WORLD TRADE ORGANIZATION

WT/DS343/AB/R
WT/DS345/AB/R
16 July 2008
(08-3434)

Original: English

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

AB-2008-3

UNITED STATES – CUSTOMS BOND DIRECTIVE FOR MERCHANDISE SUBJECT TO ANTI-DUMPING/COUNTERVAILING DUTIES

AB-2008-4

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Brazil – Desiccated Coconut	Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report, WT/DS22/AB/R, DSR 1997:I, 189
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045, and Corr.1
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990, BISD 37S/132
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853

Short Title	Full Case Title and Citation
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Canadian Pork	GATT Panel Report, *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, adopted 11 July 1991, BISD 38S/30
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Customs Bond Directive	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, circulated to WTO Members 29 February 2008
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663, and Corr.1
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, circulated to WTO Members 29 February 2008
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008

Short Title	Full Case Title and Citation
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R, DSR 2006:II, 521
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1959 Group of Experts Report	GATT Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT document L/978, adopted 13 May 1959, BISD 8S/151
1960 Group of Experts Report	GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194
1991 Directive	Customs Directive on Monetary Guidelines for Setting Bond Amounts, No. 099-3510-004 (23 July 1991) amended 9 July 2004 (Exhibits THA-1 and IND-2)
Ad Note	*Ad* Note to Article VI:2 and 3 of the GATT 1994
Amended CBD	Amended Customs Bond Directive – collectively, the July 2004 Amendment, the Current Bond Formulas, the August 2005 Clarification, and the October 2006 Notice
Antidumping Act of 1916	Title VIII (under the heading "Unfair Competition") of the United States Revenue Act of 1916, 39 Stat. 756 (1916)
Antidumping Act of 1921	United States Antidumping Act of 1921, 42 Stat. 11, codified under *United States Code*, Title 19, as amended
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
August 2005 Clarification	United States Customs, "Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases" (Exhibits THA-4 and IND-5)
Basic bond requirement	Basic requirements listed for a continuous bond as set out in the 1991 Directive
Current Bond Formulas	United States Customs document entitled "Current Bond Formulas" dated 25 January 2005 (Exhibits THA-3 and IND-4)
DDP	Delivery Duty Paid
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EBR	Enhanced continuous bond requirement
GATT 1994	*General Agreement on Tariffs and Trade 1994*
July 2004 Amendment	United States Customs, "Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases" (9 July 2004) (Exhibits THA-2 and IND-3)
October 2006 Notice	United States Customs, "Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements", *United States Federal Register*, Vol. 71, No. 205 (24 October 2006), Notices (Exhibits THA-5 and IND-6)

Abbreviation	Description
Panel	Panels in *United States – Measures Relating to Shrimp from Thailand* and *United States – Customs Bond Directive for Merchandise subject to Anti-Dumping/Countervailing Duties*
Panel Report, *US – Customs Bond Directive*	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R
Panel Report, *US –Shrimp (Thailand)*	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Subject shrimp	Frozen warmwater shrimp subject to anti-dumping duties
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, codified under *United States Code*, Title 19, as amended
United States Customs	United States Customs and Border Protection
United States Regulations	*United States Code of Federal Regulations*
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USGAO	United States Government Accountability Office
USGAO Report	USGAO Report, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington DC, October 2006) (Exhibits THA-10 and IND-26)
USITC	United States International Trade Commission
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Relating to Shrimp from Thailand	AB-2008-3
United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/ Countervailing Duties	AB-2008-4
Thailand, *Appellant/Appellee/Third Participant* India, *Appellant/Appellee/Third Participant* United States, *Appellant/Appellee* Brazil, *Third Participant* Chile, *Third Participant* China, *Third Participant* European Communities, *Third Participant* Japan, *Third Participant* Korea, *Third Participant* Mexico, *Third Participant* Viet Nam, *Third Participant*	Present: Sacerdoti, Presiding Member Baptista, Member Ganesan, Member

I. Introduction

1. Thailand, India, and the United States each appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Measures Relating to Shrimp from Thailand*[1] ("Panel Report, *US – Shrimp (Thailand)*") and *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*[2] ("Panel Report, *US – Customs Bond Directive*"). Two Panels were established to consider complaints by Thailand and by India concerning the application of an enhanced continuous bond requirement (the "EBR") by the United States on imports of frozen warmwater shrimp that were subject to anti-dumping duties ("subject shrimp").[3] As the claims brought by Thailand and by India in respect of the EBR were substantially similar, both Thailand and India requested that the same persons serve as panelists in their respective

[1] *Complaint by Thailand*, WT/DS343/R, 29 February 2008.
[2] *Complaint by India*, WT/DS345/R, 29 February 2008.
[3] Panel Report, *US – Shrimp (Thailand)*, para. 2.1; Panel Report, *US – Customs Bond Directive*, para. 2.1.

disputes, in accordance with Article 9.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the DSU").[4] The composition of both Panels was therefore identical.[5]

2. The claims brought by Thailand and by India pertained to the EBR imposed by the United States on imports of subject shrimp from Thailand and India.[6] Another measure, challenged only by Thailand in *US – Shrimp (Thailand)*, involved the use of "zeroing" by the United States' investigating authorities when calculating dumping margins on the basis of weighted-average comparisons of export prices and normal value in the original anti-dumping duty investigation on imports of shrimp from Thailand.[7] The Panel's finding on this issue has not been appealed by the United States.

3. The EBR consists of a continuous bond equivalent to 100 per cent of the anti-dumping/countervailing duty rate established in the original anti-dumping/countervailing duty order, or the most recent administrative review, multiplied by the value of imports made by the importer during the previous 12 months.[8] This enhanced bond is required in addition to the basic bond amount equivalent to the greater of US$50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, and to the entry "cash deposits" that are required under the United States' retrospective duty assessment system.[9] The EBR has been imposed pursuant to Customs Directive

[4]Panel Report, *US – Shrimp (Thailand)* para. 1.7; Panel Report, *US – Customs Bond Directive*, para. 1.7. Although the Panels' working procedures were harmonized (See Panel Report, *US – Shrimp (Thailand)* para. 1.10; and Panel Report, *US – Customs Bond Directive*, para. 1.10), separate reports were issued.

[5]As the composition of both Panels was identical, we will refer to the Panels in this Report collectively as the "Panel".

[6]Panel Report, *US – Shrimp (Thailand)*, para. 2.5; Panel Report, *US – Customs Bond Directive*, para. 2.2.

[7]Panel Report, *US – Shrimp (Thailand)*, paras. 7.9-7.36 and 8.2.

[8]More details on the EBR are provided in Section IV.B.3 of this Report.

[9]More details on the United States' retrospective duty assessment system are provided in Section IV.B.1 of this Report.

No. 099-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991[10] (the "1991 Directive"), as amended by the documents and instruments constituting the "Amended CBD".[11]

4. Pursuant to the Amended CBD[12], United States Customs and Border Protection ("United States Customs") amended its existing bond requirements to include new guidelines for "covered cases" within "special categories" of merchandise. To date, "agriculture/aquaculture merchandise" is the only merchandise designated as a "special category", and "shrimp covered by anti-dumping or countervailing duty cases" is the only "covered case" designated within that category. On 1 February 2005, United States Customs implemented the EBR with respect to subject shrimp. Thereafter, United States Customs began requiring subject shrimp importers to maintain enhanced bond coverage.

5. Before the Panel, both Thailand and India raised "as applied" claims under Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, (the "*Anti-Dumping Agreement*") regarding the application of the EBR to subject shrimp. Article 18.1 of the *Anti-Dumping Agreement* provides that "*[n]o specific action against dumping* of exports from another Member can be taken except *in accordance with the provisions of the GATT 1994, as interpreted by this Agreement*."[13] The parties referred to Article VI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), as well as the *Ad* Note to Article VI:2 and 3 of the

[10]United States Customs Directive on Monetary Guidelines for Setting Bond Amounts, No. 099-3510-004 (23 July 1991) (Exhibits THA-1 and IND-2 submitted by Thailand and India, respectively, to the Panel).

[11]The documents constituting the "Amended CBD" comprise:

- United States Customs, "Amendment to Bond Directive 099-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases" (9 July 2004) (the "July 2004 Amendment") (Exhibits THA-2 and IND-3 submitted by Thailand and India, respectively, to the Panel);
- United States Customs, "Current Bond Formulas", posted on United States Customs' website 24 January 2005 (the "Current Bond Formulas") (Exhibits THA-3 and IND-4 submitted by Thailand and India, respectively, to the Panel);
- United States Customs, "Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases" (the "August 2005 Clarification") (Exhibits THA-4 and IND-5 submitted by Thailand and India, respectively, to the Panel); and
- United States Customs, "Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements", *United States Federal Register*, Vol. 71, No. 205 (24 October 2006), Notices (the "October 2006 Notice") (Exhibits THA-5 and IND-6 submitted by Thailand and India, respectively, to the Panel).

(See Panel Report, *US – Shrimp (Thailand)*, para. 2.5; and Panel Report, *US – Customs Bond Directive*, para. 2.2) More details on the Amended CBD are provided in Section IV.B.3 of this Report.

[12]See *supra*, footnote 11.

[13]Footnote omitted; emphasis added.

GATT 1994[14] (the "*Ad* Note"), as the relevant provisions of the GATT 1994 for purposes of Article 18.1 of the *Anti-Dumping Agreement*.

6. Thailand and India each claimed that the *application* of the EBR to imports of subject shrimp constitutes "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and is therefore impermissible. In response, the United States argued that the EBR is not a "specific action against dumping" and that, in any event, the EBR constitutes "reasonable security" within the scope of the *Ad* Note to Article VI:2 and 3 of the GATT 1994.

7. The Panel Reports were circulated to Members of the World Trade Organization (the "WTO") on 29 February 2008. The Panel examined first whether the application of the EBR to subject shrimp constitutes "specific action against dumping" within the meaning of Article 18.1. It found that the EBR is "specific action" in response to dumping because it is "inextricably linked to or has a strong correlation with the constituent elements of dumping", in the sense that it can be applied only to goods that are subject to a United States anti-dumping duty order, and because the formula set forth in the Amended CBD for calculating the EBR includes a direct reference to the anti-dumping duty rate. Furthermore, the Panel found that the EBR constitutes action "against" dumping because it has an adverse impact on dumping and results in additional costs to exporters and producers. The United States has not appealed the finding of the Panel that the application of the EBR constitutes a "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

8. The Panel turned next to consider whether the EBR had been taken "in accordance with the provisions of the GATT 1994", in particular, with the *Ad* Note. In so doing, the Panel first examined the relationship between the *Ad* Note and the *Anti-Dumping Agreement*. It found that the two Agreements should not be read to preclude the *Ad* Note from authorizing certain types of security that are not expressly foreseen by the *Anti-Dumping Agreement*. Further, the Panel interpreted that, contrary to the arguments of Thailand and India, the temporal scope of the *Ad* Note is not limited to the period up to the imposition of the definitive anti-dumping duty order; instead, that scope extends to the period after the imposition of the order as well.[15]

---

[14]The *Ad* Note to Article VI:2 and 3 of the GATT 1994 provides, in relevant part:

> As in many other cases in customs administration, a contracting party may require *reasonable security (bond or cash deposit)* for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization. (emphasis added)

[15]Panel Report, *US – Shrimp (Thailand)*, para. 7.137; Panel Report, *US – Customs Bond Directive* para. 7.114.

9. However, the Panel found that the EBR, as applied, is not in conformity with the requirement in the *Ad* Note that the security be "reasonable". The Panel considered that there would be an appropriate basis for applying an increased security such as the EBR only if it was properly determined that the rates of dumping provided for in the anti-dumping duty order were likely to increase, and the likely amount of such increase.[16] According to the Panel, without this type of analysis, the rate in the anti-dumping duty order remains the best and only available baseline proxy of duties that ultimately may be assessed, and security exceeding this estimate would not be "reasonable" within the meaning of the *Ad* Note.[17] The Panel found that the United States had failed to establish that the rates of dumping provided for in the anti-dumping duty order were likely to increase. The Panel therefore concluded that the additional security requirements resulting from the application of the EBR are not "reasonable" within the meaning of the *Ad* Note.[18] For the purposes of Article 18.1 of the *Anti-Dumping Agreement*, the application of the EBR is therefore not in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.[19] As a result, the Panel found that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and the *Ad* Note.[20]

10. The Panel rejected the defence raised by the United States under Article XX(d) of the GATT 1994 because the United States had not established that anti-dumping duties were likely to increase above the cash deposit rates. The Panel therefore considered that the additional security provided through the application of the EBR could not be viewed as "necessary" within the meaning of Article XX(d).

11. Both Thailand and India made "as applied" claims under various provisions of Articles 7 and 9 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Thailand made "subsidiary and alternative" "as applied" claims under Articles 7.1, 7.2, 7.4, and 7.5 of the *Anti-Dumping Agreement*, as well as under Articles 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 and the *Ad* Note of the GATT 1994, in the event that the Panel did not find in its favour regarding its Article 18.1 claim. In the light of its findings in respect of Thailand's Article 18.1

---

[16]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.

[17]*Ibid*.

[18]Panel Report, *US – Shrimp (Thailand)*, para. 7.150; Panel Report, *US – Customs Bond Directive*, para. 7.128.

[19]Panel Report, *US – Shrimp (Thailand)*, para. 7.151; Panel Report, *US – Customs Bond Directive*, para. 7.129.

[20]Panel Report, *US – Shrimp (Thailand)*, paras. 7.152 and 8.1; Panel Report, *US – Customs Bond Directive*, paras. 7.130 and 8.2(i). In *US – Customs Bond Directive*, the Panel "likewise" accepted India's related claim that the application of the EBR violated Article 1 of the *Anti-Dumping Agreement*. (Panel Report, *US – Customs Bond Directive*, paras. 7.131 and 8.2(i))

claims, the Panel considered it unnecessary to address those claims of Thailand.[21] India also claimed that the application of the EBR is inconsistent with the requirements of Article 7 of the *Anti-Dumping Agreement*, which governs provisional measures taken after a preliminary affirmative determination has been made, as well as various provisions under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. The Panel concluded that the application of the EBR on subject shrimp prior to the imposition of the definitive order, in addition to certain provisional measures, resulted in the imposition of provisional measures that were "in excess of the duty provisionally estimated", in violation of Article 7.2 of the *Anti-Dumping Agreement*[22], but exercised judicial economy with respect to India's claims under Articles 7.1(iii) and 7.4.[23] The Panel however rejected India's claims under Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[24]

12. The Panel refrained from deciding the other "as applied" claims made by both Thailand and India that the EBR is inconsistent with certain GATT 1994 Articles, including Articles I:1, II:1(a) and (b), X:3(a), XI:1, and XIII.[25]

13. In addition, India claimed that the Amended CBD "as such" violates Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"). Relying on its earlier reasoning and findings regarding the "as applied" claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement* and the *Ad* Note, the Panel dismissed India's "as such" claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*.[26] The Panel also rejected India's other "as such" claims under Articles 7 and 9 of the *Anti-Dumping Agreement* and Article VI.2 of the GATT 1994, as well as Articles 17 and 19 of the *SCM Agreement* and Article VI:3 of the GATT 1994. The Panel declined, as it had done with respect to India's similar "as applied" claims, to rule on India's claims that the

[21]Panel Report, *US – Shrimp (Thailand)*, paras. 7.153 and 7.154.
[22]Panel Report, *US – Customs Bond Directive*, para. 7.146.
[23]*Ibid*., para. 7.147.
[24]*Ibid*., paras. 7.161 and 7.162.
[25]See Panel Report, *US – Shrimp (Thailand)*, para. 7.155: "Thailand has made additional claims under Article XI:1 and, alternatively, Article II:1(a) and the first and second sentences of Article II:1(b), of the *GATT 1994*; and Articles X:3(a) and I of the *GATT 1994*"; and Panel Report, *US – Customs Bond Directive*, para. 7.163: "India has requested the Panel to find that the EBR *as applied* to imports of shrimp from India is inconsistent with Article X:3(a) of the *GATT 1994* and with Articles I:1, II:1(a) and (b) of the *GATT 1994* or, alternatively, with Articles XI:1 and XIII of the *GATT 1994*."
[26]Panel Report, *US – Customs Bond Directive*, paras. 7.237 and 7.238.

Amended CBD is "as such" inconsistent with Articles I, II:1(a) and (b), XI:1 and XIII of the GATT 1994. Finally, the Panel upheld India's claim that the United States had acted inconsistently with Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* by failing to notify the Amended CBD to the Anti-Dumping and SCM Committees.

14. In the light of these findings, the Panel recommended that the United States bring the application of the EBR into conformity with its WTO obligations under the *Anti-Dumping Agreement* and the GATT 1994.[27]

15. On 17 April 2008, Thailand and India both separately notified the Dispute Settlement Body (the "DSB"), pursuant to paragraph 4 of Article 16 of the DSU, of their intention to appeal certain issues of law covered in Panel Report, *US – Shrimp (Thailand)* and Panel Report, *US – Customs Bond Directive*, respectively, and certain legal interpretations developed by the Panel, and filed separate Notices of Appeal[28] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[29]

16. In a letter dated 21 April 2008, the participants were informed that Appellate Body Member, Mr. A.V. Ganesan, had been selected, on the basis of rotation, to serve on the Division hearing these appeals, and that, in accordance with Rule 15 of the *Working Procedures*, the Appellate Body had notified the Chairman of the DSB of its decision to authorize Mr. Ganesan to complete the disposition of the appeals even though his second term as Appellate Body Member was to expire before the completion of the appellate proceedings. The Division further noted that, in the interests of "fairness and orderly procedure", as referred to in Rule16(1) of the *Working Procedures*, and in agreement with the participants, the appellate proceedings in respect of the appeals by both Thailand and India would be consolidated due to the substantial overlap in the content of the disputes. A single Division would hear and decide both appeals, and a single oral hearing would be held by the Division. Further to a request by the United States, and in consultation with the participants, the Division extended, pursuant to Rule 16(2) of the *Working Procedures*, the time periods for the filing of the other appellant's submissions by the United States, as well as for the filing of appellees' and third participants' submissions. The Division also invited all third parties in *US – Shrimp (Thailand)* and *US – Customs Bonds Directive* to attend the single oral hearing in the consolidated appellate proceedings, noting, however, the understanding that, in their written submissions and oral statements, the third

[27]Panel Report, *US – Shrimp (Thailand)*, para. 8.6; Panel Report, *US – Customs Bond Directive*, para. 8.7.

[28]WT/DS343/10 (attached as Annex I to this Report); WT/DS345/9 (attached as Annex II to this Report).

[29]WT/AB/WP/5, 4 January 2005.

participants would address only the issues appealed in the dispute(s) to which they were third parties in the panel proceedings.

17. By letter dated 22 April 2008, India requested the Division to extend the time period for filing its appellant's submission by one working day, that is, from 24 April to 25 April 2008, pursuant to Rule 16(2) of the *Working Procedures*, due to certain unforeseen developments. On the same day, the Division invited the participants and third participants to comment on India's request by 5 p.m. on 23 April 2008. Two comments were received: Thailand did not object to India's request; and the United States submitted that it would accept India's request provided that the filing dates applicable to the United States' submissions would be adjusted accordingly.

18. Having carefully considered India's request and the views expressed by the United States and Thailand, the Division granted India time until 1 p.m., Geneva time, on 25 April 2008 to file its appellant's submission. Further, in view of the submission made by the United States, the Division also granted the United States time until 1 p.m., Geneva time, on 20 May 2008 to file its appellee's submissions. The same extension was also granted to India and to Thailand to file their appellee's submissions and to those third participants wishing to file a submission pursuant to Rule 24(1) or a notification pursuant to Rule 24(2) of the *Working Procedures*.

19. On 24 April 2008, Thailand filed an appellant's submission.[30] On 25 April 2008, India filed an appellant's submission.[31] On 29 April 2008, the United States notified the DSB, pursuant to paragraph 4 of Article 16 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretation developed by the Panel and filed a Notice of Other Appeal[32] in each dispute pursuant to Rule 23(1) of the *Working Procedures*. On 6 May 2008, the United States filed an other appellant's submission in each appeal.[33] On 19 May 2008, Viet Nam notified its intention to appear at the oral hearing as a third participant.[34] On 20 May 2008, Thailand and India each filed an appellee's submission and the United States filed an appellee's submission in each appeal.[35] On the same day, Brazil, Chile, the European Communities, India, Japan, Korea, and

[30]Pursuant to Rule 21 of the *Working Procedures*.
[31]Pursuant to Rules 16(1) and (2) and 21 of the *Working Procedures*.
[32]WT/DS343/11 (attached as Annex III to this Report); WT/DS345/10 (attached as Annex IV to this Report).
[33]Pursuant to Rules 16(1) and (2) and 23(3) of the *Working Procedures*.
[34]Pursuant to Rule 24(2) of the *Working Procedures*.
[35]Pursuant to Rules 16(1) and (2), 22, and 23(4) of the *Working Procedures*.

Thailand each filed a third participant's submission[36], and China and Mexico each notified its intention to appear at the oral hearing as a third participant.[37]

20. By letter dated 29 April 2008, India requested authorization from the Division to correct certain "clerical errors" in its appellant's submission, pursuant to Rule 18(5) of the *Working Procedures*. On 30 April 2008, the Division invited all participants and third participants to comment on India's request. None of the participants or third participants objected to India's request. On 7 May 2008, the Division authorized India to correct the "clerical errors" in its appellant's submission.

21. The oral hearing in this appeal was held on 28 and 29 May 2008. The participants and third participants presented oral arguments, with the exception of Chile, China, Mexico, and Viet Nam, and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Thailand – Appellant in US – Shrimp (Thailand)*

1. *Ad* Note to Article VI:2 and 3 of the GATT 1994

22. Thailand requests the Appellate Body to reverse the Panel's interpretation of the *Ad* Note to Article VI:2 and 3 of the GATT 1994, and to clarify that the *Ad* Note does not authorize the application of security requirements after definitive anti-dumping duty measures have been imposed. Specifically, Thailand objects to the Panel's interpretation of the phrase "pending final determination of the facts in any case of suspected dumping" occurring in the *Ad* Note. Thailand considers that the temporal scope of this phrase is limited to the time period before the existence of dumping has been established in an investigation conducted pursuant to Article 5 of the *Anti-Dumping Agreement*, and that the Panel's interpretation of the *Ad* Note is inconsistent with the ordinary meaning of the phrase read in the context of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.

23. Thailand also disagrees with the Panel's interpretation that a finding of dumping in an investigation under Article 5 of the *Anti-Dumping Agreement* gives rise only to a "suspicion of dumping" with respect to individual transactions occurring after the imposition of an anti-dumping

[36]Pursuant to Rule 24(1) of the *Working Procedures*. On 26 May 2008, the participants and the third participants were provided an English translation, prepared by the WTO Language Services and Documentation Division, of Chile's third participant's submission, filed originally in Spanish on 20 May 2008.

[37]Pursuant to Rule 24(2) of the *Working Procedures*.

duty order.[38] In Thailand's view, the text of Article VI of the GATT 1994, as well as the context provided by Articles 2.1, 3.5, 3.7, and 14.2 of the *Anti-Dumping Agreement*, confirm that dumping is a present, continuous, and ongoing state of affairs, and that, therefore, a finding of dumping in an investigation under Article 5 also covers individual transactions after the imposition of an anti-dumping duty order. For Thailand, an investigation that establishes dumping does so in relation to the transactions occurring during the investigation, as well as with respect to future imports of the subject product, and dumping, therefore, cannot be merely "suspected" with respect to the future imports.

24. According to Thailand, the *Ad* Note was introduced merely to interpret and clarify the provisions of Article VI:2 and 3 of the GATT 1994. Thailand reasons that, since the only determination referred to in those provisions is the finding of dumping and injury within the meaning of Article VI:1, 2, and 6 necessary to authorize the imposition of anti-dumping duties, the term "pending final determination of the facts in any case of suspected dumping" in the *Ad* Note must be read to refer to the period before such a finding is made. Furthermore, Thailand points out that Article 5.1 of the *Anti-Dumping Agreement* mandates procedures for an investigation into whether dumping *exists* and "is taking place", and that, following such a determination and the imposition of definitive anti-dumping duties, dumping is no longer "suspected" but is considered to be occurring, even if the final amount of anti-dumping liability is still undetermined.

25. Thailand submits that Article 7 of the *Anti-Dumping Agreement* on provisional measures subsumes and governs the application of the *Ad* Note. In support of this position, Thailand underlines the use of similar language in Article 7 and in the *Ad* Note to describe the type of action authorized. It also refers to a second report prepared in 1960[39] by the Group of Experts on Anti-Dumping and Countervailing Duties (the "1960 Group of Experts Report") in which the term "suspect[ed]" in the *Ad* Note is used to refer to only the period for which provisional measures could be used.[40] For Thailand, "it is clear that the Group of Experts, in recommending [in its first report] the adoption of rules governing provisional measures that eventually became Article 7 [of the *Anti-Dumping Agreement*], expressly considered itself to be implementing the Ad Note."[41]

---

[38]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 29 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.105).

[39]GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT document L/1141, adopted 27 May 1960, BISD 9S/194.

[40]See 1960 Group of Experts Report, *supra*, footnote 39, para. 15.

[41]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 56 (referring to GATT Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT document L/978, adopted 13 May 1959, BISD 8S/151, (the "1959 Group of Experts Report"), para. 19).

26. Thailand further points out that the Panel's interpretation of the *Ad* Note is erroneous when read in the context of Article 9 of the *Anti-Dumping Agreement*, which governs the imposition and collection of anti-dumping duties. Many provisions of the *Anti-Dumping Agreement*, including Articles 8.6[42], 10.3[43], 10.6[44], 11.2[45], and 11.3[46] refer to the duties imposed pursuant to Article 9.1 as "definitive" duties. Thailand submits that, when the United States imposes an anti-dumping duty order following the completion of an investigation under Article 5 and following affirmative findings of dumping and injury, it makes a decision to impose definitive anti-dumping duties under Article 9.1. Thailand reasons that, to the extent that Article 9.1 and Article VI provide that definitive duties may be imposed only after a finding of dumping and injury, a case of "suspected dumping" within the meaning of the *Ad* Note cannot continue to exist after the decision has been made to impose such definitive anti-dumping duties.

27. Thailand disagrees with the Panel's reasoning that a "case of suspected dumping" may continue to exist after the imposition of definitive anti-dumping duties, because, in the United States' retrospective duty assessment system, the amount of liability is not finally determined until the completion of an assessment review (also called a "periodic review") under Article 9.3.1.[47] For Thailand, the *Anti-Dumping Agreement* "draws a clear textual distinction between (i) determinations that affect the *existence* of dumping, and injury and, therefore, the authority to impose and maintain measures to offset such dumping and (ii) determinations under Article 9.3 regarding the subsidiary issue of the amount of duties to be paid".[48] In this respect, Thailand refers to footnote 22 to the *Anti-Dumping Agreement*, which provides that "a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." According to Thailand, this means that a product is considered to be dumped even if the amount of the final liability for a particular period is determined to be zero. It also means that the determination of the amount of final liability under Article 9.3.1 or Article 9.3.2 is subsidiary to the determination of the existence of dumping and that, therefore, it is not the "final determination of the facts in any case of suspected dumping" referred to in the *Ad* Note.

[42]Article 8.6 provides that "definitive duties" may be levied retrospectively in cases of violation of price undertakings.

[43]Article 10.3 begins with the words: "If the definitive anti-dumping duty is higher than the provisional duty ...".

[44]Article 10.6 begins with the words: "A definitive anti-dumping duty may be levied ...".

[45]Article 11.2 refers explicitly to the "imposition of the definitive anti-dumping duty".

[46]Article 11.3 provides that "any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition".

[47]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 62 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.103).

[48]*Ibid*., para. 64. (original emphasis)

28. Thailand also argues that the Panel failed to take properly into account the fact that assessment reviews under Articles 9.3.1 and 9.3.2 are not mandatory and may not even take place, because such reviews are conducted only upon "request". For Thailand, the drafters of the *Anti-Dumping Agreement* could not have intended the "final determination of the facts" under the *Ad* Note to refer to a determination that is contingent upon a request from an interested party. Thailand contends that the Panel erred because it treated a final determination of duty liability, which may or may not be made depending on whether an assessment review is requested, as the "final determination of the facts" within the meaning of the *Ad* Note.

29. Further, Thailand points out that the Appellate Body has consistently held that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* limit the permissible responses to dumping to three measures only: namely, provisional measures, price undertakings, and definitive measures.[49] According to Thailand, the Panel's interpretation of the *Ad* Note is not consistent with this finding of the Appellate Body because it implies that a requirement to provide reasonable security after the conclusion of the investigation is a fourth permissible response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. The Panel's interpretation also goes against the disciplines of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, because the *Ad* Note would then permit specific action against dumping in the form of a security in the amount of a *likely future* dumping margin, whereas, in Thailand's view, "[n]othing in the text of Article VI or the [*Anti-Dumping*] *Agreement* remotely supports the idea that the Ad Note authorises specific action against dumping on the basis of *future* dumping margins."[50] According to Thailand, the only remedy foreseen by Article VI or the *Anti-Dumping Agreement* is the imposition of duties to offset present dumping. Nothing in these provisions suggests that action against dumping may be based on margins of dumping that may (or may not) be found to exist in the future.

30. Thailand considers that its interpretation of the *Ad* Note would not prevent the United States from taking action under Article XX(d) of the GATT 1994 to require necessary security in cases where there is an importer-specific risk of non-collection of duties. According to Thailand, Article VI confers the right to impose anti-dumping duties, but does not permit any other remedy to counteract dumping, and, therefore, any action to enforce the collection of those duties must be taken under Article XX(d) rather than as "specific action against dumping" within the meaning of Article 18.1.

[49]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 79 (referring to Appellate Body Report, *US – 1916 Act*, para. 137; and Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 264 and 265).

[50]*Ibid*., para. 85. (original emphasis)

31. Thailand therefore requests the Appellate Body to reverse the Panel's legal interpretation of the phrase "pending final determination of the facts in any case of suspected dumping" in the *Ad* Note, and to find, instead, that the phrase means that the facts will be finally determined and "a case of suspected dumping" will no longer exist once a Member has imposed definitive anti-dumping duties under Article 9.1 of the *Anti-Dumping Agreement* following a determination of injurious dumping in an investigation conducted under Article 5 of the *Anti-Dumping Agreement*.

2. Cash Deposits and Anti-dumping Duties

32. Thailand challenges the Panel's interpretation that, under the retrospective duty assessment system of the United States, cash deposits are not anti-dumping duties and that they are not duties imposed pursuant to Article 9 of the *Anti-Dumping Agreement*. Relying on references to the term "anti-dumping duties" in various provisions of the *Anti-Dumping Agreement*, Thailand argues that anti-dumping measures imposed further to the conclusion of an investigation under Article 5 are anti-dumping duties for the purposes of the *Anti-Dumping Agreement*.[51]

33. Thailand further points out that the imposition of the cash deposit requirement on subject shrimp from Thailand in the amount of the established margin of dumping was notified to the WTO by the United States as a "final measure" and a "definitive duty".[52] This supports Thailand's interpretation that cash deposits are anti-dumping duties within the meaning of Article 9 of the *Anti-Dumping Agreement*.

---

[51]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 116. Thailand first points to Article VI of the GATT 1994 and Article 9.1 of the *Anti-Dumping Agreement*; both provisions authorize Members to impose definitive anti-dumping duties "in cases where all requirements for the imposition have been fulfilled". (*Ibid*., para. 109) Thailand also refers to the "lesser duty rule" in Article 9.1, which refers to "the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less". (*Ibid*., para.110) Thailand underlines that Article 9.2 twice refers to an anti-dumping "duty" being imposed and collected, and that the "amount of the anti-dumping duty" in Article 9.3 is not qualified in any way. (*Ibid*., para.111) Thailand quotes Article 10.1 of the *Anti-Dumping Agreement*, which provides, *inter alia*, that "anti-dumping duties" are "applied to products which enter for consumption after the time when the decision taken under ... paragraph 1 of Article 9 ... enters into force"; Article 10.4, which refers to an "anti-dumping duty" being "imposed only from the date of the determination of threat of injury"; Article 11.1, which provides that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury"; Article 11.2, which refers to the "imposition of the definitive anti-dumping duty", the "continued imposition of the duty", and to what would happen "if the duty were removed or varied"; Article 11.3, which states that "any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition"; as well as Article 12.2.2, which refers to an "affirmative determination providing for the imposition of a definitive duty". (*Ibid*., paras. 112-115) In Thailand's view, all these provisions show that any anti-dumping measure imposed or anti-dumping action taken further to the conclusion of an anti-dumping investigation under Article 5 of the *Anti-Dumping Agreement*—under United States law, this would be after the imposition of an anti-dumping duty order—is a duty for the purposes of the *Anti-Dumping Agreement*. (*Ibid*., para. 115)

[52]*Ibid*., (referring to the United States' Semi-Annual Report under Article 16.4 of the Agreement to the Committee on Anti-Dumping Practices, G/ADP/N/132/USA, 16 September 2005).

34. Further, the Panel appears to think that, because United States law refers to "cash deposits of estimated antidumping duties", and Article 7 of the *Anti-Dumping Agreement* refers to "cash deposits" as security for provisional measures, the cash deposits collected by the United States must be a security, not a duty. Thailand argues that such reasoning is incorrect, because Article 7 has a limited temporal scope and it refers only to provisional measures during the investigation stage. Thailand adds that the manner in which a measure is characterized under domestic law is not determinative of its classification under WTO law. Therefore, the use of the term "cash deposits" by the United States, when referring to the amounts it collects on entries of goods subject to an anti-dumping duty order, cannot mean that the amounts so collected are not "duties".

35. Thailand contends that, even when examined in the light of the domestic law of the United States, cash deposits are "duties" within the meaning of the *Anti-Dumping Agreement*. Under United States law, the cash deposits required after the publication of the anti-dumping duty order are cash deposits "of estimated antidumping duties".[53] By contrast, United States law governing provisional measures uses the same terminology as Article 7 of the *Anti-Dumping Agreement*, and describes provisional measures as "cash deposit, bond, or other security"[54], with no reference to the term "estimated duties". Thailand maintains that this difference in language is consistent with its view that the *Anti-Dumping Agreement* draws a distinction between provisional measures imposed under Article 7 and definitive anti-dumping duties imposed under Article 9. Thailand adds that the ordinary meaning of a deposit *of* a duty is that it is itself a duty, even if it is not the full amount of the duty that may eventually be levied, and that it cannot be re-cast into a security *for* a duty.

36. Thailand also argues that the Panel erred when it considered that cash deposits have no intrinsic value. According to Thailand, since cash deposits of estimated anti-dumping duties are paid in cash and that money is fungible, they have the same cash value to the importing Member as any other payment of duties or any other payment of cash. Thailand argues that, because a cash deposit of estimated duties secures payment of only the amount of the deposit (it does not secure any subsequent additional liability), it cannot properly fulfil the function of a security. For Thailand, this indicates that the United States' cash deposits of estimated duties are duties, not securities.

37. Thailand considers that the cash deposits are duties because their function is to offset or counteract injurious dumping. Thailand emphasizes that dumping takes place and is counteracted at

[53]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 122 (referring to United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, codified under *United States Code*, Title 19, as amended (the "Tariff Act"), Section 1673e(a)(3)). This provision of the Tariff Act requires that "the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited."

[54]*Ibid*., (referring to Tariff Act, *supra*, footnote 53, Section 1673b(d)(2)).

the time of import, not at the time of final assessment of duty liability following completion of an assessment. For Thailand, the fact that the final amount of liability for anti-dumping duties may be different from the amount collected as cash deposits does not affect the fundamental nature of cash deposits of estimated anti-dumping duties; it only means that more duties or a refund may be due.

38. Thailand is of the view that the ceiling on the amount of anti-dumping duties in Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* applies to cash deposits of "estimated anti-dumping duties" collected by the United States at the time of entry of dumped goods. The amount of the anti-dumping duty is limited to the amount of the margin of dumping established in the investigation, or the most recently completed assessment review. According to Thailand, because dumping takes place when goods "are introduced into the commerce of another country at less than the normal value"[55], the limit in Article VI:2 on the amount of duties that may be collected must, therefore, be interpreted to apply at the time of importation. Thailand also refers to Article 9.2 of the *Anti-Dumping Agreement*, which provides that anti-dumping duties "shall be collected in the appropriate amounts" in each case. Thailand stresses that the term "collected" must be interpreted to refer to the amount collected at the time of importation, rather than the final liability assessed following an assessment review. Thailand finds further support for its position in the chapeau of Article 9.3, which provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Thailand argues that the chapeau does not contain any qualification that the "amount of the anti-dumping duty" refers exclusively to the final amount of duty liability and not to the amount of duties collected in the form of cash deposits at the time of importation of the goods. Thailand adds that the chapeau of Article 9.3 must be interpreted in the context of Articles 9.1 and 9.2, which refer to the imposition and collection of duties. For Thailand, the plain language of the chapeau of Article 9.3 cannot be read to apply only to a subsequent review of the amount of liability and not to the amounts collected on entry. Thailand emphasizes that, in cases in which no assessment review is conducted, the cap in the chapeau applies at the time when the goods are imported and the cash deposits are made, because that is the only time at which any payments of anti-dumping duties are made.

