada)* said that if the Appellate Body's interpretation (as determined in previous cases) of "margins of dumping" was to apply throughout the Anti-Dumping Agreement (i.e. to be determined for the "product as a whole"), it would lead to absurd results under the prospective normal value system. It would mean that "one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers."<sup>47</sup> On appeal, the Appellate Body disagreed with the Panel. In the view of the Appellate Body:

"[The Panel] confuse[d] duty collection at the time of importation with the determination of the final margin of dumping and assessment of final duties in administrative reviews ... Under a prospective normal-value system, the anti-dumping duty collected at the time of importation is subject to review and importers have the right to request a refund when the duties paid exceed the actual margin of dumping, pursuant to Article 9.3.2 of the Anti-Dumping Agreement. Accordingly, the operation of prospective normal-value systems has no bearing on the permissibility of zeroing under the transaction-to-transaction comparison methodology in Article 2.4.2."<sup>48</sup>

39. The Appellate Body in *US – Zeroing (Japan)* disagreed with the Panel's general approach to zeroing, including in the context of the prospective normal value system. In disagreeing with the Panel, the Appellate Body quoted extensively from the Panel Report:

"Before the Panel, Japan argued that the collection of a variable duty on an entry-by-entry basis under a prospective normal value system does not involve the establishment of margins of dumping with respect to individual export transactions, because the actual margin of dumping in such a system is only determined in a review under Article 9.3.2. Moreover, according to Japan, in a prospective normal value system, 'the *final liability* for duties must be assessed in a review under Article 9.3.2'.

The Panel disagreed, noting that Japan's argument was 'inconsistent with the *prospective* nature of such a system'. The Panel added that '[i]t is clear from the text of Article 9.4(ii) of the [*Anti-Dumping*] Agreement that in a prospective normal value system '*liability for payment of anti-dumping duties* is calculated on the basis of a prospective normal value'. Moreover, '[a]lthough Article 9.3.2 provides for a refund procedure when the amount of anti-dumping duties is assessed on a prospective basis, a requirement that arguably also applies to prospective normal value systems referred to in Article 9.4(ii), a refund procedure in a prospective duty assessment system is not a *determination of final liability for payment of anti-dumping duties*.' The Panel further noted that '[t]he phrase 'determination of the final liability for payment of anti-dumping duties' is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2.'

The Panel stated that, 'notwithstanding the possibility of a refund, liability for payment of anti-dumping duties is final in a prospective normal value system at the time of importation of a product.' This may be so, but it does not mean that the anti-dumping duty collected at the time of importation represents a 'margin of dumping'. Nor does it mean that the total amount of anti-dumping duties that are levied can exceed the exporter's or foreign producer's 'margin of dumping'. Under a prospective normal value system, exporters may choose to raise their export prices to the level of the prospective normal value in order to avoid liability for payment of anti-dumping duties on each export transaction. However, under Article 9.3.2, the amount of duties collected is subject to review so as to ensure that, pursuant to Article 9.3 of the *Anti-Dumping Agreement*, the amount of the anti-dumping duty collected does not exceed the margin of dumping as established under Article 2. It is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter.

<sup>47</sup> Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.57.

<sup>48</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.

The Panel stated that, in a prospective normal value system, 'liability for payment of anti-dumping duties is incurred only to the extent that prices of individual export transactions are below normal value.' Therefore, Article 9.4(ii) 'confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value.' The Panel also stated that '[i]f in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value', there is no reason why duties may not be similarly assessed under the United States' retrospective duty assessment system.

Under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.

The *Anti-Dumping Agreement* is neutral as between different systems for levy and collection of anti-dumping duties. The Agreement lays down the 'margin of dumping' as the ceiling for collection of duties regardless of the duty assessment system adopted by a WTO Member, and provides for a refund if the ceiling is exceeded. It is therefore incorrect to say that the *Anti-Dumping Agreement* favours one system, or places another system at a disadvantage."<sup>49</sup>

### 1.5.7 Are "dumping" and "margins of dumping" exporter- or importer-related concepts?

40. The Appellate Body in *US – Zeroing (Japan)* disagreed with the Panel's approach to importer-specific duty assessment. It was an issue that would come up again and be dealt with extensively in *US – Stainless Steel (Mexico)*:

