NON-MARKET ECONOMY STATUS IN ANTI-DUMPING INVESTIGATIONS AND PROCEEDINGS: A CASE STUDY OF VIETNAM

A Thesis submitted in Fulfilment of the Requirement for the Degree of Doctor of Philosophy to the Faculty of Business, Justice and Behavioural Sciences

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Certification of Authorship

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Acknowledgement

I would like to express my deepest gratitude to my supervisors, Professor David Widdowson and Associate Professor Mikhail Kashubsky, at the Centre for Customs and Excise Studies (CCES), Charles Sturt University, Australia. Without their advice, support, and encouragement, I would not have completed my PhD journey.

I'm extremely grateful to Associate Professor Greg Weppner, who gave me valuable feedback on my drafts, and I would like to extend my sincere thanks to Ms Biljana Kearney, Ms Georgia Preece, and Ms Charlotte Schroeder-Juratowitch, who gave me huge support during my candidature at CCES. I also express my sincere gratitude to Associate Professor Andy Johnson, Associate Professor Mark Harrison, Associate Professor Rob Preece, Senior Lecturer Shane Davie, and Vocational Education Director Brent Juratowitch, who gave me inestimable motivation, instruction and guidance when I was studying at the CCES. I enjoyed every minute of your lectures as well as your marvellous senses of humour and have always appreciated the inspiration that all of you gave me in the last 9 years.

I would like to offer my special thanks to Dr Nguyen Ngoc Son, Dean of Law Faculty, Ton Duc Thang university; Dr Nguyen Nhu Ha, Dean of Economic Law Faculty, Academy of Policy and Development, Vietnam Ministry of Planning and Investment; Ms Thuy Dung, official of Vietnam Chamber of Commerce and Industry; Mr Le Van Loc, Vice Director, Ministry of Industry and Trade - Dong Nai provincial branch; Mr Cao Sy Tien, Director of BH Industrial Zone, Ministry of Industry and Trade - Dong Nai provincial branch; and 15 Vietnamese exporters who participated in the interviews during the course of this research.

I am also grateful to Chief Judge Vo Van Phuoc, Judge Ha Thi Thanh Nu, Judge Vo Thi Thanh Phuong, and all my former colleagues at the People's Court of Dong Nai province, Supreme People's Court of Vietnam, who gave me many helps and support at the start of my PhD journey.

I would like to extend my sincere thanks to Mr Le Nguyen Thang, Vice Prosecutor General of the People's Procuracy of Dong Nai province, Vietnam, who provided immense support to me during my data collection activities in Vietnam.

I take this opportunity to express my gratitude to the Brown Squirrel crew for all the love and trust you have been giving me for many years.

I place on record, my sincere thank you to Ms Kim Ngan Tran and Mr Anh Tuan Le. I will always appreciate your friendship, trust, and support that you have been giving me during my journey in Australia.

The thesis will be dedicated to my parents, without their tremendous understanding and encouragement in the past few years, it would be impossible for me to complete my study. I am also deeply indebted to my big family, auntie Nam, and auntie Ba. I could not have undertaken this journey without their unconditional love and trust. My appreciation also goes out to my sisters and brothers, also the brother from Vinh Long, for their encouragement and support all through my study.

Professional Editorial Assistance

I hereby certify that I have employed a professional editor to edit for the format, grammar and style. The contact details of the professional editor as follows:

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List of Abbreviations

A-A	Average to average
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, or the Anti- Dumping Agreement
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEM	Asia Europe Meeting
A-T	Average to transaction
ATC	Agreement on Textiles and Clothing
CCP	Chinese Communist Party
CPV	Communist Party of Vietnam
DOC	United States Department of Commerce
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Commission
EU	European Union
FASB	United States Financial Accounting Standards Board
FDI	Foreign direct investment
FTA	Free Trade Agreement
GAAP	Generally Accepted Accounting Principles
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GDP	Gross domestic product
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
ITA	United States International Trade Administration
ITC	United States International Trade Commission

LTFV	Less than fair value
MFN	Most-Favoured-Nation
NME	Non-market economy
OECD	Organisation for Economic Cooperation and Development
OTCA	Omnibus Trade and Competitiveness Act of 1988
PAPI	Vietnam Provincial Governance and Public Administration Performance Index
PCI	Vietnam Provincial Competitiveness Index
SBV	State Bank of Vietnam
SCM Agreement	Agreement on Subsidies and Countervailing Measure
SME	Small and medium sized enterprise
SOE	State-owned enterprise
TPP	Trans-Pacific Partnership
Treasury	United States Department of Treasury
T-T	Transaction to transaction
UN	United Nations
US	United States
USD	United States dollar
USTR	United States Trade Representative
VCCI	Vietnam Chamber of Commerce and Industry
VGSO	Vietnam General Statistic Office
VND	Vietnam dong
WA	Weighted average
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

HREC Proposal Approval

(The research was approved by the Human Research Ethics Committee (HREC), Charles Sturt University.)

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Tue 4/21/2020, 9:37 AM
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Reply all

Dear Mr Huynh,

Project title: Challenges and issues of 'non-market economy' status in anti-dumping investigations and proceedings between the World Trade Organisation member States: A case study of Vietnam

Protocol number: H20011 (Please refer to this number in all contact or correspondence relating to this application)

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Abstract

'Dumping' is a practice in international trade whereby a product is introduced into the commerce of another country at less than its 'normal value,' which might cause or threaten material injury to the domestic industry of the importing country. To address the practice of dumping and provide rules to deal with it, the World Trade Organization (WTO) adopted the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994), known as the Anti-Dumping Agreement (ADA).

The ADA sets out anti-dumping investigation procedures that importing countries must follow if they wish to impose anti-dumping measures, which are determined by comparing the normal value and the export price of the goods in question. However, not all countries are treated equally under these arrangements. Countries that are non-market economies (NMEs) are accorded special treatment provided by specific rules, including the option for investigating authorities to resort to surrogate prices in a third country for the purpose of establishing normal value. This application of surrogate prices is referred to as 'NME treatment'. In the absence of an internationally recognised definition of an NME, each WTO Member has adopted its own definition and/or a list of NMEs. Vietnam, a WTO Member whose economy is moving from being centrally planned to being market-based, is considered an NME by both the United States (US) and the European Union (EU).

This research investigates whether the non-market economy status of NMEs such as Vietnam disadvantages exporters in anti-dumping investigations and proceedings. The research analyses legal, procedural and other issues relating to the non-market economy status of NMEs in general and Vietnam in particular, in anti-dumping investigations and proceedings conducted by the US and the EU.

The research uses a qualitative methodology design, by which data was collected primarily using desk-based study, supplemented by interviews with anti-dumping experts, Vietnamese exporters and government officials. It involves the examination of international law pertaining to anti-dumping, the US and EU anti-dumping laws and

investigation procedures, analysis of the WTO anti-dumping dispute settlement procedures and related jurisprudence, as well as the analysis of Vietnam's transition to a market economy.

The research has found that both the US and EU treat Vietnam as a NME and have developed their own specific methodologies for anti-dumping investigations on exports from Vietnam. Furthermore, it highlights the wide discretion of the US and the EU under their domestic laws in many stages of anti-dumping investigations.

The findings also show that the WTO Dispute Settlement Body generally considers the US and the EU practices to be consistent with the ADA provisions. However, certain US and EU practices were found to be inconsistent with the ADA, including 'zeroing', limited examination, surrogate country selection, and the imposition of the 'entity-wide rate.' Further, by applying these practices, investigating authorities might establish unpredictable normal values that may inflate the estimated dumping margins and ultimately lead to the imposition of a higher than appropriate anti-dumping duty. The analysis concludes that the NME status of countries such as Vietnam disadvantages them when facing claims of dumping.

Finally, this thesis provides recommendations for Vietnamese exporters that will serve to improve their competence as defendants/respondents in anti-dumping investigations and proceedings and more effectively demonstrate the degree to which their operations are based on market-based principles. Recommendations are also provided to the Vietnam Government on ways in which it can support Vietnamese exporters in anti-dumping investigations and proceedings.

CHAPTER 1 - INTRODUCTION

1. Background

Anti-dumping rules under the World Trade Organization (WTO) framework have a long history predating the establishment of the WTO. The origin of these rules lie in the provisions of Article VI of the General Agreement on Tariffs and Trade 1947 (GATT 1947). At the time of signing the GATT 1947, the increase in cheap exports and the arbitrary employment of anti-dumping measures against those cheap exports had already resulted in many debates in relation to international trade negotiations. To address this issue, Article VI was an effort by the original signatories to the GATT 1947 that aimed to reach a multilateral agreement on the conduct of anti-dumping investigations and proceedings.

During the Uruguay Round of trading negotiations from 1986 to 1993, the matter of dumping and anti-dumping remedies, which had been addressed by Article VI of the GATT 1947, resurfaced due to demands by the GATT 1947 signatories for further explanation and guidance regarding the application of anti-dumping rules. As a result, signatories to the GATT 1947 signed the Uruguay Round agreements in Marrakesh in 1994, which include the Agreement Establishing the WTO and the GATT 1994 (the GATT 1947 was extended and has been referred to as the GATT 1994 since the Uruguay Round agreements). At the same time, as a part of the Uruguay Round agreements, the WTO adopted the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which is known as the Anti-Dumping Agreement (ADA). Similar to Article VI of the GATT 1947, in Article 2.1 of the ADA, 'dumping' is defined as a practice by which a product is "introduced into the commerce of another country at less than its normal value", that is, "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (ADA, 1994, Article 2.1). However, while Article VI of the GATT 1947 only provides a brief definition of 'dumping' and allows signatories to "levy on

any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" as an anti-dumping measure, the ADA takes it further and provides a detailed set of rules on anti-dumping investigation procedures and proceedings for the imposition of anti-dumping measures.

To balance the interests of key players among WTO members and the establishment of justifiable rules on dumping, the ADA was created to provide a remedy to counter dumping called "anti-dumping duties",[1] as well as the procedures which import countries will need to follow to impose the duties. According to Article 1 of the ADA, anti-dumping duties can be imposed on an imported product if an investigation conducted by the authority of the import country has found that (a) the product subjected to investigation is dumped and (b) it causes or threatens material injury to the domestic industry of the import country (ADA, 1994, Article 1). It is important to note that the causal link between the dumped goods and the material injury, which could be actual or simply threatened, must be established as the result of anti-dumping investigation (ADA, 1994, Article 3).

Technically, to determine if an import product is dumped, the investigating authority must establish a 'normal value' of the product, which is the price of the same product when it is sold in the domestic market of the exporting country. The export price of the product is then established. By comparing the export price with the normal value, the authority can obtain the margin of dumping—if this margin is positive, the authority can conclude that the product is dumped. Additionally, the authority must ascertain whether there is material injury as a result of the dumped import product before they can make determinations on the application of any anti-dumping measure.

There is a great deal of contention over the validity of dumping, in which one might wonder whether the practice of dumping is a distortion of fair trade or acceptable and beneficial to consumers, as well as the justification of measures against the said

[1] Before the final determination of an anti-dumping investigation and the imposition of anti-dumping duties (Article 9), the ADA also provides other measures which are provisional measures (Article 7) and price undertakings (Article 8).

dumping practice. Some argue that low-priced sales of dumped exports are often a consequence of a protected domestic market, and that it would be appropriate to shelter the market in the import country from such "unfair" competition by anti-dumping measures (Cheng, Qiu, & Wong, 2001, pp. 639−45; Krugman, Wells, & Olney, 2009, pp. 342−5). Others, on the other hand, consider that dumped products can provide great benefits for consumers, and that dumping is an acceptable business decision (Bovard, 1991; Lester Mercurio, Davies, & Leitner, 2008, pp. 465−6).

In fact, the way in which anti-dumping laws address dumped goods is very similar to how antitrust and competition policies address low-priced sales, in the context of price discrimination and predatory pricing (Gifford, 1991). Price discrimination and anti-dumping laws both discuss the difference in prices of particular products sold to consumers in different markets. Hence economists might assume dumping to be an acceptable practice because price discrimination has also been acceptable. Notwithstanding, the practice of dumping could be a distortion of fair trade if such a practice is a cover for predatory pricing, by which exporters aim to eliminate other competitors in the import domestic industry, through insistently selling at unreasonable prices which are below cost, then monopolising the market share of their products.

The statistics on anti-dumping initiations from 1995 to 2016 indicate that exporters from developing countries are more likely to be respondents of anti-dumping investigations in comparison with exporters from developed countries (WTO, 2018a). Among developing countries, non-market economies (NMEs) are accorded special treatment provided by specific rules of the GATT on price establishment in Annex I. Even though the ADA provides standards for anti-dumping investigations and proceedings, the GATT still represents the fundamental WTO rules, therefore relevant provisions in the GATT directly affect how the provisions of the ADA are interpreted and implemented. In particular, Addendum to paragraph 1 of Article VI of the GATT 1947 as set out in Annex I of the GATT 1994[2] provides the possibility for investigating authorities to resort to surrogate prices in a third country for establishing normal value instead of the

[2] As mentioned above, the GATT 1994 is the updated version of the GATT 1947.

actual prices in NMEs, if "special difficulties … exist in determining price comparability" and that "in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate" (GATT, 1994, p. 64).For the purposes of this thesis, the application of surrogate prices in a third country to calculate normal value is referred to as 'NME treatment'.

In cases of NMEs, the use of surrogate country data brings up the question of whether this method could inflate normal value. If the cost of production in the selected surrogate country is higher, a higher normal value could be determined as a result, which ultimately means a greater chance of finding dumping in the conclusion of the investigation process (Ly & Ngo, 2016). The problem is that applicants of anti-dumping filings are allowed to suggest the surrogate country for consideration to the investigating authority in charge, and there is no limitation on which country should be selected if applicants can provide enough reasons for the similarities between the exporting country and the surrogate country. Unfortunately, the cost of production could still be very different even if the similarities are justified (Czako, Human, & Miranda, 2003, pp. 34−5).

In the absence of an internationally recognised definition of NME, the WTO members have adopted their own definitions and/or lists of NMEs. The European Union (EU) has a list of 15 countries that are considered NMEs. The United States (US), on the other hand, does not list any specific countries as NMEs; but under Section 1677(18) of the US *Tariff Act* (1930) (Tariff Act of 1930), an NME is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." In this definition, the "administering authority" refers to the US Department of Commerce (DOC) in the context of the anti-dumping administration.

Vietnam is considered an NME by both the EU and the US. Vietnam is also a WTO Member, and its economy is moving from being centrally-planned to being market-based (Dixon, 2003, pp. 287–306). Hence, Vietnam cannot avoid the reality that large trading partners such as the US and EU question whether its economic policies are over-

supportive of Vietnamese producers and exporters. Consequently, in anti-dumping investigations, the US and the EU treat Vietnam as an NME and, as a result, the US and EU authorities assume that exporters from Vietnam do not operate on free-market principles from the start of their anti-dumping investigations, unless Vietnamese exporters manage to prove their market-based operation.[3] The WTO's statistics on anti-dumping show that from 1995 to 2016, the proportion of investigation cases resulting in the imposition of duties was 67.7 per cent for Vietnam (WTO, 2018a; WTO, 2018b), only 3.46 per cent lower than China, which was subjected to the highest number of anti-dumping initiations (a total of 1327 initiations, with the proportion of investigation cases resulting in duties imposition for China at 71.16 per cent). It is considered that either Vietnamese exporters have been employing dumping practices relatively often or the NME status has a negative effect on the probability of being a respondent in an anti-dumping investigation. To further explore the field of anti-dumping, specifically the case of Vietnam as an NME in the context of anti-dumping investigations, the following research question was developed, as well as aims and objectives, to set forth distinct and specific goals for this thesis.

2. Research question

As noted above, NME treatment was a solution to a practical issue that arose during the process of anti-dumping investigations. This treatment allows investigating authorities to use surrogate prices in a third country instead of the actual prices in the NME, which is the exporting country of the products under investigation, for the purpose of developing a normal value. Therefore, the central question of this thesis is as follows:

Does the NME status of Vietnam disadvantage Vietnamese exporters in anti-dumping investigations and proceedings conducted by the US and the EU?

[3] Article 2(7)(a) and 2(7)(b) of Regulation (EU) 2016/1036 of The European Parliament and of The Council of 8 June 2016 treat Vietnam as an NME. Also, the US International Trade Administration lists Vietnam as an NME for anti-dumping and countervailing purposes on their official website (https://www.trade.gov/nme-countries-list).

3. Research objectives

The specific objectives of this thesis are to:

1. analyse the policies and processes of anti-dumping investigations under WTO laws including those involving NMEs.

2. examine legal and procedural aspects of anti-dumping investigations and proceedings against NME countries by the US and EU and determine to what extent the laws and practices are consistent and compliant with WTO laws.

3. identify any specific aspects of anti-dumping investigations and proceedings conducted by the US and EU against NME countries that may negatively impact the outcome of such investigations for the NME.

4. examine WTO anti-dumping dispute settlement procedures and WTO jurisprudence as they relate to NMEs generally and Vietnam in particular.

5. analyse relevant aspects of Vietnam's transitional economy and the Vietnam Government's level of intervention in the market that may impact the conduct and outcome of anti-dumping investigations and proceedings.

6. provide recommendations on:

    a. practical options for Vietnamese exporters to improve their competence as defendants/respondents in anti-dumping investigations and proceedings brought by the US and the EU.

    b. ways in which the Vietnam Government can overcome its NME status and therefore assist Vietnamese exporters involved in anti-dumping investigations and proceedings.

4. Scope and limitations

Anti-dumping is arguably one of the most specific areas of international trade law (Czako et al., 2003). However, it could result in a drastic change in the price of a

particular product and other like products in the market of a whole nation. Even though national anti-dumping laws of WTO members should be in accordance with the ADA, different approaches to interpretation of the ADA commonly lead to noticeable differences in practice (Aggarwal, 2007, pp. 18−20). Similarly, NMEs differ from each other. Even though they might be labelled as an NME by the same WTO member, the reasons for treating them as NMEs could be different. Therefore, the scope of this thesis is limited to Vietnam as an NME (with occasional references to, and examples involving, China). The circumstances of other NMEs are also discussed where appropriate, however, this thesis includes recommendations specifically for Vietnam and Vietnamese exporters (which may also have relevance to other NMEs).

In terms of the key trading partners of Vietnam, this thesis mainly focuses on Vietnam's trading relationships with the US and the EU, given that the US and the EU are the only key trading partners of Vietnam that have not yet recognised Vietnam as a market-based economy. However, trading relationships between Vietnam and other key trading partners (for example, Japan and Australia) that already recognise Vietnam as a market-based economy are discussed to some degree to provide an overall comparison between anti-dumping investigations and proceedings involving Vietnamese exporters with and without the issue of NME status.

As is the nature of anti-dumping, the parties involved in anti-dumping cases strongly protect their opinions (Aggarwal, 2007). Therefore, another potential limitation is that there is always the risk of biased information. While the exporters and applicants in anti-dumping investigations and proceedings are likely to have biased opinions, Vietnamese national trade organisations and relevant government authorities may also be biased for various economic and political reasons. To prevent biased information, which can distort the research results, data from respondents representing both sides of the argument were examined to identify points of disagreement on the same issue. An analysis was then undertaken to determine whether those differences were the result of a biased point of view. This problem of biased information was also addressed by analysing the data from WTO anti-dumping cases, to determine the point of view from the WTO Dispute

Settlement Body (DSB) on the same matter, in which the other parties in the cases had different opinions.

The WTO anti-dumping cases/disputes that were under discussion and analysis in this thesis were mostly those in which Vietnam was involved, and the NME issue was brought up and/or challenged. It should be noted that cases/disputes in which Vietnam was a third party, or not even a party, were also examined and analysed, if the NME issue was mentioned in such cases. In addition, the anti-dumping cases that were outside the DSB's jurisdiction, but involved Vietnam, the US, and/or the EU, and mentioned the issue of NME, were selectively examined.

5. Contributions of the research

The findings of this research will benefit Vietnamese exporters, considering that anti-dumping plays a significant role in the profits and stability of their export activities. The more Vietnamese exporters understand the investigation procedure for exporters from NMEs, the better able they will be to comply with the authorities of importing countries. Thus, it is intended that Vietnamese exporters who apply the recommendations resulting from this research will be able to minimise their losses from anti-dumping determinations (for example, minimising the amount of anti-dumping duties which will be imposed on their exports). Furthermore, this research also provides recommendations to assist them in the process of proving their market-based operation in anti-dumping investigations. Similarly, the Vietnamese Government can consider this research to amend Vietnamese laws and policies on export support, where applicable, to lessen the impact from trade partners who treat Vietnam as an NME.

For Vietnam's trade partners, this research provides further understanding on the current characteristics of Vietnamese export policies, exporters' practices and government support. These trade partners can then develop a more efficient approach to maintain and enhance their trading relationship with Vietnam as appropriate. For researchers, this thesis will provide a base from which they can further investigate a specific area in anti-dumping practice, that is the NME treatment of countries such as Vietnam, which few

researchers have explored to date. Therefore, this thesis may inspire further research on the anti-dumping treatment of NMEs, not only for Vietnam, but also for other countries.

6. Conclusion

Generally, both national anti-dumping laws and WTO anti-dumping rules were created to prevent cheap exports from damaging the domestic industries of importing countries. In other words, anti-dumping measures were created to offset the injury caused by dumped imports, not to hinder international trade facilitation. However, the influence of NME treatment on the calculation of normal value in anti-dumping investigations could potentially disadvantage exporters from NME countries such as Vietnam and make anti-dumping measures another trade barrier between NMEs and their trading partners. To identify and understand the relevant issues in this area of anti-dumping, it is necessary to undertake a review of relevant literature and identify the gaps in the literature upon which this research will build, which is done in the following chapter.

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CHAPTER 2 - LITERATURE REVIEW

1. Introduction

An anti-dumping investigation is a complex process in which each party strongly protects their interests. Obstacles and issues can arise at any stage of the process, from the initiation of the investigation to the reviews of the anti-dumping measure after five years. In this chapter, the relevant literature is introduced and reviewed, through which a general understanding of anti-dumping investigations and proceedings is provided and gaps in the existing literature are identified. In particular, the literature review in this chapter covers several anti-dumping aspects including the meaning of the concept of 'dumping' in the context of international trade, the process and conduct of anti-dumping investigations including those involving NMEs, and the NME status of countries and Vietnam specifically.

2. The matter of dumping

While Article 2.1 of the ADA provides a definition of dumping, the term 'dumping' has also had other meanings throughout the history of international trade. It has been used to refer to the practice of exporting a product at an unreasonably low price to drive out competitors, thus monopolisation takes place in the market of the importing country (Lester et al., 2012, p. 473). Matsushita, Schoenbaum and Mavroidis (2006, p. 396) refer to it as "social dumping", which occurs if the exporting country has cheaper labour costs and lower working conditions than that of the importing country. Such a situation commonly happens in international trade between developing and developed countries (Mankiw & Swagel, 2005).

The protectionist point of view would be that whatever dumping means, it implies an unfair and predatory behaviour over like products from domestic producers, because such low-priced imports are the result of a protected domestic market of the exporting country. On the other hand, the economic point of view sees dumping as a legitimate and acceptable practice, which, in practice, brings great benefit to consumers (Lester et al., 2008, pp. 465−6; McGee, 1993, pp. 535−45). In fact, the way in which anti-dumping laws address dumped goods is very similar to how antitrust and competition policies

address low-priced sales, in the context of price discrimination and predatory pricing (Lester et al., 2008). Price discrimination and anti-dumping laws both discuss the difference in prices of particular products sold to consumers in different markets. Hence, economists might assume dumping to be an acceptable practice since it benefits the consumers. Notwithstanding, there is an acceptance among politicians, economists, and lawmakers that dumping should be prevented if it is a cover for predatory pricing (Gifford, 1991).

In a similar approach, Matsushita et al. (2006, pp. 396−401) separate dumping into two major types: dumping as sales below cost and as international price discrimination. Theoretically, price discrimination happens when a company provides the same product at different prices to different consumers or in different regions. At the international level, it often means selling the same or a similar product in the domestic market and the export market at different prices. In this regard, the reason that international price discrimination occurs is because the trading relationship between the exporting country and importing country encounters obstacles such as high tariffs, quotas, or any form of anti-competitive practices (Lester et al., 2008, pp. 465−8; Stiglitz, 1997, p. 418). International price discrimination can also occur when the elasticity of demand between the exporting country and the importing country is considerably different. For example, a product could have a higher price in the market of an exporting country if the demand for that product is inelastic in that market, while at the same time this product could have a lower price in the market of the importing country, where the demand is elastic (Finger, 1993, p. 56; Matsushita et al., 2006, pp. 398−9).

Dumping as sales below cost is the premise for triggering the whole anti-dumping system under national laws. Generally, the meaning of sales below cost in many countries' laws is that the selling prices of a product are below its manufacture costs, including indirect expenses (Matsushita et al., 2006, pp. 396−7). Sales below cost can arise in various situations. First, fierce competition in an industry may force a company to sell a product at prices below its production cost, in which the mark-up is smaller than the marginal cost of manufacture (Kufuor, 1998). Another cause of sales below cost can be a decrease in demand in the market. The steel industry is a typical example since steel

is an intermediate product with a high fixed cost of production. Therefore, when a recession hits the steel industry, sales volume declines and consequently pushes down the selling price to the point where it is below production cost (Ernst & Young Global Media, 2017; Vermulst, 1987). For example, the Australian Anti-Dumping Commission (2016) has indicated that the rapid growth of steel production in Asian countries from 2000 to 2014, and subsequent increase in production. might easily cause supply to exceed demand in their domestic markets. In general, Bierwagan (1990) predicted this issue of production being much higher than domestic demand and pointed out that it results in the export of the product at very competitive prices, even dumped prices, not only in the steel industry but also in general.

Sales below cost may also be a strategy at the early stage of introducing a new product into the market, which is called forward pricing. This practice is utilised to increase sales volume of the new product early in its life cycle, then maximise the lucrativeness over the later stages of its full life cycle. There are circumstances where the cost of developing the product is very high, so that the initial production cost is consequently so high that introducing a new product at sales above cost would be unreasonable and impractical (Matsushita et al., 2006). To address this tough situation, the producer does not have many options. Forward pricing would be the easy and rational choice assuming that the product will be mass-produced to decrease the production costs, along with good sales volumes created by a strategy to sell below cost, leading to a later profit (Tyson, 1992).

Lastly, predatory pricing can result in sales below cost. This form of sales below cost is a controversial issue and may be used as a reason by domestic industries of the importing country to initiate an anti-dumping investigation (Bort, 1978; Krugman, 1986; Posner, 2001). The practice of predatory pricing is when an enterprise takes advantage of its power to sell products at prices below cost to eliminate competitors and gain a monopoly over the market. In this circumstance, the enterprise might be financially confident enough to expect that the loss from sales below cost will be compensated by an increase in the selling price after it successfully monopolises the market (Easterbrook, 1981; Miranda, Torres & Ruiz, 1998, p. 16).

Since predatory pricing significantly distorts the competitiveness of the industry, seriously damages the existence of other producers of similar products in an unfair way and takes away the benefits of consumers in the long run, such a practice is commonly prohibited under national laws (Matsushita et al., 2006). However, predatory pricing is not easy to prove. For example, to prove a *prima facie* case of predatory pricing under the US antitrust laws, the pricing below cost alone is not sufficient proof for determining a violation of the law (Brodley & Hay, 1981).

The US Supreme Court furthermore set hurdles for plaintiffs in predatory pricing cases in its decision in *Brooke Group v. Brown & Williamson Tobacco* (1993), in which the requirements for proving a predatory pricing case included: 1) evidence of the company engaging in pricing below cost; 2) evidence that such practice damages competition and 3) evidence that the company employed such a strategy to eliminate competitors, then create a monopoly so that it can recoup its losses by raising selling price in the future. Additionally, in another predatory pricing case *In re Japanese Electronic Products Antitrust Litigation* (1986), the US Supreme Court also stated that the burden of proof is on the parties challenging the practice. On the other hand, Bolton, Brodley & Riordan (2015) criticised the economic theories used by the US Supreme Court in predatory pricing cases, stating that such theories were out of date and gave support to the practice of predatory pricing, which is the real problem.

To tackle harmful dumping practices, anti-dumping measures are instigated, often in the form of anti-dumping duties (Czako et al., 2003). Before the imposition of anti-dumping duties, the ADA provides that authorities from importing countries must collect and analyse data to calculate the dumping margin,[4] determine whether the product is dumped, determine injury and causation and ultimately decide what the appropriate remedies should be.

[4] According to Article 2 of the ADA, the "dumping margin" can be interpreted as the difference between "the export price of the product exported from one country to another" and the "normal value", in a transaction.

There are generally three types of driving force behind the use of anti-dumping duties: 1) a political perspective; 2) an economic perspective and 3) a political-economic perspective (Aggarwal, 2007, pp. 176−208). While the economic perspective asserts that anti-dumping should only be utilised against predatory dumping, the political-economic perspective is all about protectionism. In the political-economic approach, domestic producers who are likely to lose from free trade willingly lobby the authorities in charge of anti-dumping investigations to strive for protection (Nelson, 2006). Therefore, once an anti-dumping application is filed, those domestic producers might have a high chance of obtaining protection.

The political perspective also aims to shelter domestic industry, but it is more rational than the political-economic approach. In this perspective, anti-dumping duty is a remedy for domestic manufacturers who are injured by low-priced imports and therefore could put political pressure on their government seeking restraint on an import surge (Blonigen & Prusa, 2001). In this context, dumped prices are often a result of price discrimination employed by exporters, which is the main reason for anti-dumping rules to be triggered. A communication document from the Permanent Mission of the US at the WTO (*Communication from the United States — Basic Concepts and Principles of the Trade Remedy Rules*, 2002) indicates its political approach to the use of anti-dumping rules. US anti-dumping rules are a treatment for 'unfair' price discrimination practices of exporters, whose home market is over-protected by government policies. Such circumstances allow those exporters to create monopolies in their home market; hence, after those exporters export with low prices, they can compensate for the loss of exportation by charging a higher price in their home market (Aggarwal, 2007).

As explained above, motives for the use of anti-dumping as responses can vary between political compulsions and economic decisions. Even though free trade provides benefits to consumers in terms of higher quality and lower cost products, it can never create a perfect trading environment that benefits every sector of society. Furthermore, not every imported product has the advantage of lower prices over domestic goods. Nonetheless, producers will always sense "danger" being placed in a very competitive free-trade environment (Fletcher, 2010). Therefore, when an import surge happens, it is

understandable that domestic industries immediately think about employing anti-dumping practices. Even if no dumping is found in the end, the anti-dumping investigation itself can alleviate the import surge. Through an econometric analysis on anti-dumping activities of WTO members, Prusa (2001) shows that after investigations were concluded, no dumping was found and no measure could be imposed yet imports still fell by at least 15 per cent.

3. Anti-dumping investigation procedures

Before the 1990s, anti-dumping measures were used by a very limited number of countries (mostly by economically and politically stable nations) in international trade. After the 1990s, participation of developing countries in the world trading system considerably increased and consequently developing countries began to take anti-dumping actions against allegedly dumped imported goods from other developing countries (Aggarwal, 2007). In this regard, WTO members are now required to take measures against dumping in ways that are consistent with the multilaterally agreed rules set out in the ADA. The ADA is not a lengthy document, but its content offers flexibility as to how national authorities should proceed in anti-dumping investigations, which unfortunately causes confusion among other WTO members who are not used to utilising it (Lester et al., 2012, p. 475). As a result, the WTO has been confronted with a high volume of technical assistance requests from developing member states on how to interpret and apply the ADA rules appropriately and in conformity with their WTO obligations, so anti-dumping technical assistance has always been a significant function of the WTO Rules Division (Czako et al., 2003).

Understanding the effort of the WTO Rules Division, Czako et al. (2003) provides a detailed interpretation and explanation of anti-dumping investigation rules of the ADA. This study explains each step of the investigation set out in the articles of the ADA, from initiation of an investigation to the final determination, and any other side matters that would be taken into consideration after the investigation (that is, duration of investigation, duration of final anti-dumping duties, reviewing the continued imposition of duties and overview of the process). Similarly, Matsushita et al. (2006, pp. 401−25) provide a precise interpretation for the words in ADA texts that might be misunderstood.

Therefore, the authors help to clear confusion over several issues, which arise from the fact that the ADA texts are too concise and do not provide sufficient explanation (for example, “interested parties”, “essential facts”, “like product”, “export price” and “margin of dumping”). Notwithstanding, both Czako et al. (2003) and Matsushita et al. (2006, pp. 401−25) limit themselves as tools for technical support and the authors do not provide their opinions on any practical situations or issues that might arise under complicated political and/or economic driving forces.

Drawing on the ADA, Van den Bossche (2005) explains the procedure of an anti-dumping investigation and provides four explanation sections of the WTO rules on dumping. namely: 1) history of the law on dumping; 2) the concept of dumping; 3) WTO dumping treatment and 4) the response to harmful dumping. Van den Bossche (2005) provides an overview of WTO anti-dumping rules in an easy way for initial understanding. For each stage of an anti-dumping investigation, the study analyses the ADA text to point out parts that need further clarification (Van den Bossche, 2005, pp. 513−51). The author then quotes the relevant paragraphs of Panel reports and/or Appellate Body reports from anti-dumping disputes, which state corresponding views of the Panel/Appellate Body, to demonstrate how ADA provisions have been interpreted by ATO Panels and the Appellate Body.

In a similar approach, Pryles, Waincymer and Davies (2004, pp. 978−87) provide examples of the texts of Panel/Appellate Body reports as guidelines for interpretation of ADA provisions. However, neither Van den Bossche (2005) nor Pryles et al. (2004) consider the context of a particular dispute case, that is, the specific details that led the Panel/Appellate Body to reach such a determination. In explaining how the ADA provisions should be interpreted, they only refer to Panel/Appellate Body reports as side notes to support their explanation, but do not provide any in-depth consideration of practical issues that can arise in an anti-dumping investigation. Furthermore, they do not give much regard to the obstacles that are faced by developing countries only, and the difficulties that are faced by developed countries only.

To increase understanding of the provisions of the ADA, Lester et al. (2008, pp. 465−519) provide the history of WTO anti-dumping rules. Lester et al. (2008) note that

the ADA was the result of many contentious discussions and arguments between users and targets of anti-dumping measures, and they conclude that the ADA should be seen as the success of the WTO Uruguay Round of Negotiations. Lester et al. (2008) use real anti-dumping investigation cases and WTO dispute settlement cases to identify and analyse practical issues that have caused debates between members for years such as "zeroing", "domestic dumping determination", "sunset review", or the use of anti-dumping measures other than duties. However, Lester et al. (2008) do not discuss the reasons and arguments that interested parties (in a WTO anti-dumping case) made during both the anti-dumping investigation and the WTO anti-dumping case. Therefore, their work is insufficient to fully understand all the reasons that the domestic authorities and WTO Panel/Appellate Body used to reach their determinations.

While the literature reviewed in this section comprehensively explains the ADA provisions, as well as how those provisions can be interpreted and applied, Czako et al. (2003), Van den Bossche (2005), Pryles et al. (2004) and Lester et al. (2008) do not provide any in-depth analysis of the issue of NMEs. They mention that NMEs are a special case in anti-dumping investigations, however, little attention is given to other important issues relating to NME status, such as the history of NME treatment, how NME treatment is applied and the economic and political reasons behind the NME status. Therefore, this thesis aims to contribute to the existing literature in this field by providing a detailed examination of those issues relating to NME status.

4. Non-Market Economy status

When an anti-dumping investigation is initiated, the authorities of some WTO countries consider the country the exporters are from, and whether that country is an NME, so the authorities can apply special treatment under both the ADA and their domestic anti-dumping rules (Czako et al., 2003, p. 34). The definition of an NME has never been included in the texts of GATT or any WTO Agreements, however, the treatment of NMEs has been an element of some anti-dumping investigations. In this regard, some WTO members like to interpret NME status as putting an exporting country under the rule of the second Supplementary Provision to paragraph 1 of Article VI in Annex I to

GATT 1994 (under the *Ad* Article VI of Annex I: Notes and Supplementary Provisions).[5]

Even though each WTO member might have its own definition of an NME, most of the definitions have one aspect in common, which is that a country will be considered an NME if the domestic trade is monopolised by the State, and government involvement in the marketplace causes domestic prices to be fixed (Lester et al., 2012, p. 529). This, in turn, enables authorities of an importing country to apply the *Supplementary Provision to Article VI* above and resort to surrogate prices in a third country for establishing normal value. For example, Article 2(7)(a) and 2(7)(b) of *Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union* (Regulation 2016/1036) list 15 countries as NMEs.[6] In contrast, the US does not list any particular countries as NMEs, but under Section 1677(18) of the Tariff Act 1930, an NME is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." In fact, some influential WTO members such as the EU and the US have had justifiable reasons to apply NME methodology in their anti-dumping investigations, noting that some countries such as Vietnam and China agreed to be treated as NMEs to gain their accession to the WTO (*Accession of the People's Republic of China* [China's Accession Protocol], 2001).

For example, at the time when China was in the process of negotiations for accession to the WTO, it was not able to fully implement all market-based requirements for its economy; therefore, China agreed to the inclusion of a special treatment for Chinese

[5] This Supplementary Provision provides that: "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State… importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

[6] Article 2(7)(a) and 2(7)(b) of Regulation (EU) 2016/1036 of The European Parliament and of The Council of 8 June 2016 lists Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam as NMEs.

"non-market producers"[7] in the China's Accession Protocol for a period of 15 years.[8] Such special treatment allows an importing WTO member to "use a methodology that is not based on strict comparison with domestic price or cost in China if the producer under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to production and sale of that product" (China's Accession Protocol, 2001, p. 9). Consequently, this protocol provides an option for other members to treat China as an NME in the scope of the anti-dumping investigation. Unfortunately, exploitation of such treatment could not be avoided, and several disputes were brought to the DSB regarding the issues arising from China's NME status (Aggarwal, 2007, p. 158).

5. Debates on NME status

As mentioned in chapter 1, if the exporter responding to an anti-dumping investigation is from an NME, the investigating authority in charge can disregard the domestic price of that NME and instead use a surrogate price from a third country to calculate normal value instead. This practice is arguably one of the most debatable issues in the anti-dumping field, since it can considerably influence or impact the outcome of an anti-dumping investigation (Lester et al., 2008). Furthermore, for this reason, NME status is a critical issue in anti-dumping investigations and proceedings.

In the *EU — Anti-dumping Measures on Certain Footwear from China* (*EU — Footwear (China)*) (2011) case, China argued that Article 9(5) of the EU Basic Anti-Dumping Regulation violates the "Most-Favored-Nation" principle provided in Article I:1 of GATT 1994. Such legal provision of the EU subjects WTO members who are treated as NMEs by the EU (including China) to additional conditions, in order for exporters from those NMEs to receive equal treatment to other exporters from WTO members with market-based economy status. The Panel agreed with China's claim, stating that the EU's regulation challenged by China falls within the scope of "rules and formalities in connection with importation" provided in Article I:1 of GATT 1994, hence the

[7] Non-market producers can be understood as producers who still receive government support and have not yet operated under market-based conditions.

[8] China became a WTO member in 2001, so this period has expired now.

automatic granting of individual treatment to imports from market economy countries is an "advantage" that is not immediately and unconditionally extended to like products from NME WTO members (*EU — Footwear (China),* 2011, p. 75).

Also, in the *EU — Footwear (China)* case, China challenged EU anti-dumping laws for calculating the margins of dumping for imported products from NMEs based on values from an "analogue country" (*EU — Footwear (China),* 2011, p. A-5). Article 2 of the ADA requires that the margins of dumping should be calculated on the basis that "a fair comparison shall be made between the export price and the normal value", in which normal value is referred to as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Article 2(2) of the ADA only provides two alternatives for the determination of normal value which are: 1) "a comparable price of the like product when exported to an appropriate third country" and 2) "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". The Panel agreed with China that the term "analogue country" is not mentioned in the ADA nor in other texts of the WTO, and the EU did not provide sufficient references in the standards, procedure and criteria for "analogue country" selection. However, the Panel concluded that the "analogue country" method should be interpreted as an "alternative methodology" within China's commitment under its Accession Protocol.[9]

Ly and Ngo (2016) propose alternative approaches for determining an "analogue country" before the WTO can provide a definition and other criteria over this matter in any official document. Article 2 of the ADA provides that normal value would be determined by considering the price of a like product, thus Ly and Ngo (2016) suggest a "likeness test" which can assess whether a product from an "analogue country" is appropriate to become the like product. In fact, Article 2.6 of ADA already defines the

[9] In *EU–Footwear*, at footnote 557, the Panel stated that: "Paragraph 15(a)(ii) of China's Accession Protocol does provide that an importing WTO member 'may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producer under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.' … The 'analogue country' methodology is generally understood to be an 'alternative methodology' within the meaning of Paragraph 15(a)(ii)".

term "like product,"[10] but that definition is too vague and does not make it clear how one should determine whether a product is a "like product" in practice since the ADA does not provide any clear standards for it. Unfortunately, Ly and Ngo (2016) do not clarify or provide further guidance on how the "likeness test" should operate. Furthermore, standards and requirements for the subjects under this test are not specified by the authors.

There are traditional "likeness" criteria set in previous Reports of the GATT Working Party on Border Tax Adjustments (GATT 1970, para. 18)[11] that have been applied and developed by many Panels and Appellate Bodies of Dispute Settlement Bodies, for example, the Appellate Body Report in *Japan — Taxes on Alcoholic Beverages* (1996, p. 19) or the Panel Report in *United States — Measures Affecting the Production and Sale of Clove Cigarettes* (2011, p. 51). However, these criteria focus on the physical characteristics of the product, rather than on its production method and cost. Therefore, Howse and Regan (2000, p. 249) criticise the disregard of production method and cost as a loophole of the "likeness" criteria; Read (2005, p. 239) furthermore emphasises that a "likeness" assessment would be meaningless if the cost and production method of the subject product are not considered, because the calculation of normal value is actually based on the cost of the product.

Another issue of NME status is the potential problem of the concurrent imposition of anti-dumping and countervailing measures, which simply causes unnecessary double remedies on the same product (Lester et al., 2012, p. 529). In *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US — Anti-Dumping and Countervailing Duties (China)*) (2010), China challenged the DOC's adjustments made to the costs that are used to determine normal value in dumping calculations regarding the way subsidies are taken into account. Such a method leads to

[10] Article 2.6 of the ADA defines "like product" as: "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

[11] Those criteria are: the properties, nature and quality of the products; the end uses of the products; consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and the tariff classification of the products.

the presumption that, in relation to the dumping calculation, the home market value of the product under investigation is not reliable for the determination of normal value, hence it is replaced by a surrogate value (price) from a third country whose economy runs under market-based principles (Pryles et al., 2004, pp. 989−91). By such a method, the normal value is determined by the costs reflecting the unsubsidised amount, but the export price is not adjusted and still reflects subsidies. Therefore, after comparison, the resulting dumping margin reflects both the dumping and the amount that the producer benefited from subsidies, thereby the anti-dumping remedy offsets the dumping as well as the subsidy (*US — Anti-Dumping and Countervailing Duties (China)*, 2010, p. 226). Consequently, if a countervailing duty is applied in this case, it would constitute a double remedy since it overlaps with a part of the anti-dumping duty.

In contrast, the DOC in *US — Anti-Dumping and Countervailing Duties (China)* case claimed that concurrent remedy involving domestic subsidisation should not be considered inappropriate because domestic subsidies presumably reduce the price of the product in both domestic market and export markets, therefore such subsidies cause no effect to the dumping margin calculation where a comparison of export price to domestic market price is conducted (*US — Anti-Dumping and Countervailing Duties (China)*, 2011). The Panel also agreed with the DOC on this matter (*US — Anti-Dumping and Countervailing Duties (China)*, 2010, pp. 227−8). Even though the Panel indicated a potential problem with double remedies in the use of NME methodology, it concluded that the provisions of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) cited by China do not address the problem of concurrent remedy. As a result, China failed to prove that the DOC's use of NME methodology, as well as concurrent remedies, were inconsistent with GATT 1994 and the SCM Agreement.

On appeal, the Appellate Body reversed the Panel's decision that the cited the SCM Agreement provisions do not address the double remedies issue (*US — Anti-Dumping and Countervailing Duties (China)*, 2011). In detail, the Appellate Body explained that the dumping margin calculated by the NME methodology reflects both the dumping and the subsidies that affect the producer's costs of manufacture. As a consequence, "an anti-

dumping duty calculated based on an NME methodology may, therefore, 'remedy' or 'offset' a domestic subsidy, to the extent that such subsidy has contributed to a lowering of export price" (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, pp. 200−1). In other words, "the subsidization is 'counted' within the overall dumping margin" (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, p. 201). The Appellate Body ultimately concluded that the DOC failed to "establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties", hence the Appellate Body found there to be a violation of Article 19.3 of the SCM Agreement (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, p. 223). Given these points, the Appellate Body already indicated that NME status could potentially cause concurrent remedy, which is a violation of WTO anti-dumping and countervailing rules. However, the Appellate Body did not specify the extent to which a domestic subsidy contributes to export price to cause the double remedies issue, and did not provide the criteria to determine whether such extent to be inappropriate.

Technically, anti-dumping and countervailing duties have the same mission, namely, to secure the "fairness" of international trade (Van den Bossche, 2005, p. 512). Concurrent remedy might cause an unreasonable imposition of both anti-dumping and countervailing duties because it applies to the export prices that were reduced by subsidies, then also were dumped. However, the overlap of two remedies, called 'double remedy', is prohibited under paragraph 5 of Article VI of GATT 1994. While Article VI(5) could lead to an interpretation that export subsidies result in lower export prices, it is arguable that export subsidies might not be used to reduce export price all the time because the lower export price could also arise from domestic subsidies. In this regard, Lester et al. (2012) suggested that, if there is a concern about double remedies, each instance of subsidisation should be investigated where concurrent imposition of two remedies is sought, regardless of whether it is an export or a domestic subsidy. This method can be utilised either by investigating authorities to determine a finding on concurrent remedies in such cases, or by the respondents in WTO dispute cases to demonstrate that the subsidy was used to lower the export price and thereby cause the dumping, in which case a concurrent remedy would be inappropriate (*US — Anti-*

Dumping and Countervailing Duties (China), 2011, pp. 200−1). However, in practice such a method would be onerous, not to mention that proving how subsidies were used might be exceedingly difficult, and in many cases, there might not be any definite answer to how a particular subsidy was utilised (Lester et al., 2012, pp. 532−3). After all, there has not been any method to effectively and practically demonstrate a concurrent remedy being inappropriate. Hence, this issue was investigated in this thesis, and the reasons behind the ineffectiveness of these demonstrated methods of concurrent remedy were analysed. Through this, the most practical and effective method to assess concurrent remedy was revealed.

As the effect of NME treatment under paragraph 15(a)(ii) of China's WTO Accession Protocol expired on 11 December 2016,[12] the utilisation of NME treatment in anti-dumping investigations of products imported from China should now be inappropriate. However, this expiration does not mean a market economy status is automatically granted to China by other WTO members. There is, instead, a possibility that other WTO members may continue to consider China as an NME under their national anti-dumping laws (Zhou, 2017). In contrast, Lynam (2010) warned about this expiration in a worrying manner, because the US has historically used anti-dumping duties against China for the illegal subsidisation of imported goods from Chinese NME enterprises, instead of imposing countervailing duties. Hence, if the US cannot apply NME methodology anymore, the DOC might be unsure how to legally and appropriately impose countervailing duties in such a context. Nevertheless, Zhou (2017) stated that even if the US and EU keep labelling China as an NME, it cannot change the fact that the application of NME methodology to China is no longer appropriate, and the use of surrogate prices must be in accordance with relevant WTO rules, which are applicable to all WTO members.

[12] As mentioned above in the last paragraph of Section 2.3, China agreed to be treated as an NME in its WTO Accession Protocol.

6. The NME status of Vietnam

Vietnam, as a member of the WTO, was in a similar situation to China during its accession negotiations with other WTO members, which resulted in Vietnam agreeing to receive special treatment for its non-market producers in the Working Party report. As explained above, this means other WTO members can treat Vietnam as an NME and apply the NME methodology during their anti-dumping investigations, if their authorities suspect that Vietnamese exporters are operating in non-market conditions (*United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, 2006, p. 66).[13]

Being a developing country has never been easy in the international trading arena, especially when it comes to anti-dumping rules. All WTO members are equally bound by the ADA, but in practice, each of them confronts different challenges in utilising their anti-dumping laws and/or responding to investigations from other WTO members in compliance with the ADA. Aggarwal (2007) pointed out that developing countries are particularly vulnerable anti-dumping targets. There are many reasons for this. For example, companies in those countries might have a well-developed data saving system, but not be well-prepared for an anti-dumping investigation, for example, because their relevant documents, which prove their production cost, their operating conditions or their selling price of similar products in the domestic market, might not be prepared in the right way to defend their interests in front of the investigating authorities. Such circumstances consequently lead to them being disadvantaged as a result of the dumping margin calculation (Zissimos & Wouters, 2017). Similarly, in *United States — Anti-Dumping and Countervailing Measures on Steel Plate from India*, the DOC discarded all data provided by the exporters, and instead used 'best facts available', which actually was data reported by the petitioners.[14] The case was brought to the DSB, and the Panel

[13] In the *Accession of Viet Nam — Report of the Working Party on the Accession of Viet Nam* (2006), subparagraph 255(a)(ii) provides that: "The importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product".

[14] "Petitioners" in this context means individuals and/or companies from domestic industries, who brought the case to the national authorities and requested the opening of an anti-dumping investigation.

finally concluded that the DOC should have used all data submitted which satisfied Annex II of the ADA, and that it went beyond its authority to reject all information submitted by the exporters (*United States — Anti-Dumping and Countervailing Measures on Steel Plate from India*, 2002). In practice, not all anti-dumping cases will be brought to the DSB for resolution, because the cost of an international dispute settlement is usually very high. Therefore, if exporters from developing countries can prepare their documents well for submission during the investigation, they can protect their interests more effectively.

While expressing the same statement as Aggarwal (2007) above, Bahcekapili and Cokgezen (2007) also noted that developing countries who are considered NMEs are in the most vulnerable and controversial situation, especially in the process of determining normal value. According to Article 2 of the ADA, there are typically three methods by which an authority can determine normal value: 1) the price of "like product" in the home market of the exporting country; 2) the export price to a third country and 3) production cost in the country of origin. However, as already mentioned in section 2.3 above, the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 allows authorities to disregard data from the exporting country and use information relating to normal value in a surrogate market economy (a substitute country) for this end. Ikenson (2005) criticised such a provision, saying it would make dumping practices too easily determined without considering the data from the exporting country if the defendants were NMEs. Even if a comparable surrogate country is found, the investigating authority could still use cost and price information differently in each case (Zissimos & Wouters, 2017). Hufbauer, Wong and Sheth (2006) identified the issue of NMEs as significant in the trade relationship between China and the US, which has been similar to the trade relationship between Vietnam and the US.

In the trade partnership between Vietnam and the US, trade remedies had been imposed on Vietnam by the US for years before the official accession of Vietnam to the WTO (Ly & Ngo, 2016). On 8 November 2002, the DOC issued a determination on the case of *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, in which the US designated Vietnam as an NME, a status that will

apply to every future anti-dumping case until it is revoked (United States Department of Commerce, 2002). McCarty and Kalapesi (2003) investigated this case and discussed the six factors that the DOC argued Vietnam had not satisfied to "graduate" from being an NME. These factors were: 1) how the currency can be converted into the currency of other countries; 2) that the wage rate should be determined by free bargaining between the labourer and manufacturer; 3) joint ventures or other investment from foreign companies; 4) the extent of State-owned production; 5) the extent of government control over the allocation of resources and 6) other factors that the DOC considered appropriate, such as trade liberalisation, legal frameworks, and corruption (McCarty and Kalapesi, 2003, pp. 25−9).

Pelzman (2011) on the other hand, assessed the DOC's determination negatively, saying that "it flows in complete contradiction to the US-Vietnam BTA"[15] (p. 2) and that it fails to acknowledge Vietnam's "significant progress in its march to revamp its system to respond to and participate actively in the global economy" (p. 29). Finally, both McCarty and Kalapesi (2003) and Pelzman (2011) concluded that the NME status of Vietnam was designated because of political reasons more than reasonable economic standards, but they did not provide any deeper discussion on what those political driving forces behind the scenes were or how they affected decisions of the DOC. To contribute to filling this gap, this thesis further explores not only the economic forces, but also the political forces behind the NME treatment of the US towards Vietnam.