39. According to Thailand, the interpretation that Article 9.3 imposes a cap on cash deposits made at the time of entry is supported by the existence of a cap with respect to provisional measures. Article 7.2 of the *Anti-Dumping Agreement* provides that provisional measures applied on entry may not be greater than the "provisionally estimated margin of dumping". Thailand maintains that, in view

[55]Article VI:1 of the GATT 1994.

of the cap set forth in Article 7.2 for provisional measures, it makes no sense to interpret Article 9.3 as not imposing any cap on the amount of definitive duties that can be collected on entry.

3. The Reasonableness of the EBR, as Applied to Subject Shrimp

40. Thailand does not challenge the Panel's conclusion that the EBR, as applied to subject shrimp, is not a "reasonable security". However, Thailand does contest the Panel's statement that, "[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers."[56]

41. Thailand argues that risk of default underpins the non-collection risk purportedly addressed by the EBR, and that, therefore, it must be considered in determining what is a reasonable amount of security. For Thailand, any assessment of whether a security requirement is "reasonable" must take account of not only the likelihood and magnitude of increases in dumping rates, but also the likelihood of default by a particular importer. Thailand considers that the Panel erred in finding that only the first factor is relevant to the analysis of reasonableness under the *Ad* Note. Thailand adds that requiring WTO Members to consider the risk of default in setting security requirements under the *Ad* Note would "simply reflect the practices followed by customs officials in numerous [countries]".[57]

B. *Arguments of the United States – Appellee in US – Shrimp (Thailand)*

1. *Ad* Note to Article VI:2 and 3 of the GATT 1994

42. The United States requests the Appellate Body to reject Thailand's appeal of the Panel's interpretation of the *Ad* Note in relation to the *Anti-Dumping Agreement*. The United States contends that: Thailand's arguments ignore the immediate context of the words "suspected dumping" in the *Ad* Note; Thailand treats the reference to "duty" as being synonymous with "cash deposit"; Thailand renders the provisions of Article VI of the GATT 1994 (and the *Ad* Note) inutile by suggesting that the *Anti-Dumping Agreement* supersedes the GATT 1994; and Thailand treats statements in previous Appellate Body reports as dispositive of the interpretation of the *Ad* Note, when those reports were not concerned with the *Ad* Note or security requirements for anti-dumping duties.

43. The United States notes that one of the central questions before the Panel was whether any provisions of the *Anti-Dumping Agreement* or the GATT 1994 apply to a security requirement such as that contemplated by the EBR for the payment of an anti-dumping duty *after* an anti-dumping duty

[56]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to para. 7.142.
[57]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 151.

order has been imposed. The United States agrees with the Panel that the *Ad* Note applies and is the sole provision that limits security requirements of this type.

44. More specifically, the United States argues that the phrase "final determination of the facts" in the *Ad* Note refers, in the context of a retrospective duty assessment system, to the determination of the "final liability for payment of anti-dumping duties" as provided for in Article 9.3.1 of the *Anti-Dumping Agreement*. Therefore the "final determination of the facts" in the *Ad* Note follows an assessment review under Article 9.3.1. The United States considers this interpretation to be consistent with the references in the *Ad* Note to "security ... for ... payment" and "other cases in customs administration". As in other cases in customs administration, security is required upon entry of merchandise, when the actual amount of liability is not known, until the liability is finally determined and duties assessed and paid. Furthermore, Article VI:2 and 3 of the GATT 1994 addresses the "levy[ing]" of anti-dumping and countervailing duties, and this term used in Article 4.2 (and footnote 12 thereto) of the *Anti-Dumping Agreement* refers to the "definitive or final legal assessment or collection of a duty or tax". Thus, the "final determination" in the *Ad* Note extends to security pending final legal assessment of duties, which, in retrospective duty assessment systems, does not occur when the anti-dumping duty order is imposed; rather, it occurs when final duty liability is assessed.

45. The United States submits that there is contextual support in the *Anti-Dumping Agreement* for the Panel's interpretation. Article 9.3 requires that the anti-dumping duty not exceed the margin of dumping established under Article 2 of the *Anti-Dumping Agreement*. The United States considers that the cash deposit and the enhanced bond secure payment of this amount of duty and ensure the ability of the United States to collect this amount of duty in accordance with Article 9.2. The United States notes that the reference in Article 9.3.1 to "final" liability coincides with the use of the term "final" determination of the facts in the *Ad* Note.

46. The United States disagrees with Thailand that the imposition of an anti-dumping duty order means that dumping is no longer "suspected", and that, therefore, the *Ad* Note does not permit security for the payment of anti-dumping duties after the order is imposed. The United States argues that the term "suspected" should be interpreted based on its immediate context. The United States rejects the idea that dumping is no longer "suspected" once the order is imposed, because the use of the present tense in Article VI of the GATT 1994 and certain provisions of the *Anti-Dumping Agreement* indicates that dumping is a "continuous state". Further, the United States rejects the idea that the *Ad* Note is "governed" by the *Anti-Dumping Agreement* and that, therefore, anything not addressed by

the *Ad* Note is prohibited.[58] The United States contends that no provision of the relevant covered agreements refers to dumping as an "ongoing" or "continuous" act; to the contrary, Article 11 of the *Anti-Dumping Agreement* refers to the continuation or "recurrence" of dumping, which suggests that dumping could be "episodic" in nature.[59] Furthermore, Article 9.3.1 refers to final liability for the payment of anti-dumping duties, which requires that there be a determination as to whether or not these entries were dumped. If dumping were indeed "continuous", duties would always be owed; however, footnote 22 to Article 11.3 indicates otherwise, since an order may remain in place even after it has been determined that no duties are owed with respect to entries from one assessment period.[60] Furthermore, footnote 22 does not suggest that a finding of zero liability for a given set of entries extinguishes the suspicion of dumping; rather, as the Panel found, it would be reasonable to suspect that future imports may be dumped based on the original dumping determination underlying the anti-dumping duty order.[61]

47. The United States also notes that the *Ad* Note itself provides that security in a case of "suspected dumping" relates to "payment" "pending final determination of the facts". "Suspected dumping" must be understood in the context of an assessment of whether and in what amount duties must be paid. In a retrospective duty assessment system, this is not known until the assessment is completed, and dumping is suspected during the intervening period when an assessment is being conducted. The United States contends that Thailand's interpretation divorces the term "suspected" from its immediate context, which pertains to the process of assessing and collecting duties.

48. The United States also rejects Thailand's arguments that Article VI of the GATT 1994 and Article 5.1 of the *Anti-Dumping Agreement* suggest that security is limited to the period prior to the imposition of an anti-dumping duty order. The United States considers Thailand's argument that the only "determination" referred to under Article VI:2 and 3 is one that results in an anti-dumping duty order to be without basis, because it is contrary to the manner in which the term "levy" is used in the

[58]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 16 (referring to Thailand's appellant's submission, *US – Shrimp (Thailand)*, paras. 22 and 23).

[59]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 17.

[60]*Ibid*., Footnote 22 to Article 11.3 of the *Anti-Dumping Agreement* reads:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[61]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 34 (referring to Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 66; and Panel Report, *US – Shrimp (Thailand)*, footnote 150 to para. 7.104).

Anti-Dumping Agreement, that is, as encompassing assessment and collection of duties. With regard to Article 5.1, the United States agrees with the Panel that, because the existence of dumping has to be proven at the time of the imposition of an anti-dumping duty order, this does not mean that the existence of dumping is being established in respect of future import entries covered by that order. Article 5.1 merely requires that dumping exists at the time of the order's imposition; however, until the assessment review is completed, it is not known whether specific entries are being dumped, and thus dumping is still "suspected" as to those future entries.

49. The United States also rejects Thailand's reliance on previous Appellate Body reports in support of its views. Contrary to Thailand's arguments, the Panel did not address whether dumping is determined on a product or on a transaction-specific basis, a question that is irrelevant for this dispute. Rather, the Panel focused on the timing of the assessment of duties and noted that whether and what amount of duties are owed is determined only after entry of the goods. Moreover, the Panel recognized, as did the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, that, at the time an order is imposed, a Member is not required to establish the existence of dumping for all future entries covered by the order; Members choosing to use a retrospective duty assessment system may determine final liability after an order is imposed.[62]

50. The United States submits, with respect to negotiating documents, that the text of the *Ad* Note is sufficiently clear, and that recourse to the negotiating history, as provided for in Article 32 of the *Vienna Convention on the Law of Treaties*[63] (the "*Vienna Convention*"), is unnecessary. Further, the term "suspected" in the 1948 Report of Working Party on Modifications to the General Agreement[64], referred to by Thailand, did not relate to the *Ad* Note; and other reports relied on by Thailand were issued 10 and 20 years after the *Ad* Note was inserted, and therefore cannot be relevant as negotiating history.[65]

51. The United States further argues that the Panel properly found that the *Anti-Dumping Agreement* does not prohibit security requirements such as the EBR, if they are "reasonable". As to the relationship between the *Anti-Dumping Agreement* and the *Ad* Note, the United States agrees with the Panel's reliance on the Panel and Appellate Body Reports in *Brazil – Desiccated Coconut* in

[62]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 21 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.109; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165).

[63]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[64]Report of Working Party on Modifications to the General Agreement, GATT/CP.2/22/Rev.1, adopted 1 September 1948, BISD II/37.

[65]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 23 (referring to Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 37 and footnote 51 thereto, and para. 42).

finding that, where the *Ad* Note authorizes a conduct and the *Anti-Dumping Agreement* confirms that such conduct is not prohibited by it, there is no basis for prohibiting such conduct.[66] The United States rejects Thailand's approach, which suggests that the silence of the *Anti-Dumping Agreement* on an issue means that it is prohibited, even if expressly permitted by the GATT 1994. Thailand's approach would "read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning."[67] According to the United States, and as recognized by past panels and the Appellate Body, Article VI is part of the same treaty as the *Anti-Dumping Agreement* and should not be interpreted to deprive it or the *Anti-Dumping Agreement* of meaning.[68] Neither the Appellate Body Report in *US – Offset Act (Byrd Amendment)*, nor in *US – 1916 Act*, supports the view that an action permitted by the *Ad* Note, and not addressed by the *Anti-Dumping Agreement*, is prohibited by Article 18.1 of the *Anti-Dumping Agreement*.

52. In addition, the United States agrees with the Panel that Article 7 of the *Anti-Dumping Agreement* does not address security requirements after the imposition of an anti-dumping duty order. The United States considers that Thailand's argument, that Article 7 governs the application of the *Ad* Note, is based on the fallacy that, if provisional measures within the meaning of Article 7 can take the form of security, all security requirements must be provisional measures. The United States considers that, since Article 7 does not address security requirements after the dumping determination is made, it cannot place limitations on those requirements beyond the limited scope of application of the *Ad* Note. Thus, in the United States' view, Article 7 is irrelevant to the legal assessment of the EBR. The fact that both Article 7 and the *Ad* Note refer to "cash deposits and bonds", does not mean that all security must be provisional.[69]

53. The United States argues further that the Panel properly found that Article 9 of *Anti-Dumping Agreement* does not address security requirements. More specifically, the United States agrees with

---

[66]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 24 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.93 and 7.94 and footnote 142 thereto, in turn referring to Panel Report, *Brazil – Desiccated Coconut*, para. 227 and footnote 6 thereto; and Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14, DSR 1997:I, 167, at 179).

[67]*Ibid*., para. 25.

[68]*Ibid*., (referring to Panel Report, *US – 1916 Act (EC)*, para. 6.97).

[69]*Ibid*., paras. 29-31 (referring to Thailand's submission, para. 50; and Panel Report, *US – Shrimp (Thailand)*, para. 7.129). The United States also refers to Panel Report, *US – Shrimp (Thailand)*, para. 7.125, in which the Panel referred to a statement in the 1959 Group of Experts Report (*supra*, footnote 41) that "Article VI made no mention of [provisional measures]." According to the Panel, this statement is "fundamentally at odds" with Thailand's argument that the scope of the *Ad* Note is limited to provisional measures taken prior to final determination of dumping. (Panel Report, *US – Shrimp (Thailand)*, para. 7.126) The United States disagrees with the argument that this statement by the Group of Experts simply meant that Article VI and the *Ad* Note do not use the term "provisional measures". The United States also rejects Thailand's reference to an exchange between the United States and the United Kingdom in 1965, which, according to Thailand, quotes United States law at the time regarding the use of certain bonds as provisional measures. (United States' appellee's submission, *US – Shrimp (Thailand)*, para. 30)

the Panel's interpretation of "suspected" dumping in the *Ad* Note, because reference to "final determination of the facts" in the *Ad* Note and the parallel reference to "determination of the final liability for payment" in Article 9.3.1 both refer to the determination of the amount to be paid, and until this determination is made, dumping continues to be merely "suspected". The United States also rejects Thailand's view that Article 9 contemplates only one type of action (that is, definitive duties), and that the EBR is therefore contrary to that provision. Although Article 9 contains certain obligations with respect to duties, this does not mean that it contemplates that only definitive duties are permitted. The United States contends that, since cash deposits are not "definitive duties", Thailand's argument would imply that they are prohibited as well. Such a far-reaching result implies that the *Anti-Dumping Agreement* supersedes the GATT 1994, contrary to the Appellate Body Report in *Brazil – Desiccated Coconut*. Finally, Thailand's argument that the United States did not have a retrospective duty assessment system at the time when the *Ad* Note was inserted to support its view that the negotiators could not have anticipated the need for security after imposition of an anti-dumping duty order is factually incorrect. The United States refers to its Antidumping Act of 1921[70], which established a retrospective system for duty assessment, a fact that the Panel accepted.[71]

54. The United States also submits that Thailand's reading of the term "margin of dumping" in Article 9.3 ignores the margins established in an assessment review, and that it is payment for the duties up to these margins that the cash deposit and bond are intended to secure. The United States claims that the Appellate Body Report in *US – Zeroing (EC)*[72] supports its view that the "margin of dumping established for an exporter or foreign producer" refers to the margin of dumping found in an assessment review and not in the original investigation. Finally, the United States points out that Thailand does not explain how Article 9 can be read to address bonds, as bonds are not definitive duties. Therefore, the Appellate Body should reject Thailand's request for clarification that Article VI, as interpreted by the *Anti-Dumping Agreement*, limits the amount of any definitive duty, which include the "cash deposits of estimated dumping duties" to the amount of the previously determined margin of dumping.

55. The United States also argues that the Appellate Body Reports in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)* should not be read to imply that additional security is prohibited. As the Panel noted, these reports do not contain any analysis of the *Ad* Note, nor do they even discuss how Members could guard against a risk that one of the "permissible responses" to dumping might be

[70]United States Antidumping Act of 1921, 42 Stat. 11, codified under *United States Code*, Title 19, as amended.

[71]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 37 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.129 and footnote 174 thereto).

circumvented. For the United States, Thailand's reading of the reports would alter the balance of rights and obligations in the covered agreements, contrary to the DSU and the Appellate Body Report in *Brazil – Desiccated Coconut*.

56. Lastly, the United States rejects the argument that security for anti-dumping duties may be taken only if justified under Article XX(d) of the GATT 1994. The United States submits that, if this were indeed the only provision that authorized security in cases where there is a risk of non-collection, it is unclear why the *Ad* Note, or any other provision dealing with security, would have been included in the GATT 1994. The United States argues that its position in these proceedings is consistent with its view in *EEC – Parts and Components* because, in that case, the United States had argued that Article XX(d) permitted GATT Contracting Parties to take action for the enforcement of customs laws; it did not argue that Article XX(d) was the *only* provision addressing actions facilitating the collection of duties. The United States notes that the "action" in that case was anti-circumvention measures, which are not governed by the *Ad* Note. The United States further highlights that, if security is not inconsistent with the GATT 1994, including the *Ad* Note, Article XX(d) is not relevant for an analysis of its WTO-consistency. Finally, the United States submits that Thailand's purported distinction between "action against dumping" under Article 18.1 and action falling under Article XX(d) begs the question of which provisions of the Agreements limit security for anti-dumping duties. In the United States' view, "reasonable" security under the *Ad* Note is not exclusively related to "dumped goods", but extends to considerations such as the amount of potential liability and risk of default.[73]

2. Cash Deposits and Anti-dumping Duties

57. The United States supports the Panel's view that a cash deposit is security for a duty owed, and is not itself a duty. The United States agrees with the Panel that, in contrast to a duty, a cash deposit is not liquidated public revenue and has no "intrinsic value" until duties are assessed. The United States also endorses the Panel's observation that the retrospective duty assessment in Article 9.3.1 would make no sense if "cash deposits" were duties, since cash deposits are established on a prospective basis. It also agrees with the Panel that there is a textual difference between Articles 9.3.2 and 9.3.1—the former refers to refunds of "duties", whilst the latter refers only to "refund" without specifying what must be refunded—and that this textual difference supports the view that cash deposits are not duties. Like the Panel, the United States notes that Article 7.2 distinguishes

[72]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 42 (referring to Appellate Body Report, *US – Zeroing (EC)*, paras. 128 and 130).
[73]The United States refers to its other appellant's submission in *US – Shrimp (Thailand)*.

a "cash deposit" as a form of security from "duties", and agrees with the Panel that, in indicating a preference for requiring payment of cash deposits, rather than duties, the text of Article 7.2 establishes a substantive difference between a cash deposit and a duty.

58. The United States rejects Thailand's argument that "what is imposed" pursuant to an assessment review is a "duty" and that, because cash deposits are "imposed", they too must be "duties".[74] For the United States, Thailand's logic is circular. Moreover, the reference in United States law to "cash deposits of estimated anti-dumping duties" reflects the fact that cash deposits are required in an amount equal to estimated duties.[75] The United States agrees with the Panel that, by definition, security for estimated duties is not a duty *per se*, it is merely a security for duties that may be collected in the future, and there is no duty in the absence of any such future collection.[76] For the United States, the fact that cash deposits are "paid in cash", and that they may be made in an amount less than the final liability, does not make them "duties".[77]

3. The Reasonableness of the EBR, as Applied to Subject Shrimp

59. Whilst the United States agrees with Thailand that the risk of default may be among the factors that are relevant to determining whether any additional security is reasonable within the meaning of the *Ad* Note, it disagrees with the assertion of Thailand that the likelihood of default for a particular importer must be taken into account in assessing the reasonableness of a security, and that security can only be required where there is a "direct and substantial risk of non-collection" of anti-dumping duties from an importer.[78] According to the United States, the text of the *Ad* Note does not suggest that "reasonableness" requires an importer-specific assessment of default risk. The United States adds that assessing the risk of default of individual importers involves practical difficulties, as United States Customs cannot conduct an assessment of individual risk without collecting information from the importer and cannot wait until the importer defaults. The risk of default of importers as a whole may, however, be considered in order to assess whether requiring additional security is reasonable. According to the United States, factors such as the industry's characteristics, the ability to pay, or the compliance history may be relevant to determine the risk of default. The United States notes that, with respect to shrimp importers, United States Customs concluded that: agriculture/aquaculture industries were characterized by low capitalization and high debt-to-equity ratios; importers of this type of merchandise had been responsible for significant defaults in the past;

[74]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 39 (referring to Thailand's appellant's submission, *US – Shrimp (Thailand)*, paras. 110 and 111).
[75]*Ibid*.
[76]*Ibid*.
[77]*Ibid*., para. 40.
[78]*Ibid*., para. 50 (referring to Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 152).

and shrimp importers of merchandise were therefore likely to have a heightened risk of default due to similarities with these other agriculture/aquaculture importers. For the United States, because the Panel failed to consider the evidence that it had provided regarding risk of default with respect to the importers of shrimp subject to anti-dumping duties, it could not have known whether the risk of default was such that additional security was "reasonable".

C. *Claims of the United States – Other Appellant in US – Shrimp (Thailand)*

1. The Reasonableness of the EBR, as Applied to Subject Shrimp

60. The United States explains that the EBR was developed for increasing security requirements regarding merchandise with a higher risk of default by importers on final duty liability. Past history had shown that importers of agriculture/aquaculture merchandise were the source of the bulk of defaults, that anti-dumping rates increased in assessment reviews 38 per cent of the time, and that when rates increased, they did so by an average of 285 per cent. The United States underscores the fact that United States Customs applied the EBR to subject shrimp because the potential unsecured liability appeared significant (due to the fact that shipments in excess of US$2.5 billion were subject to such orders), as did the risk of default (because the industry shared characteristics similar to those of other industries that, in the past, had been the source of substantial defaults).

61. According to the United States, the Panel developed its own standard to determine whether the EBR as applied to subject shrimp constitutes "reasonable security" within the meaning of the *Ad* Note. In considering that additional security may only be "reasonable" if a WTO Member determines that the anti-dumping rate is "likely" to increase between imposition of the order and final assessment, the Panel adopted an incorrect standard. This is because it would exclude bonding where there is less than "substantial certainty" that such an increase will occur. For the United States, the Panel's approach is contrary to the ordinary meaning of the term "reasonable", and would imply that ordinary revenue collection strategies may not be applied to importers that are liable to anti-dumping duties.

62. The United States considers that United States Customs' analysis as to whether additional security should be required is in line with ordinary customs practice, as United States Customs' decision to require additional security depends upon the amount of potential liability being secured and the likelihood of default. The United States explains that the potential additional liability depends on the likelihood of an increase in the margin of dumping, the likely size of that increase, and the total value of shipments subject to that margin of dumping. The likelihood of default by importers, on the other hand, will be assessed in the light of factors such as industry characteristics, ability to pay, and

compliance history. Customs administrations do not merely secure liability that is determined to be "likely" to accrue; the Panel's analysis is, therefore, at odds with the textual reference in the *Ad* Note to "other cases in customs administration".

63. The United States observes that the Panel asserted that default risk is irrelevant to a determination of whether security is "reasonable". According to the United States, risk of default is routinely taken into consideration by customs authorities in establishing security requirements. In fact, the risk of default was an important element of the analysis that led United States Customs to apply the EBR to subject shrimp. The United States considers that, "[i]f the evidence demonstrated a significant risk of default, the Panel should have concluded that the security requirement was 'reasonable', even if the likelihood of an increase [in the anti-dumping rate] was less than 'substantial certainty'."[79]

64. For the United States, the Panel's position—according to which additional security may only be reasonable if the customs authorities show that the anti-dumping rate is "likely" to increase, and determine the likely amount of such increase—would "limit 'reasonable security' to a calculation based on information that is impossible to know at the time the security is imposed."[80] The United States argues that, to determine whether the EBR as applied to subject shrimp was "reasonable", the Panel should have considered the totality of the evidence available at the time regarding the revenue risk against which the bond was secured. According to the United States, this evidence included the likelihood of default, the amount of potential unsecured liability, and the likelihood of rate increases.

65. The United States therefore requests the Appellate Body to reverse the Panel's finding that the EBR, as applied to subject shrimp, is not a "reasonable security" and that it is not consistent with the *Ad* Note.

2. The Panel's Analysis of the Term "Necessary" under Article XX(d) of the GATT 1994

66. Should the Appellate Body not reverse the Panel's interpretation of the reasonableness of the security under the *Ad* Note, the United States requests the Appellate Body to reverse the Panel's finding that, unless a Member demonstrates that rates subject to the anti-dumping duty order "are likely to increase", an additional security requirement cannot be considered to be "necessary" within the meaning of Article XX(d) of the GATT 1994, and to complete the analysis with respect to the chapeau of Article XX(d).

[79]United States' other appellant's submission, *US – Shrimp (Thailand)*, para. 14.
[80]*Ibid.*, para. 17.

67. The United States submits that the test used by the Panel to determine the necessity of the EBR for purposes of Article XX(d) was the same as the one it used to evaluate the "reasonableness" of the security under the *Ad* Note. According to the United States, that test provides "no insight", since security may be "necessary" even where there is a "likelihood" that liability will accrue, but it is not "likely" (in the sense of "substantial certainty") that it will do so.[81]

68. The United States recalls that the application of the EBR to subject shrimp was necessary due to the significant potential unsecured liability and the significant default associated with entries of similar merchandise in the past. According to the United States, requiring additional security pending final determination of duties owed is a standard approach among WTO Members to address the problem of potential unsecured duty liability pending final assessment. The United States argues that the Panel failed to take into account the fact that United States Customs adopted a tailored process for evaluating risk and bond amounts, in which the bond amount required of an importer reflects that importer's actual ability to pay duties lawfully owed, and thus the "necessity" of any additional security. Further, the United States claims that Thailand has not identified any "reasonable alternatives" to the EBR that would address the specific problem faced by United States Customs, nor did the Panel find that any such alternatives existed. In fact, the possible WTO-consistent alternatives cited by the complaining parties—including the cash deposit requirement, civil recovery proceedings, and the "basic bond requirement"[82]—were already in effect when United States Customs experienced its non-collection problem. Finally, the United States contends that the EBR meets the requirements of the chapeau of Article XX and requests the Appellate Body to complete the analysis, given that there is sufficient evidence in the record to do so; and also to find that the EBR is "necessary" to enforce relevant United States anti-dumping laws and regulations.

D. *Arguments of Thailand – Appellee in US – Shrimp (Thailand)*

1. The Reasonableness of the EBR, as Applied to Subject Shrimp

69. Thailand points out that, in the event the Appellate Body interprets the *Ad* Note as temporally limited to the period before definitive duties are imposed, it will not reach the issues raised in the United States' other appeal.

70. Thailand contends that the United States' appeal of the Panel's finding that the EBR is not a "reasonable security" within the meaning of the *Ad* Note is predicated on a "fundamental

[81]United States' other appellant's submission, *US – Shrimp (Thailand)*, para. 21.

[82]"Basic bond requirement" refers to the basic requirements listed in the 1991 Directive for a continuous bond.

misunderstanding or misrepresentation of the standard actually applied by the Panel".[83] It is also based on the assumption that the Panel interpreted "reasonable" in the *Ad* Note to require that additional security is permitted only where there is a "substantial certainty" of an increase in dumping margins.[84] Thailand considers that the Panel's standard was, rather, that there should be a "likelihood" that margins will increase, and that additional security should only be required up to the "likely amount" of such increase. Thailand submits that the terms "likely" and "substantial certainty" are distinct and represent different levels of probability, and that the Panel did not, in fact, apply a standard of "substantial certainty".[85]

71. Thailand considers that the test of reasonableness developed by the Panel is consistent with the ordinary meaning of that term. Thailand submits that the dictionary definition of "reasonable" endorsed by the Panel—that is, "in accordance with reason; not irrational or absurd"; and with respect to amounts, "[w]ithin the limits of reason; not greatly less or more than might be thought to be likely or appropriate"[86]—had been proposed by the United States, and that the test ultimately applied by the Panel "closely follows"[87] this definition. Thailand recalls that the Panel construed this definition as requiring, in the case of "suspected dumping", a proper determination that dumping rates were "likely" to increase before additional security could be imposed, and that additional security should not be "greatly more"[88] than the amount of "likely" additional anti-dumping duty liability. According to Thailand, it is apparent that security "greatly more" than the amount of likely anti-dumping duty liability considerably burdens importers without generating substantial benefits as far as revenue collection is concerned, and thus is neither "in accordance with reason", nor "appropriate".

72. Thailand further submits that the Panel was correct in basing its standard of reasonableness on the amount of "likely" anti-dumping duty liability, and not on an indeterminate amount of "possible" liability, as proposed by the United States. Under the United States' test, additional security would be "reasonable" as long as there is a "reasonable possibility" or "reasonable chance" of dumping margins increasing. This would mean that the United States would *always* be permitted to require additional security of an indeterminate amount. Thailand agrees with the Panel that the *Ad* Note does not

---

[83]Thailand's appellee's submission, *US – Shrimp (Thailand)*, para. 17.

[84]*Ibid*., paras. 14 and 17 (referring to United States' other appellant's submission, *US – Shrimp (Thailand)*, paras. 6, 11, 14, and 21).

[85]*Ibid*., para. 15 (referring to Panel Report, *US – Shrimp (Thailand)*, paras. 6.58 and 6.69; in particular, the Panel's statements at paragraph 6.58 merely restate the position of the United States at the interim review stage. Further, Thailand explains that the Panel declined during its interim review comments to accede to the United States attempt to "weaken" the likely standard to one of "possible" liability).

[86]*Ibid*., para. 19 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.139; and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2496).

[87]*Ibid*., para. 20.

[88]Panel Report, *US – Shrimp (Thailand)*, para. 7.141.

sanction security at levels that seek to "eliminate" totally the risk of non-collection of increased duty liability in a retrospective duty assessment system.

73. Thailand notes that the United States has not appealed the Panel's finding that the EBR constitutes "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. Therefore, it does not dispute that the EBR acts "against" exporters of shrimp to deter them from exporting dumped products. In Thailand's view, the EBR therefore has an impact upon exporters, just as anti-dumping duties do, and the disciplines of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 would be undermined if the broad interpretation of "reasonable" by the United States were endorsed. Given the United States' admission that the actual margin of dumping from the investigation or most recent assessment review is the "best and only available baseline proxy of duties that ultimately may be assessed"[89], Thailand submits that the term "reasonable" should be narrowly construed to ensure that additional security, and therefore additional costs to exporters in excess of this baseline, are not permitted.

74. Thailand also contests the United States' argument that the Panel misconstrued the phrases "as in other cases of customs administration" and "any case of suspected dumping" in the *Ad* Note. Thailand disagrees that the Panel's interpretation of "reasonable" does not accord with the practices adopted by customs authorities "as in other cases of customs administration", and submits that the United States' argument is difficult to reconcile with its own admission that United States Customs considers the likelihood and size of an increase in dumping margins when setting security amounts. Moreover, the record does not suggest that customs authorities routinely, if ever, require additional security even where there is a high risk of default. Thailand endorses the Panel's view that the *Ad* Note does not impose a substantive obligation to adhere to "ordinary customs practice", and argues that there is no evidence on the record regarding precise practices of customs authorities other than the United States. Thailand also points to a ruling of the United States Court of International Trade[90] (the "USCIT") that the EBR violated United States law governing bond determinations, and that it was applied in an "arbitrary and capricious manner", which is difficult to reconcile with the United States' position that the EBR conforms to "ordinary customs practice".

[89]Thailand's appellee's submission, *US – Shrimp (Thailand)*, para. 25 (referring to United States' first written submission to the Panel in *US – Shrimp (Thailand)*, para. 37).

[90]*Ibid*., para. 28 (referring to USCIT, *National Fisheries Institute Inc., et al* v. *United States Bureau of Customs and Border Protection*, No. 05-00683 (Exhibit THA-9 submitted by Thailand to the Panel), pp. 54-61).

75. Thailand rejects the United States' argument that the Panel's standard unduly limits security to a calculation based on information impossible to know at the time security is imposed. Thailand does not see why it would be "impossible" to make predictions on likely liability at the time of entry, and recalls the United States' admission that United States Customs routinely considers the likelihood of increase in margins and the size of that increase. Furthermore, Thailand notes that Article 11.3 of the *Anti-Dumping Agreement* contemplates prospective assessments in sunset reviews of the likelihood of dumping to continue. Thailand also submits that, if it were indeed "impossible" to predict dumping margins, it would be prudent to base security requirements on the most recently assessed margin of dumping, because the United States itself admits that these margins are the best and only available proxy of duties that will be ultimately assessed.

76. Thailand argues that the risk of default cannot justify the imposition of security in excess of the amount of likely anti-dumping duty liability. Whilst Thailand accepts that the importers' risk of default is an important factor for assessing the reasonableness of security, this factor affects the analysis in a manner different to that suggested by the United States. In Thailand's view, the amount of security cannot exceed the likely amount of future liability and, therefore, the risk of default must be considered only for deciding whether to require security for the full amount or a lesser amount. Thailand highlights that dumping is an "exporter-specific" concept, and the amount of likely future liability for dumping duties as well. Whilst the EBR acts "against" exporters, it is the importers who pay duties and to whom the risk of default relates. Thus, it would not be reasonable to permit additional "action against dumping" in the form of security under the *Ad* Note in excess of the *exporter's* likely future dumping margin on the basis of importer-specific factors. Thailand further submits that the United States fails to clarify how the reasonable amount of security demanded from an importer with a high risk of default would be assessed and how this would affect the determination of the amount of security exceeding expected liability.

77. Thailand agrees with the Panel that general historical trends in dumping margins in agriculture/aquaculture cases could not have justified conclusions that dumping margins were likely to increase in the case of subject shrimp. Thailand submits that the United States has not contested these Panel findings and, therefore, the Appellate Body should not disturb them. For Thailand, the Panel was legitimately concerned with the absence of documentary evidence at a level of detail that would enable it to assess the rigour and relevance of the analysis carried out by United States Customs.

78. Regarding the United States' argument that the Panel failed to consider the risk of default, Thailand recalls that the Panel found that "reasonable" security is limited to the amount of the likely future dumping margin. Accordingly, the Panel cannot be faulted for not taking into account evidence of risk of default, because such risk could not justify security in excess of the likely future dumping margin.

2. The Panel's Analysis of the Term "Necessary" under Article XX(d) of the GATT 1994

79. Thailand submits that Article XX(d) of the GATT 1994 cannot operate as a defence to an inconsistency with the *Anti-Dumping Agreement*, and that the Appellate Body need not therefore make findings on the Panel's analysis of necessity under Article XX(d), or under its chapeau. In Thailand's view, once an action has been found to be an impermissible "specific action against dumping" under Article 18.1 of the *Anti-Dumping Agreement*, as the Panel found with respect to the EBR, such action cannot be "rehabilitated" as WTO-consistent by recourse to a defence under Article XX(d).

80. Thailand argues that, in any event, the United States' appeal against the Panel's necessity analysis rests on the same arguments as the analysis of "reasonableness" under the *Ad* Note. In Thailand's view, the latter analysis is "simply inapplicable" to the analysis required under Article XX(d) because the two provisions contain different language. Nor does the United States explain how or why the reasonableness analysis under the *Ad* Note should apply also to the interpretation of "necessary" under Article XX(d), or further how the EBR is applied consistently with the chapeau.

81. Thailand submits that the United States does not explain how the Panel failed to consider certain "aspects" of the EBR in its analysis.[91] Thailand emphasizes that the United States fails to explain how the fact that the import value of subject shrimp is in excess of US$2 billion, and how the significant risk of default associated with these entries could justify the EBR if dumping margins are not likely to increase.

82. Thailand further contends that the United States fails to explain why only importers of subject shrimp must pay additional security, and why the "less trade restrictive" combination of the basic bond requirement, cash deposits, and ordinary enforcement proceedings was not adequate.[92] According to Thailand, in the absence of evidence that dumping margins are likely to increase by

[91]Thailand's appellee's submission, *US – Shrimp (Thailand)*, para. 47 (referring to United States' other appellant's submission, *US – Shrimp (Thailand)*, para. 22).
[92]*Ibid*., para. 48.

100 per cent, and that there is a significant risk of default, the EBR cannot be considered as a measure "necessary" to secure compliance with laws and regulations requiring payment of anti-dumping duties. Nor is it clear that the EBR would remedy difficulties in collecting duties owed since the evidence suggests that these difficulties arise from the interaction of unique factors that were particular to imports of crawfish from China.[93] Moreover, Thailand argues, by applying the EBR to only six WTO Members, whilst exempting other importers of products from other countries that present equivalent or even greater risks to revenue, the United States "arbitrarily" and "unjustifiably" discriminates between countries where the same conditions prevail.[94] Thailand also contends that the EBR operates as a "disguised restriction on international trade" in shrimp products. For all of these reasons, Thailand requests the Appellate Body to find that the United States has not met the burden of establishing the affirmative defence under Article XX(d) of the GATT 1994 and that its arguments on appeal be rejected.