"[T]he Panel expresses its concern that, if a Member applies a retrospective duty assessment system, it 'may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value.' This concern is not well founded. The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping. At the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales, including those occurring at above the normal value. However, in a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in all sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The same 'ceiling' applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems."<sup>50</sup>

41. The Appellate Body in *US – Stainless Steel (Mexico)* was of the view that "dumping" and "margin of dumping" were exporter-specific concepts, and did not relate to importers. Drawing on other provisions in the Anti-Dumping Agreement to support its view, the Appellate Body noted:

"There is nothing in Articles 5.8, 6.10, and 9.5 of the *Anti-Dumping Agreement* to suggest that it is permissible to interpret the term 'margin of dumping' under those provisions as referring to multiple 'dumping margins' occurring at the level of

<sup>49</sup> Appellate Body Report, *US – Zeroing (Japan)*, paras. 158-163.

<sup>50</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 156.



individual importers. Instead, these provisions reinforce the notion that a single margin of dumping is to be established for each individual exporter investigated.

...

... we disagree with the proposition that importers 'dump' and can have 'margins of dumping'. Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets. The fact that 'dumping' and 'margin of dumping' are exporter-specific concepts under the *Anti-Dumping Agreement* is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties."<sup>51</sup>

We also disagree with the proposition that the term 'margin of dumping' has a different or special meaning in the context of Article 9.3 of the *Anti-Dumping Agreement* ... Although transaction-based multiple comparisons may be necessary in periodic reviews to calculate an importer's liability for payment of anti-dumping duties, this cannot impart a different or special meaning to the term 'margin of dumping' in Article 9.3."<sup>52</sup>

42. In *US – Stainless Steel (Mexico)* the Appellate Body stated that: "A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporters pricing behaviour as reflected in all of its transactions over a period of time."<sup>53</sup> The Appellate Body continued, that in order to address "injurious dumping", dumping and margin of dumping could not exist at the level of an individual transaction (emphasizing in a footnote that this situation did not address the hypothetical situation of one large import transaction). In addition, it was not possible to have several margins of dumping for a single exporter for the product under consideration. The Appellate Body found no textual support to indicate that the concepts of transaction and importer specific dumping and margin of dumping could be confined to duty assessment under Article 9.3.<sup>54</sup>

43. The Appellate Body in *US – Stainless Steel (Mexico)* noted that in a prospective normal value system the anti-dumping duty collected from each importer at the time of importation did not represent a "margin of dumping". A margin of dumping was for an exporter and applied to all of its sales. A review could be triggered if the ceiling prescribed by Article 9.3 was breached (i.e. the margin of dumping could not exceed the margin established under Article 2). The Appellate Body also repeated its view from earlier decisions that the Anti-Dumping Agreement was neutral as to the different systems for the levy and collection of anti-dumping duties.<sup>55</sup>

44. The Appellate Body in *US – Stainless Steel (Mexico)* considered the Panel had misunderstood the Appellate Body's interpretation of Article 9.3 in previous disputes. The Appellate Body noted that it had consistently held that the total amount of anti-dumping duties assessed and collected from all importers could not exceed the total amount of dumping found in all sales made by the exporter concerned. Its interpretation had not favoured importers with high margins of dumping at the expense of importers who did not dump or dumped at a lower margin. In order to calculate a proper margin of dumping all transactions had to be taken into account. The Appellate Body summarized by saying that it had ruled on the amount of anti-dumping duty that could be levied in accordance with Article 9.3, and not on how that amount was to be collected from the importers.<sup>56</sup>

### 1.5.8 Relationship with Article 9.2

45. See paragraph 10 above.

<sup>51</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95.

<sup>52</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 89 and 95-96.

<sup>53</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.

<sup>54</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 99.

<sup>55</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 120-121.

<sup>56</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 112-114.



### 1.5.9 Relationship with Article 2

46. The Panel in *EC – Salmon (Norway)* found that the obligation in Article 9.3 to ensure that anti-dumping duties were not collected in excess of the "margin of dumping as established under Article 2" did not require that any anti-dumping duties collected not exceed the margin of dumping calculated in the original investigations:

"[W]e find that the obligation in Article 9.3 to ensure that anti-dumping duties are not collected in excess of the 'margin of dumping as established under Article 2' does not require that any anti-dumping duties collected not exceed the margin of dumping calculated in the *original investigation*. Thus, in the specific context of prospective normal value systems of duty assessment, such as the one applied by the EC in the present investigation, we do not believe that Article 9.3 prevents investigating authorities from collecting anti-dumping duties from investigated parties in excess of the *ad valorem* equivalent of the margin of dumping calculated in the original investigation, when such an amount of duty represents the difference between an investigated party's normal value and the export price of the transaction subject to duty assessment. On this basis, we find that Norway has failed to establish that the EC acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because of its failure to adopt a mechanism, in the operation of the MIPs it imposed, which ensured that an anti-dumping duty greater than the *ad valorem* equivalent of the margin of dumping from the *original investigation* could not be collected.