7. The practice of 'zeroing'

The normal value established by NME methodology is already unfavourable to Vietnam, and if authorities use this normal value to calculate the dumping margin by way of a 'zeroing' methodology, things get even worse (Ikenson, 2004, p. 1). Zeroing methodology is a practical calculation method of the dumping margin. Such a method was adopted and applied under Article 2.4.2 of the ADA, which allows WTO members to compare individual normal values to individual export prices, or weighted average

[15] The full name of the US-Vietnam BTA is the Agreement Between the United States of America and the Socialist Republic Of Vietnam on Trade Relations.

normal value to individual export prices to determine the dumping margin. During the process, authorities can find a positive dumping amount or a negative dumping amount. Instead of using negative dumping to offset positive dumping for the calculation of a weighted average dumping margin, however, all negative dumping margins are given zero value, which leads to the result always being a positive margin. Ikenson (2004, p. 1) stated that such a method "can create dumping margins out of thin air." Furthermore, it also inflates the anti-dumping duty amount because such duty is imposed according to the margin of dumping. From the same point of view, Lindsey and Ikenson (2002) explained how domestic industries in the US could influence the legislation for their protection against imported products. It is understandable that they would exploit anti-dumping laws for protectionism regardless of any notions of fair trade, and zeroing is clearly a convenient tool to achieve this aim.

Despite being criticised, the practice of zeroing under the US anti-dumping law is long-standing and was used even before the ADA was adopted, and the US already has justification to utilise this practice domestically. In *Serampore Industries Pvt. Ltd. v. US Department of Commerce* (1987), zeroing was challenged for the first time in the US, but the US Court of International Trade upheld the DOC and claimed that the practice prevents sales below cost on a portion of a company's product line being negated by more profitable sales. In other words, the Court justified the DOC's zeroing practice, which prevents foreign exporters from covering their dumping with higher profits from other sales. The reasoning of the US Court of International Trade was arguably not convincing, since a fair calculation method should include the exact negative and positive numbers of both loss and profitable sales, respectively. Nonetheless, this decision has led to further application of zeroing in anti-dumping investigations by the US in relation to Vietnam.

To make zeroing a legitimate and internationally acceptable practice, the US proposed an amendment to the WTO anti-dumping rules during the Doha Round of Negotiations (*Draft Consolidated Chair Texts of the AD and SCM Agreements*, 2007). However, the Appellate Body held a different point of view. Zeroing was challenged by formal dispute settlement under the ADA for the first time in *European Communities — Anti-Dumping*

Duties on Imports of Cotton-type Bed Linen from India (*EC — Bed Linen*). In this case, the Appellate Body objected to zeroing and stated that such a practice "is not a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2" (*EC — Bed Linen*, 2001, para. 55). Later, in *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (*US — Zeroing (EC)*), the Appellate Body (*US — Zeroing (EC)*, 2006, para. 127) emphasised that negative dumping margins would be used to decrease the total dumping margin found. The Panel in *United States – Anti-dumping Measures on Certain Shrimp from Viet Nam* (2011) again concluded that the DOC's zeroing methodology used in administrative reviews was inconsistent with Article 2.4 of the ADA. In conclusion, the US failed in its attempt to make zeroing methodology applicable within the WTO anti-dumping rules.

On 6 February 2012, the US, the EU, and Japan reached agreements settling zeroing disputes, and on 14 February 2012, the DOC published its final notice of legal change regarding zeroing. According to this notice, the DOC abandons zeroing in sunset reviews by not relying on "weighted-average dumping margins that were calculated using the methodology found to be WTO-inconsistent" (United States Department of Commerce, 2012a, p. 1). After this, one would expect that the US had already abandoned such a practice in its investigation procedure. However, in the recent case of *United States — Anti-Dumping Measures on Fish Fillets from Vietnam*, Vietnam submitted a request for consultations to the DSB and the representative of the US at the WTO, and one of the issues was "improper use of the zeroing methodology in original investigations and reviews pursuant to its so-called differential pricing methodology" (*United States — Anti-Dumping Measures on Fish Fillets from Vietnam*, 2018, p. 2). At the end of the day, anyone would question whether it really was the end of the zeroing practice. Therefore, this research examined this issue further to identify if zeroing still exists in the practice of DOC.

Vietnam has been actively transitioning to the market economy. The European Parliament published a study by Puccio (2016) providing discussions on the NME status of China under the EU's and the US's anti-dumping rules. The study explained five

criteria that NMEs must satisfy to be granted market economy status by the EU, which are: 1) low government control over resources allocation; 2) a privatised economy that operates without distortion; 3) effective enterprise laws; 4) an effective legal framework for proper functioning of a market-based economy and 5) a sincere and legitimate financial sector. This thesis examined these criteria to find out which requirements Vietnam has already met, and which requirements need more effort in both economic and political reform to be fulfilled.

8. Conclusion

The literature review in this chapter has highlighted the findings of previous studies and identified gaps in the existing literature that this research will fill. In particular, the ADA provides the fundamental basis and a comprehensive set of procedures for anti-dumping investigations and proceedings. Even though WTO Members have enacted the ADA provisions into their national anti-dumping laws, this has not resulted in a harmonised application of the anti-dumping rules, and it appears that WTO Members interpret some aspects of the ADA differently, which can potentially create more anti-dumping disputes. Furthermore, the ADA do not provide detailed procedures for anti-dumping investigations and proceedings involving exporters from NMEs. The literature review has also shown that the NME status of Vietnam has never been thoroughly investigated and discussed in the literature.

The literature suggests that there is a considerable conflict in the interests between Vietnamese exporters as respondents and domestic industries of the importing country as applicants in anti-dumping investigations. It also appears that an investigating authority might find it difficult to maintain a neutral position because of the economic and political pressures from domestic industries. The exact reasons why the US and EU consider a country (and Vietnam in particular) to be an NME are unclear and need to be further studied and analysed to provide recommendations to Vietnamese exporters and the Vietnam Government on how to better deal with anti-dumping investigations and how Vietnam can potentially overcome its NME status. The next chapter explains how the research was undertaken and covers methodological aspects such as data collection and data analysis.

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CHAPTER 3 - METHODOLOGY

1. Introduction

This chapter outlines the methodology that was used to perform the research to address the research objectives and the central research question set out in chapter 1. It describes the overall methodological approach and research design. In this regard, the qualitative method is discussed, followed by an explanation of the appropriateness of qualitative approach to this research. Then, the types of data collected, data collection methods and how the data were analysed are presented in detail.

2. Overall methodology

To address the central research question and research objectives set out in chapter 1, a qualitative approach was adopted, and qualitative data was used, which was collected using both a desk-based study and interviews. Qualitative data is generally composed of words, observations, images, and even symbols; for this reason, Bhatia (2018) recommends using a qualitative approach for exploratory research. Schutz, Nichols and Rodgers (2009) explain how the qualitative method was uniquely created for researching human experience in making decisions based on their interactions with the subjects of research. Johnson, Onwuegbuzie and Turner (2007) also agree that qualitative data analysis can be used to facilitate the understanding of legal and political issues, like the NME issue. In this light, a qualitative approach was adopted in this thesis to gain an understanding of how exporters, authorities and other stakeholders deal with the NME issue in practice during anti-dumping investigations and proceedings.

3. Data collection

The qualitative data used in this research were obtained using two types of data collection methods, a desk-based study and interviews. The desk-based study was a major component of this research and it involved identification and collection of WTO dispute cases, international conventions and agreements, business records of Vietnamese exporters, national anti-dumping laws and national export policies. Travis (2016) notes that a desk-based study fundamentally involves collecting data from existing resources,

which was the case in this study. It entailed obtaining data and other relevant materials from various, and in most cases, publicly available sources, as further explained below.

Interviews were the other data collection method that was used to collect qualitative data in this research, whereby data relating to the views and opinions of anti-dumping experts from the Vietnam Government, the private sector and academia were obtained. Data from interviews complemented the desk-based study and were used to compare and validate the data from the desk-based study to increase the credibility and validity of the research (Frances, Coughlan, & Patricia [2009, pp. 309−14] provide explanations and examples on this matter to prove the effective combination of interviews and desk-based studies). Moreover, interview data provided further insights into the relevant issues from those who have firsthand practical experience in dealing with the NME issues, therefore their responses helped to better inform the study and confirm some of the findings of the desk-based study. The following sections outline the data collection methods in more detail.

3.1 Desk-based study

As part of the desk-based study, all relevant international agreements, national laws and policies, WTO dispute cases and Vietnamese exporters who have experience with anti-dumping investigations were identified. Subsequently, those exporters were contacted and asked to provide access to copies of available paper and digital documents/records relating to the anti-dumping investigations in which they were involved. The sections below specify the type of data collected by various desk-based study collection methods and explains in more detail how the relevant data were collected.

3.1.1 International agreements

The full official texts of the relevant international agreements, namely the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA), were collected via the WTO website where they are freely and publicly available. In addition, the official texts of the United States – Vietnam Bilateral Trade

Agreement concluded in 2001 and the European Union – Vietnam Free Trade Agreement concluded in 2015 were collected from the websites of the DOC and European Commission (EC), respectively, where they are publicly and freely available.[16]

3.1.2 National anti-dumping laws of the US and the EU and export policies of Vietnam

The relevant US and EU legislation, namely the US Tariff Act of 1930 and EU Regulation 2016/1036 on protection against dumped imports from non-EU countries, as well as Vietnam export policies, which are promulgated in Decree No. 75/2011/ND-CP of 2011 (Decree No. 75) and the Vietnam Government Instruction No. 25/CT-TTg of 2018 (Instruction No. 25), were collected for the purposes of this research.

The texts of national US and EU laws were collected from the DOC and EC websites, respectively, and Vietnam export policies were collected from the Vietnam Ministry of Commerce website, where they are all publicly and freely available.[17] In this regard, national anti-dumping laws of countries involved in an anti-dumping dispute, particularly laws of the country that initiates an anti-dumping investigation (in this case the US and the EU), were crucial for understanding how the investigating authorities from these WTO members undertake anti-dumping investigations, and how they apply NME treatment in investigation cases involving Vietnamese exporters. Relevant Vietnamese exportation policies provided an understanding of the rules with which Vietnamese exporters are required to comply, as well as the benefits and support those exporters can access or receive from the Vietnam Government.

3.1.3 Anti-dumping investigation records

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[16] As explained in Chapter 1, the US and the EU are the only WTO members that treat Vietnam as an NME for the purposes of anti-dumping investigations.

[17] As explained in the Scope of Research in Chapter 1, this research primarily focuses on anti-dumping investigations initiated and conducted by the US or EU involving products imported from Vietnam. Therefore, the relevant national anti-dumping laws that need to be examined are those of the US and EU. Since Vietnamese exporters inevitably become respondents in such anti-dumping investigations, Vietnamese anti-dumping law does not directly affect the outcome or procedures of the anti-dumping investigation and therefore was not examined for the purposes of this research. Instead, Vietnam's export policies were collected and analysed in this context as export policies of Vietnam may have a bearing on the future initiation of anti-dumping investigations and outcomes of those investigations.

Anti-dumping investigation records and documents of Vietnamese exporters who have been directly involved in an anti-dumping investigation (as respondents or foreign producers), were collected to gain an in-depth understanding of the practical aspects of the anti-dumping investigations and any difficulties that have arisen from the Vietnamese exporters' perspectives. Vietnamese exporters that were involved in anti-dumping investigations between 2007 and 2020 were identified through information on the websites of the DOC, the EU and the Vietnam Ministry of Investment and Trade. These records and documents included the investigating authorities' initiation of the investigation and questionnaires, exporters' responses generated in the process of the investigation and evidence submitted by exporters to verify their claims and protect their interests.

The anti-dumping investigation records and related documents were collected from three sources: 1) the exporters; 2) the database of the Vietnamese Government and 3) databases of the investigating authorities. Most records relevant to this research were publicly available and were collected from the websites of the DOC, the EC, Vietnam Ministry of Investment and Trade, and the Vietnam Chamber of Commerce and Industry (VCCI). Additional information and records were collected from several Vietnamese exporters who participated in the interviews.

When an anti-dumping investigation is brought to the DSB for arbitration, the DSB establishes a Panel and/or an Appellate Body to provide recommendations and rulings which are recorded in the Panel or Appellate Body Reports. These reports contain the relevant data on arguments of the parties, interpretations of the law and reasoning of the Panel and/or Appellate Body, which are discussed in the next section. However, the reports of the Panel and/or the Appellate Body usually do not mention every detail of the investigation under consideration. Therefore, it was necessary to collect and analyse records and documents generated during or as part of these anti-dumping investigations. By collecting both records of an anti-dumping investigation and its Panel and Appellate Body Reports (as the result of the investigation brought to the DSB), the variety of data was increased. This assisted in avoiding bias, which might be the case if reference was only made to the recommendations and rulings of the DSB, while ignoring the records

and documents of the initial anti-dumping investigation before it was brought to the DSB.

3.1.4 WTO anti-dumping dispute cases

As part of the desk-based study, WTO (Vietnam vs US and Vietnam vs EU) anti-dumping dispute cases were identified and collected from the WTO dispute settlement database, which is freely and publicly available on the WTO website. In particular, the reports of the WTO Panel and the WTO Appellate Body on anti-dumping dispute cases for the period from 2007 to 2020, in which Vietnamese exporters were respondents and where NME treatment was applied, were identified and collected. WTO dispute cases in which NME treatment was not applied, but that were handled by the same investigating authority, were also identified and collected.

To explain the significance of data from WTO anti-dumping cases to this research, it is important to note that the decisions of the WTO Panel and the WTO Appellate Body are the final and binding determination of cases, and they become precedents to be followed in future similar cases. For this reason, the reports of the WTO Panel and Appellate Body are among the most reliable and credible sources of interpretation of the WTO anti-dumping rules and the ADA. The reports of the WTO Panel and the WTO Appellate Body contain all arguments, interpretations, reasonings and evidence presented by the parties and therefore the data contained therein are the most comprehensive and authoritative, and these reports are easily accessible online.

3.2 Interviews

While most data were collected from the desk-based study, interviews provided supplementary data, which allowed deeper insights into the participants' perceptions and experiences. Opdenakker (2006) supports the use of interviews in qualitative research for effectively collecting relevant qualitative information, because an interview is the most versatile and productive method of communication. Another benefit of using interviews is that they enable spontaneity for the respondents and encourage them to express their opinions (Leedy & Ormrod, 2013, pp. 153–4). An interview is also

advantageous because the researcher has complete control in deciding who the interview is intended for. Patten and Newhart (2008, pp. 161–3) argue that a direct conversation allows the best opportunity for the interviewer to clarify any confusing or unclear questions on the spot, and for respondents to elaborate on or clarify their answers. As such, interviews are an appropriate data collection method in this study.

Here, interviews with Vietnamese exporters who have been involved in anti-dumping investigations and/or proceedings provided an opportunity to understand their practical experiences of being the subject of an anti-dumping investigation including any difficulties or problems they encountered. Interviews with officials, who work for the Vietnam Government and national trade and industry associations (the VCCI, the Vietnam Association of Seafood Exporters and Producer and the Vietnam Leather, Footwear and Handbag Association), also provided an insight into their roles in anti-dumping investigations/proceedings. Lastly, interviews with anti-dumping experts (including academics and consultants) provided a better understanding of the NME issue and different points of view from people who specifically practice and/or research in the field of anti-dumping investigations.

For interviewees to participate on behalf of organisations, permissions were obtained from relevant executives to interview their staff. Relevant companies/organisations were contacted through official channels (phone numbers or emails) and a director or relevant person in charge was requested to provide permission to interview their staff. As part of seeking permission to interview their staff, organisations were requested to nominate personnel with appropriate knowledge and expertise who have worked and/or provided technical support for anti-dumping investigations and proceedings or have practical experience in the field. In the case of anti-dumping experts, participants were people who have published on anti-dumping, or people who have considerable practical working experience in this field (e.g. a legal adviser of a respondent in an anti-dumping investigation or a staff member or investigator of a national anti-dumping department). Anti-dumping experts were contacted through official channels (phone numbers or emails) and invited to participate in the interviews.

The interviewer played a significant part in maintaining cooperation between interviewer and interviewee to increase the response rate during the interview. Grove, Fowler, Couper, Lepkowski, Singer, and Tourangeau (2004) emphasise the need for the interviewer to avoid giving respondents any motivation to provide socially 'expected' or 'desirable' answers. Each practitioner or researcher might have different opinions; therefore, to minimise the likelihood of respondents providing biased responses and to increase the validity of collected data, the interview questions (in Interview Protocols)[18] were drafted in such a way that the interviewer had a neutral position in the eyes of the interviewees. Furthermore, each group of interviewees was provided with a tailored Interview Protocol containing several questions specifically aimed at that particular group of participants (i.e. Vietnamese exporters, international experts, government officials). The following procedure/approach was used in conducting the interviews.

First, the interviewer sent the Interview Information Sheet and Consent Form, and explained the interview procedure, to potential interviewees. Second, after the respondents had agreed to participate as interviewees, they were provided with an Interview Protocol in advance by email, containing a list of questions specifically tailored for each group of interview participants, and then the time and place of the interviews were agreed upon with the participants. The interviews were semi-structured, whereby the interview protocols were prepared in advance, but the predetermined questions did not limit the scope of interview. The interviewer followed the flow of the conversation with each respondent, instead of following the interview guide rigorously. Through this technique, the interviewer was able to maintain a neutral standpoint, while the interviewees had more room to elaborate on certain aspects before providing their responses. Interviews were recorded in cases where interviewees agreed to have them recorded, while handwritten notes were taken in cases where interviewees did not agree to have their interview recorded.

Originally, interviews were to be conducted both face-to-face and using distance communication means, such as telephone and online/mobile calling applications (online

[18] See Appendix 1 for the list of questions in the respective Interview Protocol for each type/group of interviewees.

interviews were conducted using Zalo, Skype and Messenger). However, because of the COVID-19 outbreak at the start of 2020, all interviews were conducted by telephone and online calling applications. Telephone and Skype interview procedures were the same as those developed for face-to-face interviews.

The sampling of this data collection method was designed to focus on participants who have expertise or practical experience in anti-dumping investigations and proceedings. A total of 20 interviews were conducted comprising the following participants:

- fifteen participants representing Vietnamese exporters, identified as 'foreign producers' of the product under investigation in at least one anti-dumping investigation
- three officials of the Vietnam Government (one each from the Ministry of Industry and Trade (MIT), the Ministry of Planning and Investment, and the VCCI) who are anti-dumping experts and provide legal and technical assistance to Vietnamese exporters in anti-dumping investigation cases
- two Vietnamese anti-dumping experts (an academic and a consultant) who specialise in the field of anti-dumping.

4. Data analysis

Adam, Khan, Raeside, and White (2007, pp. 155–8) argue that in qualitative research, there is no clear distinction between the data collection and data analysis phase, hence data analysis begins as soon as the data is available. A similar approach was applied here, in which whenever data from a desk-based study or interview (in this case, an interview record) were collected, such data was ready for analysis. This approach was utilised flexibly depending on the type of data, because it was not necessary to start the analysis as soon as data were collected in every case. For example, an interview record could be analysed as soon as it had been obtained or prepared, whereas the records of an anti-dumping investigation case and the Panel and/or Appellate Body reports pertaining to the same case were first collected and then analysed together. The data analysis, which is described in the following sections, was undertaken by following this general approach.

4.1 Data preparation

As most data was contained in documents and interview transcripts[19] in the data preparation stage, the documents were firstly examined, then all relevant details that provided useful data were noted. The research aim and objectives were then re-visited to identify which type of collected data was relevant to which objectives, and the data were separated into their respective groups. These groups were: (a) data from the international agreements; (b) data from national laws and policies; (c) data from anti-dumping investigation records; (d) data from WTO dispute cases and (e) data from interviews.

In this regard, there were data that obviously belonged to a specific group (e.g. GATT 1994 and ADA belonged to the international agreements group, while the WTO Panel and Appellate Body reports belonged to the WTO dispute case group). There were also data from books and journal articles that could have been relevant to different groups. To prepare this type of data, it was read as an electronic copy on a computer. The data were allocated to different groups using a search function to look for keywords (codes) from each group to identify the paragraphs or parts of the data that included those codes, then those paragraphs or parts of the data were allocated to their respective groups. For instance, to identify which part of an article discussed the provisions of GATT 1994, the following codes were searched, *GATT*, *GATT 1947*, *GATT 1994* and *General Agreement of Trade and Tariffs*.[20] If a paragraph or part of the data consisted of several codes from two groups, it was listed in both groups, and so on. After allocating the data into relevant groups, the preparation of that data was complete.[21] In relation to interview data, the preparation steps included transcribing the interviews into Word documents and translating Vietnamese interview transcripts into English.

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[19] All audio recordings of interviews were subsequently transcribed into documents.

[20] The full list of codes is provided in Appendix 1.

[21] William, Given, and Scifleet (2013, pp. 417–39) and Grbich (2013, p. 16) explain these processes in more detail including how interviewees can be coded into groups (similar jobs, professional field, age, etc.) to identify the patterns in their responses.

4.2 Content analysis of text

The analytical approach in this research was content analysis of text. Content analysis is a versatile analysis method that directly examines texts or interview transcripts to obtain the key points of the discussion. It can be used to interpret documents for research purposes and provides an interpretation into models of human thought and language use. Gibbs (2007, p. 38) states that it can be employed to analyse documented information in the form of text. Therefore, content analysis has a wide application. It can be used to examine the nature and frequency of specific types of legal phenomena within legal reports or legal cases, or to consider the content of interviews or policy documents. It reduces text to themes or codes by categorising items in the text and then counting occurrences of those items to allow inferences to be drawn from the document (Webley, 2010, pp. 927–50). Here, content analysis was used to analyse the data collected from the desk-based study and responses from interviewees in the form of interview transcripts. All qualitative data collected were in the form of text documents, therefore content analysis of text was the most suitable analytical approach.

After data preparation was completed, each group of data were analysed. Daniel and Harland (2017, pp. 99–102) generally suggest that by analysing all groups of data, a researcher should be able to identify emerging themes and patterns, then list the content of those themes and patterns into groups.[22] Here, all the themes and patterns revolved around NME status in anti-dumping investigations and proceedings. A set of keywords was created, which were relevant to the main aim and objectives of the research, and then used to search for specific content in the collected data. For example, to identify all content which related to anti-dumping investigation procedures, keywords were searched for in the relevant data collected, such as *anti-dumping investigation*, *investigation*, *questionnaire* and *ADA*. During the analysis process, all content that included the same keyword but in different groups was linked to, and compared with, each other. For instance, both anti-dumping investigation records and WTO dispute cases groups had the keyword *NME*; all data including this keyword in both groups were

[22] See also William et. al. (2013, pp. 430–9) for how to determine the codes based on themes and patterns.

linked to and compared with each other, to find out if they contrasted or complemented one another. The following sections provide further details of the analysis procedure applied for each type of collected data.

4.2.1 International agreements

The GATT and the ADA are significant international agreements, which regulate the standards of anti-dumping investigations, and contain proceedings for WTO Members to follow and legislate these standards into their national anti-dumping laws (Van de Bossche, 2005, pp. 513–50). These two agreements were therefore analysed for the purpose of fully understanding their provisions and later, to gain further insight into how the US, the EU and Vietnam interpret the provisions of these two agreements. As only Chapter VI and Annex I of the GATT contain anti-dumping provisions, the analysis process was only applied to these sections. On the other hand, the ADA provisions were specifically created to regulate the implementation of anti-dumping rules under WTO laws, hence all texts of the ADA were analysed equally.

This data enabled a comprehensive understanding of the international regulatory aspects that govern anti-dumping investigations and proceedings and identified any relevant practical issues that may arise. Throughout the process, the texts of relevant provisions in the GATT and the ADA were examined and analysed, the provisions which caused the issues in anti-dumping investigations and proceedings on which this research focused were highlighted, and the provisions which could be amended to solve the issues noted.

Additionally, analysis of the US-Vietnam and the EU-Vietnam bilateral trade agreements provided an understanding of Vietnam's political, economic and trade relationships with the US and the EU and provided an opportunity to consider whether these bilateral agreements have any relevance to or implications for anti-dumping investigations and disputes involving these respective countries, as well as the treatment of Vietnam as an NME by the US and EU. This allowed appropriate recommendations for amendments, which addressed the research objectives, to be developed.

4.2.2 National anti-dumping laws of the US and the EU and export policies of Vietnam

The domestic anti-dumping laws of the US and the EU were then analysed subsequently to gain an understanding of how the US and the EU interpret and implement the provisions of the GATT 1994 and the ADA, and how the investigating authorities of these two WTO members conduct their anti-dumping investigations. The domestic anti-dumping laws of WTO members normally have both provisions regulating the procedures of anti-dumping investigations initiated by their authorities and provisions regulating how their exporters should act as respondents under investigations initiated by other countries (Joseph & Selvam, 2019, pp. 82–90). Therefore, not all articles of these laws were analysed, the focus being on the provisions relating to anti-dumping investigation procedures. As for the export policies of Vietnam, both previous and current policies for export products, which were or currently are the subject of anti-dumping investigations conducted by the US and the EU, were analysed.

The analytical process applied to these laws and policies was the same as the process used for analysing international agreements. Extra analysis steps were taken, however, to compare the provisions of these domestic laws to the respective provisions of the GATT 1994 and the ADA, and to examine whether the export policies of Vietnam violate the standards of a market-based economy, which could be the reason for the US and the EU treat Vietnam as an NME in their anti-dumping procedures.

4.2.3 Anti-dumping investigation records

After obtaining the anti-dumping investigation records, the documents were sorted to identify which data provided relevant information for research purposes. A study by Czako et al. (2003) mentions that the whole set of documents in one anti-dumping investigation case contains a considerable amount of information. Unfortunately, not all documents was directly related to the issues of NME treatment that are relevant to this research, therefore the analysis for this type of data was selective. The selected documents were then examined and analysed to identify information that explained how NME treatment was decided, how the investigation was conducted by the US/EU

investigating authorities and how Vietnamese exporters acted to defend their interests as respondents; this information was further used to compare with the data from other sources.

4.2.4 WTO anti-dumping dispute cases

The Panel Reports and Appellate Body Reports of relevant anti-dumping dispute cases were collected and sorted chronologically (from 2007 to 2020).[23] A WTO dispute case does not necessarily have both a Panel Report and an Appellate Body Report (Bievre, 2017, pp. 14–6), however, all dispute cases that were collected for the purposes of this research had both. The Panel/Appellate Body Reports were examined and analysed to identify specific parts where the Panel/Appellate Body discussed and provided comments on relevant issues in the anti-dumping investigations and proceedings between the US/EU authorities and Vietnamese exporters, as well as the NME treatment in those investigations. Furthermore, dispute cases (not necessarily involving Vietnam) in which NME treatment was not applied, conducted by the US/EU authorities, were examined to identify any variations in the investigation procedures, particularly between investigations which involved the application of NME treatment and investigations which did not.

After examining and analysing all relevant parts of the reports, information that helped to address the research aim and objectives was noted and listed in groups. These groups were discussions on the initiatives of the investigations, the process of sending questionnaires and collecting responses, the method used for calculating normal values, the determination of measures, the application of measures and the sunset review of the applied measures. For each relevant WTO anti-dumping dispute, the Panel Report and the respective Appellate Body Report were analysed. It was important to specifically identify and compare all opposing points of view of the Panel and the Appellate Body to determine if the rulings and reasons for the rulings had changed or were different. The

[23] The list of relevant WTO anti-dumping dispute cases is in Appendix 1.

Panel reports of different cases were then compared with each other to identify similar or different points of view among Panels in different anti-dumping disputes/cases.

4.2.5 Data from interviews

After transcribing the interview recordings into Word documents, the analysis process of interview data commenced.[24] This process was like the analysis process of the desk-based study data; all interview transcripts were examined to grasp the points of view that the interviewees expressed. The analysis of the interview data included a detailed examination of the interview transcripts and a comparison of answers. Not only were the specific individual answers to each question analysed, but the interviewees' responses as a whole were considered to obtain an understanding of their general attitudes and their personal views on the issues under discussion.

To select relevant interview data for each chapter of this thesis, a set of keywords was created for each chapter. A search for those keywords was then performed on the (electronic) interview transcripts to identify and examine interviewees' responses containing those keywords. For instance, chapter 4 discusses the anti-dumping rules in international agreements; the set of keywords for this chapter included *ADA*, *WTO*, *GATT* and *Anti-Dumping Agreement*. Once all responses containing relevant keywords were identified they were further examined and analysed. Responses from each interviewee that addressed the same issue were also compared with each other. In the process, the similarities and differences of different interviewee's responses on the same issue were identified.

At the end of the process, the analysed interview data were compared and correlated to the relevant data from the desk-based study. The data retrieved from interviews were used to validate the data of the desk-based study when the same issue was discussed in both the interview and desk study. Lastly, interview analysis results were incorporated throughout the thesis.

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[24] See Opdenakker (2006) for an explanation on why voice recordings should be transcribed into text for analysis of interviews.

5. Conclusion

This chapter has described the methodology used to collect and analyse the most relevant data sources in this research area. It was designed to then obtain the most appropriate and useful qualitative data possible. The principal data collection method was a desk-based study, supplemented by interviews with anti-dumping experts and experienced exporters. The data was then arranged into five groups which are: international agreements, national anti-dumping laws and policies, anti-dumping investigation records, WTO dispute cases, and interview data. Finally, these groups of data were analysed using the analytical approach of content analysis of text.

The desk-based study contributed most data to this research, in which the provisions in anti-dumping international rules and national laws provided an overall basic knowledge, then the information obtained from investigation records supplied a more practical understanding of the application of these laws and rule. Finally, the WTO Panel and Appellate Body reports opened the door to further insights with their numerous discussions and arguments. While only a minor part of the data was obtained from interviews, the information retrieved compliments the desk-based study data considerably, by providing specific opinions from various practitioners and experienced individuals in the field of anti-dumping. This chapter has also detailed a data analysis method in which relevant information was harvested from the data using content analysis of text. The next chapter examines international agreements and analyses the procedures of anti-dumping investigations and proceedings under those agreements.

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CHAPTER 4 - ANTI-DUMPING RULES IN INTERNATIONAL AGREEMENTS

1. Introduction

Having addressed methodological aspects of the research project, this chapter focuses on international legal agreements pertaining to anti-dumping, which are the GATT 1994 and the ADA. The chapter discusses the history of anti-dumping laws generally, the establishment of the first international anti-dumping rules in Article VI of the GATT 1947, the adoption of the ADA, and analyses the current international anti-dumping rules in the ADA including procedures of anti-dumping investigations. This chapter further examines the origin of NME status under the legal framework of the WTO. In this regard, the NME treatment in anti-dumping investigations and proceedings, which is the result of special provisions in Annex I of the GATT 1947, is also analysed. Finally, the chapter discusses the NME status of Vietnam and China at the WTO.

2. International Anti-Dumping Rules under the GATT

The issue of "free trade" versus "protectionism" has long been at the heart of all trade discussions (Nollen & Quinn, 1994; Erixon & Sally, 2010), including those concerning anti-dumping (Bown, 2009). By the end of the World War II, it had become widely accepted among trading countries that "free trade" would provide more benefits for the world trading cooperation and order, while "protectionism" distorts international trade and the nations that employ this trading approach would suffer more than gain, Fouda (2012, p. 352) agrees on this and states that protectionism after the World War II is 'a trade war in which both sides lose'. Consequently, in 1947 the international community adopted GATT 1947.[25]

The original twenty-three Contracting Parties[26] of GATT 1947 were bound to a multilateral free trade agreement, which entered into force on 1 January 1948, had

[25] The text of GATT was annexed to the Final Act adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. See United Nations (1947).

[26] The original 23 Contracting Parties of GATT 1947 were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New

envisioned an elaborate set of provisions for trade liberalisation. Its objective was to substantially reduce tariffs and other trade barriers and aiming to eliminate them, based on reciprocity and mutual advantage. The GATT 1947 regulated anti-dumping and countervailing measures in Article VI, which is discussed in detail in section 2.2 below.

In 1994, Contracting Parties of GATT 1947 adopted the Uruguay Round agreements in Marrakesh, which include the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), GATT 1994 and the ADA. Along with the establishment of the WTO, Annex 1A of the WTO Agreement contains the GATT 1994, which incorporates and envelops the provisions of the GATT 1947, and also comprises six Understandings on particular articles of the GATT 1947, tariff concession protocols, accession protocols, and 'GATT acquis' that refers to GATT decisions adopted by Contracting Parties between 1948 and 1994. In this regards, GATT 1947 is an integral part of the WTO and compulsory if a country is to become a WTO Member (Bown, 2009, p. 23-5).

Although a great deal of essential international trade law has changed, the GATT's cornerstone principles remain the same. WTO agreements are thus based on following three fundamental GATT principles: 1) the principle of progressive trade liberalisation, 2) the principle of non-discrimination between trade members, and 3) the principle of reciprocity (Bagwell and Staiger, 2002).

The first principle, trade liberalisation progress, provides for the reduction and elimination of tariffs and other non-tariff barriers to trade through multilateral negotiations. It prohibits countries from using quantitative restrictions, except in specified cases (GATT, Art XI). Even if a WTO Member decides to introduce or maintain any sort of quantitative restrictions under specified cases, it must be designed and monitored in a non-discriminatory manner (GATT, Art XIII). Protection for

Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States (GATT 1947, Preamble).

domestic industries can be extended only through tariffs, however that must be kept at low levels.

The second principle, non-discrimination, demands international trade to be conducted on the basis of equality, or non-discrimination, between the WTO Members. It requires WTO Members to not discriminate between their trading partners, who are also WTO Members, by giving them equally most-favoured-nation treatment (GATT, Art I). It also requires Members to not discriminate between their own and imported products, services, or nationals (GATT, Art III).

Lastly, the third principle, which is reciprocity, implies that a Member requesting advantageous access to the markets of other Members, through tariff reductions or the removal of quantitative restrictions under the implementation of the two principles mentioned in above paragraphs. Cheng (2018) explains that a Member must be ready to make concessions of reciprocal or equivalent value for those other Members, by which it results in balanced changes in bilateral trade flows between the Members. Bagwell and Staiger (2010, p. 19) describe the principle of reciprocity in the GATT/WTO context to be "the ideal of mutual changes in trade policy that bring about changes in the volume of each country's imports that are of equal value to changes in the volume of its exports". Although there is no explicit definition of nor provision on the principle of reciprocity in the texts of the GATT 1994 and the WTO Agreements, reciprocity in the GATT/WTO context has always been interpreted this way.[27]

Notwithstanding, in some circumstances, a WTO Member may temporarily break these principles and impose higher protection (which breaks the first principle) against import of one or more goods from one or more countries (which disregards the second principle) without being subject to the third principle of reciprocity (Aggarwal, 2007). These exceptional arrangements, which depart from the fundamental principles of the GATT/WTO, are termed "contingent trade protection provisions", or "contingent trade

[27] The preamble of the GATT clearly states that the agreement's objectives will be achieved by "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".

protective measures", or just "contingent protections" by several studies (Dam, 1970; Fischer & Prusa, 1999; Messerlin & Tharakan, 1999). Contingent protection measures allow WTO Members to temporarily protect their domestic industries from competitive imports that are artificially low priced, Nivola (1993, p. 30) stated that the artificially under-priced imports are usually the result of "foreign subsidies or other unfair trade practices".

These contingent protections fall under two categories: (i) measures that ensure remedies against unfair trade and (ii) measures that provide remedies against surge in imports (Aggarwal, 2007). Within the WTO framework, contingent protection is taken to mean the safeguard measures, which are a remedy against increase in imports, and anti-dumping and countervailing duties, which address the issue of unfair trade (Prusa & Teh, 2009). These measures, particularly the anti-dumping measure, are designed to secure the fairness of international trade. Even though they depart from the fundamental principles of the GATT 1994, the rationale of including them in the Uruguay Round agreements is to ensure fair and free trading environment between WTO Members. This thereby explains the adoption of the ADA along with the establishment of the WTO, as a part of the Uruguay Round agreements.

2.1 The history of international anti-dumping laws

Anti-dumping laws had had a long history in several national legislations. Anti-dumping rules started to develop in the early part of the twentieth century with the adoption of anti-dumping provisions by Canada in 1904, which were a part of the amendments to the *Custom Tariff Act 1897* (Ciuriak, 2005). While the proposed amendments were concerned mainly with the tariff schedules of a large variety of import items, Section 19 of the Act introduced a "special duty on undervalued products".[28] This law introduced

[28] Section 19 of the Canada *Customs Tariff Act 1897* introduced a new special duty, which is the world's first anti-dumping duty, with the following prominent features: the special duty was set at the difference between the selling price in Canada and the fair market value (the price at which the products were sold in the country of production), the application of the duty was limited to the type of import goods that were also produced in Canada, import goods are exempted from this special duty if domestic supply conditions were inadequate, and maximum special duty was capped at 50 per cent of the regular duty. However, there was no provision developed to regulate the injury test.

anti-dumping measure as a "special duty" that could be levied administratively rather than being enacted. The real impetus for introducing this law was the Canadian manufacturing's concern about low import prices of steel and its primary objective was to protect Canadian firms from steel dumped in Canada by the US firms (Finger, 1993).

New Zealand in 1905 and Australia in 1906 followed Canada and introduced their anti-dumping laws (Viner, 1923, p.204).[29] In Australia, anti-dumping laws were developed to avoid the threat from the International Harvester Trust, which was preparing to introduce US and Canadian agricultural machinery into the Australian market. It was feared that this would wipe out the emerging Australian manufacturing sector, which at that time was focusing on the production of agricultural machinery (Plowman, 1993). Likewise, in New Zealand the immediate cause that prompted the country to introduce anti-dumping laws was the pressure from the International Harvester Trust on both local and British suppliers (Ciuriak, 2005).

The US introduced the first anti-dumping legislation in *Revenue Act of 1916* (1916), which was an extension of the *Sherman Antitrust Act of 1890* (1890) and the *Clayton Antitrust Act of 1914* (1914) to international trade and intended to counter predatory dumping by foreign exporters (Sykes, 1998; Hufbauer, 1999). However, this law was rarely invoked due to the strict conditions for its use (Irwing, 2005). In 1921, the US enacted the Anti-Dumping Act 1921, which empowered the Secretary of the Treasury to impose duties on dumped goods without regard to the dumper's intent. It was this act that set the stage for the US anti-dumping law as it is today. It closely resembled Canada's anti-dumping law but essentially differed from the 1916 law. While the 1916 law focused on the intent of the exporter, the 1921 law hinged on a finding of price discrimination and injury.[30] Furthermore, the 1916 law was a criminal law, which

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[29] New Zealand enacted it first anti-dumping legislations by the name of the *Agricultural Implement Manufacture, Importation and Sale Act 1905* (Government Printer, 1905). One year after, Australia's first anti-dumping laws was enacted by the name of the *Australian Industries Preservation Act 1906* (Productivity Commission, 2016, pp. 25–6).

[30] The US Anti-Dumping Act of 1921 had salient features which are: duties could be imposed if the exporter's price was less than the foreign market value, foreign cost of production might be calculated if the foreign market value was not ascertainable, and dumping must be related to injury suffered by the domestic industry.

specified fines and even imprisonment to the dumper, whereas the 1921 law was a civil statute to assess penalty duties to compensate for price differentials.

In 1921, Britain adopted its first anti-dumping law whilst Canada, New Zealand, and Australia substantially made changes to their acts. Subsequently, more European countries passed anti-dumping laws in the period from 1920 to 1922. In the time of post-World War I, many war-devastated European countries put in efforts to rebuild their economies, they found that anti-dumping must be adopted to counter the possible dumped goods from the huge stockpiles of goods amassed by Germany (Stewart, Markel, and Kerwin, 1993, p. 1391). The war had disrupted international trade, which had resulted in the growth of import substituting domestic industries in these countries. With the end of the World War I, the goods could once again be imported, and this threatened the new emerging domestic industries. Countries sought solution in anti-dumping legislation. In the historical context, providing protection was the driving force of the evolution of the anti-dumping laws in several countries (Ciuriak, 2005).

After various countries individually adopted the legislation on anti-dumping, multilateral initiatives also commenced. In 1922, the League of Nations started to examine the issues of dumping and differential pricing (Viner, 1926). No agreement could however be reached on a collective basis until GATT 1947.

2.2 Anti-dumping rules from the GATT 1947 to the ADA

During the 1940s when the GATT was under negotiation, many countries were concerned with anti-dumping laws as these laws had been abused for protectionist purposes, not for maintaining fair trade as intended. The result of GATT negotiations over anti-dumping issues was Article VI of GATT 1947, which regulates both anti-dumping and countervailing duties.[31] The provisions in Article VI of GATT 1947 were relatively concise and left many rooms for interpretation in term of practical procedures

[31] In this research context, we focus on the anti-dumping aspect of Article VI of GATT 1947, which reads: "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country as less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry."

(Muller, 2017, pp. 372–6); however they represented a remarkable start to the introduction of detailed disciplines into the procedures used by member countries for the adoption of anti-dumping action.

In particular, Article VI exhorts the contracting parties to condemn dumping (pricing exports below the home market price or below the cost of production) "if it causes or threatens material injury to an established industry". However, it left the country of importation to respond to injurious dumping by imposing a duty "not greater than the margin of dumping". Trebilcock, Howse and Eliason (2012, p. 167) comment that Article VI by itself was insufficient in dealing with anti-dumping issue. Article VI indeed provides a general framework with limited details for responding to dumped products by anti-dumping duties, the provisions within Article VI are brief and vague, hence the need of more specific standards quickly became apparent. As a consequence, these rules have been developed in subsequent rounds of multilateral trade negotiations. The Kennedy Round introduced a Code on Anti-Dumping action in 1967, which was signed by 18 nations and attempted to fill in the inadequacies of Article VI, by specifying minimal procedural standards for anti-dumping cases and requiring that 'dumping' must be the 'principle' cause of the injury to domestic industry. Later, the Tokyo Round improved this Code in 1979, by developing additional rules on dumping and removing the requirement that dumping is the principle cause of injury. Unfortunately, disagreement over the proper use of anti-dumping procedures continued to arise and the issue was addressed again during the Uruguay Round negotiations.

The Uruguay Round, which established the WTO to strengthen the operation of the GATT, took the Code a lot further, resulting in the ADA (which is included in Annex IA of the WTO Agreement). As per the agreement during the Uruguay Round, anti-dumping measures are subject to the WTO Dispute Settlement Understanding (DSU), which will be discussed more in section 2.3 below in this chapter.

3. WTO Anti-Dumping Agreement

With the establishment of the WTO, Article VI(1) of the GATT, which defined the concept of dumping, has been implemented by WTO Members in accordance with the

ADA. To follow up with the overview of the anti-dumping investigation procedure, which was mentioned in previous chapters, the sections below will provide more technical understanding of each stage of the investigation under provisions of the ADA.

3.1 Anti-dumping investigation procedures and proceedings under the ADA

3.1.1 Technical terms

It is convenient at this stage to grasp the overall understanding of significant technical terms within the texts of the ADA. Most of these terms have been mentioned throughout chapters 1 and 2, this section continues to provide more explanations of them, which are 'normal value', 'export price', 'dumping margin', 'material injury', and 'domestic industry'.

Dumping is the practice of selling a product for export at a price below its 'normal value' (ADA, Arts 2.1 and 2.2). The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers for a like product in the exporting country. Where the exporter in the exporting country does not produce or sell the like product, the normal value may be established on the basis of prices of other sellers or producers. In practice, the US authorities use the term 'fair market value' to express normal value (DeFilippo, 2015, p.3). Meanwhile Australia consistently refers to the original definition of normal value from the ADA in their national anti-dumping policies (Productivity Commission, 2016, p. 29).

According to Article 2.2 of the ADA, sales of the like product intended for domestic consumption shall normally be used to determine normal value if the volume of such sales constitutes 5 per cent or more of the sales volume of the (imported) product under consideration to the importing Member. When there are no sales, or insufficient sales, of the like product in the ordinary course of trade, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin, plus a reasonable amount for selling, general and administrative costs and for profits (this basis is often called 'constructed value'). Or it should be calculated on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that these prices are representative. Even though Article 2 lists the calculation using export

price to a third country before the calculation using constructed price, it has not been a preference of hierarchy (Lester et. al., 2008, pp. 473–5). Therefore, export price to a third country is not necessarily a preferred option over constructed price, the investigating authorities may pick either of the options. Notwithstanding, the EU in practice rarely uses export prices to third countries as a measure of normal value (Bentley & Silberston, 2007).

The 'export price' shall normally be the transaction price actually paid or payable for the product when sold for export to the importing country (ADA, Arts 2.3 and 2.4)). However, the transaction price may not always an appropriate export price, especially if it is an internal transfer or barter (Van den Bossche, 2005, pp. 522–3). Where the export price is unreliable, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. Adjustments shall be made for all costs, including duties and taxes. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made as nearly as possible at the same time. When the normal value and the export price are not on a comparable basis, due allowance, in the form of a number of specified adjustments, may be made.

After establishing normal value and export price, the 'dumping margin' shall normally be established by one of three possible methods: a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the importing country, or by a comparison of individual normal values and individual export prices, or by a comparison of a weighted average normal value with the prices of all individual export transactions to the importing country (ADA, Art 2.4.2). The last method may be used when there is a pattern of export prices which differs significantly among different purchasers, regions or time periods. The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established. In order for the comparison between the normal value and export price to be fair, Article 2.4 requires that: "Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale,

taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." The ADA does not provide further explanation and reference for these differences, however the Panel (WTO, 2007, para. 6.77) in *US — Stainless Steel* decided that an unpredictable bankruptcy of a customer which results in a failure to pay for certain sales would not be considered a difference in conditions and terms of sale, because "a difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4."

The existence of dumping alone does not justify the taking of anti-dumping measures, it has to be proved that the dumped imports are causing 'material injury' to the producers of the like product in the importing country (ADA, Art 3). It is taken to mean material injury to the domestic industry of the importing country, or a threat of material injury to the industry, or material deceleration of the establishment of such an industry. While Article 4.1 of the ADA defines 'domestic injury' as: "the domestic producers as a whole of the like products", the Panel in *EC — Bed Linen* mentioned that the domestic industry might presumably be one or multiple domestic producers by stating that "Article 4.1 of the [Anti-Dumping] Agreement defines the domestic industry in terms of 'domestic producers' in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the [Anti-Dumping] Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation" (*EC — Bed Linen*, 2000, para. 6.72). Article 4 of the ADA provides that a complaint about dumped imports has to be made by or on behalf of the domestic industry. It shall be considered as satisfied if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product, produced by that portion of the domestic industry.

Article 3.1 requires a determination of injury to be based on positive evidence and to involve an objective determination of: (a) the volume of dumped imports, their effect on prices in the importing country, and (b) the consequent impact of those imports on the

domestic industry of the importing country. With regard to the volume of dumped imports and their effect, the Panel in *EC — Bed Linen* (2000, para. 6.136) ruled against the interpretation that 'dumped imports' must only refer to transactions of imports in which the export price was lower than the normal value by the statement: "We consider that dumping is a determination made with reference to a product from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authorities are entitled to consider all such imports in their analysis of 'dumped imports' under Articles 3.1, 3.4, and 3.5 of the [Anti-Dumping] Agreement."

The examination of the impact of the dumped imports on the relevant industry shall include an evaluation of all relevant economic factors that have a bearing on the circumstance of the industry. A non-exhaustive list of such factors is given in Article 3.4 of the ADA. In addition, known factors other than the dumped imports which are injuring the domestic industry shall also be examined, to ensure that injury caused by these other factors is not attributed to these dumped imports, and Article 3.5 of the ADA provides an illustrative list of such factors. In making a determination regarding the existence of a threat of material injury, consideration shall be given to a number of specified factors, including a significant rate of increase of dumped imports into the market, free capacity on the part of the exporter, and whether import prices are likely to depress domestic prices or prevent price increases which would otherwise have occurred.

3.1.2 The initiation

The ADA provides that anti-dumping proceedings can be initiated on the basis of the following: (a) a written application[32] by, or on behalf of the domestic industry affected by the alleged dumped imports (ADA, Art 5.1); or (b) in "special circumstances," by the investigating authorities of the country concerned acting on their own motion (ADA, Art 5.6).[33] An example of a case where the authorities might decide to initiate an investigation on their own motion might be where the domestic industry is so fragmented that, although it is suffering material injury, it is not possible for domestic producers to coordinate their efforts to meet the standing requirements to bring an application due to a lack of cooperation amongst the producers.

In the ordinary practical course of events, the representative of the domestic industry, which is normally one or a number of domestic producers, would reach to the relevant Ministry, Department, or other institutions concerned to express a complaint that their particular industry is injured by dumped imports (Czako et. al., 2003, pp. 21–5). After consultations, and if it appears that there is substance to the claim, the domestic producers will normally prepare an application for the initiation of an anti-dumping investigation on the basis of a *pro forma* document (see Appendix 3). It is the experience of many investigating authorities that the domestic industries do not always have an adequate understanding of the legal, substantive, and procedural requirements that have to be met before the process can be set into motion. This lack of understanding may lead to confusion and frustration with the process, especially regarding the information required to be submitted as supporting evidence when lodging an application. Some investigating authorities appear to have found it useful to develop step-by-step guides to assist the domestic industries in filing applications (United Nation, 2006, pp. 27–31). In the case of a written application by the domestic industry, the application must be supported by evidence to substantiate the allegations made therein (ADA, Art 5.2). In

[32] Also referred to as "complaint" or "petition" in various WTO documents (Panel reports, Appellate Body reports, documents released by the WTO's Committee on Anti-Dumping Practices, and the Working Group on Implementation's documents).

[33] The ADA does not provide further definition for the term "special circumstances".

the case where the process is activated by the authorities concerned without having received a written application by or on behalf of the domestic industry, the authorities must also ensure that they have the evidence, as described in Article 5.2 of the ADA, at their disposal to justify the initiation of the investigation. In either case, therefore, an investigation cannot be initiated unless the investigating authorities have sufficient evidence regarding the existence of dumping, injury, and a causal link between dumping and injury (ADA, Arts 5.2, 5.3 and 5.6). Thus, if the investigating authorities have not received an application, but wish to initiate an investigation, they must nonetheless ensure that there is sufficient evidence to justify initiation. Although the ADA does not go into detail in this regard, the requirement for sufficient evidence in the context of self-initiation would imply that the investigating authorities have undertaken some kind of information-gathering exercise on their own in order to be able to conclude that the requirement is met.

3.1.3 Required minimum information for an anti-dumping application

For an anti-dumping investigation to be initiated, the application must provide certain minimum information. Article 5.2 of the ADA states that applications containing simple assertions, unsubstantiated by relevant evidence, cannot be considered sufficient. Instead, this minimum information must indicate the existence of dumping, injury, and a causal link between the alleged dumping and injury. The Panel in *Argentina — Poultry Anti-Dumping Duties* noted that "without ruling on this matter, it does not exclude the possibility that Article 5.2 could oblige Members to verify that applications contain evidence, and not mere assertion, of dumping, injury, and causal link" and that "a consequence of this obligation may be that applications not meeting the requirements of Article 5.2 are rejected" (WTO, 2003, para. 7.98). Article 5.2 lays out the specific requirements which applications have to meet. Those requirements are grouped into four main categories: 1) the identity of the applicant(s) and a description of the volume and value of domestic production of the like product produced by the applicant(s); 2) the characteristic of the allegedly dumped product and its sources, names of exporters and importers; 3) specific information supporting the allegations of dumping, which is information on prices at which the product at issue is sold when destined for

consumption in the domestic markets of the country or countries of origin and information on export prices; and 4) specific information supporting the allegations of injury and causality.

By the very nature of category 1 of required minimum information, it is readily available to the applicant. In the case where the applicant is bringing the application on behalf of the domestic industry, it will usually have some indication of the production accounted for by the other domestic producers, either through direct knowledge or through industry publications, etc.

For category 2, normally the applicant does not encounter any problems regarding information on the characteristics of the alleged dumped product, although it might sometimes be problematic to obtain details on the manufacturing process and raw materials used in the production process (Lester et. al., 2008). Applicants also normally experience few problems in identifying the country of export, although it might be difficult in some instances to identify the country of origin if it differs from the country of export, especially when repackaging, etc., is involved. The more problematic aspect is usually for the applicant to identify the exporters/foreign producers and the importers (Czako et. al., 2003). Potential sources of this information might be the trade office of the exporting country, the relevant embassy, or marketing information sources. Another possible source might be the import documentation, but this type of information may be classified and thus may not be available to the applicant.

On the contrary, the information required under category 3 is not generally available to the applicant and it usually has to make a special effort to satisfy the requirements of Article 5.2, especially regarding the information relating to the price of the like product when sold for consumption in the domestic market of the exporting country (normal value information). This has led authorities to have different requirements on the sufficiency of evidence to substantiate the allegation of dumping, depending to a large degree on the facts of the case regarding access by the applicant to necessary information. However, in relation to this category, the Panel in *US — Zeroing (EC)* noted that the applicant is only required to "provide information on domestic and export prices and not to perform the calculations foreseen in Article 2.4.2" (WTO, 2005, para.