E. *Claims of India – Appellant in US – Customs Bond Directive*

1. *Ad* Note to Article VI:2 and 3 of the GATT 1994

83. India argues that the Panel erred in its interpretation of the phrase "as interpreted by this Agreement" in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*. India submits that any interpretation of the *Ad* Note that would authorize the United States to impose the EBR independently of the three permissible specific actions against dumping under the *Anti-Dumping Agreement* or of the four permissible specific actions under the *SCM Agreement* would render this phrase redundant and inutile. According to India, had the intent of the drafters of the *Anti-Dumping Agreement* and the *SCM Agreement* been to consider as permissible the specific actions identified in Article VI:2 or 3 of the GATT 1994, but not specified in the *Anti-Dumping Agreement* or the *SCM Agreement*, they would not have included the phrase "as interpreted by this Agreement" in the text of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

84. India also considers that the Panel erred in concluding, on the basis of the Appellate Body Report in *US – Offset Act (Byrd Amendment)*, that the phrase "as interpreted by this Agreement" was intended solely to clarify that the relevant provision of the GATT 1994 was Article VI. For India, the second sentence of Article 1 of the *Anti-Dumping Agreement* supports its view that the provisions of the *Anti-Dumping Agreement* limit the types of specific actions that may be taken against dumping

[93]Thailand's appellee's submission, *US – Shrimp (Thailand)*, para. 48.
[94]*Ibid*.

under Article 18.1 of the *Anti-Dumping Agreement*. India points out that, in *US – 1916 Act* and in *US – Offset Act (Byrd Amendment)*, the Appellate Body "emphasized the importance of reading Article VI and, in particular, Article VI:2, in conjunction with the *whole* of the Anti-Dumping Agreement to determine what are the permissible specific actions against dumping."[95] India adds that the Panel's interpretation of the phrase "as interpreted by this Agreement" would imply that specific actions against dumping or subsidization that are expressly contemplated by the *Anti-Dumping Agreement* would not be permissible unless they are expressly authorized by Article VI of the GATT 1994 as well. According to India, the phrase "as interpreted by this Agreement" requires an analysis of the text of Article VI of the GATT 1994, the *Anti-Dumping Agreement*, and the *SCM Agreement* as a whole to determine what are the specific actions permissible under the *Anti-Dumping Agreement* and under the *SCM Agreement*.

85. India observes that the Panel's analysis of the relationship between Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement* was based on a general observation made by the Appellate Body in *Brazil – Desiccated Coconut*, according to which the provisions of the *SCM Agreement* (or by implication, the *Anti-Dumping Agreement*) do not supersede the provisions of Article VI of the GATT 1994. For India, the Panel erred in wrenching this general observation of the Appellate Body out of its context and in making it the basis for its conclusion on the permissibility of a fourth specific action against dumping (that is, the taking of security for definitive anti-dumping duties). In India's view, the Panel could not have relied on this general observation to find that a specific action against dumping is permissible, as authorized by the *Ad* Note, but which is prohibited by the *Anti-Dumping Agreement*. On the basis of the same Appellate Body Report, India argues that Article VI of the GATT 1994 cannot be applied independently of the *Anti-Dumping Agreement*, and that Article VI read in conjunction with the *Anti-Dumping Agreement* modified the rights of the WTO Members with respect to anti-dumping measures, as compared to their rights under Article VI taken in isolation. In this respect, India argues that Article 7 of the *Anti-Dumping Agreement* does address the taking of security for the payment of anti-dumping duties and, therefore, the *Ad* Note is not available as a stand-alone provision independent of the *Anti-Dumping Agreement* to justify the taking of a security.

86. India points out that, in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*, the Appellate Body found that there were only three specific actions permissible against dumping (definitive duties, provisional measures, and price undertakings), and four permissible specific actions against subsidization (including multilaterally sanctioned countermeasures in addition to the three specific actions permissible in the context of dumping). According to India, the Panel's position (that the

[95]India's appellant's submission, *US – Customs Bond Directive*, para. 21. See also *ibid.*, para. 24.

taking of reasonable security for the payment of anti-dumping duties is a permissible action against dumping) is not consistent with these Appellate Body findings. Furthermore, India argues that the Panel erred in considering that these findings were dicta on the grounds that, in these two cases, the Appellate Body did not address the provisions of the *Ad* Note. For India, these findings do not constitute *obiter dictum*. India adds that the Panel was mistaken when it said that, in reaching these findings, the Appellate Body did not refer to the provisions of the *Ad* Note. In India's view, it was inappropriate for the Panel to disregard settled WTO jurisprudence, as coherence and continuity in WTO jurisprudence contribute to security and predictability in the multilateral trading system.

87. India argues that the *Ad* Note cannot be interpreted as authorizing a security requirement for the payment of anti-dumping duties under a retrospective duty assessment system. India submits that, in interpreting the *Ad* Note, the Panel "worked backwards from its strongly held conviction that it was essential that Members such as the United States that follow the retrospective duty assessment system be permitted to take security in cases where there is a likelihood of increase in dumping margins between the final determination (at the end of the investigation phase) and the final assessment review."[96] For India, the Panel's approach was not in accordance with the customary principle in Article 31(1) of the *Vienna Convention* that a treaty provision shall be interpreted in good faith in accordance with its ordinary meaning in its context and in the light of its object and purpose.

88. India contends that the Panel erred in interpreting and applying the term "suspected dumping" in the *Ad* Note. For India, in focusing exclusively on the retrospective duty assessment system as applied by the United States to determine whether there remains "a case of suspected dumping" after the determination of dumping and preceding the imposition of a United States anti-dumping duty order, the Panel departed from the customary principles of treaty interpretation. According to India, the Panel's interpretation implies that suspicion of dumping begins after the final determination of the existence of injurious dumping, a result that India views as "startling"[97] from the standpoint of the prospective duty assessment system.

89. India maintains that the Panel also erred in interpreting and applying the term "final determination" in the *Ad* Note. India considers that this term must be interpreted in the light of the context provided by the *Anti-Dumping Agreement* and the *SCM Agreement*. In this respect, India points out that, in many cases where the term is used in these agreements, it is used in conjunction with the term "preliminary determination" and the phrase "affirmative or negative". India also underlines that, in most cases, the term "final determination" is referred to in the singular in the

[96]India's appellant's submission, *US – Customs Bond Directive*, para. 55. (footnotes omitted)
[97]*Ibid*., para. 59.

context of the determination immediately preceding the application of "final measures" or "definitive duties".[98] For India, these contextual considerations establish that there is only one final determination in the life of an anti-dumping or countervailing measure, and that this final determination precedes the decision to impose a duty under Article 9.1 of the *Anti-Dumping Agreement*, or under Articles 19.1 and 19.2 of the *SCM Agreement*. India contends that the Panel's interpretation of the term "final determination"—which, in the case of a retrospective assessment system, means the "determination of the final liability for payment of anti-dumping duties" referred to in Article 9.3.1 of the *Anti-Dumping Agreement*—is erroneous, because such an interpretation would imply that there is not a single final determination of the facts in a case of suspected dumping, but rather a series of final determinations.

90. India maintains that the Panel's interpretation of the *Ad* Note brings about an asymmetry between the prospective and the retrospective duty assessment systems. In India's view, the Panel's interpretation of the terms "suspected dumping" and "final determination" in the *Ad* Note bestows special privileges on the retrospective duty assessment system as compared to the prospective duty assessment system, because it permits only the Members that follow the retrospective duty assessment system to take additional security for the payment of anti-dumping duties. India contends that, since the Panel concluded that Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* do not implement the *Ad* Note, the *Ad* Note remains available solely to WTO Members such as the United States that follow the retrospective system of duty assessment.

91. India submits that Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* implement the *Ad* Note to the extent that these provisions permit security to be taken as a provisional measure. Accordingly, India reasons, the United States cannot justify the EBR under the *Ad* Note independently of these provisions. India points out differences between the *Ad* Note and Article 7 of the *Anti-Dumping Agreement* as well as Article 17 of the *SCM Agreement* (the latter provisions seem to impose stricter conditions on taking security than the *Ad* Note) that cannot be circumvented by relying exclusively on the *Ad* Note. According to India, Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* "implement the *Ad* Note in the sense that each of these provisions forms part of the inseparable package of rights and disciplines under the provisions of Article VI of the GATT 1994 including the Ad Note read in conjunction with the Anti-Dumping Agreement (or the SCM Agreement, as the case may be)."[99]

[98]India's appellant's submission, *US – Customs Bond Directive*, para. 63.
[99]*Ibid*., para. 81.

2. Cash Deposits and Anti-dumping Duties

92. India appeals the Panel's finding that cash deposits are not anti-dumping duties within the meaning of Article 9 of the *Anti-Dumping Agreement*. For India, whether cash is accepted as a "cash deposit" or as "payment of duties", it is a difference only in nomenclature and not in substance. In this respect, India points to submissions made by the United States to the Negotiating Group on Rules in relation to Article 9.3 in which, allegedly, the United States characterized payments of cash deposits made under Article 9.3.1 as "duties".[100]

93. India also refers to submissions made by the United States to the panels in *US – Zeroing (EC)* and *US – Section 129(c)(1) URAA* that, allegedly, admit that the United States collects duties as opposed to security during the period between the imposition of an anti-dumping duty order and an assessment review. Assuming *arguendo* that the United States collects cash deposits by way of security and not by way of duties, India submits that the United States cannot take such security in excess of the margins specified in Article 9.3 of the *Anti-Dumping Agreement* and Article 19.4 of the *SCM Agreement*.

94. India refers to the Appellate Body Report in *US – Zeroing (Japan)* in which the Appellate Body stated that, "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales, including those occurring at above the normal value."[101] According to India, the Panel erred in characterizing this statement as *obiter dicta*. India considers that the observation of the Appellate Body in *US – Zeroing (Japan)* should take precedence over factual statements made by the Appellate Body in *US – Zeroing (EC)*, where the Appellate Body stated that the United States collects security in the form of a cash deposit[102], because the observation made in *US – Zeroing (Japan)* was part of the Appellate Body's reasoning in rejecting the panel's analysis relating to the retrospective duty assessment system.[103]

3. The Reasonableness of the EBR, as Applied to Subject Shrimp

95. India does not challenge on appeal the Panel's ultimate finding that the EBR, as applied to subject shrimp, is not a "reasonable security". However, India does contest the Panel's statement that,

[100]India's appellant's submission, *US – Customs Bond Directive*, footnotes 113 and 114 to para. 111 (referring to Negotiating Group on Rules, Identification of Additional Issues under the Anti-Dumping and Subsidies Agreements, Paper submitted by the United States, TN/RL/W/98 (6 May 2003); Negotiating Group on Rules, Accrual of Interest (ADA Articles 9.3.1 and 9.3.2), Communication from the United States, TN/RL/W/168 (10 December 2004); and Negotiating Group on Rules, Collection of Anti-Dumping Duties under Article 9.3, Communication from the United States, TN/RL/GEN/131 (24 April 2006)).

[101]Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

[102]Appellate Body Report, *US – Zeroing (EC)*, para. 109.

[103]India's appellant's submission, *US – Customs Bond Directive*, para. 116.

"[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers."[104]

96. India claims that the Panel erred in concluding that the term "reasonable security" under the *Ad* Note did not require the United States to assess the likelihood of default by individual importers. For India, because any exercise in estimating the likely increase in the liability for anti-dumping duties and the likely amount of such increase is likely to be based on "conjecture and guess work"[105], it is necessary to add a requirement regarding the likelihood of default by individual importers in order to render an additional security such as the EBR "reasonable" under the *Ad* Note.

4. "As Such" Consistency of the Amended CBD with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*

97. India recalls the grounds on which the Panel made its findings, and accepts that its "as such" claims on appeal "can succeed only if the Appellate Body agrees with India that the requiring of security between the final determination and the final assessment review under the retrospective duty assessment system is not authorized by the Ad Note".[106] India argues that, if the Appellate Body were to reverse that finding of the Panel, its other finding that the Amended CBD is a discretionary measure "cannot stand in the way of India's 'as such' claims under Articles 1 and 18.1 of the Anti-Dumping Agreement".[107] India offers a number of reasons to substantiate its claim. Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement* require Members to bring their laws into conformity with their obligations under these Agreements, as recognized in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*.[108] Further, if discretionary measures could not be challenged "as such", anti-dumping and countervailing duty legislation or regulations (such as the United States Antidumping Act of 1916[109]) would never be subject to challenge since they are inherently discretionary in character. India contends that Members should not be permitted to avoid obligations to bring their laws into conformity by couching obligations in non-mandatory terms. The Appellate Body also has recognized this by stating that the mandatory/discretionary distinction should not be applied "mechanistically" but with caution.[110] Finally, India refers to

[104]Panel Report, *US – Customs Bond Directive*, footnote 148 to para. 7.119.
[105]India's appellant's submission, *US – Customs Bond Directive*, para. 135.
[106]*Ibid*., para. 84.
[107]*Ibid*.
[108]*Ibid*., para. 85 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87).
[109]Title VIII (under the heading "Unfair Competition") of the United States Revenue Act of 1916, 39 Stat. 756 (1916).
[110]See India's appellant's submission, *US – Customs Bond Directive*, paras. 87 and 88 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81 and 82; and Appellate Body Report, *US – 1916 Act*, para. 91).

"numerous admissions"[111] by the United States that United States Customs is bound to impose the EBR on every occasion where it considers the cash deposits to be inadequate to meet likely increases in final liability for anti-dumping or countervailing duties in assessment reviews.

98. India's "as such" claims on appeal are premised on its view that requiring a security between the imposition of the definitive anti-dumping duty order and the assessment of anti-dumping duties is not authorized by the *Ad* Note. Therefore, India reasons, every time the United States resorts to the EBR, it would be an impermissible specific action against dumping or subsidization, with the implication that the Amended CBD is WTO-inconsistent "as such".

5. Consistency of the Amended CBD with Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*

99. India appeals the findings of the Panel as regards the interpretation of Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*, and refers primarily to the Panel's interpretation of Article 9, which formed part of its contextual analysis of the *Ad* Note.[112] In particular, India challenges the Panel's finding that neither the EBR nor cash deposits imposed by Members with a retrospective duty assessment system are subject to the disciplines of Article VI:2 of the GATT 1994 and Article 9 of the *Anti-Dumping Agreement*; or Article VI:3 of the GATT 1994 and Article 19 of the *SCM Agreement*.

100. First, India contends that the Panel read into Article 9 a right to impose security after imposition of a definitive anti-dumping duty order, when the wording of Article 9.1 through Article 9.5, and the specific reference to the imposition and collection of "duties", make it clear that Article 9 intends to exclude any other rights. Secondly, India claims that the Panel erred in assuming that, because Article 9.3.1 "authorizes" retrospective duty assessment systems, it was necessary for the Panel to interpret it in the way the Panel did. India contends that the scope of Article 9.3.1 is "extremely limited"[113] and is meant to impose restrictions on the operation of retrospective duty assessment systems, as is clear from its negotiating history. Thirdly, as submitted by the United States in other WTO disputes, cash deposits are considered "duties" for purposes of Article 9. India contends that the right to collect duties permits only the collection of cash deposits not in excess of the margin of dumping, and does not permit the United States to collect duties in excess of the margin of dumping, even during the period between the anti-dumping duty order and the assessment review.

---

[111]See India's appellant's submission, *US – Customs Bond Directive*, para. 91, where India lists these "numerous admissions" by the United States.

[112]*Ibid*., para. 98 (referring to Panel Report, *US – Customs Bond Directive*, paras. 7.97, 7.100, 7.101, 7.106, 7.117, and 7.159-7.161).

[113]*Ibid*., para. 105.

101. Based on these arguments, India requests the Appellate Body to reverse the Panel's findings, and to find, instead, that the Amended CBD is inconsistent both "as such" and "as applied" with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*; and "as such" with Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*.

6. Completing the Analysis on Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*

102. In the event the Appellate Body reverses the Panel's findings with respect to India's "as such" claims under Articles 1, 9.1, 9.2, 9.3, 9.3.1, and 18.1 of the *Anti-Dumping Agreement*, and under Articles 10, 19.2, 19.3, and 19.4 of the *SCM Agreement*, India requests the Appellate Body to complete the analysis and find that the Amended CBD is "as such" inconsistent with Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*, respectively.

7. The Panel's Terms of Reference

103. India appeals the finding of the Panel that Section 1623 of the United States Tariff Act of 1930[114] (the "Tariff Act") and Section 113.13 of the *United States Code of Federal Regulations* (the "United States Regulations") were not within the scope of the measure at issue, and were not part of the Panel's terms of reference, because they are "separate and legally distinct" from the Amended CBD.

104. India submits that, in making this finding, the Panel ignored previous statements of the Appellate Body that establish that there is no requirement for a "precise and exact" identity between the measures identified in the consultations request and the panel request.[115] India refers to previous Appellate Body Reports that caution against substituting the consultations request with the panel request because it is the latter that establishes a panel's terms of reference.[116]

105. India notes that it is undisputed that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were specifically mentioned in the panel request. India refers to the Panel's

[114]*Supra*, footnote 53.
[115]India's appellant's submission, *US – Customs Bond Directive*, para. 119 (referring to Appellate Body Report, *US – Upland Cotton*, para. 285; and Appellate Body Report, *Brazil – Aircraft*, para. 132).
[116]*Ibid*., para. 129 (referring to Appellate Body Report, *US – Upland Cotton*, para. 285).

reliance on the Appellate Body Report in *US – Certain EC Products* when it asserted that mere reference in a panel request does not mean that a measure falls within the panel's terms of reference.[117]

106. India contrasts the factors relevant to the Appellate Body's finding in *US – Certain EC Products*, that the two measures in question were legally distinct[118], with the factors identified by the Panel in this case. India claims that the Panel erred by not considering that India had challenged Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations only "to the extent that they authorize the EBR", which was a challenge narrower than assumed by the Panel. A finding of violation, therefore, would only require the United States to ensure that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations do not extend to taking bonds to secure payment of anti-dumping and countervailing duties. Further, India contends that there is no dispute that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations grant the legal authority to impose the EBR, specifically, to secure revenue collection. Therefore, to the extent that the provisions listed and the arguments in India's consultations request concerned the WTO-consistency of the EBR, the measures consulted on would certainly include Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations.

107. For these reasons, India requests the Appellate Body to reverse the Panel's finding that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were not within the scope of the Panel's terms of reference.

---

[117]India's appellant's submission, *US – Customs Bond Directive*, para. 123 (referring to Panel Report, *US – Customs Bond Directive*, para. 7.183). India explains that, in the *US – Certain EC Products* case, the Appellate Body was required to determine whether a measure taken by the United States Trade Representative on 19 April 1999 (the "19 April Measure") that imposed 100 per cent duties on imports of certain products from the European Communities was within its terms of reference, in addition to a measure taken by United States Customs that imposed increased bonding requirements on 3 March 1999 (the "3 March Measure"). According to India, the reason that the Appellate Body did not accept the 19 April Measure as falling within its terms of reference was not because it was not included in the consultations request; rather, the main reason was that the European Communities had failed to specify clearly and expressly the 19 April Measure in its panel request. Furthermore, the complaint was about the increase in bonding requirements under the 3 March Measure, not the imposition of additional duties under the 19 April Measure. (India's appellant's submission, *US – Customs Bond Directive*, paras. 121 and 122 (referring to Appellate Body Report, *US – Certain EC Products*, para. 70))

[118]*Ibid*., para. 125. India refers to the fact that the duties imposed by the 19 April Measure were an additional 100 per cent, whereas the 3 March Measure provided for increased bonding requirements. Further, India notes that the number of products covered by the respective Measures varied; that separate agencies acting under distinct legal authorities were involved; that the earlier Measure did not require the imposition of 100 per cent duties in the later measure and that the legal bases for the two Measures were distinct; and that neither Measure required action similar to that contemplated by the other.

8. The Availability of a Defence under Article XX(d) of the GATT 1994 to the United States

108. India appeals the Panel's decision not to address "as a threshold question" whether Article XX(d) of the GATT 1994 remains available to justify a specific action against dumping or subsidization, and requests the Appellate Body to complete the analysis in this regard. Specifically, India considers that the United States could not assert "two mutually inconsistent defences"[119], namely, defending simultaneously the EBR as being consistent with the *Ad* Note to Article VI:2 and 3 of the GATT 1994, as well as that the EBR constituted non-specific action to secure payments of duties under Article XX(d). India bases its argument on the statement of the Appellate Body in *US – Offset Act (Byrd Amendment)* that, for purposes of Article 18.1 of the *Anti-Dumping Agreement*, a measure can be either a "specific action against dumping" as referred to in Article 18.1, or a general, "non-specific action" under footnote 24 to Article 18.1. Thus, according to India, the United States was required to invoke the footnote before justifying the EBR under Article XX(d). India contends further that Article VI of the GATT 1994, the *Ad* Note, and the *Anti-Dumping Agreement* constitute a "complete, self-contained code" according to which anti-dumping measures must be applied. Accordingly, a measure that does not comply with any of the provisions relating to Article VI of the GATT 1994 read in conjunction with the *Anti-Dumping Agreement* must be held to be inconsistent with the relevant provisions of these Agreements. Any interpretation that permits Members to justify impermissible specific actions against dumping under Article XX(d) would render "inutile" Article 18.1 of the *Anti-Dumping Agreement*.[120]

9. *Prima Facie* Case by the Panel under Article XX(d) of the GATT 1994

109. India argues that, in the event the Appellate Body finds that Article XX(d) of the GATT 1994 remained available to the United States to justify the EBR, the Appellate Body should find that the Panel acted inconsistently with its obligations under Article 11 of the DSU to make an objective assessment of the matter before it in evaluating the United States' defence.

110. India contends that the Panel supplemented the case of the United States by including provisions not cited by the United States, and concluding that, "for the purpose of considering the United States' defence under Article XX(d), the law or regulation at issue", for which it is "necessary to secure compliance", is Section 1673e(a)(1) of the Tariff Act, read together with Sections 1673e(b)(1) and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations, "all of which together govern the final collection of anti-dumping or

[119]India's appellant's submission, *US – Customs Bond Directive*, paras. 141 and 142.
[120]*Ibid*., paras. 144 and 145.

countervailing duties".[121] India considers this expansion of laws and regulations to be unacceptable in the light of the fact that the United States had limited its claim to—and "relied solely on"[122]—Section 1673e(a)(1) of the Tariff Act.

111. India submits that, in expanding the reference of the United States beyond Section 1673e(a)(1) of the Tariff Act, the Panel made a *prima facie* case for the United States. India therefore requests the Appellate Body to find that the Panel should have dismissed the defence of the United States under Article XX(d) of the GATT 1994, and further to find that the Panel violated Article 11 of the DSU.

F. *Arguments of the United States – Appellee in US – Customs Bond Directive*

1. *Ad* Note to Article VI:2 and 3 of the GATT 1994

112. The United States requests the Appellate Body to reject India's appeal of the Panel's interpretation of the *Ad* Note in relation to the *Anti-Dumping Agreement*. The United States contends that: India's arguments ignore the immediate context of the words "suspected dumping" in the *Ad* Note; India treats the reference to "duty" as being synonymous with "cash deposit"; India renders the provisions of Article VI of the GATT 1994 (and the *Ad* Note) inutile by suggesting that the *Anti-Dumping Agreement* supersedes the GATT 1994; and India treats statements in previous Appellate Body reports as dispositive of the interpretation of the *Ad* Note, when those reports were not concerned with the *Ad* Note or security requirements for anti-dumping duties.

113. The United States notes that one of the central questions before the Panel was whether any provisions of the *Anti-Dumping Agreement* or the GATT 1994 apply to a security requirement such as that contemplated by the EBR for the payment of an anti-dumping duty *after* an anti-dumping duty order has been imposed. The United States agrees with the Panel that the *Ad* Note applies and is the sole provision that limits security requirements of this type.

114. More specifically, the United States argues that the phrase "final determination of the facts" in the *Ad* Note refers, in the context of a retrospective duty assessment system, to the determination of the "final liability for payment of anti-dumping duties" as provided for in Article 9.3.1 of the *Anti-Dumping Agreement*. Therefore the "final determination of the facts" in the *Ad* Note follows an assessment review under Article 9.3.1. The United States considers this interpretation to be consistent with the references in the *Ad* Note to "security ... for ... payment" and "other cases in customs

[121]India's appellant's submission, *US – Customs Bond Directive*, para. 149 (quoting Panel Report, *US – Customs Bonds Directive*, para. 7.300).
[122]*Ibid*.

administration". As in other cases in customs administration, security is required upon entry of merchandise, when the actual amount of liability is not known, until the liability is finally determined and duties assessed and paid. Furthermore, Article VI:2 and 3 of the GATT 1994 addresses the "levy[ing]" of anti-dumping and countervailing duties, and this term used in Article 4.2 (and footnote 12 thereto) of the *Anti-Dumping Agreement* refers to the "definitive or final legal assessment or collection of a duty or tax". Thus, the "final determination" in the *Ad* Note extends to security pending final legal assessment of duties, which, in retrospective duty assessment systems, does not occur when the anti-dumping duty order is imposed; rather, it occurs when final duty liability is assessed.

115. The United States submits that there is contextual support in the *Anti-Dumping Agreement* for the Panel's interpretation. Article 9.3 requires that the anti-dumping duty not exceed the margin of dumping established under Article 2 of the *Anti-Dumping Agreement*. The United States considers that the cash deposit and the enhanced bond secure payment of this amount of duty and ensure the ability of the United States to collect this amount of duty in accordance with Article 9.2. The United States notes that the reference in Article 9.3.1 to "final" liability coincides with the use of the term "final" determination of the facts in the *Ad* Note.

116. The United States rejects India's argument that the imposition of an anti-dumping duty order means that dumping is no longer "suspected" and that, therefore, the *Ad* Note does not address security for the payment of anti-dumping duties if that security is required after the order is imposed. The United States contends that India's argument is based on its misunderstanding of the term "final determination" in the *Ad* Note, which, as the Panel correctly found, refers to the final determination with regard to the "payment" of the duty. Further, the Panel's discussion of the "levying" of duties accords with the United States' view, and not India's, that the "final determination" is the determination "that precedes the imposition of the decision under Article 9.1".[123] The United States rejects India's characterization of the Panel's analysis as "purposive"[124]; rather, the Panel interpreted the text and applied it to the facts of the case insofar as they relate to a retrospective duty assessment system. Finally, the United States disagrees that the Panel's reasoning creates "disparities"[125] between retrospective and prospective duty assessment systems; in the United States' view precluding Members with retrospective systems from requiring the posting of security prior to the determination of final liability would prevent such Members from collecting duties lawfully owed.

[123]United States' appellee's submission, *US – Customs Bond Directive*, para. 15 (referring to India's appellant's submission, *US – Customs Bond Directive*, para. 63).
[124]*Ibid*., (referring to India's appellant's submission, *US – Customs Bond Directive*, para. 68).
[125]*Ibid*., para. 16 (referring to India's appellant's submission, *US – Customs Bond Directive*, para. 67).

117. The United States further argues that the Panel properly found that the *Anti-Dumping Agreement* does not prohibit security requirements such as the EBR, if they are "reasonable". As to the relationship between the *Anti-Dumping Agreement* and the *Ad* Note, the United States agrees with the Panel's reliance on the Panel and Appellate Body Reports in *Brazil – Desiccated Coconut* in finding that, where the *Ad* Note authorizes a conduct and the *Anti-Dumping Agreement* confirms that such conduct is not prohibited by it, there is no basis for prohibiting such conduct.[126] The United States rejects India's approach, which suggests that the silence of the *Anti-Dumping Agreement* on an issue means that it is prohibited, even if expressly permitted by the GATT 1994. India's approach would "read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning."[127] According to the United States, and as recognized by past panels and the Appellate Body, Article VI is part of the same treaty as the *Anti-Dumping Agreement* and should not be interpreted to deprive it or the *Anti-Dumping Agreement* of meaning.[128] Neither the Appellate Body Report in *US – Offset Act (Byrd Amendment)*, nor in *US – 1916 Act*, supports the view that an action permitted by the *Ad* Note, and not addressed by the *Anti-Dumping Agreement*, is prohibited by Article 18.1 of the *Anti-Dumping Agreement*.

118. In addition, the United States agrees with the Panel that Article 7 of the *Anti-Dumping Agreement* does not address security requirements after the imposition of an anti-dumping duty order. The United States considers that, since Article 7 does not address security requirements after the dumping determination is made, it cannot place limitations on those requirements beyond the limited scope of application of the *Ad* Note. India appears to believe that, because some security requirements are addressed by Article 7, all such requirements must fall within the ambit of Article 7. Even if one were to accept India's view that Article 7 implements the *Ad* Note, this does not mean that security that is not provisional must necessarily comport with the Article 7 disciplines on provisional measures. India itself appears to accept that Article 7 implements the *Ad* Note only "to the extent that" security is provisional.[129]

119. The United States argues further that the Panel properly found that Article 9 of the *Anti-Dumping Agreement* does not address security requirements. First, contrary to India's assertion, the Panel did not "read into Article 9" the right to impose security; rather, it merely found that such security is not prohibited by Article 9, which concerns duties, and not security. The United States

[126]United States' appellee's submission, *US – Customs Bond Directive*, para. 17 (referring to Panel Report, *US – Customs Bond Directive*, paras. 7.73 and 7.74 and footnote 114 thereto, in turn referring to Panel Report, *Brazil – Desiccated Coconut*, para. 227 and footnote 60 thereto; and Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14, DSR 1997:I, 167, at 179).

[127]*Ibid*., para. 18.

[128]*Ibid*., (referring to Panel Report, *US – 1916 Act (EC)*, para. 6.97).

[129]*Ibid*., para. 23 (referring to India's appellant's submission, *US – Customs Bond Directive*, para. 80).

does not consider that India's reference to the maxim "*expressio unius est exclusio alterius*" is applicable since Article 9 does not confer a right to impose and collect duties *alone*[130]; to the contrary, Article 9 does not address bonds or other security.

120. Further, because, according to the Untied States, cash deposits are not definitive "duties", India's argument would imply that they are prohibited. For the United States, such a result is "far too much" and would suggest that the *Anti-Dumping Agreement* supersedes the GATT 1994, contrary to the Appellate Body Report in *Brazil – Desiccated Coconut*. Finally, the United States considers that India mischaracterizes the Panel's analysis of Article 9.3.1, which the Panel used only as context for its interpretation of the *Ad* Note, and not to find that Article 9.3.1 "authorized" retrospective duty assessment.[131]

121. Finally, the United States argues that the Appellate Body Reports in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)* should not be read to imply that additional security is prohibited. As the Panel noted, these reports do not contain any analysis of the *Ad* Note, nor do they even discuss how Members could guard against a risk that one of the "permissible responses" to dumping might be circumvented. For the United States, India's reading of those reports would alter the balance of rights and obligations in the covered agreements, contrary to the DSU and the Appellate Body Report in *Brazil – Desiccated Coconut*.

2. Cash Deposits and Anti-dumping Duties

122. The United States supports the Panel's view that a cash deposit is security for a duty owed, and is not itself a duty. The United States agrees with the Panel that, in contrast to a duty, a cash deposit is not liquidated revenue and has no "intrinsic value" until duties are assessed. The United States also endorses the Panel's observation that the retrospective duty assessment in Article 9.3.1 would make no sense if "cash deposits" were duties, since cash deposits are established on a prospective basis. It also agrees with the Panel that there is a textual difference between Articles 9.3.2 and 9.3.1—the former refers to refunds of "duties", whilst the latter refers only to "refund" without specifying what must be refunded—and that this textual difference supports the view that cash deposits are not duties. Like the Panel, the United States notes that Article 7.2 distinguishes a cash

[130]United States' appellee's submission, *US – Customs Bond Directive*, para. 26 (referring to India's appellant's submission, *US – Customs Bond Directive*, paras. 101 and 102).
[131]*Ibid*., para. 28 (referring to India's appellant's submission, *US – Customs Bond Directive*, para. 104).

deposit as a form of security from duties, and agrees with the Panel that, in indicating a preference for requiring payment of cash deposits, rather than duties, the text of Article 7.2 establishes a substantive difference between a cash deposit and a duty.

123. The United States does not consider that the statements it made to the Negotiating Group on Rules, and in other dispute settlement proceedings referred to by India, provide a basis to depart from the ordinary meaning of the terms used in the covered agreements.

124. The United States considers that India attaches too much significance to the Appellate Body's statement in *US – Zeroing (Japan)* that "an administering authority may collect duties, in the form of a cash deposit".[132] As the Panel found, in *US – Zeroing (EC)*, the Appellate Body did not address the issue of whether cash deposits are duties, and India's suggestion that the Appellate Body Report in *US – Zeroing (EC)* is less significant because the Appellate Body's description was based on the underlying panel report, should be rejected. The United States further argues that India fails to address many arguments relied on by the Panel, including its analysis of Articles 7 and 9.3 of the *Anti-Dumping Agreement*, and the requirement that the amount of anti-dumping duty "not exceed the margin of dumping". For the same reasons, the United States considers that India's argument that the EBR is inconsistent with Articles 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement*, should be rejected.

3. The Reasonableness of the EBR, as Applied to Subject Shrimp

125. Whilst the United States agrees with India that the risk of default may be among the factors that are relevant to determining whether any additional security is "reasonable" within the meaning of the *Ad* Note, it disagrees with the assertion of India that the likelihood of default for a particular importer must be taken into account in assessing the reasonableness of a security. According to the United States, the text of the *Ad* Note does not suggest that "reasonableness" requires an importer-specific assessment of default risk. The United States adds that assessing the risk of default for individual importers would imply practical difficulties, as United States Customs cannot conduct an assessment of individual risk without collecting information from the importer and cannot wait until an importer defaults. The United States considers, however, that the risk of default in case of increase in the dumping rate may be considered in assessing whether requiring additional security is

[132]United States' appellee's submission, *US – Customs Bond Directive*, para. 31 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 156).

reasonable. According to the United States, factors such as the industry's characteristics, the ability to pay, or the compliance history may be relevant to determine the risk of default. The United States notes that, with respect to shrimp importers, United States Customs concluded that: agriculture/aquaculture industries were characterized by low capitalization and high debt-to-equity ratios; importers of this type of merchandise had been responsible for significant defaults in the past; and shrimp importers of merchandise were therefore likely to have a heightened risk of default due to similarities with these other agriculture/aquaculture importers. For the United States, because the Panel failed to consider the evidence that it provided regarding risk of default with respect to the importers of shrimp subject to anti-dumping duties, it could not have known whether the risk of default was such that additional security was "reasonable".

4. "As Such" Consistency of the Amended CBD with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*

126. The United States agrees with the reasoning by the Panel in rejecting India's claim that the Amended CBD is "as such" inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. The United States considers that India's assertion that anti-dumping duties and countervailing duties are "inherently discretionary"[133] is both inaccurate and a *non sequitur*, as such measures have been considered by other panels and the Appellate Body to be mandatory. For the United States, the relevant question is whether the particular characteristics of a measure require a Member to act inconsistently with a given obligation in every instance, which, as the Panel found, the Amended CBD does not. The alleged "admissions" of United States Customs cited by India reflect only the fact that United States Customs collects duties lawfully owed to the United States and, in certain instances, it may consider additional security necessary for doing so. Requesting the Appellate Body to find that the Amended CBD is inconsistent "as such" with the *Ad* Note on the grounds that it "could never provide legal cover for the [Amended CBD] even in principle and that every time the United States resorts to it, it would be an impermissible specific action against dumping"[134] begs the question whether the EBR requires WTO-inconsistent action. Finally, the United States considers India's reliance on *US – Corrosion-Resistant Steel Sunset Review* to be "misplaced", because the issue here is not whether the relevant instrument—in this case the Amended CBD—is a "measure" (which was at issue in that case) but, rather, whether the Amended CBD "as such" violates various provisions of the *Anti-Dumping Agreement*.

[133]United States' appellee's submission, *US – Customs Bond Directive*, para. 40 (quoting India's appellant's submission, *US – Customs Bond Directive*, para. 86; and referring to the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice*).

[134]*Ibid*., (quoting India's appellant's submission, *US – Customs Bond Directive*, para. 90).

5. Consistency of the Amended CBD with Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*

127. The United States agrees with the Panel's findings that India's claims under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 fail because the EBR, imposed pursuant to the Amended CBD, is not an anti-dumping duty. Similarly, the claims under the "substantively similar" provisions of Article 19 of the *SCM Agreement* and Article VI:3 of the GATT 1994 also must fail. According to the United States, these Panel findings accord with the text of these Agreements and, without a "theory"[135] by India on how the bond requirement is "as such" inconsistent with these provisions, the reasons given by the Panel in rejecting India's arguments should be sustained.

6. Completing the Analysis on Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*

128. The United States notes that India's claims under Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement* are conditional upon the Appellate Body reversing the Panel's findings relating to India's "as such" claims under Articles 1, 9.1, 9.2, 9.3, 9.3.1, and 18.1 of the *Anti-Dumping Agreement* and Articles 10, 19.2, 19.3, 19.4, and 32.1 of the *SCM Agreement*. As explained above, the United States submits that India fails to demonstrate on appeal that the EBR is "as such" inconsistent with these provisions, and the United States therefore requests the Appellate Body to reject this conditional appeal of India.