...

what is important in terms of compliance with Article 9.3 (and Article 9.1) of the AD Agreement is that any duties imposed and collected on investigated parties do not exceed the *actual* margin of dumping determined on the sales that are subject to duty assessment. In essence, this follows from the fact that pursuant to Article 9.3.2, investigating authorities must refund any duty collected in excess of the 'actual margin of dumping' for sales that are subject to duty assessment."<sup>57</sup>

47. The Panel in *EU – Biodiesel (Argentina)*, in a finding upheld by the Appellate Body, found that "it is clear that the term 'the margin of dumping as established under Article 2' means a margin established in a manner that is consistent with Article 2, as opposed to whatever erroneous margin was actually established by the investigating authority."<sup>58</sup> The Panel also found that in the investigation at issue the European acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 "by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement".<sup>59</sup>

48. The Appellate Body in *EU – Biodiesel (Argentina)* also agreed with the Panel's view that not every inconsistency with Article 2 in the calculation of dumping margins will lead to a violation of Article 9.3:

"[T]he Panel explicitly made clear that '[a]n error or inconsistency under Article 2 does *not* necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping.' According to the Panel, 'it is possible that an anti-dumping duty could be applied at a rate that is lower than the WTO-inconsistent dumping margin.' The Panel referred, by way of example, to the lesser duty rule under Article 9.1 of the Anti-Dumping Agreement. According to the Panel, where the lesser duty rule is applied, it is conceivable that the final duties imposed will 'not only be lower than the WTO-inconsistent dumping margin, but also lower than the dumping margin that would have been established in accordance with Article 2', and hence not inconsistent with Article 9.3 of the Anti-Dumping Agreement.

<sup>57</sup> Panel Report, *EC – Salmon (Norway)*, paras. 7.749 and 7.760.

<sup>58</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.362.

<sup>59</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.367. See also Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.168-7.173.

We agree with the above analysis of the Panel. Indeed, understanding the 'margin of dumping' referred to in Article 9.3 as one established consistently with Article 2 of the Anti-Dumping Agreement does *not* mean that *any error* in the calculation of the dumping margin will *necessarily* lead to a violation of Article 9.3. The application of the lesser duty rule provides one example of when this may not be the case. Moreover, because Article 9.3 is concerned with the maximum amount of anti-dumping duties that may be collected, the errors under Article 2 that matter for purposes of Article 9.3 are those that result in a *higher* dumping margin than the one that would have been calculated had the authority acted consistently with Article 2. Not all breaches of Article 2 will invariably or predictably entail such a result. In this respect, we also share the European Union's understanding that a complainant 'must show something more than a simple erroneous calculation of normal value' in order to succeed with a claim under Article 9.3. In our view, the complainant must show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2."<sup>60</sup>

#### 1.5.10 Relationship to the Note *Ad Article VI, Paragraphs 2 and 3*

49. In *US – Shrimp (Thailand)/US – Customs Bond Directive*, the Appellate Body found that the term "final determination" in the Note *Ad Paragraphs 2 and 3* of Article VI of the GATT 1994 "includes the determination that is made to assess the final liability for payment of anti-dumping duties under Article 9.3.1 in a retrospective duty assessment system."<sup>61</sup> See the discussion of this issue in the Section on Article VI of the GATT 1994.