7.196) It is common practice for applicants to substantiate dumping allegations by submitting recent pricelists, price quotations or invoices as proof of the prices at which sales in the country of export and sales from the country of export into the country of import are made, or on the basis of pricing studies or market research. It is also common practice to use official trade statistics in determining the export price for purposes of initiation of an investigation.

The information required under category 4 relates to the domestic industry itself and applicants therefore generally have fewer difficulties obtaining information in support of the injury and causality allegations. Article 5.2 provides that the injury information in an application must concern changes in the volume of the allegedly dumped imports, their effect on domestic prices, and their impact on the performance of the domestic producers, in terms of the relevant economic factors, such as output, sales, revenue, etc. In this regard, the Panel in *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* (*Mexico — Corn Syrup*) observed that, while it is clear that the application must contain information regarding the consequent impact of the allegedly dumped products on the domestic industry, an application does not need to contain information on all the factors and indices listed in Articles 3.2 and 3.4 of the ADA (*Mexico — Corn Syrup*, 2000, para. 7.73). For the most part, such information can be derived from the business records, including accounting and financial records, of the domestic producers themselves.

This would include information regarding 1) whether dumped imports have increased significantly, either in absolute terms or relative to production or consumption; 2) whether there has been significant price undercutting, or whether dumped imports have otherwise significantly depressed prices, or prevented price increases which otherwise would have occurred, to a significant degree; and 3) the impact of dumped imports on the performance of the domestic industry, including an evaluation of the factors listed in Article 3.4 of the ADA.

Article 5.2 qualifies the obligation to provide information set out above. It provides that the applicant should submit such information which is reasonably available to it. This means that if all the required information, as set out above, has not been submitted, the

investigating authorities will have to judge whether the applicant has submitted the information "reasonably available" to it, and if not, whether a reasonable effort has been made to obtain it, before the application is accepted.

Article 5.2 does not specify the time-period to which the information supporting the allegations of dumping and injury should refer. The practice of most Members is that the dumping information should relate to the most recent 12-month period and that the injury information should cover, at a minimum, the most recent three-year period. The WTO's Committee on Anti-Dumping Practices (*Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, 2000, pp. 5–16) advised that the period covered by the injury information should include the period covered by the dumping data. How recent the information should be, might, from a practical and "reasonableness" perspective, depend on the availability of import statistics, the financial year-end of the applicant etc. It might, for example, be unreasonable to expect a small producer to provide injury information up to August if it brings the application in September, and its financial year-end is July. The investigating authorities might in this case decide that the applicant should submit injury information covering the period to end of July. Once the period of investigation for dumping and the period of investigation for injury determination have been determined by the authorities, the applicant might be requested to supplement the information submitted in the original application.

In case where an application is brought against allegedly dumped imports from an NME, as explained in chapter 2, it may be possible, and appears to be common practice, for authorities to use information relating to the normal value in a substitute, or surrogate country, to determine the normal value. This could imply that, in general, the substantiating information requirements for the application would be the same for the substitute or surrogate country as if the substitute country were the country against which the allegation of dumping is being made. As the cooperation of an exporter/producer has to be obtained in the surrogate country to submit its own company-confidential information relating to domestic sales and/or costs of production, it is the experience of investigating authorities that it is sometimes difficult for applicants to obtain the required cooperation. As the ADA does not contain any

guidance on this matter, authorities have a degree of discretion on what type of information they will accept, and the level of detail required, as substantiation of the allegation of dumping in such a case. In practice this has led authorities to use export prices from the surrogate country to a third country as a basis, or constructed the normal value on the basis of adjusted cost data of the applicant industry itself.

3.1.4 Confidential information

Article 6.5 specifies which information is to be treated as confidential, describes the steps to be taken to ensure that confidential treatment is justified, and sets out rules for the submission of non-confidential summaries of confidential information. Pursuant to Article 6.5, information shall be treated as confidential by the investigating authorities if it is "by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information)"; or the information was "provided on a confidential basis by parties to the investigation".

Confidential treatment is not automatic. Article 6.5 specifies that parties requesting confidential treatment for any information submitted must show "good cause" why the information should be treated as confidential. Although footnote 18 to the ADD notes that requests for confidentiality should not be rejected arbitrarily, the investigating authorities are not obligated to accept information as confidential merely because the party has submitted it as such. The authorities have to assess the reasons given for the claim of confidentiality and decide whether confidential treatment is warranted. If the claim for confidentiality is warranted, Article 6.5.1 requires the supplier of the confidential information to file a non-confidential summary thereof. These summaries must be "sufficient in detail to provide a reasonable understanding of the substance" of the confidential information concerned (ADA, Art 6.5.1). The reason why a non-confidential summary of the information is required is that it is a recognised principle of law that any party which might be negatively affected by an action taken by authorities has a right to know the case against it to enable it to defend its own interests. The party

involved is not entitled to have access to all the details of the case against it, as long as it has sufficient information to know what the case against it is.

However, recognizing that is not always possible to summarize the confidential information in a non-confidential form, Article 6.5.1 provides that, in such exceptional circumstances, the party submitting the information must provide a statement of reasons as to why a non-confidential summarization is not possible. If the investigating authorities have found that a request for confidential treatment is not warranted, the party submitting the information must either agree to make the information concerned public or authorize its disclosure in generalized or summary form. If the party refuses, the investigating authorities may disregard the information in question for the purposes of the investigation "unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct".

Generally, Article 6.5 provides that, if requested, and if they accept the request, the investigating authorities have to provide special treatment for confidential information. If confidential status is granted to certain information, the supplier has to submit a non-confidential summary of such information. If the request is found not to be warranted by the authorities, the supplier can either authorise its publication as is, or provide a summarized non-confidential version. If the supplier is not prepared to follow any of the two options above, the authorities may disregard such information. However, under no circumstances can the authorities disclose information, claimed by the supplier to be confidential, to any other party without the specific permission of the party submitting it.

3.1.5 Conduct of anti-dumping investigations

Once the authorities have decided to initiate an investigation, Article 12.1 of the ADA requires that public notice of the initiation of the investigation be given. The common practice for Members is to publish a notice in an official government publication, usually the official gazette of the Member concerned. After the required public notice has been given, the formal investigation process starts.

Article 5.10 of the ADA provides that investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after initiation. Although the maximum time-period allowed might seem quite adequate, or even excessive, the experience of investigating authorities shows that it is sometimes very difficult to meet this deadline, especially when the product to be investigated is complex, a number of countries, exporters and importers are involved, a large body of information has to be gathered, reviewed, and analysed, extensions of time are requested, etc. It is therefore essential that the conduct of the investigation is properly planned and executed. Unavoidable adjustments to the planning schedule need to be made at the earliest opportunity so as to ensure that the whole process is concluded within the set time-limit. If this is not done, there is a real risk that the investigation might not be concluded within the required time-limit. The result of this might be that the measure taken by the authorities as a result of the investigation might be challenged in the WTO.

3.1.5.1 Questionnaires

To meet the requirement of Article 6 of the ADA regarding the collection of evidence, it is standard practice for investigating authorities to collect the information required in the investigation by means of questionnaires. These questionnaires contain detailed questions covering all aspects of the information needed, from the production of the product, its marketing, to the financial statements; for example, the legal structure of the firms concerned, all the relevant transactions, production processes and volumes, costing, marketing, market share, price developments, etc. This provision, which in fact serves the purpose of protecting fundamental rights of interested parties in anti-dumping investigations and reviews (WTO, 2004, para. 241), guarantees the the right of all interested parties to receive, on the one hand, notice of the information required by authorities and, on the other, ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question (WTO, 2011, para. 609). Once an investigation is initiated, questionnaires are sent to known interested parties, in particular, foreign producers or exporters, importers, and domestic producers.

Some Members also routinely send questionnaires to purchasers of the product in the domestic market at some point in the investigation.

Investigating authorities identify questionnaire recipients on the basis of the information provided in the application, supplemented by any other information that is available to them. For instance, investigators may request information regarding the identity of exporters from the country(ies) concerned.[34] In the case of importers, the investigators may obtain information from the official import records, if such records identify individual importers (and exporters). Information about domestic producers and importers, as well as purchasers, if relevant, may be obtained from other government agencies or trade or business associations.

In contrast to the specific rules governing questionnaires to foreign producers and exporters, the ADA is silent regarding questionnaires to domestic producers and importers. However, it is common practice for Members to follow the same basic rules as are set out in the ADA for questionnaires to foreign producers and exporters. Such a practice guarantees that all interested parties are treated the same with respect to the transmittal/submission of questionnaires.

3.1.5.2 Determination of anti-dumping measures

After the information and evidence has been obtained through questionnaires, the investigation is continued, and the information submitted is verified (if verification was not done before the preliminary determination). During this part of the process, the ADA provides the parties the opportunity to comment on the factual and legal basis of the preliminary determination and to submit further evidence (ADA, Art 6.2). At the conclusion of the investigative phase, a final determination has to be made, based on all the evidence obtained by the investigating authorities. Once the authorities have made a final determination that dumping exists and that the domestic industry is suffering

[34] The ADA and GATT 1994 actually have no provision that requires the Government concerned, under their WTO membership's obligations, to provide the requested information to the investigator, but in practice it may consider the interest of its exporters and cooperates by submitting their exporters' details to ensure that the questionnaires are sent to them directly.

material injury as a result, definitive (final) anti-dumping duties may be imposed (ADA, Art 9.1). Dumping margins are normally calculated on an exporter-specific basis (ADA, Art 6.10), and as a rule, are based on the information each individual exporter submits in its questionnaire response, or otherwise in writing. However, non-cooperating exporters (i.e. those who do not submit a questionnaire response, or provide incomplete and / or incorrect data) may be assessed a dumping margin based, partly or wholly on "facts available", which might include information as submitted by the applicant (ADA, Art 6.8 and Annex II).

Pursuant to the ADA, the imposition of definitive anti-dumping measures is not mandatory, that is, the authorities have the option not to impose measures, even if all the requirements for its imposition have been met (ADA, Art 9.1). However, in some countries' domestic legislation, it is mandatory to impose anti-dumping duties once all requirements are met. Final measures are applied in the form of final anti-dumping duties, that is, duties in addition to the normal applicable import duties, and are imposed by public notice. Alternatively, the authorities may enter into price undertakings, whereby individual exporters undertake to revise their export prices, or cease exports at dumped prices, so that the injurious effect of the dumping is eliminated (ADA, Art 8.1). As in the case of preliminary anti-dumping measures definitive duties may be imposed at a level equal to, but not higher than the dumping margin. However, it is desirable that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry (ADA, Art 9.1). Price undertakings are also subject to these two provisions (ADA, Art 8.1). If the final determination is negative with respect to either dumping, injury, or causal link, the investigation is terminated.

Additionally, Article 6.9 provides that, before a final determination is made, parties shall be informed of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." Article 6.9 notes that such disclosure "should take place in sufficient time for the parties to defend their interests." However, it does not specify what constitutes the "essential facts" that are to be disclosed. Public notice of the final determination, whether affirmative or negative, has to be given (ADA, Art 12.2). Public notice has also to be given of any decision to accept a price

undertaking, of the termination of an undertaking, and of the termination of a definitive anti-dumping duty (ADA, Art 12.2).

3.1.5.3 Duration and review of anti-dumping measures

The ADA allows the maximum duration of anti-dumping duties to be 5 years, unless a review (called a "sunset" or "expiry review"), covering both dumping and injury, is initiated before the expiry of the 5 years and it is determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury (ADA, Art 11.3).

Any party can request the authorities to review the continued imposition of antidumping duties if they submit positive evidence substantiating the need for a review, *inter alia*, information indicating that circumstances have changed and that either dumping is no longer taking place, and/or that the original applicant industry is no longer suffering material injury as a result of dumping—sometimes called a "changed circumstances review." The authorities can also, on their own initiative, initiate a review (ADA, Art 11.2).

The ADA provides that the amount of the anti-dumping duty shall not exceed the margin of dumping established (ADA, Art 9.3). Therefore, in addition to a review under Article 11.2, dumping margins may be updated periodically, with subsequent adjustments to the duties imposed, so as to avoid collecting definitive duties in excess of the dumping margins. Since definitive duties collected correspond to the dumping margins originally calculated, they may not reflect current dumping margins over time. In order to avoid this situation, investigating authorities shall, upon request for a refund by either the exporter or importer, re-calculate the dumping margins based on more recent data. On the basis of such re-assessments, definitive duties paid in excess of the actual dumping margins must be reimbursed (ADA, Arts 9.3.1 and 9.3.2). Normally, such procedures must be completed within 12 months.

3.2 Non-Market Economy status

The WTO currently faces an array of challenges, notably the consistent failure of multilateral negotiations, the rise of unilateralism threatening the WTO's rules-based system, the imminent crisis in the WTO's dispute settlement mechanism, and the inadequacy of WTO rules in addressing certain systemic or contemporary issues (Mastromatteo, 2017, pp. 601–18). Collective actions by WTO Members are required to overcome these challenges, to protect and promote the values of multilateralism, and to counteract the ongoing trend of de-globalisation. Among these challenges, the issue of NME has acquired growing prominence.

3.1.5.4 WTO Dispute Settlement

It is no longer a question of member countries agreeing loosely to apply the Code on Anti-Dumping action under GATT 1947, with no sanction for failure to comply. Failure to comply with one of the Uruguay Round Agreements, including the ADA, can lead to proceedings before the DSB, whereby an independent panel and, if appealed, the Appellate Body of the WTO, will decide whether a member country has complied with the ADA or the Subsidies and Countervailing Measures Agreement. If not, the offending country will be ordered to correct the situation, failing which the injured member country can be authorised to take countermeasures, in the form of increased tariffs (that is, in derogation from the principle of bound tariffs and the Most-Favoured-Nation [MFN] treatment under Article I of the GATT 1947). As a result of this innovation, the WTO can be a far more effective body than the GATT, which had no teeth, and had to rely solely on exhortation to correct any abuses which it found to be contrary to its free trade principles. However, even the DSB's powers of enforcement have limits, owing to the fact that the subjects of WTO law are all sovereign powers.

3.2.1 The origin of NME status in the GATT/WTO Framework

The obstacle that NMEs pose to the world trading system essentially arises from state intervention in commercial activities which causes market distortions and sabotages the norms and principles that are generally applicable to market-based economies. However,

Zhou et al (2019, pp. 980–93) argued that it remains a matter for debate whether the general rules of the GATT/WTO have the capacity to cope with NMEs. In the context of GATT/WTO, this matter has its roots in the GATT 1947 era.

The negotiations of the GATT between 1946 and 1948 were conducted pre-dominantly among market economy countries without much contemplation of rules that apply to NMEs (Jackson, 1989, pp. 892–3). One major exception was the consideration of state trading as a potential barrier to trade and hence the inclusion of Article XVII of GATT 1947 to impose a general obligation of non-discrimination on "State Trading Enterprises" (Davey, 1998, p. 36). However, this rule is confined to anti-discrimination and leaves many other ways of state intervention unregulated. Furthermore, Article XVII is not a special rule on NMEs and applies to state trading in both market economies and NMEs. In this regard, a report of the Organisation for Economic Cooperation and Development (OECD) (OECD, 2016) shows a steadily increasing involvement of state-owned enterprises (SOEs) in international trading and other commercial activities all over the globe, including many major nations.

In 1950s–60s, the admission of certain NMEs (e.g. Poland, Romania, and Hungary) to the GATT led to the creation of a special anti-dumping rule to address certain extreme situations in which markets were dominated by state monopolies (WTO, n.d., p. 228). In dealing with allegedly dumped imports from these economies, investigating authorities may decide not to use the domestic prices of these economies for the calculation of dumping margins.[35] On the surface, the scope of applicability of this special rule is also limited. However, Jackson (1989, p. 894) argued that these NMEs were "relatively small in terms of their impact on trade", the limitations of the GATT rules in addressing NME-related problems did not escalate into a systemic issue. Notwithstanding, since the commencement of the negotiations of China's accession to the WTO, the issue of

[35] The second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 (under the Ad Article VI of Annex I: Notes and Supplementary Provisions) reads: "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

Chinese NME status stands as a unique example due to the size and influence in global economic activities and the ever-increasing complexities in the Chinese economy.

3.2.2 China and its NME status

China's negotiations to join the multilateral trading system took fifteen years between 1986 and 2001.[36] At the outset of the negotiations, China was a centrally planned economy although domestic economic reforms were launched in 1979 to transform China to a market-oriented economy. The progress of China's transformation was a matter of crucial importance throughout the accession negotiations (Lardy, 2002, pp. 29–62). In one of the sessions of the GATT Working Party on China's resumption of GATT membership in 1988, several members pointed out the difficulties in applying GATT rules to NMEs and hence the need for special rules on China (*Working Party on China's Status as A Contracting Party: Introduction and General Statements*, 1988, pp. 10–3). In subsequent negotiations, China was requested to respond to numerous questions on various aspects of its economic system, spanning from import and export regulatory regime to pricing mechanism, domestic subsidies, state trading, transparency, and so forth. In response to these concerns, the Chinese delegation insisted that China was no longer a centrally controlled economy, but had integrated planning with market mechanism through the domestic economic reforms (*Working Party on China's Status as A Contracting Party: Communication from China*, 1988).

In a press conference in Beijing after the conclusion of the Uruguay Round in 1994, Peter Sutherland, the founding Director General of the WTO, acknowledged that "China's economic reforms have given a far greater role to market forces and have led to a rapid liberalization of its foreign trade regime" (Sutherland, 1994, p. 4). In the meantime, Sutherland highlighted some specific issues that needed to be resolved in China's accession negotiations. The negotiating history reveals the difficulties in applying the special anti-dumping rule invented in the 1950s to China given its limited

[36] For discussions on a number of issues of the negotiations and the outcome, *See* Cass, D. Z., Williams, B. G., & Barker, G. (2003). *China and the World Trading System: Entering the New Millennium*. Cambridge University Press.

applicability and ill-defined scope, and hence the need for new rules to address the changing circumstances in China (*Communication from China*, 1995; *Communication from China*, 1998). Thus, the WTO Working Party on the Accession of China (the successor of the GATT Working Party) was tasked to facilitate the negotiations of China-specific issues and draft the corresponding rules to be included in the legal instruments on China's accession (*Communication from China*, 2000).

Consequently, China agreed to undertake a range of obligations in addition to the general ones set out in WTO agreements. These WTO-plus obligations are included in two accession instruments which are the China's Accession Protocol (2001) and the *Report of the Working Party on the Accession of China* (2001). Among these obligations, the most invoked and controversial has been Section 15 of the China's Accession Protocol. Section 15 of the China's Accession Protocol essentially confers a right on WTO Members to treat China as an NME in anti-dumping investigations. This means that special anti-dumping rules may be applied to Chinese producers and exporters based on the assumption that they do not operate according to market economy conditions. The application of the special anti-dumping rules typically results in the use of prices and costs in a third market economy country (i.e., a surrogate country) for the calculation of a "normal value" of the Chinese goods under investigation. In practice, the use of the special anti-dumping rules almost invariably inflates the normal value depending on the arbitrary choices of surrogate values, and ultimately the quantum of anti-dumping duties to be imposed (Bown, 2016, pp. 6–7; Bellora & Jean, 2016, pp. 3–16). Generally, China's accession is the start of special anti-dumping rules caused by NME status, Vietnam subsequently confronted its predictably similar NME status in the context of WTO anti-dumping rules.

3.2.3 Vietnam's NME status

Vietnam agreed to being treated as an NME in anti-dumping proceedings as a condition of its accession to the WTO and agreed to a time bound expiration of the use of NME methodology against its exporters. That date for Vietnam is December 31, 2018. The provisions on anti-dumping in the *Accession of Viet Nam — Report of the Working Party on the Accession of Viet Nam* (Vietnam's Accession Protocol) (2006) are similar to those

in China's Accession Protocol. Whether Vietnam graduates to market economy status is unclear, particularly in light of the US' position against treating China as a market economy country. The fate of Vietnam in many respects hinges on the outcome of China's two WTO cases (*United States — Measures Related to Price Comparison Methodologies* and *European Union — Measures Related to Price Comparison Methodologies*) against the EU and the US (WTO, 2016a; WTO, 2016b).

Theoretically, it is possible that a Vietnamese industry (as opposed to the entire country of Vietnam) could attempt and be successful at claiming market economy status for itself as Vietnam's Accession Protocol enables an industry to prove that it operates on market economy conditions. Article 255(a)(i) of Vietnam's Accession Protocol states: "If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability." But that is highly unlikely given the stringency of the standard employed under US anti-dumping law which enables industries to claim market economy status. The US trade deficit with China and Vietnam further make that possibility highly unlikely. By the end of 2019, the US goods trade deficit with Vietnam stood at $55.8 billion, which is in the top 10 largest trade deficits between the US and other countries (United States Census Bureau, 2019). The history of US anti-dumping practice shows that its increasing trade deficits with countries, particularly NMEs have correspondingly resulted in increased anti-dumping initiations and orders against such countries (Bello, Holmer, & Preiss, 1992, pp. 668–70). How the US, and the EU, particularly apply special anti-dumping rules on imported goods from Vietnam due to its NME status will be discussed further in the next chapter.

4. Conclusion

The first international regulation on anti-dumping materialised is in Article VI of the GATT 1947. Subsequently, as part of the Uruguay Round of Negotiations the ADA was adopted in 1994 and entered into force in 1995. It is believed to have made significant progress in international anti-dumping regulations and addressed many areas of anti-

dumping that previously lacked precision and detail. The ADA allows WTO Members to impose anti-dumping measures on imports of products that were exported at a price below the normal value if such imports cause or threaten material injury to a domestic industry in the territory of the importing WTO Member.

In general, the purpose of an anti-dumping investigation is to determine whether dumping has occurred and caused injury to the domestic industry of the importing country. In summary, the investigation process involves: a) establishing a normal value of the product when sold in the domestic market of the exporting country; b) establishing the export price of the product; c) comparing the export price with the normal value established; and d) ascertaining whether the domestic industry of the importing country is suffering injury because of dumped imports. The rules of the ADA require that anti-dumping investigations be conducted with adequate cognisance taken of the appropriate process, in which anti-dumping investigations must be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests. However, the note to Article VI of the GATT 1947 provides for a special methodology in anti-dumping investigations for exporters from NME countries and allows WTO Members to use this special method to establish the normal value.

The analysis also demonstrated that NME treatment originates in the GATT 1947 and has been applied by the US and EU in anti-dumping investigations ever since. However, it is important to note that Vietnam and China (which are both considered NMEs) have agreed to be treated as NME as part of their accession to the WTO. Having addressed these aspects, the next chapter discusses the practical approaches of the US and the EU regarding anti-dumping investigations of exported products from NMEs generally and Vietnam in particular.

CHAPTER 5 - DOMESTIC LEGAL FRAMEWORKS AND PROCEDURES OF THE US AND THE EU

1. Introduction

As the previous chapter introduced and explained the technical procedures of anti-dumping investigations and proceedings under the ADA, this chapter specifically focuses on the anti-dumping investigation procedures of the US and the EU under their anti-dumping laws. To gain an in-depth understanding of these procedures, the history of the US and the EU anti-dumping laws are examined and explained. This will lead to a better understanding of the current anti-dumping investigation methodologies applied to imports from NMEs by the US and the EU.

This chapter also analyses the origins, emergence and development of the treatment of NMEs under US and EU anti-dumping laws. The analysis of NME status in the investigations conducted by the US and the EU is further discussed, as well as how the US and EU investigating authorities determine normal value for the purpose of calculating dumping margins. Additionally, this chapter also discusses how the investigating authorities determine that an exporter fully respects and applies market-based practices in international trade. Finally, the chapter provides a brief overview of Vietnamese exporters as respondents to the US and the EU anti-dumping investigations.

2. US Anti-dumping Law

The imposition of tariffs and other forms of foreign trading regulation are the authority of the US Congress granted by the US Constitution (Ikenson, 2020). In terms of tariff imposition, most US trade partners have been equally treated under US law and foreign policy since 1922. Since the GATT was established in 1947, the US system has reflected the international trading framework of MFN treatment. Three 'trade remedy' provisions of GATT, being safeguard, countervailing, and anti-dumping, allow an exception to MFN treatment. Trade remedy provisions are used to address unfair trade practices and assist domestic producers to respond to abrupt increases in improperly priced imports, by levying additional duties. The most commonly utilised remedy is the

imposition of anti-dumping duty, but it is also considerably contentious (United States Congressional Budget Office, 1994). The purpose of US anti-dumping regulation is to protect domestic industry from dumped imports, which inflict or threaten material injuries to such industry. The US International Trade Administration (ITA) of the DOC has the authority to calculate and determine extra import duties to be imposed on the said dumped goods.

2.1 History of US Anti-dumping Law

The rise of economic monopoly, which resulted in inequitable competitive advantages at the end of the nineteenth century, led to the development of US anti-dumping laws as the response to this issue. Any attempt or scheme to monopolise a certain industry was forbidden under the *Sherman Antitrust Act of 1890*. These rules were then expanded to apply to foreign commerce in further relevant US statutes that were introduced soon afterwards. The *Wilson Tariff of 1894* (also called the Income Tax Act of 1894) made every plan and combination of persons or corporations illegitimate, if any of them intended to monopolise the US market. Despite the fact that the *Wilson Tariff of 1894* included harsh punishments including jail and fines, Viner (1923) claims that such provisions were "without practical significance" (p. 241), since it was an impracticable task to conduct procedures against the relevant importers.

Price discrimination that is potentially established to monopolise a market or to reduce competition is now prohibited, as a result of the *Clayton Act of 1914*. In the same manner, the US Congressional Budget Office (1994) also noted that, "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States" (p. 20), selling imported products for much less than the exporting country's market price of such products was also unlawful under the *Anti-dumping Act of 1916*.

Individuals convicted of violating the *Anti-dumping Act of 1916* faced possible imprisonment and fines, not the imposition of additional duties on imports. This made the *Anti-dumping Act of 1916* a criminal law, and any violation of such law could be

punishable by criminal penalties. It was challenging for the plaintiff to prove that there was predatory motive in the exporter's practices, with the goal of restricting or inhibiting competitiveness, and the *Anti-dumping Act of 1916*'s remedies were never used. Regardless, despite the introduction of replacement legislation (discussed below) the *Anti-dumping Act of 1916* has never been repealed. The *Anti-Dumping Act of 1916* was in fact determined to be in conflict with WTO rules by the Appellate Body (*United States – Import Measures on Certain Products from the European Communities*, 2000).

The legislative features that are nowadays considered to be anti-dumping measures in the US were initially included in the *Anti-Dumping Act of 1921*, in which taxes could be levied if the exporter's sales price was less than the value of the foreign market. The Act provided that proper response to dumping practices should be higher import duty (not criminal punishment), domestic industries must suffer injuries which directly relate to dumped imports, the manufacture costs in the exporting country might be used to determine the market value of the products in exporting country's market, and selling exported goods at prices lower than the market value of the products in the exporting country's market might result in anti-dumping duties. The *Anti-dumping Act of 1921*, under Title II of the *Emergency Tariff Act of 1921*, represents the foundation of the current US anti-dumping legislation. In fact, the current anti-dumping legislative framework in the US was established by the *Anti-Dumping Act of 1921*. In this regard, the US Congressional Budget Office (1994) confirmed that, in accordance with the articles of *Anti-dumping Act of 1921*:

> Whenever the Secretary of the Treasury finds that an industry in the United States is likely to be injured, or is prevented from being established, by reason of the importation into the United States of foreign merchandise, … If the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production), there shall be levied, collected, and paid a special dumping duty in an amount equal to such difference. (United States Congressional Budget Office, 1994, p. 21)

The 1921 law made significant changes to the *Anti-Dumping Act of 1916*. Predatory pricing is an ambiguous term used to describe the practice of dumping in the *Anti-*

dumping Act of 1916. However, predation is not mandatory in the *Anti-dumping Act of 1921*, instead the selling of imported goods in the US at prices lesser than in the domestic market of exporting country would define dumping. Additional import duty is the relevant trade measure under the *Anti-dumping Act of 1921*, as opposed to penalties and imprisonment and fines under the *Anti-dumping Act of 1916*. The *Anti-Dumping Act of 1921* is based on the determination of material injury and discrimination in prices, while the exporters' intention was the emphasis in the Anti-Dumping Act of 1916. Administrative authorities implemented the *Anti-dumping Act of 1921*, while it required judicial processes by the courts to execute the provisions of the *Anti-dumping Act of 1916*.

Accordingly, the *Anti-dumping Act of 1921* provides better conditions for the processing of anti-dumping filings, in a way that the *Anti-dumping Act of 1916* could not. Finger (1993) explained the advancements of the *Anti-dumping Act of 1921* as follow:

> Under the softer standard of interpretation and proof, administration of the law could follow changing political pressures for protection much more quickly than a more rigorous, rule-of-law standard would allow. Thus, it prepared the way for the eventual emergence of antidumping as the main vehicle for import-competing interests to press for protection - and for governments to respond to those pressures. (p. 24)

Notwithstanding, throughout the 1920s to the 1930s, or soon after the World War II, the US did not prioritise anti-dumping measures in its foreign trading policies.
US manufacturers might request authorities to utilise additional trade rules to shield themselves from global competitors in the 1920s and early 1930s, which caused higher import tariffs, but such method started to diminish after the early 1930s (Irwin, Blonigen & Finger, 2004). In fact, the US Tariff Commission was the authority that enforced several different trade laws, by which domestic producers could seek protection against import goods. There were several ways in which suspected unfair competitive practices could be examined by the Tariff Commission, including the use of Section 337 of the Tariff Act of 1930, which allowed the Tariff Commission to act, if the US economy might be monopolised or limited, or a new industry might be hindered

to be established, or the US industries might be considerably injured, by the suspected import practices. After the Tariff Commission had conducted its investigation and provided determinations on the gap between manufacturing costs in the US and in the exporting country, a declaration could be made to announce the change in import duty of involved imported goods to address the unfair practices, under the procedures set in Section 336 of the Tariff Act of 1930.

The provisions of Article VI of GATT 1947, which was integrated into the ADA after the establishment of the WTO, are among the international treaties that have since influenced the anti-dumping regulations of the US. However, a study by Irwin (2005) found a mutual influence, in which the US anti-dumping law "was the main proponent of including anti-dumping procedures in Article VI of the [GATT] in 1947. Indeed, the *Anti-dumping Act of 1921* formed the textual basis for Article VI" (p. 654). This indicates that both Article VI of GATT 1947 and the ADA were advocated by the US, since anti-dumping legislation and practice of the US had an influence on both of the GATT 1947 and the ADA.

From 1954 to 1979, the anti-dumping procedures underwent significant adjustments in administration. At first, investigating if there were material injuries inflicted on the US industry, and examining whether the imports were sold at less than fair value (LTFV) into the US market, were the responsibilities of the US Treasury. However, in 1954, the Congress made change that the Tariff Commission replaced the Treasury to be in charge of investigating the material injuries. In 1974, the Tariff Commission renamed itself the International Trade Commission (ITC). In fact, operational capacity happened to be the main reason for this change of authority between the Treasury and the Tariff Commission, because, to enforce other trading regulations, the Tariff Commission had already been in charge of similar investigations. This shift of authority was also favoured by the Treasury, by stating that the determination of material injuries was actually "outside the ordinary scope of departmental activities" (United States Department of the Treasury, 1954, p. 304). The US anti-dumping laws were again amended by the Congress during the 1970s, and consequently it was more probable for import tariffs to be imposed as a result of anti-dumping investigations. A new Title

VII was introduced to the Tariff Act of 1930, and the Anti-dumping Act of 1921 was abolished by Title I of the Trade Agreements Act of 1979. The US anti-dumping regulation was significantly impacted by these amendments.

In 1979, the US House of Representatives' Ways and Means Committee expressed their concern that:

> The Committee has long been dissatisfied with the administration of the antidumping and countervailing duty statues by the Treasury Department … Given Treasury's performance over the past 10 years, many have questioned whether the dumping an countervail investigations and policy functions should remain in the Treasury Department. (US House of Representatives, 1979, p. 24)

In fact, because of the Treasury's apparent lack of concern about the involved companies' situations, the authority of determining the LTFV was transferred from the Treasury to the DOC, with Congress approval, and the DOC has been in charge of the responsibility of determining the LTFV since 1980. Furthermore, the Ways and Means Committee noted that the change of authority "will give these functions high priority within a Department whose principle mission is trade. In the past agencies have arbitrarily set a course of administration of these statutes contrary to congressional intent" (US House of Representatives, 1979, pp. 6–7). Therefore, the likelihood that import duty would be imposed as the result of the investigation was boosted, and application request procedures were made easier, as the consequences of the amendments to operational authorities and the provisions of the US anti-dumping regulations.

At the present, in accordance with the Tariff Act of 1930, if there are concerns that the dumped imported goods hinder a new industry to be established, inflict, or threaten to inflict material injuries to the US industries, the ITC will be requested to examine such concerns. In the meanwhile, the DOC is responsible to examine and determine if the dumping practices exist, then calculate the relevant dumping margins.

2.2 The application of NME status in anti-dumping investigations by the US

As all WTO Members comply with WTO agreement, including the ADA, the US anti-dumping laws regulate anti-dumping investigation and proceedings in conformance to the rules of the ADA. The DOC and ITC however conduct a more complicated procedure when it comes to NMEs in their anti-dumping investigations. This section explores the process of calculating dumping margin by the US authorities in NME cases, in which the NME status directly affects calculation method of dumping margin and ultimately distorts the final determination of anti-dumping measures.

2.2.1 Margin of dumping calculation by the US anti-dumping authorities

As explained in chapter 4, the dumping margin is simply the amount by which the normal value exceeds the export price. While following this general formula, the US margin of dumping calculation method has its own characteristics. If foreign producers sell their exports into the US market at the prices that are "less than its fair value", dumping is considered to have happened under the US anti-dumping legislations (Tariff Act of 1930, § 1673). When allegations of dumping are made, to determine the fair value of exports from market-based economy countries, the DOC conducts its investigation by a standard approach, which is in accordance with the ADA procedure explained in chapter 4. The DOC begins by looking at the imported product's price in the home market of exporting country (Tariff Act of 1930, § 1677b[a][1][B][i]), which is the 'normal value' (Tariff Act of 1930, § 1677b[a]), then compares such normal value to the selling price of the products in the US market to evaluate if the products were sold in the US for less than their fair value. Normal value can also be determined by the prices at which the goods under investigation are marketed or sold in nations apart from the US, in case where the goods are not available in the domestic market of the exporting country (Tariff Act of 1930, § 1677b[a][1][B][ii]). As a last option, the DOC is permitted to use a "constructed value" where there are no sales in the domestic market of the exporting country or to other third countries. Construction value is defined in

1677b(a)(4) of the Tariff Act of 1930, whereas the constructed value's calculation process is provided in Section 1677b(e).

An anti-dumping duty is imposed when there is evidence of dumping, and the dumping margin has been determined. The dumping margin is the average amount whereby the fair market value of a commodity surpasses the price at which it is sold in the US, if the existence of dumping is determined by the DOC (Tariff Act of 1930, § 1677[35]). Lastly, the affirmative determination that the dumped imported goods hinder a new industry to be established, inflict, or threaten to inflict material injuries to the US industries, must be issued to impose the anti-dumping duty (Tariff Act of 1930, § 1677[7][A]). It is essential to keep in mind that the ITC, which is a nonpartisan and independent organisation, is the authority in charge of making the injuries assessment.

2.2.2 US approach to applying anti-dumping rules to NMEs

Not long after the creation of GATT 1947, countries, including the US, quickly realised that the Supplementary Provision to paragraph 1 of Article VI in Annex I allows them to effectively interpret "a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State" as an NME. This interpretation subsequently provides a means of disregarding the use of domestic prices of an NME to establish normal value for the purpose of calculating the margin of dumping.

From the standpoint of the US, it is reasonable that, if the subject is actually an NME, the resource allocation in NME would not be in accordance with the market-based conditions of demand and supply, therefore this might create issues if the DOC apply the standard methodology for calculating the margin of dumping discussed above (Lantz, 1995). In this regard, the US decided that the normal value should be determined using a different approach. Taking the issue of NME in anti-dumping into account, for anti-dumping rules to be applied to NME nations, the 'surrogate country' method in anti-dumping regulations were created and first used by the US Treasury in the 1960s, which was the authority for internal trade remedy legislation at that time. To establish the

normal value, the data of expenses and prices in the NME was replaced by corresponding data of a surrogate country with comparable situation.[37] By the Congress's approval, Section 321 of the *Trade Act of 1974* codified and enacted the US surrogate country approach.

A suitable third nation with social and economic situations, that is comparable to the NME, may not be found or even exist, in order to implement surrogate country approach. Lantz (1995) argued that "the surrogate methodology proved difficult to apply because there were occasions when there was no available surrogate. Therefore, it was necessary to devise an alternative methodology to use when an appropriate surrogate could not be located" (p. 1003). In 1975, in response to the Treasury's worries about the surrogate country strategy, a new method was employed in *Electric Golf Cars from Poland*. It was mandated under the new method that a nation, with a market economy and an equivalent economic growth rate to the NME, is chose to collect a factor of production costs to establish the normal value. This method was justified in *Electric Golf Cars from Poland* (1975, p. 497) and called the 'factors of production' method. According to the *Trade Agreements Act of 1979*, when a surrogate country is not available, the Congress explicitly recognised this method as an option to be utilised in NME circumstances.

Consistent with their intention to treat NMEs as special cases during anti-dumping investigations, in 1988, additional anti-dumping rules to address the issue of NMEs were adopted by the US Congress. In this regard, the Congress adopted various amendments to the Tariff Act of 1930, in which, for the DOC to consider during anti-dumping investigations, the list of requirements for assessing whether a country is an NME, as well as a definition for NME, were introduced in the *Omnibus Trade and Competitiveness Act of 1988* (OTCA) which amended the Tariff Act of 1930. According to the OTCA provisions, the DOC might consider a country to be "nonmarket economy country" if the DOC determines that such country "does not operate on market

[37] The "surrogate country" approach had been introduced in many anti-dumping cases investigated by the US since 1960, for example, in *Bicycles from Czechoslovakia* (1960, p. 657).

principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise" (Tariff Act of 1930, § 1677[18][A]).

In accordance with the OTCA, the DOC is given considerable flexibility in making the determination of which countries are considered to be NMEs. A decision of NME status could be issued at any moment "with respect to any foreign country," according to the OTCA, and unless the DOC explicitly rescinds it, the determination of NME status stays in force (Tariff Act of 1930, § 1677[18][C]). The DOC's decisions in anti-dumping investigations furthermore would not be subjected to judicial process (Tariff Act of 1930, § 1677[18][D]).

In the cases of NMEs, the factors of production method became the recommended approach by the OTCA amendments to the US anti-dumping regulations, which was a noticeable change regarding the US anti-dumping approach for NMEs.[38] However, the extent of the DOC's discretion appeared to be considerable, when it came to how the DOC would apply the new amendments. Notwithstanding, the US authorities have not applied the factors of production approach in any of their anti-dumping investigations against imports from Vietnam as at the date of this research, but only the surrogate country approach.

The OTCA's amendments to the US anti-dumping laws appear to provide flexible discretion to the DOC, by which it is ambiguous if a consistent method should be applied or to take a different approach, depending on the available facts in each situation. According to a Report of the US Committee of Finance on the OTCA, when the DOC applies surrogate country approach to merchandise from an NME in anti-dumping investigation and finds a market economy country as the surrogate country, and DOC determines that "there is no eligible market economy country", "the foreign market value of the merchandise under investigation shall be the constructed value of

[38] Pursuant to Section 1677b(c) of the Tariff Act of 1930, when "(A) the subject merchandise is exported from a nonmarket economy country, and (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined ... the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses."

comparable merchandise in any market economy country" (United States Committee of Finance, 1987, p. 106).

As an additional demonstration of the DOC's discretion in deciding on the method to be used in calculating normal value, in *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China* (1991), the DOC announced that it will prioritise the following elements in terms of importance:

> (1) prices paid by the NME manufacturer for items imported from a market economy; (2) prices in the primary surrogate country of domestically produced or imported materials; (3) prices in one or more secondary surrogate countries reported by the industry producing the subject merchandise in the secondary country or countries; and (4) prices in one or more secondary surrogate countries from sources other than the industry producing the subject merchandise. (p. 588)

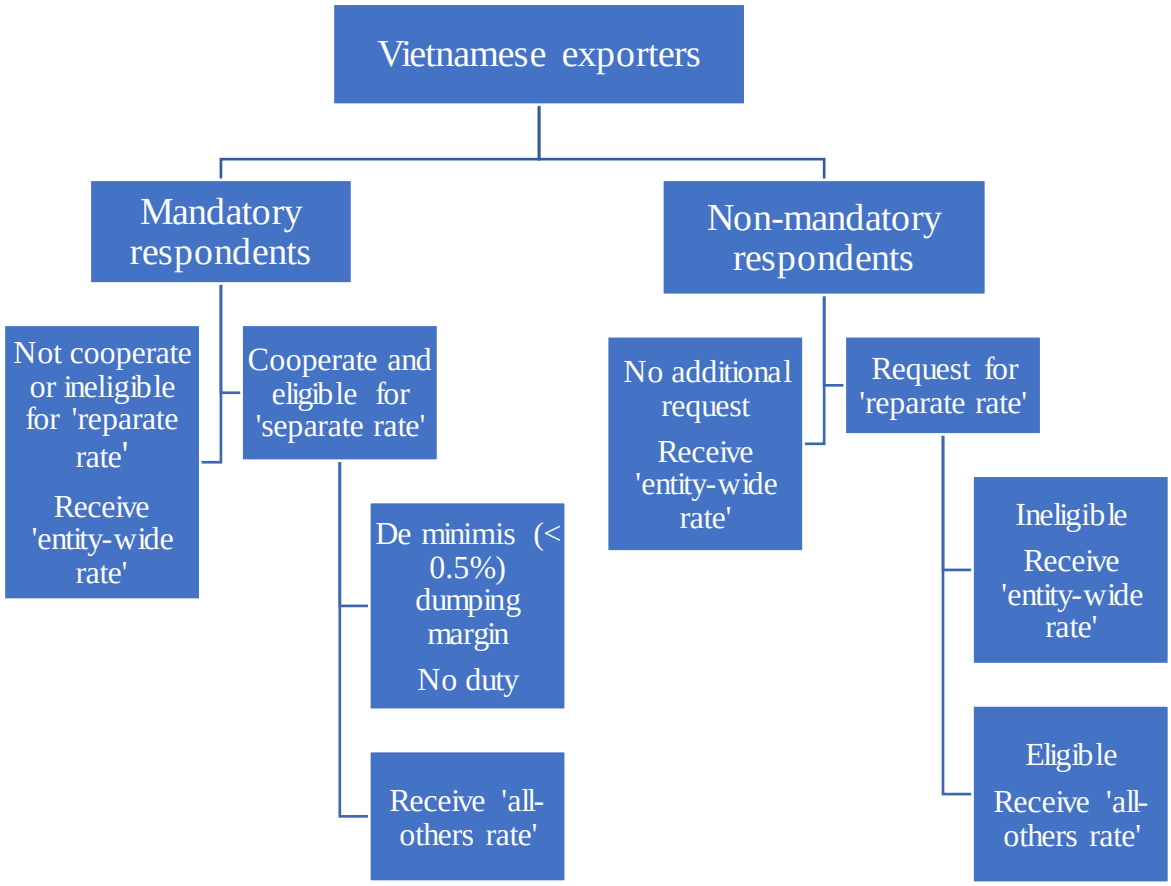
However, the DOC also stated that "this ranking of data sources reflects the Department's desire to use to the greatest extent possible factor prices in a single surrogate country" (*Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 1991, p. 590), because in fact they were unable to follow this ranking for all inputs in the case.

The US anti-dumping law has become the unique solution to battle the surge of importation from NMEs for US producers, since the Congress's approval of various approaches for surrogate country method has empowered the DOC's application of anti-dumping laws to NMEs. Through the practice of the surrogate country approach, the normal value was established by the market value of any other country except the NME under investigation, and as long as the discretion in the DOC's practice remains, the dumping margin will always be unpredictable and likely disadvantage the exporters from NMEs. The next section will provide further discussion and argument as to how US approach affects the determination of anti-dumping duty.

As stated in the Article 6.10 of the ADA, dumping margins are established on an individual basis for each known exporter under investigation. As a result, the

investigative authorities should, in theory, issue a questionnaire to every known NME (say, Vietnamese) exporter of the product in question. In the investigations initiated by the US authorities, the questionnaires and initiation notice are merged in the document called Request for Information – Antidumping Duty Administrative Review (ITA, n.d.). However, if the number of exporters engaged is so high that such a determination is impractical, the investigating authorities are allowed to limit their examination. In such cases, Article 6.10 allows the investigating authorities to limit the number of Vietnamese exporters under investigation. Figure 1 illustrates how the DOC interprets and applies the limited examination in its processes of determining anti-dumping duty rates.

Figure 1: The US determination of anti-dumping duty rates in NME cases.



Source: Author; Broude & Moore (2013).

In US anti-dumping investigations and proceedings, unless Vietnamese exporters can demonstrate their market-based operations in their replies to the DOC's questionnaires, the DOC initiates the investigation with the presumption that all Vietnamese exporters of the product under investigation operate under a single NME, hence the DOC only imposed a single 'entity-wide rate' for all exporters' dumping margins. Exporters that are able to demonstrate this might be individually examined by the DOC and receive a 'separate rate'. The DOC also determine how many Vietnamese exporters they will select as mandatory respondents, as mentioned earlier. Typically, only a small number of Vietnamese exporters would be selected by the DOC to become mandatory respondents. Furthermore, the DOC normally considers exporters that account for the largest volume of the exports under question for this mandatory respondent selection. As exporters can apply for the initiation of administrative reviews annually after the original investigation, it should be noted that there is no certainty that the DOC would select the exporters that apply for such reviews to be mandatory respondents.

In the original investigation, the DOC uses 'adverse facts available' to establish the 'entity-wide rate.' Uncooperative mandatory respondents and respondents who are ineligible for 'separate rate' will receive this 'entity-wide rate.' The DOC also excludes all data of uncooperative mandatory respondents and respondents who are ineligible for 'separate rate' when calculating the 'all-others rate.' Such 'all-others rate' is granted to cooperative and eligible mandatory respondents, as well as non-mandatory respondents who are eligible for 'separate rate.' However, there will be no anti-dumping duty rate imposed if the dumping margin of any Vietnamese exporters was determined to be *de minimis*, which is below 0.5 percent.

Through the practice of the surrogate country approach, the normal value is established by the market value of any other country except the NME under investigation, and if this discretion in the DOC's practice remains, the margin of dumping will always be unpredictable and likely disadvantage exporters from NMEs. Section 2.2.3 provides further discussions and arguments on how the US approach affects the determination of anti-dumping duty.

2.2.3 The unpredictability of the US approach

As noted by Leclerc (1999), anti-dumping laws are established to "prevent companies from establishing monopolies through the use of predatory pricing" (p. 113). This implies that the expense to retrain workers or to rebuild infrastructure, when intermittent dumping eventually ceases, would be covered by the economy. As a result of dumping, individuals may have to shift employment, which can result in a negative impact on the society's performance and motivation (Leclerc, 1999, pp. 117–20). Cheaper commodities might not be able to cover the injuries caused by dumping, but economic assessments have so far been unable to answer this matter. In this regard, in empirical research, Bhala (1995) shows that "this gain [to society in the form of lower prices] outweighs the cost to producers in the import country, measured by reduced profits, and to their employees, in terms of reduced employment" (p. 11). However, anti-dumping regulations continue to play an important role in most nations' trade laws.

A thorough understanding of the calculation of anti-dumping duty is essential to comprehend the unpredictability that exporters face when engaging in anti-dumping investigations of NME exports. As mentioned in sections 2.1 and 2.2 above, the Tariff Act of 1930, which is the source of the present US anti-dumping regulations, has been substantially changed multiple times since its adoption by the US Congress.[39] A domestic industry can submit a request to authorities for the initiation of anti-dumping investigation,[40] an initial assessment as if there is material injury or a threat of injury to the US industry thereby will be made by the ITC (Tariff Act of 1930, § 1673a). If the ITC determines that there is material injuries or threats of injuries to the US, the DOC will proceed to issue a preliminary determination to announce that the export(s) under investigation has been found to be dumped. According to the DOC, each exporter's dumping margin is calculated and provided in such preliminary determination. To calculate a dumping margin, the DOC deducts the price of the imported product when it was originally sold in the US (export price) from the amount it was sold in the exporting

[39] The provisions of anti-dumping duties in the Tariff Act of 1930 were lately amended by the Trade Facilitation and Enforcement Act of 2015, P.L. 114–25, title IV, §§ 401–33, 130 Stat. 155–71.

[40] This point was discussed in Chapter 2 and 4. For further explanation, see Johnson (1992).

country's home market (normal value).[41] The product is termed 'dumped' if the dumping margin is larger than zero,[42] and an anti-dumping duty equivalent to the margin of dumping will be imposed on the imported product (Tariff Act of 1930, § 1673). In order to issue a final dumping margin assessment, the DOC first conducts preliminary assessments and then solicits opinions from both the US domestic industries and the exporters of the goods under investigation (Tariff Act of 1930, § 1673d[a] & [c]).

While it may seem that this would be a straightforward and uncomplicated procedure, the degree of difficulty rapidly grows in practice. In fact, exporters of the same commodity importing into the US will often set their prices differently.[43] But considering that approximately 60 exporters may be investigated at the same time, the DOC would have to spend an enormous amount of time trying to calculate the dumping margin for each individual exporter.[44] In this regard, the DOC once argued that, even if there are only four exporters under review, calculating an individual dumping margin for each of them would already be an administrative burden (*Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v United States*, 2009, p. 1128). Therefore, Section 1677f-1(c)(2) of the Tariff Act of 1930 enables for the DOC to select and compute each of the dumping margins of certain exporters, known as mandatory respondents.[45] Then, the DOC use the weighted average of these mandatory respondents' dumping margins to determine the 'all-others rate', which will be applied to all exporters who were not individually evaluated or not eligible for an individual rate.

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[41] Pursuant to Section 1677(34)–(35) of the Tariff Act of 1930, the dumping margin simply equals normal value minus export price.

[42] In practice, no anti-dumping duty would be levied if the dumping margin is *de minimis*, which is the case where the calculated dumping margin is less than 2 percent. See Section 1673b(b)(3) of the Tariff Act of 1930.

[43] See, for example, the case in *Fresh Garlic from the People's Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review* (December 7, 2011).

[44] For an example of the number of companies/exporters that could be under one anti-dumping investigation, in *Mid Continent Nail Corp. v United States* (Court of International Trade, 2013), the authority reviewed the export/import transactions of 159 companies in total.

[45] 'All-others rates' can only be calculated by the dumping margins of a mandatory respondents which are higher than *de minimis* rate.

A voluntary request for individual examination is available for exporters who are not mandatory respondents, but the DOC has broad discretion in deciding whether or not to accept such extra workload. This type of request has been repeatedly rejected by the DOC in reality. For instances, in *Longkou Haimeng Mach. Co. v United States* (2008, p. 1151), the DOC refused to include dumping margins of voluntary respondents in their calculation of the 'all-others rate.' In *MacLean-Fogg Co. v United States* (2014, p. 1240), the DOC even argued the provisions of *Time Periods and Persons Examined; Voluntary Respondents; Exclusions*, which exclude the calculated weighted-average dumping margins for voluntary respondents, are invalid. In *Shenzhen Xinboda Indus. Co. v United States* (2016), the DOC argued that: "Commerce's recent history evidences a questionable tendency not to accept any voluntary respondents" (p. 1319).

The DOC is only obligated under the broad wording of the law, since it has never established rules clarifying how mandatory respondents would be selected and on what criteria an exporter could be mandatory respondent. The DOC might, supposedly to save operational expenses, select just two of the largest exporters and turn down the majority of voluntary respondent requests from other exporters.[46] Furthermore, the DOC has the ability to finally discard either one of the dumping margins of these two mandatory respondents, or even both of them. This means that an 'all-others rate,' which is calculated exclusively on the data of a single exporter, will be assigned to the major of exporters.[47] From initial determination to final determination to re-determination in certain situations, as well as from year-to-year, the dumping margin of an exporter might fluctuate significantly.[48]

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[46] For instance, in *Husteel Co. v US Steel Corp.* (2016, pp. 1334–5), the DOC only accepted two exporters and refused all other exporters, without giving any detailed reason.