7. The Panel's Terms of Reference

129. The United States requests the Appellate Body to reject India's claims that the Panel erred in finding that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were not within the Panel's terms of reference. The United States notes that, as conceded by India, neither measure was included in India's consultations request; and further, these measures are "separate and legally distinct" from the Amended CBD.[136] The United States submits, consistent with previous Appellate Body statements[137], that the Panel carefully considered the relationship between Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations, on the one hand, and the Amended CBD, on the other hand, in order to determine whether the two measures were "separate and legally distinct" from the Amended CBD. In doing so, the Panel considered various

[135]United States' appellee's submission, *US – Customs Bond Directive*, para. 43.
[136]*Ibid*., para. 45 (referring to Panel Report, *US – Customs Bond Directive*, para. 7.193).
[137]*Ibid*., (referring to Appellate Body Reports in *Brazil – Aircraft*, *US – Upland Cotton*, and *US – Certain EC Products*).

factors, including the fact that, unlike the Amended CBD, these provisions do not specify the particular requirements relating to the imposition of continuous bonds or other types of security; they relate to conditions and forms of bonds, and provide more general authority to customs officers. However, the Panel did not think that the general authority to require additional bonds supported India's claims that the two measures were legally inseparable from the Amended CBD. Further, according to the United States, India's theory would imply that laws and regulations providing general "authority" to collect revenue would be implicated in a dispute even if they were not mentioned in a consultations request. The United States considers that this would be directly contrary to Articles 4 and 6 of the DSU.

8. The Availability of a Defence under Article XX(d) of the GATT 1994 to the United States

130. The United States submits that "nothing in the text of the covered agreements suggests that the United States was required to 'invoke' footnote 24 of the Antidumping Agreement in order to justify the EBR under Article XX(d)."[138] According to the United States, India's emphasis on footnote 24 is based on a misinterpretation of the Appellate Body Report in *US – Offset Act (Byrd Amendment)*. In that case, the Appellate Body found that footnote 24 means that provisions other than Article VI of the GATT 1994 are not among the provisions "interpreted by" the *Anti-Dumping Agreement* for purposes of analyzing Article 18.1; however, in these proceedings, the relevant provision—the *Ad* Note—is part of Article VI of the GATT 1994, and nothing in the Appellate Body's reasoning suggests that footnote 24 precludes resorting to Article XX(d) to defend a measure found to be inconsistent with Article VI of the GATT 1994, or that footnote 24 places additional requirements in doing so. The United States agrees with the Panel that Article XX(d) of the GATT 1994 does not "on its face" limit a panel from considering such a defence.[139] Moreover, India offers no explanation as to why a recognition of the availability of such a defence would render Article 18.1 of the *Anti-Dumping Agreement* inutile.

9. *Prima Facie* Case by the Panel under Article XX(d) of the GATT 1994

131. The United States argues that India's claim that the Panel "supplemented" the affirmative defence of the United States by expanding the "laws or regulations" for purposes of the defence under Article XX(d) of the GATT 1994 mischaracterizes the United States' arguments before the Panel.[140]

---

[138]United States' appellee's submission, *US – Customs Bond Directive*, para. 35.
[139]*Ibid*., (referring to Panel Report, *US – Customs Bond Directive*, para. 6.13).
[140]*Ibid*., para. 36 (referring to India's appellant's submission, *US – Customs Bond Directive*, paras. 147-155).

The United States submits that it did not refer "solely" to Section 1673e(a)(1) of the Tariff Act as the relevant law or regulation; rather, the United States argued that the Amended CBD is necessary to secure compliance with United States anti-dumping and countervailing duty assessment laws, "in particular", Section 1673e(a)(1) of the Tariff Act, governing the assessment of anti-dumping duties, and general customs laws and regulations for payment of duties to the United States Treasury. Further, the United States notes that India itself identified some of the laws and regulations that the Panel relied on, and included, in its examination of the United States' defence.

G. *Claims of the United States – Other Appellant in US – Customs Bond Directive*

1. The Reasonableness of the EBR, as Applied to Subject Shrimp

132. The United States explains that the EBR was developed for increasing security requirements regarding merchandise with a higher risk of default by importers on final duty liability. Past history had shown that importers of agriculture/aquaculture merchandise were the source of the bulk of defaults, that anti-dumping rates increased in assessment reviews 38 per cent of the time, and that when rates increased, they did so by an average of 285 per cent. The United States underscores the fact that United States Customs applied the EBR to subject shrimp because the potential unsecured liability appeared significant (due to the fact that shipments in excess of US$2.5 billion were subject to such orders), as did the risk of default (because the industry shared characteristics similar to those of other industries that, in the past, had been the source of substantial defaults).

133. According to the United States, the Panel developed its own standard to determine whether the EBR as applied to subject shrimp constitutes "reasonable security" within the meaning of the *Ad* Note. In considering that additional security may only be "reasonable" if a WTO Member determines that the anti-dumping rate is "likely" to increase between imposition of the order and final assessment, the Panel adopted an incorrect standard. This is because it would exclude bonding where there is less than "substantial certainty" that such an increase will occur.[141] For the United States, the Panel's approach is contrary to the ordinary meaning of the term "reasonable", and would imply that ordinary revenue collection strategies may not be applied to importers that are liable to anti-dumping duties.

134. The United States considers that United States Customs' analysis as to whether additional security should be required is in line with ordinary customs practice, as United States Customs' decision to require additional security depends upon the amount of potential liability being secured

[141]United States' other appellant's submission, *US – Customs Bond Directive*, para. 11.

and the likelihood of default. The United States explains that the potential additional liability depends on the likelihood of an increase in the margin of dumping, the likely size of that increase, and the total value of shipments subject to that margin of dumping. The likelihood of default by importers, on the other hand, will be assessed in the light of factors such as industry characteristics, ability to pay, and compliance history. Customs administrations do not merely secure liability that is determined to be "likely" to accrue; the Panel's analysis is, therefore, at odds with the textual reference in the *Ad* Note to "other cases in customs administration".

135. The United States observes that the Panel asserted that default risk is irrelevant to a determination of whether security is "reasonable".[142] According to the United States, risk of default is routinely taken into consideration by customs authorities in establishing security requirements. In fact, the risk of default was an important element of the analysis that led United States Customs to apply the EBR to subject shrimp. The United States considers that, "[i]f the evidence demonstrated a significant risk of default, the Panel should have concluded that the security requirement was 'reasonable', even if the likelihood of an increase [in the anti-dumping rate] was less than 'substantial certainty'."[143]

136. For the United States, the Panel's position—according to which additional security may only be reasonable if the customs authorities show that the anti-dumping rate is "likely" to increase, and determine the likely amount of such increase—would "limit 'reasonable security' to a calculation based on information that is impossible to know at the time the security is imposed."[144] The United States argues that, to determine whether the EBR as applied to subject shrimp was "reasonable", the Panel should have considered the totality of the evidence available at the time regarding the revenue risk against which the bond was secured. According to the United States, this evidence included the likelihood of default, the amount of potential unsecured liability, and the likelihood of rate increases.

137. The United States therefore requests the Appellate Body to reverse the Panel's finding that the EBR, as applied to subject shrimp, is not a "reasonable security" and that it is not consistent with the *Ad* Note.

2. The Panel's Analysis of the Term "Necessary" under Article XX(d) of the GATT 1994

138. Should the Appellate Body not reverse the Panel's interpretation of the reasonableness of the security under the *Ad* Note, the United States requests the Appellate Body to reverse the Panel's

[142]Panel Report, *Customs Bond Directive*, footnote 148 to para. 7.119.
[143]United States' other appellant's submission, *US – Customs Bond Directive*, para. 14 .
[144]*Ibid*., para. 17.

finding that, unless a Member demonstrates that rates subject to the anti-dumping duty order "are likely to increase", an additional security requirement cannot be considered to be "necessary" within the meaning of Article XX(d) of the GATT 1994, and to complete the analysis with respect to the chapeau of Article XX(d).

139. The United States submits that the test used by the Panel to determine the necessity of the EBR for purposes of Article XX(d) was the same as the one it used to evaluate the "reasonableness" of the security under the *Ad* Note. According to the United States, that test provides "no insight", since security may be "necessary" even where there is a "likelihood" that liability will accrue, but it is not "likely" (in the sense of "substantial certainty") that it will do so.[145]

140. The United States recalls that the application of the EBR to subject shrimp was necessary due to the significant potential unsecured liability and the significant default associated with entries of similar merchandise in the past. According to the United States, requiring additional security pending final determination of duties owed is a standard approach among WTO Members to address the problem of potential unsecured duty liability pending final assessment. The United States argues that the Panel failed to take into account the fact that United States Customs adopted a tailored process for evaluating risk and bond amounts, in which the bond amount required of an importer reflects that importer's actual ability to pay duties lawfully owed, and thus the "necessity" of any additional security.[146] Further, the United States claims that India has not identified any "reasonable alternatives" to the EBR that would address the specific problem faced by United States Customs, nor did the Panel find that any such alternatives existed. In fact, the possible WTO-consistent alternatives cited by the complaining parties—including the cash deposit requirement, civil recovery proceedings, and the basic bond requirement—were already in effect when United States Customs experienced its non-collection problem. Finally, the United States contends that the EBR meets the requirements of the chapeau of Article XX and requests the Appellate Body to complete the analysis, given that there is sufficient evidence in the record to do so; and also to find that the EBR is "necessary" to enforce relevant United States anti-dumping laws and regulations.

H. *Arguments of India – Appellee in US – Customs Bond Directive*

1. The Reasonableness of the EBR, as Applied to Subject Shrimp

141. Without prejudice to India's contention that the *Ad* Note does not permit the United States to take security in addition to cash deposits in the period between the imposition of an anti-dumping

[145]United States' other appellant's submission, *US – Customs Bond Directive*, para. 21.
[146]*Ibid*., para. 22.

duty order and an assessment review, India requests the Appellate Body to reject the United States' arguments regarding the Panel's test of reasonableness under the *Ad* Note and, further, to uphold the Panel's finding that the EBR as applied to subject shrimp is inconsistent with the provisions of the *Ad* Note and Article 18.1 of the *Anti-Dumping Agreement*.

142. In India's view, and as the Panel found, the evidence submitted by the United States was inadequate to support its position that, at the time of the imposition of the EBR, it could be said that margin rates were likely to rise. In this regard, India refers to the Panel's findings, including: that the United States had not provided relevant documentary evidence that rates increased 33 per cent of the time even for agriculture/aquaculture cases[147]; that the only evidence before United States Customs related to rate fluctuations for crawfish; that it had not been proven that rate increases were not attributable to error or fraud; and that the United States could not explain how, based on historical trends for agriculture/aquaculture, dumping rates on subject shrimp would increase. Further, India contends that the evidence put forward by the United States on appeal constitutes *ex post* rationalization.

143. India contends that the United States' test for reasonableness would in fact endorse the test adopted by the Panel. According to India, the test put forward by the United States suggests that the total value of imports is the most important component of its reasonableness test. For India, given that the cash deposits collected by United States Customs already cover the full extent of the dumping rates specified in the order, the most important factor for determining reasonableness must, rather, be whether the rates are likely to increase and the likely amount of such increases. In the absence of such determination, security is not at all permissible regardless of the total value of imports and the consequent potential for importers to default. India notes that, in contrast to the exporter-based test of reasonableness used by the Panel, the United States' test is importer-focused, and is based solely or mainly on the magnitude of potential unsecured liability and likelihood of default. In India's view, accepting the United States' test would mean that the United States could impose security requirements simply because the value of the imports is high and the structure of the import industry is suspect, even if there is no likelihood of increases in dumping margins.

144. India argues that, even if the Panel's test is permissible under the *Ad* Note, United States Customs is not the appropriate authority to determine the likelihood of rate increase or the amount of that increase. Whilst the reference to "customs administration" in the *Ad* Note suggests that, at the time the *Ad* Note was drafted, customs authorities collected anti-dumping duties, today, specialized

[147]On appeal, the United States contests this finding, arguing that its evidence demonstrated that rates increased 38 per cent of the time.

authorities with relevant expertise conduct investigations for determining dumping margins and per-unit subsidization.[148] India underlines that the reference to "customs administration" in the *Ad* Note predates the other WTO agreements and is no longer relevant in the light of the disciplines on provisional measures under Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*. In India's view, it is clear that Members did not envisage that "ordinary customs practice" would apply and govern the taking of security prior to the final determination of dumping and subsidization.

145. India questions how the United States' and the Panel's test of reasonableness squares with the requirement in Article 2 of the *Anti-Dumping Agreement*, and the comparable provision of the *SCM Agreement*, and whether it would be necessary to undertake a company-specific and exporter-wide analysis of dumping or subsidization. In India's view, rather than a "counter-factual" analysis, the Panel's test requires projection into the future. India adds that the test of reasonableness should be applied at a company-specific level and that the analysis of likely dumping should be on an exporter-specific basis. India agrees with the Panel that the evidence to support likely rate increases should be specific to subject shrimp and cannot be based on generalized historical trends, such as those relevant to the wider agriculture/aquaculture cases.

146. India submits that the Panel never stated that its interpretation of "likely" increase in dumping margins meant "substantial certainty" of such increase. India notes that the dictionary meaning of "certain" is "defined, fixed; not variable" and "definite, precise, exact" and that, given that the Panel found that the taking of security under the *Ad* Note must be based on a prospective determination, it is clear that "certainty" about the future is impossible, and that the Panel did not intend this standard to apply.[149]

147. India notes, however, that the test of "likely" increase adopted by the Panel is stricter than a mere "reasonabl[y] possible" or "reasonable chance" standard[150], but that, even under this standard, the United States' test fails, bearing in mind that cash deposits are already applied to the full extent of

[148]In the case of the United States, it is the United States Department of Commerce that has the role, as notified to the WTO by the United States under Article 16.5 of the *Anti-Dumping Agreement* and Article 25.12 of the *SCM Agreement*. India refers to the Panel's reference in its analysis to "investigating authority". (India's appellee's submission, *US – Customs Bond Directive*, para. 42)

[149]India's appellee's submission, *US – Customs Bond Directive*, para. 49 (referring to, for instance, United States' other appellant's submission, *US – Customs Bond Directive*, paras. 11, 13, 15, and 16).

[150]*Ibid*., para. 51.

the dumping margin specified in the order. India contends that both aspects of the Panel's test of reasonableness—that an increase in rates must be "likely"; and the "likely" amount of such increase—must meet the standard of proof required by the meaning of the term "likely", which should correspond to "having an appearance of truth or fact" or be "probable".[151]

148. India submits that the Panel correctly applied the dictionary meaning of the term "reasonable" when it reasoned that an increased security such as the EBR would not be viewed as "reasonable" unless the rate of dumping was likely to increase. For India, it is not sufficient to establish a propensity for an increase in the rate of dumping in order to conclude that a security is "reasonable" under the *Ad* Note. India agrees with the Panel that the determination of the likely amount of increase in the rate of dumping is necessary because, unless that amount has been established, it would not be reasonable to depart from the "best and only available baseline proxy of duties that may ultimately be assessed".[152]

149. India also rejects the argument of the United States that the Panel's reference to a "case of suspected dumping" cannot be read to limit "reasonable security" to a calculation based on information that is impossible to know at the time security is imposed.[153] India considers that, just as WTO Members have developed their own test of proving recurrence of dumping under Article 11.3 of the *Anti-Dumping Agreement*, it is possible for the United States to meet the standard of reasonableness under the *Ad* Note.

150. Finally, India rejects the United States' arguments regarding possibility of "multiple 'reasonable' security requirements" that are permissible under the *Ad* Note.[154] Whilst the interpretation of "reasonable" should depend on the facts of a case, this does not mean that there are multiple standards for determining when a particular action is reasonable or not. Furthermore, the United States' argument that, under the *Ad* Note, the different risk thresholds acceptable to different Members should be taken into account is a "*non sequitur*"[155], since, regardless of a particular Member's risk preference, it would never be permissible to take security where it is not reasonable to

[151]India's appellee's submission, *US – Customs Bond Directive*, paras. 51 and 53 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 1588).
[152]*Ibid*., para. 55 (quoting Panel Report, *US – Customs Bond Directive*, para. 7.118, in turn quoting United States' first written submission to the Panel in *US – Customs Bond Directive*, para. 37).
[153]*Ibid*., para. 56 (referring to United States' other appellant's submission, *US – Customs Bond Directive*, para. 17).
[154]*Ibid*., para. 58 (referring to United States' other appellant's submission, *US – Customs Bond Directive*, para. 15).
[155]*Ibid*.

do so. India submits that the standard of reasonableness must be objective, which, in certain cases might permit multiple determinations of reasonableness. Therefore, in India's view, it was incorrect for the United States to suggest that the Panel adopted a "one-size-fits-all" approach.[156]

2. The Panel's Analysis of the Term "Necessary" under Article XX(d) of the GATT 1994

151. In support of its view that the EBR is not "necessary" within the meaning of Article XX(d) of the GATT 1994, India refers to the arguments it made in relation to the issue of what constitutes "reasonable security" under the *Ad* Note. In particular, India reiterates its views that the Panel's approach was not premised on the standard of "substantial certainty" that rates were likely to increase, and that the United States did not bring relevant and persuasive evidence showing that rates were "likely" to increase for subject shrimp. India further submits that it identified "reasonable alternatives" to the EBR, such as quicker completion of assessment reviews as a means to lower the non-collection risk.

152. Further, India argues that imposing the EBR on all importers, based on the total value of imports and the risk of default if rates were to increase, has no objective basis. For India, even if rates increased by 285 per cent, as suggested by the United States, for only some importers, the imposition of the EBR on all shrimp importers would not guarantee the collection from those whose margins increased. Importers whose rates did not increase would be unnecessarily burdened by the EBR and suffer disastrous consequences. In India's view, this constitutes "arbitrary" discrimination and operates as a "disguised restriction on trade" contrary to the chapeau of Article XX. Although the United States requests the Appellate Body to complete the analysis under the chapeau, India considers that there are no "uncontested facts" on the record, and that the Appellate Body should therefore not accede to this request.

I. *Arguments of the Third Participants*

1. Brazil

153. Brazil argues that the Panel's interpretation of the *Ad* Note is "fundamentally flawed"[157] and that the Appellate Body should rule that the temporal scope of the *Ad* Note is limited to the original investigation and that the *Ad* Note does not authorize the application of bonds or other special security

[156]India's appellee's submission, *US – Customs Bond Directive*, para. 60 (referring to United States' other appellant's submission, *US – Customs Bond Directive*, para. 12).

[157]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 6.

requirements, such as the EBR, after the imposition of an anti-dumping duty order. Brazil highlights that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* permit only three types of responses to dumping (that is, provisional measures, price undertakings, and definitive measures). Brazil agrees with Thailand and India that the Panel's interpretation would authorize a fourth measure in the form of security requirements for potential future anti-dumping liability. In Brazil's view, it is unlikely that the drafters of the *Anti-Dumping Agreement* had envisaged such a fourth permissible response to dumping, but negotiated detailed rules and publication requirements governing only three of these responses, while leaving the fourth completely unregulated. Brazil argues that the *Ad* Note does not authorize any action against potential future dumping, and that, once there has been an affirmative final determination of dumping in an investigation, there is no longer a "case of suspected dumping". Brazil adds that periodic reviews merely establish the amount, and not the existence of dumping. Moreover, the phrase "final determination of the facts" refers to an original investigation under Article 5 of the *Anti-Dumping Agreement*, as opposed to a periodic assessment review. Brazil furthermore contends that the *Ad* Note has been implemented and interpreted in Article 7 of the *Anti-Dumping Agreement*, and that there are strong similarities between the "language and the thrust" of Article 7 and the *Ad* Note.[158]

154. In Brazil's view, the Panel's approach to the *Ad* Note implies that *each entry* of merchandise imported after the anti-dumping duty order is a "case" of suspected dumping. For Brazil, this ignores past decisions of the Appellate Body which clarify that dumping is determined for a "product as a whole".[159] For Brazil, the Panel's authorization of bond requirements for retrospective duty assessment systems, and not for prospective duty assessment systems, impermissibly privileges retrospective duty assessment systems despite previous findings of the Appellate Body that the *Anti-Dumping Agreement* is "neutral" with respect to the two systems.[160]

155. Brazil requests the Appellate Body to endorse Thailand's and India's arguments that cash deposits of estimated anti-dumping duties in the United States' system are definitive duties that are subject to Article VI of the GATT 1994 as well as Article 9 of the *Anti-Dumping Agreement*. Brazil also contends that the Panel's reasoning on "suspected dumping" gives rise to asymmetry between the

[158]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, para. 23 and *US – Customs Bond Directive*, para. 42.

[159]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, para. 25 and *US – Customs Bond Directive*, para. 44 (referring to, for instance, Appellate Body Report, *US – Softwood Lumber V*, paras. 92 and 93; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 108 and 109).

[160]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, para. 27 and *US – Customs Bond Directive*, para. 46 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 121; and Appellate Body Report, *US – Zeroing (Japan)*, para. 163).

determinations necessary for WTO-consistent imposition of anti-dumping duties as it does not accord with the treatment of injury, which is not merely "suspected" but is treated as "actually existing".[161]

156. Brazil submits that, even assuming that the *Ad* Note applies to the EBR, the Panels correctly determined that the bond requirement does not constitute "reasonable security" within the meaning of the *Ad* Note. Brazil agrees that the Panel's "likelihood" standard for assessing reasonableness reflects the ordinary meaning of the term. Further, Brazil considers that the United States' argument concerning a "high risk of default on any additional duties owed" is "misconceived"[162], since this factor only becomes relevant once it has been demonstrated, as a threshold matter, that the duty rate will increase.

157. Brazil argues that Article XX(d) of the GATT 1994 provides the requisite legal basis for the United States to address the risk of non-collection of duties. However, the EBR targets the dumped goods and not the non-creditworthy importer. As a result, Brazil agrees with the Panel's analysis that the EBR is not "necessary" to secure compliance with WTO-consistent measures and that the EBR does not meet the requirements of the chapeau of Article XX(d).

158. With respect to the Panel Report, *US – Customs Bond Directive*, Brazil makes two further comments. First, Brazil urges the Appellate Body to reverse the Panel's finding that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations, which were listed in the panel request, but not in the consultations request, were outside the Panel's terms of reference. In Brazil's view, this finding disregards previous jurisprudence on the function of consultations and the relationship between consultations requests and panels' terms of reference[163], negates the usefulness of consultations in assisting the complainant to refine the dispute and discover information, and places an excessively high burden on complainants. For Brazil, the important consideration in deciding whether to include, in a panel's terms of reference, measures referred to in a panel request, but not in the consultations request, is whether the newly added measures still part of the same dispute, are part of the natural evolution of the consultations process, and do not have the effect of changing the essence of the complaint.

---

[161]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, para. 33 and *US – Customs Bond Directive*, para. 52.

[162]Brazil's third participant's submissions, *US – Shrimp (Thailand)*, para. 38 and *US – Customs Bond Directive*, para. 70 (quoting United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 13).

[163]Brazil's third participant's submission, *US – Customs Bond Directive*, para. 14 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138; Appellate Body Report, *US – Upland Cotton*, para. 293; and Panel Report, *Brazil Aircraft*, para. 7.9).

159. Secondly, Brazil supports India's request that the Appellate Body reverse the Panel's determination that the Amended CBD is not "as such" inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and complete the analysis on this issue. For Brazil, only a certain type of discretion is relevant under the "mandatory/discretionary" doctrine, namely, where the executive authority enjoys discretion not to apply a measure in a particular case but, nonetheless, when it chooses to apply the measure, the authority has no scope of interpreting the measure in a WTO-consistent manner, and the resulting action is necessarily WTO-inconsistent. In Brazil's view, the Amended CBD constitutes such a measure because, whenever it is applied, it results in WTO-inconsistent action, constituting "specific action against dumping" that is not authorized by the *Ad* Note.

2. Chile

160. Chile supports Thailand's position that additional security requirements, like the EBR, imposed after definitive anti-dumping measures have been applied, are not permissible under the *Ad* Note to Article VI of the GATT 1994 because, *inter alia*, the *Ad* Note refers to provisional measures, which are now regulated under Article 7 of the *Anti-Dumping Agreement*, and which apply in cases where dumping is "suspected". Further, in contrast to the Panel's findings, the review provided for in Article 9.3.1 of the *Anti-Dumping Agreement* refers to the assessment of the final amount of anti-dumping duties payable, not to the existence of dumping, which is determined earlier. Chile submits that the Panel's approach to the interpretation of "suspected dumping" raises concerns about the types of disciplines that should apply in a determination of "suspected dumping", and calls into question the core "principle of the *Anti-Dumping Agreement*" that the definitions of dumping and margin of dumping are the same throughout the Agreement. Further, it may even lead Members to require security for any dumping that might occur in the future, even where a negative determination has been made. Moreover, Chile submits, the Panel's interpretation of the *Ad* Note would benefit only the United States, since it uses a retrospective duty assessment system. Finally, in Chile's view, acceptance of the Panel's interpretation would imply a recognition of the absence of limitations on additional security requirements, such as the EBR, when there are limitations on other specific actions against dumping. Chile also disagrees with the Panel that cash deposits are not "duties" and considers that the amount of these "cash deposits" should not be higher than the margin of dumping established in a final determination or most recent assessment review.

161. Finally, Chile submits that, in assessing whether security is "reasonable" under the *Ad* Note, the Appellate Body should establish that security is reasonable only where it "does not exceed the likely final liability for payment"[164] of anti-dumping duties, and where it is based on the default risk of each importer.

3. European Communities

162. The European Communities focuses its comments on the issue of whether the EBR was taken "in accordance with the provisions of GATT 1994, as interpreted by [the *Anti-Dumping Agreement*]". The European Communities disagrees with the Panel's description of the relationship between Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. The European Communities further contends that the EBR is inconsistent with the *Anti-Dumping Agreement* and the *Ad* Note, and that the EBR cannot be justified under Article XX of the GATT 1994.

163. The European Communities submits that both Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty and should be interpreted in a harmonious and non-conflicting manner.[165] The General interpretative note to Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organisation* (the "*WTO Agreement*") and Articles 1 and 18.1 of the *Anti-Dumping Agreement* make clear that the relationship between Article VI of the GATT 1994 and the *Anti-Dumping Agreement* is of a hierarchical nature. Given that hierarchy, a treaty interpreter has to consider first the provisions of the *Anti-Dumping Agreement* to determine what (exact) rights and obligations the *Anti-Dumping Agreement* sets forth with respect to a particular issue. The European Communities also notes that the Appellate Body applied the same kind of interpretation in the *US – 1916 Act* case.[166]

164. Following this order of analysis, the European Communities recalls the Appellate Body's statement in *US – Offset Act (Byrd Agreement)* that "Article VI of the GATT 1994 and the *Anti-Dumping Agreement* identify three responses to dumping, namely, definitive anti-dumping duties, provisional measures, and price undertakings. No other response is envisaged in the text of Article VI

[164]Chile's third participant's submission, *US – Shrimp (Thailand)*, para. 23 ("*no excede de la cantidad definitiva probable que deba satisfacerse*").
[165]European Communities' third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 4 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 549; and Appellate Body Report, *Korea – Dairy*, para. 81).
[166]*Ibid*., para. 6 (referring to Appellate Body Report, *US – 1916 Act*, paras. 114-116).

of the GATT 1994, or the text of the *Anti-Dumping Agreement*."[167] The European Communities notes that the *Anti-Dumping Agreement* requires that all three forms of measures that a Member can adopt in response to dumping have to be preceded by at least a preliminary affirmative determination of dumping and injury. However, the EBR, whenever applied, "mandates a collection of duties which significantly (up to 100%) exceeds the margin of dumping established in the preceding anti-dumping investigation."[168] Furthermore, the EBR is inconsistent with, *inter alia*, Article 9 of the *Anti-Dumping Agreement*; and Article 9.3, in particular, does not allow the imposition and collection of anti-dumping duties related to a *hypothetical* margin of dumping (that is, one that has not been established or confirmed yet in any investigation but is based on speculation).

165. The European Communities disagrees with the Panel's view that a cash deposit under the United States' retrospective duty assessment system is not a "duty" subject to Article 9 of the *Anti-Dumping Agreement*. The European Communities argues that the chapeau of Article 9.3 refers to "the margin of dumping", and also, under the United States' retrospective duty assessment system, the duties shall not exceed the margin of dumping as established under Article 2. This is confirmed by a number of specific provisions of the *Anti-Dumping Agreement*, for instance, Article 6.9, 7.4, 9.1, 9.3.1, and 10.3. This interpretation is also in accordance with past panel and Appellate Body case law regarding the imposition and administration of variable duties under Article 9.4(ii) of the *Anti-Dumping Agreement*.[169]

166. Next, the European Communities contends that the *Ad* Note, interpreted in the light of the *Anti-Dumping Agreement*, does not authorize the EBR or any similar measure that requires deposits to be made in an amount exceeding the margin of dumping established under Article 2 of the *Anti-Dumping Agreement*. According to the European Communities, the Panel erred in creating the impression that the functioning of the United States' retrospective duty assessment system would be endangered if the EBR were not permissible. However, the European Communities believes that variable duties that are consistent with the *Anti-Dumping Agreement* can be used to solve the United States' collection problem. Moreover, the Panel relied excessively on the dictionary meaning of the term "suspected" and ignored other important textual elements of the *Ad* Note, in particular, the

[167]European Communities' third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 8 (quoting Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 269; and referring to Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.273-7.280).

[168]*Ibid*., para. 10.

[169]*Ibid*., paras. 14, 15, and 18 (referring to Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.359; Appellate Body Report, *US – Zeroing (Japan)*, para. 162; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 120 and 121).

phrase "pending final determination". The term "final" makes clear that such determination had to be preceded by some sort of preliminary determination of facts and, therefore, the *Ad* Note cannot be interpreted to authorize measures against a hypothetical dumping.

167. In the European Communities' view, a security is a measure designed to ensure the payment of an anti-dumping duty, and therefore merely ancillary to the duty itself; it cannot therefore be more onerous than the duty. This principle is also reflected in Article 7.2 of the *Anti-Dumping Agreement*, which governs provisional measures (including in the form of security). Anti-dumping duties are, in contrast to other duties, conceived as a response against a particular behaviour by the exporter. The anti-dumping disciplines are well equipped to allow that behaviour to be recorded and, on the basis of that record, impose duties that are adequate and commensurate to deal with that specific behaviour. In the European Communities' view, measures such as the EBR circumvent these disciplines and, instead, endeavour to discipline the exporter directly on the basis of pure speculation. Precisely because the EBR attempts to regulate the activity of the exporter, which has no relationship to the dumping recorded and quantified for that exporter as required by the *Anti-Dumping Agreement* and Article VI of the GATT 1994, it is inconsistent with those instruments.

168. The European Communities, furthermore, submits that the EBR fails to satisfy the substantive conditions of Article XX(d) of the GATT 1994. More fundamentally, being a "specific action against dumping", the EBR simply cannot be legally considered under that provision. It follows from Article 18.1 and footnote 24 thereto of the *Anti-Dumping Agreement*, as interpreted by the Appellate Body, that a measure that constitutes a "specific action against dumping" is subject to the disciplines of Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Hence, it cannot be justified under other provisions of the GATT 1994.

4. India

169. India supports Thailand's position in *US – Shrimp (Thailand)* that the Panel erred in finding that the permissible specific actions against dumping under Article 18.1 of the *Anti-Dumping Agreement* are not limited to provisional measures, price undertakings, and definitive duties, contrary to previous panel and Appellate Body jurisprudence. Specifically, India takes issue with the Panel's statement that the phrase "as interpreted by this Agreement" in Article 18.1 is designed simply to clarify that the relevant provision of the GATT 1994 is Article VI, since that is the provision interpreted by the *Anti-Dumping Agreement*. India notes, however, that previous Appellate Body reports emphasize that Article VI, and in particular Article VI:2, must be read in conjunction with the entire *Anti-Dumping Agreement* to determine what constitutes permissible specific action against

dumping. In India's view, the Panel's statement would lead to "serious anomalies"[170] since specific actions that are expressly contemplated by the *Anti-Dumping Agreement* would not be permissible unless expressly authorized by Article VI. To the extent, therefore, that the Panel concluded that provisional measures do not implement the *Ad* Note, such provisional measures would be impermissible, because Article VI does not expressly authorize them. India submits that the Panel found that a specific action contemplated by Article VI is permissible if it either is not expressly implemented by the text of, or is not prohibited by, the *Anti-Dumping Agreement* or the *SCM Agreement*. In India's view, the Panel thereby rewrote the phrase "as interpreted by this Agreement" to read "if interpreted by this Agreement" and thus proceeded contrary to the Appellate Body's view in *Brazil – Desiccated Coconut* that Article VI and the *Anti-Dumping Agreement* or the *SCM Agreement* together constitute an inseparable package of rights and disciplines.[171]

170. India contends that, based on this error of interpretation, the Panel then concluded that the *Ad* Note had not been implemented by the *Anti-Dumping Agreement*. India also notes that Article 7 of the *Anti-Dumping Agreement* does permit the taking of security for payment of anti-dumping duties prior to the final determination, which is the basis of the decision to impose anti-dumping duties under Article 9.1. In India's view, therefore, the *Ad* Note was not available as a "stand alone" provision, independent of the *Anti-Dumping Agreement*, to justify the taking of security after the imposition of an anti-dumping duty order. To the extent that Article 7 clearly modifies rights under Article VI, including the *Ad* Note, therefore, even under the Panel's own analysis, the Panel should have concluded that Article VI is not available to justify the taking of security under the *Ad* Note.

5. Japan

171. Japan agrees with Thailand and India that a bond requirement imposed after the conclusion of an Article 5 investigation is *not* permissible specific action against dumping. In Japan's view, the Panel did not pay sufficient attention to the nature of the relationship between the *Anti-Dumping Agreement* and Article VI of the GATT 1994, including the *Ad* Note. Japan submits that the provisions of the GATT 1994 and Article 18.1 of the *Anti-Dumping Agreement* must be read harmoniously to give full and effective meaning to all of their terms.[172]

[170]India's third participant's submission, *US – Shrimp (Thailand)*, para. 8.
[171]*Ibid*., para. 9 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 13-14, DSR 1997:I, 167, at 178-179).
[172]Japan's third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, paras. 12-14 (referring to Appellate Body Report, *US – Upland Cotton*, para. 549; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto; Appellate Body Report, *US – Hot-Rolled Steel*, paras. 51 and 52; and Appellate Body Report, *Guatemala – Cement I*, para. 65).

172. Japan asserts that, given the exceptional nature of anti-dumping duties (being exceptions from Article II of the GATT 1994), Article VI of the GATT 1994 and the *Anti-Dumping Agreement* impose strict disciplines regarding the purpose, nature, and extent of the remedial action that may be taken against dumping. Japan notes that Article 11.1 of the *Anti-Dumping Agreement*, the opening clause of Article VI:2 of the GATT 1994, and Appellate Body case law clarify that anti-dumping measures allow Members to take remedial action against dumping in an amount that does not exceed the level of dumping that is causing injury.[173] Article 18.1 of the *Anti-Dumping Agreement* provides that only certain specified types of remedial action are authorized as a means of counteracting injurious dumping, namely, provisional measures, price undertakings, and definitive anti-dumping duties. Other types of trade restrictions, even if they act against dumping and protect the domestic industry, are *not* permitted by the *Anti-Dumping Agreement* (although they may be permitted by Article XX(d) of the GATT 1994). Japan is of the view that Article 17.4 of the *Anti-Dumping Agreement* does not allow a fourth permissible specific action against dumping under the *Ad* Note. Japan further submits that the structure and design of the *Anti-Dumping Agreement* confirm this view. For Japan, although dumping is merely suspected during an investigation under Article 5 of the *Anti-Dumping Agreement*, its existence is determined by an affirmative final determination at the conclusion of such an investigation. Thereafter, dumping is no longer suspected and, for the entire lifetime of the anti-dumping duty order, a Member is authorized to impose a definitive duty up to the prevailing margin of dumping.

173. Japan disagrees with the Panel's finding that, following a final determination in an investigation, an importing Member can impose a bond requirement at the time of importation, and impose a "duty" later. For Japan, this interpretation contradicts Articles 9.1, 9.2, 9.3, 9.4, and 9.5, none of which authorizes the imposition of a bond to cover *potential* liability for potential dumping that might never be found to exist and, therefore, guarantees for such potential liability of potential dumping are not permissible forms of action against dumping at that stage. Japan, therefore, disagrees with the Panel's finding that cash deposits, paid after a final determination, are not "duties" but merely a guarantee against potential future liability.

174. Moreover, Japan argues that the Panel misinterpreted the terms "case", "pending", "dumping", and "final determination" in the *Ad* Note. Further, as the Panel failed to take into account the proper interpretive relationship between the *Ad* Note and Article 7, it improperly concluded that the *Ad* Note supplements the three forms of remedial action envisaged in the *Anti-Dumping Agreement*.