### 1.6 Article 9.4

#### 1.6.1 Purpose of Article 9.4

50. In *US – Hot-Rolled Steel*, the Appellate Body indicated that "Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."<sup>62</sup>

51. The Panel in *EC – Salmon (Norway)*, drawing on the Appellate Body Report in *US – Hot Rolled Steel* explained Article 9.4 in the following way:

"Article 9.4 applies when investigating authorities have conducted a limited examination in accordance with Article 6.10 of the AD Agreement. In particular, Article 9.4 applies when an investigating authority has not determined an individual margin of dumping for each known exporter or producer, within the meaning of the first sentence of Article 6.10, and instead determined individual margins of dumping for a limited number of interested parties selected from the known exporters or producers, in accordance with the second sentence of Article 6.10."<sup>63</sup>

#### 1.6.2 Ceiling for "all others" rate

52. In *US – Hot-Rolled Steel*, the Appellate Body explained that Article 9.4 does not provide for a method to calculate "all others" rate but simply provides for a "ceiling" for such a rate and establishes two "prohibitions" on the use of certain margins in the calculation of the "all others" rate, i.e. not to use (i) zero or *de minimis* margins and (ii) margins established on the basis of best facts available:

"Article 9.4 does not prescribe any method that WTO Members must use to establish the 'all others' rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities '*shall not exceed*' in establishing an 'all others' rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be

<sup>60</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.103-6.104.

<sup>61</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 221.

<sup>62</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.

<sup>63</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.420.

established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who *were* investigated. However, the clause beginning with 'provided that', which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, 'for the purpose of this paragraph', investigating authorities '*shall disregard*', first, zero and *de minimis* margins and, second, 'margins established under the circumstances referred to in paragraph 8 of Article 6.'."<sup>64</sup>

### 1.6.3 Article 9.4(i): "weighted average margin of dumping with respect to selected exporters or producers"

#### 1.6.3.1 "margins"

53. In *US – Hot-Rolled Steel*, the Appellate Body looked into the meaning of the word "margins" under Article 9.4. The Appellate Body recalled the interpretation made by the Panel of the word "margins" under Article 2.4.2 in *EC – Bed Linen* and considered that the same meaning should apply to the word "margins" under Article 9.4:

"[W]e recall that the word 'margins', which appears in Article 2.4.2 of that Agreement, has been interpreted in *European Communities – Bed Linen*. The Panel found, in that dispute, and we agreed, that "margins" means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions. We see no reason, in Article 9.4, to interpret the word 'margins' differently from the meaning it has in Article 2.4.2, and the parties have not suggested one."<sup>65</sup>

54. In *EC – Salmon (Norway)* the anti-dumping duties applied by the investigating authority to non-investigated cooperating companies took the form of both minimum import prices (MIPs) and a fixed anti-dumping duty. Norway argued that the investigating authority relied on the weighted average margin of dumping for the individually investigated parties when setting the fixed duty. The European Communities disputed this, and argued that the fixed duty was derived instead from the weighted average injury margin, not the weighted average dumping margin for the investigated producers.<sup>66</sup> Following an analysis of the facts of the case the Panel in *EC – Salmon (Norway)* found that the investigating authority had acted inconsistently with Article 9.4(i) of the Anti-Dumping Agreement:

"[T]o the extent that it [the investigating authority] determined the fixed duty on the basis of an assessment that relied upon a weighted average margin of dumping for investigated parties that (i) was overstated because it did not take into account downward revisions to the margins of dumping of three individually examined producers; and (ii) was calculated with reliance on a margin of dumping that was based on 'facts available' [previously found to be inconsistent with Annex II and Article 6.8], we find that the investigating authority acted inconsistently with Article 9.4(i) of the AD Agreement."<sup>67</sup>

#### 1.6.3.2 "exporters or producers"

55. Referring to provisions which use the plural form, but which are also applicable in the singular case, the Panel in *EC – Bed Linen* stated that:

"Article 9.4(i) provides that the dumping duty applied to imports from producers/exporters not examined as part of a sample shall not exceed 'the weighted average margin of dumping established with respect to the selected exporters or producers'. We consider that this provision does not become inoperative if there is

<sup>64</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.

<sup>65</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

<sup>66</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.421.

<sup>67</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.428.

only one selected exporter or producer – rather, the dumping margin for that exporter or producer may be applied."<sup>68</sup>

56. However, see the explanations on Article 2 of the Anti-Dumping Agreement for a reversal by the Appellate Body of a panel finding under Article 2.2.2(ii) that the plural form "other exporters and producers" could also be interpreted as referring to one single exporter or producer.

### **1.6.3.3 "non-cooperating companies"**

57. In *EC – Salmon (Norway)*, Norway made a claim that was premised on the view that Article 9.4(i) governs the determination of margins of dumping for non-cooperating companies. The Panel rejected this view, clarifying the scope of Article 9.4(i).