[47] In this regard, the anti-dumping duty rate applied to manufacturers and exporters who have not been individually examined is known as the 'all-others rate,' according to Section 1673b(d)(1)(A)(ii) of the Tariff Act of 1930. It is meant to be a weighted average of the results from each of the exporters that were individually evaluated, according to Section 1673d(c)(5) of the Tariff Act of 1930. For more instances of 'all-others rate,' see *Navneet Publications (India) Ltd. v United States* (2015).

[48] In *Navneet Publications*, the 'all-others rate' plummeted from 11.01 percent to 0.5 percent when the dumping margin of a mandatory respondent had been ignored by the DOC. Similarly, in *US Steel Corp. v United States* (2016), the 'all-others rate' finally decreased to 5.79 percent from the initially higher rate of 55.29 percent.

Even in an economy where the market is free to operate, dumping margin calculation to impose duty on imported products would already be a complicated procedure, and this difficult procedure is exacerbated and might produce unpredictable results when dealing with imports from NMEs. The importance of these problems in administration explains why countries that have been treated as NMEs by the US are noticeably concerned about their NME status (Donnan, 2017; Bey, 2017). By analysing pricing information of a market-economy surrogate country, the DOC is obliged by law to make an effort to identify a comparative price for the imported goods under investigation, in order to make decisions on the imposition of NME anti-dumping duties (Tariff Act of 1930, § 1677b[a][1][C]). The DOC's broad discretion in choosing a third country, which was explained in section 2.2.2 above, is the main reason for the DOC's inability to consistently and predictably identify a surrogate country and calculate the normal value of a product. The idea that the DOC "makes it up as it goes" has been generated by this approach (Watson, 2014, p. 4). Similarly, Piskorski (2005) notes that "the US anti-dumping rubric is left open to criticism . . . because of its unpredictability and lack of accuracy" (p. 598). Inarguably, overall economic success largely relies on the level of efficiency and predictability of the law. There is a detrimental effect on both local and international manufacturers as a result of the unpredictability in the operation of the DOC (Watson, 2014, pp. 3–4). Because neither US producers nor exporters can predict how much the anti-dumping duties will be, and how the US market will react to the changes in the prices of the imports; therefore, determining their products' selling prices is much more challenging for both of these groups of firms.

As was mentioned earlier, the fact that neither local producers nor overseas exporters are capable of predicting the amount of anti-dumping duties that will be imposed on the imported goods from NMEs, seems to be the most significant issue with the method used by the DOC (Piskorski, 2005, p. 598). For the DOC's NME methodology, Watson (2016) discusses that the practice of the DOC "harms domestic import-using businesses and consumers" because it "results in unpredictable and unrealistically high antidumping duties" (p.1). Impossibility of long-term planning causes severe operational issues for overseas exporters and manufacturers, and raises costs for the US consumers at the same time.

2.2.4 Case study: US anti-dumping duty on Chinese garlic from 2007 to 2014

Exporters have had a tough time keeping up with the unpredictability of the DOC's anti-dumping determinations (Luberda, 2014, p. 15). To illustrate the difficulties that exporters have in trying to predict the amount of anti-dumping duties they will be required to pay, it is appropriate to examine cases relating to the US's anti-dumping duties imposed on Chinese fresh garlic from (Williams, 2018). Under the *Antidumping Duty Order; Fresh Garlic from the People's Republic of China* (1994), since 1994, the DOC has imposed an anti-dumping duty on Chinese fresh garlic, and the DOC reviews and re-calculates the duty rate (which is the 'all-others rate' discussed in section 2.2.3 above) every year until the DOC decides that the imported product is no longer being dumped. In this US anti-dumping investigation and proceeding over Chinese fresh garlic, it is possible to see how duty might change over the years for a range of factors, especially during 2007–2014 when the fluctuation of anti-dumping duties on this product was clearly noticeable. Table 1 provides details of the relevant DOC Notices on anti-dumping measures on Chinese fresh garlic and anti-dumping duty rates for each year during the period from 2007 to 2014.

Table 1: DOC Administrative Reviews on Chinese garlic during 2007–2014.

Period of Admin. Review	**DOC Notice**		**Surrogate Country**	**'All-others rate'[49] (USD per kg)**
	Full name	**Short name**		
Nov. 2006 – Oct. 2007	*Fresh Garlic from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative and New Shipper Reviews and Intent to Rescind, In Part, the Antidumping Duty Administrative and New Shipper Reviews* (2008)	*Preliminary Results of 13th Review* (2008)	India	0.1

[49] Which basically means the anti-dumping duty imposed on Chinese garlic as a result of the DOC's administrative review each year.

	Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews (2009)	*Final Results of 13th Review* (2009)	India	1.03
Nov. 2007 – Oct. 2008	*Fresh Garlic from the People's Republic of China: Preliminary Results of, and Intent to Rescind, in Part, the Antidumping Duty Administrative Review* (2009)	*Preliminary Results of 14th Review* (2009)	Not available (Previous year's rate was applied)	1.03
	Fresh Garlic from the People's Republic of China: Finals Results and Partial Rescission of the 14th Antidumping Duty Administrative Review (2010)	*Final Results of 14th Review* (2010)	Not available (Previous year's rate was applied)	1.03
Nov. 2008 – Oct. 2009	*Fresh Garlic from the People's Republic of China: Preliminary Results of, Partial Rescission of, and Intent to Rescind in Part, the 15th Antidumping Duty Administrative Review* (2010)	*Preliminary Results of 15th Review* (2010)	India	0.72
	Final Results of Redetermination Pursuant to Remand, Shenzhen Xinboda Indus. Co. v United States (2014)	*Final Results of 15th Review* (2014)	India	0.06
Nov. 2009 – Oct. 2010	*Fresh Garlic from the People's Republic of China: Preliminary Results of the 2009-2010 Antidumping Duty Administrative Review* (2011)	*Preliminary Results of 16th Review* (2011)	India	0.48
	Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review (2012)	*Final Results of 16th Review* (2012)	India	0.41

Nov. 2010 – Oct. 2011	*Fresh Garlic from the People's Republic of China: Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review* (2012)	*Preliminary Results of 17th Review* (2012)	Ukraine	1.81
	Fresh Garlic from the People's Republic of China: Final Results of the 2010–2011 Antidumping Duty Administrative Review (2013)	*Final Results of 17th Review* (2013)	Not available	1.28
Nov. 2011 – Oct. 2012	*Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review* (2013)	*Preliminary Results of 18th Review* (2013)	Philippines	1.47
	Fresh Garlic from the People's Republic of China: Finals Results and Partial Rescission of the 18th Antidumping Duty Administrative Review (2014)	*Final Results of 18th Review* (2014)	Philippines	1.82
Nov. 2012 – Oct. 2013	*Fresh Garlic from the People's Republic of China: Preliminary Results of the 19th Antidumping Duty Administrative Review* (2014)	*Preliminary Results of 19th Review* (2014)	Not available (Previous year's rate was applied)	1.82
	Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 19th Antidumping Duty Administrative Review (2015)	*Final Results of 19th Review* (2015)	Not available (Previous year's rate was applied)	1.82
Nov. 2013 – Oct. 2014	*Fresh Garlic from the People's Republic of China: Preliminary Results, Preliminary Intent to Rescind and Partial Rescission of the 20th Antidumping Duty Administrative Review* (2015)	*Preliminary Results of 20th Review* (2015)	Romania	2.72

	Fresh Garlic from the People's Republic of China: Final Results and Final Rescission of the 20th Antidumping Duty Administrative Review (2016)	*Final Results of 20th Review* (2016)	Romania	2.75
Average 'all-others rate' imposed on garlic from China during 2007–2014				1.275

Source: Author, based on the DOC data as indicated.

There were large fluctuations in the computed anti-dumping duty rates from the preliminary decision to the final decision in each year, and from one year to the next during 2007–2014. The *Preliminary Results of 13th Review* (2008, p. 74468) covering the period 2006–2007 showed that the dumping margin was given as 7.07 percent which is equivalent to USD0.1. The final determination, however, stated that the duty is USD1.03 (*Final Results of 13th Review*, 2009, p. 29176), which means the dumping margin is 72.74 percent - ten times higher than the margin in the preliminary determination. This is a significant increase in the determined dumping margin which was almost impossible to predict. Furthermore, the following year, in the fourteenth administrative review, instead of recalculating new dumping margin, the DOC used the same dumping margin of the thirteenth review (*Final Results of 14th Review*, 2010, p. 34976).

However, in the fifteenth administrative review, the duty rate was USD0.72 in the preliminary result (*Preliminary Results of 15th Review*, 2010, p. 80467), but decreased considerably to USD0.06 in the final determination (*Final Results of 15th Review*, 2014). Furthermore, in the fifteenth review, a Chinese exporter named Shenzhen Xinboda requested a review and revision of the final determination and succeeded in proving their cost of production, which in turn forced the DOC to revise their determination and reduce the rate down to USD0.02.

In the seventeenth administrative review, the DOC changed the surrogate country from India to Ukraine (*Preliminary Results of 17th Review*, 2012), but the duty rate still had a decrease from USD1.81 to USD1.28 (*Final Results of 17th Review*, 2013, p. 36169). A similar situation happened in the eighteenth administrative review, where the surrogate

country was the Philippines (*Preliminary Results of 18th Review*, 2013), but instead of decreasing, the duty rate was increased from USD1.47 to USD1.82 (*Final Results of 18th Review*, 2014, p. 36723). The nineteenth administrative review was like the fourteenth review, where the duty rate remained the same between the preliminary to the final result; while the twentieth administrative review showed a slight increase from the preliminary to the final result, where the surrogate country was Romania (*Final Results of 20th Review*, 2016). To assess the cost of manufacture in the NMEs in general, the DOC would sum up the production inputs' costs in the surrogate country, however, the fluctuation in duty rates above illustrates that the DOC's method was an unreliable approach.

The lack of additional data for the calculation of new 'separate rates,' which were provided to exporters who were individually examined, in the fourteenth and nineteenth administrative reviews, was determined and announced by the DOC (*Preliminary Results of 14th Review*, 2009, p. 34978; *Preliminary Results of 19th Review*, 2014, p. 72626). As a result, in these two administrative reviews, Chinese exporters that were individually examined received the same duty rates of the last year administrative reviews (which were the thirteenth and eighteenth administrative reviews respectively). The DOC also decided that the dumping margins announced in the final determinations to be the same as the dumping margins in the preliminary determinations, because of the lack of additional data (*Preliminary Results of 14th Review*, 2009, p. 34979; *Preliminary Results of 19th Review*, 2014, p. 72625). This raised the concern that the imposition of a same duty rate on individually examined exporters, which were supposed to received separate duty rates, might be an inappropriate practice.

It is interesting that the average duty rate imposed on garlic from China during 2007–2014 was USD1.275 per kilogram, which indicates that the DOC determined the average cost of garlic production in China (the 'real' normal value) to be at least USD1.275. However, the average price of garlic in the US market during 2007–2014 was only USD1.25 per kilogram (YCharts, n.d). Therefore, the average production cost of garlic in the US must have been lower than USD 1.25 for domestic garlic producers to gain profits. This leads to the conclusion that the cost of garlic production in China was

higher than the cost of garlic production in the US, which seems unrealistic, because even the American Dehydrated Onion and Garlic Association stated that "Chinese dehydrated garlic has a competitive advantage over U.S.-produced dehydrated garlic in all markets because of lower production costs" (ITC, 2011, Appendix D-3). This questionable cost of garlic production in China showed the unpredictability in the DOC's use of data from surrogate countries.

The fifteenth, seventeenth and eighteenth administrative reviews also illustrated how unpredictable the DOC's practice was. For instance, India was selected as the surrogate country by the DOC for the purpose of calculating the production cost of garlic, this selection was announced in the fifteenth administrative review's preliminary determination (*Preliminary Results of 15th Review*, 2010, p. 80462). At first, the duty rate of USD0.72 per kilogram was determined in this preliminary determination (*Preliminary Results of 15th Review*, 2010, p. 80467). Later, while analysing an Indian firm to determine proper financial indicators, the DOC was convinced to utilise data from a certain pricing index of garlic, instead of the general wholesale pricing index used in the preliminary determination (*Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission, in Part, of the 2008–2009 Antidumping Duty Administrative Review*, 2011, p. 37323). This sudden change in the selection of data made the duty rate announced in the final determination of the fifteenth administrative review significantly drop to USD0.02 per kilogram (*Final Results of 15th Review*, 2014).

For further discussions, the DOC chose Ukraine to be the surrogate country in its preliminary determination of the seventeenth administrative review and announced the duty rate of USD1.81 per kilogram calculated by data from a certain set of data collected in Ukraine (*Preliminary Results of 17th Review*, 2012). However, like what happened in the fifteenth administrative review, the DOC again switched to a new set of data to calculate the duty rate for its final determination, because the DOC determined that the garlic bulb prices in the previous set of data was untrustworthy. Because of this disruptive change, the dumping margin effectively became USD0.00 (*Final Results of 17th Review*, 2013). In this regard, calculating anti-dumping duties by *de minimis*

dumping margins is a violation of the US anti-dumping regulations.[50] Therefore, instead of announcing that the seventeenth administrative review found no dumping, the DOC decided to re-use the duty rate of a new shipper review[51] conducted during the fifteenth administrative review (which based on India's surrogate data) and announced the final duty rate of USD1.28 per kilogram, then explained that it exercised its exclusive discretion permitted by the laws to "use any reasonable method" (*Final Results of 17th Review*, 2013, p. 36169).

During the eighteenth administrative review, the duty rate was USD1.47 per kilogram in the preliminary determination, which also announced that the surrogate country in this review is the Philippines (*Preliminary Results of 18th Review*, 2013). However, an involved US importer claimed that the Philippines produced less than 0.04 percent of global garlic production during the year of this administrative review, which was not a significant garlic producer, and thus should not be selected as the surrogate country (*Fresh Garlic Producers Association v United States*, 2015, p. 1339). The case was brought to the US Court of International Trade, in which the DOC argued that there is no minimum indication of how a country is considered a significant producer of a product in Policy Bulletin 04.1, hence the DOC exercised its exclusive discretion to define "significant" as "noticeably or measurably large" (*Fresh Garlic Producers Association v United States*, 2016, p. 1238). The US Court of International Trade ultimately decided that the "characteristics of world production" must be considered in determining how significant a country as a producer is, and thus denied the DOC's claim (*Fresh Garlic Producers Association v. United States*, 2016, p. 1238).

The anti-dumping duty rates imposed on Chinese garlic, the prices of garlic exported from China to the US, and garlic production costs in both countries are the factors that are interconnected and dependant on each other in this analysis. Overall, the DOC's

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[50] See Section 1673b(b)(3) of the Tariff Act of 1930.

[51] If new exporters of a specific product are going to export to the nation where such product is currently under an anti-dumping duty, that nation's anti-dumping authority should conduct a 'new shipper review' to assess whether the new exporters are excluded from the anti-dumping duty or issued new individual dumping margins to them. In the US, the DOC conducts new shipper reviews in accordance with the rules of *New Shipper Reviews* under Section 751(a)(2)(B) of the Act (2013).

actual policy towards garlic from China indicates a large amount of inconsistency and unpredictability.

2.3 The complications of NMEs and the reasoning of the US approach

Even though the procedures applied to NMEs by the DOC might be unpredictable, such approaches against NMEs by the US in anti-dumping investigations have their reasons. Watson (2014) explains that in NMEs, "domestic sale prices are not market-determined but are instead set by central planners" (p. 7), therefore, the normal value of the product under anti-dumping investigation should not be based on the data from NMEs, and this is also to primary reason of the NME treatment. In this regard, data from a surrogate country might be more reliable to establish the normal value, because the prices of the product in the NMEs are unsuitable, thus the US anti-dumping laws allow the DOC to select and use data from surrogate countries in anti-dumping investigations and proceedings relating to exports from NMEs (Tariff Act of 1930, § 1677b[c][1][B]).

To establish a normal value from the data of surrogate country, the DOC must identify the cost of production of the product under investigation, and insert relevant costs such as package cost, container cost, and general expenses to the cost of production (Tariff Act of 1930, § 1677b[c][1][B] and 1677b[c][4]). The DOC determines these costs by examining the data collected from producers of the like goods in the surrogate country. As provided in Section 1677b(c)(4) of the Tariff Act of 1930, the selected surrogate country should be "at a level of economic development comparable to that of the NME country, and significant producers of comparable merchandise." Besides, up to the date of this research, there is no other legal criteria or procedure for the establishment of normal value based on data of surrogate countries; the DOC only needs to base its practice "on the best available information" (Tariff Act of 1930, § 1677b[c][1][B]).[52]

[52] In Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States (2001, p. 1382), the authority stated that: "In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible."

Supplemental instructions for the establishment of normal value in NME cases was enacted in *Calculation of Normal Value of Merchandise from Nonmarket Economy Countries* (2013), which requires Gross Domestic Product (GDP) per capita to be an important factor in determining how compatible the selected surrogate country should be, in comparison with the NME under investigation. Nonetheless, the US anti-dumping laws grant considerable discretion to the DOC as an anti-dumping authority, by which the DOC prefers that the normal value is calculates entirely based on the production costs of only one selected surrogate country, and that all data of production costs is collected from accessible public database in that surrogate country.

2.3.1 The US method of determining the surrogate country

The US legal framework outlined above provides little guidance to the practitioners at the DOC who determine the surrogate country, for the purpose of establishing normal value in anti-dumping investigations of Vietnamese imports. A simple example is helpful to understand exactly how insufficient those provisions are. Let's imagine that the DOC has decided in its preliminary determination that freshwater fishes imported from Vietnam were dumped and threatened US domestic freshwater fish industry with material injuries. To establish the normal value, the DOC proceeds to select a surrogate country and examine the production expenses (such as labour costs, costs of ponds, aquaculture raceways, net pens, water reuse systems and water quality maintenance systems) in that surrogate country. In this context, Table 2 illustrates the possible options of the DOC's surrogate country selection.

Table 2: Example of surrogate country selection in anti-dumping investigation against freshwater fish products from Vietnam.

Country	**Freshwater fish production (unit: 1000 tonnes)**	**Gross Domestic Product (GDP) per capita (unit: USD)**
Brazil	732.76	6,796.8
Norway	1304.14	67,389.9
Egypt	1363.12	3,569.2
Myanmar	1872.85	1,467.6
Vietnam	**2864.9**	**2,785.7**

Bangladesh	3448.22	1,961.6
Indonesia	5535.65	3,869.6
India	7005.32	1,927.7

Source: Author, based on data from the Food and Agriculture Organization of the United States and the World Bank.[53]

The DOC's selection of surrogate country would be in line with the Import Administration Policy Bulletin 04.1 (United States Department of Commerce, 2004). The DOC firstly establishes a list of potential surrogate countries, in which the potential surrogate countries are manufacturers of the like product, comparable with Vietnam economically and must be market economies. Then, the DOC selects a surrogate country by considering how comparable the GDP and production of that country are in comparison with Vietnam. In this regard, the Import Administration Policy Bulletin 04.1 (Bulletin 04.1) uses the term "comparable merchandise" to refer to the like product of the export under investigation and permits the DOC to determine the comparable "on a case-by-case basis." The Bulletin 04.1 requires the DOC to consider the "characteristics of world production of, and trade in, comparable merchandise" to determine which country in the list to be the significant producer of the comparable merchandise. The Bulletin 04.1 furthermore provides that a "significant producer" would be a "significant net exporter," however, "the standard for 'significant producer' will vary from case to case … because the meaning of 'significant producer' can differ significantly from case to case, fixed standards ... have not been adopted."

For the final determination of the surrogate country, the DOC consider which option in the list has the best quality regarding five different factors.[54] Importantly, the factors

[53] The selected countries in this table have similar, or closest number, to Vietnam in term of production quantity or GDP. The information of freshwater fish production is retrieved from database of Food and Agriculture Organization of the US (https://www.fao.org/faostat/en/#data/FBS) (date of visit: September 26, 2021). The information of GPD per Capita is retrieved from database of World Bank (https://data.worldbank.org/indicator) (date of visit: September 26, 2021).

[54] Pursuant to Bulletin 04.1, the five factors are: (1) does the data represent "period wide price averages"; (2) are the prices provided "specific to the input in question"; (3) are the prices the "net of taxes and import duties"; (4) are the prices "contemporaneous with the period of investigation or review"; and (5) are the data "publicly available"?

such as a significant producer of higher volume of product, or a more comparable country, are not what the DOC considers to be decisive factors in surrogate country selection. Instead, the DOC has the discretion to select a country with lower volume of product or less economically comparable. The Bulletin 04.1 additionally extends the DOC's discretion by allowing the DOC "to address economic comparability only after the significant producer of comparable merchandise requirement is met." It appears that the DOC issued the Bulletin 04.1 to widen its discretion, instead of improving the surrogate country selection process with better predictability and uniformity. Consequently, it is possible for each country in Table 2 to be the surrogate country in anti-dumping investigation on Vietnamese freshwater fish, even after applying all the criteria in the Bulletin 04.1. Ultimately, the choice is left to the discretion of the DOC.

In an interview conducted during the course of this research, a Vietnamese freshwater fish exporter also affirmed that their company had a very hard time predicting the level of anti-dumping duty that would be imposed on their exports, because the DOC's decision is unpredictable (personal communication, 12 November 2020). On this issue, 13 out of 15 exporters who participated in interviews mentioned that they could not predict the duties that would be imposed, while the other two exporters gave no specific comment on this issue in their replies. In fact, the DOC's practices have been inconsistent and unpredictable as demonstrated in the above section. Thus, it would be very difficult for any exporter to predict their anti-dumping duty rates (Luberda, 2014, p. 15). That the US uses its discretion in dealing with NMEs, where prices do not reflect market-based values, is not sufficient evidence that its methods are unfair. Furthermore, every country and economy are different from one another, if the criteria were much more detailed and the DOC did not have discretion in choosing the surrogate country, it would not be able to pick one. The problem is not how the US deals with NMEs in anti-dumping investigations, but that the US assumes Vietnam to be an NME from the start. The DOC's findings that Vietnam is an NME in these investigations would be more persuasive if it provided more transparent and detailed NME criteria up-front. Vietnam could then have a more specific plan to achieve market-based status, and Vietnamese exporters may have a better chance in proving their market-based operations in US anti-dumping investigations.

In this regard, as mentioned in the Report of the Working Party on the Accession of Vietnam (Vietnam's Accession Protocol, 2006, pp. 65–6) makes it possible for other WTO Members to apply NME treatment in anti-dumping investigations involving goods exported from or originating in Vietnam.[55] Paragraph 254 of the Report of the Working Party on the Accession of Vietnam advises that Vietnam is not a nation where there is "complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State" (as required by Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT). However, there is no requirement or condition provided in paragraph 254 that other WTO Members should meet before identifying Vietnam as an NME. Therefore, each WTO Member exercises their own discretion regarding this matter. Nonetheless, this special NME provision in the Report of the Working Party on the Accession of Vietnam expired in 2018, but apparently this has not prevented the US continuing to treat Vietnam as an NME in anti-dumping investigations. In this regard, the author contents that Vietnam should overcome its NME status and achieve market-based status, instead of trying to prove the US method towards NMEs is unfair, the possibility of which is unlikely since the DOC has persisted with this method for a long time.

2.3.2 The US determination of Vietnam's NME status

Section 1677(18)(A) of the Tariff Act of 1930 provides a definition of NME, which is "any foreign country that the administering authority [the DOC] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Therefore, in the case of NMEs, the DOC's rejection to use the prices of like products when sold in the domestic market of the exporting country as the basis for calculating dumping margins is permitted by this rule. This is in contrast to the standard procedure in nations which are

[55] Paragraph 254 of the Vietnam's Accession Protocol states: "Several Members noted that Viet Nam was continuing the process of transition towards a full market economy. Those Members noted that under those circumstances, in the case of imports of Vietnamese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those Members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in Viet Nam might not always be appropriate".

market-based economies, where domestic costs and prices are typically established by market forces (*Certain Frozen Fish Fillets from Vietnam*, 2003, pp. 37119–20). As an alternative, an economically comparable market economy, where costs and prices are established in accordance with market-based conditions, is selected by the DOC as the surrogate country. The DOC then collects relevant data of production costs of the like product in such surrogate country to compute the normal value for product under investigation (*Certain Frozen Fish Fillets from Vietnam*, 2003, p. 37120).

Additionally, pursuant to the Tariff Act of 1930, to consider whether a country should be identified as an NME, the DOC must consider the following characteristics of that country's economy:

> (i) the extent to which the currency of the foreign country is convertible into the currency of other countries; (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (iv) the extent of government ownership or control of the means of production; (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and (vi) such other factors as the administering authority considers appropriate. (Tariff Act of 1930, § 1677[18][B])

In practice, the DOC has no hesitation in applying the extensive discretion provided by the above provisions, especially provision (vi) that basically permits the DOC to consider whatever factor that might be relevant in its NME status determination.

In the case *Certain Frozen Fish Fillets from Vietnam* in 2002, the DOC identified Vietnam as an NME, because the market economy transition in Vietnam had yet to complete, even though the DOC recognised that Vietnam's economic reforms achieved remarkable progress (United States Department of Commerce, 2002, p. 1). In its report of the case *Certain Frozen Fish Fillets from Vietnam*, the DOC considered that "wages are largely determined by free bargaining between labor and management", and that "various legal reforms have led to the marked and sustained growth of the private

sector" (United States Department of Commerce, 2002, pp. 1–2), are significant market-based traits which Vietnam has achieved. However, the DOC ultimately identified Vietnam as an NME because:

> The level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value. The Vietnamese currency ... is not fully convertible .... Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalised for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatisation of SOEs and the state-dominated banking sector has been slow, thereby excluding the private sector from access to resources and insulating the state sector from competition... Private land ownership is not allowed and the government is not initiating a land privatisation program.... Finally, rule of law is particularly weak in Vietnam: laws are vague, the judiciary is not independent of the Communist Party. (United States Department of Commerce, 2002, p. 2)

It appears that Vietnam needs some more years to be able to fully adopt conditions and requirements of a market economy. Even though the issue of ownership of private land was resolved, policies and laws had been significantly improved, but the remains of the above factors pointed out by the DOC were not fully addressed by Vietnam (Klingler-Vidra, Tran, & Chalmers, 2021). Noticeably, in *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination* (2009, pp. 45815–6), although identifying inappropriate government's support by using commercial bank loans in Vietnam as a baseline was denied by the DOC, however, Vietnam's NME factors was constructively revaluated. Unfortunately, the DOC did not conclude any reassessment of Vietnam's NME status because no Vietnamese exporters in this case request for such a reassessment.

For further discussion into the driving forces behind the US recognition of a market economy, the US acknowledged that market economy reforms in Russia were successful in 2002, and that going forwards, anti-dumping investigations and proceedings on Russian exports would no longer use surrogate country data to establish the normal value, but instead utilise selling price and production cost from Russia (Stoler, 2003). While the US cited Section 1677(18)(B) of the Tariff Act of 1930 to justify its recognition of Russia's market economy status, there was incontrovertibly a political reason behind such recognition, because this happened while the Bush administration was actively trying to improve ties between the two countries economically and politically (Vazquez, Lopez-Portillo, & Bravo, 2008). Therefore, it can be presumed that considerations outside of the current US legislative requirements (which might be political relation or bilateral agreement) might play a role in whether the US recognises Vietnam as a market economy in future.

Another example in the analysis of Vietnam's market economy reforms is that Vietnam was acknowledged by New Zealand and Australia as a market economy in the achievement of "substantial market access commitments under AANZFTA [ASEAN-Australia-New Zealand Free Trade Agreement]" (Australian Ministry of Trade, 2009). According to the Australian Ministry of Trade, this market economy acknowledgement would apply to countervailing and anti-dumping investigations and proceedings as well, because it was approved in the framework of the Free Trade Agreement (FTA) negotiations. As a result, it seems plausible that Vietnam's active involvement in the Trans-Pacific Partnership (TPP) discussions of a FTA with Singapore, Peru, New Zealand, Chile, Brunei, and Australia, which are supported by the US, would be beneficial. (Tsui, 2010). Notwithstanding, there is no guarantee that a successfully negotiated FTA would include a market economy acknowledgement granted by the US.

Besides the market economy status that still needs more time to be achieved by Vietnam, for a more practical option, exporters in Vietnam should improve their preparations to the point that they could provide convincing factual evidence showing undeniable market-based operations, whenever they are involved in anti-dumping investigations conducted by the US. Even if such convincing evidence could not break through the

wide discretion of the DOC, when the case is brought to the WTO's Dispute Settlement Body, those evidence could make the DOC's arguments vulnerable in the WTO dispute settlement system. The negative outcomes of NME treatment would be reason enough for Vietnamese exporters to request for market economy treatment in US anti-dumping investigations, even if there are considerable expenses and burden of proof associated with such request.

3. EU Anti-dumping Law

This section provides discussions and analysis of the history and changes of EU anti-dumping laws, particularly the EU's NME methodology in anti-dumping investigations and proceedings. As mentioned in chapter 2, there was a list of NME countries in EU anti-dumping laws that explicitly identifies which countries are treated as NMEs in EU anti-dumping actions. However, an amendment in 2017 replaced the old NME methodology by a new approach that, instead of pre-identifying the NMEs, evaluates and targets the 'significant distortions' in exporting country's market to determine whether to establish normal value by surrogate data from a 'representative country'. Particularly, when there is more than one option for representative country, this new approach permits the EC to consider not only economic comparability, but also certain social and environmental factors. While the new approach varies in formality from the old NME methodology, it achieves the same ends—namely, the correction of significant NME-like distortions and the capacity in inflating anti-dumping duty imposed on exports under anti-dumping investigations.

3.1 History of EU Anti-dumping Law

In 1968, countervailing and anti-dumping remedies were introduced into the EU legislations for the first time (Li, 2003, p. 69).[56] All exports to the EU market from all countries (signatories of GATT or not) might be under the application of this first EU anti-dumping laws. In 1979, the specific procedure for NMEs in anti-dumping

[56] *Regulation (EEC) No 459/68 of the Council of 5 Apr. 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community* 1987introduced the very first EU countervailing and anti-dumping regulations.

investigations was introduced in EU anti-dumping laws (Van Bael & Bellis, 2011). Specifically, for NMEs like Vietnam and China, Article 3(2)(c) of *Regulation (EEC) No 1681/79 of 1 Aug. 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Community* (Regulation 1681/79) provides that anti-dumping investigations on exports from these NMEs establish the normal value by a different process, in which Regulation 1681/79 introduced the 'analogue country' method that allow investigating authority to use data from another country (Noel & Zhou, 2019). This analogue country method is very similar to the US surrogate country method, and became a standard process of normal value calculation in EU anti-dumping investigations involving NME exporters.

The EU anti-dumping laws has been undergone many amendments since 2013, the EC shown its intentions to progressively initiate those amendments by stating that "the Commission believes it is now imperative for the EU's Trade Defence Instruments to be updated, strengthened and made legally more robust" (European Commission, 2016a, p. 3). As a result, the 2016–2018 amendments to EU anti-dumping laws received considerable attention, since they were the only significant updates of EU anti-dumping laws in the last 20 years. Muller (2018) discusses several components and aspects of the 2016–2018 amendments, among different amendments, and notes that government's market interventions which result in NME distortions have been addressed particularly by new anti-dumping approach. The new approach directly impacts the determination of anti-dumping measures, which are duties imposed on import products that have their export price below their price in the home market, in other words, the normal value. Currently, the EU anti-dumping laws are in *Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union* (Regulation 2016/1036), which builds on the ADA. According to the Recital of Regulation 2016/1036, the EC is responsible for all the EU anti-dumping investigations and proceedings, including the imposition of anti-dumping measures.

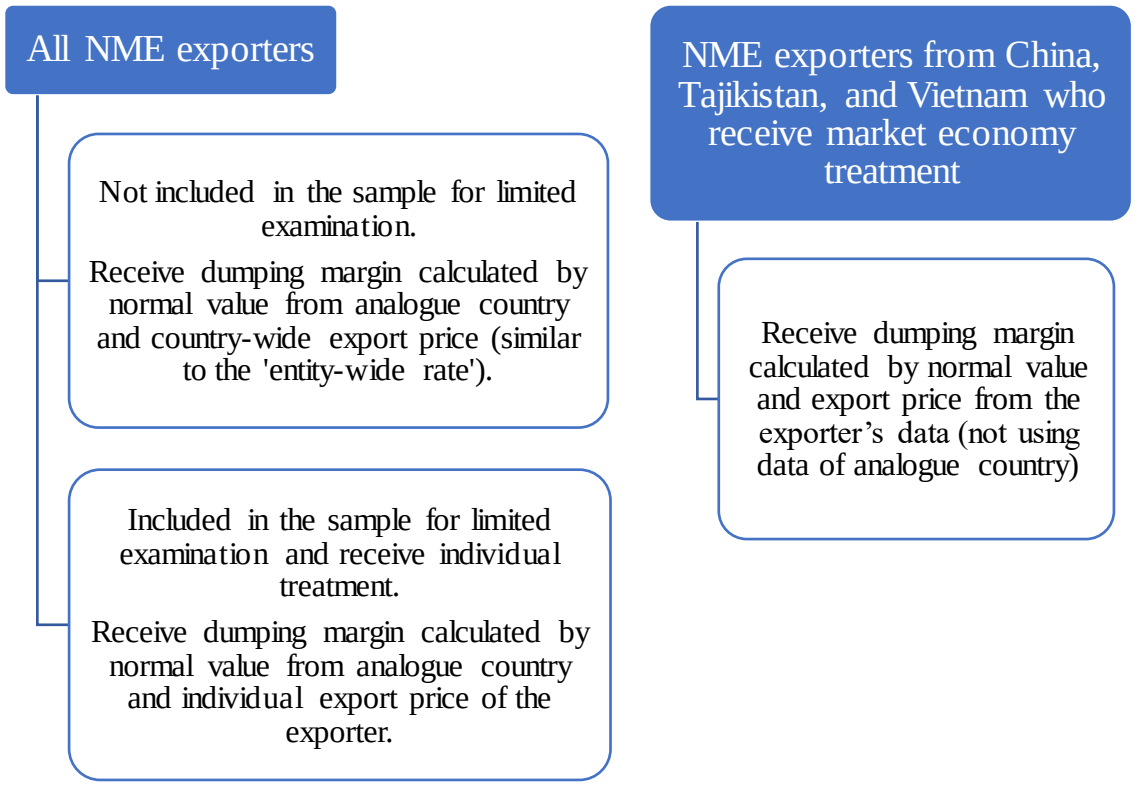
In recent years, the severity of unfair dumping practices has increased due to large-scale government's export supports and distortions in production costs and prices. As a result, EU domestic industries have faced significant risks from considerable surges of imports, and this is the main reason that the EC suggested intensive amendments to EU anti-dumping laws (European Commission, 2016a, p. 1; Muller, 2018). For instance, the exports of Chinese steel products to the EU market had a remarkable increase that even caused a detrimental impact to the EU steel industry, in which the number of people losing their jobs in EU steel sector was increasing (European Commission, 2016a, p. 2). Furthermore, as mentioned in chapter 2, the export prices of Chinese products destined to the EU market would be much cheaper because of the expiry of NME provision in China's Accession Protocol to the WTO. Therefore, the EC considered that, as most of the EU anti-dumping investigations and proceedings involve Chinese products, the EU anti-dumping laws must be improved to adapt to the expiry of NME provision in China's Accession Protocol (European Commission, 2016a). Like the US's calculation method of the dumping margin for NMEs, the EU's NME methodology permits investigating authority to refuse the prices in the NME's market, and rather utilise the prices in an analogue country's market, and such analogue country must be a market economy. Because of this methodology, the dumping margins are often inflated. As a result, the average anti-dumping duty rates imposed on Chinese exports by the EC was about double the duty rates imposed on exports from other nations (Prusa, 2017, pp. 619–21).

There are two approaches in the amendments to Eu anti-dumping laws. For the first approach, the European Council, the European Parliament, and the EC reached an agreement to improve the effectiveness, transparency, and swiftness of EU anti-dumping actions in addressing harmful dumping practices (European Commission, 2018). In the second approach, the three EU governmental bodies above agreed to enact *Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the EU* (Regulation 2017/2321) which provides substantial amendments to the existing NME methodology in Regulation 2016/1036. During the last

20 years, these are considered to be the most significant amendments to the EU anti-dumping laws.

Similar to the limited examination method of the US applying to NME cases as explained above, the EU also practices limited examination in their anti-dumping investigations and proceedings in NME cases. Figure 2 illustrates how the EC interprets and applies the limited examination in its processes of determining anti-dumping duty rates.

Figure 2: The EU determination of dumping margins in NME cases.



Source: Author, based on the data of European Parliament (2018).

In the context of EU anti-dumping investigations, Vietnam is considered an NME that has undergone reforms which have led to the emergence of firms for which market economy conditions might prevail. Therefore, certain Vietnamese exporters are able to apply for 'market economy treatment' (MET) by responding to the questionnaire obtained from the EU authorities. In investigations initiated by the EU authorities, the

questionnaire is called the Anti-Dumping Questionnaire (European Commission, n.d.). If Vietnamese exporters succeed in receiving MET, they receive dumping margins calculated by normal value from their own submitted data and export price also from their own submitted data. In case where Vietnamese exporters do not achieve MET, they can request individual treatment, in which the EC will use the exporter's own data to establish export price and use surrogate country's data to establish normal value.

As mentioned in chapter 2, Article 2(7)(a) and 2(7)(b) of Regulation 2016/1036 lists Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan, Uzbekistan and Vietnam as NMEs. The next section analyses the detail of the EU's NME methodology in anti-dumping investigation and proceedings, which discuss the NME status of Vietnam identified by the EU, and the application of analogue countries by the EC.

3.2 EU treatment of NMEs before 2017

The EC had already used specific dumping margin calculation method under Regulation 2016/1036 to counter NMEs' market distortions in its anti-dumping investigations (the EU's NME methodology) before Regulation 2017/2321 was enacted. While a number of provisions of Regulation 2016/1036 on the EU's NME methodology were amended by Regulation 2017/2321, the provisions on cost adjustments in Regulation 2016/1036 remains the same.

3.2.1 EU Regulation 2016/1036

There are two NME categories in the list of NMEs provided in the old version of Article 2(7) of the Regulation 2016/1036 (which was later amended by Regulation 2017/2321). Article 2(7)(a) outlines the first category of NMEs that includes Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan, and Uzbekistan. Normal values in anti-dumping investigation involving exports from these countries will be established on the basis the production costs and prices of a like product, or export prices of such like products in a third country (analogue country) with market-based economy. The economic conditions, growth, and

development of such analogue country should be comparable to the exporting NME. Vietnam is not in this category but is in a slightly 'softer' category (Regulation 2016/1036, Art. 2.7.b).

This second category had a 'softer' approach for NMEs including Vietnam which are WTO Members at the initiation date of EU anti-dumping investigation. In this category, exporters from Vietnam actually had the chance to prove their operations to be market-based (Regulation 2016/1036, Art. 2.7.b). In particular, if an exporter in Vietnam under investigation can prove their market-based operations to the investigating authority, standard method used for market economies must be applied to calculate the normal value for such Vietnamese exporter, and the NME methodology under Article 2(7)(a) should only be utilised when the exporter failed to do so. The EU's NME methodology is similar to the US' dumping margin calculation method against NMEs such as Vietnam and China. In this regard, Regulation 2016/1036 also provides the requirements which a country must satisfy to be considered a market economy:

- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values,
- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,
- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
- exchange rate conversions are carried out at the market rate. (Regulation 2016/1036, Art. 2.7.c)

Only after demonstrating compliance with all five of the aforementioned requirements will the NME exporter be granted MET by the EC. If the EC determines that even one out of the five requirements was not satisfied, the exporter's request for MET would be refused. This requirement of fulfilling all five requirements above was upheld in many cases, for examples, in *Shanghai Teraoka Electronic v Council* (2004, para. 54), *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision v Council* (2009, para. 83), and *Changmao Biochemical Engineering v Council* (2017, para. 47). In other words, unless a Vietnamese exporter succeeds in proving its market-based operations to the EC's satisfaction, all Vietnamese exporters are presumed to be put under NME methodology by Article 2(7)(b) (Noel & Zhou, 2019). In practice, it is very difficult to fulfil the burden of proof in this regard; according to the database of the EC between 2006 and 2015, only 17 percent (41 out of 248) requests for MET from exporters were accepted by the EC (European Commission, 2016b). Nonetheless, it was not impossible for Vietnamese exporters, in an interview with the author, Mr Nguyen Ngoc Son, an anti-dumping expert and former official representative of the Vietnam Ministry of Industry and Trade, mentioned that a Vietnamese bicycle exporter succeeded in obtaining MET from the EC during the EU's anti-dumping investigations against bicycles from China and Vietnam (personal communication, 25 October 2020).

In *Commission v Rusal Armenal* (2015), the EU's NME methodology under Article 2(7) of Regulation 2016/1036 was ruled by the court to be not an implementation of the EU's obligations under the WTO relating to the conduction of anti-dumping investigations and proceedings, but to be "an approach specific to the EU legal order" (para. 59). In fact, there is no rule under both the ADA and the GATT 1947 providing a specific normal value calculation method in the case of NMEs, although the Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1947 allows that "a strict comparison with domestic prices" in considerably state-controlled NMEs "may not always be appropriate." However, this GATT provision only address the NMEs where the government performs "a complete or substantially complete monopoly" of trade and controls "all domestic prices," but not to nations which are under transition to market-based economies but still have some traits of an NME such as Vietnam and China. Notwithstanding, perhaps because of this, Vietnam and China had to agree with being

treated as NMEs in anti-dumping investigations and proceedings in their WTO accession protocols to gain their WTO memberships.

Paragraph 255 of Vietnam's Accession Protocol (2006) permits WTO Members to apply specific anti-dumping procedures for Vietnamese exports. Paragraph 255(a)(i) require investigating authorities of WTO Members to utilise the costs and prices in Vietnam's domestic market when involved Vietnamese exporters demonstrate that "market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product." On the other hand, the NME methodology, by which investigating authorities can disregard costs and prices in Vietnam, could be applied in the cases where Vietnamese exporters fail to demonstrate their market-based operations, including the EU's NME methodology (WTO, 2006, para. 255[a][ii]). Paragraph 255(a)(ii) of Vietnam's Accession Protocol had been in effect for the first twelve years of Vietnam's WTO membership and expired on 31 December 2018 (WTO, 2006, para. 255[d]). However, the EU reacted to the expiry of paragraph 255(a)(ii) in the same manner as the US, in which both the EU and the US consider their NME treatment towards Vietnam was not only because Vietnam accepted to be treated as an NME but based on the characteristics of Vietnam's economy. Therefore, Vietnam will not be granted market economy status in anti-dumping investigations conducted by the EU and the US automatically following the expiry of paragraph 255(a)(ii).

3.2.2 EU method of cost adjustment

Like the EU's NME methodology, the EU's cost adjustment method under Articles 2(3) and 2(5) of Regulation 2016/1036, which remained in effect after the 2017 amendments in Regulation 2017/2321, is applied in the case of market economy countries where the costs of production of the goods under anti-dumping investigation were influenced by non-market-based distortions. In the future, even if the EU recognises Vietnam as a market economy, there is still a possibility that the EU will apply this cost adjustment method to Vietnamese exports in anti-dumping investigations.

Pursuant to Regulation 2016/1036, the normal value must be established based on "the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits", if "there are no or insufficient sales of the like product in the ordinary course of trade … because of the particular market situation" (Regulation 2016/1036, Art. 2.3). In this context, the 'particular market situation' "may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements" (Regulation 2016/1036, Art. 2.3). Normally, data of costs submitted by involved exporters would be used to calculate the normal value, if the data of the exporters "generally accepted accounting principles" and "reasonably reflect the costs" (Regulation 2016/1036, Art. 2.5). However, when the exporters' data of costs does "not reasonably reflected in the records", then the normal value "shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets" (Regulation 2016/1036, Art. 2.5). In short, these provisions permit the EC to use data of costs and prices of a third country to adjust the costs, for the purpose of calculating the normal value in anti-dumping investigations on NME exports.

In practice, distortions in the exporting NMEs have been identified and addressed by the EC using Articles 2.3 and 2.5 of Regulation 2016/1036 simultaneously (Tietje & Sacher, 2018). Particularly, the EC utilise surrogate data from a market economy third country to calculate the normal value, if it determined that the prices in exporting country were distorted and not reliable. For instance, in *Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia* (Regulation 1194/2013), the EC initiated anti-dumping investigation on biodiesel from Indonesia and Argentina, where these two countries had been imposing export taxes on biodiesel lesser than the taxes on materials used in the production of such biodiesel. In this regard, the EC considered that such taxes in Indonesia and Argentina unnaturally decreased the production costs in domestic markets, therefore, the data of Indonesia and Argentina might be distorted and

unreliable. Thus, the EC used other benchmarks instead of the production costs of Indonesia and Argentina. However, in *Molinos Río de la Plata and Others v. Council* (2016), the court considered that the EC could not demonstrate how the governments of Indonesia and Argentina create 'appreciable distortion' in their domestic markets, and determined to rule against the EC's cost adjustment practice. Section 3.3.2 below continues to discuss further into the cost adjustment method of the EC, using the case of biodiesel from Argentina as an example.

3.2.3 Case study: the EU method of cost adjustment against biodiesel from Argentina

To gain more understanding of the EU's method under Regulation 2016/1036, this section specifically considers the recent WTO dispute settlement findings relating to EU dumping measures applied to imports of biodiesel from Argentina. This biodiesel case helps illustrate how the EC calculates dumping on imports from Vietnam and China from 2017 and beyond.

In 2013, the EU imposed anti-dumping measures on biodiesel from Argentina, in which the method of cost adjustment was applied during the investigation. Disagreeing with such measures, Argentina brought this case to the WTO. The name of the case was *European Union — Anti-Dumping Measures on Biodiesel from Argentina* (*EU – Biodiesel (Argentina)*) by the WTO. In this case, Argentina had two claims against the relevant anti-dumping measures. Firstly, Argentina challenged the second paragraph of Article 2(5) of *Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community* (Regulation 1225/2009).[57] For the second claim, Argentina challenged some specific aspects of the anti-dumping measures imposed by the EU on biodiesel imported from Argentina.

[57] In detail, the cost adjustment method was applied by the EC to biodiesel from Argentina under the second paragraph of Article 2(5) of Regulation 1225/2009, which states that: "If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets."

In the first claim, Argentina argued that Article 2(5) of Regulation 1225/2009 was inconsistent with Article 2.2.1.1 of the ADA by providing that the EU investigating authority is allowed to reject or make adjustment to the data of production costs included in records of Argentina's exporters/manufacturers when these data reflect prices that are abnormally or artificially low because they are the result of an NME-like distortion. The Appellate Body in *EU – Biodiesel (Argentina)* (2016) considered that Article 2.2.1.1 of the ADA does not particularly impose any restriction relating to the EC's cost adjustment practice under Article 2(5) of the Regulation 1225/2009, and thereby denied the Argentina's claim.

In this regard, the Appellate Body stated that the challenged "Article 2(5) comes into play only after a determination has been made under the first subparagraph that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration", and that "the costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, then the EU authorities must 'adjust' or 'establish' the costs on the basis of the alternative means provided for under the second subparagraph." (*EU – Biodiesel (Argentina)*, 2016, para. 6.327). The Appellate Body considered that the challenged Article 2(5) of Regulation 1225/2009 prescribes a reasonable procedure which must be completed after the EC determined that an exporter's data do not reasonably reflect the production costs, and such a provision does not govern the determination of whether those records reasonably reflect the production costs.

The Appellate Body also pointed out that:

> Article 2(5) may be read to encompass the possibility that the EU authorities may use 'information from other representative markets'... Nevertheless, the existence of that possibility does not mean, as Argentina contends, that the second subparagraph of Article 2(5) requires the EU authorities to construct the normal value on the basis of the costs prevailing in countries other than the country of origin. (*EU – Biodiesel (Argentina)*, 2016, para. 6.243)

This was because:

> a distortion affects the costs of all the producers or exporters in the same country, then the EU authorities are to use 'any other reasonable basis, including information from other representative markets.' Thus, even if, according to Argentina, the term 'other representative markets' necessarily refers to markets outside the country of origin, the word 'including' makes clear that the information from other representative markets is but one illustration of what may constitute 'any other reasonable basis.' (*EU – Biodiesel (Argentina),* 2016, para. 6.251)

This means that the use of production cost data from a surrogate country under Article 2(5) is merely a possibility. Article 2(5) does not necessarily require the construction of the normal value based on costs from other representative markets.

In the second claim, Argentina continued to challenge the EC's dumping and injury determinations, on the basis that Article 2(5) violates Article 2.2.1.1 of the ADA. The Appellate Body, even though it determined that Article 2(5) does not violate the ADA, however, upheld the claim that the EC acted inconsistently with Article 2.2.1.1 of the ADA, since in this particular case, the EC failed to take into account the records kept by the exporters/manufacturers under investigation for the purpose of production cost calculation. In this context, the investigating authorities of WTO Members are required by Article 2.2.1.1 of the ADA to treat the involved exporters' data as "the preferred source for cost of production data" when such data "reasonably reflect" the actual production costs (*EU – Biodiesel (Argentina),* 2016, paras. 6.18 & 6.21). The Appellate Body explained that the terms 'reasonably reflect' does not refer to the reasonability of the cost itself, but the data of the cost (*EU – Biodiesel (Argentina),* 2016, para. 6.37), but the EC's practice was in contradiction with this ruling of the Appellate Body. In short, Article 2.2.1.1 of the ADA only regulates the treatment of the actual production costs (whether the government intervened to distort such costs or not) in exporting country's domestic market (*EU – Biodiesel (Argentina),* 2016, paras. 6.39 & 6.41). The Appellate Body also explained that:

> when relying on any out-of-country information to determine the 'cost of production in the country of origin' under Article 2.2 of the Anti-Dumping

> Agreement, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin', and this may require the investigating authority to adapt that information. (*EU – Biodiesel (Argentina)*, 2016, para. 6.81)

This means that while the EC is permitted to adjust the production cost using surrogate data from a third country, the EC still could not prove that it appropriately addressed the 'cost of production in the country of origin' as requirement under Article 2.2 of the ADA. Ultimately, the EU's cost adjustment practice in this case was determined to be inconsistent with the ADA by the Appellate Body.

3.3 EU treatment of Vietnamese products after 2017

The EU's NME methodology in Regulation 2016/1036 was amended by Regulation 2017/2321, in which the presumption of NME based on the NME list in Regulation 2016/1036 was replaced by the new approach. This new approach requires the EC to identify and consider the 'significant distortions' in exporting WTO Members' economies before determining whether to apply NME treatment in anti-dumping investigations. The new approach varies from the old one in a few technical respects, but they aim to accomplish the same goals, which are identifying NME-like impact in the market of exporting countries and thereby applying NME methodology in relevant anti-dumping investigations and proceedings.

3.3.1 The amendment to the EU NME methodology and the reasons behind it

China and Vietnam have been identified as the two major economies with considerable NME-characteristics (BKP Development Research & Consulting, 2012). The NME provisions in the WTO accession protocols for China and Vietnam expired at the end of 2016 and 2018, respectively. Therefore, the reasoning and legality of the EU's old NME methodology under Regulation 2016/1036 could be at risk. To react to the expiry of both countries' NME provisions, the EC considered 03 alternatives for reforming the EU anti-dumping laws: 1) establishing a new method to address the case of NMEs, 2) using the standard methodology which is applied to market economies instead of the NME

methodology, and 3) keeping the current laws with no change (European Commission, 2016b, pp. 23–6).

After carefully evaluating and considering each option, the EC explains that the economic and political relationships with Vietnam, China, and other NMEs might be worsened, if the EC keeps utilising the old NME methodology after their accession NME provisions expired. Therefore, the third alternative is removed from consideration (European Commission, 2016b, pp. 31–3). The EU would be under considerable negative impacts, if the EC uses prices in exporting NMEs to calculate the normal value as suggested by the second alternative. It was estimated that 146,700 jobs might be lost in the EU, if anti-dumping duty rates of Chinese exports are reduced as a result of applying Chinese market's costs to establish normal values (European Commission, 2016b, p. 35). In the end, considering several factors such as EU jobs preservation, improvement of EU producers' competitiveness, and facilitation of global free trade, the EC determined that the first alternative is the best option to react to the expiry of NME provisions in WTO accession protocols of Vietnam and China (European Commission, 2016b, p. 45).