[173]Japan's third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, paras. 20-22 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 115; and Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 92).

175. Japan strongly disagrees with the distinction created by the Panel between prospective and retrospective duty assessment systems, since the consequence is that Members operating a retrospective system are authorized to impose a bond requirement after the end of an Article 5 investigation to cover the potential liability for potential dumping that might be found in a periodic review, whilst Members operating a prospective system cannot impose a bond as imports are known to be dumped in a pre-determined amount. Japan considers that the negotiating history of the *Ad* Note confirms that the phrase "case of suspected dumping" refers to an Article 5 investigation, and not to the period after a final determination has been made.

176. Japan concurs with the Panel that the EBR is not a "reasonable security" within the meaning of the *Ad* Note. In Japan's view, the Panel properly interpreted the term "reasonable" to require a showing "that the rates of dumping provided for in the anti-dumping order were *likely* to increase".[174]

177. Finally, Japan agrees that the EBR is not justified pursuant to Article XX(d) of the GATT 1994. Japan asserts that, absent evidence of a likelihood of increase in the anti-dumping duty rates, the United States has failed to demonstrate the "necessity" of a bond requirement that involves considerable additional costs for importers of foreign goods. Additionally, even if the EBR were to satisfy the elements of Article XX(d), Japan considers that certain findings by the United States Government Accountability Office (the "USGAO") and the USCIT regarding the application of the EBR raise serious questions about "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX.

6. Korea

178. Korea contends that the Panel ignored previous decisions of the Appellate Body and created an additional specific action against dumping, contrary to Article 18.1 of the *Anti-Dumping Agreement*.[175] In Korea's view, the *Ad* Note does not authorize additional specific action against dumping *after* definitive measures are imposed. More importantly, the *Anti-Dumping Agreement* does not allow a Member to impose measures against alleged *future* dumping, since an anti-dumping measure is permitted only to address currently existing dumping. Finally, Korea submits that cash deposits (whether considered as "final payment" or an "estimated payment") are "duties" within the meaning of Article 9 of the *Anti-Dumping Agreement*, since an importer must pay this at the time of

[174]Japan's third participant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 108 (quoting Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118). (emphasis added by Japan)

[175]Korea's third participant's submission, *US – Shrimp (Thailand)*, para. 9 (referring to Appellate Body Report, *US – 1916 Act*, para. 137; and Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265).

entry of merchandise. For Korea, therefore, the limit of the amount of duties in Article VI:2 of the GATT 1994, and Article 9 of the *Anti-Dumping Agreement* applies to cash deposits and should amount to the full margin of dumping or less, as stipulated under these provisions.

7. Thailand

179. Thailand raises two issues regarding India's appeal of the Panel Report in *US – Customs Bond Directive*. First, Thailand agrees with India that it was not necessary or appropriate for the Panel to find that the *Ad* Note permits additional specific action against dumping in order to ensure that the *Anti-Dumping Agreement* does not impermissibly supersede Article VI of the GATT 1994 and thereby render the *Ad* Note superfluous. In Thailand's view, contrary to the Panel's finding, the Appellate Body Report in *Brazil – Desiccated Coconut* does not support the Panel's approach. Conversely, statements of the Appellate Body in both *Brazil – Desiccated Coconut* and *US – 1916 Act* suggest that Article VI of the GATT 1994 must be read in conjunction with the provisions of both the *SCM Agreement* and the *Anti-Dumping Agreement*.[176] Further, in Thailand's view, as Article 1 of the *Anti-Dumping Agreement* confirms, the *Anti-Dumping Agreement* was negotiated to "implement" and "govern the application of Article VI", and the fact that numerous elements of Article VI are governed by the *Anti-Dumping Agreement* does not render these elements of Article VI superfluous. Thailand argues that, contrary to the Panel's reasoning, the fact that, for instance, Article VI:5 and Article VI:6(b) of the GATT 1994 are not elaborated in the *Anti-Dumping Agreement* does not mean that these provisions permit additional specific action against dumping. In any event, Thailand considers that the matters covered in the *Ad* Note are expressly addressed in Article 7 of the *Anti-Dumping Agreement*. For this reason, Thailand submits that the Appellate Body should reverse the Panel's interpretation and find that the *Ad* Note is temporally limited in scope and governed by Article 7; however, in the event that the Appellate Body does not do so, Thailand asks the Appellate Body to reject the Panel's statement that the provisions of Article VI must be interpreted to permit specific actions against dumping separate from those authorized under the *Anti-Dumping Agreement*, in order to avoid these provisions being rendered superfluous.

180. Thailand shares India's concern that the Panel's finding that Article XX(d) of the GATT 1994 may be used as a defence to measures found to be inconsistent with the *Ad* Note, would "improperly undermine the disciplines of Article 18.1 of the *Anti-Dumping Agreement*."[177] Thailand considers that, as the Appellate Body has clarified, Article VI of the GATT 1994 is the only provision of the

[176]Thailand's third participant's submission, *US – Customs Bond Directive*, paras. 5-8 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18, DSR 1997:I, 167, at 182; and Appellate Body Report, *US – 1916 Act*, para. 118).
[177]*Ibid*., para. 14.

GATT 1994 "interpreted" by Article 18.1 of the *Anti-Dumping Agreement*, once a measure is found to be "specific action against dumping". If that is the case, its legality is to be determined only by reference to the provisions of Article VI as interpreted by the *Anti-Dumping Agreement*, and there is no basis to consider further whether it may be justified under other provisions of the GATT 1994 not referred to in Article 18.1. Further, Thailand submits that the Panel's interpretation that "specific action against dumping" may be justified specifically under Article XX would allow for a situation in which a measure could be inconsistent with *both* Article VI and Article 18.1, yet a defence would only be available under Article XX with respect to the Article VI finding of inconsistency. In Thailand's view, there is "no rational basis"[178] for such distinction, which would introduce fragmentation in the regime of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.

III. Issues Raised in These Appeals

181. The following issues are raised in these appeals:

(a) in the appeals by Thailand and India[179]:

(i) whether the Panel erred in finding that the temporal scope of the *Ad* Note to Article VI:2 and 3 of the GATT 1994 (the "*Ad* Note") is not limited to the original investigation period and extends as well to the period after the imposition of an anti-dumping duty order; and

(ii) whether the Panel erred in concluding that cash deposits required under United States law are not anti-dumping duties falling within the scope of Article 9 of the *Anti-Dumping Agreement*;

(b) in the other appeals by the United States, and the appeals by Thailand and India:

(i) whether the Panel erred in its analysis of the "reasonableness" of the enhanced continuous bond requirement (the "EBR") by the United States on imports of frozen warmwater shrimp that were subject to anti-dumping duties ("subject shrimp");

(c) in the appeal by India:

[178]Thailand's third participant's submission, *US – Customs Bond Directive*, para. 18.

[179]In this Report, we refer to Thailand first and then to India, in keeping with the chronology of the Panel Reports.

(i) whether the Panel erred in finding that the "Amended Customs Bond Directive" (the "Amended CBD")[180] is not inconsistent "as such" with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*;

(ii) whether the Panel erred in finding that the Amended CBD is not inconsistent "as such" and "as applied" with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, and in finding that the Amended CBD is not inconsistent "as such" with Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*;

(iii) whether the Panel erred in finding that Section 1623 of the United States Tariff Act of 1930[181] (the "Tariff Act") and Section 113.13 of the *United States Code of Federal Regulations* (the "United States Regulations") were not within the Panel's terms of reference; and

(iv) whether, in its consideration of the defence raised by the United States under Article XX(d) of the GATT 1994, the Panel:

- erred in concluding that a defence under Article XX(d) of the GATT 1994 was available to the United States; and
- made a *prima facie* case for the United States and, thereby, acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it; and

(d) in the other appeals by the United States:

(i) whether, in its analysis of the defence raised by the United States under Article XX(d) of the GATT 1994, the Panel erred in finding that the EBR, as applied to subject shrimp, was not "necessary" to secure compliance with certain laws or regulations of the United States.

[180]The EBR has been imposed pursuant to Customs Directive No. 099-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991 (the "1991 Directive"), as amended by the documents and instruments constituting the "Amended CBD". (See *supra*, footnote 11 and *infra*, paras. 190 and 191)

[181]*Supra*, footnote 53.

IV. The Measure at Issue

A. *Introduction*

182. The relevant measure in both *US – Shrimp (Thailand)* and *US – Customs Bond Directive* is the EBR. The EBR is imposed by United States Customs and Border Protection ("United States Customs") pursuant to the Amended CBD, which comprises four instruments that amend a United States directive that sets out the guidelines to be followed by United States Customs in determining the amount of customs bonds required for importation of merchandise into the United States.[182]

183. Both Thailand and India have made "as applied" claims regarding the EBR. The EBR was imposed by United States Customs, with effect from 1 February 2005, on all imports of subject shrimp. These anti-dumping duties had been imposed by an anti-dumping duty order published by the United States Department of Commerce (the "USDOC") on the same date, that is, 1 February 2005.[183] India has also made a number of separate "as such" claims against the Amended CBD, pursuant to which the EBR is imposed.

[182]See *infra*, paras. 190 and 191.

[183]The anti-dumping duty order was issued on 1 February 2005 by the USDOC following a determination that subject shrimp from Brazil, China, Ecuador, India, Thailand, and Viet Nam were being dumped in the United States, and a finding by the United States International Trade Commission (the "USITC") that the United States' domestic industry was materially injured by imports of subject shrimp. (See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, *United States Federal Register*, Vol. 70, No. 20 (1 February 2005) 5145 (Exhibit THA-14 submitted by Thailand to the Panel); and Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India, *United States Federal Register*, Vol. 70, No. 20 (1 February 2005) 5147 (Exhibit IND-13 submitted by India to the Panel)) In the amended final determinations, the USDOC established margins of dumping ranging from 5.29 to 6.82 per cent for Thai exporters and an "all others" rate of 5.95 per cent; and margins of dumping ranging from 4.94 to 15.36 per cent for Indian exporters and an "all others" rate of 10.17 per cent.

B. *Background*

1. The Retrospective Anti-Dumping Duty Assessment System of the United States[184]

184. The first stage of the United States' anti-dumping duty system is the original investigation for the imposition of anti-dumping duties. The USDOC conducts an investigation to determine whether dumping by an exporter occurred during the period of investigation. The USDOC communicates its determination of the existence and level of dumping to the United States International Trade Commission ("USITC"), which conducts its own investigation to determine whether the relevant United States industry is materially injured or threatened with material injury by reason of the dumped imports. If the USDOC makes an affirmative determination that dumping occurred during the period of investigation, and the USITC makes an affirmative determination that the domestic industry was materially injured or threatened with material injury by reason of dumped imports, the USDOC issues a Notice of Antidumping Duty Order and imposes an "estimated anti-dumping duty deposit rate" (also referred to as a "cash deposit rate") equivalent to the "overall weighted average dumping margin" for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an "all-others" rate applicable to exporters that were not individually examined.

185. The second stage of the United States' system is the assessment of the final liability for payment of anti-dumping duties. The United States uses a retrospective duty assessment system for the assessment of anti-dumping duty liability under which the final liability for payment of anti-dumping duties is determined in an assessment review for a discrete period of time after the merchandise is imported. Under this system, the United States initially collects "cash deposits" at the time of each entry of the subject merchandise at the "estimated anti-dumping duty deposit rate" (also called "cash deposit rate") of the relevant exporter. Subsequently, once a year, during the anniversary month of the anti-dumping duty order, interested parties may request the USDOC to conduct an assessment review (also called a "periodic review") to determine the final liability for payment of anti-dumping duties owed on entries that occurred during the previous year. If a request for an assessment review is made by any party, the USDOC will review all sales made by the relevant exporter in order to calculate a going-forward cash deposit rate that will apply to all future entries of

[184]See also the Panel's description of the United States' retrospective duty assessment system at Panel Report, *US – Shrimp (Thailand)*, paras. 2.7-2.10 and Panel Report, *US – Customs Bond Directive*, paras. 2.4-2.7. For a more detailed description of the United States' retrospective anti-dumping duty assessment system, see also Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 72-75.

the subject merchandise from that exporter. Simultaneously, the USDOC will calculate a duty assessment rate for each importer that imports from that exporter and determine the final liability for payment of anti-dumping duties by that importer on the basis of its duty assessment rate. If no assessment review is requested, the cash deposits made on entries during the previous year are automatically assessed as the final duties.

2. Overview of Customs Bond Requirements in the United States

186. All importers of merchandise into the United States must post a basic customs bond for importation.[185] An importer subject to an anti-dumping duty order must also post a basic customs bond to United States Customs in addition to paying the cash deposits mentioned above.

187. Customs bonds are legal instruments to secure possible liabilities that may arise out of failure to perform various obligations imposed on importers under United States laws and regulations, including the obligation to pay any duties, taxes, and charges imposed on the imported merchandise.[186] There are three parties to a customs bond—the bond principal, the surety, and the beneficiary. The bond principal is usually an importer; the surety is a guarantor that agrees to pay any liabilities that might arise from the bond principal's failure to perform the specified obligations under United States law[187]; and the beneficiary of the bond is United States Customs.

188. United States Customs derives its authority to require such bonds from Section 1623 of the Tariff Act, which empowers the Secretary of the Treasury to require or authorize customs officers to require bonds for the protection of the revenue and for ensuring compliance with any laws or regulations that the Secretary is authorized to enforce. The Secretary has also the authority to prescribe the conditions of the bonds and to fix the amounts thereunder.[188] Section 113.13 of the United States Regulations authorizes United States Customs to determine the sufficiency of bond

[185]See Section 142.4(a) of the United States Regulations provides that "merchandise shall not be released from Customs custody … unless a single entry or continuous bond on Customs Form 301 … has been filed".

[186]See United States Regulations, Section 113.62.

[187]Surety companies are certified by the Financial Management Service of the United States Treasury. (See Questions and Answers on Customs Bonds, United States Customs Publication No. 0000-0590, revised November 2006, p. 3). The surety usually charges a fee from the bond principal and may take a collateral.

[188]Tariff Act, *supra*, footnote 53, Section 1623. This authority is reflected, *inter alia*, in the United States Regulations at Section 113.1: "Where a bond or other security is not specifically required by law, the Commissioner of Customs, pursuant to Treasury Department Order No. 165 Revised, as amended (TD 53654, 19 FR 7241, November 6, 1954) may by regulation or specific instruction require, or authorize the port director to require, such bonds or other security considered necessary for the protection of the revenue or to assure compliance with any pertinent law, regulation or instruction."

amounts to secure the importers' liability.[189] United States Customs is also required to review bonds periodically in order to determine whether such bonds are adequate to protect the revenue and ensure compliance with the laws and regulations and, may require additional security where this is necessary to protect the revenue or to ensure enforcement of United States Customs laws or regulations.[190]

189. In accordance with Section 113.13 of the United States Regulations, United States Customs established guidelines under Customs Directive No. 099-3510-004 of 23 July 1991[191] (the "1991 Directive") for determining the amount of an importer's bond. As far as importation is concerned, the prescribed bond amount differs depending on whether a single transaction bond[192] or a continuous bond is sought by the importer. For purposes of these appeals, only the continuous bond—which secures payments arising out of all the import transactions by a particular importer over the period of time for which the bond remains effective—is relevant. Under the 1991 Directive, the basic continuous bond formula for an existing importer (the "basic bond requirement") applicable to all its imports is the greater of US$50,000 or 10 per cent of the duties, taxes, and fees paid by that importer during the prior calendar year.[193]

3. The Enhanced Continuous Bond Requirement

190. In 2003, United States Customs undertook a review of its overall duty collection system to identify areas in which it was experiencing serious difficulties in the collection of customs duties. This review revealed that defaults on anti-dumping duty supplemental bills had increased

[189]Specifically, Section 113.13 of the United States Regulations provides that United States Customs should consider the following: (1) the prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments; (2) the prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations; (3) the value and nature of the merchandise involved in the transaction to be secured; (4) the degree and type of supervision that Customs will exercise over the transaction; (5) the prior record of the principal in honouring bond commitments, including the payment of liquidated damages; and (6) any additional information contained in any application for a bond.

[190]United States Regulations, Section 113.13(c) and (d).

[191]*Supra*, footnote 10.

[192]A single transaction bond secures payments arising out of a single import transaction.

[193]See 1991 Directive, *supra*, footnote 10, p. 3, which fixes a minimum continuous bond amount of US$50,000 and establishes the following formula: (1) in the case of US$0 to US$1 million duties/taxes, the bond limit of liability is fixed in multiples of US$10,000 nearest to 10 per cent of duties, taxes, and fees paid during the preceding calendar year; or (2) in the case of duties/taxes over US$1 million, the bond liability is fixed in multiples of US$100,000 nearest to 10 per cent of duties, taxes, and fees paid during the preceding year. (Panel Report, *US – Shrimp (Thailand)*, para. 2.15 and footnote 25 thereto; Panel Report, *US – Customs Bond Directive*, para. 2.12 and footnote 20 thereto) See also Panel Report, *US – Shrimp (Thailand)*, paras. 2.13-2.15; Panel Report, *US – Customs Bond Directive*, paras. 2.10-2.12. Note however, that the 1991 Directive also provides that the basic bond may be higher than that computed using the formula, "provided sufficient evidence is on-hand to support the higher amount."

substantially from the previous years.[194] This led United States Customs to reconsider its basic continuous bond formula and to identify certain situations in which the basic bond requirement was found to be no longer sufficient. The following four instruments amended the 1991 Directive:

(i) United States Customs document entitled "Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases" dated 9 July 2004 (the "July 2004 Amendment")[195];

(ii) United States Customs document entitled "Current Bond Formulas" dated 25 January 2005 (the "Current Bond Formulas")[196];

(iii) United States Customs document entitled "Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases" dated 10 August 2005 (the "August 2005 Clarification")[197]; and

(iv) United States Customs Federal Register Notice USCBP-2006-0119 entitled "Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements" dated 24 October 2006 (the "October 2006 Notice").[198]

191. These four instruments, which collectively constitute the Amended CBD, permit United States Customs to impose enhanced bond amounts on importers seeking to import certain merchandise subject to anti-dumping or countervailing duties. Merchandise subject to anti-dumping or countervailing duties designated by United States Customs as a "covered case" within a "special category" is subject to the EBR. To date, only subject shrimp has been designated as a "covered case" within the "special category" of agriculture and aquaculture. The October 2006 Notice "represents the comprehensive and exclusive statement of policy and processes expressed in" the other instruments of the Amended CBD.[199]

[194]According to the United States, while historically, annual uncollected anti-dumping duties from importers had been relatively low (rarely exceeding US$10 million a year), outstanding anti-dumping liability for 2004 alone reached an unprecedented US$225 million for agriculture and aquaculture cases, that is, for merchandise similar to shrimp. (See United States' first written submission to the Panel in *US – Shrimp (Thailand)*, paras. 12 and 52; and United States' first written submission to the Panel in *US – Customs Bond Directive*, paras. 13 and 68).

[195]Exhibits THA-2 and IND-3 submitted by Thailand and India, respectively, to the Panel.

[196]Exhibits THA-3 and IND-4 submitted by Thailand and India, respectively, to the Panel.

[197]Exhibits THA-4 and IND-5 submitted by Thailand and India, respectively, to the Panel.

[198]Exhibits THA-5 and IND-6 submitted by Thailand and India, respectively, to the Panel.

[199]October 2006 Notice, *supra*, footnote 11, at 62277.

192. The EBR includes a standard formula to determine the amount of the enhanced continuous bond that all existing importers[200] of subject shrimp must provide, unless United States Customs determines that there are "exceptional circumstances" or that the importer has "a record of compliance … and … has demonstrated an ability to pay."[201] According to the standard formula, the EBR requires, in addition to the basic bond requirement, an amount equivalent to 100 per cent of the anti-dumping duty rate of the exporter concerned, multiplied by the value of imports of subject shrimp of that importer in the previous 12 months.[202]

193. Therefore, the total obligations imposed on importers of subject shrimp by United States Customs, following the imposition of the EBR, comprise:

(a) the cash deposits for estimated anti-dumping duties;

(b) the basic bond requirement in an amount that is the greater of US$50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded to the figure set out in the basic bond formula; and

(c) the EBR in an amount equivalent to 100 per cent of the anti-dumping duty rate multiplied by the value of imports of subject shrimp in the previous 12 months.[203]

194. The Amended CBD authorizes United States Customs to use the standard formula or, instead, make individualized bond determinations for subject shrimp importers to determine the EBR amounts. Specifically, the August 2005 Clarification and the October 2006 Notice provide that United States Customs may reconsider bond amounts for individual importers on a case-by-case basis to ensure that duties owed by them are collected. In order to receive an individualized bond determination, an importer must make a request and may submit information on its financial condition related to the risk of non-collection of duties for that importer. United States Customs will then determine bond amounts applicable to that importer based on the financial information supplied by the importer, United States Customs' records on compliance history of the importer, the importer's or principal's

[200]The requirements for new importers are analogous. (See *ibid*, at 62277: "For new importers with no prior history of imports who import Special Category merchandise subject to AD/CVD the continuous bond will be calculated in accordance with the following formula: the [USDOC] deposit rate in effect on date of entry X the importer's estimated annual value of imported goods subject to the case").

[201]See *ibid*., at 62277-62278.

[202]The October 2006 Notice provides: "The amount of additional coverage will be calculated using the following formula: AD/CVD rate established in [USDOC] Order (or the rate established in the most recently completed administrative review) x previous 12 months' cumulative import value of subject merchandise". (*Ibid*., at 62277)

[203]See Panel Report, *US – Shrimp (Thailand)*, para. 2.15 and Panel Report, *US – Customs Bond Directive*, para. 2.12, for hypothetical illustrations of the total obligations due from importers of shrimp subject to the anti-dumping duty order, as a result of the EBR.

ability to pay, and other "relevant information" available to United States Customs.[204] The enhanced continuous bonds provided pursuant to the Amended CBD are released when the final liability for payment of anti-dumping duties is assessed, and the relevant import entries are liquidated.[205]

195. The parties disagreed before the Panel on the impact of the EBR on importers of Thai and Indian shrimp.[206] However, the Panel noted that importers have faced significantly higher security obligations than previously to enter merchandise.[207] The Panel also referred to a report by the United States Government Accountability Office (the "USGAO") on United States Customs' Revised Bonding Policy[208] (the "USGAO Report"), which concluded that, because of the additional security, collateral, and fee obligations associated with the EBR, importers/exporters probably had to forgo other commercial opportunities, although the effects could not be fully isolated from other changes occurring at the same time.[209] The USGAO Report also observed that some importers have required exporters to export on a Delivery Duty Paid ("DDP") basis, thereby making the exporter, as the importer of record, responsible for customs bond requirements.[210] Additionally, in October 2006, the USGAO concluded that the Amended CBD criteria were not transparent, nor were they consistently

[204]See October 2006 Notice, *supra*, footnote 11, at 62277. The Panel noted that to date, the United States has indicated that, as regards imports of subject shrimp, it has received 27 requests for individualized bond determinations, of which it has reviewed 22 requests and has granted no reductions to three importers, reductions of 25 per cent to 11 importers, 45 per cent to one importer, 75 per cent to two importers, 80 per cent to one importer and 85 per cent to two importers. (See United States' response to Question 28 posed by the Panel in *US – Shrimp (Thailand)*, para. 31; United States' response to Question 22 posed by the Panel in *US – Customs Bond Directive*, para. 28; and Exhibit US-12 submitted by the United States to the Panel, which provides a list of importers requesting individual bond amounts) A report by the United States Government Accountability Office (the "USGAO") indicates that the number of shrimp importers totalled 550 through June 2006. (USGAO Report, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington DC, October 2006) (Exhibits THA-10 and IND-26 submitted by Thailand and India, respectively, to the Panel), p. 42) Exhibit US-17 submitted by the United States to the Panel refers to 530 shrimp importers in 2004. (See Panel Report, *US – Shrimp (Thailand)*, para. 2.16 and footnote 27 thereto; and Panel Report, *US – Customs Bond Directive*, para. 2.13 and footnote 22 thereto)

[205]Under Section 1675(b) of the Tariff Act (*supra*, footnote 53), once the administering authority orders liquidation of entries pursuant to a review, goods are liquidated within 90 days after the instructions to United States Customs are issued, in most cases. (Panel Report, *US – Shrimp (Thailand)*, para. 2.17 and footnote 28 thereto; Panel Report, *US – Customs Bond Directive*, para. 2.14 and footnote 23 thereto)

[206]Panel Report, *US – Shrimp (Thailand)*, paras. 2.18; Panel Report, *US – Customs Bond Directive*, paras. 2.15.

[207]*Ibid*.

[208]*Ibid*., (referring to USGAO Report, *supra*, footnote 204).

[209]See *ibid*., (referring to USGAO Report, *supra*, footnote 204, pp. 6, 24, and 35; and *National Fisheries* v. *US Customs*, *supra*, footnote 90, p. 31).

[210]See Panel Report, *US – Shrimp (Thailand)*, para. 2.18 and Panel Report, *US – Customs Bond Directive*, para. 2.15 (referring to USGAO Report, *supra*, footnote 204, p. 6). See also United States' second written submission to the Panel in *US – Shrimp (Thailand)*, para. 30, wherein the United States contends that the use of a DDP basis rather than a Cost, Insurance and Freight (CIF) basis does not affect the costs borne by the importer of record.

applied.[211] The Panel also noted that, following a complaint by certain shrimp importers, the United States Court of International Trade (the "USCIT") issued a preliminary *status quo* injunction in favour of eight of 20 complaining parties on the grounds that the administrative record supported the conclusion that the plaintiffs are likely to demonstrate that United States Customs arbitrarily and capriciously selected the anti-dumping duty orders on shrimp as the only "covered case" of merchandise and that the application of the EBR to eight complaining parties was "arbitrary and capricious".[212] The USCIT's decision on the merits of the case is still pending.

V. The Interpretation of the *Ad* Note to Article VI:2 and 3 of the GATT 1994

A. *Introduction*

196. We first note the context in which the question of the interpretation of the *Ad* Note arose before the Panel. The Panel came to examine the *Ad* Note in the broader context of the "as applied" claims brought by Thailand and India against the EBR under Article 18.1 of the *Anti-Dumping Agreement*. This Article provides that:

> [n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. (footnote omitted)

197. Before the Panel, Thailand and India contended that the application of the EBR to subject shrimp constitutes an impermissible "specific action against dumping" and that, therefore, it is inconsistent with Article 18.1.[213] In response, the United States argued that the EBR is not a specific action against dumping and that, in any event, the EBR was applied "in accordance with the provisions of the GATT 1994" as interpreted by the *Anti-Dumping Agreement*, because the application of the EBR is authorized by the *Ad* Note.[214]

198. The Panel began its analysis of these claims by examining whether or not the application of the EBR to subject shrimp constitutes "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. Relying on the Appellate Body Reports in *US – 1916*

---

[211]See Panel Report, *US – Shrimp (Thailand)*, para. 2.19 and Panel Report, *US – Customs Bond Directive*, para. 2.16 (generally referring to USGAO Report, *supra*, footnote 204).

[212]*Ibid*.

[213]Thailand's first written submission to the Panel in *US – Shrimp (Thailand)*, executive summary, Panel Report, *US – Shrimp (Thailand)*, pp. A-10 to A-12, paras. 5-18; India's first written submission to the Panel in *US – Customs Bond Directive*, executive summary, Panel Report, *US – Customs Bond Directive*, pp. A-10 to A-12, paras. 4-13.

[214]See United States' first written submission to the Panel in *US – Shrimp (Thailand)*, executive summary, Panel Report, *US – Shrimp (Thailand)*, pp. A-5 and A-6, paras. 18-21 and 24; United States' first written submission to the Panel in *US – Customs Bond Directive*, executive summary, Panel Report, *US – Customs Bond Directive*, pp. A-5 and A-6, paras. 19-22 and 25.

Act and *US – Offset Act (Byrd Amendment)*, the Panel indicated that three conditions must be met in order to conclude that a measure is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*. First, the measure must be specific to dumping. Secondly, it must be shown that the measure acts "against" dumping. Thirdly, the measure has not been taken in accordance with the provisions of the GATT 1994 as interpreted by the *Anti-Dumping Agreement*.

199. The Panel first found that the application of the EBR is "specific" to dumping because it is inextricably linked to, or has a strong correlation with, the constituent elements of dumping. For the Panel, the constituent elements of dumping are implicit in the express conditions and legal prerequisites for the application of the EBR. The Panel considered that the close link between the application of the EBR and the constituent elements of dumping appears from the direct reference to the anti-dumping duty rate in the formula for calculating the EBR.[215]

200. The Panel then examined whether the application of the EBR acts "against" dumping. Recalling previous Appellate Body jurisprudence, the Panel considered that a measure acts against dumping if it deters or dissuades foreign producers or exporters from engaging in the practice of dumping. For the Panel, the application of the EBR acts in this manner because it entails additional costs that, although initially borne by the importers, ultimately impact on foreign producers/exporters of the subject merchandise.[216] The Panel identified the additional costs as being the fees and collateral requirements required by surety companies for providing the enhanced bonds.[217] The Panel reasoned that, since a bond applied as a provisional measure is treated as "specific action against dumping", a bond applied as a definitive measure should be similarly categorized, because the adverse bearing of the bond on foreign producers/exporters and importers is the same.[218] The Panel therefore concluded that the application of the EBR constitutes "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.[219]

201. We observe that the findings of the Panel that the application of the EBR to subject shrimp is "specific" to dumping and that it acts "against" dumping have not been appealed. Therefore, we do not express a view as to the correctness of this finding and treat it as a given in this appeal.

---

[215]Panel Report, *US – Shrimp (Thailand)*, paras. 7.71 and 7.72; Panel Report, *US – Customs Bond Directive*, paras. 7.45 and 7.46.

[216]Panel Report, *US – Shrimp (Thailand)*, para. 7.75; Panel Report, *US – Customs Bond Directive*, para. 7.49.

[217]Panel Report, *US – Shrimp (Thailand)*, footnote 119 to para. 7.75; Panel Report, *US – Customs Bond Directive*, footnote 87 to para. 7.49.

[218]Panel Report, *US – Shrimp (Thailand)*, para. 7.77; Panel Report, *US – Customs Bond Directive*, para. 7.51.

[219]Panel Report, *US – Shrimp (Thailand)*, para. 7.78; Panel Report, *US – Customs Bond Directive*, para. 7.52.

202. Having found that the application of the EBR to subject shrimp constitutes "specific action against dumping", the Panel turned to an examination of whether the EBR was applied "in accordance with the provisions of GATT 1994, as interpreted by the *Anti-Dumping Agreement*". In doing so, the Panel first examined the relationship between the *Ad* Note and the *Anti-Dumping Agreement*, and disagreed with the arguments of Thailand and India that recourse to the *Ad* Note is not available once an action is found to be a specific action against dumping, because the *Ad* Note cannot be applied independently of the *Anti-Dumping Agreement* and the *Ad* Note cannot provide an independent basis to create a fourth permissible response to dumping.[220] It is in this context that the Panel interpreted the *Ad* Note and applied it in assessing whether the application of the EBR to subject shrimp is "in accordance with" this provision of the GATT 1994. Although the Panel considered that the application of the EBR falls within the temporal scope of the *Ad* Note, it concluded that the application of the EBR to subject shrimp is inconsistent with the *Ad* Note because it is not "reasonable" within the meaning of the *Ad* Note.[221] Therefore, the Panel concluded that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*.[222]

B. *The Temporal Scope of the Ad Note*

203. The main issue on appeal concerns whether the application of the EBR to subject shrimp is in accordance with the GATT 1994 as interpreted by the *Anti-Dumping Agreement*. Since it is not disputed that the *Ad* Note is part of the GATT 1994[223], the resolution of this issue rests on whether the EBR is consistent with the *Ad* Note.

204. Thailand and India contend on appeal that the temporal scope of the *Ad* Note is restricted to securities taken as provisional measures. They claim that the Panel erred in finding that the *Ad* Note authorizes the imposition of security requirements also after the imposition of a United States anti-dumping duty order and that, accordingly, the application of the EBR falls within the temporal scope of the *Ad* Note.[224]

---

[220]Panel Report, *US – Shrimp (Thailand)*, para. 7.90. See also Panel Report, *US – Customs Bond Directive*, para. 7.64.

[221]Panel Report, *US – Shrimp (Thailand)*, para. 7.150; Panel Report, *US – Customs Bond Directive*, para. 7.128.

[222]Panel Report, *US – Shrimp (Thailand)*, paras. 7.151 and 7.152; Panel Report, *US – Customs Bond Directive*, paras. 7.129 and 7.130.

[223]Panel Report, *US – Shrimp (Thailand)*, footnote 136 to para. 7.88; Panel Report, *US – Customs Bond Directive*, footnote 99 to para. 7.62.

[224]Panel Report, *US – Shrimp (Thailand)*, para. 7.130; Panel Report, *US – Customs Bond Directive*, para. 7.107.

205. The *Ad* Note to Article VI:2 and 3 of the GATT 1994 provides, in relevant part:

> As in many other cases in customs administration, a Member may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

206. The Panel examined the relationship between the *Ad* Note and the *Anti-Dumping Agreement*, and addressed the question of whether the *Ad* Note authorizes the imposition of security requirements that are not expressly envisaged by the *Anti-Dumping Agreement*. The Panel considered that the Appellate Body Report in *Brazil – Desiccated Coconut* makes it clear that Article VI of the GATT 1994 (including the *Ad* Note) was not superseded by the *Anti-Dumping Agreement*.[225] The Panel reasoned that, whereas Article VI may not be interpreted so as to justify action that is prohibited by the *Anti-Dumping Agreement*, Article VI can be an appropriate legal basis for authorizing a conduct that is not prohibited by the *Anti-Dumping Agreement*. According to the Panel, "[a]ny other approach would deprive the Ad Note of meaning and legal effect, and would effectively mean that it has been superseded by the *Anti-Dumping Agreement*."[226] The Panel also discussed the statements made by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment*) that "Article VI and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to 'definitive anti-dumping duties, provisional measures and price undertakings'".[227] For the Panel, these statements did not undermine its reasoning because in neither report did the Appellate Body refer to the *Ad* Note.[228] The Panel therefore concluded that "the relationship between the Ad Note and the *Anti-Dumping Agreement* is not such as to preclude the Ad Note authorizing certain types of security that are not expressly envisaged by the *Anti-Dumping Agreement*."[229]

207. The Panel then examined the ordinary meaning of the *Ad* Note, noting that, by its express terms, the *Ad* Note is applicable "pending final determination of the facts in any case of suspected dumping or subsidization". Regarding the term "suspected", the Panel considered that it refers to

---

[225]Panel Report, *US – Shrimp (Thailand)*, para. 7.92; Panel Report, *US – Customs Bond Directive*, para. 7.72.

[226]Panel Report, *US – Shrimp (Thailand)*, para. 7.94; Panel Report, *US – Customs Bond Directive*, para. 7.73.

[227]Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.

[228]Panel Report, *US – Shrimp (Thailand)*, para. 7.97; Panel Report, *US – Customs Bond Directive*, para. 7.76.

[229]Panel Report, *US – Shrimp (Thailand)*, para. 7.98; Panel Report, *US – Customs Bond Directive*, para. 7.77.

"dumping that is suspected to exist, in the sense that its existence may be imagined to be likely."[230] For the Panel, there is no certainty that imports entering the United States after the imposition of an anti-dumping duty order are in fact dumped since the determination of dumping made during the original investigation did not pertain to these imports, and the final determination (of the existence and amount) of dumping is only made when an assessment review is undertaken.[231] The Panel reasoned that there is, however, a reasonable basis for suspecting that imports subsequent to the order might also be dumped due to the finding of dumping made in respect of imports that entered during the original period of investigation.[232] In the Panel's view, even when no assessment review is ultimately conducted, at the time of entry, imports may only be suspected of being dumped, because, at that point in time, it cannot be excluded that an assessment review may be requested, which might show that those imports are not dumped.[233]

208. Regarding the meaning of the phrase "pending final determination of the facts" in the *Ad* Note, the Panel took the view that this phrase is not necessarily limited to the final determination made in an original investigation and that it may well cover the "determination of the final liability for payment of anti-dumping duties" referred to in Article 9.3.1 of the *Anti-Dumping Agreement*. For the Panel, such an interpretation is consistent with the manner in which a retrospective duty assessment system operates.