"In our view, this does not include exporters and producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. Thus, the disciplines in Article 9.4(i) apply only in respect of non-investigated parties that cooperated with the investigating authority for the purpose of selection of the parties that would be subject to a limited investigation. It does not apply in respect of parties that did not cooperate for this purpose."<sup>69</sup>

## **1.6.4 Prohibitions in the calculation of "all others" rate: zero and de minimis margins, margins based on facts available**

### **1.6.4.1 Exclusion of margins based on facts available**

58. In *US – Hot-Rolled Steel*, Japan had claimed that the United States statutory method for calculating the "all others" rate in section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, as well as the authorities' application of the statutory method were inconsistent with Article 9.4 because they require the consideration of margins based in part on facts available in the calculation of the "all others" rate. The United States contended that only those margins which are calculated *entirely* on the basis of facts available could not be taken into account for the "all others" rate.<sup>70</sup> The Panel found that Article 9.4 excludes from the calculation of the ceiling for the "all others" rate any margins which are calculated, *even in part*, using facts available. The Appellate Body, which upheld the Panel's finding, found that "the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available ... Article 6.8 may apply in situations where recourse to facts available is needed to surmount the lack of even a very small amount of information."<sup>71</sup>

59. The Appellate Body then considered that "the '*circumstances referred to*' in Article 6.8 are the circumstances in which the investigating authorities properly have recourse to 'facts available' to overcome a lack of necessary information in the record ... these '*circumstances*' may, in fact, involve only a small amount of information to be used in the calculation of the individual margin of dumping for an exporter or producer."<sup>72</sup>

60. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel stated, as a general proposition, that where investigating authorities have limited their investigation to a select group of exporters or producers, in accordance with Article 6.10 of the Anti-Dumping Agreement, the anti-dumping duty rate applied to the exporters and producers not included in the investigated sample is referred to as the "all others" rate:

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<sup>68</sup> Panel Report, *EC – Bed Linen*, para. 6.72.

<sup>69</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.431.

<sup>70</sup> The United States interpreted this sentence of Article 9.4 as meaning to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin – normal value and export price – are determined *exclusively* using facts available, Appellate Body Report, *US – Hot-Rolled Steel*, para. 117.

<sup>71</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 119.

<sup>72</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 120.

"We note that Article 9.4 applies only in cases where investigating authorities have used 'sampling', that is, where investigating authorities have, in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers. In such cases, the anti-dumping duty rate applied by an investigating authority to those exporters and producers who were not included in the investigated sample is referred to as the 'all others' rate. We also note that Article 9.4 does not prescribe a particular method that WTO Members must use to determine the 'all others' rate; rather, it simply identifies a maximum limit, or ceiling, which investigating authorities 'shall not exceed' in establishing an 'all others' rate."<sup>73</sup>

61. The Panel then noted the parameters within which an "all others" rate may be set. The Panel considered that subparagraph (i) of Article 9.4 constrains the discretion of investigating authorities by imposing a ceiling that the "all others" rate "shall not exceed" and by requiring investigating authorities to disregard, for the purposes of paragraph 4, any zero, *de minimis*, and "facts available" margins. The Panel also considered that, by requiring investigating authorities to disregard "facts available" margins, Article 9.4 seeks to prevent exporters who were not asked to cooperate in the investigation from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters:

"Subparagraph (i) of Article 9.4 sets out the general rule that the relevant ceiling is to be established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who were 'selected' or investigated. However, this general rule is qualified by the proviso that, 'for the purpose of this paragraph', investigating authorities 'shall disregard', first, zero and *de minimis* margins and, second, 'margins established under the circumstances referred to in paragraph 8 of Article 6'. Thus, the provision constrains the discretion of investigating authorities in two ways: first, by imposing a ceiling that the 'all others' rate 'shall not exceed'; and, second, by requiring investigating authorities to disregard, for the purposes of that paragraph, any zero, *de minimis*, and 'facts available' margins. By requiring investigating authorities to disregard 'facts available' margins, Article 9.4 'seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters'."<sup>74</sup>