In this context, Regulation 2017/2321 emphasises the importance of the amendment to Article 2(7) of the Regulation 2016/1036 in the EU's NME methodology by stating that "in view of developments with respect to certain countries … normal value should be determined in accordance with a specific methodology designed for those countries" (Regulation 2017/2321, Recital 2), which hints at a reference to China and Vietnam. Regulation 2017/2321 further emphasise that "in light of experience gained in past proceedings, it is appropriate to clarify the circumstances in which significant distortions affecting to a considerable extent free market forces may be deemed to exist" (Regulation 2017/2321, Recital 3). In other words, Regulation 2017/2321 highlights the necessary to define market circumstances affected in a way characteristic of NME. The EU also wants to specify the commencement date of the amendments, and to clarify the proof relating to distortions which might impact the costs and prices (Regulation 2017/2321, Recitals 7, 8, & 9).

3.3.2 The provision of significant distortions in Regulation 2017/2321

The concept of 'significant distortions' is a noticeable addition to the EU's NME methodology by the amendments of Regulation 2017/2321. Particularly, Regulation 2017/2321 adds a new Article 2(6a) to Regulation 2016/1036, which allows the EC to disregard "domestic prices and costs in the exporting country due to the existence in that country of significant distortions". According to Regulation 2017/2321, significant distortions happen "when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention" (Regulation 2017/2321, Art. 1.1). The EC shall evaluate and determine the significant distortions based on the:

> potential impact of one or more of the following elements:
>
> - the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
> - state presence in firms allowing the state to interfere with respect to prices or costs;
> - public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
> - the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
> - wage costs being distorted;
> - access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state. (Regulation 2017/2321, Art. 1.1)

Regulation 2017/2321 adds a new paragraph 6a(a) to Article 2 of Regulation 2016/1036, which provides that, when significant distortions exist in the market of exporting country, normal value established by the costs and prices of that exporting country would be unreliable. Therefore, the EC must establish the normal value by using other data of costs and prices "reflecting undistorted prices or benchmarks" (Regulation 2017/2321, Art. 1). Regulation 2017/2321 also requires that the "amount for administrative, selling, and general costs and for profits" which are used to determine

the normal value must also be "undistorted and reasonable" (Regulation 2017/2321, Art. 1). The previous NME provisions in Regulation 2016/1036 and the new one in Regulation 2017/2321 are different in some respects, but also similar in some points. In this regard, new Article 2(6a) added by Regulation 2017/2321 establishes new standards for WTO Members, whether they are NMEs or market economies, which have NME-like distortions in their economies or relevant industries, for the application of data from a third country in EU anti-dumping investigation. This is very different to the now-defunct Article 2(7)(c) of Regulation 2016/1036. Regulation 2017/2321 also emphasises this point by stating that this regulation "is without prejudice to establishing whether or not any WTO Member is a market economy or to the terms and conditions set out in protocols and other instruments in accordance with which countries have acceded to the Marrakesh Agreement Establishing the World Trade Organization done on 15 April 1994" (Regulation 2017/2321, Recital 2). This, with respect to the legal framework, seems clearly to be preparation for the expiry of the NME provisions of China and Vietnam in their WTO accession protocols.

Furthermore, as the conditions in new Article 2(6a)(b) added by Regulation 2017/2321, only "one of more of" the elements listed in this article must be considered, the EC does not need to demonstrate all elements in this article. In this regard, the now-cancelled Article 2(7)(c) of Regulation 2016/1036 included the word 'and' between its relevant criteria, which suggested that all the criteria were cumulative and must be met before the application of the EU's NME methodology. The Court in *Shanghai Teraoka Electronic v. Council* (2004, para. 54) also confirms this interpretation of this provision.

Nonetheless, the EU's new NME methodology in Regulation 2017/2321 does not have significant changes relating to the computation of dumping margins, in the case of Vietnam and other nations that were listed as NMEs under the now-cancelled Article 2(7)(c) of Regulation 2016/1036 (Suse, 2017, pp. 269–75). There is little difference between the old NME methodology and the EU's new NME methodology in terms of their influence on import restrictions. For instance, when applying the new NME methodology to recalculate anti-dumping duty rates for NME cases, on average, there is only 3.8 percent of decrease in the duty rates (European Commission, 2016b, p. 40).

When it comes to the use of prices and costs data, the similar approach of using data of market economy third country to replace data of countries with significant distortions (including NMEs) was again regulated in Regulation 2017/2321.

Moreover, Recitals 5 and 7 of Regulation 2017/2321 might be the implication that new Article 2(6a) might be designed to justify the EC's practice of cost adjustment under in Articles 2(3) and 2(5) of Regulation 2016/1036 (as explained in sections 3.2.2 and 3.2.3 above). In this regard, Recitals 5 and 7 address the EC's past practice of adjusting 'artificially low' costs in the exporting country's market. In particular, Recital 5 states:

> Costs are normally calculated on the basis of records kept by the exporter and producer under investigation. However, where there are direct or indirect significant distortions in the exporting country with the consequence that costs reflected in the records of the party concerned are artificially low, such costs may be adjusted or established on any reasonable basis, including information from other representative markets or from international prices or benchmarks. Domestic costs may also be used, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence. (Regulation 2017/2321, Recital 5)

The EC's normal value calculation based on market economy data also receives new criteria under Recital 7: "Where part of the costs for an exporter and producer is distorted, including where a given input is sourced from different sources, that part of the costs should be replaced by undistorted costs" (Regulation 2017/2321, Recital 7).

Nonetheless, it might be questionable whether the EU's new NME methodology is consistent with the obligations under the ADA. Even the Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT, which permits investigating authorities of WTO Members to disregard NME costs and prices, might not accommodate the EU's new NME methodology as applied to Vietnam and other NMEs under EU anti-dumping investigations and proceedings. Even if the EU refers to NME provisions in accession protocols of Vietnam and China to advocate its new NME

methodology, the WTO has yet to provide any rulings as if this is applicable after the expiry of the NME provisions in those accession protocols.

3.3.3 New amendment to the burden of proof

The burden of proof under Article 2(7) of Regulation 2016/1036 was noticeably amended by Regulation 2017/2321. By the new amendment, the responsibility is transferred from involved exporters to involved EU's domestic industries or the EC, who must prove the existence of significant distortions and NME practices. Under the old NME methodology, exporters bear the burden of proof to demonstrate their market-based operations in order to counter the assumption of NME.

Prior to the promulgation of Regulation 2017/2321, the EC guaranteed that the changes "do not impose any additional burden on EU industry" in its official press release (European Commission, 2017a). The EC is required to provide the complainants with the evidence they need, as stated in Regulation 2017/2321. In this regard, according to the new Article 2(6a)(c) added to Regulation 2016/1036, If the EC has "well-founded evidence" of significant distortions in ab exporting country's market or industry, it must prepare and publish reports on the conditions of that country's market or industry. Involved parties in relevant anti-dumping investigations are allowed to give comments, improve, or challenge such reports, which must be updated frequently by the EC. Although the involved exporters are allowed to challenge those reports, it appears that the EC is unlikely to deviate from significant distortion findings in the reports, since the EC created those reports themselves.

Also, in 2017, the EC (2017b) released a report for the purposes of Article 2(6a)(c) of Regulation 2016/1036 (as amended by Regulation 2017/2321). This report evaluates and discusses the significant distortions in the economy of China for the purposes of, *inter alia*, anti-dumping investigations. The report finds that the 'socialist market economy' of China is actually characterised by "an extensive and sophisticated economic planning system, an interventionist government policy in the economy in order to implement these plans by using a broad array of tools, including guiding catalogues, investment screening, financial incentives etc." (European Commission, 2017b, p. 21). As a matter

of fact, the Chinese Communist Party (CCP) and its leadership controls exist as an essential constituent in the design of China's 'socialist market economy' (Houtari, Heep, & Heilmann, 2017, p. 239). These features, as the report notes, prove that the CCP's tight state-control on the economy results in NME-characterised resource allocation and "the creation of overcapacities in many sectors" (European Commission, 2017b, p. 21). As for distortions in factors of production, the report concludes that the Chinese Government exerts influence on the allocation of resources and the pricing of production, particularly in land, energy, capital, material inputs and labour.

For the purposes of Article 2(6a)(c), other countries' distortion reports would be made by the EC in the future. The next country to be named on the EC's distortion report might likely be Vietnam as the second major NME (BKP Development Research & Consulting, 2012). The EU's distortion reports might be questioned for prejudiced or biased nation choices due to the fact that those reports would not cover all nations, only the ones that are suspected by the EC for having significant distortions.

3.3.4 Normal value construction by amendment in Regulation 2017/2321

Pursuant to the new Article 2(6a)(a) added to Regulation 2016/1036 by Regulation 2017/2321, the EC are permitted to utilise 1) comparable costs and prices from an "appropriate representative country with a similar level of economic development," 2) "undistorted international prices, costs, or benchmarks," or 3) undistorted "domestic costs," to establish normal value in the case where there are significant distortions in the exporting country. While there is no specific sequence in the utilisation of the above types of data provided in Article 2(6a)(a), however, when applying the new Article 2(6a)(a) together with Article 2(5) of Regulation 2016/1036, it appears that the priority data might be the undistorted "domestic costs". For instance, costs of exporters/producers operating by market economy conditions in the exporting country might be used by the EC to replace costs of SOEs in the same country.

The first and second type of data listed in Article 2(6a)(a) above are basically similar to the data from analogue (surrogate) country noted in the EU's old NME methodology. One noticeable change, however, has been made. If more than one "appropriate

representative country" is found as potential source for the first type of data, Regulation 2017/2321 requires the EC to consider the factors of "social and environmental protection" in those countries, as measured by the standards of "core conventions of the International Labour Organization and relevant multilateral environmental conventions", to select the representative country (Regulation 2017/2321, Recital 4 & 6). Regardless of social and environmental protection level in the representative country, the use of data from a third country would likely to inflate the anti-dumping duty rates as a matter of fact. Applying all the factors provided in the new NME methodology in the calculation of anti-dumping margins, it is possible that the final anti-dumping duties might appear to be even higher than they would have been under the EU's old NME methodology.

Furthermore, the criteria of "wage costs being distorted" in the list of significant distortions provided in new Article 2(6a)(b) seems to create possibility for the EC to even address government-intervened social dumping in their anti-dumping investigations and proceedings. However, social and environmental dumping are out of the scope of the ADA, as the WTO rejected to include these types of dumping into the rules of the ADA (Vermulst, 2005, p. 3). Therefore, the possibility of the EU to initiate anti-dumping investigations towards social and environmental dumping implied in Regulation 2017/2321 was already questioned by some WTO Members (WTO Committee on Anti-Dumping Practices, 2018, para. 102–107).

3.3.5 Exceptions to the new EU NME methodology

The EU's new NME methodology provides two exceptions, which are noted in the new version of Article 2(7) of Regulation 2016/1036 amended by Regulation 2017/2321. Firstly, for anti-dumping investigations on products from Uzbekistan, Turkmenistan, North Korea, Belarus, and Azerbaijan,[58] which are not WTO Members, while not identifying them as NMEs like the old Article 2(7), Regulation 2017/2321 still requires the EC to apply the EU's old NME methodology, which establish the normal value by using data from a third country. In the case of these countries, the third country is now

[58] New Article 2(7) refers to Annex I of *Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries* (Regulation 2015/755).

called ‘appropriate representative country’ by Regulation 2017/2321, in comparison with the term ‘market economy third country’ in old Article 2(7) of Regulation 2016/1036.

As discussed in previous section, the factor relating to the “level of social and environmental protection” must be considered to determine the representative country (Regulation 2017/2321, Recital 4). In this regard, the representative country selection for anti-dumping investigations relating to the countries listed in the above paragraph is similar. However, new Article 2(7) provides another exception, in which such representative countries must be determined in a ‘reasonable manner,’ while the old Article 2(7) instructed the selection of third countries to be in ‘not unreasonable manner.’ Perhaps since the countries listed above are not classified as NMEs anymore, it appears that the EU set a higher standard for the use of data from third countries through such change of words in the same anti-dumping investigation procedure. This also seems to directly imply the NME provisions in the accession protocols of China and Vietnam. Through Regulation 2017/2321, the EU changes its anti-dumping investigation approach towards China and Vietnam, following the expiry of the NME treatment provisions in the accession protocols of China and Vietnam, and at the same time maintain its effort in addressing market distortions in these countries. The EU now applies a methodology using surrogate data, similar to the US.

The above sections examined the US and the EU anti-dumping laws and procedures of anti-dumping investigations and proceedings. It is now necessary to discuss how Vietnamese exporters deal with such anti-dumping investigations and proceedings conducted by the US and the EU. This includes discussion of how Vietnamese exporters reply to relevant questionnaires from the investigating authorities, including any processes and activities that exporters typically undertake.

4. Vietnamese exporters as respondents in US and EU anti-dumping investigations

This section provides an overview of the processes and actions that Vietnamese exporters typically undertake, when they are involved in anti-dumping investigations by the US or EU authorities. The following discussion also incorporates the analysis of

interview responses of Vietnamese exporters who have been involved in anti-dumping investigations conducted by the US and EU and who were interviewed as part of this study. A particular emphasis is placed on analysing how the NME status of Vietnam affects Vietnamese exporters as respondents in anti-dumping investigations.

As explained in chapter 4, exporters would typically receive a notice of initiation of an anti-dumping investigation from an investigating authority along with a questionnaire that they are requested to complete and return within a timeframe as specified by the investigating authority. As part of responding to questionnaires, exporters are required to submit relevant evidence to support their claims. In the case of investigations initiated by the US authorities, the questionnaires and initiation notice are merged in a document called Request for Information – Antidumping Duty Administrative Review, while the EU authorities use a document called an Anti-Dumping Questionnaire, which has a similar purpose and effect.

Among the 15 Vietnamese exporters who participated in the interviews, 13 were involved in anti-dumping investigations initiated by the US, while the other two were involved in anti-dumping investigations by the EU. All 15 exporters advised that they were not aware of what anti-dumping was prior to receiving a notice of initiation from the investigating authorities and they were not sure why they were involved in those investigations. In this regard, 11 Vietnamese exporters noted that they first approached their provincial branches of the MIT and obtained general technical advice on anti-dumping and the procedures of anti-dumping investigations and proceedings. The other four exporters consulted with their companies' lawyers first, and then also approached their provincial branches of the MIT.

The interviews with exporters indicated that the next steps would typically involve seeking legal advice from a lawyer who is specialist in anti-dumping. As there are not many legal practitioners in Vietnam who specialise in anti-dumping, most of the interviewed exporters indicated that they preferred to engage lawyers in the investigating country (i.e., the US or the EU) rather than one in Vietnam. This means the costs of actively participating in an investigation is considerably higher. However, not all Vietnamese exporters are willing to incur such additional legal expenses and

consequently do not seek legal assistance in the investigating country, but use the services of Vietnamese lawyers. Based on interview responses, this is especially the case for exporters that are involved in an anti-dumping investigation for the first time and do not fully understand how the outcome of an investigation could impact their exports.

As discussed earlier in this chapter, due to Vietnam's NME status, Vietnamese exporters are considered to have unreliable pricing and cost information. In practice, this places a higher burden on Vietnamese exporters to demonstrate that they are operating under market-based conditions because they are required to provide more detailed information and evidence to the investigating authorities.

Two Vietnamese exporters that participated in interviews were mandatory respondents in investigations conducted by the US. The interviews with them indicate that exporters who are mandatory respondents are encouraged to cooperate with investigating authorities by providing detailed information and documentation. The respondents advised that they were required to provide detailed information and that they worked directly with the investigators and in some instances were requested to provide additional information. The remaining 11 Vietnamese exporters that were interviewed advised that they were non-mandatory respondents, but they could still participate in an investigation and provide information to the DOC voluntarily and request to be assessed for a 'separate rate' instead of being subjected to the 'entity-wide rate'.

Vietnamese exporters advised that due to numerous differences in accounting standards between Vietnam and the US, the accounting and financial information that they provided was considered to be insufficient or inadequate in the DOC's view. This appears to be one of the key reasons why all 13 interviewed exporters failed to demonstrate that they operated under market-based conditions. Six of the 13 interviewed exporters advised that another problematic area related to providing information about shareholders, which some exporters were reluctant to do.

The remaining two interviewed exporters were involved in anti-dumping investigations conducted by the EU authorities. Both exporters advised that they cooperated with the EU investigating authority and provided the requested information. They were, however,

ultimately unsuccessful in proving that they operated under market-based conditions. They did not receive 'separate rates,' apparently because their accounting records were found to be questionable by the investigating authority. In addition, they did not have enough evidence to prove that the non-market exchange rate of the Vietnamese currency had not affected their export prices.

Based on these interviews, the author concluded that exporters appear to face similar difficulties (in both US and EU anti-dumping investigations) in proving that they are operating under market-based conditions. The interviews also indicate that it is not easy to satisfy investigating authorities to qualify for a 'separate rate.' They also indicate that Vietnam's status as an NME ultimately increases the costs to the exporters of doing business, particularly when exporting to the US and EU, and negatively impacts their profitability.

Regarding technical advice on anti-dumping provided by the MIT, in 2021, the MIT announced that it is developing an 'early warning system' for potential anti-dumping investigations on certain Vietnamese products (Vietnam Ministry of Industry and Trade, 2021). According to the newspaper article, this so-called system is a process, in which the MIT monitors 36 products that are predicted to be investigated in future anti-dumping investigations, then informs relevant Vietnamese exporters of these products through provincial branches of the MIT. As of August 2021, 7 out of these 36 products were investigated in several anti-dumping processes initiated by other countries (Vietnam Ministry of Industry and Trade, 2021). However, up to the date of this research, this system is still under development and tests, there has been no further official information about the detailed procedures of the system, or on what basis the MIT identifies the products to be monitored. The MIT is still testing the efficiency and accuracy of this warning system (Vietnam Ministry of Industry and Trade, 2021).

5. Conclusion

In general, the analysis in this chapter has demonstrated that the reliability in the US's current methodology for finding a surrogate country and ultimately establishing a product's dumping margin is far from certain, because such a method may produce

unpredictable results. Regarding the US's NME methodology, the Tariff Act of 1930 does not set out many rules governing how the DOC can select a surrogate country, but it simply mandates that the DOC meet three requirements in going about such work. First, it must base its normal value determination on production costs and selling prices. Second, it must base the valuation of the factors of production on appropriate data. Third, the DOC must also ground the valuation of the factors of production in the NME on the factors' costs in a surrogate country that has comparable economic growth and development.

Regarding the EU's NME methodology, the 2017 amendment to the EU anti-dumping legislation discontinued the old NME methodology that used to be applied to a narrowly defined category of countries. The new methodology counters significant market distortions in all WTO Members and adds some labour and environmental features to the anti-dumping process. The discussions in this chapter show that, while the new methodology is technically sound in preserving fairness in trade, which is the purpose of anti-dumping, it appears that the EU's new methodology has been questioned by WTO Members as to its consistency with international law.

This chapter has also identified the specific reasons why the DOC treats Vietnam as an NME in US anti-dumping investigations and proceedings, which are government intervention in the transitional economy of Vietnam, export practice, currency convertibility, the privatisation of state-owned enterprises, and accounting management. Additionally, the EU's new NME method provided by Regulation 2017/2321 requires the EC to evaluate and determine the economic distortions in the market of the exporting country, based on the presence of state-owned enterprises and their impact, export and relevant policies and other elements that financially affect the prices. In general, the factors that the EC consider when determining whether a WTO Member is an NME are like those used by the DOC in the US.

To further determine whether the US and EU anti-dumping laws and practices applied to NMEs are consistent with international law, the next chapter examines the WTO anti-dumping dispute settlement procedures and system, and related WTO jurisprudence involving the US, the EU and NMEs including Vietnam.

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CHAPTER 6 - WTO ANTI-DUMPING DISPUTE SETTLEMENT AND JURISPRUDENCE

1. Introduction

The previous chapter introduced the US and EU anti-dumping laws and the procedures and proceedings of anti-dumping investigations. It also examined and discussed the reasons why Vietnam has been treated as an NME by the US and the EU in anti-dumping investigations and proceedings, as well as the effect of Vietnam's NME status on the procedures of anti-dumping investigations in those two countries. In this regard, if Vietnam does not agree with the anti-dumping measures imposed by the US/EU, Vietnam can refer the case to the WTO dispute settlement system. As members of the WTO can bring disputes to the WTO including anti-dumping disputes, the complainant starts with a request for consultation with the respondent. If the dispute is not solved through this consultation, the DSB (unless a consensus decision is reached to not proceed with the establishment) shall establish a panel to examine and provide rulings on the dispute, which can be appealed by either or both parties, and then examined again by the Appellate Body.

This chapter examines the WTO anti-dumping dispute settlement cases involving NMEs, particularly Vietnam. The next section provides an overview of the WTO anti-dumping dispute settlement process, in which relevant provisions of the ADA, the DSU, and relevant rulings of Panel/Appellate Body Reports are discussed. The following sections then analyse the details of specific anti-dumping dispute cases involving Vietnam as a complainant and its NME status, and the Panel and Appellate Body reports of those cases to identify the issues relating to NME status. Other anti-dumping dispute cases, in which Vietnam is a third party or which are relevant to the clarification of the discussions in this chapter, are also examined.

2. Overview of the WTO anti-dumping dispute settlement process

A WTO Member can bring an anti-dumping dispute under the ADA to the WTO for settlement. Article 17 of the ADA and the DSU, which together comprise the WTO anti-dumping dispute resolution framework, provide the rules and processes that are

applicable for consultations and the settlement of disputes regarding the interpretation and application of the ADA. Article 17 of the ADA is not intended to serve as a substitute for the dispute resolution mechanism that was established by the DSU; rather, it is intended to support the DSU. Article 17 of the ADA lays out the foundation for how disputes and claims relating to the ADA are resolved through dispute settlement, and it expressly states that the DSU is applicable to the settlement of disputes under the ADA (ADA, Art. 17.1).

2.1 Application of the WTO Dispute Settlement Understanding

All disputes involving rules and procedures of any of the WTO agreements are processed through the procedure provided in the DSU, once a dispute is brought to the WTO by a Member (DSU, Art 1). Accordingly, the WTO DSB established under the DSU has the authority to create a panel, approve the findings of a panel and/or Appellate Body, monitor the implementation of judgments and recommendations, and allow suspension of concessions and other duties under the relevant agreements (DSU, Arts 2.1). Article 17.1 of the ADA states that, "except as otherwise provided", consultations and dispute settlement of anti-dumping disputes will follow the provisions of the DSU.

In a WTO dispute, the complaining Member can make what is called 'as such' and 'as applied' claims to challenge the legislation as such and the specific application of that legislation by the responding Member. In this regard, for the definition of an 'as applied' claim, the Appellate Body provides that, "by 'as applied', we refer to the types of claims involving challenges to a Member's application of a general rule to a specific set of facts" (*United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* [*US — Oil Country Tubular Goods Sunset Reviews*], 2004, footnote 22). For the definition of an 'as such' claim, the Appellate Body provides that:

> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct - not only in a particular

> instance that has occurred, but in future situations as well - will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members ex ante from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims. (*US — Oil Country Tubular Goods Sunset Reviews*, 2004, para. 172)

2.2 Consultations, good offices, conciliation and mediation

A WTO anti-dumping dispute settlement process starts with a request for consultations under Article 4 of the DSU. If a Member receives a request for consultations under the ADA, that Member must respond to the request within 10 days and begin consultations in good faith within a period of 30 days after the date of receipt with the goal of reaching a mutually satisfactory solution (DSU, Art. 4.3). If the Member does not answer within 10 days of the date that they received the request, or if they do not enter consultations within a period of 30 days, or another arrangement otherwise mutually agreed upon, following the date that they received the request, then the Member that sought the holding of consultations may continue immediately to request the appointment of a panel (DSU, Art. 4.3). After the WTO Agreement entered into force, the DSU is only applied to new requests for consultations filed under the consultation procedures of the covered agreements. If a consultation was requested under GATT 1947, or any other predecessor agreement to covered agreements, prior to the date of the WTO Agreement's entry into force, those rules and procedures will continue to apply to those disputes, regardless of whether the WTO Agreement was in force at the time (DSU, Art. 3.11).

Article 5 of the DSU provides that "good offices, conciliation, and mediation" are processes that may be carried out voluntarily provided the parties to the dispute choose to do so (DSU, Art. 5.1). It is expected that any discussions about a dispute in good offices, conciliation, or mediation will be kept strictly confidential and will not affect either party's rights or interests in any subsequent proceedings under the same processes (DSU, Art. 5.2). When good offices, conciliation, or mediation are entered into within 60 days after the date on which a request for consultations was received, the complaining party is required to wait 60 days from the date on which a request for

consultations was received before making a request to create a panel (DSU, Art. 5.4). During the 60-day period, the party that filed the complaint has the right to make a request for the appointment of a panel if the parties to the dispute collectively decide that the good offices, conciliation, or mediation procedure has been unsuccessful in resolving the problem (DSU, Art. 5.4).

Articles 17.3 and 17.4 of the ADA, additionally give the consultation and dispute settlement requirements pursuant to which disputes may be filed under the ADA, which is validated by the Appellate Body in *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico* (*Guatemala — Cement I*). Coupled with the provisions of Article 4 of the DSU above, Articles 17.3 and 17.4 of the ADA provide additional rules for the consultation and dispute settlement in anti-dumping disputes (*Guatemala — Cement I*, 1998, footnote 43). While Article 17.2 and 17.3 of the ADA both deal with consultations, Article 17.4 of the ADA outlines the parameters for when and how a dispute can be brought to the DSB once consultations have been completed.

Article 4 of the DSU, which states that "each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former" (DSU, Art 4.2), broadly correlates to Article 17.2 of the ADA. This article requires WTO Members to accord supportive attention to and sufficient opportunity for consultation regarding any representations made by another WTO Member concerning measures relating to the operation of any covered agreement including the ADA.

The legal foundation for consultation requests under the ADA is found in Article 17.3 of the ADA, which is equivalent to Article XXIII:1 of the GATT 1947 (*Guatemala — Cement I*, 1998, para. 64). The Appellate Body in *United States — Anti-Dumping Act of 1916* (*US — 1916 Act (EC)*) (2000, para. 67) stated that Article 17.3 of the ADA is not included in the distinctive and extra guidelines and procedures listed in Appendix 2 to the DSU. According to the Appellate Body Report in *United States — Continued*

Existence and Application of Zeroing Methodology (*US — Continued Zeroing*) (2009, para. 177), Article 17.3 of the ADA is very similar to Article 3 of the DSU, which states:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. (DSU, Art 3.3)

This provision means that, under the ADA, Members have the option of going to dispute settlement over anti-dumping measures implemented by another Members, provided that this other Member believes that such measures nullify or impair advantages accruing to them under the ADA (*United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* [*US — Corrosion-Resistant Steel Sunset Review*], 2003, para. 86).

2.3 Establishment of Panels

Article 6 of the DSU stipulates that if a complaining party so asks, a panel must be constituted at the latest DSB meeting at which the request first appears as an item on the DSB's agenda, unless the DSB determines by agreement at that meeting not to establish a panel. A written request is required to initiate the process of establishing a panel. This request must state whether consultations were undertaken, name the particular measures that are in question, and offer a concise explanation of the legal foundation of the complaint that is enough to communicate the issue in a way that is understandable. If the applicant proposes the formation of a panel with terms of reference that differ from those that are conventional, the written request must contain the suggestions of the particular terms of reference (DSU, Art 6.2). Panel discussions are secret. Panel reports must be prepared in the absence of the parties to the dispute, taking into consideration the information that has been presented and the comments that have been made. Individual panellists maintain their anonymity while contributing their thoughts and opinions to the final report (DSU, Art 14).

To ensure that the Members have the time to review the panel reports, the DSB does not consider the reports for adoption until 20 days following the date on which they were first sent to the Members. This ensures that the Members have adequate time to review the reports (DSU, Art 16.1). If a member has a problem with a panel report, they must provide written reasons to the DSB at least 10 days before the meeting at which the report is scheduled to be discussed to explain why they disagree with the report (DSU, Art 16.2). Unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report, the report must be adopted at a meeting of the DSB within 60 days of the date on which it was circulated to the Members. However, this requirement does not apply if the DSB decides not to adopt the report. If a party has already informed the DSB that it will be appealing the judgment, the report that was prepared by the panel will not be considered for adoption until after the appeal has been resolved. This adoption method does not in any way affect the ability of members to voice their opinions on a panel report (DSU, Art 16.4).

Appeals from decisions made by Panels are heard by the Appellate Body (DSU, Art 17.1). The Appellate Body is composed of seven people, with a minimum of three of those people serving on any one case. The DSB is responsible for appointing members to the Appellate Body, each of whom has a term length of four years and is eligible for reappointment once (DSU, Art 17.2). It is required that members of the Appellate Body serve in a rotating capacity. As a rule, the processes should not exceed 60 days from the day that a party to the dispute officially informs its decision to appeal to the date that the Appellate Body distributes its report. This period begins when the party to the dispute communicates its intention to appeal (DSU, Art 17.5).

If they are applicable, the requirements of paragraph 9 of Article 4 of the DSU are to be taken into consideration by the Appellate Body while they are determining their schedule. If the Appellate Body believes that it will not be able to produce its report within 60 days, then it must provide the DSB with a written explanation of the reasons for the delay, as well as an estimate of the amount of time remaining until it will provide its report. The procedures cannot last for more than 90 days under any circumstances. An Appellate Body Report must be adopted by the DSB and unconditionally accepted

by the parties to the dispute, unless the DSB decides by consensus within 30 days of the report's circulation to the Members that it will not adopt the Appellate Body Report. In that case, the parties must accept the report without conditions (DSU, Art 17.14). This method for adopting a resolution does not in any way restrict the freedom of members to voice their opinions about a report from an Appellate Body.

In WTO anti-dumping disputes, a Panel operates under rules and procedures in a manner conforming with, not only Article 12, 13, 14, and 15 of the DSU, but also with additional requirements from Articles 17.4 to 17.7 of the ADA. In this regard, Article 1.2 of the DSU states:

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. (DSU, Art. 1.2)

The purpose of such specific or extra provisions in Article 1.2 of the DSU is "to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement" (*Guatemala — Cement I*, 1998, para. 66). Because of this, the paragraphs of Article 17 of the ADA take precedence to the extent that there is a disparity between the requirements of those paragraphs and the relevant rules of the DSU. Only in situations in which those rules "cannot be read as complementing each other" (*Guatemala — Cement I*, 1998, para. 65), that is, in the manner that adhering to one provision will cause a breach of the other provision, and therefore the provisions are mutually inconsistent with one another, will the specific or extra rules take precedence.

If any of the three different forms of action described in Article 17.4 of the ADA have been performed by the WTO Members involved in the dispute and is specified in the request for establishment of Panel, then Panels have authority to consider matters in relation to the ADA (*Guatemala — Cement I*, 1998, para. 79–80; *US — Corrosion-*

Resistant Steel Sunset Review, 2003, para. 83).[59] In light of this, Article 17.4 stipulates that "certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation" (*US — 1916 Act (EC)*, 2000, para. 74). The Appellate Body in *US — 1916 Act (EC)* provided the following explanation for the rationale behind the limits that were outlined in Article 17.4 of the ADA:

> In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted. In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure, Article 17.4 strikes a balance between these competing considerations". (2000, para. 73)

The Appellate Body in *US — 1916 Act (EC)* also explained that it would be possible for an antidumping investigation to be repeatedly disrupted if there was an unfettered right to resort to dispute settlement throughout the course of the investigation (2000, footnote 38).

For a dispute over the ADA to be brought before the DSB, it is necessary, as stated in Article 17.4 of the ADA, that the consultations have been unsuccessful in producing a solution that is acceptable to both parties. This condition is very similar to the condition that is found in the broadly applicable provision of the DSU, which states that a request for the establishment of a Panel may be made in the event that "the consultations fail to

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[59] The three types of action under Article 17.1 of the ADA are: (i) "the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution", (ii) "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties", and (iii) "to accept price undertakings".

settle a dispute within 60 days after the date of receipt of the request for consultations" (DSU, Art 4.7). Despite this, the consultations that are required by Article 17.3 of the ADA are expressly mentioned in Article 17.4 of the ADA, which is a special, or an extra, rule. These are consultations that must be initiated in writing if any Member believes that any advantage attributable to it, under the ADA, is being negated or damaged, or that the fulfilment of any objective is being hampered, and the goal of which is to seek a mutually suitable solution.

Pursuant to Article 17.4 of the ADA, for a Member to bring the case before the DSB, the investigating authority of the importing Member must either have imposed definitive anti-dumping duties or have accepted a price undertaking, and consultations between the Members failed to resolve the dispute. The particular situation in which a provisional measure is sent to the DSB is discussed in the second sentence of Article 17.4 of the ADA. If there is a provisional measure, the establishment of a Panel may be sought if the provisional measure has a substantial effect and the Member who requested consultations determines that it was adopted in contradiction to the provisions of Article 7.1 of the ADA (*US — Continued Zeroing*, 2009, para. 206).

It would seem that it is appropriate for a complainant to name one of the final activities that are mentioned in Article 17.4 of the ADA. Claims may also be submitted with regards to other phases of the initiation, investigation, and conclusion relevant to the final activity stated in the Panel request if the requirement in Article 17.4 is fulfilled. For example, in *Mexico — Corn Syrup*, in the case where the remedy mentioned in the Panel request was a final anti-dumping duty, the Panel agreed that a claim may be filed under Article 7.4 of the ADA, which establishes maximum time limits for the imposition of provisional measures. The Panel's point of view is that "a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty" (*Mexico — Corn Syrup*, 2000, para. 7.53). Consequently, the claims under Article 7.4 were allowed to proceed. Moreover, Article 17.4 does not restrict a complainant from filing a claim concerning any part of an anti-dumping investigation and proceeding (*European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* [*EC — Fasteners (China)*], 2011, para. 7.165), if one of the remedies

indicated in Article 17.4 of the ADA is specified in the request for Panel establishment. For instance, in a disagreement over a definitive anti-dumping remedy, complaints about the initiation or conduct of the underpinning anti-dumping investigation may be submitted (*EC — Fasteners (China)*, 2011, para. 7.165–7.166).

Appendix 2 to the DSU lists Article 17.4 of the ADA as a specific or extra dispute settlement regulation (*US — 1916 Act (EC)*, 2000, para. 70). However, for all circumstances not mentioned by this rule, the DSU's standard regulations apply. Article 17.4 of the ADA, for example, does not specify the standards for the degree of clarity for which claims should be addressed in a Panel request. Consequently, this matter will be considered under Article 6.2 of the DSU (*Mexico — Corn Syrup*, 2000, para. 7.14). In addition, Article 17.4 of the ADA does not limit the sort of claims that can be filed. (*Guatemala — Cement I*, 1998, para. 79).

Despite the conditions outlined in Article 17.4 of the ADA, it does not prevent a WTO Member from disputing anti-dumping legislation on its own merits. In addition, a broad interpretation of 'measure' is applicable for the purposes of filing a dispute under the ADA. The Appellate Body has noted that, in a manner comparable to disputes brought under other agreements covered by the WTO, "a measure need not fit squarely within [the 'as such' or 'as applied'] categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm" (*US — Continued Zeroing*, 2009, para. 179). The Appellate Body also found that "there is no basis, either in the practice of the GATT 1994 and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement" (*US — Corrosion-Resistant Steel Sunset Review*, 2003, para. 88). That also indicates that there is no obligation, in theory, that the rules or practices that are being disputed must be stated in the form of a written document (*US — Zeroing (EC)*, 2009, para. 193).

2.3.1 Panel requests and terms of reference

Article 17.5 of the ADA establishes the framework for the DSB to establish a Panel to examine the dispute at the request of the complainant. A Panel request containing claims referred to the ADA must meet the conditions outlined in Article 6.2 of the DSU as well as Articles 17.4 and 17.5 of the ADA. Article 17.5 of the ADA, however, does not take precedence over Article 6.2 of the DSU. Rather, it incorporates additional criteria not listed in DSU Article 6.2 (*Guatemala — Cement I,* 1998, para. 74). In this regard, the additional criteria in Article 17.5 of the ADA do "not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the Anti-Dumping Agreement" (*Guatemala — Cement I,* 1998, para. 75). Because of this, a panel request that concerns a disagreement under the ADA must conform with the dispute settlement requirements that are outlined in both the ADA and the DSU.

There are two separate components that make up Article 17.5 of the ADA. Firstly, the content of a request to have a Panel established to hear a dispute under the ADA must meet the requirements outlined in Article 17.5(i). In detail, Article 17.5 requires the panel request to explain "how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded" (ADA, Art 17.5[i]). For instance, the Panel in *Mexico — Definitive Anti-Dumping Measures on Beef and Rice* (*Mexico — Anti-Dumping Measures on Rice*) considered it adequate that a Panel request of the complainant "describes the factual and legal circumstances alleged to constitute the asserted violations of the cited provisions of the [Anti-Dumping] Agreement in some detail" (2005, para. 7.48). In *Mexico — Corn Syrup* case, the Panel ruled that Article 17.5(i) of the ADA requires that "it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired" (2000, para. 7.26). Secondly, Article 17.5(ii) of the ADA provides that Panels are required to examine the problem brought to them based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member"

(ADA, Art 17.5[ii]). This implies that Panels must base their decisions on the facts presented in the investigation's record (*EC — Fasteners (China)*, 2016, para. 7.43).

Panels may not accept new evidence in examining claims under the ADA as an outcome of Article 17.5(ii) of the ADA (*United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* [*US — Hot-Rolled Steel*], 2001a, para. 7.7). This provision is also consistent with the notion that a Panel is not permitted to conduct an assessment of matters before investigative authorities (*Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey* [*Egypt — Steel Rebar*], 2002, paras. 7.15–7.21). On the other hand, given the current state of the law, Article 17.5(ii) of the ADA does not appear to prohibit a Member from putting the evidence and facts on the record of the investigations in a different manner, or from submitting them in a new draft or form (*EC — Bed Linen*, 2000, para. 6.43). What is important is the content of any paper filed during the Panel procedures, not its format. In this regard, the Panel in *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway* (*EC — Salmon (Norway)*) examined whether "the information, in any form, was ... demonstrably before the investigating authority at the time it made its determination" (2007, para. 7.839). If not, it would be acceptable for a Panel to exclude it from consideration.

2.3.2 Panels' interpretation of the ADA

Article 17.6(ii) of the ADA specifies how a Panel interprets the applicable ADA requirements. Article 17.6(ii) is composed of two sentences. The first sentence states that Panels should interpret the ADA in accordance with the conventional standards of public international law. This relates to the responsibility outlined in Article 3.2 of the DSU. The Appellate Body in *US — Hot-Rolled Steel* noted that the first sentence of Article 17.6(ii) "echoes closely Article 3.2 of the DSU" (2001b, para. 57). In other words, the first sentence of Article 17.6(ii) of the ADA and Article 3.2 of the DSU do not contradict each other, the first sentence of Article 17.6(ii) simply "confirms that the usual rules of treaty interpretation under the DSU also apply to the [Anti-Dumping] Agreement" (*US — Hot-Rolled Steel*, 2001b, para. 57).

The second sentence of Article 17.6(ii) of the ADA is of particular importance. It presupposes that, after applying the first sentence, a Panel decides that there are many permitted interpretations of an ADA rule (*US — Continued Zeroing*, 2009, para. 271). A Panel must then decide if an investigating authority's action was based on one of these interpretations. In this case, a Panel will have to decide whether the measure in question complies with the ADA. According to the Appellate Body in *US — Hot-rolled Steel*, the second sentence of Article 17.6(ii) "presupposes that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the [Anti-Dumping] Agreement, which, under that Convention, would both be 'permissible interpretations'" (2001b, para. 59). The second sentence of Article 17.6(ii) of the ADA cannot be invoked if an investigating authority's interpretation is not appropriate, and no consideration is accorded to that authority (*United States — Measures Relating to Zeroing and Sunset Reviews* [*US — Zeroing (Japan)*], 2009, para. 189).

3. Anti-dumping disputes over the US practice of zeroing

In every anti-dumping dispute between Vietnam and the US, the practice of 'zeroing' applied by the US investigating authorities has always been challenged by Vietnam. Zeroing is a practice occurring in the process of calculating the margin of dumping during anti-dumping investigations and proceedings. As mentioned in chapter 4, to determine whether a product is dumped, or that dumping exists, the 'margin' of dumping is calculated by comparing the export price with the normal value. To this end, the ADA requires such comparison to be fair, and adjustments must be made to the export price and the normal value based on "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability" (ADA, Art 2.4). Calculating the dumping margin in practice is a considerably difficult task and there are many differences in the method of calculation used by WTO Members. In this regard, Article 2.4.2 of the ADA provides two basic methodologies: the weighted average (WA) normal value versus weighted average export price (average-to-average [A-A]) method, and the individual normal values versus individual export prices (transaction-to-transaction [T-

T]) method. Since the ADA does not provide any formula for the calculation of dumping margin, in practice it generally can be computed as:

$$\frac{WA\ Normal\ Value - WA\ Export\ Price}{WA\ Export\ Price} = Margin\ of\ Dumping$$

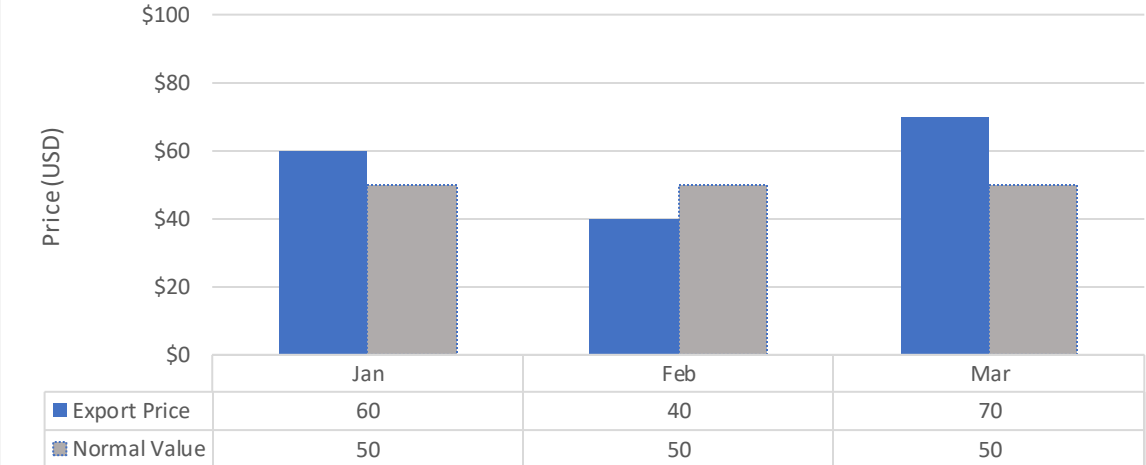
The ADA also allows Members to compare the WA normal value to individual export prices (average-to-transaction [A-T]) if the investigating authorities "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" (ADA, Art 2.4.2). This would involve an explanation of why such differences cannot be taken into account by the use of one of the two basic methods. Using this third method, the authorities can find a positive dumping amount (where an individual export price is less than the WA normal value), as well as a negative dumping amount (where an individual export price is higher than the WA normal value). In this context, instead of using negative dumping to offset positive dumping for the calculation of the weighted average dumping margin, zeroing occurs where any export transactions that prove to be un-dumped goods (where a negative dumping amount is found) are given a zero value rather than the calculated negative dumping margin (Ahn & Messerlin, 2014). Theoretically, zeroing can also occur under the individual normal values versus individual export prices method, if positive dumping amounts are treated as zero.

In fact, there are two types of zeroing: 'simple' and 'model' zeroing (Hoekman & Wauters, 2011). While simple zeroing occurs in the A-T method as explained above, model zeroing occurs in the A-A method. The case *EC — Bed Linen* was the first case addressing model zeroing, where the products under investigation were grouped into 'models', and only normal values and export prices of specific models were compared. The Appellate Body in this case noted that all comparable export transactions will be considered for calculations under the A-A methodology, therefore the practice of model zeroing is an unfair comparison and thus inconsistent with Article 2.4 and Article 2.4.2 of the ADA (*EC — Bed Linen*, 2001, para. 55).

To illustrate how simple zeroing works, it is useful to look at the following hypothetical scenario. In Figure 3, the normal value of a product imported by a foreign company is

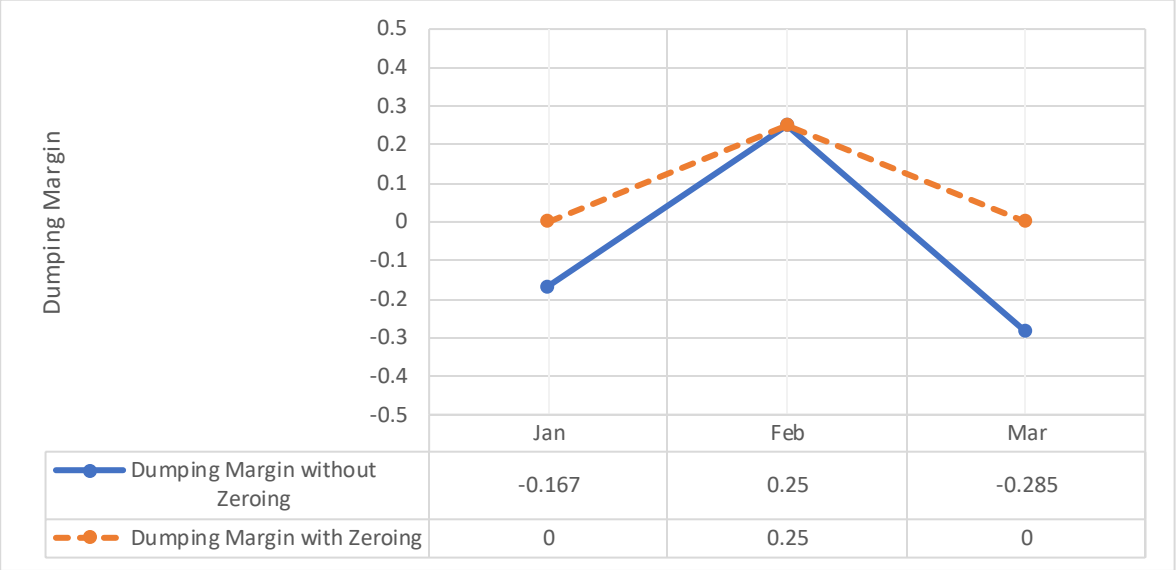
constant at USD50. While export prices are higher than the normal value in the January and March transactions the export price of the February transaction is less. Then, based on the data in Figure 3, Figure 4 illustrates the respective margins of dumping in the two scenarios where such margins are computed using the formula above. The first scenario is displayed by the solid line, in which dumping margins of the three transactions are calculated without zeroing. Accordingly, when those three dumping margins are combined to determine the overall dumping margin for the foreign company, the negative margins of the January and March transactions offset the positive margin of February transactions, therefore the overall margin shows that the product is not dumped. In contrast, the square-dotted line illustrates the second scenario where zeroing is applied, in which the margins of January and March transactions are marked at zero instead of negative margins. Consequently, the overall margin is positive, leading to the conclusion that the product is dumped.

Figure 3: Example of Export Price and Normal Value in Several Export Transactions.



Source: Author.

Figure 4: Example of Margin of Dumping with and without Zeroing.



Source: Author.

As explained above, by practicing zeroing, an investigating authority only needs one dumped transaction, in which the export price is less than the normal value, to determine that dumping has occurred, and anti-dumping duty can be assessed. Since zeroing effectively increases (or even creates) a positive overall dumping margin by preventing negative margins from offsetting positive margins, exporters would find it extremely difficult to avoid their products being considered as dumped. As stated by Ikenson (2004), zeroing "can create dumping margins out of thin air" (p. 1). Furthermore, zeroing also inflates the anti-dumping duty amount because this duty is imposed according to the margin of dumping. The following sections continue to examine the US practice of zeroing in anti-dumping investigations and proceedings involving Vietnam, and related jurisprudence.

3.1 The US zeroing practice in anti-dumping investigations of shrimp from Vietnam

The *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam* (*US — Shrimp (Viet Nam)*) case was a dispute in the series of zeroing disputes brought to the WTO against the US. Since India brought the *EC — Bed Linen* case to the WTO in 2001, several more WTO disputes have been lodged over various zeroing procedures

used in dumping calculations (Bown & Sykes, 2008; Prusa & Vermulst, 2011; Bown & Prusa, 2011). The large percentage of these complaints have been lodged against the US, which has been hesitant to adjust its procedures and only made significant policy and legislative reforms in 2012 (Cho, 2012), which will be discussed in section 3.5 below.

In fact, zeroing practice under US anti-dumping laws existed before the ADA. In *Serampore Industries Pvt. Ltd. v U.S. Department of Commerce* (1987), zeroing was challenged for the first time in the US, but the US Court of International Trade upheld the DOC position and stated that the practice "ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales" (p. 1360). In other words, the Court justified the DOC's zeroing practice which prevents foreign exporters from covering their dumping with more profitable sales. Nonetheless, there is a possibility that the DOC applied zeroing simply because US domestic industries had effectively lobbied the Congress for protection from competition. Lindsey and Ikenson (2002) explain how domestic industries in the US influence legislation and suggest that there might be a possibility that they could exploit anti-dumping law for protectionism against imports of cheaper like products.

In the case of *US — Shrimp (Viet Nam)*, Vietnam objected to the use of zeroing in the computation of dumping margins in both 'as applied' and 'as such' claims, noting to both the consequences of zeroing that was applied in the original investigation and the ADA consistency of zeroing applied in subsequent periodic administrative reviews. Following the lines of argument set out by the Appellate Body in past jurisprudence, the Panel's findings in this matter found the US zeroing practice to be inconsistent with the ADA (*US — Shrimp (Viet Nam)*, 2011, paras. 8.1[b] & 8.1.[c]). Neither the US nor Vietnam decided to appeal the rulings of the Panel. As the Panel noted, *US — Shrimp (Viet Nam)* was "not the first time US practices in relation to zeroing have come before a WTO panel" (2011, para. 7.82). The case, however, was 'exceptional' in the sense that all the individually computed dumping margins in the concerned administrative reviews were either zero or *de minimis*. This prompts the concern of whether zeroing is ADA-

inconsistent even when it does not result in the imposition of anti-dumping duties on exporters who have an individually computed dumping margin.

It is helpful to briefly explore the economic and political background of the dispute between the US and Vietnam over shrimp before moving on to a more in-depth analysis of the dispute. Shortly after Vietnam's entry into the WTO in January 2007, the country lodged its very first complaint with the WTO's dispute settlement mechanism in the form of this dispute (*US — Shrimp (Viet Nam)*, 2010). In fact, this dispute originated from an initial anti-dumping investigation that the US carried out prior to Vietnam's membership of the WTO. Vietnam was a socialist country without a tradition of participating in the global legal system when it brought the *US — Shrimp (Viet Nam)* case to the WTO. At the same time, Vietnam's economic system was undertaking a difficult and complicated transition to a market-based economy while maintaining a centralised governing system (the so-called 'socialist-oriented market economy') (Gantz, 2007). Additionally, Vietnam had been building on the Doi Moi economic reforms since 1986, which will be discussed further in chapter 7.

Furthermore, the issue discussed in this section concerns the global market for shrimp exports, and as such is related to a range of other WTO disputes. Demand for shrimp products has expanded dramatically since the late 1990s; nevertheless, such demand has been enthusiastically met by exporters in various Asian nations at low costs, resulting in generally lower shrimp pricing in the US market (Do, 2010). A substantial portion of Asia's shrimp exports was redirected to North America due to EU import restrictions based on health concerns over antibiotic treatment of farmed shrimp in the early 2000s (Debaere, 2010). This had a huge impact on the US shrimp sector, leading to requests for anti-dumping measures by the US shrimp industry, which were successful (Keithly & Poudel, 2008). This means that *US — Shrimp (Viet Nam)* should be seen in the context of a total of six complaints relating to US anti-dumping duties on shrimp exports that were submitted to the WTO independently by China, Ecuador, India, Thailand, and Vietnam, as well as a follow-up complaint submitted by Vietnam (*United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*, 2012). Several of these complaints address zeroing concerns.

3.2 Vietnam's NME status in *US — Shrimp (Viet Nam)*

As explained in chapter 5, In the US, the DOC is the agency that is legally obligated to investigate allegations of dumping. The DOC determines dumping margins in three stages: 1) original investigations, when deciding whether anti-dumping duties should be levied and at what rates; 2) periodic administrative reviews, which occur on the anniversary of the original anti-dumping order, subject to certain conditions; and 3) five-year 'sunset reviews', where the original anti-dumping order is terminated and the anti-dumping order is re-evaluated (Barfield, 2005). The DOC carries out its analyses based on two types of exporting counties: market economies and NMEs. Cases involving market economies include overseas exporters operating in economies where prices are recognised to offer reliable data regarding the effective utilisation of resources under US law. In contrast, exporters involved in NME cases are presumed to have untrustworthy price and cost information, therefore the DOC computes dumping margins using third-country surrogates (Broude & Moore, 2013). Because Vietnam is classified as an NME by the US, Vietnamese exports are subject to the latter set of rules.