209. The Panel also addressed contextual considerations arising from Articles 5.1 and 9.3.1 of the *Anti-Dumping Agreement*, as well as Article 7 of the *Anti-Dumping Agreement*. The Panel rejected the argument of Thailand and India that dumping cannot be suspected after the existence of dumping has been determined in an original investigation within the meaning of Article 5.1. Relying on the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, the Panel held that the conditions for imposing anti-dumping duties, including the existence of dumping, must be established in respect of the "current situation" at the time of their imposition.[234] The Panel considered that the

[230]Panel Report, *US – Shrimp (Thailand)*, para. 7.101. See also Panel Report, *US – Customs Bond Directive*, para. 7.80.
[231]Panel Report, *US – Shrimp (Thailand)*, para. 7.103; Panel Report, *US – Customs Bond Directive*, para. 7.82.
[232]Panel Report, *US – Shrimp (Thailand)*, para. 7.104; Panel Report, *US – Customs Bond Directive*, para. 7.83.
[233]Panel Report, *US – Shrimp (Thailand)*, paras. 7.106 and 7.107; Panel Report, *US – Customs Bond Directive*, paras. 7.89 and 7.90.
[234]Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165.

fact that the United States establishes, under Article 5.1, the existence of dumping at the time it imposes an anti-dumping duty order, "does not mean that the United States is at the same time establishing the existence of dumping in respect of future import entries covered by that order."[235]

210. The Panel also rejected the argument that the reference in Article 9.3.1 to the determination of "final liability for payment of anti-dumping duties" necessarily implies that there has previously been a determination that dumping exists and dumping is, therefore, no longer suspected. In a retrospective duty assessment system, determining final liability for payment of anti-dumping duties takes place after the import entries have been made, and according to the Panel, part of the process of determining "final liability for payment of anti-dumping duties" is to determine whether or not those entries were dumped.[236] Furthermore, the Panel saw no contextual support in Article 7 of the *Anti-Dumping Agreement* for an interpretation of the *Ad* Note that would limit its temporal scope to provisional measures taken prior to the imposition of an anti-dumping duty order.[237]

211. Within its contextual analysis, the Panel also dealt with the question of whether cash deposits are anti-dumping duties within the meaning of Article 9 of the *Anti-Dumping Agreement*, or whether they are securities.[238] The Panel noted that the retrospective duty assessment system is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*, and that the ability to require security is an essential element of such a system. For the Panel, if a cash deposit may not be imposed under other provisions of the GATT 1994 or the *Anti-Dumping Agreement*, an interpretation of the *Ad* Note permitting such security would be further justified.[239] This is so because, in the absence of a legal justification of cash deposits under the *Ad* Note, or any other provision of the GATT 1994 or the *Anti-Dumping Agreement*, cash deposits would constitute "specific action against dumping" contrary to Article 18.1 of the *Anti-Dumping Agreement*. For the Panel, these considerations provided contextual support for its interpretation of the ordinary meaning of the *Ad* Note as permitting such security.[240]

---

[235]Panel Report, *US – Shrimp (Thailand)*, para. 7.109.
[236]*Ibid*., para. 7.110.
[237]Panel Report, *US – Customs Bond Directive*, paras. 7.91-7.95.
[238]Panel Report, *US – Shrimp (Thailand)*, paras. 7.111-7.122; Panel Report, *US – Customs Bond Directive*, paras. 7.96-7.107.
[239]Panel Report, *US – Shrimp (Thailand)*, para. 7.112; Panel Report, *US – Customs Bond Directive*, para. 7.97.
[240]Panel Report, *US – Shrimp (Thailand)*, para. 7.122; Panel Report, *US – Customs Bond Directive*, para. 7.106.

212. In addition, the Panel examined aspects of the negotiating history of the *Ad* Note and Article VI of the GATT 1994. The Panel was of the view that nothing in the negotiating history supports the argument that the *Ad* Note is expressly limited to provisional measures taken prior to a final determination of dumping.[241]

213. In the light of these considerations, the Panel found that "the application of the EBR falls within the temporal scope of the Ad Note, in the sense that the Ad Note authorizes the imposition of security requirements during the period following the imposition of a [United States] anti-dumping [duty] order."[242]

214. Both Thailand and India appeal this finding of the Panel. Thailand requests the Appellate Body to reverse the Panel's interpretation of the phrase "pending final determination of the facts in any case of suspected dumping" in the *Ad* Note. Thailand considers that the temporal scope of this phrase is limited to the time period before the existence of dumping has been established in an original investigation under Article 5 of the *Anti-Dumping Agreement*, and that the Panel's interpretation of the *Ad* Note is inconsistent with the ordinary meaning of this phrase read in the context of Article VI of the GATT 1994 and the *Anti Dumping Agreement*.[243] Thailand disagrees with the Panel that there can only be a "suspicion" of dumping with respect to individual import transactions after the imposition of a definitive anti-dumping duty order.[244] For Thailand, dumping is a present, continuous, and ongoing "state of affairs", and, therefore, after the existence of dumping has been established in an original investigation, dumping is no longer "suspected" but is considered to be occurring, even if the final liability for payment of anti-dumping duties may not have been assessed.[245] As definitive duties can be imposed under Article 9 only after a finding of injurious dumping, a case of "suspected dumping" within the meaning of the *Ad* Note cannot continue to exist after the decision has been made to impose definitive anti-dumping measures under Article 9.1 of the *Anti-Dumping Agreement*.[246] Thailand also argues that the Panel failed to take properly into account the fact that administrative reviews under Articles 9.3.1 and 9.3.2 are not mandatory and may never take place.[247] Finally, Thailand maintains that Article 7 of the *Anti-Dumping Agreement*, dealing with

---

[241]Panel Report, *US – Shrimp (Thailand)*, paras. 7.123-7.130; Panel Report, *US – Customs Bond Directive*, paras. 7.94 and 7.95. The Panel referred to the 1959 Group of Experts Report, *supra*, footnote 41, para. 19, as well as to the Report of Working Party on Modifications to the General Agreement, GATT/CP.2/22/Rev. 1, adopted 1 September 1948, BISD II/37, para. 10(a).

[242]Panel Report, *US – Shrimp (Thailand)*, para. 7.130; Panel Report, *US – Customs Bond Directive*, para. 7.107.

[243]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 5.

[244]*Ibid*., para. 35.

[245]*Ibid*., paras. 40 and 41.

[246]*Ibid*., para. 60.

[247]*Ibid*., paras. 67-69.

provisional measures in the original investigation phase, governs the application of the *Ad* Note.[248] Thailand emphasizes that the Panel's interpretation of the *Ad* Note is not consistent with the previous jurisprudence of the Appellate Body because it creates an impermissible fourth response to dumping.[249]

215. For its part, India argues that the Panel erred in its interpretation of the phrase "the provisions of GATT 1994 as interpreted by this Agreement" in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*. According to India, any interpretation of the *Ad* Note that would authorize the United States to impose the EBR independently of the three permissible specific actions against dumping under the *Anti-Dumping Agreement*, or of the four permissible specific actions under the *SCM Agreement*, would render this phrase redundant and inutile.[250] For India, the Panel's position that the taking of a reasonable security for the payment of anti-dumping duties is a permissible action against dumping is not consistent with the Appellate Body's findings in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*. India submits that, in interpreting the *Ad* Note, the Panel "worked backwards" from its strongly held conviction that it was essential that Members using the retrospective duty assessment system be permitted to take security.[251] The Panel's interpretation implies that suspicion of dumping begins after the final determination of the existence of injurious dumping, which is untenable.[252]

216. India also maintains that the Panel erred in interpreting and applying the term "final determination" in the *Ad* Note. For India, there is only one final determination in the life of an anti-dumping or countervailing duty order, and that final determination precedes the decision to impose a duty under Article 9.1 of the *Anti-Dumping Agreement*, or under Articles 19.1 and 19.2 of the *SCM Agreement*.[253] India considers that the Panel's interpretation of the *Ad* Note confers an unfair advantage on Members using retrospective duty assessment systems as it permits them to impose an additional charge over and above the anti-dumping duty rate established in the original

[248]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 56.
[249]*Ibid*, para. 79 (referring to Appellate Body Report, *US – 1916 Act*, para. 114; and Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 264 and 265). Also Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 84.
[250]India's appellant's submission, *US – Customs Bond Directive*, para. 15.
[251]*Ibid*., para. 55.
[252]*Ibid*., paras. 58 and 59.
[253]*Ibid*., para. 63.

investigation.[254] India further submits that Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* implement the *Ad* Note to the extent that these provisions permit security to be taken as a provisional measure, and that the United States cannot justify the EBR under the *Ad* Note independently of these provisions.[255]

217. In response, the United States argues that the phrase "final determination of the facts" in the *Ad* Note refers to the determination of the facts with respect to the "*payment* of anti-dumping or countervailing duty".[256] In the context of a retrospective duty assessment system, the "determination of the *final* liability for payment of anti-dumping duties", referred to in Article 9.3.1, must be made in order for the facts with respect to payment to be determined.[257] Thus, for the United States, the term "payment" in the *Ad* Note is critical to determine the scope of application of the *Ad* Note.

218. The United States rejects the view that the imposition of an anti-dumping duty order means that dumping is no longer "suspected". Rather, the United States agrees with the Panel that proof of the existence of dumping with respect to past import entries during the period of investigation does not mean that the existence of dumping is being established in respect of future import entries covered by an anti-dumping duty order.[258] For the United States, the argument that Article 7 of the *Anti-Dumping Agreement* governs the application of the *Ad* Note is based on the erroneous assumption that, if provisional measures within the meaning of Article 7 may take the form of security, all security requirements must be provisional measures as well. The fact that both Article 7 and the *Ad* Note refer to "cash deposits and bonds" does not imply that all securities must be provisional.[259] The United States considers that the Appellate Body Reports in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)* are not dispositive of the interpretation of the *Ad* Note as these reports do not contain any analysis of the *Ad* Note and were not concerned with security requirements for final anti-dumping duties.[260] The United States is of the view that the Panel correctly articulated the relationship between the *Anti-Dumping Agreement* and the *Ad* Note. For the United States, there is no basis for prohibiting an action that is authorized by the *Ad* Note and that is not addressed by the *Anti-*

[254]India's appellant's submission, *US – Customs Bond Directive*, para. 75.
[255]India's appellant's submission, *US – Customs Bond Directive*, para. 81.
[256]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 11 and *US – Customs Bond Directive*, para. 15. (emphasis added by the United States)
[257]United States appellee's submissions, *US – Shrimp (Thailand)*, para. 11 and *US – Customs Bond Directive*, para. 15. (emphasis added by the United States)
[258]United States appellee's submission, *US – Shrimp (Thailand)*, para. 20 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.109).
[259]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 29 and *US – Customs Bond Directive*, para. 23.
[260]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 46 and *US – Customs Bond Directive*, para. 34.

Dumping Agreement.[261] The United States points out that precluding WTO Members with retrospective duty assessment systems from taking security prior to the determination of final liability would prevent such Members from collecting duties lawfully owed, and would result in an asymmetry between prospective and retrospective duty assessment systems.[262]

219. We turn now to the analysis of the question whether the *Ad* Note authorizes security requirements after the imposition of an anti-dumping duty order and, accordingly, whether the application of the EBR falls within the temporal scope of the *Ad* Note.

1. Interpretation of the Phrase "pending final determination of the facts in any case of suspected dumping"

220. We begin with the interpretation of the phrase "pending final determination of the facts in any case of suspected dumping" in the *Ad* Note, as this phrase is central to determining the question whether security may be taken after the imposition of an anti-dumping duty order. In particular, we need to ascertain the ordinary meaning of the terms "final determination of the facts" and "suspected dumping". The parties disagree on the question as to which "final determination" is referred to in the *Ad* Note: the determination pursuant to which an anti-dumping duty order is imposed at the end of an original investigation; or the determination of the final liability for payment of anti-dumping duties pursuant to an assessment review under a retrospective duty assessment system. The parties disagree also on the question as to whether dumping remains "suspected" only up to the imposition of the anti-dumping duty order, or whether it continues to remain "suspected" until the final liability is determined in successive assessment reviews and, accordingly, during the lifetime of an anti-dumping duty order under a retrospective duty assessment system.

221. We find useful guidance for interpreting the terms of this phrase in the *Ad* Note in the immediate context in which they appear. The *Ad* Note refers to "security ... for the *payment* of anti-dumping or countervailing ... duty".[263] In our view, this reference to the *payment* of a duty is key to ascertaining the temporal scope of the *Ad* Note because it reveals the nature of the obligation whose performance the security seeks to guarantee. The obligation that is intended to be secured under the *Ad* Note is the "payment of anti-dumping or countervailing duty". In other words, the *Ad* Note recognizes the right of WTO Members to take reasonable security against the risk of non-payment of an anti-dumping or countervailing duty that is lawfully established. This risk might exist during the period of an original investigation, and a provisional measure in the form of a security may be taken

[261]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 25 and *US – Customs Bond Directive*, para. 18.
[262]United States' appellee's submissions, *US – Customs Bond Directive*, para. 16.
[263]Emphasis added.

in accordance with Article 7 of the *Anti-Dumping Agreement* to protect against this risk. In a retrospective duty assessment system, this risk might also exist after the anti-dumping duty order has been imposed, arising from the difference between the amount collected at the time of import entry and the final liability assessed in an assessment review. The *Ad* Note also suggests that the reasonable security envisaged by it fulfils the same function as the securities taken "in many other cases in customs administration". As the United States points out, in most other cases in customs administration, security is required upon entry of merchandise when there is some uncertainty about the actual amount of liability that may be lawfully owed by the importer.[264] Such a security is intended to provide a protection against the non-payment risk that might arise from the differences between the amount collected at the time of importation and the liability that may be finally determined. Accordingly, we are of the view that the term "final determination" in the *Ad* Note *includes* the determination that is made to assess the final liability for payment of anti-dumping duties under Article 9.3.1 in a retrospective duty assessment system. The "facts" are those that are necessary to be determined in order to assess properly the amount of final liability of the duty in accordance with the *Anti-Dumping Agreement*.

222. In the retrospective duty assessment system followed by the United States, the factual determination of the amounts of anti-dumping duties payable by the importers is not complete until an assessment review has been conducted. A factual determination of the amount of anti-dumping duties payable occurs even if an assessment review does not take place. If no interested party requests an assessment review, the USDOC will instruct United States Customs to assess anti-dumping duties and liquidate the import entries at the cash deposit rate required upon import entry. This cash deposit rate is determined for each exporter or producer individually investigated, and is established on the basis of its transactions over the period covered by the original investigation or the latest assessment review, as the case may be. Thus, even in the event that no assessment review has been requested, the final determination of the facts includes a determination regarding amounts of anti-dumping duties finally payable, as the USDOC has to instruct United States Customs to liquidate the import entries on the basis of the cash deposit rates.

223. We are not persuaded by the arguments of Thailand and India that the phrase "final determination of the facts" refers to the determination of injurious dumping made in an original investigation pursuant to Article 5 of the *Anti-Dumping Agreement* and that there is only one "final

[264]United States' appellee's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 12.

determination of the facts" in the life of an anti-dumping duty measure.[265] As we have explained above, determination of the facts is not final within the meaning of the *Ad* Note in a retrospective duty assessment system until the amount of the liability for payment of anti-dumping duty is determined in the assessment review.[266]

224. We turn next to the term "suspected dumping" in the phrase under review. Thailand and India point out that, under the *Ad* Note, a security can only be taken "in ... case of suspected dumping or subsidization". According to them, once the determination of injurious dumping is made in an original investigation pursuant to Article 5 of the *Anti-Dumping Agreement*, the existence of dumping is no longer suspected, but established. As the phrase "final determination of the facts" refers to the final determination in any case of "suspected dumping", and as dumping can no longer be suspected after an original investigation and the issuance of an anti-dumping duty order under Article 9.1, they argue that the *Ad* Note has a temporal scope limited to provisional measures taken prior to the determination of injurious dumping.

225. The Panel took the view that, under the retrospective duty assessment system of the United States, dumping remains suspected even after the issuance of an anti-dumping duty order. The Panel reasoned that there is no certainty that imports entering the United States following the imposition of an anti-dumping duty order are in fact dumped, because the determination of dumping made during the original investigation does not pertain to those import transactions. According to the Panel, with respect to the import transactions subsequent to the issuance of an anti-dumping duty order, the *existence* of dumping is established only when an assessment review is undertaken and the final duty liability is assessed. On this specific point, we disagree with the Panel's reasoning. Under the United States' anti-dumping duty system, the existence of dumping, as well as the existence of injury and the causal link between the two, is determined in an original investigation conducted pursuant to Article 5 of the *Anti-Dumping Agreement*. The legal basis for collection of cash deposits at the anti-dumping duty rate and determination of the final liability for payment of anti-dumping duties in an assessment review under the United States' retrospective duty assessment system is the fact that these three determinations (dumping, injury, and the causal link between the two) have been made prior to the imposition of the anti-dumping duty order. Therefore, under the United States' system, the

[265]The term "injurious dumping" refers to the findings of dumping and injury and a causal link between the two by an investigating authority in an original investigation.

[266]We find support for our interpretation by referring to the equally authentic French and Spanish versions of the relevant provisions. In the French and Spanish versions of the *Ad* Note the phrase "final determination of the facts" is, respectively, "*la constatation définitive des faits*" and "*la comprobación definitiva de los hechos*". By contrast, the terms "*détermination*" (in French) and "*determinación*" (in Spanish) are used in Article 5 of the *Anti-Dumping Agreement*, whereas the English version uses the term "determination" in both Article 5 and the *Ad* Note.

uncertainty subsequent to the original investigation period pertains only to the *amount* of the final liability for the payment of anti-dumping duties, and there is no uncertainty with respect to the *existence* of dumping. This is also clear from the fact that, even where the duty assessment rate of an importer is zero in an assessment review, that importer will continue to make cash deposits for future entries of subject merchandise at the going-forward cash deposit rate of the exporter concerned. Footnote 22[267] of the *Anti-Dumping Agreement* also confirms this point as it distinguishes between the *existence* and the *amount* of dumping in a retrospective duty assessment system. Furthermore, under United States law, an anti-dumping duty order remains in effect until it is revoked, meaning, thereby, that dumping is considered to "exist" until the order is revoked.

226. Although we do not agree with the Panel that the "existence" of dumping remains "suspected" under the United States' retrospective duty assessment system even after the imposition of the anti-dumping duty order, we are of the view that the term "dumping" in the *Ad* Note covers both the *existence* of dumping and the *amount* or margin of dumping. Dumping and margin of dumping—which measures the magnitude of dumping—are inter-related concepts. Under the United States' retrospective duty assessment system, the *magnitude* of dumping, or, in other words, the amount of final liability for payment of anti-dumping duties, is determined only in an assessment review. Thus, dumping remains "suspected" within the meaning of the *Ad* Note as regards its *magnitude* for the import entries occurring after the anti-dumping duty order is imposed. Until an assessment review is conducted and the import entries are liquidated, there remains uncertainty regarding the *magnitude* of dumping, so that dumping remains in this respect, and until then, "suspected".[268]

227. For these reasons, we find that the *Ad* Note authorizes the taking of a reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final liability for payment of the anti-dumping duty. In our view, this finding is neutral as between prospective and retrospective duty assessment systems, because the determination of the final liability for payment of duty takes place in a retrospective system in assessment reviews subsequent to the imposition of the anti-dumping duty order.

---

[267]Footnote 22 of the *Anti-Dumping Agreement*, reads as follows:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[268]As noted in paragraph 222 above, where no assessment review is requested, the USDOC instructs the United States Customs to liquidate the import entries on the basis of the cash deposit rate of the original anti-dumping duty order or the cash deposit rate assessed for the exporter in the most recent assessment review. Whether or not an assessment review will be requested (and whether the final liability will be assessed at the previous cash deposit rate or according to the current data) is not known *ex ante*. Thus, even in the event that no assessment review is requested, until liquidation of the import entries, there is some uncertainty regarding the magnitude of dumping.

228. We turn now to examine two additional considerations that, according to Thailand and India, go against an interpretation of the *Ad* Note that extends its temporal scope beyond security taken as a provisional measure.

2. Impermissible Response to Dumping

229. Thailand and India rely on the Appellate Body statement in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)* that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings".[269] According to Thailand and India, if the temporal scope of the *Ad* Note is not limited to provisional measures, and if security (such as a bond) for potential increase in duty liability after the imposition of an anti-dumping duty order is allowed under the *Ad* Note, such a security would constitute a fourth permissible response to dumping. This would be contrary to the above statement of the Appellate Body.

230. Before addressing the arguments of Thailand and India, we reaffirm the Appellate Body findings in previous reports that the *Anti-Dumping Agreement* does not allow a fourth category of specific action against dumping.[270] We do not, however, consider that a security taken for guaranteeing the payment of a lawfully established duty liability would necessarily constitute a "specific action against dumping"; rather, whether a particular security constitutes a "specific action against dumping" should be evaluated in the light of the nature and characteristics of the security and the particular circumstances in which it is applied. We wish to emphasize that, in any event, an impermissible specific action against dumping cannot be taken in the guise of a security.

231. Generally speaking, a security is accessory or ancillary to the principal obligation that it guarantees. A security that is taken to guarantee the obligation to pay anti-dumping or countervailing duties is intrinsically linked to that obligation. Thus, taking security for the full and final payment of duties should be viewed as a component of the imposition and collection of anti-dumping or

[269]Appellate Body Report, *US – 1916 Act*, para. 137 (quoted in Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265).

[270]*Ibid*., paras. 81 and 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 265 and 269. See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 113 and 115.

countervailing duties. Therefore, a reasonable security taken in accordance with the *Ad* Note for potential additional anti-dumping duty liability does not necessarily, in and of itself, constitute a fourth autonomous category of response to dumping.[271]

3. The *Ad* Note to Article VI:2 and 3 of the GATT 1994 and Article 7 of the *Anti-Dumping Agreement* (Provisional Measures)

232. The second additional consideration raised by Thailand and India is that Article 7 of the *Anti-Dumping Agreement* on provisional measures interprets, governs, and implements the *Ad* Note to Article VI:2 and 3 of the GATT 1994, and that, therefore, a security cannot be justified under the *Ad* Note independently of Article 7. According to Thailand and India, the scope of the *Ad* Note should therefore be limited to securities taken as a provisional measure in accordance with Article 7.

233. We agree with Thailand and India that there is some overlap between the *Ad* Note and Article 7. The *Ad* Note allows security in the form of provisional measures during the original investigation period, the disciplines of which are implemented through Article 7. At the same time, in our view, the *Ad* Note allows the taking of a reasonable security for payment of the final liability of anti-dumping duties after an anti-dumping duty order has been imposed where such security may be needed to ensure that the difference between the duty collected on import entries and the final duty liability is collected. We therefore do not agree with Thailand and India that the *Ad* Note is completely subsumed under Article 7 so that the taking of a reasonable security is not allowed after a definitive anti-dumping duty is imposed. As the Appellate Body clarified in *Brazil – Desiccated Coconut*, the *Anti-Dumping Agreement* does not supersede the provisions of the GATT 1994, including the Notes and Supplementary Provisions of Annex I to the GATT 1994.[272] Rather, Article VI of the GATT 1994 (including the *Ad* Note) and the *Anti-Dumping Agreement* represent an inseparable package of rights and disciplines. Our interpretation of the *Ad* Note is consistent with this approach as it gives meaning and effect to both.

[271]Our views on what would constitute a "reasonable" security and how "potential additional liability" and "risk of default" are to be established to justify a security under the *Ad* Note are explained in Section VI of this Report.

[272]Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14, DSR 1997:I, 167, at 179.

4. The Panel's Legal Characterization of Cash Deposits

234. We now turn to the issue of whether the Panel erred in its interpretation that (i) cash deposits required under United States law are not anti-dumping duties falling within the scope of the *Anti-Dumping Agreement*, and that (ii) these cash deposits are not subject to the requirements of Article 9.1 and the chapeau of Article 9.3 that the amount of anti-dumping duties shall not exceed the margin of dumping established under Article 2 of the *Anti-Dumping Agreement*.[273]

235. The Panel addressed the question of cash deposits only as a contextual consideration in support of its conclusion that the *Ad* Note allows security to be taken after the imposition of an anti-dumping duty order. Thailand and India did not claim before the Panel that the cash deposits taken by the United States under its retrospective duty assessment system are WTO-inconsistent. In our view, the outcome of this case in relation to the WTO-consistency of the EBR does not depend on the legal characterization of the cash deposits required by United States law on imports subject to an anti-dumping duty order. Indeed, the "Conclusions and Recommendations" of the Panel Reports make no reference to cash deposits.

236. The Panel took the view that cash deposits are securities and that they are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*. For the Panel, the term "duty" is not broad enough to encompass cash deposits, because a cash deposit does not "yield public revenue at the time it is provided" and it is without intrinsic value.[274] The Panel found contextual support for its view in various provisions of the *Anti-Dumping Agreement*.[275]

237. On appeal, Thailand and India challenge the Panel's interpretation that cash deposits are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*, but are, rather, securities to secure payment of final anti-dumping duties. Thailand notes that, under United States law, the cash deposits required after the publication of the anti-dumping duty order are referred to as deposits "of estimated antidumping duties".[276] By contrast, United States law governing provisional measures uses the same terminology as Article 7 of the *Anti-Dumping Agreement*, and describes a provisional

---

[273]Panel Report, *US – Shrimp (Thailand)*, para. 7.122; Panel Report, *US – Customs Bond Directive*, para. 7.106.

[274]See Panel Report, *US – Shrimp (Thailand)*, paras. 7.113 and 7.114; and Panel Report, *US – Customs Bond Directive*, para. 7.98.

[275]See Panel Report, *US – Shrimp (Thailand)*, para. 7.115-7.119; and Panel Report, *US – Customs Bond Directive*, para. 7.99-7.105.

[276]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 122 (referring to Tariff Act, *supra*, footnote 53, Section 1673e(a)(3)). This provision of the Tariff Act requires "the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited."

measure as a "cash deposit, bond, or other security"[277] with no reference to the term "estimated duties".[278] Thailand submits that cash deposits are duties because their purpose is to offset or counteract injurious dumping; the fact that the amount of final liability for anti-dumping duties may be different from the amount collected as cash deposits does not affect their fundamental nature.[279] Thailand also argues that the Panel erred in considering that cash deposits have no intrinsic value since, being paid in cash, cash deposits have the same cash value to the importing Member as any other payment of duties or any other payment of cash.[280]

238. India argues that there is no substantive difference between "cash deposits" and "cash" in payment of anti-dumping duties.[281] India refers to submissions made by the United States to the Negotiating Group on Rules in relation to Article 9.3 in which the United States had allegedly characterized payments of cash deposits made under Article 9.3.1 as "duties".[282] For India, the cash deposits, however characterized, cannot be collected in excess of the margins specified in Article 9.3 of the *Anti-Dumping Agreement* and Article 19.4 of the *SCM Agreement*.[283]

239. The United States supports the Panel's view that a cash deposit is security for a duty owed, and is not itself a duty. Like the Panel, the United States notes that Article 7.2 distinguishes a "cash deposit" as a form of security from "duties", and agrees with the Panel that, in indicating a preference for requiring payment of cash deposits, rather than duties, the text of Article 7.2 establishes a substantive difference between a cash deposit and a duty.[284] For the United States, a cash deposit of estimated duties is a security for duties that may be collected in the future, and there is no duty in the absence of any such future collection.[285] The United States argues that the fact that cash deposits are

[277]Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 122 (referring to Tariff Act, *supra*, footnote 53, Section 1673b(d)(2)).
[278]*Ibid*.
[279]*Ibid*., para. 127.
[280]*Ibid*., para. 124.
[281]India's appellant's submission, *US – Customs Bond Directive*, para. 109.
[282]Negotiating Group on Rules, "Accrual of Interest (ADA Articles 9.3.1 & 9.3.2)", Communication from the United States, TN/RL/W/168.
[283]India's appellant's submission, *US – Customs Bond Directive*, para. 114.
[284]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 38 and *US – Customs Bond Directive*, para. 29.
[285]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 39.

"paid in cash" does not make them "duties".[286] Furthermore, the United States denies that its statements to the Negotiating Group on Rules and in other dispute settlement proceedings support India's proposition, and submits that they do not provide a basis to depart from the ordinary meaning of the terms used in the covered agreements.[287]

240. We are of the view that, in order to interpret the *Ad* Note and determine the WTO-consistency of the *bonds* required under the EBR, it was not necessary for the Panel to decide whether the *cash deposits* are duties governed by Article 9 of the *Anti-Dumping Agreement*. As Thailand and India did not raise any claim regarding the cash deposits, the cash deposits are not a measure at issue in these disputes.

241. At the oral hearing, Thailand and India agreed that the legal characterization of the "cash deposits" or their nomenclature under the domestic law of the United States is not relevant to determine the WTO-consistency of the EBR (provided the cash deposits are subject to the disciplines of Article 9 of the *Anti-Dumping Agreement*).[288] While the description of an instrument under domestic law is not determinative under WTO law, we note that under the United States' anti-dumping law, once an anti-dumping duty order is issued, importers may no longer post bonds as security, but, instead, must make a cash "deposit of estimated antidumping duties" at the rates established in the anti-dumping duty order or in the most recent assessment review.[289] Thus, a cap on the cash deposits equivalent to the margin of dumping established for an exporter in the anti-dumping duty order, or in the most recent assessment review, exists under United States law.

[286]United States' appellee's submission, *US – Shrimp (Thailand)*, para. 40.

[287]United States' appellee's submission, *US – Customs Bond Directive*, para. 30 (referring to India's appellant's submission, *US – Customs Bond Directive*, paras. 111 and 112).

[288]See also Thailand's appellant's submission, *US – Shrimp (Thailand)*, para. 117.

[289]Tariff Act, *supra*, footnote 53, Section 1673e(a)(3). See also United States Regulations, Section 351.211(a).

242. Therefore, we do not consider it necessary to rule on the merits of the appeals by Thailand and India concerning the cash deposits. We do not share the reasoning of the Panel on this issue and declare of no legal effect the interpretation developed by the Panel that the cash deposits required under United States law following the imposition of an anti-dumping duty order are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*.[290]

C. *Conclusion*

243. In the light of all these considerations, we *uphold* the Panel's findings, in paragraph 7.130 of the Panel Report in *US – Shrimp (Thailand)* and paragraph 7.107 of the Panel Report in *US – Customs Bond Directive*, that the application of the EBR falls within the temporal scope of the *Ad* Note, in the sense that the *Ad* Note authorizes the imposition of security requirements during the period following the imposition of a United States anti-dumping duty order.

VI. The Reasonableness of the EBR, as Applied to Subject Shrimp

244. We now turn to the issue of whether the Panel erred in its analysis of the "reasonableness" of the application of the EBR to subject shrimp.[291]

245. Having found that the application of the EBR falls within the temporal scope of the *Ad* Note[292], the Panel examined whether the application of the EBR to subject shrimp is a "reasonable" security within the meaning of the *Ad* Note. The Panel began its analysis by recalling

[290]See Panel Report, *US – Shrimp (Thailand)*, paras. 7.111-7.122; and Panel Report, *US – Customs Bond Directive*, paras. 7.96-7.106. As regards the cash deposits collected under the United States' retrospective duty assessment system, we recall that, in *US – Zeroing (EC)*, the Appellate Body stated that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the import entries of the subject product (from an exporter) covered by the duty assessment proceeding." (Appellate Body Report, *US – Zeroing (EC)*, para. 130 (original emphasis)) See also, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102; and Appellate Body Report, *US – Zeroing (Japan)*, para. 162. Under the retrospective duty assessment system applied by the United States, it may happen that an advance payment for an anti-dumping duty in the form of a cash deposit equivalent to the margin of dumping determined for an exporter in an original investigation in accordance with Article 2 of the *Anti-Dumping Agreement*, and imposed "at the full margin or less" in an anti-dumping duty order subject to Article 9.1, or calculated in the most recent assessment review subject to the requirements of Article 9.3, exceeds the magnitude of final liability ultimately assessed in an assessment review. If an advance payment for an anti-dumping duty in the form of a cash deposit at the level of the margin established for an exporter in the anti-dumping duty order or the most recent assessment review exceeds the amount of anti-dumping duty liability finally assessed, no WTO-inconsistency arises provided that a refund is made in accordance with Article 9.3.1. If no assessment review is requested, the USDOC assesses final anti-dumping liability at the level of the most recently calculated cash deposit rate. Furthermore, if final liability exceeds the cash deposit, the difference in lawfully owed duties may be collected.

[291]Panel Report, *US – Shrimp (Thailand)*, para. 7.150; Panel Report, *US – Customs Bond Directive*, para. 7.128.

[292]Panel Report, *US – Shrimp (Thailand)*, paras. 7.130 and 7.137; Panel Report, *US – Customs Bond Directive*, paras. 7.107 and 7.114.

that the EBR is applied in conjunction with cash deposits and that, while the cash deposits secure the duty liability resulting from the anti-dumping duty order (or the most recent assessment review), the EBR secures the additional liability resulting from increases in the rate of dumping over and above the rates established in the order (or most recent assessment review).[293] The Panel then referred to the ordinary meaning of the term "reasonable" and noted that reasonableness may be defined as "not irrational or absurd" and, regarding amount of security, as "not greatly less or more than might be thought likely or appropriate".[294] Following these definitions, the Panel considered that there would be an appropriate basis for applying an increased security such as the EBR if it was properly determined that the rates of dumping established in the anti-dumping duty order were likely to increase to the effect that the cash deposits would not provide sufficient security for the final liability.[295] The Panel added that the likely amount of such increase in liability would also need to be determined in order to ensure that the amount of the additional security requirement is not substantially more than the amount by which the final liability would be likely to exceed the liability secured by the cash deposits. According to the Panel, without such an analysis of the increase in the rate of dumping, the rate in the anti-dumping duty order remains the best and only available baseline proxy of duties that may be ultimately assessed, and security exceeding that rate would not be "reasonable" within the meaning of the *Ad* Note.[296]

246. The Panel also held that, "[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers."[297] For the Panel, "[t]here is nothing in the Ad Note to suggest that security may only be required if it is further established that importers would not otherwise pay the relevant anti-dumping duties."[298] The Panel added, however, that a WTO Member could nevertheless decide to impose security requirements under the *Ad* Note only in respect of importers with a greater risk of default.[299]

---

[293]Panel Report, *US – Shrimp (Thailand)*, para. 7.140; Panel Report, *US – Customs Bond Directive*, para. 7.117.

[294]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.

[295]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.

[296]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.

[297]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to paragraph 7.142; Panel Report *US – Customs Bond Directive*, footnote 148 to paragraph 7.119.

[298]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to para. 7.142; Panel Report, *US – Customs Bond Directive*, footnote 148 to para. 7.119.

[299]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to para. 7.142; Panel Report, *US – Customs Bond Directive*, footnote 148 to para. 7.119.

247. The Panel then analyzed whether the United States properly determined that the rates of dumping established in the anti-dumping duty order pertaining to subject shrimp were likely to increase. The Panel noted that the analysis conducted by United States Customs in this regard was based mainly on historical data with respect to agriculture and aquaculture sectors as a whole according to which the rates increased 33 per cent of the time, did not change 11 per cent of the time, and decreased 56 per cent of the time.[300] While regretting the absence of documentary evidence that would have allowed a rigorous analysis of these figures, the Panel considered that, in any event, United States Customs could not properly conclude "that rates of dumping for subject shrimp were likely to increase on the basis of a finding that, historically, rates only increased in one third of agriculture/aquaculture cases generally."[301] The Panel added that "the United States has provided no explanation as to how any alleged historical trend in respect of dumping rates for agriculture/aquaculture cases generally might justify conclusions regarding the likelihood of dumping rates for subject shrimp specifically."[302] Recalling that the EBR is applied on all imports of subject shrimp, the Panel expressed the view that the historical data on which United States Customs relied were not sufficient to demonstrate that all rates in respect of all imports of subject shrimp were likely to increase.[303]

248. The Panel examined the United States' contention that the USDOC's preliminary results from the first administrative review of the anti-dumping duty order with respect to subject shrimp indicated that several companies covered by the order were subject to an assessment rate that was higher—in certain cases, substantially higher—than the rate of the cash deposit established in the investigation.[304]

---

[300]Panel Report, *US – Shrimp (Thailand)*, para. 7.143 (referring to United States' first written submission to the Panel in *US – Shrimp (Thailand)*, footnote 28 to para. 26); Panel Report, *US – Customs Bond Directive*, para. 7.120 (referring to United States' first written submission to the Panel in *US – Customs Bond Directive*, footnote 29 to para. 27).

[301]Panel Report, *US – Shrimp (Thailand)*, para. 7.145; Panel Report, *US – Customs Bond Directive*, para. 7.122.

[302]Panel Report, *US – Shrimp (Thailand)*, para. 7.145; Panel Report, *US – Customs Bond Directive*, para. 7.122.

[303]Panel Report, *US – Shrimp (Thailand)*, para. 7.145; Panel Report, *US – Customs Bond Directive*, para. 7.122.