62. The Panel then turned to an argument by the United States that Article 9.4 would not apply, given that all dumping margins were based on facts available, that these margins would be disregarded under Article 9.4, and thus the provision would become "inoperative".<sup>75</sup> The Panel noted that nothing in the text of Article 9.4 indicates that that provision would cease to be applicable in a situation where all rates established by the investigating authority are zero, *de minimis*, or based on facts available. Thus, the Panel disagreed with the United States that Article 9.4 would be "inoperative" in the light of the facts and circumstances of the dispute:

"We note that although 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 the prohibitions'. However, nothing in the text of Article 9.4 indicates that the provision ceases to be applicable in a situation where all rates established by the investigating authority are either zero, *de minimis*, or based on facts available. In the absence of such a limitation in the text of Article 9.4, Article 3.2 of the DSU prevents us from 'add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements'. We therefore disagree with the United States that Article 9.4 of the Anti-Dumping Agreement is 'inoperative' in light of the facts and circumstances of the present case."<sup>76</sup>

63. The Panel also dismissed the United States' argument that the complainant's claim failed because it had not alleged what the cap was in a particular determination. In the Panel's view, the issue before it was not whether the US Department of Commerce (USDOC) had improperly

<sup>73</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.575.

<sup>74</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.576.

<sup>75</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.572 and 7.577.

<sup>76</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.578.

exceeded the ceiling for the "all others" rate inconsistently with Article 9.4(i). Rather, the issue was whether the investigating authority's determination of the ceiling for the "all others" rate was consistent with the proviso to Article 9.4 of the Anti-Dumping Agreement:

"We also note the United States' argument that Korea's claim fails because 'Korea has not even alleged what the cap was' in the determination at issue. Nothing in the record suggests that the USDOC calculated a ceiling for the 'all others' rate separately from the 'all others' rate of 60.81 percent assigned to Iljin, Iljin Electric, and LSIS. Rather, we consider that the determination of the ceiling for the 'all others' rate was implicit in the USDOC's determination of the 'all others' rate to be applied. The issue before us is not whether the USDOC improperly exceeded the ceiling for the 'all others' rate inconsistently with subparagraph (i) of Article 9.4, but, instead, whether the USDOC's determination of the ceiling for the 'all others' rate is consistent with the proviso to Article 9.4 of the Anti-Dumping Agreement."<sup>77</sup>

#### 1.6.4.2 Calculating an "all others" rate in a "lacuna situation"

64. In *US – Hot-Rolled Steel*, the Appellate Body considered how to interpret "margins established under the circumstances referred to in Article 6.8" in Article 9.4. The Appellate Body found that even margins calculated partially on the basis of the facts available were "established under the circumstances referred to" in Article 6.8, and further reasoned that the purpose of Article 9.4 is to prevent exporters who were not asked to cooperate in the investigation from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters:

"To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet, the text of Article 9.4 simply refers, in an open-ended fashion, to 'margins established under the circumstances' in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word 'entirely' as suggested by the United States. In our view, a margin does not cease to be 'established under the circumstances referred to' in Article 6.8 simply because not every aspect of the calculation involved the use of 'facts available'.

Our reading of Article 9.4 is consistent with the purpose of the provision. Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of, information supplied by the investigated exporters. ...Article 9.4 seeks to prevent the exporters who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to 'all others' were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins 'established' even in part on the basis of the facts available."<sup>78</sup>

65. In response to the US objection that this interpretation of Article 9.4 would make it impossible to calculate an "all others" rate in any investigation where all of the individual margins have been calculated using some element of facts available, the Appellate Body noted that there could be investigations where all of the margins are entirely based on facts available. It characterized this situation as "a *lacuna* in Article 9.4", because Article 9.4 does not address how the ceiling for the "all others" rate should be calculated if all margins of investigated respondents must be excluded from the calculation.<sup>79</sup>

66. The Appellate Body in *US – Zeroing (Article 21.5 – EC)* commented on the disciplines that apply in such a *lacuna* situation, although it made no findings concerning the EC claim under Article 9.4:

"[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

<sup>77</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.579.

<sup>78</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 122-123.

<sup>79</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 125.