In particular, the administrative reviews in the anti-dumping investigations and proceedings conducted by the DOC are the focus in *US — Shrimp (Viet Nam)*. Administrative reviews play an especially significant part, which is a direct result of the 'retrospective' duty-assessment process that is used in the US. According to this system, a cash deposit for anti-dumping duty responsibilities is collected at the time of importation, but the actual anti-dumping duties are evaluated later (Broude & Moore, 2013). Periodic administrative reviews may be sought annually by relevant parties, such as exporters or domestic US industries, and this evaluation takes place annually during the anniversary month of the initial anti-dumping decision. Regardless of this, the DOC has the authority to begin a periodic administrative review based on its own assessment. During an administrative review, the DOC determines whether the importer is liable for anti-dumping charges by performing a retroactive transaction-by-transaction analysis (*US — Shrimp (Viet Nam)*, 2011, para. 7.12).

3.3 Issues relating to NME identified by the Panel of *US — Shrimp (Viet Nam)*

Certain frozen and warm-water shrimp exported from Vietnam to the US was under anti-dumping duties imposed by the US, and the DOC has conducted an administrative review each year to review and recalculate the duty. In this regard, after Vietnam brought the case *US — Shrimp (Viet Nam)* to the DSB, the ADA-consistency of the DOC's determinations in those administrative reviews was assessed by the Panel in this case. As mentioned above, Vietnam was treated as an NME by the DOC in the initial investigation and anti-dumping order (United States Department of Commerce, 2005, p. 5152). Due to time constraints and practical issues, the DOC chose to focus on just four mandatory respondents who accounted for the biggest amount of shrimps exported to the US from Vietnam during the time period under review, instead of evaluating all data from all involved Vietnamese exporters (United States Department of Commerce, 2005, pp. 5152–3).

Among the four mandatory respondents, the DOC only received responses to questionnaire and relevant data from three of them, and their individual dumping margins ranged from 4.3 percent to 5.2 percent. Based on these three dumping margins, the DOC determined that the 'all-others rate' is 4.57 percent, which was the average rate of the individual dumping margins of three cooperated mandatory respondents (United States Department of Commerce, 2005, pp. 5154–5). The DOC also, based on an 'adverse facts available' basis, calculated and determined an 'entity-wide rate' of 25.7 percent (*US — Shrimp (Viet Nam)*, 2011, para. 7.24). In this regard, the three cooperated Vietnamese exporters who were mandatory respondents received the 'all-others rate' for their anti-dumping duties, while the non-cooperated mandatory respondent and the rest of Vietnamese exporters in this case received the much higher 'entity-wide rate'.

Right after Vietnam became an WTO Member in 2007, the second and third administrative reviews in *US — Shrimp (Viet Nam)* were conducted by the DOC. Merely two mandatory respondents were investigated in the second review, and the results of their calculated dumping margins were minimum or zero (United States Department of Commerce, 2008). After this review, the DOC determined to maintain the imposition of the same anti-dumping duties, even though no dumping was found because the dumping

margins were *de minimis*. It seems the DOC concluded that, if they remove the anti-dumping duties that were currently imposed on the imported shrimps, the dumping margins would be positive again. As a consequence, the same 'entity-wide rate' of 25.7 percent and 'all-others rate' of 4.57 percent continued to be applied to all exporters and the two mandatory respondents, respectively (United States Department of Commerce, 2008, pp. 52275–76). Due to the fact that all Vietnamese exporters who were not mandatory respondents received the 'entity-wide rate', it means all of their requests for individual examination and separate rate were refused by the DOC.

In regard to the DOC's practice in the third administrative review, only three mandatory respondents were examined by the DOC, and the results of their calculated dumping margins were again *de minimis*, ranging from 0.08 percent to 0.43 percent (United States Department of Commerce, 2009, p. 47195). Like the result of the second review, the 4.57 percent 'all-others rate' from the initial investigation was imposed to cooperated mandatory respondents and non-mandatory respondents who were eligible for separate rates (United States Department of Commerce, 2009, p. 47196). The of 25.7 percent 'entity-wide rate' again was applied to the rest of Vietnamese exporters, who probably were failed to prove their market-based operations and were not eligible for a separate rate (*US — Shrimp (Viet Nam)*, 2011, paras. 7.26–7.27). In this regard, it is necessary to remind that an exporter who was eligible for a separate rate still received the 'all-others rate', not the exact rate based on such exporter's dumping margin.

Four allegations were raised by Vietnam in relation to the DOC's anti-dumping practices: the imposition of the 'all-others rate' and the 'entity-wide rate', the selection of mandatory respondents and limited examination, and the application of zeroing method. The following sections will examine the rulings made by the Panel in *US — Shrimp (Viet Nam)* and discuss these allegations.

3.3.1 The application of zeroing methodology by the DOC

In *US — Shrimp (Viet Nam)*, Vietnam challenged the DOC's continued use of zeroing methodology by attempting a general claim, which was inspired by the previous success of the case *United States — Continued Existence and Application of Zeroing*

Methodology (*US — Continued Zeroing*) that was brought to the WTO by the EU to challenge 18 anti-dumping determinations by the DOC involving the zeroing method (*US — Continued Zeroing*, 2009). The Panel in *US — Shrimp (Viet Nam)* referred to the rulings of the Appellate Body in the *US–Continued Zeroing* case (*US — Shrimp (Viet Nam)*, 2011, para. 7.69), which accepted that it is possible to challenge a 'continued use of challenged practices' again at the DSB, to examine the DOC's practice that was challenged by Vietnam's claim. The Panel, however, decided that the claim did not fall within the scope of the Terms of Reference of the Panel (*US — Shrimp (Viet Nam)*, 2011, para. 7.68), because Vietnam did not sufficiently address the DOC's zeroing practice as a continuing measure. The Panel ultimately refused this claim of Vietnam.

Notwithstanding, the Panel agreed with Vietnam's 'as applied' claim that the DOC's application of 'simple zeroing', during its individual examination of exporters, was a breach of Article 2.4 of the ADA (*US — Shrimp (Viet Nam)*, 2011, para. 7.91), which requires a fair comparison in such examination. This ruling of the Panel was also in accordance with previous rulings in *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (2004), *United States — Final Dumping Determination on Softwood Lumber from Canada* (2006), and *United States — Measures Relating to Zeroing and Sunset Reviews* (2007). To argue with Vietnam's claim, the US claimed that no anti-dumping duty was evaluated and imposed for the individual dumping margins of some transactions which turned out to be *de minimis* or negative (export price higher than normal value). Therefore, these dumping margins should be treated as zero and excluded from the final determination of dumping margins, because they might prevent the authority to address other transactions which were dumped. However, the Panel stated that: "even in cases where no anti-dumping duties are assessed, the application of zeroing distorts the prices of certain export transactions, because export transactions made at prices above normal value are not considered at their real value" (*US — Shrimp (Viet Nam)*, 2011, para. 7.93). Due to this ruling by the Panel in *US — Shrimp (Viet Nam)*, the ADA-inconsistency of zeroing method is independent of whether anti-dumping duties were actually assessed.

Vietnam submitted the 'as such' claim challenging the use of zeroing in the DOC's calculation of dumping margins in the second and third administrative reviews, with the risk of insufficient evidence, since the DOC had never before produced any paper explicitly expressing such practice. Notwithstanding, the Panel upheld this claim of Vietnam and decided that the DOC's zeroing method exists as a "rule or norm of general and prospective application" (*US — Shrimp (Viet Nam)*, 2011, para. 7.117). In order to confirm this matter, the Panel provided that the evidence suggested how the DOC would apply zeroing and such application in administrative reviews "extends well beyond the mere repetition of a practice in specific cases and rather substantiates Viet Nam's allegation that the USDOC maintains a deliberate policy to this effect" (*US — Shrimp (Viet Nam)*, 2011, para. 7.115).

Nevertheless, it is arguable that the distinction between Vietnam's 'as such' and 'as applied' claims against zeroing method in *US — Shrimp (Viet Nam)* is not particularly clear, and the Panel did not provide any explanation on this matter. In this regard, the Appellate Body in *US — Continued Zeroing* explained the distinction between 'as applied' and 'as such' to be a tool which:

> however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm. (2009, para. 179)

Therefore, the ongoing application of zeroing in subsequent anti-dumping procedures would be seen to be vulnerable to dispute in a Panel process even though it is not categorised as either 'as such' or 'as applied.' However, the importance of the Panel's findings in *US — Shrimp (Viet Nam)* is not whether a new type of measure should be recognised and challenged at the DSB, but the ADA-inconsistence of the DOC's use of zeroing in administrative reviews. This issue also related to the next claim of Vietnam, which challenged the rationality of the 'all-others rate' imposed on exported shrimps of exporters who are non-selected respondents, as explained in section 3.3.3 below.

3.3.2 DOC's limited examination of selected mandatory respondents

As explained in chapter 5, the DOC only examines the data submitted by major exporters who were selected to be mandatory respondents by the DOC in anti-dumping investigations and proceedings. It is generally interpreted that the individual dumping margin of each exporter should be determined in a thorough manner. However, this might cause considerable burdens because of the number of involved exporters in a case. Taking this matter into consideration, Article 6.10 of the ADA allows investigating authorities to limit their examination by stating that:

> In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated. (ADA, Art. 6.10)

With limited resources at their disposal, investigating authorities may have difficulty in examining all involved exporters in an anti-dumping investigation. In this regard, Article 6.10 of the ADA seems to aim for an alleviation the practical issue of heavy workload, while maintaining certain criteria for the quality and transparency of the investigation. According to Article 6.10, only in circumstances where comprehensively examining all exporters is impractical, can investigating authorities utilise limited examination, in which the samples of exporters selected for such limited examination should either cover most of the export volume or be statistically available in term of accessible and collectable data.

Considering the two conditions of Article 6.10 of the ADA above, it would be expected that Vietnam challenged the utilisation of limited examination by the DOC by claiming that the DOC's practice did not fulfil one or both conditions of Article 6.10. For instance, Vietnam might allege that the DOC's mandatory respondents sampling did not represent most of the export volume, or at least the thorough examination of all

exporters was not exactly impractical from the beginning. Nonetheless, the US argued that Vietnam did not do so (*US — Shrimp (Viet Nam)*, 2011, para. 7.158), and the Panel confirmed that, because "Viet Nam is not challenging the USDOC's determination that it was 'impracticable' to examine all known exporters and producers. Nor is Viet Nam challenging the number of exporters or producers which the USDOC included in its limited sample" (*US — Shrimp (Viet Nam)*, 2011, para. 7.164).

As a result, in the DOC's second and third administrative reviews, its application of limited examination was presumed to be conforming to the conditions of Article 6.10 of the ADA, but the Panel did not definitively decide this before evaluating Vietnam's allegations. The DOC claimed that it is indisputable that "numerous concurrent antidumping proceedings" have placed "significant workload" on their practice, as the rationale in support of the DOC's limited examination (*US — Shrimp (Viet Nam)*, 2011, para. 7.156). It was simply noted by the Panel that the DOC had examined two Vietnamese mandatory respondents who accounted for 34 percent of all exports under investigation in the second administrative review (United States Department of Commerce, 2008), and that three Vietnamese mandatory respondents who accounted for an unidentified percentage of all exports were examined in the third administrative review (United States Department of Commerce, 2009), the Panel then did not provide any further rulings in relation to the limited examination's sampling quantity and quality. In this case, it appears that the Panel could only proceed strictly within its terms of reference, and no further discussions on the matter of limited examination was presented, because Vietnam did not clearly dispute with the satisfaction of the DOC' limited examination by citing Article 6.10 of the ADA.

For another claim, Vietnam referred to Article 9.3 of the ADA, which provided that an anti-dumping duty should never be higher than the dumping margin, and Article 11 of the ADA, which requires an anti-dumping duty to be reassessed under a sunset review after five years and should only continue to be imposed if it is necessary to counter injuries, to argue that the limited examination by the DOC violated the legal rights of Vietnamese exporters who were not selected as mandatory respondents. When it comes to these ADA provisions, Vietnam was basically suggesting that these provisions

indirectly provide the right for individual exporters to be individually examined in the review of the definitive anti-dumping duty. Therefore, Vietnam claimed that the repetitive limited examination of the DOC in administrative reviews was a breach of the ADA.

While Article 6.10 of the ADA provides the rule of data examination of individual exporter in the first sentence, the second sentence of Article 6.10 however provide the limited examination as an exception. The link between these two rules in Article 6.10 was the issue which Vietnam argued against the DOC's practice of limited examination. After examining the arguments presented by the US and Vietnam, the Panel arrived at a rational dichotomy that balances one interpretation against the other (*US — Shrimp (Viet Nam)*, 2011, para. 7.167). On the one hand, Vietnam argued that Article 9 and 11 of the ADA put responsibilities towards individual exporter on an investigating authority, therefore the limited examination under Article 6.10 of the ADA cannot be interpreted that an investigating authority is allowed to avoid its responsibilities under other articles, which might make the rules of Article 9 and 11 of the ADA unenforceable. On the other hand, the US argued that the second sentence of Article 6.10 of the ADA would be pointless, if every examination of exporters must be strictly in accordance with Articles 9 and 11 of the ADA. The US concluded that limited examination should be interpreted as an exception which outshines the rules of Articles 9 and 11 of the ADA. In the end, Vietnam's argument was dismissed by the Panel, and the US's interpretation was preferred to be applied (*US — Shrimp (Viet Nam)*, 2011, para. 7.167).

In anti-dumping investigations and proceedings, the right of individual exporters and the burdens of workload of investigating authorities should be addressed in a balanced manner. While Article 6.10 of the ADA aims to achieve such a balance, the issue of contrary interpretations was obvious in *US — Shrimp (Viet Nam)*. However, limited examination is restricted by the criteria provided by Article 6.10 of the ADA regarding the condition of appropriate sampling and impractical issue caused by the significant number of exporters. If these criteria are not satisfied, the DOC must maintain individual examination because limited examination would be ADA-inconsistent. Furthermore, the DOC should not use limited examination to reject exporters' requests for individual

examination. In contrast, in the case where all criteria under Article 6.10 of the ADA are met, individual examination will certainly place an unnecessary and costly burden on investigating authorities, hence limited examination should be acceptable.

In *US — Shrimp (Viet Nam)*, both Vietnam and the US's discussions and arguments were around the function and criteria satisfaction of Article 6.10 of the ADA, not about any allegation of a breach of this article. In this regard, an argument of Vietnam was:

> the USDOC made no effort in the proceedings at issue to balance its right to conduct limited examinations with the interests and rights of Vietnamese respondents to have duties assessed based on individual margins and to obtain a company-specific review in order to demonstrate the absence of dumping. (*US — Shrimp (Viet Nam)*, 2011, para. 7.147)

In response, the US noted that, "whenever the conditions for doing so are met, i.e., where the number of exporters/producers makes determinations of individual margins for all exporters/producers 'impracticable'" (*US — Shrimp (Viet Nam)*, 2011, para. 7.158), limited examination is allowed to be applied by investigating authorities under Article 6.10 of the ADA. Nonetheless, within its terms of reference, the Panel briefly concluded that "the use of limited examinations is governed exclusively by the second sentence of Article 6.10" (*US — Shrimp (Viet Nam)*, 2011, para. 7.166), which disregards the consequence of limiting the examination on individual exporter.

The DOC's handling of non-mandatory respondents who voluntarily provided data was the subject of the second claim of Vietnam on the limited examination process. Article 6 of the ADA mandates that dumping margins for non-mandatory respondents should be calculated, except "where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation" (ADA, Art. 6.10.2). Article 6.10.2 of the ADA additionally notes that "voluntary responses shall not be discouraged" (ADA, Art. 6.10.2). An expansion of the balanced approach between the right of individual exporter and the work burden of investigating authorities, as previously mentioned, should be seen as an attempt by Article 6.10.2 to partially address the possible violation of the

right of individual exporter, since the application of limited examination might restrict such right. Individual evaluation may be an advantage for exporters who are concerned that the dumping margins computed by the collected data from mandatory respondents would be larger than their individual dumping margins (that might in reality be negative, nil, or *de minimis*). Individual exporters' requests for individual examination may only be refused if the goal of limited examination could not be achieved because the number of such individual requests was too high, which again overloaded the investigating authorities.

In *US — Shrimp (Viet Nam)*, instead of specifically establishing how much the capacity of the authority could manage the extra voluntary replies from exporters who are not mandatory respondents, the policies of the DOC allowed little adjustability towards non-mandatory respondents, which was comparable to a disincentive of individual evaluation request, according to Vietnam's argument that the DOC disregarded filings of voluntary replies based on its initial judgement under Article 6.10 of the ADA (*US — Shrimp (Viet Nam)*, 2011, paras. 7.172–7.175). According to the US arguments in response, voluntary filings were not discouraged by the DOC under any circumstances during the second and third administrative reviews, and in fact there was no complete voluntary filings from non-mandatory respondents submitted to the DOC (*US — Shrimp (Viet Nam)*, 2011, paras. 7.176–7.178).

On the surface, the Panel's work with regard to Vietnam's Article 6.10.2 allegations was quite straightforward. The Panel concluded that the first clause of Article 6.10.2 of the ADA was not activated, since Vietnam could not prove the disincentive of voluntary filings by sufficient proofs; furthermore, there were actually no voluntary filings (*US — Shrimp (Viet Nam)*, 2011, para. 7.183). This claim was therefore ruled out by the Panel. However, the Panel's rationale requires further investigation because it concerns the link between the potential of further voluntary filings under Article 6.10.2 of the ADA and the selection of mandatory respondents in limited examination under Article 6.10 of the ADA. Vietnam also challenged the DOC's statement that "it cannot and will not examine more than the identified number of companies will of course dissuade companies from seeking examination on a voluntary respondent basis" (*US — Shrimp*

(Viet Nam), 2011, para. 7.185). Considering that the DOC's determination to apply limited examination was valid, the Panel rejected this argument of Vietnam.

3.3.3 The 'all-others rate' applied to non-mandatory respondents

In *US — Shrimp (Viet Nam)*, the calculation results of mandatory respondents' dumping margins were all less than 0.5 percent, which means *de minimis* dumping margins, in the DOC's second and third administrative reviews (United States Department of Commerce, 2008, p. 52275; United States Department of Commerce, 2009, p. 47195). In this regard, the DOC's determinations of 'all-others rates' in these two administrative reviews, which were supposed to be the average rates of mandatory respondents' dumping margins, were challenged by Vietnam. Because all mandatory respondents' dumping margins were *de minimis*, the original investigation's 'all-others rate' of 4.57 percent was imposed again by the DOC as the 'all-others rate' of the second and third administrative reviews, for most Vietnamese exporters who were not mandatory respondents. The DOC considered this determination as "a reasonable method which is reflective of the range of commercial behaviour demonstrated by exporters of the subject merchandise during a very recent period" (*US — Shrimp (Viet Nam)*, 2011, paras. 7.197–7.198).

Pursuant to Article 9 of the ADA, the 'all-others rate' should not include any dumping margin calculated by adverse facts available or dumping margin which is *de minimis*; furthermore, it should never be higher than "the weighted average margin of dumping established with respect to the selected exporters or producers" (ADA, Art. 9.4). This raises the possibility that the DOC's determination of the 'all-others rate' was over the appropriate average dumping margin under the provision of Article 9.4 of the ADA. With *de minimis* or zero dumping margins, this average dumping margin is a debatable issue since all dumping margins of mandatory respondents could not be included in the computation. The Appellate Body in *US — Hot-Rolled Steel* described this circumstance as a *lacuna* because, in the case where all mandatory respondents' dumping margins were disregarded, the calculation method for 'all-others rate' would be uncertain (*US — Hot-Rolled Steel*, 2001b, note 11). Nonetheless, the Panel in *US — Shrimp (Viet Nam)* did not explicitly provide any answer for this issue. Instead, the

DOC's practice, in which the dumping margins computed through zeroing were used to determine the 'all-others rate', was examined by the Panel. The US argued that the DOC decided to impose the 'all-others rate' which was determined before Vietnam became a WTO Member, therefore ADA rules should not be applicable in the calculation approach of such rate. In this context, this argument of the US made this claim more complex (*US — Shrimp (Viet Nam)*, 2011, para. 7.221). Because, even after the Vietnam's accession to the WTO, in each following administrative review, the DOC would calculate and determine a new 'all-others rate', not always apply the rate calculated before Vietnam's accession to the WTO; therefore, considering this DOC's practice, the Panel refused the US's argument (*US — Shrimp (Viet Nam)*, 2011, paras. 7.221–7.223). Vietnam's claim regarding the DOC's calculation of 'all-others rate' was approved by the Panel. In its rulings, the Panel discussed that there was evidence proving the DOC's application of zeroing during computing dumping margins, and that the DOC's zeroing practice inflated the dumping margins and created an unjustifiably high 'all-others rate', which was concluded by the Panel to be inconsistent with Article 9.4 of the ADA (*US — Shrimp (Viet Nam)*, 2011, para. 7.229).

3.3.4 The 'entity-wide rate' in *US — Shrimp (Viet Nam)*

When conducting anti-dumping investigations and proceedings in the US, the DOC would start on the assumption that all Vietnamese exporters will be given an 'entity-wide rate' for the calculation of their dumping margins. The entity-wide rate means that all Vietnamese exporters are given the same dumping margin regardless of their data submitted to the DOC, unless these Vietnamese exporters demonstrate to the satisfaction of the DOC that there is no effect of government control on their exports. Exporters that fulfil this condition may be eligible for a separate rate which is a rate established independently from the entity-wide rate. Instead of the 'all-others rate', Vietnamese shrimp exporters, who were regarded as a part of an NME, received a much higher rate which was computed by adverse facts available rather than the mandatory respondents' dumping margins. Therefore, Vietnam challenged this rate in its final claim. The US claimed that the rate based on adverse facts available could not be inconsistent with Article 9.4 of the ADA, because there is no restriction set by Article 9.4 on how high a

duty rate should be in the case all mandatory respondents' dumping margins were determined to be *de minimis* or zero (*US — Shrimp (Viet Nam)*, 2011, para. 7.242).

The Panel considered that many Vietnamese exporters in this case received an unwarranted high rate based on adverse facts available. Therefore, the Panel concluded that a distinct rate for exporters, who were neither mandatory respondents nor individually examined, was not recognised and permitted by Article 9.4 of the ADA. Furthermore, the Panel determined that the DOC would have imposed the rate based on adverse facts available regardless of whether exporters had cooperated or not, and thereby refused the US's claim that insufficient cooperation from the Vietnamese exporters led to the application of adverse facts available in the calculation of their rates (*US — Shrimp (Viet Nam)*, 2011, para. 7.274).

3.4 The compliance of the US with WTO Appellate Body's rulings over zeroing

The *US — Shrimp (Viet Nam)* case was not the only dispute in which the US zeroing practice was challenged. In fact, zeroing was disapproved by the Appellate Body in *US — Zeroing (EC)* and *US — Zeroing (Japan)*, before the Panel in *US — Shrimp (Viet Nam)* again decided that zeroing is ADA-inconsistent. Therefore, this section proceeds further to discuss the rulings of Appellate Body in *US — Zeroing (EC)* (2009) and *US — Zeroing (Japan)* (2009). In these cases, the DSB rulings pertaining to the ban of zeroing in anti-dumping investigations and procedures, and the US's implementation of those rulings, were at the centre of discussions. Legally, regarding the retroactive administration system of anti-dumping measures, the most important question in these conformity cases was how the US prospectively implemented the Panel and Appellate Body rulings. The matter of implementing the Panel and Appellate Body rulings, in the context of zeroing, and the circumstance of the US are specifically addressed in these cases. Notwithstanding, the cases are relevant to this analysis since further understanding of the Appellate Body's approach in evaluating the implementation of DSB rulings was provided.

Pursuant to Article 21.5 of the DSU, the Appellate Body assessed the implementation of DSB rulings in *US — Zeroing (EC)* and *US — Zeroing (Japan)*. In this regard, involved parties in both cases *US — Zeroing (EC)* and *US — Zeroing (Japan)* had been given a 'reasonable period of time' to implement the previous Appellate Body rulings, and the Appellate Body ultimately found that the US did not succeed to implement the previous Appellate Body rulings. The Appellate Body was consistent in their rulings that the DOC's zeroing violated the provisions of Article 2.4.2 of the ADA, in which the DOC applied zeroing to the calculation of dumping margins on a transaction-to-transaction basis, where each dumping margin for each transaction was established. The Appellate Body noted that:

> In the light of our analysis of Article 2.4.2 of the Anti-Dumping Agreement, we conclude that, in establishing 'margins of dumping' under the T–T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value. (*US — Zeroing (Japan)*, 2007, para. 137)

The Appellate Body determined that calculating dumping margin on transaction-to-transaction with zeroing was a breach of the fair comparison rule of the ADA, therefore concluded that such zeroing practice was prejudiced and biased. As a result, the Appellate Body found that the DOC's application of zeroing in the original anti-dumping investigations violated Article 2.4 of the ADA.

3.4.1 *US — Zeroing (EC)*

In *US — Zeroing (Japan)* case, the DOC's zeroing practice in a variety of anti-dumping investigations and proceedings on a number of EU exports was challenged in both 'as such' and 'as applied' claims of the EU. Following the Panel and Appellate Body rulings against the US zeroing practice, the EU complained that the US did not comply with the DSB rulings under Article 21.5 of the DSU.

The EU argued that all following administrative reviews conducted by the DOC, after the original investigation, were only 'amendments' to the anti-dumping measures under dispute. In its consideration, the Appellate Body noted that "successive administrative, changed circumstances, and sunset review determinations issued in connection with the measures at issue in the original proceedings constitute separate and distinct measures, which therefore cannot be properly characterized as mere 'amendments' to those measures" (*US — Zeroing (EC)*, 2009, para. 192). Therefore, the Appellate Body denied this argument of the EU.

In the Panel's compliance report of the *US — Zeroing (Japan)* case, the Panel established a nexus test. While the Appellate Body approved this test, it also explained why it differed with the Panel about the application of this test regarding the factor of time:

> In this respect, we agree with the European Communities and the United States that the *timing* of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding. Since compliance with the recommendations and rulings of DSB can be achieved *before* the recommendations and rulings of the DSB are adopted, a compliance panel may have to review events pre-dating the adoption of those recommendations and rulings in order to resolve a disagreement as to the 'existence' or 'consistency with a covered agreement' of such measures. Indeed, the United States argued before the Panel that it did not have to take further action to implement the recommendations and rulings of the DSB in respect of the administrative reviews at issue in the original proceedings, because they were superseded by subsequent administrative reviews that pre-dated the adoption of the DSB's recommendations and rulings. We also note the United States' argument that, where a measure is withdrawn prior to the DSB's recommendations and rulings, a Member may not need to take any further measures to comply with those recommendations and rulings after they are adopted. We do not see why a compliance panel should be unable to take such prior withdrawal into account. (*US — Zeroing (EC)*, 2009, para. 224)

The Appellate Body applied the nexus test to the DOC's administrative reviews and found that "the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of nature or subject matter, between such measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB" (*US — Zeroing (EC)*, 2009, para. 230). The Appellate Body came to the conclusion that those DOC's administrative reviews created assessment rates and cash-deposit rates computed with zeroing that substituted those determined to be ADA-inconsistent in the original investigations, with the effects of assessment rates and cash-deposit rates that persisted to reflect the zeroing practice, this would establish a sufficient connection between those DOC's administrative reviews and the recommendations of the DSB, therefore the need for discontinuing the use of zeroing practice is at issue (*US — Zeroing (EC)*, 2009, para. 231).

To defend the use of zeroing in a weighted-average-to-weighted-average context, the US argued that the administrative reviews which applied zeroing on transaction-to-transaction basic had no link to the anti-dumping measures under dispute; however, the Appellate Body did not agree with this argument (*US — Zeroing (EC)*, 2009, para. 267). There were two DOC's administration reviews in which no cash-deposit rates for anti-dumping duties had been established, this led a member of the Appellate Body to provide a distinct decision that there was little possibility of circumvention (*US — Zeroing (EC)*, 2009, paras. 267–268).

In *US — Zeroing (EC)*, the EU also challenged the sunset reviews conducted by the DOC. According to the Appellate Body, the DOC has only issued preliminary determination which was premature because "such preliminary results could be modified by the final results" (*US — Zeroing (EC)*, 2009, para. 374), therefore the Appellate Body cited its rulings in *US — Continued Zeroing* to decide that it would be too early for a sunset review to be challenged. The Appellate Body also upheld the Panel's determination to not examine the sunset reviews, because, even with the application of zeroing, sunset reviews still resulted in the cancellation of the anti-dumping measures. The Appellate Body only considered the reality that "the sunset reviews resulted in

revocation orders and that these revocation orders became effective on a date prior to the end of the reasonable period of time" (*US — Zeroing (EC)*, 2009, para. 380).

The reasonable timeframe for complying to the DSB rulings had passed, but the US did not fulfil the implementation of previous rulings until a compliance Panel was established under Article 21.5 of the DSU, therefore the compliance Panel rejected to issue any rulings regarding the US's non-compliance. This rejection of the compliance Panel was upheld by the Appellate Body. According to the Appellate Body, if a compliance was adopted by a WTO Member after the reasonable timeframe but before the establishment of compliance Panel under Article 21.5 of the DSU, the findings regarding such failure to comply should not be relevant:

> When an Article 21.5 panel makes a finding that a WTO Member has not complied with the recommendations and rulings of the DSB in the original proceedings, the implication of that finding is that the WTO Member remains subject to obligations flowing from the recommendations and rulings issued by the DSB in the original proceedings. However, if the compliance panel finds that compliance has been achieved at the time of its establishment, but not at the end of the reasonable period of time, the responding WTO Member will not need to take additional remedial action. (*US — Zeroing (EC)*, 2009, para. 412)

3.4.2 *US — Zeroing (Japan)*

The *US — Zeroing (Japan)* dispute relating to steel-related goods from Japan that were under the US's anti-dumping duties calculated by zeroing, in which the US's application of zeroing in various anti-dumping investigations and administrative reviews was challenged by Japan in both 'as applied' and 'as such' claims. After the Panel and Appellate Body ruled against the US zeroing practice in the original anti-dumping investigation and subsequent administrative reviews, according to Japan, the DSB's decisions and recommendations were not implemented by the US. The US's application of zeroing in calculating dumping margins on the transaction-to-transaction basis (and other comparison basis such as weighted-average-to-weighted-average) was challenged in Japan's 'as such' claim and ruled against by the Appellate Body, however the US did

not adopt any action to comply with the DSB rulings regarding this 'as such' claim (*US — Zeroing (Japan),* 2009). Another claim made by Japan was that, after five administrative reviews, duty rates of individually examined exporters were not revised by the US, and this was not in compliance with the ADA. Furthermore, in the four following administrative reviews, the US still applied the same zeroing practice which had been ruled to be ADA-inconsistent.

To consider and evaluate the compliance of the US, the compliance Panel found that the key factor was the anti-dumping duties collection date. The US did not agree with this finding of the compliance Panel; however, the Appellate Body refused this appeal of the US. Article 21.5 of the DSU's provisions of compliance duties were assessed by the Appellate Body, which found that they were limited in timeframe and scope, and that "Article 21.3 requires that the obligation to implement fully the DSB's recommendations and rulings be fulfilled by the end of the reasonable period of time at the latest and, consequently, the ADA-inconsistent conduct must cease at the latest by that time" (*US — Zeroing (Japan),* 2009, para. 158).

When it came to compliance to DSB rulings and reassessing anti-dumping decisions, the US claimed that domestic courts should be given the ability to evaluate them independently under Article 13 of the ADA. This argument of the US was denied by the Appellate Body:

> The fact that WTO Members are required to maintain independent review procedures for administrative anti-dumping actions does not exonerate them from the requirement to comply with the DSB's recommendations and rulings within the reasonable period of time. We see no conflict between the obligation to maintain independent review procedures under Article 13 and the obligation to comply with the DSB's recommendations and rulings. Accordingly, we do not consider that Article 13 provides support for the proposition that a WTO Member is excused from complying with the DSB's recommendations and rulings by the end of the reasonable period of time, where a periodic review has been challenged in that Member's domestic courts and this has resulted in the collection of duties being delayed. (*US — Zeroing (Japan),* 2009, para. 175)

Involved exporters under anti-dumping duty imposition would face more financial burdens, as a consequence of the US's non-compliance, which might also cause administrative risks (Hartigan, 2016). In fact, it seems that many exporters would be excluded from anti-dumping duties entirely if zeroing were removed. While zeroing might have a significant effect, it is presently difficult to predict what that effect would exactly be, hence the procedure of compliance needs better clarity. Exporting nations might be forced to bring more disputes to the DSB, if the US maintains the application of zeroing in dumping margin calculations during their anti-dumping investigations and proceedings. The DSU has already been triggered by many WTO Members, and more anti-dumping disputes may emerge.

On 14 February 2012, the DOC (2012) announced its *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification* (*Final Modification*), in which the DOC made a statement that, in subsequent accelerated reviews, new shipper reviews, and administrative reviews, the dumping margin computation would no longer be made with the application of zeroing. This change took effect from 16 April 2012. One might think that this was the end of the US zeroing practice in anti-dumping investigations and proceedings, however, in *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam* (*US — Shrimp II (Viet Nam)*), the DOC again used zeroing methodology in instances where 'targeted dumping' is alleged, which is discussed in the next section.

3.5 The DOC's zeroing practice in *US — Shrimp II (Viet Nam)*

After the *US — Shrimp (Viet Nam)*, for the second time Vietnam challenged the US zeroing practice in anti-dumping proceedings relating to shrimp products from Vietnam and brought the case *US — Shrimp II (Viet Nam)* to the DSB. In this context, in the *Final Modification*, the DOC (2012) stated that:

> After considering all of the comments submitted, the Department is adopting the proposed changes to its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons when using monthly A–A comparisons in reviews, in a manner that

> parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. In reviews, except where the Department determines that application of a different comparison method is more appropriate, the Department will compare monthly weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate. Where the weighted-average margin of dumping for the exporter is determined to be zero or de minimis, no antidumping duties will be assessed. (p. 8102)

In short, through the *Final Modification*, the DOC announced that it will not apply zeroing methodology in the calculation of dumping margins in all reviews. However, this is not applicable to the case of targeted dumping. The DOC defined targeted dumping as the practice where importers sell imported products in the US at prices that differ "significantly among purchasers, regions, or periods of time" (United States Department of Commerce, 2014, p. 22372).[60] In the *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations* (*Final Rule*) on 22 April 2014, the DOC (2014) established extensive discretion in determining anti-dumping duties, including the use of zeroing in targeted dumping cases, by stating that: "when the Department finds that there is a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time,… the Department may compare the weighted average of the normal values to the export price (or constructed export price) of individual transactions for comparable merchandise (known as the average-to-transaction method)" (p. 22372).

[60] In details, the importation of a product into the US market would include many transactions designated to different buyers, different regions, in different periods of time. If the prices of the imported product in these transactions are considerably differed from each other, the DOC might determine that targeted dumping has occurred.

3.5.1 Targeted dumping

Among the most controversial problems in trade defence disputes in the US, one is targeted dumping, which has grown more prominent in US anti-dumping investigations and proceedings (Porter & Bidlingmaier, 2013). However, targeted dumping does not relate to the process of intentionally identifying the differences between export prices of the products exported to the US and the normal value of such products in the exporting country. Therefore, targeted dumping might be an inaccurate name because it does not exactly concern the practice of dumping. In fact, in 2013, new investigation method for targeted dumping was established by the DOC (*Xanthan Gum From the People's Republic of China*, 2013). Previously, when domestic industries raised concerns about alleged targeted dumping, the DOC investigated the claims in question. Since 2013, regardless of whether an allegation of targeted dumping has been submitted, the DOC still examines the differences in prices of an exported product sold to different defined types of consumers, in order to determine targeted dumping. According to the DOC's standards, a considerable pricing discrepancy indicates that targeted dumping is being done with a specific intent. In this context, before the new investigation method for targeted dumping was introduced, targeted dumping claims had been in fact very unusual; however, after the new method, the DOC identified widespread targeted dumping in almost one-third of the investigations, in which this new method was utilised (*Stainless Steel Plate in Coils from Belgium*, 2013; *Welded Carbon Steel Standard Pipe and Tube Products from Turkey*, 2013). The average dumping margins in anti-dumping investigations relating to targeted dumping would be calculated with zeroing. By such practice, the DOC again inflated the anti-dumping duties, as previously explained.

The DOC considered that the inclusion of more targeted dumping provisions in the *Final Modification* might be irrelevant, and refused all requests about this matter (United States Department of Commerce, 2012b, p. 8113). The DOC (2014) reaffirmed this point of view in the *Final Rule*. To validate its determinations included in the *Final Rule*, the DOC explained that a particular extent of discretion would be necessary, by which the DOC could obtain the "refinement" (United States Department of Commerce,

2014, p. 22374) through experiencing the new method relating to targeted dumping and improve "its ability to identify and address masked dumping" (p. 22375). Ahn and Messerlin (2014) have noted that the DOC has utilised new investigation methods for targeted dumping against large household washers and bottom mount combination refrigerator-freezers from Korea, and targeted dumping as defined by the DOC is lacking in term of criteria and procedures and adds to their arguments that the DOC did not provide efficient explanation of the necessity and appropriation of targeted dumping.

3.5.2 Vietnam's claim against the DOC's zeroing practice in *US–Shrimp II (Viet Nam)*

Generally, the Panel in *US–Shrimp II (Viet Nam)* (2014) agreed with the 'as applied' claim of Vietnam that the DOC's zeroing practice was in violation of both Article 9.3 of the ADA and Article VI:2 of the GATT.[61] However, the 'as such' claim of Vietnam was rejected by the Panel, in which the Panel noted that "Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent 'as such' with Article 9.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article VI:2 of the General Agreement on Tariffs and Trade 1994" (*US–Shrimp II (Viet Nam)*, 2014, para. 8.1.a).

In *US–Shrimp II (Vietnam)*, the DOC has never made any claim or argument relating to targeted dumping, and *US–Shrimp II (Vietnam)* has never been an anti-dumping dispute over any determination of targeted dumping. Notwithstanding, the Panel determined that the arguments of Vietnam "fail to appreciate the significance of the Final Modification for its assertion that the zeroing methodology is a measure of general and prospective application" (*US–Shrimp II (Viet Nam)*, 2014, para. 7.51). As a result, the 'as such' claim of Vietnam was refused because a heavy consideration was granted to the *Final Modification* by the Panel in *US–Shrimp II (Vietnam)*. In this regard, it seems that the

[61] Vietnam argued that the DOC's zeroing practice is inconsistent with both Article VI:2 of the GATT, which provides a general rule that "a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product", and Article 9.3 of the ADA which provides detailed provisions for the general rule set in Article VI:2 of the GATT.

ongoing utilisation of zeroing to targeted dumping cases, that was confirmed in the Final Modification, was justified by questionable reasons that the DOC provided to itself. By citing the Final Modification to reject the 'as such' claim, it appears that the Panel did not thoroughly appraise those questionable reasons stated by the DOC in the *Final Modification*. Instead, the Panel should have maintained the previous DSB rulings to stop the DOC from using zeroing to compute dumping margins. Not being prevented by the Panel, the DOC continued to issue the *Final Rule* to again give itself more discretion in applying zeroing to anti-dumping investigations and proceedings. In this context, the DOC's anti-dumping investigations relating to targeted dumping had a considerable growth, which was implied in *US–Shrimp II (Viet Nam)* as one of important aspects.

It is arguable that the Panel in *US–Shrimp II (Viet Nam)* made a questionable determination that the DOC's application of zeroing method did not violate the provisions of Article 9.3 of the ADA and Article VI:2 of the GATT, and that Vietnam's arguments failed to prove it in 'as such' claim. For the DOC's anti-dumping investigations after 2014, adequate rules for the zeroing method were not appropriately addressed by either the *Final Modification* or the *Final Rule*. Another issue is that, when evaluating whether or not the US has complied with its duties under Articles 6.10 and 9.2 of the ADA, the market system of the exporting country was not taken into account by the Panel in *US–Shrimp II (Viet Nam)*. The DOC assumes that all Vietnamese exporters operate and are a part of an NME, therefore these Vietnamese exporters were imposed the same dumping margin (called the "entity-wide rate") as a result.

As discussed above, due to the *Final Modification*, the DOC's application of zeroing was determined by the Panel to be not inconsistent with Article 9.3 of the ADA, and there the 'as such' claim of Vietnam was rejected. An assumption was made by the Panel that the DOC's discontinuation of utilising zeroing in anti-dumping investigations is a "general and prospective application" (*US–Shrimp II (Viet Nam)*, 2014, para. 7.51). However, the DOC stated in the *Final Modification* that it would maintain "discretion to establish criteria for the selection of an appropriate comparison methodology in reviews" (United States Department of Commerce, 2012b, p. 8104). It was also confirmed by the

DOC that "it is not necessary, appropriate, or desirable" to adopt a "total prohibition of zeroing", as the DOC claimed that the *Final Modification* already fulfilled "the WTO dispute settlement reports at issue" (United States Department of Commerce, 2012b, p. 8106). Significantly, the DOC also stated in the *Final Modification* that it "will continue to work closely and actively with USTR with a view towards clarifying that the AD Agreement should not be read to require WTO Members to provide offsets for non-dumped comparisons" (United States Department of Commerce, 2012b, p. 8113). Therefore, one might conclude that the DOC had no intention to completely give up its zeroing methodology.

3.5.3 Vietnam's NME status and Vietnam-wide entity rate in *US–Shrimp II (Viet Nam)*

As explained in chapter 5, Title VII of the Tariff Act of 1930 provides the rules for the conduction of anti-dumping investigations and proceedings in the US, which grants relevant US investigating authorities to determine whether a country is a market economy or an NME. According to the *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam 1*, the anti-dumping investigation on shrimp from Vietnam was initiated in 2004 and an anti-dumping order was determined in 2005 (United States Department of Commerce, 2005). Before Vietnam brought the *US–Shrimp II (Viet Nam)* case to the DSB, anti-dumping duties on shrimps from Vietnam had been continuously imposed by the DOC, who determined that the dumping practices of Vietnamese exporters would return if the anti-dumping duties were revoked. In fact, seven administrative reviews and the first sunset review had been already undertaken and concluded by the DOC prior to the time when the *US–Shrimp II (Viet Nam)* was processed by the Panel (2014, para. 2.4). In its anti-dumping investigations and proceedings, the NME status was applied to Vietnam by the DOC. As a consequence, the same anti-dumping duty rate (the 'entity-wide rate') was imposed on all Vietnamese exporters, because they were presumed to be a part of a single NME entity by the DOC. To get a separate rate distinct from, and in fact lower than, the 'entity-wide rate', Vietnamese exporters were subject to an examination for separate

rates, after which the 'entity-wide rate' is given to those who failed (*US–Shrimp II (Viet Nam)*, 2014, para. 2.5). In other words, if Vietnamese exporters could prove their export operation to be independent from any Vietnam Government's intervention to the DOC's satisfaction, they might avoid the 'entity-wide rate' and be eligible for a separate dumping margin.

The DOC's presumption that all Vietnamese exporters would be a part of a single NME entity was strongly opposed by Vietnam, and the Panel confirmed this opposition of Vietnam in *US–Shrimp II (Viet Nam)*. In this situation, the burden of proof shifted to the Vietnamese exporters to refute the DOC's presumption. The Panel agreed with Vietnam that Vietnam can challenge the DOC's presumption in its 'as applied' claim, which was a major point of contention between the parties. Vietnam also questioned the way in which the DOC used 'adverse facts available' to compute dumping margins. The Panel, on the other hand, did not accept that the calculation method of the DOC should be included in an 'as such' claim, because the Panel considered that the calculation method, which was used in anti-dumping investigations and proceedings relating to NMEs by the DOC, had already established. The Panel ultimately found that Articles 6.10 and 9.2 of the ADA were violated when all Vietnamese exporters were assumed to be in a single entity and imposed a single 'entity-wide rate' by the DOC (*US–Shrimp II (Viet Nam)*, 2014, para. 7.193), and that the same practice in particular administrative reviews conducted by the DOC was also a breach of Articles 6.10 and 9.2 of the ADA (*US–Shrimp II (Viet Nam)*, 2014, para. 7.208).

Indeed, even after six administrative reviews, the 'entity-wide rate' of 25.6% was established in the DOC's original investigation against shrimp imports from Vietnam still remained the same (United States Department of Commerce, 2005; United States Department of Commerce, 2010a). The competitiveness of exporters, who are under the imposition of 'entity-wide rate,' seems to be considerably reduced to the point where they could not compete with domestic producers of the like products in the US. In fact, shrimp products from Vietnam have been confronted by considerable competition in the US market from the start. Therefore, it might be very unlikely that Vietnamese exporters could compete even with the 'all-others rate' of 4.57 percent from the first anti-dumping

order to the subsequent three administrative reviews, and even when this rate was slightly reduced to 3.92 percent after the fourth review (United States Department of Commerce, 2005; United States Department of Commerce, 2008; United States Department of Commerce, 2009; United States Department of Commerce, 2010b); the much higher 'entity-wide rate' in this regard might completely terminate the competitiveness of Vietnamese exporters. While the 'all-others rate' might or might not be reconsidered and limited, the provision of individual dumping margin under Article 6.10 of the ADA should be interpreted in the manner to appropriately inhibit or even prohibit the imposition of the 'entity-wide rate.' The DOC conducted its investigations and proceedings with a wide range of discretion, even though Article 9.2 of the ADA limits such discretion by the term "appropriate amounts" (ADA, Art. 9.2), it seems that Article 9.2 does not adequately set a clear boundary for the discretion of the investigating authorities. Since the limited examination of the DOC included presuming that all Vietnamese exporters operated in a single entity, and thereby a single 'entity-wide rate' was imposed on all of them, such practices were determined to be inconsistent with Articles 6.10 and 9.2 of the ADA by the Panel in *US–Shrimp II (Viet Nam)*.

However, the 'as such' claim of Vietnam, in which Vietnam considered that the 'entity-wide rate' calculation using 'adverse facts available' was a breach of Articles 6.8, 9.4, and Annex II of the ADA, did not sufficiently prove the DOC's practice was ADA-inconsistent (*US–Shrimp II (Viet Nam)*, 2014, para. 7.194). For Vietnam's 'as such' claim relating to Article 9.4 of the ADA, the Panel determined that the limitations set in Article 9.4 of the ADA was violated by the DOC's practice of imposing a single 'entity-wide rate' to all Vietnamese exporters (*US–Shrimp II (Viet Nam)*, 2014, para. 7.223). On the other hand, the DOC' practice in this regard did not violate Article 6.8 and Annex II of the ADA, as determined by the Panel, and therefore a part of Vietnam's 'as such' claim was refused (*US–Shrimp II (Viet Nam)*, 2014, para. 7.236).

The requests for individual examination and duty exemption of Vietnamese exporters were not appropriately considered in particular administrative reviews conducted by the DOC, and the Panel determined that such practice was a breach of Article 11.2 of the ADA (*US–Shrimp II (Viet Nam)*, 2014, para. 7.391). The Panel also found that the DOC

acted inconsistently with the ADA by using zeroing to determine dumping margins of various Vietnamese exporters and then refusing those exporters' requests for duty revocation (*US–Shrimp II (Viet Nam)*, 2014, para. 7.396). Lastly, the DOC's imposition of 'entity-wide rate' and application of zeroing in sunset review were determined by the Panel to be inconsistent with Article 11.3 of the ADA (*US–Shrimp II (Viet Nam)*, 2014, paras. 7.319–7.320).

4. The EU NME methodology under WTO rulings in *EU — Footwear (China)*

Like the US, the EU's anti-dumping investigations in NME cases have also been challenged through the WTO dispute settlement system. However, as Vietnam has not brought any anti-dumping dispute against the EU to the DSB to date, it is appropriate to analyse WTO jurisprudence relating to disputes between EU and China (which is also considered an NME).

The EU's NME methodology and anti-dumping duties imposed on leather footwear from China led to a dispute at the DSB, which is the case *European Union — Anti-Dumping Measures on Certain Footwear from China* (*EU — Footwear (China)*) (2011). Vietnam was a third party in this case, and footwear from Vietnam was also part of the same original anti-dumping investigation by the EU (*EU — Footwear (China)*, 2011). Therefore, the EU's NME methodology applied to China, which was brought under examination by the DSB, would also have been applied to Vietnam.

4.1 Background of *EU — Footwear (China)*

The EU's NME methodology, which was discussed in chapter 5, provides that normal value in NME cases has specific calculation rules. In the case of anti-dumping investigations against footwear from China, which is an NME under EU's anti-dumping laws, the normal value would be calculated "on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries ... or where those are not possible, on any other reasonable basis" (*Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community* [Regulation

1225/2009], Art. 2.7.a). On the other hand, normal value in anti-dumping investigations on products from market economies would be calculated by using data from within the exporting countries entirely. Notwithstanding, if an NME was a WTO Member before an EU anti-dumping investigation is initiated (which would include Vietnam and China), the anti-dumping investigation on products from that NME might be processed using the market economy method. In particular, if a Chinese exporter passes the MET which proves that "market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned" (Regulation 1225/2009, Art. 2.7.b), the method which is used to calculate normal value from market economies will be applied to calculate that Chinese exporter's normal value.

In *EU — Footwear (China)*, the EU's imposition of 'entity-wide rate' regulated in Article 9.5 of Regulation 1225/2009 was the centre of discussions. In the case of NMEs, where examining each exporter is not practical, or when Article 2.7.a of Regulation 1225/2009 is utilised to calculate normal value by NME methodology, the European Council might determine not to provide individual exporters with a separate duty rate. Instead of a separate duty rate, all NME exporters will be imposed the same 'entity-wide rate' (Regulation 1225/2009, Art. 9.5). However, even if normal value in anti-dumping investigations is calculated by NME methodology under Article 9.5 of Regulation 1225/2009, it is a possibility for exporters from NMEs to receive separate duty rates instead of an 'entity-wide rate', by applying for MET. Those NME exporters must fulfil the following requirements to achieve MET and receive separate duty rates:

> (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits; (b) export prices and quantities, and conditions and terms of sale are freely determined; (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference; (d) exchange rate conversions are carried out at the market rate; and (e) State interference is not such as to permit circumvention of measures if

> individual exporters are given different rates of duty. (Regulation 1225/2009, Art. 9.5)

In fact, there was a considerable increase in the amount of anti-dumping investigations conducted by the EU on products from NMEs in 2009 (BKP Development Research and Consulting, 2012), and in order to prove their market-based operations in order to achieve the MET, NME exporters faced noticeable obstacles. For instance, only 29 out of 141 requests from NME exporters were determined to be eligible for MET by EU investigating authorities from 2005 to 2010. In this regard, Chinese exporters submitted 129 out of those 141 requests for MET, but only 27 of these 129 requests were accepted (World Bank, n.d.). Furthermore, being treated as an NME or a market economy had a diverse practical impact. Bown (2011) has noted that, right before China challenged EU's NME methodology in *EU — Footwear (China)* in 2009, the average of anti-dumping duty rates of MET exporters was 7.3 percent, while the 'entity-wide rate' of exporters from NME, who failed to acquire the MET status, was 13.8 percent. This highlights the differential effect on exporters that receive MET and those that do not.

Before the Uruguay Round of Negotiations, the GATT Multifiber Arrangement (1974) governed the trade of textile and clothing products between GATT Members. The WTO Agreement on Textiles and Clothing (ATC) (1995) replaced the Multifiber Arrangement from 1995. Both these multilateral agreements had imposed quotas on the imports of textile and clothing products from developing countries to developed countries which were GATT/WTO Members (Multifiber Arrangement, Art. 4; ATC, Art. 2). By 1 January 2005, this quota imposition was put to an end and the ATC no longer exists. The EU footwear market was significantly impacted by the discontinuation of import quotas (Dunoff & Moore, 2014). The particular product under anti-dumping investigation in *EU — Footwear (China)* was leather upper footwear, a specific type in the footwear categories. In 2004, just before the elimination of quota, exports of leather upper footwear from China to EU were approximately 30,500 pairs; but after the quota was removed, this number rose significantly to approximately 183,500 pairs. The market share of Chinese leather upper footwear in the EU market increased from 4.4 percent to 22.9 percent between 2004–2005. In this regard, in the same EU anti-dumping

investigation,[62] the market share of Vietnamese leather upper footwear in the EU market was 14 percent, and exports of this product from Vietnam to EU showed a slight decrease from approximately 103,100 to 100,600 pairs from 2004 to 2005, even with the elimination of quota. This was because during that time, several anti-dumping investigations were initiated on products from Vietnam, and Vietnamese exporters had difficulties coping with those investigations (*Council Regulation (EC) No. 1472/2006: Imposing a Definitive Anti-dumping Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam* [*Council Regulation No. 1472/2006*], 2006).