[304]Panel Report, *US – Shrimp (Thailand)*, para. 7.146. According to the United States, "several Thai companies that had been making cash deposits at the 6% rate established in the investigation may be subject to an assessment rate in excess of 57%." (*Ibid*., (quoting United States' first written submission to the Panel in *US – Shrimp (Thailand)*, para. 26)) Also, according to the United States, the "USDOC's preliminary results suggest higher assessment rates for 63 of 70 Indian companies subject to the original order", and "17 of these companies, which had been making cash deposits at the 10.17% rate established in the investigation, may be subject to an assessment rate in excess of 82%." (Panel Report, *US – Customs Bond Directive*, para. 7.123 (quoting Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, *United States Federal Register*, Vol. 72 (9 March 2007) 10658 (Exhibit US-6 submitted by the United States to the Panel), at 10667-10668))

Before the Panel, the United States argued that this supports its conclusion that rates of dumping for subject shrimp would likely increase. The Panel rejected this argument because it considered that the preliminary results of the first administrative review of the shrimp anti-dumping duty order were not relevant to its analysis as they were issued after the EBR was imposed on shrimp and, therefore, would constitute an *ex post facto* rationalization.[305] The Panel added that, even if these results were relevant, they would not favour the position of the United States as the rates increased for only a very small proportion of shrimp imports from Thailand and India.[306]

249. For these reasons, the Panel concluded that the United States could not properly have found, on the basis of the evidence relied on by the United States at the time it applied the EBR, that the rates of dumping established in the subject shrimp order were likely to increase. Accordingly, the Panel concluded that the additional security requirements resulting from the application of the EBR are not "reasonable" within the meaning of the *Ad* Note.[307]

250. The United States appeals this conclusion of the Panel. The United States explains that the EBR was developed in order to increase the security requirements on merchandise with a higher risk of default, and that United States Customs applied the EBR to subject shrimp because the potential unsecured liability appeared significant (due to the fact that shipments in excess of US$2.5 billion were subject to the anti-dumping duty orders), as did the risk of default (because the industry shared characteristics similar to those of other industries that in the past had been the source of substantial defaults).[308] The United States argues that, in finding that additional security may be "reasonable" only if a WTO Member determines that the anti-dumping rate is "likely" to increase between the imposition of the order and the final assessment, the Panel relied on an incorrect standard which would exclude bonding where there is less than "substantial certainty" that such an increase will occur.[309] The United States points out that United States Customs' analysis concerning the need for additional security for subject shrimp is in line with ordinary customs practice, as additional security under the EBR is related to the amount of potential liability being secured and the likelihood of default. The United States contends that the Panel's erroneous standard of "substantial certainty" in

[305]Panel Report, *US – Shrimp (Thailand)*, para. 7.147. See also Panel Report, *US – Customs Bond Directive*, para. 7.125.

[306]*Ibid*. See also Panel Report, *US – Customs Bond Directive*, para. 7.125.

[307]Panel Report, *US – Shrimp (Thailand)*, para. 7.150; Panel Report, *US – Customs Bond Directive*, para. 7.128.

[308]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 4.

[309]*Ibid*., para. 11.

rate increase requires information that is impossible to know at the time the security is imposed.[310] According to the United States, in assessing the reasonableness of the EBR as applied to subject shrimp, the Panel had to consider both the likelihood of default and the amount of potential unsecured liability.[311] For the United States, if the risk of default was "significant", the security requirements would be reasonable even if the likelihood of an increase in the margin of dumping was less than substantial certainty.[312]

251. In response to the United States' appeal, Thailand contends that the United States misunderstands or misrepresents the standard actually applied by the Panel.[313] For Thailand, the Panel's standard is that there should be a "likelihood" that margins of dumping would increase and that additional security should be required only up to the "likely amount" of such increase. Thailand considers that this standard is consistent with the ordinary meaning of the term "reasonable". Thailand adds that the Panel was correct in not basing its standard of reasonableness on an indeterminate amount of "possible" liability, because such an approach would mean that the United States would always be permitted to require additional security of an indeterminate amount. For Thailand, the disciplines of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 would be undermined if the expansive interpretation of "reasonable" proposed by the United States were endorsed.[314] Thailand rejects the United States' argument that the Panel's standard unduly limits security to a calculation based on information impossible to know at the time security is imposed.[315] Thailand also emphasizes that the risk of default cannot justify the imposition of security in excess of the amount of likely anti-dumping duty liability. Thailand agrees with the Panel that general, unsubstantiated historical trends in margins of dumping in agriculture and aquaculture cases cannot justify the conclusion that dumping margins were likely to increase in the case of subject shrimp.[316]

252. In response to the United States' appeal, India argues that the evidence submitted to the Panel by the United States was inadequate to support its position that, at the time of the imposition of the EBR, it could be said that the margins of dumping were likely to rise in the case of subject shrimp. For India, the most important factor for determining reasonableness is whether the rates are likely to increase and, if so, the likely amount of such increases; and, in the absence of a proper determination of these two elements, security is not permissible regardless of the total value of imports and the

[310]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 17.
[311]*Ibid*., para. 19.
[312]*Ibid*., para. 14.
[313]Thailand's appellee's submission, *US – Shrimp (Thailand)*, para. 17.
[314]*Ibid*., paras. 23-25.
[315]*Ibid*., para. 29.
[316]*Ibid*., para. 40.

potential for importers to default. In India's view, the United States' approach implies that the United States could impose security requirements simply on the basis that the value of the imports is high and the structure of the import industry is suspect, even if there is no likelihood of increase in dumping margins.[317] India adds that the test of reasonableness should be applied at a company-specific level and that, therefore, the analysis of likely increase in margins of dumping should be on an exporter-specific basis. India agrees with the Panel that the evidence to support likely rate increases should be specific to subject shrimp, and cannot be based on generalized historical trends pertaining to the wider agriculture and aquaculture cases.[318] India submits that the Panel never stated that its interpretation of "likely" increase in dumping margins meant "substantial certainty" of such increase.[319]

253. Thailand and India do not challenge on appeal the Panel's ultimate finding that the EBR, as applied to subject shrimp, is not a "reasonable" security. They do, however, contest one specific aspect of the Panel's reasoning. According to Thailand and India, the Panel erred in stating that "[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers".[320] Thailand considers that any assessment of whether a security requirement is reasonable must take account of not only the likelihood and magnitude of increases in the margins of dumping, but also the likelihood of default by individual importers.[321] India cautions that, as an estimation of the likely increase in the liability for anti-dumping duties may be based on "conjecture and guess work", it is necessary to add a requirement regarding the likelihood of default by individual importers.[322]

254. In response to the position of Thailand and India on this point, the United States contends that the text of the *Ad* Note does not suggest that "reasonableness" requires an importer-specific assessment of default risk. The United States points out that assessing the risk of default of individual importers involves practical difficulties, as United States Customs cannot conduct an assessment of individual risk without collecting all relevant information from the importer and cannot wait until the importer defaults.[323]

---

[317]India's appellee's submission, *US – Customs Bond Directive*, para. 39.
[318]*Ibid*., para. 48.
[319]*Ibid*., para. 49.
[320]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to para. 7.142. See also Panel Report, *US – Customs Bond Directive*, footnote 148 to para. 7.119.
[321]Thailand appellant's submission, *US – Shrimp (Thailand)*, paras. 150 and 151.
[322]India's appellant's submission, *US – Customs Bond Directive*, para. 135.
[323]United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 51 and *US – Customs Bond Directive*, para. 49.

255. In our analysis of the Panel's finding on the "reasonableness" of the EBR under the *Ad* Note, we first discuss the general considerations to be kept in view to assess the reasonableness of a security requirement such as the EBR. We then examine whether the EBR, as applied to subject shrimp, is a "reasonable security" within the meaning of the *Ad* Note.

A. *The Assessment of Reasonableness under the Ad Note*

256. It is not in dispute that the EBR operates in conjunction with cash deposits and the basic bond, and that the EBR is applied to secure potential additional liability that might arise from likely increases in the margin of dumping over and above that established for an exporter in the anti-dumping duty order or the most recent assessment review. The EBR is applied to *all* importers who import subject shrimp from certain countries. We recall that, under the United States' retrospective duty assessment system, whether such an additional liability has arisen or not will be known with certainty only when the final liability for payment of anti-dumping duties is assessed in an assessment review and the entries of subject merchandise are liquidated. If no assessment is requested, the entries are liquidated at the previous cash deposit rate, in which case, there would be no additional liability over and above the cash deposits. The assessment may also result in the margin of dumping for an exporter (the going-forward cash deposit rate) being lower than the previously estimated cash deposit rate. Furthermore, even where there is an increase in the margin of dumping for an exporter, the duty assessment rates for particular importers might be lower than the margin for the exporter from whom the importer is importing the merchandise, and, to that extent, the cash deposits would have to be refunded to such importers. Thus, additional liability over and above the cash deposit rates may not arise at all or may arise in respect of only some importers.

257. The United States has explained that, "as in the other cases in customs administration", the EBR is a "security" measure that seeks to ensure the *full* collection of the *final* anti-dumping duties that may be assessed in an assessment review. Therefore, whether United States Customs requires additional security depends on "the *amount* of potential [additional] liability being secured and the likelihood of default" by importers.[324] According to the United States, the amount of potential additional liability depends on "the likelihood of an increase in the margin of dumping during the assessment review, the likely size of that increase, and the total value of shipments subject to that

[324]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 10. (emphasis added)

margin of dumping."[325] As regards the "likelihood of default" by importers, a range of factors may be relevant to establish non-collection risk, including "industry characteristics, ability to pay, and compliance history".[326]

258. In our view, a two-step approach is necessary to assess the "reasonableness" of a security such as the EBR. The first step involves a determination of the "likelihood" of an increase in the margin of dumping of an exporter as a result of which there will be a *significant additional liability* to be secured. This determination should have a rational basis and be supported by sufficient evidence. The second step involves a determination of the "likelihood of default" on the part of importers in respect of whom such additional liability is likely to arise. It is evident that the second step of the process would become pertinent only if the likelihood of increase in the margin of dumping has been properly established under the first step. If the determination of the likelihood of significant additional liability itself lacks a sufficient evidentiary foundation, the imposition of a security cannot be justified. Furthermore, should the determination of likelihood under the first step be properly made and thereby the second step of the process become relevant, an evaluation of the reasonableness of the amount of security demanded would depend on the magnitude of the likely additional liability and the risk of default by importers. A security must obviously reflect and be commensurate with the likely magnitude of the non-payment or non-collection risk that has been established on a proper basis. Taking security from an importer who may have no additional liability to pay or from an importer who presents no risk of default, as revealed by available and pertinent evidence, would obviously be unreasonable. Finally, security requirements that impose excessive additional costs on the importers may convert the security into an impermissible specific action against dumping.

259. In the light of these considerations, we agree with the Panel that additional security could be taken only:

> … if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping).[327] (footnote omitted)

[325]United States' other appellant's submissions, *US – Shrimp (Thailand)*, para. 10 (referring to Panel Report, *US – Shrimp (Thailand)*, para. 6.69) and *US – Customs Bond Directive*, para. 10 (referring to Panel Report, *US – Customs Bond Directive*, para. 6.34).

[326]*Ibid*.

[327]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.

The Member would also need to determine the likely *amount* of the additional liability arising from such increase in order to ensure that the amount of the security requirement is commensurate with that additional liability.

260. We also agree with the Panel that "it would not be reasonable to require additional security simply because of the possibility of rates of dumping increasing"[328], since, in our view, a mere possibility is not sufficient to establish likelihood of increase. We also concur with the Panel that:

> ... the possibility of rates increasing beyond a reasonable level of security, and importers defaulting on that excess, is a risk inherent in the retrospective system. The Ad Note does not allow Members to seek to eliminate that risk through the application of unreasonably excessive security requirements.[329]

261. We do not agree with the argument of the United States that the Panel has introduced the standard of "substantial certainty" with respect to the likely increase in the rate of dumping. The Panel has recognized the fact that, in a retrospective duty assessment system, the final liability for payment of anti-dumping duty is determined only in an assessment review. However, since the purpose of the security is to protect against additional liability over and above the rate previously established, the Panel reasoned that there must be a proper determination that the margins of dumping were "likely to increase".[330] We therefore see no error in this aspect of the Panel's analysis of the matter.

262. Thailand and India have appealed against the statement of the Panel that, "[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers."[331] The United States does not dispute that the likelihood of risk of default is a crucial factor in applying the EBR. Indeed, "ability to pay" and "compliance history" are

[328]Panel Report, *US – Shrimp (Thailand)*, footnote 182 to para. 7.141; Panel Report, *US – Customs Bond Directive*, footnote 146 to para. 7.118.
[329]*Ibid*.
[330]Panel Report, *US – Shrimp (Thailand)*, para. 7.141; Panel Report, *US – Customs Bond Directive*, para. 7.118.
[331]Panel Report, *US – Shrimp (Thailand)*, footnote 184 to para. 7.142; Panel Report, *US – Customs Bond Directive*, footnote 148 to para. 7.119.

factors taken into account by United States Customs in assessing risk of default.[332] But the United States does not agree that an importer-specific assessment of risk of default is required.[333] The United States has also drawn attention to the practical difficulties involved in such an assessment.[334]

263. As we noted above, in the two-step approach to assess the reasonableness of a security such as the EBR, the second step of the process involves an evaluation of the risk of default by the importers concerned. The fact that significant additional liability may arise does not in itself establish that there is a risk of default with respect to that liability. The financial condition and creditworthiness of the importer (ability to pay) and its track-record of payment (history of compliance) are important factors in the analysis of risk of default. In fact, the October 2006 Notice of the Amended CBD has opened the possibility of importer-specific bond amounts being determined under the EBR. We disagree with the Panel to the extent that the Panel suggests that risk of default of individual importers need not be assessed. Rather, we believe that the risk of default of individual importers is an important factor in an analysis of the reasonableness of a security.[335] We therefore *reverse* the legal interpretation made by the Panel, in footnote 184 to paragraph 7.142 of the Panel Report in *US – Shrimp (Thailand)* and footnote 148 to paragraph 7.119 of the Panel Report in *US – Customs Bond Directive*, that, in the context of the application of the EBR, there is no obligation under the *Ad* Note to assess the risk of default by individual importers.

B. *The Reasonableness of the EBR, as Applied to Subject Shrimp*

264. The decision of United States Customs to apply the EBR to subject shrimp was mainly based on the following elements, namely, that: (i) in agriculture and aquaculture sectors, the margin of dumping increased in about one third of cases, and such increase was significant; (ii) importers of agriculture and aquaculture merchandise were the source of the bulk of defaults on the payment of anti-dumping duties; and (iii) the potential additional liability was significant because of the heavy volume of shipments subject to the anti-dumping duty orders.

---

[332]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 10.

[333]See United States' appellee's submissions, *US – Shrimp (Thailand)*, para. 51 and *US – Customs Bond Directive*, para. 49.

[334]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 17.

[335]Having said this, we do not express a view on the proper methodology to assess the default risk of importers, and in particular, on whether this could be done based on information from individual importers or on the basis of adequately reasoned inferences from a representative sample of importers of the subject merchandise or from other pertinent factors.

265. As we explained above, the application of a security such as the EBR cannot be viewed as reasonable unless, at the time it is applied, a likelihood of an increase in the margin of dumping of an exporter resulting in significant additional liability has been properly determined on a sufficient evidentiary foundation. We believe that an analysis showing that margins of dumping had increased in 38 per cent of cases, in the agriculture and aquaculture sectors as a whole, is not a sufficient evidentiary basis to conclude that margins of dumping were likely to increase for subject shrimp. Moreover, the cases in which an increase of the margin of dumping was allegedly found did not include subject shrimp.[336] In this respect, we also note the Panel's statement that "India ha[d] demonstrated—and the United States ha[d] not disputed—that rates increased for a very small proportion of shrimp imports from India."[337]

266. Moreover, we note that, in requiring security in an amount equivalent to the dumping margin multiplied by the value of imports in the preceding 12 months, the EBR assumes that the final liability for payment of anti-dumping duties will virtually double in each assessment review compared to the previously established margin. We see no credible basis for this assumption underlying the EBR. We further note that the EBR does not take into account the fact that, if there is an increase in the going-forward cash deposit rate in an assessment review with respect to an exporter, that revised cash deposit rate would capture the increase in the duty liability up to that level for all importers purchasing from that exporter.

267. In our view, a "significant potential unsecured liability"[338] in respect of subject shrimp can arise only if there is a significant increase in the margin of dumping of an exporter as compared to the margin of dumping established in the original investigation or the most recent assessment review. We do not see how the total value of subject shrimp shipments (US$2.5 billion, according to the United States) is, in and of itself, a relevant factor for determining whether there is significant additional

[336]We note from Exhibit US-19 submitted by the United States to the Panel that, in arriving at the figure of 38 per cent, 888 anti-dumping cases in the agriculture and aquaculture sectors were examined in which anti-dumping duty rates had increased in 338 cases. Of the 338 cases, one item alone, namely, cut flowers, accounted for 263 cases. The next two highest items accounting for the increase in anti-dumping duty rates were crawfish (34 cases) and mushrooms (19 cases). Taken together, a few other items, like fresh Atlantic salmon and honey, accounted for the remaining 22 cases of increases in anti-dumping duty rates. As far as the aquaculture sector is concerned, there were only three items, namely, crawfish (34 cases), fresh Atlantic salmon (8 cases), and frozen fish fillets (1 case) of the 338 cases in which the anti-dumping duty rates had increased. (See Panel Report, *US – Shrimp (Thailand)*, para. 7.143; and Panel Report, *US – Customs Bond Directive*, para. 7.120)

[337]Panel Report, *US – Customs Bond Directive*, para. 7.125. See also Panel Report, *US – Shrimp (Thailand)*, para. 7.147 for a similar statement in respect of shrimp imports from Thailand.

[338]See the United States' arguments referred to by the Panel in Panel Report, *US – Shrimp (Thailand)*, para. 7.185 and Panel Report, *US – Customs Bond Directive*, para. 7.306.

liability, unless there is a significant increase in the margin of dumping of an exporter as well, because the cash deposits capture the liability on the total value of the shipments at the level of the existing estimated anti-dumping rates. Furthermore, as we noted earlier[339], we agree with the Panel that risk of default on small increases in the future liability is inherent in a retrospective duty assessment system. To a certain extent, the basic bond itself would offer protection against such small increases in liability arising over and above the cash deposit rates.

268. For all these reasons, we agree with the conclusion of the Panel that the United States could not have properly found, on the basis of the evidence relied upon by it, that the margins of dumping in respect of subject shrimp were likely to increase.[340] Since the first step of the two-step approach indicated by us above has not been fulfilled, we *uphold* the Panel's findings, in paragraph 7.150 of the Panel Report in *US – Shrimp (Thailand)* and paragraph 7.128 of the Panel Report in *US – Customs Bond Directive*, that the additional security requirement resulting from the application of the EBR to subject shrimp is not "reasonable" within the meaning of the *Ad* Note. In reaching this conclusion, we have also taken into account the fact that the EBR operates as a third layer of protection against risk of default over and above the cash deposits and, to some extent, the basic bond.

269. Therefore, the finding of the Panel that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* stands.[341]

VII. India's Claims that the Amended CBD is "As Such" Inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*

270. We turn to India's claim that the Panel erred in finding that the Amended CBD[342] is not inconsistent "as such" with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. Before examining India's claim, we briefly recall the Panel's reasoning in rejecting India's arguments. Having accepted the utility of the mandatory/discretionary distinction as an "analytical tool" for evaluating India's "as such" claims[343], the Panel proceeded to consider whether the instruments constituting the Amended CBD are, on their face, mandatory or discretionary. Based on an examination of the texts of these instruments, the Panel preliminarily concluded that their provisions are not binding on Port Directors, or, more broadly, United States

[339]*Supra*, para. 260 (referring to Panel Report, *US – Shrimp (Thailand)*, footnote 182 to para. 7.141; and Panel Report, *US – Customs Bond Directive*, footnote 146 to para. 7.118).

[340]Panel Report, *US – Shrimp (Thailand)*, para. 7.148; Panel Report, *US – Customs Bond Directive*, para. 7.126.

[341]Panel Report, *US – Shrimp (Thailand)*, paras. 7.152 and 8.1; Panel Report, *US – Customs Bond Directive*, paras. 7.130 and 8.2(i).

[342]As we explained in, *supra*, paras. 190 and 191, the Amended CBD refers to the legal instruments pursuant to which the EBR is imposed.

[343]Panel Report, *US – Customs Bond Directive*, paras. 7.205-7.214.

Customs.[344] In particular, the Panel noted that certain instruments of the Amended CBD—specifically the August 2005 Clarification and the October 2006 Notice—do not *require* United States Customs to designate "covered cases" or "special category" merchandise subject to an anti-dumping duty order prior to applying the EBR; rather, these instruments only provide *criteria* for identifying such "covered cases" or "special categories". The Panel noted further that the Amended CBD did not "mandate WTO-inconsistent behaviour", as, to date, United States Customs has applied the Amended CBD only to shrimp importers.[345]

271. The Panel then addressed India's argument that the Amended CBD is "as such" WTO-inconsistent, as it allows for impermissible specific action against dumping and subsidization by imposing the EBR *in every* case in which the United States concludes that there is a likelihood of increase in dumping margins or the amount of subsidy. The Panel rejected this argument by India in the light of its earlier finding that the imposition of security was authorized under the *Ad* Note during the period following the anti-dumping (or countervailing) duty order, provided it was reasonable.

272. Relying on these findings that the Amended CBD is not a mandatory measure and that the EBR does not constitute impermissible action against dumping or subsidization in *every case* when it is imposed, the Panel concluded that the Amended CBD "as such" does not violate Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*.[346]

273. On appeal, India accepts that its "as such" claims on appeal "can succeed only if the Appellate Body agrees with India that the requiring of security between the final determination and the final assessment review under the retrospective [duty] assessment system [of the United States] is not authorized by the *Ad* Note".[347] India argues that, if the Appellate Body were to reverse the finding of the Panel on the temporal scope of the *Ad* Note, the other finding of the Panel that the Amended CBD is discretionary "cannot stand in the way of India's 'as such' claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement*."[348]

274. For its part, the United States agrees with the reasoning by the Panel in rejecting India's claim that the Amended CBD is "as such" inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. For the United States, the central

[344]Panel Report, *US – Customs Bond Directive*, paras. 7.216-7.220. The Panel made specific reference to certain instruments in the Amended CBD that provide, for instance, that additional bonds "may" be required, or that United States Customs "may" calculate the bond using certain formulas.
[345]Panel Report, *US – Customs Bond Directive*, para. 7.221.
[346]*Ibid*., paras. 7.233-7.238.
[347]India's appellant's submission, *US – Customs Bond Directive*, para. 84.
[348]India's appellant's submission, *US – Customs Bond Directive*, para. 84.

question is whether the particular characteristics of a measure require a Member to act inconsistently with a given obligation in every instance. The United States agrees with the Panel that the Amended CBD does not.[349]

275. As explained in Section V above, we have upheld the finding of the Panel that a security required after the imposition of an anti-dumping duty order in an original investigation falls within the temporal scope of the *Ad* Note. Thus, the premise on which India's appeal rests does not stand, and we therefore *uphold* the Panel's finding, in paragraphs 7.236-7.238 and 8.1 of the Panel Report in *US – Customs Bond Directive*, that the Amended CBD, by virtue of which the EBR is imposed, is not inconsistent "as such" with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*.

VIII. India's Claims that the Amended CBD is Inconsistent with Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*

276. We turn to India's claim that the Panel erred in finding that the Amended CBD is not inconsistent "as such" and "as applied" with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, and in finding that the Amended CBD is not inconsistent "as such" with Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*. Before the Panel, India argued, in the context of its "as applied" claims, that the Amended CBD is inconsistent with Article 9 of the *Anti-Dumping Agreement* because it is "impermissible to demand an enhanced, continuous bond in addition to the duties collected in an amount equal to the dumping margin or the amount of the subsidy found to exist" following a final determination in the original investigation.[350] In considering these claims, the Panel noted that, as provided for in its title, Article 9 is concerned with the "imposition and collection of anti-dumping *duties*".[351] For the Panel, a bond is not a "duty" and the term "duty" does not encompass bonds, because a bond does not yield public revenue at the time it is provided.[352] Accordingly, the Panel concluded that the EBR is not an anti-dumping duty and therefore falls outside the scope of Article 9 of the *Anti-Dumping Agreement*.[353]

[349]United States' appellee's submission, *US – Customs Bond Directive*, paras. 37-41 (referring to Panel Report, *US – Customs Bond Directive*, paras. 7.215-7.227).
[350]Panel Report, *US – Customs Bond Directive*, para. 7.148 (quoting India's first written submission to the Panel in *US – Customs Bond Directive*, para. 77).
[351]*Ibid*., para. 7.159. (original emphasis)
[352]*Ibid*., para. 7.160.
[353]*Ibid*., para. 7.161.

277. The Panel rejected India's "as such" challenge against the Amended CBD for the same reasons it had rejected India's "as applied" claims.[354] Furthermore, having noted that the provisions of Articles 19.2, 19.3, and 19.4 of the *SCM Agreement* are substantively similar to those in Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, the Panel concluded that the enhanced bond is not a countervailing duty and that the EBR also falls outside the scope of Article 19 of the *SCM Agreement*.[355]

278. India appeals these findings of the Panel. For India, the Panel erred because it read into Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement* a right to impose security after the imposition of an anti-dumping duty order, when the wording of these provisions and the specific reference in the provisions to the imposition and collection of "duties" make it clear that they intend to exclude other rights such as taking additional security.[356]

279. For its part, the United States agrees with the Panel that the EBR, imposed pursuant to the Amended CBD, is not an anti-dumping duty, and that measures other than anti-dumping duties (or countervailing duties) fall outside the scope of Article 9 of the *Anti-Dumping Agreement* (or Article 19 of the *SCM Agreement*). The United States considers that India's argument would require an interpretation at odds with the ordinary meaning of the terms used in these provisions, in particular, the term "duty".[357]

280. India's appeal raises the question of whether a bond is a "duty" within the meaning of Article 9 of the *Anti-Dumping Agreement* (or Article 19 of the *SCM Agreement*). A bond under the Amended CBD secures the payment of a duty. A bond, by itself, is not a duty as it does not entail any transfer of money from the importer to the government. Therefore, the EBR imposed pursuant to the Amended CBD cannot be characterized as a "duty" within the meaning of Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*.

281. Accordingly, we agree with the Panel that bonds provided under the Amended CBD are not anti-dumping duties or countervailing duties and that, therefore, they fall outside the scope of Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, as well as Article 19.2, 19.3, and 19.4 of the *SCM Agreement*. On this basis, we *uphold* the Panel's finding, in paragraphs 7.161, 7.263, 7.264, and 8.1 of the Panel Report in *US – Customs Bond Directive*, that the Amended CBD,

[354]Panel Report, *US – Customs Bond Directive*, para. 7.263.
[355]*Ibid*., para. 7.264.
[356]India's appellant's submission, *US – Customs Bond Directive*, paras. 100-102.
[357]United States' appellee's submission, *US – Customs Bond Directive*, paras. 42 and 43.

by virtue of which the EBR is imposed, is not inconsistent "as such" and "as applied" with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and that it is not inconsistent "as such" with Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*.[358]

IX. India's Request for Completion of the Analysis on Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*

282. We turn to India's request that the Appellate Body complete the analysis and find that the Amended CBD is inconsistent "as such" with Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*.[359]

283. Before the Panel, India claimed that the Amended CBD is inconsistent "as such" with the United States' obligations under Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.[360] Relying on the Appellate Body's approach in *US – Corrosion-Resistant Steel Sunset Review*, the Panel found that it was unnecessary to make findings with respect to these claims because the Panel had already found that India had failed to establish that an "as such" violation had occurred under any specific obligation of the covered agreements.[361] The Panel therefore did not make any findings on the claims of India that the Amended CBD violates Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.

284. In the event the Appellate Body reverses the Panel's findings with respect to India's "as such" claims on appeal regarding the Amended CBD under Articles 1, 9.1, 9.2, 9.3, 9.3.1, or 18.1 of the *Anti-Dumping Agreement*, or under Articles 10, 19.2, 19.3, or 19.4 of the *SCM Agreement*[362], India

---

[358]Panel Report, *US – Customs Bond Directive*, paras. 7.161, 7.263, 7.264, and 8.1.

[359]Article 18.4 of the *Anti-Dumping Agreement* provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Article 32.5 of the *SCM Agreement* provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

[360]Panel Report, *US – Customs Bond Directive*, para. 7.267.

[361]*Ibid*., para. 7.271 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 210 and 211, where the Appellate Body made such findings with regard to Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*). The Panel considered that the Appellate Body's rationale in that dispute is equally applicable to India's claim under Article 32.5 of the *SCM Agreement* in this dispute.

[362]India's appellant's submission, *US – Customs Bond Directive*, paras. 95 and 96.

requests the Appellate Body to complete the analysis and find that the Amended CBD is "as such" inconsistent with Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*, respectively.

285. As we have upheld the Panel's findings that the Amended CBD is not inconsistent "as such" with Article 1, 9.1, 9.2, 9.3, 9.3.1, or 18.1 of the *Anti-Dumping Agreement* or with Article 10, 19.2, 19.3, 19.4, or 32.1 of the *SCM Agreement*, we *find it unnecessary* to make findings with respect to the "as such" claims of India under Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*.[363]

X. The Panel's Terms of Reference

286. We turn now to consider India's claim that the Panel erred in finding that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were not within the scope of the measure at issue, and were therefore not within the Panel's terms of reference.[364]

287. Before the Panel, India claimed that, in addition to the instruments constituting the Amended CBD, one statutory provision (Section 1623 the Tariff Act) and one regulatory provision (Section 113.13 of the United States Regulations)—which each provide the general legal authority for the Amended CBD[365]—constitute the "measure at issue" for India's "as such" claims. The Panel noted that, whilst Section 1623 the Tariff Act and Section 113.13 of the United States Regulations are mentioned in India's panel request[366], they had not been included in India's request for consultations with the United States; rather, the text of India's consultations request refers only to the legal instruments constituting the Amended CBD.[367] India conceded that its consultations request did not

[363]Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 210 and 211.
[364]Panel Report, *US – Customs Bond Directive*, para. 7.196.
[365]See, for instance, Panel Report, *US – Customs Bond Directive*, para. 7.193.
[366]Panel Report, *US – Customs Bond Directive*, para. 7.176 (quoting, in relevant part, Request for the Establishment of a Panel by India (WT/DS345/6):

> [India] understands that the Amended CBD was adopted pursuant to the laws and regulations of the United States that authorize [US Customs] to administer customs laws and regulations including 19 U.S.C. §1484, 19 U.S.C. §1502, 19 U.S.C. §1505, 19 U.S.C. §1623, and 19 U.S.C. §1673g, and the regulations governing the amount and imposition of bonds codified at 19 C.F.R. §113.13, 19 C.F.R. §113.40, 19 C.F.R. §113.62 and 19 C.F.R. §142.2. (footnote omitted; emphasis added))

[367]*Ibid*., para. 7.184. The Panel found it unnecessary to consider the actual statements made during consultations and confined its examination of the issue to the content of the consultations request. (See *ibid.* para. 7.186 (referring to Appellate Body Report, *US – Upland Cotton*, para. 287, in turn referring to the approach adopted by the panel in Panel Report, *Korea – Alcoholic Beverages*, para. 10.19))

refer to any United States statutory or regulatory provisions.[368] India, however, claimed that Section 1623 the Tariff Act and Section 113.13 of the United States Regulations nonetheless fall within the Panel's terms of reference because it is the request for the establishment of a panel that defines a panel's mandate, and because there is no need for a "precise and exact identity" between the measures subject to consultations and those identified in the panel request.[369]

288. The Panel recalled that a panel's terms of reference[370], referred to in Article 7 of the DSU, are governed by the panel request[371], referred to in Article 6.2 of the DSU. However, Article 4.4 of the DSU provides that a request for consultations should identify the measures at issue. A panel's terms of reference will include the specific measure identified in the panel request, but that measure should have been identified in the consultations request "to some degree that is less than 'specific'".[372] However, the required degree of specificity is not elucidated in these DSU provisions.[373] The Panel therefore addressed the issue of whether any basis exists, in the light of Articles 4 and 6 of the DSU, to include Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations in its terms of reference. Relying on what it perceived to be a "standard" developed by the Appellate Body in *US – Certain EC Products* for deciding whether a measure listed in a panel request but not in a consultations request should be included in a panel's terms of reference, the Panel examined whether the two measures in question—that is, on the one hand, the Amended CBD (mentioned in both the panel request and the consultations request) and, on the other hand, Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations (mentioned only in the panel request)—are *separate* and *legally distinct* measures.[374]

---

[368]Panel Report, *US – Customs Bond Directive*, para. 7.184.

[369]*Ibid*., para. 7.178.

[370]*Ibid*., para. 7.180. The Panel referred to its own terms of reference (available at WT/DS345/7):

> We recall that the terms of reference that govern the present dispute are the following:
>
> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS345/6, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements." (footnote omitted)

[371]*Ibid*., para. 7.181 (referring to Appellate Body Report, *US – Upland Cotton*, para. 284).

[372]*Ibid*.

[373]*Ibid*.

[374]See Appellate Body Report, *US – Certain EC Products*, paras. 69 and 70. The Panel also noted that, in that case, the Appellate Body evaluated one measure, the "increased bonding requirements as of 3 March on the [European Communities'] listed products", against a separate measure, the "19 April action" governing the imposition of 100 per cent duties on certain designated products imported from the European Communities. (See Panel Report, *US – Customs Bond Directive*, para. 7.183 and footnote 197 thereto (referring to Appellate Body Report, *US – Certain EC Products*, para. 60))

289. After analyzing the text of the two sets of instruments[375], the Panel concluded that they were separable and legally distinct because: they do not "provide for the same action"[376]; a successful challenge to the statutory and regulatory provisions would limit the ability of the United States to impose security requirements for the collection of revenue in a wider array of circumstances than a successful challenge to the Amended CBD[377]; and the Amended CBD is a directive whilst Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations are statutory and regulatory provisions. The Panel therefore found that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were not within its terms of reference.[378]

290. India requests the Appellate Body to reverse this finding of the Panel. India refers to the statement of the Appellate Body in *US – Upland Cotton* that a "precise and exact" identity between the scope of consultations and the measures specified in the panel request is not needed.[379] Further, India seeks to distinguish the Appellate Body's approach in *US – Certain EC Products* from that of the Panel.[380] With regard to the Panel's finding that the two sets of measures in question are separate and legally distinct, India claims that the Panel overlooked the fact that India challenged Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations only "to the extent that they authorize the EBR."[381] Further, India submits that it is undisputed that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations represent the legal authority for the EBR, and to the extent that India's consultations request concerned the WTO-consistency of the EBR, Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were implicated in the consultations.[382] In response, the United States contends that the Panel did carefully consider the

[375]With regard to the Amended CBD, the Panel noted that the July 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [United States Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected. To accomplish this end, in particular, the instruments provide formulas to determine the amount of the EBR, establish a methodology for making individualized determinations of enhanced bond amounts for individual exporters/producers, and describe notification and publication requirements. Finally, the Panel noted that the July 2004 Amendment, the August 2005 Clarification, and the October 2006 Notice each expressly refers to Section 113.13 of the United States Regulations as constituting the laws and regulations for which United States Customs intends to ensure compliance. (See Panel Report, *US – Customs Bond Directive*, para. 7.188 and footnote 205 thereto)

The Panel noted that Section 1623 of the Tariff Act governs the conditions and form of a bond, cancellation of a bond, validity of a bond, and the making of deposits *in lieu* of bonds; and that the provisions of Section 113.13 of the United States Regulations govern minimum bond amounts, guidelines for determining the bond amounts, and periodic review of bond sufficiency. (See Panel Report, *US – Customs Bond Directive*, para. 7.190 and footnote 207 thereto, and para. 7.192 and footnote 209 thereto)

[376]Panel Report, *US – Customs Bond Directive*, para. 7.193.

[377]*Ibid*., para. 7.194.

[378]*Ibid*., para. 7.196.

[379]India's appellant's submission, *US – Customs Bond Directive*, para. 119 (referring to Appellate Body Report, *US – Upland Cotton*, para. 285; and Appellate Body Report, *Brazil – Aircraft*, para. 132).

[380]*Ibid*., paras. 121-124.

[381]*Ibid*., para. 127.