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."<sup>80</sup>

#### 1.6.4.3 Requirement to use WTO-consistent margins to establish the maximum "all others" rate

67. The Panel in *US – Shrimp (Viet Nam)* examined claims regarding the "all others" rate in a *lacuna* situation: two administrative reviews in which all respondents selected for individual examination received a zero or *de minimis* margin of dumping. Reasoning that "any margin of dumping calculated or relied upon by an investigating authority in the context of the application of the Agreement must be calculated consistently with Article 2 and its various paragraphs", the Panel found 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. This is true irrespective of whether or not all individual margins are zero, *de minimis* or based on facts available."<sup>81</sup>

68. Concerning the *lacuna* situation identified above, the Panel in *US – Shrimp (Viet Nam)* reasoned 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."<sup>82</sup> The Panel went on to find 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."<sup>83</sup>

69. In *US – Shrimp (Viet Nam)*, the Panel found that in the underlying anti-dumping proceeding on shrimp, the US Department of Commerce treated Viet Nam as a non-market economy, and therefore applied a rebuttable presumption that all shrimp exporters were State-controlled such that they could be treated as units of a single, State-controlled, Viet Nam-wide entity. Exporting companies that could establish their independence from government control were eligible for a separate rate, and were either selected for individual examination or assigned the "all others" rate. The other ("non-separate rate") companies were assigned the rate for the Viet Nam-wide entity, which was based on facts available.<sup>84</sup>

70. The Panel began by addressing Viet Nam's Article 9.4 claim, finding that by denying the "all others" rate to companies that had not positively proved their eligibility for separate rates, the United States had violated Article 9.4:

"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."<sup>85</sup>

71. In response to a US argument that paragraph 254 of Vietnam's Accession Working Party Report recognized Vietnam's non-market economy nature, the Panel noted that the Working Party Report referred to "special difficulties in price and cost comparability" affecting calculation of

<sup>80</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453.

<sup>81</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.213.

<sup>82</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.215.

<sup>83</sup> Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.237-7.238.

<sup>84</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.217.

<sup>85</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.245.



normal value, but did not modify any other provisions in the Agreement, such as Article 9.4. The Panel found:

"[T]here 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 subparagraphs (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."<sup>86</sup>

72. The Panel then found that "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". Thus, the US DOC's decision not to apply an "all others" rate to the Viet Nam-wide entity was inconsistent with Article 9.4.<sup>87</sup>

### 1.6.5 Article 9.4(ii)

73. In *EC – Salmon (Norway)*, Norway argued that the exclusion of margins of dumping established on the basis of facts available had to be disregarded in setting the appropriate level of the applicable MIP (minimum import price) because normal values were an integral part of the calculation of margins. Norway asserted that the MIPs imposed on the non-investigated parties did not meet this standard. The Panel agreed:

"Whenever 'facts available' are used to determine an investigated party's normal value, the margin of dumping that is determined for that party will be established on the basis of 'facts available', within the meaning of Article 6.8. Thus, the requirement that 'facts available' margins be disregarded for the purpose of setting the 'prospective normal value' referred to in Article 9.4(ii) means that any normal values of investigated parties calculated on the basis of 'facts available' must be excluded from the calculation of the 'weighted average normal value of the selected exporters or producers'. To this extent, we find that Article 9.4(ii) sets the maximum level of the 'prospective normal value' that may be imposed on non-investigated parties at the weighted average of the normal values of the investigated parties, excluding any normal values calculated for investigated parties on the basis of 'facts available' within the meaning of Article 6.8."<sup>88</sup>

74. The Panel in *EC – Salmon (Norway)* concluded that the MIPs imposed on the non-investigated parties were inconsistent with Article 9.4(ii):

"We have found that there is no objective factual basis to support the conclusion that the MIPs imposed on non-investigated parties were lower than the weighted average of the normal values of the investigated parties, excluding normal values calculated on the basis of 'facts available', for the following reasons:

- (i) the weighted average of the 'non-dumped' MIPs of the investigated parties did not amount to the weighted average of the normal values of the investigated parties, because the 'non-dumped' MIPs used for this purpose were greater than the relevant normal values, greater than what those normal values should have otherwise been and derived through the application of a flawed methodology;
- (ii) the weighted average of the 'non-dumped' MIPs of the investigated parties did not amount to the weighted average of the normal values of the

<sup>86</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.251.

<sup>87</sup> Panel Report, *US – Shrimp (Viet Nam)*, para. 7.254.