In general, anti-dumping laws imply a contrast in relationship between foreign exporters and domestic industries, in which an anti-dumping mechanism is triggered by complaints from domestic industries that might result in import restraint, while foreign exporters (and domestic importers) reply to the investigations and might bear anti-dumping duties (Eckhardt, 2011). However, this implication may not be valid in today's globally integrated economy with its international supply chain. An anti-dumping duty may be levied on a domestic company if the product under investigation is outsourced by that domestic company from a foreign producer, even if the headquarters of that domestic company is in the importing country.

4.2 Panel rulings in *EU — Footwear (China)*

In *EU — Footwear (China)*, regarding the EU's anti-dumping duty imposition under Council Regulation No. 1472/2006, the EU's NME methodology provided by Regulation 1225/2009, and the continuation of anti-dumping duty imposition after sunset review were challenged in both 'as such' and 'as applied' claims of China. In the Report of the Panel, which was adopted on 22 February 2012, the Panel examined the EC's requirement that the eligibility for individual examination of Chinese exporters must be demonstrated by those exporters themselves and found that such requirement is

[62] When EU initiated anti-dumping investigation on footwear from China, they also investigated footwear from Vietnam.

ADA-inconsistent. In *EU — Footwear (China)*, Brazil was chosen to be the analogue country (or surrogate country) by the EC, and the EC also selected certain exporters for the application of sampling in limited examination. These practices of the EC were also analysed by the Panel.

4.2.1 Proving the eligibility for individual margins

In *EU — Footwear (China)*, China considered that, unless the number of exporters in an investigation is too high, each exporter must be individually examined and provided separate dumping margins in accordance with the ADA provisions. China thereby challenged the EC's rejection of individual treatment requests from most of the Chinese exporters and argued that EU Regulation 1225/2009 was ADA-inconsistent for allowing such rejection (*EU — Footwear (China)*, 2011, para. 7.67). In its argument, the EU claimed that China is an NME, and that all Chinese exporters are not independent firms and operate under the intervention of the government. Therefore, to prevent the avoidance of anti-dumping duties by transferring the products of high-duty exporters to low-duty exporters before exporting to the EU market, the EU considered that a same 'entity-wide rate' for all Chinese exporters would be necessary (*EU — Footwear (China)*, 2011, para. 7.71). The Panel in *EU — Footwear (China)* accepted the China's claim that Article 6.10 of the ADA requires individual examination and separate dumping margin for each involved exporter, and the use of sampling to limit the examinations is optional. Consequently, the EC's practice of requiring Chinese exporters to request and prove their eligibilities for individual examination, which has been provided by the ADA from the start, was determined to be ADA-inconsistent by the Panel (*EU — Footwear (China)*, 2011, para. 7.88). In this regard, Article 6 of the ADA provides that:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter ... In cases where the number of exporters ... involved is so large as to make such a determination impracticable, the authorities may limit their examination ... to a reasonable number of interested parties or products by using samples ... (ADA, Art. 6.10)

and

> In cases where the authorities have limited their examination ... they shall nevertheless determine an individual margin of dumping for any exporter ... who submits the necessary information ... except where the number of exporters ... is so large that individual examinations would be unduly burdensome. (ADA, Art. 6.10.2)

When investigating authorities determine the imposition of anti-dumping duties, Article 9.2 of the ADA requires that investigating 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" (ADA, Art. 9.2). The Panel in *EU — Footwear (China)* furthermore explained that Article 9.2 "further elaborates on the basic principle of individual treatment established in [Article 6.10 of the ADA]" (*EU — Footwear (China)*, 2011, para. 7.91). As a result, the Panel concluded that individual Chinese exporters "should be treated individually in the determination and imposition of anti-dumping duties" (*EU — Footwear (China)*, 2011, para. 7.91). Therefore, the Panel found that the EC's application of EU Regulation 1225/2009 to reject individual treatment requests was not in accordance with Article 9.2 of the ADA. In this context, the burden of proof in proving the exporters' eligibility for individual examination became questionable.

In general, the total expense of a dispute resolution should be maintained at an appropriate level as a matter of public policy. Therefore, the party who bears the burden of proof in anti-dumping investigations and proceedings should be determined in the same manner to maximise efficiency while minimising the expense of the whole anti-dumping process. In practice, however, there are situations in which this overall idea is not straightforward to put into practice (Wigmore, 1981). In many judicial systems, the burden of proof is normally the responsibility of the party applying for a resolution (Holmes, 1881, p. 77; Mackic, 2018, pp. 158–61). In the context of anti-dumping, Chinese exporters, however, were not the party applying for anti-dumping resolution (or remedy). The party who was actively initiating the anti-dumping investigation and

seeking for anti-dumping resolution in this case is the EC. Therefore, under this approach, it seems that the EC should bear the burden of proof to prove why the majority of Chinese exporters were not eligible for individual examination. In another approach, the party who has better accessibility to the information which might be used as evidence in a case should bear the burden of proof (Thayer, 1890, p. 59; Cooper, 2003; Allen, 2014). In *EU — Footwear (China)*, it appears that moving this responsibility to the EC would significantly raise the expense and duration of the anti-dumping investigation, since the investigating authority clearly did not have better access to the data relating to the exporters' operation than the exporters themselves. Consequently, under this approach, Chinese exporters had better accessibility to the evidence and should bear the burden of proof. Ultimately, while the Panel opposed the EU rule in this matter, it is understandable that the EC shifted the burden of proof to Chinese exporters.

The majority of MET requests and/or individual treatment requests from Chinese exporters were rejected in the *EU — Footwear (China)* case.[63] In most of these requests, Chinese exporters could not fulfil the burden of proof, which led to the rejection of their request. For instance, the *Commission Regulation (EC) No. 553/2006: Imposing a Provisional Anti-dumping Duty on Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam* (*Commission Regulation No. 553/2006*) (2006) provides that, among 13 Chinese exporters who applied for MET, an exporter's MET request was automatically rejected because this exporter had not replied to the questionnaires, 4 exporters replied to the questionnaires but their replies were "substantially incomplete and therefore no conclusions could be drawn as to whether they fulfilled the relevant criteria" (para. 71), and the remaining exporters'

[63] To be more precise, the original anti-dumping investigation conducted by the EC found that no exporter was eligible for MET or individual treatment. After the application of provisional duties but before the enforcement of definitive duties, every single Chinese exporter who was chosen for the sample contended that they should have been granted MET status but were instead wrongfully refused it. Golden Step, one of these companies, offered proof of a 'significant shift,' and as a result, it was awarded MET status. MET was not granted to the other companies. In a similar manner, a few of the Chinese companies who were chosen to participate in the sample contended that they had been unjustly excluded from individual treatment. However, none of them produced any fresh proof, thus the assertions that they made were dismissed as unfounded (*Council Regulation No. 1472/2006*, 2006).

MET requests were denied because their replies to the questionnaires could not "properly substantiate their allegations that they obtained assets at market conditions" (para. 75). In conclusion, due to the insufficiency of proof submitted by Chinese exporters, the EC used the dissatisfaction of the burden of proof as the main reason to reject most of the MET requests and/or individual treatment requests.

4.2.2 The product in *EU — Footwear (China)*

A critical aspect of any anti-dumping case is to establish the limits of what specific products are included in an investigation and the *EU — Footwear (China)* case was no exception. The product scope will determine which specific foreign producers are investigated and what prices will be considered when examining dumping margins and possible import restrictions. In the context of EU anti-dumping investigations and proceedings, the definition of the product can also be very important. The definition of 'like product' provided in the ADA, EU Regulation 1225/2009 defines the term as:

> a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. (Regulation 1225/2009, Art. 1.4)

In *EU — Footwear (China)*, the product under investigation was noted as 'footwear with uppers of leather', but boots and shoes with leather toecaps were not included in the anti-dumping initiation notice (*Commission Notice (EC) No. 2005/C 166/06: Notice of Initiation of an Anti-dumping Proceeding Concerning Imports of Certain Footwear with Uppers of Leather Originating in the People's Republic of China and Vietnam*, 2005). In this case, involved parties in the original anti-dumping investigation had significant debate because of the nonspecific nature of the word 'footwear with uppers of leather' (Dunoff & Moore, 2014). Furthermore, under the definition of like product in Article 4.1 of Regulation 1225/2009, many types of leather footwear might be classified in the scope of the original investigation, and the EC thereby exercised its discretion to identify which type of leather shoes fall within the scope of the original anti-dumping investigation. Finally, leather city footwear, leather urban boots, and leather sandals

were identified as the products under investigation by the EC (*Commission Regulation No. 553/2006*, 2006).

The application of sampling by the EC to limit the examination was allowed by the Panel in *EU — Footwear (China)*. However, the Panel found that shifting the burden of proof to Chinese exporters in proving their market-based operations was ADA-inconsistent. The Panel also concluded that the presumption which all Chinese exporters operate in a single NME entity and therefore must be imposed by a single 'entity-wide rate' by the EC was not in accordance with the ADA provisions (*EU — Footwear (China)*, 2011, para. 7.391). As discussed above, Article 6.10 of the ADA allows investigating authorities to utilise sampling in their limited examination. The EC applied sampling in this regard by choosing certain Chinese exporters and using their submitted data to determine the WA export price and WA normal value. The dumping margin computed by comparing such WA export price and WA normal value was then applied to all Chinese exporters who were not selected for sampling (*EU — Footwear (China)*, 2011, paras. 7.347–7.349). The Panel's finding, that the EU's sampling practice was not inconsistent with the ADA, implicates that the EU could have a broad discretion regarding how to select exporters in a sample. The EU argued that the original anti-dumping investigation identified more than 160 Chinese exporters involved, this number was too high that its investigating authority, the EC, decided to use sampling and selected 13 exporters who represent 25 percent of leather shoes exported from China to the European Community. The EU also claimed that it had been discussing with relevant Chinese authorities before selecting the exporters as samples (*EU — Footwear (China)*, 2011, para. 7.124).

In *EU — Footwear (China)*, China claimed that the EC's selection of samples was not in accordance with the ADA provisions. This claim was denied by the Panel, because even though Article 6.10 of the ADA requires the authorities to consider "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" (ADA, Art. 6.10), Article 6.10 however does not suggest that "any particular threshold percentage will demonstrate that the volume of exports accounted for by the selected producers is 'representative' of anything" (*EU —*

Footwear (China), 2011, para. 7.216). Broude and Moore (2013) disagreed with this Panel's ruling, explaining that the operational and financial situations of small exporters and large exporters are considerably different, hence it was unreasonable to determine that the sample of selected bigger exporters would be representative and applicable to non-selected smaller exporters. However, it appears from the text of Article 6.10 of the ADA that national anti-dumping investigating authorities have the latitude in selecting and examining only large exporters.

In *EU — Footwear (China)*, the scope of exported goods under investigation and the application of sampling had a close connection with each other. The wider the scope of exported goods under investigation, the more Chinese exporters (and more EU manufacturers of leather shoes) would be involved. Confronting the large number of exporters, the EC must limit its examination to a practical level and therefore applied sampling, even though the use of sampling might be controversial. Furthermore, with many exporters who had diversified prices and costs, limited examination of a few selected exporters might create unreliable results.

4.2.3 The analogue country in *EU — Footwear (China)*

In *EU — Footwear (China)*, the analogue country determined by the EC was Brazil. However, considering that Brazilian leather industry generally produces leather with better quality than Chinese producers, due to the fact that Brazil has one of the biggest commercial cattle industries on the globe, Brazilian leather thereby has better design, but far higher cost of production due to higher cost of labour than China. Therefore, many interested parties in the original investigation opposed the EC's selection of analogue country and proposed that a more appropriate analogue country should be Indonesia, India, or Thailand (*EU — Footwear (China)*, 2011, paras. 7.247–7.252). However, Indonesia, India, and Thailand all had considerably small sales of leather footwear at the time of the original investigation, which might cause difficulties in collecting relevant data in these countries, hence this proposal of interested parties was refused by the EC (*EU — Footwear (China)*, 2011, para. 7.254). Furthermore, the EC claimed that its determination of an analogue country was valid and was not strictly

dependent on the dissimilarity in manufacture costs of the like product or socioeconomic growth (*EU — Footwear (China)*, 2011, para. 7.255).

Regarding the EC's analogue country selection, China argued that the EC's analogue country selection greatly affected the establishment of the normal value, which potentially prevented a fair comparison between the normal value and the export price. Therefore, China claimed that the EC's analogue country selection violated the provision of Article 2.1 of the ADA. However, this claim of China was denied by the Panel. In this regard, the Panel explained that the text of Article 2.1 only states that "fair comparison shall be made between the export price and the normal value" (ADA, Art. 2.1), which does not impose any obligation relating to the analogue country selection (*EU — Footwear (China)*, 2011, para. 7.260). Additionally, the Panel noted that, on the surface, Article 2.4 of the ADA set a general principle for the comparison between the normal value and the export price. However, looking at Article 2.4 there appears to be nothing that requires specific criteria for the establishment of such export price and normal value. Moreover, as noted by the Panel in *EU — Footwear (China)*, a fair comparison as provided in Article 2.1 of the ADA "logically presupposes that normal value and export price, the elements to be compared, have already been established" (*EU — Footwear (China)*, 2011, para. 7.263). The Panel concluded that:

> China has failed to demonstrate that the fair comparison requirement of Article 2.4 of the AD Agreement, either alone, or together with Article 2.1 of the AD Agreement and/or Article VI:1 of the GATT 1994, establishes a general requirement of 'fairness' which applies, *inter alia*, to the selection of an analogue country. (*EU — Footwear (China)*, 2011, para. 7.265)

The above ruling of the Panel not only provided more discretion relating to the EC's analogue country selection (*EU — Footwear (China)*, 2011, paras. 7.262–7.265), but also posed various issues in relation to the EC's practice. First, since manufacturers of like products in the analogue country have no responsibility to collaborate with the EC, there is always a risk of insufficient data collection. Therefore, it was reasonable that the EC considered this factor and selected the best option of analogue country where it could obtain sufficient data from manufacturers. Second, manufacturers of like products

in analogue countries will gradually realise that their competitiveness in the global trade might be increased as an after-effect of the EC imposing anti-dumping duties on exporters from NMEs. In this regard, manufacturers who have higher production expenses may be more willing to collaborate with the EC, although this could potentially inflate the normal value and unpredictably increase the anti-dumping duties of exporters from NMEs. Third, exporters from NMEs have very limited information on the practice of the computation of dumping margins, especially when such dumping margins are calculated by data from an analogue country. Because of this, Palmeter (2003) compares the use of analogue country in anti-dumping investigations to "charging a driver with speeding on a road with no posted limits, based upon the limits posted on some other road – a road that will be chosen after the driver has been stopped" (p. 30).

Even if the above issues in the EC's analogue country practice were known by the Panel in *EU — Footwear (China)*, the Panel had to follow ADA jurisprudence. In this context, while there is no provision in Article 2.1 or 2.4 of the ADA regulating the process and requirement of analogue country selection, the Panel could not rule against the EC's practice (*EU — Footwear (China)*, 2011, para. 7.266). Furthermore, the majority of third parties (who are also WTO Members) in the *EU — Footwear (China)* dispute also agreed with the decision of the Panel in this matter (*EU — Footwear (China)*, 2011, paras. 7.247–7.252). As a result of the Panel's decision that the EU's selection of analogue country was not inconsistent with the ADA, anti-dumping investigating authorities could exercise more discretion in choosing the analogue (or surrogate) country, and future disputes relating to the process and requirement of analogue (or surrogate) country selection might be less likely to be brought to the DSB.

5. Concurrent imposition of Anti-dumping and Countervailing measures against NMEs

In WTO anti-dumping disputes relating to NME status, beside the issue of zeroing in dumping margin calculation, the concurrent imposition of anti-dumping and countervailing duties against an NME is also an important issue which might create unpredictably high duty rates. Like anti-dumping measures, countervailing measures are also a trade defence remedy designed to counter subsidies, which are financial

contributions provided by governments or other public bodies to particular companies or industries (Lester, Mercurio, & Davies, 2012). These two remedies, anti-dumping and countervailing, have close links to one another. Not only does Article VI of the GATT 1947 covers these two remedies in one set of provisions, but also the investigation procedures of both are very similar under WTO rules as well as Members' domestic laws. While Article VI of the GATT 1947 already mentions countervailing duties, Article XVI of the GATT 1947 gives detailed provisions on the matter of subsidies (GATT 1947, Arts. VI, XVI). Since the establishment of the WTO, subsidies and countervailing measures have been regulated by the WTO Agreement on Subsidies and Countervailing Measure 1995 (SCM Agreement).

The SCM Agreement introduced two tracks for defence measures against subsidies when it first entered into force. The first track is the system of multilateral remedies on subsidies, which allows WTO Members to challenge subsidies that cause adverse effects to their interest (SCM Agreement, Arts. 4, 7, 9). In this track, where consultations between relevant parties show no result and any WTO Member can refer the matter to the WTO dispute settlement system in accordance with the DSU, the DSB then establishes a Panel to adjudicate the case. The second track is a system of countervailing measures, which allows importing Members to impose countervailing duties on subsidised imports after conducting a domestic investigation in accordance with the provisions in Part V of the SCM Agreement. The following sections will discuss the legal framework and practical aspects of the double remedies of anti-dumping and countervailing duties, and why double remedies in the case of NMEs is an issue.

5.1 Background of the double remedies issue

Technically, anti-dumping and countervailing duties have the same objective which is to secure the fairness of international trade. However, there may be circumstances where the concurrent imposition of both anti-dumping and countervailing duties occurs, when export prices are reduced by subsidies and are also dumped (*US — Anti-Dumping and Countervailing Duties (China)*, 2010). However, the imposition of concurrent remedies, which is referred to as 'double remedy', is prohibited under Article VI of the GATT 1947, which provides that "no product of the territory of any contracting party imported

into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization" (GATT, Art. VI:5). Since the prohibition in Article VI:5 only addresses export subsidies, it seems to imply that export subsidisation causes lower priced exports, which is basically the same issue that arises when dumping occurs. This means when concurrent remedies are imposed, it would be inappropriate if, not only the dumping, but also the subsidy was the cause of the low export prices in anti-dumping investigations.

First, to explain why double remedies in the context of Article VI of the GATT 1947 are disallowed, it is important to note that when an exporter uses export subsidies to finance exported products, which in effect lowers the export price, these lower export prices lead to a finding of dumping under an investigation where export price is compared to home market price. On the other hand, it is possible that a countervailing measure against export subsidies would also cover an amount of dumping. Thus, in the same situation of dumping or export subsidisation, the imposition of one of the two remedies would already adjust the export price back to its non-dumped or non-subsidised value, therefore the overlap of two duties is obviously unnecessary (Kelly, 2014). Second, there is a possibility in theory that export subsidies would lead to lower export prices, which appears to have been recognised by the drafters of the GATT, and therefore double remedy is prohibited under Article VI:5 of the GATT 1947.

Nonetheless, while Article VI:5 of the GATT 1947 could lead to an interpretation that export subsidies result in lower export prices, it is arguable that export subsidies might not be used to reduce export price all the time, and the lower export price could also arise from domestic subsidies. Lester, Mercurio, and Davies' (2012) method argues that, if there is concern about double remedies, each instance of subsidisation should be investigated where concurrent imposition of two remedies is sought, regardless of whether it is export or domestic subsidy. This method may be utilised either by investigating authorities to examine concurrent remedies in such case, or by the respondents in WTO dispute cases to demonstrate that the subsidy was used to lower the export price and thereby was the cause of the dumping, to argue that a concurrent remedy would be inappropriate. However, in practice this method would place a significant burden on investigating authorities, not to mention that proving how

subsidies were used might be very difficult and, in many cases, there might not be any definite answer to how a particular subsidy was utilised.

In contrast, the DOC in *US — Anti-Dumping and Countervailing Duties (China)* claimed, and the Panel agreed, that the concurrent remedy involving domestic subsidisation should not be considered inappropriate because domestic subsidies presumably reduce the price of the product in both domestic and export markets, therefore such subsidies cause no effect on the dumping margin calculation where the comparison of export price to domestic market price is conducted (*US — Anti-Dumping and Countervailing Duties (China)*, 2010, paras. 14.71–14.72). The Appellate Body upheld this decision by stating that domestic subsidies will "effect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent", while export subsidies "will result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product" (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, para. 568). Such statements of the Appellate Body however might not be applicable in the special situation of an NME, in which the concurrent remedy of countervailing duties against domestic subsidies and anti-dumping duties calculated based on an NME methodology might cause double remedies.

5.2 Double remedies under NME methodology

In *US — Anti-Dumping and Countervailing Duties (China)* case, China challenged the DOC's decision that takes subsidies into account in the determination of normal value in dumping calculation. In fact, the DOC treats China as an NME in which the government controls the domestic market, which leads to the presumption that in respect of dumping calculations, the domestic market value of the product under investigation is not reliable for the determination of normal value. Hence a surrogate value (price) is used from a surrogate country that is considered to be a market economy. By this method of using a surrogate country, the normal value is determined by the costs reflecting an unsubsidised amount from the data of the surrogate country, but the export price of the Chinese exporters is not adjusted and still reflects subsidies. Therefore, after comparison, the resulting dumping margin reflects both the dumping itself and the amount that the

producer benefited from subsidies, thereby the anti-dumping remedy should offset the dumping as well as the subsidy. Consequently, if a countervailing duty is imposed in this case, it would constitute a double remedy since it overlaps a part of the anti-dumping duty.

Even though the Panel in *US — Anti-Dumping and Countervailing Duties (China)* indicated a potential problem with double remedies applied to NMEs, it concluded that the GATT 1947 and SCM Agreement provisions cited by China do not address the problem, and, therefore China failed to prove that the DOC's use of NME methodology as well as concurrent remedies were inconsistent with the GATT 1947 and SCM Agreement. The Panel therefore did not make any further examination of "the extent to which the concurrent imposition of antidumping duties determined under the USDOC's NME methodology and of countervailing duties resulted in the imposition of 'double remedies'" (*US — Anti-Dumping and Countervailing Duties (China)*, 2010, para. 14.76). On appeal, the Appellate Body reversed the Panel's decision that the cited SCM Agreement provisions do not address the double remedies issue. The Appellate Body explained that a dumping margin calculated by NME methodology reflects both the dumping and the subsidies that affect the producer's costs of manufacture. Consequently, "an anti-dumping duty calculated based on an NME methodology may, therefore, 'remedy' or 'offset' a domestic subsidy, to the extent that such subsidy has contributed to a lowering of export price"; in other words, "the subsidization is 'counted' within the overall dumping margin" (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, para. 543). The Appellate Body ultimately concluded that the DOC failed to "establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties" (*US — Anti-Dumping and Countervailing Duties (China)*, 2011, para. 604). Accordingly, the Appellate Body found there to be a violation of Article 19.3 of the SCM Agreement.

The main problem with double remedies resulting from the use of NME methodology is that even when the subsidisation does not lower the export price in comparison with the domestic market price, double remedies could still exist, regardless of whether such

subsidy is a domestic or an export subsidy. Furthermore, even if NME methodology was not used, domestic subsidies may also have an influence on the export price which consequently causes double remedies, as the Panel stated that "a double remedy may arise when the normal value of a market economy producer is constructed using costs that do not reflect the subsidies that this producer received" (*US — Anti-Dumping and Countervailing Duties (China)*, 2010, footnote 972).

6. Conclusion

The Panel's rulings in *US – Shrimp (Viet Nam)* illustrates the potential for unexpectedly inflated anti-dumping duties being imposed on exporters, as the result of the investigating authority's wide discretion in the use of limited examination under Article 6.10 of the ADA. In *US – Shrimp (Viet Nam)*, the unpredictability of the US administrative review prolonged the cost burden on exporters for years after the initial imposition of anti-dumping duties. Using *US – Shrimp (Viet Nam)* as an example, this chapter has reviewed the issues associated with NME status in anti-dumping investigations, the DOC's use of zeroing, the mandatory respondent selection in the DOC's limited examination, and how the DSB addressed and provided rulings for these issues. The author believes that future anti-dumping disputes will provide a greater opportunity for clarifying the concerns that the *US – Shrimp (Viet Nam)* dispute could not sufficiently address.

The chapter then examined *US – Shrimp II (Viet Nam)*, which was not merely a continuation of *US – Shrimp (Viet Nam)*. In fact, *US – Shrimp II (Viet Nam)* was the first WTO dispute addressing the two authoritative announcements of the DOC regarding its continuous use of zeroing in anti-dumping investigations and proceedings, which are the *Final Modification* and the *Final Rule* for the calculation of dumping margins in investigations relating to targeted dumping. Through these official announcements, it is apparent that the DOC maintained its questionable reasoning and discretion in the use of zeroing.

The chapter's examination of *EU – Footwear (China)* highlighted the concern that all Chinese exporters (and potentially all exporters from any NME) are presumed to operate dependently in a single NME entity, leading to the imposition of a single duty rate by the

EC. In this case, the Panel ultimately determined that such presumption and practice of the EC represented a violation of the ADA obligations. After the circulation of the Panel report, the EU responded by introducing amendments to its anti-dumping laws. This dispute also explained how the identification of the specific products under investigation could directly affect the outcome of the dumping margin calculation, and how the number of involved parties forced the investigating authority to exercise its controversial discretion in analogue country selection.

As a result of *US – Anti-Dumping and Countervailing Duties (China)*, recognising that the Appellate Body Report is the 'final decision' under the DSU mechanism, the US implemented the Appellate Body ruling on concurrent remedies and reported its compliance at the DSB meeting on 31 August 2012. After that date, other WTO Members should also reform their practices in accordance with the Appellate Body's ruling but will probably confront significant challenges in identifying the extent to which subsidies play a role in the determination of dumping. Even now, there are no criteria or standards for identifying the extent to which subsidies play a part in the determination of dumping. The DOC failed to establish such standards, or their components, as noted above in *US – Anti-Dumping and Countervailing Duties (China)*. To obtain clarification on these issues, it seems that WTO Members have no other option than to wait for further rulings on other similar disputes referred to the DSB. Alternatively, in future rounds of negotiations, a consensus among WTO Members could be achieved to address the concurrent remedies.

Overall, the analysis of WTO dispute settlements and related WTO jurisprudence involving NMEs has confirmed that the US/EU practices for the most part are consistent with the ADA. However, certain aspects of these practices were ruled by the DSB to be inconsistent with the ADA provisions, these being the application of zeroing, limited examination, surrogate country selection, and the imposition of an 'entity-wide rate' in certain cases. This analysis identified that the concurrent remedies of anti-dumping and countervailing in NME cases are problematic. The next chapter examines relevant aspects of Vietnam's economy to determine why the US and the EU have been classifying Vietnam as an NME in their anti-dumping investigations and proceedings.

CHAPTER 7 - VIETNAM'S TRANSITION TO A MARKET ECONOMY

1. Introduction

The findings in chapter 5 identified how and why the US and EU treat Vietnam as an NME in anti-dumping investigations and proceedings, and the findings of chapter 6 indicated that such treatment is largely consistent with the ADA. Consequently, it would appear that to eliminate the difficulties faced by Vietnamese exporters in anti-dumping investigations it is necessary to consider ways in which Vietnam can overcome its NME status and be considered a market economy. Therefore, this is the focus of this chapter. The chapter examines the history of Vietnam's transition from a centrally planned economy to a market economy including economic reforms, the development of Vietnam's international relations, export practices, the existence of state-owned enterprises, accounting standards and practices and Vietnam's currency management and convertibility.

2. The history of Vietnam's transitional economy

The NME status of Vietnam is the essential cause of the difficulties being experienced during the anti-dumping investigations and proceedings conducted by the US and the EU. This section introduces the history and development of the Vietnamese economy, from a centrally planned economy, which was underdeveloped and closed to world trade, to a transitional economy with considerable achievements in embracing market economy standards. This section also discusses both economic and political strategies of Vietnam during this transition.

In 1975, North Vietnam's victory in the Vietnam War resulted in the collapse of the South Vietnamese administration. The newly united Vietnam, now known as the Socialist Republic of Vietnam, followed the communist centrally planned economic model until 1986, when the ruling Communist Party of Vietnam (CPV) initiated a massive reform program, known as Doi Moi (Vuong, 2004). Since then, the Vietnam Government has been steadily constructing new rules and regulations for a free-market economy, as well as institutional arrangements, and laying the foundations for efficient

markets (Athukorala, 2009). Even though the transition process has not yet been completed, the Vietnam Government has made substantial efforts to reinforce its steady transition to a fully-fledged market-based economy.

2.1 Vietnam's economic transitional program — Doi Moi

Economists defined the characteristics of the centrally planned economy of Vietnam prior to Doi Moi as one with economic inefficiencies, bureaucracy, excessive institutional stiffness, and a lack of a functioning market and pricing system (Ton-That, 1984; Nghiep & Quy, 1999; Vuong, 2004). Laws and regulations before 1986 did not legally recognise private property rights, particularly productive assets. Even in the 10 years following Doi Moi, from 1986 to 1996, Vietnam was still classified as one of the world's least-developed nations. The Vietnamese economy faced many difficulties, with a primitive distribution system and a heavy reliance on Soviet-bloc financial support. At the time when Vietnam began to implement its new economic reform program and embrace market economic progressivism, its per capita GDP (USD202) was quite small, and Vietnam's overall GDP was only about USD11 billion (Pham & Vuong, 2009). Several early studies such as Dam and Le (1981), Ton-That (1984) and Kimura (1986) suggest the application of 'fence-breaking' in Vietnam (which means to overcome the existing bureaucratic and restrictive economic management norms) and the necessity for a national economy makeover.

Doi Moi's economic reforms in Vietnam began with the very fundamental step of recognising legal rights to the private property of individuals and other elements of the private sector (Vuong, 2004). It was also recognised that it was important to eliminate economic inefficiency, rigidity, and malfunctioning market and distribution networks. The Soviet price system, bureaucratic directives, and state physical and financial supports were gradually replaced by market forces. The CPV and influential economists, as well as local government authorities, decided that a transition to a market economy was necessary (Riedel, 1997). Foreign Direct Investment (FDI) inflows into Vietnam's developing market economy were made easier after Doi Moi with the enactment of the *Law on Foreign Investment 1987* (which was amended five times between 1990 and 2005), as well as the 1992 amendment to the *Constitution of Vietnam* (Pham & Vuong,

2009). As a result of the open-door policy, business and commerce has grown tremendously, leading to an improvement in the overall economy (Nghiep & Quy, 1999).

Indeed, Vietnam's overall economy has grown significantly since Doi Moi, and the rise in real GDP has led to a steady rise in per capita GDP, which encourages more people to save their money for future economic endeavours such as starting their own business or making capital investments (Vuong & Nguyen, 2000). While the broad reform's impact on the country's economy has been considerable, there were some emerging concerns including ineffective economic productivity, large state-owned enterprises, private firms with a high demand on investment, and infrastructure issues of distributing financial and physical resources to various economic sectors (Riedel, 1997; Pham & Vuong, 2009).

2.2 The evolution of Vietnam's diplomacy and international relations

Discussions in previous chapters have demonstrated that only the US and the EU treat Vietnam as an NME in anti-dumping investigations and proceedings, while other WTO Members do not. Arguably, this issue has not only been a result of Vietnam's transitioning economy, but also about politics and international relations between Vietnam and both the US and EU. To achieve a market economy status that is recognised by the US and the EU, Vietnam should not only fully adopt as many market-based principles and practices as possible, but also continuously improve its relations with these two key trading partners. While the economic transition program Doi Moi has directly influenced every area and aspect of Vietnam's economy (Vuong, 2004), in the scope of this research, only the aspects of foreign policies and international relations that are relevant to anti-dumping are examined and discussed. Following the initial adoption of Doi Moi in 1986 to develop the country's economy, and eventually achieve a market-based economy, the CPV started to improve Vietnam's relationship with other countries as trading partners. This section discusses the process in which Vietnam, from a closed country after civil war, enhanced both its foreign policies and relations to become a friendly and trusted trading partner with other parts of the world.

The year 1991 was a milestone in the development of Vietnam's foreign policy, and it marked a significant turning point in Vietnam's international relations. With the collapse of the Soviet Union and the end of the Cambodian Civil War, in 1991 it was decided that Vietnam would, as stated in the Political Report delivered in the Congress, "diversify and multilateralize economic relations with all countries... and become the friend of all countries" (CPV, 1991, p. 134). The CPV also noted that Vietnam will pursue "equal and mutually beneficial co-operation with all countries regardless of different sociopolitical systems and on the basis of the principle of peaceful co-existence" (CPV, 1991, p. 134). Notwithstanding this, in the first step of the plan, Vietnam focused on the improvement of relationships with other communist nations at that time, which were considered the "forces struggling for peace, national independence, democracy and social progress" (CPV, 1991, p. 134). Further objectives in foreign relations were additionally stated in the Political Report in 1991:

> To develop relations of friendship with other countries in Southeast Asia and the Asia-Pacific region, and to strive for a Southeast Asia of peace, friendship and co-operation. To expand equal and mutually beneficial cooperation with Northern and Western European countries, Japan and other developed countries. To promote the process of normalization of relations with the United States. (CPV, 1991, p. 135)

Following the Cambodian peace treaties, Vietnam gained significant foreign policy advantages. Transitioning from heavy reliance on the Soviet Union to a broader and more diversified range of international relationships helped achieve new international relationships. From 1986 to 1995, the number of non-communist countries that established diplomatic relations with Vietnam increased from 23 to 163 countries (CPV, 2010). At the CPV's midterm party meeting in January 1994, several critical goals were set, which included expanding Vietnam's overseas connections (Seventh Communist Party of Vietnam Central Committee, 1994).

Investment and trading restrictions in Vietnam were progressively eased in 1993, when the US terminated its opposition to the economic aid provided to Vietnam by the World Bank and the International Monetary Fund. As a result, Vietnam became eligible for a range of grants, credits, and business loans to fund its economic development objectives

(Thayer, 2018). In 1994, Vietnam's open-door international policy earned it participation in the Association of Southeast Asian Nations (ASEAN) Regional Forum. More importantly, Vietnam normalised ties with the US the next year, became the seventh member of the ASEAN, established a partnership deal with the EU, and established diplomatic relationship with the five permanent members of the United Nations (UN) Security Council (Vuong, 2004). This was the point when Vietnam started to re-connect with the US in term of diplomacy, which had been abandoned by both countries following the Vietnam War. Joining ASEAN was also a steppingstone for Vietnam to establish a relationship with the EU, which paved the way for subsequent trading deals between the two countries. Even though anti-dumping was not an issue at that time, the year 1994 was a historic milestone that opened a new era of opportunities for Vietnam, and also laid the foundation for increased negotiations between Vietnam and the US/EU over its NME status into the future.

The CPV's eighth Congress, convened from June to July 1996, was the next step in Vietnam's foreign policy development. It was the first time that officials from political parties that were in power in Cambodia, Malaysia and Singapore were among the Southeast Asian delegates that attended the Congress meeting. In the foreign policy section of the Political Report in 1996, the views of policy practitioners are shown. Regarding the "the characteristics of the international system", the Political Report in 1996 states that "scientific and technological revolution was developing at an increasingly rapid pace, thereby accelerating various production forces and the process of globalisation of the world economy and social life" (Seventh Communist Party of Vietnam Central Committee, 1996). According to Vu (2006), in 1996 Vietnam discussed globalisation for the very first time and agreed that it was a discernible pattern. The importance of Vietnam's ties with its neighbours and the ASEAN was emphasised in the CPV's Political Report in 1996, which states:

> To strengthen our relations with neighbouring countries and ASEAN member countries, to constantly consolidate our ties with traditional friendly states, and attach importance to our relations with developed countries and political-economic centres in the world while at the same time upholding the spirit of solidarity and

> brotherliness with developing countries in Asia, Africa and Latin America, and with the Non-Aligned Movement. (Seventh Communist Party of Vietnam Central Committee, 1996)

In 1996, Vietnam was for the first time a participant in the Asia Europe Meeting (ASEM) and then became a member of the Asia-Pacific Economic Cooperation (APEC) forum two years later. According to the Political Report in 1996, regarding economics, science and technology, there was the possibility for confrontation as well as collaboration between "socialist countries, communist and workers parties and revolutionary and progressive forces" and "nations under different political regimes" (Seventh Communist Party of Vietnam Central Committee, 1996).

Vietnam's discussions with the US around a Bilateral Trade Agreement illustrated the tension between dispute and collaboration among nations with different political structures (Manyin, 2005, pp. 5−6). The dangers of opening Vietnam to globalisation forces split Vietnam's policy elites. The CPV's tenth plenum, conducted in June−July 2000, eventually achieved an agreement. According to the plenum, Vietnam must accelerate its economic growth, attract foreign investment, and maintain regional and global cooperation, if it is to industrialise and modernise itself by 2020. Trade Minister Vu Khoan was approved by the tenth plenum to travel to Washington to sign the Bilateral Trade Agreement. Important provisions of this Bilateral Trade Agreement were implemented gradually over three to nine years. Vietnam was given year-by-year interim normal commercial relations status by the US in 2001. These were important initial moves by Vietnam in gaining WTO membership.

During President Vladimir Putin's visit to Hanoi in March 2001, Vietnam strengthened its relations with the Russian Federation by adopting its first bilateral cooperation agreement (Thayer, 2012a). This agreement established comprehensive cooperation in eight primary areas: politics and diplomacy, petroleum and energy cooperation, training and education, military hardware and research, science and innovation, commerce and investment, hydro and nuclear power, and finally culture and tourism. To commemorate the visit of Vietnamese President Truong Tan Sang to Russia, the two countries signed a detailed strategic relationship agreement in July 2012 (Thayer, 2012b). Defence

collaboration, including arms sales and technical assistance, lies at the heart of the Vietnam-Russia strategic alliance. When Russia and Vietnam signed a Memorandum of Understanding in 2013, they set up a Joint Defence Working Group, which includes military technology and training, as well as yearly defence discussion. They also agreed to help each other in arms repair and cooperation services.

The strategic alliance between Vietnam and Russia set the paradigm for Vietnam's ties with powerful states and other key countries. To guarantee Vietnam's strategic independence, strategic alliances facilitated comprehensive collaboration across a variety of fields and provide each major country equal stakes in Vietnam's sustainable growth. The CPV's ninth Congress in April 2001 reiterated Vietnam's desire to be "a friend and a reliable partner to all nations" by broadening and multi-lateralising its foreign ties, with a focus on expanding relations with "socialist, neighbouring, and traditional friendly states" (Thayer, 2002, p. 85). It was decided in the ninth Congress that the lack of development would be eliminated by 2010, and industrialisation and modernisation would be accelerated so that a modern industrialised country could be achieved by the year 2020. The ninth Congress, according to Vu (2006), selected two primary approaches to achieve this aim, which are: "first, perfect the regime of a market economy with socialist characteristics, and second, integrate deeper and more fully into the various global economic regimes" (p. 119).

Vietnam and Korea enhanced bilateral ties to a 'Comprehensive Partnership in the 21st century' in August 2001. Both countries committed to collaborate in politics and defence, judiciary and diplomatic relations, economy and commerce, development assistance, scientific research, and environmental protection in October 2009 when the Strategic Cooperative Partnership was upgraded to a full partnership. High-level diplomatic and military visits between the two countries are common, as are yearly strategic and national defence strategy discussions (Nguyen, Nguyen, & Nguyen, 2011, pp. 12–3).

A CPV Resolution issued in 2001 describes Vietnamese diplomatic policy in the following manner:

> Continue to strengthen relations with Vietnam's neighbours and countries that have been traditional friends; give importance to relations with big countries, developing countries, and the political and economic centres of the world; raise the level of solidarity with developing countries and the non-aligned movement; increase activities in international organizations; and develop relations with communist and workers' parties, with progressive forces, while at the same time expanding relations with ruling parties and other parties. Pay attention to people's diplomacy. (Vu, 2002, p. 110)

Vietnam identified areas of tension with China, a socialist and traditionally friendly country, and areas of agreement with its previous nemesis, the US, while multi-lateralising and expanding its international relationships and becoming a trusted partner. The CPV's eighth plenum in 2003 addressed the dilemma of how to balance these objectives. A resolution was passed at this plenum that linked two opposing forces, namely collaboration and competition, as the notions of 'partners of cooperation' and 'objects of struggle' (Thayer, 2008, pp. 24–30). The eighth plenum's resolution stated that "any force that plans and acts against the objectives we hold in the course of national construction and defence is the object of struggle, … anyone who respects our independence and sovereignty, establishes and expands friendly, equal, and mutually beneficial relations with Vietnam is our partner" (Thayer, 2008, p. 27). The eighth plenum's resolution finally confirmed that, "with the objects of struggle, we can find areas for cooperation; with the partners, there exist interests that are contradictory and different from those of ours. We should be aware of these, thus overcoming the two tendencies, namely lacking vigilance and showing rigidity in our perception, design, and implementation of specific policies" (Thayer, 2008, p. 27).

ASEAN and ASEAN-centred multilateral organisations are at the heart of Vietnam's regional cooperation. According to Nguyen Dy Nien, who served as Vietnam's Minister of Foreign Affairs in 2006, the country's foreign policy achieved three high points in 2006, which were to host the APEC conference, to become a member of the WTO, and to be unanimously nominated by the Asia bloc for non-permanent Security Council membership at the UN (Viet, 2006). In 2007, the UN General Assembly decisively

appointed Vietnam as a non-permanent member of the Security Council for a two-year term starting in 2008. In 2010 Vietnam joined the ASEAN Maritime Forum as a founding member and hosted the debut conference of the ASEAN Defence Ministers' Meeting Plus. Within ASEAN's framework of EU cooperation, Vietnam served as ASEAN's national coordinator from 2012 to 2015. From this point, Vietnam and the EU, through the ASEAN, remarkably enhanced their relationship in all aspects, from politics to commerce. It is possible that if relations between Vietnam and the EU keep improving at this pace, future bilateral negotiations between the two countries could put the issue of NME status on the agenda, and possibly find a solution.

In 2013, the CPV adopted *Resolution No. 22-NQ/TW dated 10/4/2013 of the Politburo of the Communist Party of Vietnam on International Integration* (Resolution No. 22). Section III of Resolution No. 22 states that "proactive and active international integration is a major strategic orientation of the Party aimed to successfully implement the task of building and protecting the socialist Fatherland of Vietnam". Additionally, Resolution No. 22 emphasises how important it was for Vietnam to:

> deliver on international commitments in parallel with proactive, positive participation in developing and making use of international rules and practices and participate in activities of the regional and international communities; proactively propose initiatives and cooperation mechanisms under the mutually beneficial principle; consolidate and enhance our country's position in the regional and international communities, actively contributing to the struggle for peace, national independence, democracy and social progress in the world. (Resolution No. 22, Section III)

In 2013, during Vietnam's President Truong Tan Sang state visit to the US, the two countries released a joint declaration establishing a comprehensive cooperation (The White House, 2013). Bilateral military cooperation took a major step forward in 2015 with the adoption of the Joint Vision Statement on Defence Relations by the Vietnamese and US defence ministers in Hanoi. The statement outlined 12 different areas of potential collaboration, one of which being marine security. It was just one month later that President Obama met with Nguyen Phu Trong, the general secretary of the CPV,

at the White House. In a joint statement, the two leaders reaffirmed their shared aim for "their continued pursuit of a deepened, sustained, and substantive relationship on the basis of respect for the UN Charter, international law, and each other's political systems, independence, sovereignty, and territorial integrity" (The White House, 2015). With the improvement in both commercial and political relationships between Vietnam and the US, one could expect that both countries might come to terms with the NME status of Vietnam in future negotiations.

On both regional and international levels, Vietnam has appeared to be an engaged and committed participant since 2020. Additionally, Vietnam has actively engaged and contributed to other regional and international forums including APEC and the Group of Twenty forum and finalised the Regional Comprehensive Economic Partnership agreement, while also serving as ASEAN Chair and a non-permanent member of the UN Security Council. Faced with COVID-19, Vietnam actively participated in the so-called 'face mask diplomacy'. The intensive diplomatic calendar that Vietnam had planned for 2020 illustrated the consistency of its foreign policy that aimed for "diversification and multilateralisation of external relations, active and proactive international integration" (CPV, 2016, p. 34), which was adopted at the CPV's seventh Congress in 1991.

3. Difficulties for Vietnam in achieving market economy status

As discussed in chapter 5, the US and the EU treat Vietnam as an NME in anti-dumping after examining and considering many aspects of Vietnam's transitional economy. These include "the level of government intervention in the economy", the currency of Vietnam "is not fully convertible", the privatisation of SOEs is slow and the questionable standards of the accounting system in Vietnam (United States Department of Commerce, 2002, p. 2). Additionally, all five anti-dumping experts who participated in interviews with the author agreed with the DOC to varying degrees. In this context, this section examines and discusses the main obstacles hindering Vietnam's ability to achieve market economy status, especially those in proving the market-based operations of Vietnamese exporters in anti-dumping investigations.

3.1 Vietnam's export practices and the involvement of the Vietnam Government

The role and the extent of government intervention in export practices have a direct impact on the view of anti-dumping investigating authorities as to whether exporters from Vietnam are over-supported by the government and whether such support causes export prices to be unfairly reduced when sold into their markets. This section introduces the role of the Vietnam Government in the export performance of the country as a whole, which indicates possible intervention in the export practices. Since Doi Moi in 1986, export-oriented development policies have helped Vietnam change itself from a closed, disconnected and backwards nation to an open, connected, and thriving nation.

The Doi Moi economic reconstruction program is intimately associated with this shift in policy from a centrally planned to a so-called 'socialist-oriented market economy' (Vuong, 2004). Despite numerous obstacles such as high inflation, socioeconomic instability and political unpredictability, this reform is considered to be one of the most effective policy reforms of Vietnam. According to data from the World Bank (n.d), from 1986 to 1989, Vietnam's GDP grew from 2.7 percent to 7.3 percent. Despite the 1997 Asian Financial Crisis and the 2007 Global Financial Crisis, yearly growth rate averaged 6.8 percent between 1990 and 2014 (Boughton, 2012; Ramskogler, 2014). Vietnam's annual export performance increased nearly three times more than its GDP growth during the last 30 years. During that time, economic reconstruction included a significant amount of governance change aimed at delivering growth-promoting policies (Dollar, 1992). Important export policies, such as amendments to company law and investment law, have also been introduced as part of the reform.

The transition from a centrally planned economy to a market-oriented economy in Vietnam provides an intriguing case for studying the impact of policy reforms. There is little doubt that industrialisation and trade liberalisation policies in Vietnam have had a favourable influence on the country's economic growth in general (Ohno, 2009; Leung, 2010). In reality, trade liberalisation has aided Vietnam's export development, which has increased dramatically in a short amount of time. In 2020, exports from Vietnam accounted for 1.35 percent of global total exports, which were only 0.6 percent in 1990 (Global Economy, n.d.). According to data from World Integrated Trade Solution (n.d.),

from 1995 to 2014, Vietnamese exports saw a significant shift. The percentage of agricultural goods in overall exports fell and was replaced by a substantial increase in industrial goods. Electrical items have risen from almost no export activity in 1995 to the leading export product class in 2014. The data also demonstrate the relative significance of leather, textiles and footwear goods in Vietnamese exports (World Integrated Trade Solution, n.d.). This is a trend that is typically seen in nations that are still in the early stages of export-oriented manufacturing.

In general, exports from Vietnam have grown significantly between 1990 and 2020. Over this period, the country's industrialisation has been reflected in the shift in its export product range. There has been a dramatic rise in the percentage of electrical and mechanical equipment in the market (Trading Economics, 2022). This has also happened in other nations in East Asia. This trend is expected to continue for some considerable time.

Stronger governance was widely acknowledged after a successful restoration strategy was implemented, the process of making decisions was decentralised, and individuals were given more legal rights to operate their own businesses (Athukorala, 2006). An era of significant economic expansion ensued as a result of these reforms in manufacturing motivations for businesses and other sectors of the economy. Economists have been particularly interested in the connection between commercial and institutional actions, although the degree of causation has not been agreed upon. Economic growth is strongly connected with improved institutions, according to Dollar and Kray (2003). Although there is difficulty in distinguishing between the influences on economic growth by commercial and institutional actions, both elements contribute to economic growth, nonetheless. According to Sekkat and Meon (2008), manufactured product exports are positively impacted by institutional quality, while non-manufactured product exports and overall exportation are unaffected. Levchenko (2007) demonstrates that developing countries cannot benefit from international commerce when the differences in institutions are regarded as an advantage. The differences in institutions are key predictors of export growth. In general, Rodrik (2003) describes the

link between institutions and commerce, in which trade liberalisation results in better institutional actions, while the institutional quality encourages commerce.

Provincial authorities, public entities, and all sectors of the economy were affected by the decentralisation movement. To recruit investments from overseas and enhance export performance, Vietnam focused on encouraging province-to-province rivalry. Since 2005 the views of companies on the Vietnam Provincial Competitiveness Index (PCI) have been regularly surveyed by the Vietnam Chamber of Commerce and Industry (VCCI) (2022, pp. 5–6). In this regard, how well provinces are doing in terms of economic management and institutional modernisation is ranked by the PCI. Additionally, a national questionnaire of the Vietnam Provincial Governance and Public Administration Performance Index (PAPI) has been carried out each year since 2009 (CECODES, VFF-CRT, RTA, & UNDP, 2022, pp. 2–3). The success of provincial governments in community and economic management is measured by the PAPI. The annual reports of the PAPI and the PCI are considered as prominent sources of statistics on the performance of provincial governments, even though they by non-governmental entities.

As a result of the country's administrative reforms, businesses now operate in a better economic environment. Private businesses grew by 18.9 percent annually between 2000 and 2015, while foreign-owned businesses grew by 14.7 percent annually over the same period (Vietnam General Statistic Office [VGSO], 2017). The government additionally enacted regulations to reduce post-entry cost, which might have an impact on the functioning of businesses. Therefore, post-entry expenditures have decreased dramatically, according to Malesky (2017). This is particularly important for companies with foreign investment. A multinational company's start-up processes in Vietnam have reduced from 58 days in 2010 to just 37 days in 2017. Since 2000, as a result of the reform, the Vietnam Government has made the procedure for registering new businesses easier. Vietnam Government has also been equalising the supports provided to all enterprises, in which the support provided to exporters is amended to be similar to the support provided to other enterprises. The introduction of a mandatory single-window office for each of Vietnam's over 11,000 cities and districts in 2003 was arguably one of

the biggest achievements. The concept of a single-window office was adopted by almost 99 percent of districts in 2009. An extensive variety of public services related to registration of business functions, issuing licences, enquiries, and requests for entry into certain commercial operations is provided at these single-window offices (OECD, 2011). There has been a dramatic growth in the number of manufacturing firms because of this reform program.

In terms of policy and reform, the Vietnam Government's role in export performance is considered to have been appropriate and, in the scope of this research, no questionable practices were found. This finding agrees with those of the previous chapters, in which neither the US nor the EU raised Vietnam's export policies in relation to its NME status. In addition, the previous chapters indicate that the investigating authorities did not find any kind of inappropriate intervention by the Vietnam Government in terms of its export performance. Nonetheless, in terms of commerce, it could be argued that the Vietnam Government's commitment to creating and maintaining a business-friendly environment was not sufficient. The outcomes of such efforts were not as expected, even though progress has been made in the efficiency of Vietnam's governance. Due to the CPV's domination in politics, civic responsibilities and openness remain inadequate. Advocates for a transparent administration would be generally unsatisfied with the current situation (Painter, 2014). A strategy that has proven successful for Vietnam in the past would not provide comparable results now, according to Pincus (2016) and Ohno (2009). Improving the facilitation for both local and international investors and including other stakeholders in the development of new policies, and creating a proper growth plan, are all necessary components of a new development strategy for Vietnam.

3.2 The existence of state-owned enterprises in Vietnam

One of the noticeable reasons why the US and EU investigating authorities have refused MET requests from Vietnamese exporters is the existence of SOEs, as SOEs receive 'inappropriate' support from the state. As a result, exporters who are SOEs can significantly reduce their export prices by way of advantages in taxes, land accessibility, resource allocations, credit, and connections with the government. Their production data would also show low production costs and low domestic prices. This would

unquestionably justify the use of surrogate data from surrogate countries by the US and EU anti-dumping investigating authorities because all price data from SOEs are distorted. To overcome its NME status, Vietnam must privatise and reduce its number of SOEs to a point where it is acceptable for the US and the EU to reconsider their position on this issue. In light of this, this section introduces the allocation of SOEs in Vietnam, efforts by the government to privatise them, and the current situation of SOEs in Vietnam. Vietnam's economic and investment environment varies greatly across different provinces and cities. The six areas that make up the nation of Vietnam are the Northern Midlands and Mountains, the Red River Delta, the North Central Region and Central Coast, the Central Highlands, the Southeast Region, and the Mekong River Delta. The economic climate and facilities of the Mekong River Delta and the Southeast Region have improved, and their marketplaces are huge and very competitive. However, bureaucracy is a major problem in all the northern regions of Vietnam, which are near Hanoi, the political capital. This region has huge marketplaces but also numerous SOEs (Vietnam Academy of Social Sciences, 2018). The markets in the central regions of Vietnam are quite limited and not very competitive, and their facilities are lacking. However, this region has the advantage of inexpensive resources and labour, but there is a great deal of confusion over the governing regulations. In terms of the unfair competitive advantages possessed by the SOEs, private enterprises suffer difficulties with real estate access, finance, and finding markets (Hakkala & Kokko, 2007).