<sup>88</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.731.

investigated parties, because it includes the 'non-dumped' MIPs allegedly calculated for Seafarm Invest which cannot be substantiated on the basis of the evidence that is before us; and

- (iii) the weighted average of the 'non-dumped' MIPs of the investigated parties did not amount to the weighted average of the normal values of the investigated parties, because it includes the 'non-dumped' MIPs calculated for Grieg Seafood on the basis of 'facts available' ".<sup>89</sup>

## 1.7 Article 9.5

75. In *Mexico – Anti-Dumping Measures on Rice*, the Panel and the Appellate Body examined Article 89D of Mexico's Foreign Trade Act under Article 9.5 and with Article 19.3 of the SCM Agreement. The Panel found that Article 89D permitted the investigating authority to conduct an expedited review provided that, *inter alia*, the respondent made a showing that its volume of exports during the review period was representative. The Appellate Body summarised the core provisions of Article 9.5 as follows: "Article 9.5 requires that an investigating authority carry out an expedited review of a new shipper for an exporter that (i) did not export the subject merchandise to the importing Member during the period of investigation, and (ii) demonstrated that it was not related to a foreign producer or exporter already subject to anti-dumping duties."<sup>90</sup> The Appellate Body upheld the Panel's findings that this measure was inconsistent as such with Article 9.5 of the Agreement, because by requiring a showing of a representative volume of exports, it imposes a condition not provided for in Article 9.5 and prevents the authority from granting a review in instances where the conditions set out in Article 9.5 have been met.<sup>91</sup>

### 1.7.1 Relationship with other provisions of the Anti-Dumping Agreement

76. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the Anti-Dumping Agreement. The Panel then opined that Mexico's claims under other articles of the Anti-Dumping Agreement, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the Anti-Dumping Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the *AD Agreement*, and Article VI of *GATT 1994*, if Guatemala were not found to have violated other provisions of the *AD Agreement*."<sup>92</sup> In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

#### 1.7.1.1 Article 9.3 with Article 5.8

77. The Panel in *US – DRAMS* discussed the relationship between Articles 5.8 and 9.3. See the Section on Article 5 of the Anti-Dumping Agreement.

#### 1.7.1.2 Article 9.3 with Article 6.8

78. With respect to the relationship between Article 6.8 and Article 9.3, the Panel in *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 9.3 (and Article 2.4 and Articles VI:1 and 2 of *GATT 1994*). In the Panel's view, findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated.<sup>93</sup>

#### 1.7.1.3 Article 9.4 with Article 3

79. In *Colombia – Frozen Fries*, the Panel underlined the difference between the situations contemplated in Article 3.3 and Article 9.4 of the Anti-Dumping Agreement as part of its

<sup>89</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.738.

<sup>90</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 321.

<sup>91</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 323-324.

<sup>92</sup> Panel Report, *Guatemala – Cement II*, para. 8.296.

<sup>93</sup> Panel Report, *US – Steel Plate*, para. 7.103.

assessment of the contextual relevance of Article 5.8 in interpreting the term "dumped imports" under Article 3:

"Given that the specific situations contemplated under Articles 9.4 and 3.3 have a considerably different – and narrower – scope than an investigating authority's overall determination of injury and causation pursuant to Articles 3.1, 3.2, 3.4, and 3.5, we disagree with Colombia that the context provided by Articles 9.4 and 3.3 establishes that there is 'no link' between Article 5.8 and Article 3. Rather, the fact that Articles 9.4 and 3.3 refer to Article 5.8 and 'de minimis margins', and make Article 5.8 operational in the specific situations contemplated under these provisions highlights to us the contextual relevance of Article 5.8 for purposes of the general injury and causation determinations under Article 3."<sup>94</sup>

#### **1.7.1.4 Article 9.4 with Article 6.8**

80. In *US – Hot-Rolled Steel*, both the Panel and the Appellate Body analysed the relationship between Article 9.4 and Article 6.8 as regards the prohibition to calculate the "all others" rate in sample cases on the basis of margins calculated on facts available pursuant to Article 6.8. See the Section on Article 6 of the Anti-Dumping Agreement.

### **1.7.2 Relationship with other WTO Agreements**

#### **1.7.2.1 Article VI:2 of the GATT 1994**

81. The Appellate Body in *US – 1916 Act* addressed the argument that the phrase "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" in Article VI:2 of the GATT 1994 implies that a Member is permitted to impose a measure other than an anti-dumping measure:

"We believe that the meaning of the word 'may' in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* ... Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9."<sup>95</sup>

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<sup>94</sup> Panel Report, *Colombia – Frozen Fries*, para. 7.298.

<sup>95</sup> Appellate Body Report, *US – 1916 Act*, para. 114.