According to VGSO (2020), up until 2019 Vietnam had 2,109 SOEs, 647,632 private enterprises, and 18,762 foreign invested enterprises. Compared to 2011–2015, the number of SOEs decreased by 33.5 per cent, while the number of private enterprises increased by 55.6 per cent. These numbers indicate a very positive pattern in the efforts by Vietnam to privatise SOEs. Despite this, private enterprises account the largest number of most businesses, but their revenues, capital, and human resources are overshadowed by foreign-owned companies and SOEs. Foreign-owned companies have the greatest average salary per worker and capital labour ratios, while private enterprises have the lowest (VGSO, 2020). It appears that Vietnam's labour laws might only reflect the matter of rent hiring and skills of workers from foreign-owned companies and SOEs, not all large enterprises. Notwithstanding, private businesses are becoming more

important to the development of Vietnam's economy, since they account for the majority of the total earnings, revenues, capital and labour.

One would expect that the proportion of funds of private enterprises raised via loans would be lower than that of SOEs, because private enterprises are more likely to experience financial difficulties. In 2019, enterprises with business and production outcomes increased their total amount of debt a little more than twofold. The debt rating of foreign invested companies increased 1.6 times, while the debt of private firms increased twofold, and the debt of SOEs increased 3.6 times (VGSO, 2020, p. 221). In 2019, SOEs had the lowest ratio of capital turnover at 0.4 times, while this ratio for private companies was 0.7 times, and the highest ratio (1) belonged to foreign invested companies. In total, Vietnam businesses achieved a capital turnover ratio of 0.6 times in 2019, which was equivalent to 2018's ratio (Vietnam Ministry of Planning and Investment, 2020, p. 105). To a certain degree, capital market inefficiencies might be indicated by the equitisation mechanisms of different types of enterprises. For example, SOEs can access inexpensive finance from institutional credit, while private enterprises struggle as they must depend on their own finances or other costly sources, as they have less access to bank loans than do SOEs.

The issue of misallocation of resources is also serious because of the presence of SOEs and the ease with which they may obtain resources (Hakkala & Kokko, 2007; Vo et al., 2011). In term of land ownership, labour, and finance, private enterprises and SOEs are known to experience unequal treatment. Although SOEs face stricter labour laws than private enterprises, they possess more industrial zones and enjoy easier access to formal sources of finance (Nguyen & Ramachandran, 2006; World Bank, 2005, 2008). The fragmentation of Vietnam's capital market affects the allocation of its labour force by producing significant pay disparities between employees in SOEs and non-SOE industries, and a two-tiered labour market for skilled workers. As a result, a decreased efficiency of labour allocation and the decreased motivation of workers to gain training and education impedes development (Phan & Coxhead, 2013).

The privatisation of SOEs in Vietnam created an issue as the ownership was transferred to workers and managers (who are insiders), rather than outside investors. This is

because it has concentrated on small-sized SOEs rather than large ones; therefore, the process has not been particularly effective (Sjoholm, 2006). Also, as a rule, the government maintains majority ownership in the privatised SOEs, and consequently there must be an improvement in the legal and governance context for privatisation to perform properly. Several prior studies have drawn different conclusions regarding the productivity of SOEs versus private companies. According to Vu (2003), the efficiency of technology utilisation of private enterprises was on average higher than that of SOEs. However, when it comes to productivity, both foreign investment companies and SOEs, due mainly to technology utilisation and significant investment, are more productive than private enterprises, according to Newman et al. (2009), who used Vietnam census data from 2001−2007 to draw their conclusions.

Vietnam's capital markets have been severely distorted by the country's SOEs. When it comes to obtaining loans, the SOEs are favoured by the four leading state-owned commercial banks while private companies find this process more difficult (Leung, 2009). Private companies are unable to participate in the new and underdeveloped stock market since it is reserved for huge SOEs. The informal finance sector is a source of money for private companies, although they also depend heavily on self-financing. Credit from state loan offerings, the public welfare fund, province development aid, and the Growth Support Fund has also been increasingly sought after by SOEs (Rosengard & Huynh, 2009). When compared to bank loans, which require proof of practical business strategies, a degree of transparency in the accounts and security, these sources of financing are seen as being 'less intrusive' (Hakkala & Kokko, 2007).

It is common in Vietnam to equitise SOEs in order to privatise them. Unfortunately, the equitisation process has decelerated due to several factors. There were approximately 2,600 equitised SOEs between 2003 and 2006, however, only approximately 70 of the remaining SOEs were equitised between 2009 and 2013 (Dang, Nguyen, & Taghizadeh-Hesary, 2020). Due to the downturn of Vietnam's stock market during the international economic recession of 2007–2008, SOEs were unable to execute pre-public offers, which resulted in more obstacles that slowed down the process of reform of SOEs. Another factor that prolonged the process of equitisation was that the big SOEs, which

remained and waited for privatisation during 2009–2013, shared the characteristics of significant debt commitments, organisational structures, and convoluted ownership structures. These characteristics meant that more planning time was needed to equitise these larger SOEs (VCCI, 2019). Many investors lost faith in the Vietnam Government's privatisation program due to the fact that the shares of the equitised SOEs were not listed on the stock market in a timely and appropriate way, and that most of these SOEs were still owned by the government.

The significance of divestiture returns has been notably apparent, even if there has been a decrease in the quantity of equitised SOEs. Approximately VND11,000 billion in SOE assets have been sold, with a profit of approximately VND10,500 billion, as reported by the Vietnam Ministry of Finance (2018a). The value of the return on authorised capital in 2016 was approximately VND18,800 trillion. Nonetheless, compared to the residual value of the surviving SOEs, the country's investment in privatisation is minuscule. Between 2011 and 2016, initial public offerings were announced by 426 SOEs. After this, the state retained ownership of approximately 81 percent of the entire authorised capital of these 426 SOEs. The remaining stakeholders were comprised of workers (1.6 percent), trade union organisations (0.6 percent), strategic financiers (7.3 percent), and other forms of investors. While the right and power of making decisions were preserved, strategic shareholders from the private sector had little leeway in restructuring such equitised SOEs for greater competitiveness. In practical terms, for investment-deprived and equitised SOEs, it is quite probable that private investors will have a reduced interest in such companies if the government retains a dominant share even after the equitisation process (Dang, Nguyen, & Taghizadeh-Hesary, 2020). In this context, private and external investors are likely to prefer SOEs in which the government's ownership is relatively small.

There are several concerns about the equitisation process, but auditing prior to equitisation is a major one. The waste of the country's capital invested in the SOEs, as well as the dispersion of the value of the SOEs before equitisation, are caused by the inefficiency of the SOEs' auditing procedures. The number of auditing procedures undertaken, in comparison with the number of SOEs that have been equitised, is still

relatively small. Between 2011 and 2016 only 21 of 543 equitised SOEs completed their auditing (Vietnam State Audit Office, 2017). The state's interests were negatively impacted by a number of inadequacies and restrictions discovered during audits and inspections, including inconsistencies in long-term accrued liabilities, tangible assets, stocks, property rights, the amount of investments in finance, trade advantages, and the pricing of intangible assets. The assessment approach to enhance the real worth of the country's capital of approximately VND9,600 billion, or around USD430 million, invested in the SOEs, was used by the government auditing authorities according to the findings of the audits (Vietnam State Audit Office, 2017).

The provincial government is now required to adopt and publish a plan for the use of land before and after equitisation, as one of the first stages in the equitisation procedure. Nevertheless, the whole procedure might be delayed if this first stage happens to be delayed. As Vietnam embarks on SOE privatisation, there have been suspicions that corruption in the provincial administrations is a major problem, as pointed out by Nguyen and Dijk (2012). Using survey data from 133 SOEs and 741 private companies, they determined that corruption levels in Vietnam may be influenced by publicly funded governance institutions (Nguyen & Dijk, 2012). Incentives for private sector growth, policy execution and uniformity, land availability, and entry fees are all closely linked to the degree of corruption at the provincial level. As a result, the equitisation procedure would be greatly facilitated by the improvement of the quality of provincial administration. This would help mitigate the negative impacts of the SOE equitisation process on the development and expansion of equitised SOEs.

The practice of SOE equitisation is hindered by a lack of clear information. Many government agencies are now compiling reports on the operations of SOEs. A national operations review of SOEs remains to be executed fully and appropriately, due to the diversity of the focus areas. A comprehensive list of SOEs can be found only in the Ministry of Planning and Investment and the Ministry of Finance's databases. However, information on the financial condition of SOEs in relation to the government budget shortfall and the debt of the country, as well as a comparison of the SOEs' effectiveness

with companies in similar industry sectors, are absent in the joint reports of the two ministries.

3.3 Accounting compliance in Vietnam

In anti-dumping investigations, Vietnamese exporters have faced many obstacles in proving the transparency and appropriateness of their financial practices and accounting reports. The current accounting standards of many Vietnamese exporters are the cause of this issue. However, in the past 20 years, Vietnam has made considerable progress in bringing its accounting standards in line with international standards and practices. For example, Vietnam has established linkages with professional accounting organisations worldwide, its accounting systems have undergone significant improvements, and the profession of finance and accounting in Vietnam has developed rapidly. Additionally, Vietnam has participated in the International Accounting Standards Board and its worldwide standardisation effort, through accepting the International Financial Reporting Standards (IFRS) (Vietnam Ministry of Finance, 2018b). With the intention of bringing the standards for accounting reporting more closely in line with the standards of financial practices, the outdated accounting system, which had been in use since 1988, was amended and revised by the Vietnam Ministry of Finance in 2006. The new commercial accounting system is mandatory for all enterprises in Vietnam, regardless of their registered status or ownership. According to a Ministry of Finance report, professional accountants and accounting academics were surveyed and interviewed in 2016 for their thoughts on the adoption method and operational plans of the IFRS in Vietnam up to 2025 (Vietnam Ministry of Finance et al., 2016).

There were no official organisations for accounting professionals in Vietnam, during the early advancements in Vietnamese accounting history, and the accountants of that time did not establish many professional groups (Bui, 2011). Therefore, it is arguable that no original and suitable standards for Vietnamese accounting practices existed at that time. To ensure the growth of the economy as the main mission of the accounting field, the Vietnam Ministry of Finance was responsible for monitoring, ruling, and overseeing the professional activities in accounting practices.

The results of the interviews carried out as part of this research show that 12 out of 15 exporters who participated in the interviews confirmed that they had many difficulties in proving their compliance with the IFRS, for the purposes of demonstrating their operations to be market-based under anti-dumping investigations. Furthermore, three of five anti-dumping experts who participated in the interviews also stated that Vietnamese exporters have had a very hard time in justifying their financial situations in anti-dumping investigations by the US, since there are many differences in accounting and finance standards between Vietnam and the US.

Each exporter in the interviews provided their opinions on the factors which might affect their financial activities and accounting reports. Factors such as the efficiency of the data transmission network, the legislative restrictions on how exporters comply with standards of financial and accounting practices, and the usage of accounting data outside of the company are all important, in determining whether a company should implement an accounting system in accordance with current international accounting standards. There are also factors relating to limited funding, the requirement for an increase in the standard of documentation, the company size, and inefficient administrative skills.

Financial data supplied by small-to-medium-sized businesses that disclose their practices is rarely used externally. This issue is discussed by Dang, Marriott, and Marriott (2006), who found that for smaller enterprises it would be hard to predict whether full adoption of international standards of accounting system is practical. According to Collis et al. (2013), the adoption of accounting standards is hampered by the ineffectiveness of managers and insufficient accounting expertise. These results are corroborated by this investigation. Furthermore, Collis et al. (2013) note that the most critical elements impacting the adoption of accounting standards were the accounting employees' abilities, and legislative criteria. When it comes to financial reporting, other aspects matter more than an enterprise's revenue evaluation or the size of the enterprise.

Ten of the 15 interviewed exporters advised that accounting policies were the primary driving force for the adoption of national accounting standards in their businesses. Despite the obvious benefits of improved data in compliance with accounting rules in

practice, it is surprising that the exporters did not see the benefits of improved data. In this regard, the benefits of improved data were not the main reason that the interviewed exporters adopted national accounting standards, which was noted by more than half the exporters in the interviews.

In Vietnam, there are different accounting requirements for small and medium-sized enterprises (SMEs) and for larger enterprises. Because of the complexity of contemporary accounting standards, the accounting report practices of SMEs have been burdened by higher costs. This is consistent with the findings of Joshi and Ramadhan (2002), who found that data distribution costs, stationery expenses, charges for office supplies, software costs for the accounting system, costs of legal services, accountant fees, and miscellaneous spending are the major expenses associated with the implementation of accounting systems. The biggest cost to conform with accounting standards is probably the accountant's fee. According to a study by Collis and Jarvis (2000), the data distribution costs are not considered problematic, since the number of SME yearly account users is relatively small.

Nonetheless, there are many benefits in the application and compliance of accounting standards. Such compliance would support financial statements such as tax returns and credit applications, as well as comply with regulatory obligations, improve the operation and portray a more positive public image (Joshi & Ramadhan, 2002). Based on the interviews with Vietnamese exporters, it appears they perceive that satisfying legal obligations and supporting tax statements are the primary advantages of adopting accounting standards. The connection between the expenses and the benefits of adopting accounting standards is of very limited interest to exporters, even if they may have recognised its features. Sarapaivanich and Kotey (2006) observe that it would be hard for enterprises to evaluate the advantages of adopting an accounting system to the expenses of running it, although businesses might be aware of the advantages of complying with national accounting standards. The provision of data is considered an indispensable factor for meeting tax declaration obligations, and accountant costs are recognised as a major drawback.

Conformity to accounting standards appears to not be prioritised practice of the exporters who participated in the interviews. The view of the exporters relating to accounting standards was primarily driven by the views of external users of financial data and legal obligations. The views of the exporters were not affected by the assessment of the abilities of accountants, or the companies' management, or the connection between the expense of conforming to accounting standards and the benefit it brings. When it comes to the laws and standards of accounting, it is not surprising that SMEs are unsure of the expenses and gains involved with the implementation of those standards, and they lack the facilities and expertise necessary to do so.

To proceed to achieve an operation on market economy conditions, it currently appears that a major obstacle which Vietnamese exporters should address is their accounting system. The questionable standards of Vietnamese exporters' accounting system are one of the major reasons which the DOC addressed while determining that Vietnamese exporter do not fully operate with market-based conditions. In recent years, Vietnam has made efforts to strengthen capital market supervision and enforcement of accounting standards. In the *Decision No. 345/QĐ-BTC*, the Vietnam Ministry of Finance (2020) considered adopting IFRS (at least for public interest business entities) by 2025. In this regard, the official roadmap is as follow: 1) From 2020 to 2021 is the preparation; 2) From 2022 to 2025 is the phase of voluntary adoption, in which the Ministry of Finance recommends all Vietnamese enterprises (including Vietnamese exporters) to adopt IFRS voluntarily; 3) After 2025, the IFRS shall be mandatory for particular types of enterprise.

The EU already approved the IFRS in 2002 as the mandatory financial reporting rules for the accounting and audited financial statements of all European corporations, whose debt or equity securities exchange on a regulatory market in Europe. The IFRS standards came into force in 2005 in the EU. Therefore, if Vietnamese exporters successfully adopt the IFRS, it is highly likely that they may satisfy the criteria of financial and accounting standards, in their requests for MET in anti-dumping investigations conducted by the EC. However, in the US, the Financial Accounting Standards Board (FASB) is the body that is responsible for establishing best practises for financial

reporting, and these practises are arranged within the context of the Generally Accepted Accounting Principles (GAAP) (FASB, n.d.). When US company is putting together its financial statements, both it and its accountants are required to follow the GAAP, which are a standard set of accounting concepts, rules, and processes (US Securities and Exchange Commission, n.d.). In this regard, the US Securities and Exchange Commission announced their intention to adopt the IFRS into the US financial reporting system (US Securities and Exchange Commission, 2019); however, the progress is not completed yet and therefore the US is still using the GAAP at the moment.

The major distinction between the two accounting systems is that and the IFRS is principles-based, while the US's GAAP is rules-based. There appears to be a worldwide preference for principles-based accounting system, as it is typically preferable to modify accounting principles to an enterprise's transactions, rather than to change the company's operations to fit every rule of the accounting system, and the principles-based IFRS allows this practice (Beerbaum, 2021). The primary benefit of the principles based IFRS is that its broad standards may be applied in a number of situations. Exact requirements might occasionally force enterprises' managers to modify statements to meet what is required. On the other hand, pursuant to the rule-based GAAP, enterprises and their accountants must follow the rules while preparing their financial and accounting reports, which requires the US enterprises to adjust their operations to fit the rules of GAAP (FASB, n.d.). When tight rules must be implemented, such as those in the rule-based GAAP, the potential of litigation is reduced. A set of rules can improve the precision and eliminate inconsistency, which can lead to aggressive accounting choices by enterprises' management. In light of this, even if Vietnamese exporters can prove their operations in accordance with the international standards of the IFRS, they should consider the differences between the IFRS and the US's GAAP when demonstrating their market-based operations to the DOC in anti-dumping investigations.

3.4 Vietnam's currency management and the convertibility of Vietnamese currency

The US (DOC, 2002, p. 2) and the EU[64] consider currency convertibility another major reason as to why they should treat Vietnam as an NME in anti-dumping investigations and proceedings. This section examines Vietnam's currency management and the convertibility of the Vietnam dong (VND). It discusses the background of the convertibility and exchange of Vietnamese currency, as well as contemporary issues.

The fluctuation of the exchange rate between the VND and the US dollar (USD) directly impacts the prices and costs of exports and imports between the two countries. Currently, VND20,000 is approximately equal to USD1, although this rate will always fluctuate. The convertibility of currency affects export prices directly, which might cause anti-dumping investigating authorities to seriously consider the justification of export prices in terms of the exchange rate between the VND and their own currency. Many countries' state or federal banks practice currency manipulation to some extent, and understanding how Vietnam manages the convertibility of the VND may assist Vietnamese exporters in anti-dumping investigations and proceedings.

In recent years, there has been an increase in Vietnam's current trading surplus, mainly from exports to the US. In the case of Vietnam, the US Department of the Treasury (the Treasury) (2020) suspected that the Vietnamese Government "conducted large-scale and protracted intervention, much more than in previous periods, to prevent appreciation of the dong" (p. 3). Such practices might provide Vietnamese exporters with a benefit in pricing, and the Treasury claimed that, in order to unnaturally inflate the exports from Vietnam, the VND has been maintained at an absurdly low rate. This claim by the US Treasury might allow the DOC to continue its presumption that the currency convertibility between the VND and the USD was unreasonably manipulated by Vietnam, and excessive manipulation of currency convertibility is an undeniable trait of

[64] In *Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community*, the EU considers exchange rate conversion to be an important factor in the determination of whether a country is a market economy or not.

an NME (Greene & Isard, 1991). This could make it difficult for Vietnamese exporters to demonstrate their market-based operations in anti-dumping investigations.

Whether a weak currency generally hurts imports and helps exports is a complex issue. A study of the effect of currency depreciation was conducted by the International Economy (2016), who surveyed 30 experts. Most experts believe that if a country does not depend excessively on exportation, currency depreciation has an effect (The International Economy, 2016). The currency exchange rate should increase if the country has a substantial export surplus, as is the norm. The weakening of a currency through reducing interest rates, which most central banks around the world do on a regular basis to stimulate economic growth, should likewise reduce the value of that currency from a foreign investor's point of view (Arslan & Cantu, 2019).

By forcing interest rates to decrease and so devaluing their currency, most major economies might be seen as manipulators of their own currencies. Vietnam, by having a suspicious trade surplus with the US in 2020, was considered by the US as a currency manipulator (US Census Bureau, 2021a). The US considered evidence such as increasingly buying foreign currencies and a big surplus of trade as examples of currency manipulation. In this regard, roughly 6 percent of Vietnam's total GDP of USD340 billion was generated by trade surplus in 2020, which equals approximately USD20 billion (IMF, 2021a). When compared with other countries, this surplus is rather substantial. For instance, the Netherlands' 2019 trade surplus was 8 percent of GDP, while the trade surplus in the same year for Germany was 6.8 percent, and for China it was only 3 percent. However, the IMF predicted that Vietnam's current account surplus in 2020 would be just 2.2 percent of GDP, dropping from 3.8 percent in 2019. It would be normal to not consider a 2.2 percent surplus of the GDP an excess in most cases (IMF, 2021b).

In fact, while Vietnam–US trade was balanced during the period of 2015–2019, Vietnam had a noticeable trade surplus from 2020 to early 2021. The relocation of many foreign exporters' manufacturers to Vietnam was apparently the result of China's increasing labour costs, and the imposition of tariffs on Chinese exports by the US. In the first three months of 2021, exports from Vietnam rose by 22 percent, while imports

rose by 26 percent (Vietnam General Statistics Office, 2021b). Surpluses in trade do not lead to a sustainable true exchange rate, contrary to expectations. To maintain a constant true exchange rate, the State Bank of Vietnam must efficiently acquire USD in the open market (Asian Development Bank, 2020). By doing this, however, the State Bank of Vietnam unconsciously fell within the scope of the US Treasury's consideration that suspicious trade surplus and purchase of foreign currency might be evidences of currency manipulation.

When it comes to US currency manipulation claims, in 2020, the US Trade Representative (USTR) initiated an investigation regarding Vietnam's acts, policies, and practices related to the valuation of its currency, which include the issue of convertibility of Vietnamese currency (US Trade Representative, 2020). In this initiation, the USTR was considering that "the Government of Vietnam, through the State Bank of Vietnam (SBV), tightly manages the value of its currency - the dong. The SBV's management of Vietnam's currency is closely tied to the U.S. dollar. Available analysis indicates that Vietnam's currency has been undervalued over the past three years" (2020, pp. 63637–8). However, after considerable effort of cooperation between Vietnam and the US, in 2021, the USTR issued the *Determination on Action and Ongoing Monitoring: Vietnam's Acts, Policies, and Practices Related to Currency Valuation*, which stated that:

> On July 19, 2021, Treasury and the SBV issued a joint statement announcing that they had reached an agreement … The U.S. Trade Representative has found that that the Treasury-SBV agreement and the measures of Vietnam called for in the agreement provide a satisfactory resolution of the matter subject to investigation. Accordingly, the U.S. Trade Representative has determined under Section 304 of the Trade Act that no action at this time is appropriate in this investigation. (US Trade Representative, 2021, p. 40676)

By this conclusion of the USTR, it would appear that the issue of Vietnamese currency's convertibility has for the time being been resolved. This achievement might be a considerable support for Vietnamese exporters in future anti-dumping investigations conducted by the DOC. Even though there has yet to be any official statement from the

DOC on this matter, regarding their consideration of the Vietnamese currency's convertibility in anti-dumping investigations, however, it is positive that the USTR's conclusion in 2021 above can be cited to prove that the currency convertibility of VND should no longer be an issue in US anti-dumping investigations over Vietnamese exports. Nonetheless, because the State Bank of Vietnam performs currency appreciation and depreciation annually as part of its management of the VND, and depending on the economic and political relationship between Vietnam and the US, there is always a possibility that another currency manipulation investigation might be initiated by the US Treasury into the exchange rate of the VND.

4. Conclusion

This chapter has identified that the Vietnam Government is overly supportive of SOEs by providing tax advantages, land accessibility, resource allocation, loans and credit and other advantages. It has also identified that many Vietnamese exporters are unaware of the benefits of conforming with international accounting standards in the context of anti-dumping investigations. Therefore, the issues of SOEs and accounting standards in Vietnam might continue to hinder the demonstration by Vietnamese exporters of their market-based operations. However, it is evident that the issue of currency manipulation has been successfully resolved by the recent agreement between the State Bank of Vietnam and the US Treasury.

Furthermore, the pattern of export promotion in Vietnam during the last 30 years under market-oriented reforms substantially reflects the country's efforts in developing a market-oriented policy and facilitating international trade. Notwithstanding, the increase in export volume also resulted in a rise in the number of anti-dumping investigations towards Vietnamese exports. Currently, the absence of political pledges to reform existing vague WTO anti-dumping rules creates difficulties to appropriately address the issues in anti-dumping investigation procedures conducted by the US and the EU. This highlights the need for Vietnam to complete its market-based economy reform plan actively and promptly.

At the same time, Vietnam has steadily improved economic and political relations with the US and the EU. Significant improvements to investment and trade policy frameworks, as well as participation in the WTO, have been crucial in laying the groundwork for connecting Vietnamese manufacturing to the US, EU, and other global trading networks, while alleviating the risks and negative impacts of anti-dumping measures from trade partners. The next chapter concludes the findings of this research and provides relevant recommendations for Vietnamese exporters and the Vietnamese Government.

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CHAPTER 8 - CONCLUSION

1. Introduction

This chapter concludes the research study. It provides a summary of the research project and the key research findings in relation to the stated research objectives and the central research question. This chapter also provides relevant recommendations regarding:

- practical options for Vietnamese exporters to improve their competence as defendants/respondents in anti-dumping investigations and proceedings brought by the US and the EU;
- ways in which the Vietnam Government can overcome its NME status and therefore assist Vietnamese exporters involved in anti-dumping investigations and proceedings.

Finally, the chapter provides some directions for further research on this topic.

2. An overview of the research study

This research has focused on analysing legal, procedural and other issues relating to the NME status of countries such as Vietnam in the context of anti-dumping investigations and proceedings specifically conducted by the US and the EU. These are two of Vietnam's key trading partners that both treat Vietnam as an NME for the purposes of anti-dumping investigations and proceedings. The literature review has demonstrated that the NME status of countries (and Vietnam in particular) in the context of anti-dumping has not been adequately researched and addressed. It identified several gaps in the literature and highlighted a range of issues and areas for analysis, which has been pursued in this research. Based on the outcomes of the literature review, several specific research objectives were developed to fill the gaps in the existing literature and address the issues identified.

The objectives of this research project were to:

1. analyse the policies and processes of anti-dumping investigations under the WTO laws including those involving NMEs
2. examine legal and procedural aspects of anti-dumping investigations and proceedings against NME countries by the US and the EU, and determine to what extent their laws and practices are consistent and compliant with the WTO laws
3. identify any specific aspects of anti-dumping investigations and proceedings conducted by the US and the EU against NME countries that may negatively impact the outcome of such investigations for the NME
4. examine WTO anti-dumping dispute settlement procedures and WTO jurisprudence as they relate to NMEs generally and Vietnam in particular
5. analyse relevant aspects of Vietnam's transitional economy and the Vietnam Government's level of intervention in the market that may impact the conduct and outcome of anti-dumping investigations and proceedings
6. provide recommendations for Vietnamese exporters and the Vietnam Government to support their defence of future anti-dumping investigations.

The methodology adopted for the research (addressed in chapter 3) was qualitative and data was collected primarily using desk-based study, supplemented by interviews with anti-dumping experts and Vietnamese exporters and government officials. It involved an examination and analysis of international law pertaining to anti-dumping, the US and EU anti-dumping laws and investigation procedures, analysis of the WTO anti-dumping dispute settlement procedures and related WTO jurisprudence, as well as the analysis of Vietnam's transition to a market economy. Using this research methodology, the research objectives were achieved, resulting in key findings.

3. Key research findings

The analysis in chapters 4 to 7 addressed the first five research objectives. The sixth research objective, which provides recommendations for Vietnamese exporters and the Vietnam Government, is addressed at the end of this section.

3.1 Analysis of the WTO anti-dumping law and the NME status of Vietnam

To address the first research objective, chapter 4 analysed the WTO law on anti-dumping, including international rules on the conduct of anti-dumping investigations, as well as the origin of NME treatment under international law and the reasons for Vietnam's NME status in anti-dumping investigations. The international law on anti-dumping is contained in two international agreements, namely the GATT 1947 and the ADA. Analysis of the relevant GAT 1947 and ADA provisions showed that the typical process of anti-dumping investigations is similar for both NMEs and non-NMEs and involves:

1. the establishment of a normal value of the product when sold in the domestic market of the exporting country
2. the establishment of the export price of the product
3. a comparison of the export price and the established normal value
4. ascertaining whether the domestic industry of the importing country is suffering injury because of the dumped imports.

However, the research identified that the GATT 1947 allows WTO members to adopt special procedures for anti-dumping investigations involving exports from NMEs, which provides them with some discretion in the way they conduct those anti-dumping investigations. At the same time, the ADA requires anti-dumping investigations to be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests. Both the US and EU have developed their own specific methodologies for determining the normal value of exports from NMEs. This methodology is also applied to Vietnam, which consented to be classified as an NME for anti-dumping investigation purposes as part of its accession to the WTO.

3.2 Anti-dumping investigations and proceedings conducted by the US and the EU

Chapter 5 addressed the second and third research objectives by analysing the US and EU anti-dumping laws, investigation procedures and methodologies for determining anti-dumping measures. This chapter also examined the experiences of Vietnamese

exporters involved in anti-dumping investigations including the typical process that Vietnamese exporters undergo when participating in such investigations.

The research found that the US and EU anti-dumping laws originated in the early 1900s and that they predate international anti-dumping laws. The analysis demonstrated that both the US and EU have developed their own methodologies for determining the normal value of exports from NMEs and it was concluded that overall, those laws, procedures and methodologies are consistent with their WTO obligations. However, the US and the EU have wide discretion under their domestic laws to choose which country will be the surrogate country in any given instance, which often results in investigating authorities picking a surrogate country which does not accurately reflect the economic conditions of the NME in question. The analysis has shown that the data from a surrogate country creates an unpredictable normal value, which might inflate the dumping margin in the determination and ultimately lead to the imposition of a higher anti-dumping duty. Therefore, it was concluded that the NME status of countries such as Vietnam negatively impacts the anti-dumping investigations conducted by the US and EU authorities. The analysis also found that the criteria for the selection of the surrogate country used by the US and EU authorities are not sufficiently clear, and that it is impossible for an exporter to accurately predict which country will be used by the investigating authority as the selected surrogate country.

The analysis further demonstrated that the investigating authorities have broad discretion in choosing how many exporters are to be examined during an investigation, which often results in a higher duty rate for exporters from an NME. The research revealed that, regardless of whether NME exporters involved in an investigation cooperate with investigating authorities, an 'entity-wide rate' calculated on the average export price of all NME exporters will be imposed, rather than a specific duty rate. This increases the possibility of the investigation concluding that dumping has occurred.

The analysis in chapter 5 identified several factors that the US and EU authorities consider when determining whether a country is an NME in anti-dumping investigations, which are:

1. the government's ownership and control of exporting enterprises
2. the accounting standards used by the exporters to demonstrate their costs and prices
3. currency convertibility in relation to the USD and/or Euro
4. the government's intervention in production and exports.

All these factors impact on the conduct and outcomes of anti-dumping investigations involving NMEs.

In addition, these factors are important in that they are also considered by investigating authorities when they are assessing operations of individual exporters selected for an anti-dumping investigation. This is because exporters may be able to demonstrate that they are operating under market-based conditions and receive a special anti-dumping duty rate based on their specific operations rather than being subjected to an 'entity-wide rate'.

The interviews with Vietnamese exporters showed a general lack of awareness of anti-dumping remedies among the exporters. Consequently, it is apparent that Vietnamese exporters experience many difficulties in demonstrating that they operate under market economy conditions. The interviews with anti-dumping experts confirmed that the NME treatment by the US and the EU in anti-dumping investigations and proceedings towards Vietnam is a strict determination, but not inappropriate, because Vietnam's economy is still in transition and does not yet meet all the conditions of a market-based economy. However, discretions in the practices of the DOC and the EC highlighted a number of practical issues, which were challenged at the WTO DSB.

3.3 The WTO DSB rulings over anti-dumping practices of the US and the EU

The fourth research objective was addressed in chapter 6, which analysed WTO anti-dumping dispute settlement and relevant WTO jurisprudence involving NMEs. The analysis in chapter 6 also addressed the question of whether the US and EU anti-dumping laws and investigation procedures are consistent and compliant with WTO laws.

The analysis in chapter 6 confirmed that the US and EU practices for the most part are consistent with the ADA provisions. However, some aspects were ruled by the DSB to be inconsistent with the ADA, which are 'zeroing', limited examination, surrogate country selection, and the imposition of the 'entity-wide rate.' First, in relation to the US' practice of 'zeroing', which in effect inflates or even creates positive dumping margins, the WTO jurisprudence demonstrates that the DSB has continuously expressed their disapproval of such a practice. However, the research found that the DOC still applies zeroing in anti-dumping investigations when it determines that targeted dumping is found. Second, in relation to the practice of limited examination, in the US, the DOC only examines data from some exporters who are mandatory respondents selected by the DOC, and in the EU, the EC only chooses a small number of exporters for their sample. Third, it was also demonstrated that the discretion of investigating authorities often results in unpredictability and inconsistency in the selection of surrogate countries, which has been successfully challenged by Vietnam and China at the WTO in several cases. Fourth, the imposition of a single 'entity-wide rate' on all NME exporters involved in any given case usually results in unreasonably high duty rates, which disadvantages Vietnamese (and other NMEs) exporters.

Another problematic aspect found during the analysis relates to 'concurrent remedies', where both anti-dumping and countervailing duties are imposed on one imported product. In this practice, the normal value is determined by the costs reflecting an unsubsidised amount from the data of the surrogate country, but the export price of the NME exporters is not adjusted and still reflects subsidies. This has the effect of inflating the dumping margin as a result of the comparison between the normal value and the export price. Consequently, if a countervailing duty is imposed in this case, it would constitute a double or concurrent remedy since it partly overlaps with the anti-dumping duty.

3.4 The transition economy of Vietnam

The fifth research objective was addressed in chapter 7, which analysed:

- relevant aspects of Vietnam's transitional economy

- the level of the Vietnam Government's intervention in the market
- the government support provided to any individual exporters with a particular emphasis/focus on factors (identified in chapter 5) considered by the US and EU authorities when determining whether a country is an NME
- whether an exporter is operating under market economy conditions for the purposes of anti-dumping investigations.

The analysis in chapter 7 found that the Vietnam Government is overly supportive of SOEs, providing tax advantages, land accessibility, resource allocation, loans and credit, and other advantages. The research demonstrated that because of this extensive government support, exporters that are SOEs can considerably reduce their production costs and consequently sell or export their products at lower prices. The analysis has also shown that while Vietnam has been privatising the SOEs, for large SOEs, this process has been slow and includes inefficient auditing procedures before privatisation. In this regard, there remains a considerable proportion of large SOEs operating in Vietnam.

The research found that many Vietnamese exporters are unaware of the benefits of conforming with international accounting standards, and many of them appear to lack the resources and expertise to do so. The analysis pointed out that many firms have difficulty in complying with the international standards of the IFRS. The research found that the application and compliance of international accounting standards would support Vietnamese exporters' financial statements, such as tax returns and credit applications, in their replies to questionnaires from the US and the EU investigating authorities.

The findings in chapter 7 also show that the convertibility of currency directly affects export prices. Practices such as sudden buying up of foreign currencies and sudden increases in Vietnam's trade surplus may be seen as indicators of currency manipulation, which may result in currency exchange rate fluctuations and ultimately lower export prices of Vietnamese goods. Therefore, investigating authorities are more likely to find that dumping has occurred. Similarly, by forcing interest rates to decrease and so devaluing the VND, the Vietnam State Bank might be considered to be manipulating Vietnamese currency, which may contribute to the determination by the investigating authorities that exporters are not operating under market-based conditions.

The analysis in chapter 7 also found that the Vietnam Government has introduced and implemented an overall economic reform in which export policies have been amended to conform with contemporary trends in international trade. As a result, Vietnam's annual export performance between 1990 and 2020 increased nearly three times more than its GDP in the same period. It was also found that the amendments to enterprise law in Vietnam require the Vietnam Government to provide equal support to all enterprises whether they are exporters or not. While this might avoid the presumption that Vietnamese exporters receive excessive government supports, it is unlikely that this alone would help exporters demonstrate that they operate under market-based conditions.

3.5 Recommendations for Vietnamese exporters and Vietnam Government

This section addresses the sixth objective of the research project and provides recommendations for Vietnamese exporters and the Vietnam Government on the following:

- practical options for Vietnamese exporters to improve their competence as defendants/respondents in anti-dumping investigations and proceedings brought by the US and the EU;
- ways in which the Vietnam Government can overcome its NME status and therefore assist Vietnamese exporters involved in anti-dumping investigations and proceedings.

3.5.1 Recommendations for Vietnamese exporters

To demonstrate operation under market economy conditions, and to improve Vietnamese exporters' competence as defendants/respondents in anti-dumping investigations and proceedings brought by the US and the EU, the following recommendations are provided to Vietnamese exporters:

- Vietnamese exporters should fully adopt the international standards of the IFRS, which include the accounting standards used by the EU. However, in doing so, exporters should consider the differences between the IFRS and the US' GAAP

while proving their market-based operations to the DOC in anti-dumping investigations. It is also recommended that when replying to the DOC's questionnaire in anti-dumping investigations, Vietnamese exporters should clearly emphasise how their financial and accounting practices, and reports, are compatible with the accounting rules and standards contained in GAAP.

- To demonstrate that they are operating under market economy conditions, Vietnamese exporters need to be prepared to provide full details of their shareholders to the investigating authorities. However, if an exporter has SOEs among its shareholders, the likelihood remains that their claim to be operating under market-based conditions will most likely be rejected regardless of the amount of the SOE's shareholding. Therefore, in such situations, it may be worthwhile for exporters to request an individual examination and a separate duty rate (instead of being subjected to an 'entity-wide rate', which is usually higher), which they are entitled to do, rather than requesting the investigating authority treat them as operating under market-based conditions.
- In general, Vietnamese exporters need to increase their awareness and understanding of anti-dumping investigation procedures and the potential effect of anti-dumping measures, which might be imposed on their exports, in accordance with the ADA as well as the domestic laws of the US and the EU. It is recommended that Vietnamese exporters should seek technical and legal advice not only from Vietnamese public organisations and relevant trade associations, but also from anti-dumping counsellors and/or lawyers in the country in which the anti-dumping investigation was initiated. These counsellors/lawyers should have a better understanding of the procedures of their own investigating authorities, be fluent in the language of the importing country, and have the relevant expertise of the legal and economic standards of the importing country. The only drawback of this practice is that it would increase the expenses of Vietnamese exporters. Nevertheless, by hiring a lawyer from the importing country who specialises in anti-dumping, it should be easier for Vietnamese exporters to establish reserve funds in the importing country, in case investigating authorities request a cash deposit for anti-dumping duty responsibility. This would also help Vietnamese

exporters to actively cooperate with the investigating authorities and increase the speed and quality of their responses.

- Lastly, a long-term benefit for Vietnamese exporters would be to improve their export's competitiveness by diversifying their export plans to reach different markets, and increasing the quality of their products, rather than focusing on lowering the export price.

3.5.2 Recommendations for Vietnam Government

To efficiently address the specific issues in this research relating to NME status in anti-dumping proceedings and to support Vietnamese exporters (without intervention in the exporters' operations), the recommendations for the Vietnam Government are as follows:

- Vietnam should speed up its transition plan to achieve a market-based economy as soon as possible. While this is a significant matter, it is recommended that Vietnam prioritise privatisation plans for all remaining SOEs by equitising them into joint-stock enterprises.
- Vietnam's State Bank should cooperate closely with the US Treasury to improve the transparency of any change of the convertibility between the VND and the USD. This should serve to avoid any future currency manipulation investigation by the US Treasury, which directly affects the DOC's determination regarding Vietnam's NME status and its determination regarding whether the exporters' operation was fully in accordance with market economy conditions.
- Support from the Vietnam Government to Vietnamese exporters should be limited in scope to the provision of legal and technical advice.
- As the NME provision in the Vietnam's Accession Protocol to the WTO expired in 2018, there should be new progress in achieving market economy status for Vietnam in anti-dumping investigations and proceedings conducted by other WTO Members. It is recommended that Vietnam should actively and progressively include this matter in upcoming WTO multilateral negotiations, as well as in bilateral negotiations with the US and the EU.

4. Suggestions for future research

Vietnam has made positive economic achievements in recent years. This has improved the likelihood that it will achieve a market economy status in the near future. In fact, the economic and political relationships between Vietnam and the US/EU is likely to improve at a fast pace, considering how the Vietnam – US and Vietnam – EU relationships have strengthened over the last two decades. Therefore, one area of potential future research is the change in Vietnam's NME treatment in anti-dumping investigations and proceedings by the US and the EU, as a direct result of the changes in the economic and political relationships between the countries. Future research might also examine the US practice of zeroing in the case of targeted dumping, and how the WTO DSB should consider and rule over such a practice. The practical issues of the EU's 2017 amendment to its anti-dumping laws are also another potential area for future research.

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APPENDIX A. Interview Protocol for Vietnamese exporters

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Interview No._____

Date_____/_____/_____

INTERVIEW PROTOCOL FOR VIETNAMESE EXPORTERS

Thank you for completing the consent form and attending this interview today. I appreciate your participation. I am Pham Duy Anh Huynh, a PhD candidate at the Centre for Customs and Excise Studies, Charles Sturt University.

The interview will take approximately 45-60 minutes focusing on your experience and knowledge of the anti-dumping investigations and proceedings under the World Trade Organization (WTO) rules, particularly the non-market economy (NME) treatment of Vietnam in anti-dumping investigations and proceedings.

Can I confirm that you still agree to participate in this interview and have it recorded or have me take notes?

Can I also confirm that you understand you can stop the interview at any point, or refuse to answer any question?

Finally, can I check that you have no unanswered questions about your participation in the project?

1. How many anti-dumping investigations initiated by the United States (US) and/or the European Union (EU) has your company been involved in and what were the export product(s) under investigation?

2. When were those investigations and proceedings concluded and what were the outcomes?

3. Was your company treated as an exporter from an NME in those anti-dumping investigations?

4. Were there any other anti-dumping investigations involving your company in which the investigating authorities from the US, the EU, and any other WTO member States treated your company as an exporter operating under market-based conditions?

5. Further to question 4 above, was that treatment (non-NME) automatically applied to your company or your company had successfully proved that it fully operates under market-based conditions?

6. Do you think the NME treatment/status of Vietnam in anti-dumping investigations and proceedings discriminatory? Why?

7. How many anti-dumping investigations and proceedings have you been personally handled or been involved in on behalf of your company?

8. Are you and/or other relevant staff of your company familiar with the WTO Anti-Dumping Agreement and related anti-dumping investigation procedures and do you think the current procedures are satisfactory?

9. From your company's perspective, what key challenges and problems arise in anti-dumping investigations and proceedings?

10. In your opinion, how can these challenges be addressed in Vietnam and who should be involved?

11. Did you seek any legal advice, consultation, and/or other technical support from third parties (e.g. legal firms, anti-dumping experts, national industry associations in Vietnam and/or Vietnamese Government agencies) during anti-dumping investigations and proceedings involving your company? If so, please provide details on the parties that were involved and the nature of support/assistant received?

12. Is the current level of assistance provided to Vietnamese exporters by Vietnamese Government or Vietnamese industry associations appropriate or sufficient? Why/why not?

13. How should Vietnamese Government as well as national industry associations (including chambers of commerce) appropriately assist Vietnamese exporters in responding to anti-dumping investigations? What is the appropriate or sufficient level of assistance/support that should be provided to Vietnamese exporters?

14. Does your company have any specific internal guidelines or policies on what to do (what steps to take) if your company is a subject of an anti-dumping investigation, including guidelines on how to respond to the requests from investigating authorities and better defend your company's interest(s)?

15. Are you aware of any other specific guidelines in Vietnam or any countries that can assist exporters involved in an anti-dumping investigation including on what steps a company should take and how to respond to the requests of an investigating authority and better defend their interests?

16. Please specify any best practices you may have developed or be familiar with and/or any lessons learned in those anti-dumping investigation(s)?

17. Do you think the NME status of Vietnam in those anti-dumping cases disadvantaged your company's position or negatively impacted on your company? If so, please explain why?

18. Do you think the NME treatment applied to Vietnamese exporters in anti-dumping investigations and proceedings discriminatory? Why?

19. Do you know if there are any specific reasons (such as political will, sensitiveness, regulation environment, and economic competitiveness) which may

lead/have led to the use of NME treatment of Vietnam in anti-dumping investigations, and that hinder you from successfully demonstrating that your company fully operates under market-based conditions?

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APPENDIX B. Interview Protocol for Vietnamese officials

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Interview No._____

Date_____/_____/_____

INTERVIEW PROTOCOL FOR VIETNAMESE GOVERNMENT OFFICIALS

Thank you for completing the consent form and attending this interview today. I appreciate your participation. I am Pham Duy Anh Huynh, a PhD candidate at the Centre for Customs and Excise Studies, Charles Sturt University.

The interview will take approximately 45-60 minutes focusing on your experience and knowledge of the anti-dumping investigations and proceedings under the World Trade Organization (WTO) rules, particularly the non-market economy (NME) treatment of Vietnam in anti-dumping investigations and proceedings.

Can I confirm that you still agree to participate in this interview and have it recorded or have me take notes?

Can I also confirm that you understand you can stop the interview at any point, or refuse to answer any question?

Finally, can I check that you have no unanswered questions about your participation in the project?

1. What is the role of your organisation/agency in anti-dumping investigations and proceedings initiated by other WTO member States, and what is your personal duties in that regard?

2. How long have you been working in your current position and how many anti-dumping investigations and proceedings have you been personally involved in your capacity as government official?

3. Does your organisation/agency work /coordinate with any other government agencies or industry associations during anti-dumping investigations and proceedings? If so, provide details or examples of such coordination?

4. The addendum to paragraph 1 of Article VI of GATT 1947, which is set out in Annex I of GATT 1994, provides a possibility for investigating authorities to resort to surrogate prices in a third country for establishing normal value instead of the actual prices in NME. In this regard, the United States (US) and the European Union (EU) consider Vietnam an NME. How do you think this addendum can influence and affect the interests of Vietnamese exporters in anti-dumping investigation cases?

5. Do you know if there were any anti-dumping investigations or proceedings in which the investigating authorities from the US, the EU, and any other WTO member States concluded/determined/agreed that a Vietnamese exporter was operating under market-based conditions?

6. Further to question 5 above, was that (non-NME) treatment automatically applied or the company had successfully proved that it fully operates under market-based conditions?

7. In your opinion, what is the level of knowledge of the anti-dumping investigation procedures under the WTO Anti-Dumping Agreement among Vietnamese exporters?

8. In your opinion, what is the level of awareness of the NME treatment applied to Vietnamese exporters in anti-dumping investigations and proceedings conducted by the US and the EU among Vietnamese exporters themselves?

9. What key challenges and problems arise in anti-dumping investigations and proceedings involving Vietnamese exporters including when responding to the questionnaires and document requests of the investigating authorities?

10. Further to question 9 above, in your opinion, how can these challenges be addressed and who should be involved?

11. What kind of assistance or support (e.g. legal, consultative, technical) does your organisation provide to Vietnamese exporters in the context of anti-dumping investigations and proceedings?

12. Do you think the current level of assistance provided to Vietnamese exporters by or organisation/agency or Vietnamese Government in general appropriate or sufficient? Why/why not?

13. Does your organisation have or provide any specific guidelines for Vietnamese exporters on what to do or what steps to take when they are a subject of an anti-dumping investigation, including on how to improve the quality of responses to the requests by anti-dumping investigating authorities and thereby better defend their interests?

14. How should Vietnamese Government as well as national industry associations (including chambers of commerce) appropriately assist Vietnamese exporters in responding to anti-dumping investigations? What is the appropriate or sufficient level of assistance/support that should be provided to Vietnamese exporters?

15. Please provide details of any best practices and lessons learned based on your involvement as a government official in anti-dumping investigations and proceedings?

16. How do you think about the impact of the NME treatment that is applied to Vietnamese exporters in anti-dumping investigations?

17. Do you think the NME treatment applied to Vietnamese exporters in anti-dumping investigations and proceedings discriminatory? Why?

18. Do you know if there are any specific reasons (such as political will, sensitiveness, regulation environment, and economic competitiveness) which may lead to the fact that Vietnam is considered an NME by the US and the EU in the context of anti-dumping investigations?

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APPENDIX C. Interview Protocol for anti-dumping experts

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Interview No._____

Date_____/_____/_____

INTERVIEW PROTOCOL FOR ANTI-DUMPING EXPERTS

Thank you for completing the consent form and attending this interview today. I appreciate your participation. I am Pham Duy Anh Huynh, a PhD candidate at the Centre for Customs and Excise Studies, Charles Sturt University.

The interview will take approximately 45-60 minutes focusing on your experience and knowledge of the anti-dumping investigations and proceedings under the World Trade Organization (WTO) rules, particularly the non-market economy (NME) treatment of Vietnam in anti-dumping investigations and proceedings.

Can I confirm that you still agree to participate in this interview and have it recorded or have me take notes?

Can I also confirm that you understand you can stop the interview at any point, or refuse to answer any question?

Finally, can I check that you have no unanswered questions about your participation in the project?

1. In your opinion, are exporters, particularly Vietnamese exporters, familiar with anti-dumping investigation procedures under the WTO Anti-Dumping Agreement?

2. Further to question 1 above, are they aware of the NME treatment of certain countries in the context of anti-dumping investigation procedures?

3. The addendum to paragraph 1 of Article VI of GATT 1947, which is set out in Annex I of GATT 1994, provides a possibility for investigating authorities to resort to surrogate prices in a third country for establishing normal value instead of the actual prices in NME. How do you think this addendum can influence the normal value and affect the interest of exporter(s) in anti-dumping investigation cases?

4. In your opinion, in what circumstance(s) would an anti-dumping investigation authority determine a WTO member State to be an NME in anti-dumping investigation?

5. Do you think the NME treatment applied to Vietnamese exporters in anti-dumping investigations and proceedings discriminatory? Why?

6. Vietnamese exporters have been regarded as exporters from an NME, since Vietnam is considered an NME by the United States (US) and the European Union (EU). Do you think NME treatment should automatically apply to every exporter from Vietnam or should an investigation authority provide appropriate opportunity for Vietnamese exporters to prove they are operating under market-based conditions?

7. What challenges and disadvantages do Vietnamese exporters confront in their anti-dumping investigation cases, in the circumstance that those investigations are conducted by the US or EU authorities?

8. Do you know if there is any anti-dumping investigation, in which the investigating authority involved is from the US and/or the EU, where the country of export was considered to be NME, but an exporter from that country of export was treated as an exporter operating under market-based conditions?

9. Further to question 8 above, was that treatment automatically applied or the company successfully proved that it fully operates under market-based conditions?

10. How can Vietnamese exporters improve their awareness and understanding of the anti-dumping investigation procedures under the WTO Anti-Dumping Agreement?

11. Is the current level of assistance provided to Vietnamese exporters by Vietnamese Government or Vietnamese industry associations appropriate or sufficient? Why/why not?

12. How should Vietnamese Government as well as national industry associations (including chambers of commerce) appropriately assist Vietnamese exporters in responding to anti-dumping investigations? What is the appropriate or sufficient level of assistance/support that should be provided to Vietnamese exporters?

13. What key challenges and problems arise in relation to company responses to the questionnaires and requests for document by the investigating authorities, and also other challenges during the investigation and proceeding?

14. In your opinion, how can these challenges be addressed in Vietnam and who should be involved or responsible?

15. Do you know any specific guidelines in Vietnam or any countries (particularly NMEs) for exporters involved in an anti-dumping investigation, which provides what steps a company should take if it is subject of an anti-dumping investigation, including how to respond to the requests of an investigating authority and thereby better defend their interests?

16. Please specify any best practices you know of and would recommend to Vietnamese exporters, Vietnamese Government and industry to improve exporters' responses to requests for information by investigating authorities in anti-dumping investigations?

17. How can Vietnamese exporters measure and assess the impact of the NME status of Vietnam in their anti-dumping investigation case(s)?

18. Do you know if there are any specific reasons (such as political will, sensitiveness, regulation environment, and economic competitiveness) which may lead to the fact that Vietnam is considered an NME by the US and the EU in the context of anti-dumping investigations?