[382]*Ibid*., para. 128.

relationship between the two sets of instruments and that the existence of a general authority to require additional bonds does not support the view that the two United States provisions are legally inseparable from the Amended CBD; to hold otherwise would imply that laws and regulations providing general authority to collect revenue would be implicated in a dispute even if they were not mentioned in a consultations request.[383]

291. Before assessing the merits of India's claims, we note India's statement at the oral hearing that a finding of the Appellate Body on this issue would not affect any of its substantive "as such" claims regarding the consistency of the Amended CBD with a number of provisions of the *Anti-Dumping Agreement*. India seeks a reversal of the Panel's finding on this issue for what it considers to be important "systemic" reasons. We also note the statement of the Panel that its examination of the scope of the consultations would be confined to what is contained in India's consultations request without reference to the actual content of the consultations, since "[w]hat takes place in ... consultations is not the concern of a panel."[384] India has not disputed this statement of the Panel.

292. It is well settled that the terms of reference of a panel define the scope of the dispute and that the claims and measures identified in the request for the establishment of a panel together constitute the matter within the panel's terms of reference under Article 7 of the DSU. At the same time, Article 4.4 of the DSU provides that any request for consultations must provide "*identification* of the measures at issue" (emphasis added). However, as the Panel has highlighted, there is no clarification as to what degree the measures identified in the panel request must correspond to the measures identified in the consultations request.

293. The Appellate Body has recognized the important role that consultations play in defining the scope of a dispute. Not only are they "a prerequisite to panel proceedings"[385], they also serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to "define and delimit" the scope of the dispute between

---

[383]See United States' appellee's submission, *US – Customs Bond Directive*, paras. 45 and 46.

[384]See Panel Report, *US – Customs Bond Directive*, para. 7.186 (quoting Appellate Body Report, *US – Upland Cotton*, para. 287, in turn quoting Panel Report, *Korea – Alcoholic Beverages*, para. 10.19). This approach is in line with the Appellate Body's statement in *US – Upland Cotton*:

> Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed.

(Appellate Body Report, *US – Upland Cotton*, para. 287)

[385]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

them.[386] Further, "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[387] The Appellate Body has also explained that "*[a]s long as the complaining party does not expand the scope of the dispute*, [it would] hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of the consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request".[388] The Appellate Body has also held that a "precise and exact identity" of measures between the two requests is not necessary, "provided that the 'essence' of the challenged measures had not changed."[389] In our view, whether a complaining party has "expand[ed] the scope of the dispute" or changed the "essence" of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis.

294. In the circumstances of this case, the Panel, in accordance with the guidance provided by the Appellate Body referred to above, was required to compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request. On our own reading of India's consultations request, it is clear to us that the focus of India's contention was on the instruments constituting the Amended CBD, and not on the legal provisions that provide the general authority for them, namely, Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations. India argues that the Panel failed to appreciate that it was challenging Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations only "to the extent that they authorize" the EBR. India, however, does not support this claim either by reference to the consultations request or by reference to the arguments made by India before the Panel. Furthermore, the argument of India implies that the mere fact that the consultations request includes a claim against the WTO-consistency of the EBR automatically means that the legal source of the EBR is thereby implicated.[390] A responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by

[386]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[387]Appellate Body Report, *Brazil – Aircraft*, para. 131.
[388]Appellate Body Report, *US – Upland Cotton*, para. 293. (emphasis added; footnote omitted)
[389]Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132).
[390]As the United States suggests, such an approach would imply that laws and regulations providing general authority—including constitutional provisions—would automatically be implicated in a dispute even if they were not mentioned in a consultations request. (See United States' appellee's submission, *US – Customs Bond Directive*, para. 46)

reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference. We are therefore not persuaded by the arguments of India in this regard.

295. India also challenges the Panel's reliance on the Appellate Body Report in *US – Certain EC Products*. The Appellate Body, in that case, merely treated the absence of an explicit reference to a measure in the consultations request as *one* factor for excluding that measure from the panel's terms of reference; it thereafter proceeded to consider whether the relevant measures in question were separate and legally distinct.[391] We do not see an error in the Panel's approach in this case. The Panel assessed the differing scope, as well as the legal bases, of the two sets of instruments and came to the conclusion that they were separate and legally distinct. In our view, this conclusion of the Panel supports the view that the scope of the dispute would have been expanded by the inclusion of Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations in its terms of reference.

296. For these reasons, we *uphold* the Panel's finding, in paragraph 7.196 of the Panel Report in *US – Customs Bond Directive*, that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations did not fall within the scope of the measure at issue and, accordingly, we *find* that the Panel did not err by excluding them from its terms of reference.

XI. Whether the Panel Made a *Prima Facie* Case for the United States

297. India argues that the Panel acted inconsistently with the requirement under Article 11 of the DSU that a panel make an objective assessment of the matter before it, because, in evaluating whether the application of the EBR is necessary to secure compliance with laws and regulations under

[391]Indeed, when the Appellate Body subsequently considered the relationship between the consultations request and panel request in *US – Upland Cotton*, it did not appear to treat its dictum in *US – Certain EC Products* as creating an exclusive test or precedent. The Appellate Body stated:

> In *US – Certain EC Products*, the Appellate Body found that one of the measures challenged by the European Communities was not properly before the Panel. The Appellate Body explained that, although the panel request referred to the measure, it was not possible for it to conclude "on this basis *alone*" that the measure was within the Panel's terms of reference. It noted that the European Communities' request for consultations did not refer to the measure and that the European Communities acknowledged that the measure was not the subject of the consultations. In its ruling, the Appellate Body also emphasized that the particular measure was "separate" and "legally distinct" from another measure challenged by the European Communities.

(Appellate Body Report, *US – Upland Cotton*, footnote 244 to para. 285 (referring to and quoting Appellate Body Report, *US – Certain EC Products*, paras. 69-75) (original emphasis))

Article XX(d) of the GATT 1994[392], the Panel supplemented the case of the United States by including certain laws and regulations that the United States had not itself cited. Specifically, India argues that, whereas the United States had stated that it "relied solely on"[393] Section 1673e(a)(1) of the Tariff Act, the Panel considered that Section 1673e(a)(1) of the Tariff Act in combination with Sections 1673e(b)(1) and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations were the relevant United States laws and regulations with which the EBR was designed to secure compliance. India considers that, by such an expansion of the provisions it found to be relevant, the Panel made a *prima facie* case for the United States, in a manner inconsistent with previous statements of the Appellate Body.[394]

298. The United States contends that it did not refer "solely" to Section 1673e(a)(1) of the Tariff Act as the relevant law or regulation, but, rather, that the Amended CBD is necessary to secure compliance with United States anti-dumping and countervailing duty assessment laws, "in particular", Section 1673e(a)(1) of the Tariff Act governing the assessment of anti-dumping duties, as well as general customs laws and regulations for payment of duties to the United States Treasury. The United States also points out that India itself identified some of the laws and regulations that the Panel relied on and included in its examination of the United States' defence.[395]

299. Contrary to India's arguments, we recall that, before the Panel, in addition to Section 1673e(a)(1) of the Tariff Act which governs the assessment of anti-dumping duties, the United States also cited Section 113.13(c) of the United States Regulations as the laws and regulations with which the EBR is aimed to secure compliance.[396] However, after also taking into account other laws and regulations cited by India and Thailand[397], the Panel considered that Section 1673e(a)(1) of the Tariff Act in combination with Sections 1673e(b)(1) and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations represent the United States' obligation to collect anti-dumping duties, since *each* of these provisions governs the final

[392]Article XX(d) of the GATT 1994 permits Members to adopt or enforce measures that are, *inter alia*, necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the GATT 1994.

[393]India's appellant's submission in *US – Customs Bond Directive*, para. 149.

[394]*Ibid*., para. 151 (referring to Appellate Body Report, *US – Gambling*, para. 282), para. 152 (referring to Appellate Body Report, *Japan – Agricultural Products II*, paras. 125-131), and para. 153 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191).

[395]United States' appellee's submission, *US – Customs Bond Directive*, para. 36.

[396]See Panel Report, *US – Customs Bonds Directive*, paras. 7.296 and 7.297.

[397]India referred to Sections 1673e(a)(1), 1673e(a)(3), 1673e(b), and 1673f of the Tariff Act as the relevant laws and regulations that, together, identify the obligation of the United States Treasury and United States Customs to collect anti-dumping duties. (See Panel Report, *US – Customs Bonds Directive*, para. 7.298) Thailand referred to Sections 1673e(a)(1), 1673e(a)(3), and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations. (See Panel Report, *US – Shrimp (Thailand)*, para. 7.177)

collection of anti-dumping or countervailing duties[398], and that, therefore, all of these provisions were the laws and regulations with which the EBR was designed to secure compliance, for purposes of Article XX(d) of the GATT 1994.[399]

300. It is well established that the party asserting the affirmative of a claim or defence bears the burden of establishing both the legal and factual elements of that claim or defence.[400] It is also well accepted that a panel cannot make a *prima facie* case for a party who bears that burden.[401] The Appellate Body in *US – Gambling* noted that, whilst:

> … "nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration ..."[,] … a panel enjoys such discretion only with respect to specific claims that are properly before it, for otherwise it would be considering a matter not within its jurisdiction. Moreover, when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.[402]

301. Before the Panel, all of the parties—India, Thailand, and the United States—referred to laws and regulations with which they considered the EBR was designed to secure compliance. Whilst the United States cited Section 1673e(a)(1) of the Tariff Act, governing the assessment of anti-dumping duties, as well as, more generally, Section 113.13(c) of the United States Regulations, Thailand and India argued that the provisions cited by the United States do not exclusively govern the obligation to require payment of duties owed to the United States Treasury; rather, Thailand and India referred to additional provisions which they alleged constitute the laws and regulations governing the collection of anti-dumping duties.[403] The Panel took all of these laws and regulations cited by the parties into account and, on this basis, decided that the relevant laws and regulations for considering the United States' defence is Section 1673e(a)(1) of the Tariff Act in combination with Sections 1673e(b)(1) and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations.

---

[398]See Panel Report, *US – Customs Bonds Directive*, para. 7.299.

[399]*Ibid*., para. 7.300. See also Panel Report, *US – Shrimp (Thailand)*, para. 7.179.

[400]See Appellate Body Report, *US – Gambling*, para. 282. See also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

[401]See, for instance, Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[402]Appellate Body Report, *US – Gambling*, paras. 280 and 281 (quoting Appellate Body Report, *EC – Hormones*, para. 156 (footnotes omitted); and referring to Appellate Body Report, *US – Certain EC Products*, para. 123; and Appellate Body Report, *Chile – Price Band System*, para. 173).

[403]See Panel Report, *US – Shrimp (Thailand)*, para. 7.177; Panel Report, *US – Customs Bond Directive*, para. 7.298.

302. In our view, the Panel was free to use the arguments made and provisions cited by all the parties—including Thailand and India—in order to assess objectively which laws and regulations were relevant to the United States' defence. We do not believe that, in doing so, the Panel exceeded its jurisdiction.

303. We do not, therefore, consider that the Panel made a *prima facie* case for the United States by including certain laws and regulations other than those specifically cited by the United States for assessing the Article XX(d) defence. Consequently, we *find* that the Panel did not breach its obligation to make an objective assessment of the matter under Article 11 of the DSU.

XII. The Panel's Analysis of the Term "Necessary" in Article XX(d) of the GATT 1994

304. The United States requests that, if the Appellate Body does not reverse the Panel's finding that the EBR is not a "reasonable security" within the meaning of the *Ad* Note, it should reverse the Panel's finding that, unless a Member demonstrates that the rates established in the anti-dumping duty order "are likely to increase", an additional security requirement cannot be considered to be "necessary" within the meaning of Article XX(d) of the GATT 1994. The United States also requests the Appellate Body to complete the analysis and undertake an assessment of whether the EBR satisfies the requirement of the chapeau of Article XX(d).[404]

305. Since we have not reversed the Panel's finding that the EBR was not a "reasonable" security within the meaning of the *Ad* Note, we now consider the United States' appeal of whether the EBR, as applied to subject shrimp, is "necessary" to secure compliance with certain United States laws and regulations.

306. We note, however, that India raises a threshold question of the availability of a defence under Article XX(d) of the GATT 1994 to the United States. Specifically, India argues on appeal that the Panel erred in proceeding to evaluate the United States' defence under Article XX(d) after having found that (a) the EBR constitutes "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement*, and (b) the EBR, as applied, is inconsistent with the disciplines of the *Ad* Note to Article VI:2 and 3 of the GATT 1994 and Article 18.1 of the *Anti-Dumping Agreement*.

[404]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 25.

307. We recall that, following India's request, the Panel addressed at the interim stage[405] the issue of whether the United States should be permitted to "defend" the EBR simultaneously under the *Ad* Note and under Article XX(d) of the GATT 1994. India had argued, first, that the Panel should have evaluated whether a Member must invoke footnote 24 of the *Anti-Dumping Agreement*[406] in order to assert an affirmative defence under Article XX; and, secondly, given that the Panel had found that Article VI and the *Ad* Note and the *Anti-Dumping Agreement* constitute *lex specialis*, the Panel should have refused to evaluate the defence of the EBR raised by the United States under Article XX(d) of the GATT 1994.[407] The Panel rejected India's arguments on the grounds that the text of Article XX does not, on its face, preclude a panel from considering an affirmative defence under Article XX where it has found a violation of a provision of the GATT 1994, including Article VI and/or the *Ad* Note. Further, the Panel considered it proper to analyze the United States' defence under Article XX(d), notwithstanding its finding that Article VI and the *Ad* Note constitute *lex specialis*, since the finding regarding the applicability of the principle of *lex specialis* did not apply to the defence under Article XX(d) but, rather, to the general GATT provisions of Articles I, II, X:3(a), XI, and XIII.[408] The Panel therefore did not find it necessary to examine whether a Member must first invoke footnote 24 of the *Anti-Dumping Agreement* before it may assert an affirmative defence under Article XX(d).

308. India appeals the Panel's decision not to address "as a threshold question" whether Article XX(d) remains available to justify a "specific action against dumping or subsidization", and requests the Appellate Body to complete the analysis in this regard.[409] At the oral hearing, India did not argue that footnote 24 of the *Anti-Dumping Agreement* must first be invoked before an affirmative defence under Article XX(d) is asserted. However, relying on the Appellate Body Report, *US – Offset Act (Byrd Amendment)*, India argues that, if a measure is found to be a "specific action against dumping", in violation of Article 18.1 of the *Anti-Dumping Agreement*, a defence under Article XX(d) is not available. Conversely, if a measure constitutes a general non-specific action against dumping, a

[405]India's appellant's submission, *US – Customs Bond Directive*, para. 139 (referring to India's request for interim findings (referred to in Panel Report, *US – Customs Bond Directive*, at para. 6.11)).

[406]Article 18.1 and its accompanying footnote 24 of the *Anti-Dumping Agreement* provide:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[*]
>
> [*original footnote 24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

[407]See Panel Report, *US – Customs Bond Directive*, para. 6.11.

[408]*Ibid*., para. 6.13. See also *ibid*., paras. 7.171 and 7.172.

[409]India's appellant's submission, *US – Customs Bond Directive*, para. 140.

defence under Article XX(d) is available.[410] India also submits that reports of previous GATT panels support its view that Article XX(d) is not available to justify measures inconsistent with Article VI.[411] India contends further that Article VI of the GATT 1994, the *Ad* Note, and the *Anti-Dumping Agreement* constitute a "complete, self-contained code" according to which anti-dumping measures must be applied. Accordingly, a measure that does not comply with any of the provisions relating to Article VI of the GATT 1994 read in conjunction with the *Anti-Dumping Agreement* or the *SCM Agreement* must be held to be inconsistent with the relevant provisions of these Agreements. Any interpretation that permits Members to justify impermissible specific actions against dumping under Article XX(d) would render "inutile" Article 18.1 of the *Anti-Dumping Agreement*.[412]

309. In response, the United States submits that the Panel was correct to consider the defence of the United States under Article XX(d) after having found that the United States acted inconsistently with the *Ad* Note to GATT Article VI. The United States questions the basis of India's argument that footnote 24 of the *Anti-Dumping Agreement* must be specifically "invoked" to justify such a violation under Article XX(d). In its view, this argument rests on a misinterpretation of the Appellate Body Report in *US – Offset Act (Byrd Amendment)*. Further, the United States submits that India does not offer an explanation of how the availability of a defence under Article XX(d) would render Article 18.1 of the *Anti-Dumping Agreement* inutile.[413]

310. India's appeal raises systemic issues about the availability of a defence under Article XX(d) to justify a measure found to constitute "specific action against dumping" under Article 18.1 of the *Anti-Dumping Agreement*, and not to be in accordance with the *Ad* Note to Article VI:2 and 3 of the GATT 1994, as well as Article 18.1 of the *Anti-Dumping Agreement*. Assuming, *arguendo*, that such a defence is available to the United States, we proceed to consider the United States' appeal of the Panel's finding that the EBR, as applied to subject shrimp, is "necessary" to secure compliance with certain United States laws and regulations within the meaning of Article XX(d). We examine the Panel's finding on this issue of "necessity" before we return to the question of availability of a defence under Article XX(d).

---

[410]India submits that the import of the Appellate Body's statement in *US – Offset Act (Byrd Amendment)*—that, for purposes of Article 18.1 of the *Anti-Dumping Agreement*, a measure can be *either* a "specific action against dumping" as referred to Article 18.1, *or* a general, "non-specific action" under footnote 24 to Article 18.1—is that the United States was required to invoke the footnote before justifying the EBR under Article XX(d). (India's appellant's submission, *US – Customs Bond Directive*, para. 142) See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 260-262.

[411]India's appellant's submission, *US – Customs Bond Directive*, para. 143 (referring to GATT Panel Report, *EEC – Parts and Components*, para. 5.17; and GATT Panel Report, *US – Canadian Pork*, para. 4.4).

[412]*Ibid*., paras. 144 and 145.

[413]United States appellee's submission, *US – Customs Bond Directive*, para. 35.

311. The Panel identified the two elements that must be satisfied for a measure to be justified provisionally under paragraph (d) of Article XX of the GATT 1994[414]: first, the measure must be "designed" to secure compliance with laws and regulations that themselves are not WTO-inconsistent; and, secondly, the measure must be "necessary" to secure compliance with those laws and regulations. With regard to the first element, we recall that the Panel identified the relevant laws and regulations of the United States that govern the assessment and collection of anti-dumping or countervailing duties and which are not themselves inconsistent with any provisions of the GATT 1994.[415] The Panel accepted that the EBR is "designed" to secure compliance with them because the stated goal of the Amended CBD and the EBR aligns with the objectives underlying these laws and regulations.[416]

312. The Panel then turned to the second element of its assessment, that is, whether the EBR is "necessary" to ensure compliance with these laws and regulations, taking into account the United States' arguments that the EBR secures the potential additional liability arising from anti-dumping or countervailing duties owed in excess of the cash deposits. According to the United States, the application of the EBR is "necessary" to secure against "significant potential unsecured liability" and against "significant risk of default" associated with subject shrimp imports.[417] Both Thailand and India challenged the United States' assessment that dumping margins were likely to increase and that subject shrimp importers presented a heightened risk of default in comparison to importers of other products subject to anti-dumping duty orders.[418] In its analysis, the Panel referred to previous Appellate Body reports for the interpretation of the term "necessary" in the context of Article XX(d) and noted that, in order to be considered "necessary", a measure does not need to be "indispensable", but must constitute something more than only "making a contribution to" securing compliance.[419] The Panel also relied on factors identified by the Appellate Body as relevant in determining whether the measure in question is necessary to secure compliance with other WTO-consistent laws and regulations.[420]

---

[414]Panel Report, *US – Shrimp (Thailand)*, para. 7.173 and Panel Report, *US – Customs Bond Directive*, para. 7.294 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 157).

[415]Panel Report, *US – Shrimp (Thailand)*, paras. 7.179 and 7.180; Panel Report, *US – Customs Bond Directive*, paras. 7.300 and 7.301.

[416]Panel Report, *US – Shrimp (Thailand)*, paras. 7.181-7.183; Panel Report, *US – Customs Bond Directive*, paras. 7.302-7.304.

[417]Panel Report, *US – Shrimp (Thailand)*, para. 7.185; Panel Report, *US – Customs Bond Directive*, para. 7.306.

[418]Panel Report, *US – Shrimp (Thailand)*, para. 7.186; Panel Report, *US – Customs Bond Directive*, para. 7.307.

[419]Panel Report, *US – Shrimp (Thailand)*, para. 7.188 and Panel Report, *US – Customs Bond Directive*, para. 7.309 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[420]Panel Report, *US – Shrimp (Thailand)*, para. 7.189 and Panel Report, *US – Customs Bond Directive*, para. 7.310 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162 and 163).

313. The Panel noted that, insofar as it pertains to the relative importance of the interests being protected by the EBR, the assessment and collection of anti-dumping or countervailing duties carries significant importance, specifically in the context of efforts by the United States to enforce trade remedies permissible under the covered agreements and to protect its revenue within the context of its retrospective duty assessment system.[421] However, the Panel emphasized that the EBR is designed to secure specifically against the likelihood of anti-dumping duties exceeding cash deposit rates. Recalling its earlier finding, in the context of its assessment of whether the EBR was a reasonable security under the *Ad* Note, that the United States had failed to establish that rates of dumping in the anti-dumping duty order were likely to increase and had therefore failed to demonstrate that additional security provided by the EBR reasonably correlated to any case of suspected dumping in excess of the dumping of margin established in the anti-dumping duty order, the Panel did not see the need to impose the EBR to secure against such an outcome. The Panel found that the EBR, as applied to subject shrimp, is therefore not "necessary" within the meaning of Article XX(d) of the GATT 1994.[422]

314. The United States submits on appeal that the test used by the Panel to determine the necessity of the EBR under Article XX(d) was the same flawed test that it used to find that the EBR is not a "reasonable security" under the *Ad* Note. According to the United States, that test provides "no insight" into whether the measure is necessary. In line with the arguments advanced by it against the "reasonableness" test adopted by the Panel, the United States contends that a security may be "necessary" where there is a "likelihood" that the liability will accrue, but is not "likely" (in the sense of substantial certainty) that this will occur.[423] The United States submits that the application of the EBR to subject shrimp is "necessary" due to the significant potential unsecured liability and the significant potential default associated with such entries. The United States argues that the Panel failed to take into account the fact that, with respect to subject shrimp, United States Customs has adopted a "tailored approach" for evaluating risk and bond amounts.[424] Further, the United States claims that neither Thailand nor India identified any "reasonable alternatives" to the EBR that would address the specific problem faced by United States Customs; nor did the Panel find that any such

[421]Panel Report, *US – Shrimp (Thailand)*, para. 7.190; Panel Report, *US – Customs Bond Directive*, para. 7.311.
[422]Panel Report, *US – Shrimp (Thailand)*, para. 7.191; Panel Report, *US – Customs Bond Directive*, para. 7.312.
[423]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 21.
[424]*Ibid*., para. 22.

alternatives exist.[425] Finally, the United States contends that the EBR meets the requirements of the chapeau of Article XX and requests the Appellate Body to complete the analysis on this issue as there is sufficient evidence on the record to do so.[426]

315. In response, Thailand highlights that the United States' appeal of the Panel's necessity analysis relies on the same arguments it advanced as regards the reasonableness of the EBR under *Ad* Note. The United States does not explain how or why the reasonableness analysis under the *Ad* Note should apply also to the "necessity" analysis under Article XX(d) or, further, how the EBR is applied in a manner consistent with the chapeau. Thailand considers that the two provisions require different analyses on account of their different language. Further, Thailand contends that the United States failed to establish why less trade-restrictive measures are not adequate to ensure compliance in the collection of duties as regards subject shrimp.[427] India reiterates its views that the Panel's approach was not premised on the standard of "substantial certainty" that margins of dumping were likely to increase, as alleged by the United States, and that the United States did not bring relevant and persuasive evidence showing that margins of dumping were "likely" to increase for subject shrimp.[428] India further submits that it identified "reasonable alternatives" to the EBR such as quicker completion of assessment reviews as a means to lower the non-collection risk referred to by the United States.[429]

316. Turning to our assessment of the issues appealed, we are of the view that the "necessity" test under Article XX(d) is different from the "reasonableness" test under the *Ad* Note. Relying on Appellate Body jurisprudence, the Panel considered that the following factors are relevant in determining whether a measure is "necessary" to secure compliance with laws and regulations: (i) the relative importance of the values or objectives the law or regulation is intended to protect; (ii) the extent to which the measure contributes to the realization of the end pursued—the securing of compliance with the law or regulation at issue; and (iii) the restrictive impact of the measure at issue

[425]United States' other appellant's submissions, *US – Shrimp (Thailand)*, *US – Customs Bond Directive*, para. 23.
[426]*Ibid*., para. 24.
[427]See Thailand's appellee's submission, *US – Shrimp (Thailand)*, paras. 46-49.
[428]India's appellee's submission, *US – Customs Bond Directive*, para. 64.
[429]*Ibid*., para. 67.

on imports.[430] We see no error in the Panel's analysis of the meaning of the term "necessary" and the factors relied upon by it to evaluate the necessity of the EBR to secure compliance with certain laws and regulations of the United States, as the Panel's analysis is in consonance with the previous jurisprudence of the Appellate Body.

317. The EBR is intended to secure potential additional liability that might arise from significant increases in the amount of dumping after the imposition of an anti-dumping duty order. The United States has not demonstrated that the margins of dumping for subject shrimp were likely to increase significantly so as to result in significant additional liability over and above the cash deposit rates. Like the Panel, we do not, therefore, see how taking security, such as the EBR, can be viewed as being "necessary" in the sense of it contributing to the realization of the objective of ensuring the final collection of anti-dumping or countervailing duties in the event of default by importers.

318. We therefore *uphold* the Panel's findings, in paragraph 7.192 of the Panel Report in *US – Shrimp (Thailand)* and paragraph 7.313 of the Panel Report in *US – Customs Bond Directive*, that the EBR, as applied to subject shrimp, is not "necessary" to secure compliance with certain laws or regulations within the meaning of Article XX(d) of the GATT 1994.

319. In view of this conclusion that the EBR, as applied to subject shrimp, is not "necessary" within the meaning of Article XX(d), we do not express a view on the question of whether a defence under Article XX(d) of the GATT 1994 was available to the United States.[431]

XIII. Findings and Conclusions

320. In respect of the appeal of Panel Report, *US – Shrimp (Thailand)*, for the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.130 of the Panel Report, that the application of the EBR falls within the temporal scope of the *Ad* Note, in the sense that the *Ad* Note authorizes the imposition of security requirements during the period following the imposition of a United States anti-dumping duty order;

(b) declares of no legal effect the interpretation developed by the Panel that the cash deposits required under United States law following the imposition of an anti-

[430]Panel Report, *US – Shrimp (Thailand)*, para. 7.189 and Panel Report, *US – Customs Bond Directive*, para. 7.310 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162 and 163). See also, generally, Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 139-183.

[431]See *supra*, para. 310.

dumping duty order are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*;

(c) upholds the Panel's finding, in paragraph 7.150 of the Panel Report, that the additional security requirement resulting from the application of the EBR to subject shrimp is not "reasonable" within the meaning of the *Ad* Note;

(d) reverses the legal interpretation made by the Panel, in footnote 184 to paragraph 7.142 of the Panel Report, that, in the context of the application of the EBR, there is no obligation under the *Ad* Note to assess the risk of default by individual importers; and

(e) upholds the Panel's finding, in paragraph 7.192 of the Panel Report, that the EBR, as applied to subject shrimp, is not "necessary" within the meaning of Article XX(d) of the GATT 1994.

321. Consequently, the Appellate Body upholds the Panel's conclusion, in paragraph 8.1 of the Panel Report, that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* because it is inconsistent with the *Ad* Note to Article VI:2 and 3 of the GATT 1994.

322. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report and in the Panel Report, *US – Shrimp (Thailand)*, as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, into conformity with its obligations under those Agreements.

323. In respect of the appeal of Panel Report, *US – Customs Bond Directive*, for the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.107 of the Panel Report, that the application of the EBR falls within the temporal scope of the *Ad* Note, in the sense that the *Ad* Note authorizes the imposition of security requirements during the period following the imposition of a United States anti-dumping duty order;

(b) declares of no legal effect the interpretation developed by the Panel that the cash deposits required under United States law following the imposition of an anti-dumping duty order are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*;

(c) upholds the Panel's finding, in paragraph 7.128 of the Panel Report, that the additional security requirement resulting from the application of the EBR to subject shrimp is not "reasonable" within the meaning of the *Ad* Note;

(d) reverses the legal interpretation made by the Panel, in footnote 148 to paragraph 7.119 of the Panel Report, that, in the context of the application of the EBR, there is no obligation under the *Ad* Note to assess the risk of default by individual importers;

(e) upholds the Panel's finding, in paragraphs 7.236-7.238 and 8.1 of the Panel Report, that the Amended CBD, by virtue of which the EBR is imposed, is not inconsistent "as such" with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*;

(f) upholds the Panel's finding, in paragraphs 7.161, 7.263, 7.264, and 8.1 of the Panel Report, that the Amended CBD, by virtue of which the EBR is imposed, is not inconsistent "as such" and "as applied" with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and that it is not inconsistent "as such" with Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*;

(g) finds it unnecessary, for purposes of resolving this dispute, to make an additional finding on India's claims that the Amended CBD is "as such" inconsistent with Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*;

(h) upholds the Panel's finding, in paragraph 7.196 of the Panel Report, that Section 1623 of the Tariff Act and Section 113.13 of the United States Regulations were not within its terms of reference;

(i) finds that the Panel did not breach its obligation to make an objective assessment of the matter under Article 11 of the DSU, since it did not make a *prima facie* case for the United States when it included, in its analysis under Article XX(d) of the GATT 1994, certain laws and regulations other than those specifically cited by the United States for purposes of its defence under that provision; and

(j) upholds the Panel's finding, in paragraph 7.313 of the Panel Report, that the EBR, as applied to subject shrimp, is not "necessary" within the meaning of Article XX(d) of the GATT 1994; and, therefore, does not express a view on the question of whether a defence under Article XX(d) of the GATT 1994 was available to the United States.

324. Consequently, the Appellate Body upholds the Panel's conclusion, in paragraph 8.2(i) of the Panel Report, that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* because it is inconsistent with the *Ad* Note to Article VI:2 and 3 of the GATT 1994.

325. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report and in the Panel Report, *US – Customs Bond Directive*, as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 27th day of June 2008 by:

_____

Giorgio Sacerdoti
Presiding Member

_____ _____

Luiz O. Baptista
Member

A.V. Ganesan
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS343/10
22 April 2008

(08-1911)

Original: English

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

Notification of an Appeal by Thailand
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 17 April 2008, from the Delegation of Thailand, is being circulated to Members.

---

1. Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the Appellate Body's *Working Procedures for Appellate Review*, Thailand hereby notifies its decision to request the Appellate Body to review cert ain issues of law covered in the report of the Panel in *United States – Measures Relating to Shrimp from Thailand* (WT/DS343/R) (the "Panel Report") and certain legal interpretations developed by the Panel therein.

2. Thailand seeks review by the Appellate Body of the following issues of law and legal interpretations of the provisions of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"):

(a) The Panel's interpretations of the phrase "pending final determination of the facts in any case of suspected dumping" in paragraph 1 of the Ad Note to Articles VI:2 and 3 of the GATT 1994 to mean that (i) a case of "suspected dumping" may continue to exist even after the imposition of definitive anti-dumping measures, (ii) the "final determination" in a case of suspected dumping refers not to the decision to impose definitive anti-dumping measures following an investigation conducted in accordance with Article 5 of the Anti-Dumping Agreement but instead only to the review of the final amount of liability for duties in a subsequent review proceeding conducted under Articles 9.3.1 or 9.3.2 of the Anti-Dumping Agreement, and (iii) the Ad Note therefore authorises Members to require security following the imposition of definitive anti-dumping measures (see paragraphs 7.88-7.130 of the Panel Report). These interpretations are in error and are based on erroneous findings on issues of law and related legal interpretations. Properly interpreted, the Ad Note applies only to measures imposed prior to a finding of dumping and injury that leads to the imposition of definitive anti-dumping measures (e.g., a U.S. anti-dumping order) and, as such, is governed by the provisions of Article 7 of the Anti-Dumping Agreement regarding provisional measures.

(b) As a consequence of its interpretation that the Ad Note to Article VI is not temporally limited in scope (see issue (a) above), the Panel's conclusion that Article 18.1 of the Anti-Dumping Agreement permits, in addition to the actions previously identified by the Appellate Body (provisional measures, price undertakings or definitive duties), specific action against dumping in the form of security (cash deposits or bonds) based on a determination of likely future dumping margins (see, in particular, paragraphs 7.97-98 and paragraphs 7.138-141 of the Panel Report). This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. Properly interpreted, Article VI and Article 18.1 of the Anti-Dumping Agreement permit only action against dumping in the form of provisional measures, definitive duties, and price undertakings, and nothing in Article 18.1 or Article VI, including the Ad Note, authorises additional specific action against dumping on the basis of likely future dumping margins.

(c) The Panel's interpretations that (i) monies collected by the United States as cash deposits of estimated anti-dumping duties on importation of goods subject to definitive anti-dumping measures within the meaning of Article 9.1 of the Anti-Dumping Agreement in the form of a U.S. anti-dumping order are not anti-dumping "duties" within the meaning of the Anti-Dumping Agreement and that (ii) these cash deposits of estimated anti-dumping duties collected at the time of importation are not subject to the requirement set out in Article 9.1 and the chapeau of Article 9.3 of the Anti-Dumping Agreement that the amount of such duties may not exceed the margin of dumping established in accordance with Article 2 of the Anti-Dumping Agreement (see paragraphs 7.111-7.122 of the Panel Report). These interpretations are in error and are based on erroneous findings on issues of law and related legal interpretations. Cash deposits of estimated anti-dumping duties collected at importation pursuant to a definitive anti-dumping measure imposed under Article 9 of the Anti-Dumping Agreement are anti-dumping duties within the meaning of Article 9 of the Anti-Dumping Agreement and may not, therefore, exceed the most recently-determined actual margin of dumping.

(d) Conditionally, in the event that the Appellate Body upholds the Panel's legal interpretations on issue (a) above, Thailand also seeks review of the Panel's interpretation of the Ad Note to Article VI to mean that an assessment of the reasonableness of security required pursuant to the Ad Note does not involve or require any consideration of the risk of default or non-payment of anti-dumping duties by individual importers of goods subject to anti-dumping measures (see footnote 184 to paragraph 7.142 of the Panel Report). This interpretation is in error and is based on erroneous findings on issues of law and related legal interpretations.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS345/9
22 April 2008

(08-1912)

Original: English

UNITED STATES – CUSTOMS BOND DIRECTIVE FOR MERCHANDISE SUBJECT TO ANTI-DUMPING/COUNTERVAILING DUTIES

Notification of an Appeal by India
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 17 April 2008, from the Delegation of India, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the *Working Procedures for Appellate Review*, India hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Customs Bond Directive for Merchandise Subject to Antidumping/ Countervailing Duties* (WT/DS345/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

At issue is the enhanced bond requirement (the "EBR") imposed by the United States on importers of certain frozen warmwater shrimp from India subject to anti-dumping duties imposed by the United States. The United States has imposed the EBR pursuant to certain instruments specified in paragraph 2.2 of the Panel Report which, for convenience, are referred to collectively as the "Amended CBD".

India seeks review by the Appellate Body of the following errors of law and of legal interpretation by the Panel:

1. The Panel erred in its conclusion (and related findings) that Article VI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") read in conjunction with Articles 1 and 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") permits responses to dumping other than (a) definitive duties, (b) provisional measures and (c) price-undertakings.[1] In particular:

   (a) The Panel erred in finding that the Appellate Body's conclusions in *US – Antidumping Act of 1916*[2] and *US – CDSOA*[3] that the permissible responses to dumping are limited

---

[1]*See* Panel Report, paras. 7.62 - 7.77.

[2]Appellate Body Report on *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000 ("*U.S.-Antidumping Act of 1916*").

[3]Appellate Body Report on *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted on 27 January 2003 ("*U.S.-CDSOA*").

to definitive anti-dumping duties, provisional measures and price-undertakings, are mere *dicta* because, in those Reports, the Appellate Body did not even refer to the provisions of Note 1 *Ad* paragraphs 2 and 3 of Article VI of the GATT 1994 (the "Ad Note").[4] The Panel's failure to follow the Appellate Body's conclusions in previous disputes on the same issue is inconsistent with its function under Article 3.2 of the DSU of ensuring "security and predictability to the multilateral trading system" and under Article 3.3 of ensuring the "prompt settlement of situations" and, further, is inconsistent with its obligation under Article 11 to make an objective assessment of the matter.

(b) The Panel erred in finding that the phrase "the provisions of the GATT 1994, as interpreted by this Agreement" in Article 18.1 of the *Anti-Dumping Agreement* was simply designed to clarify that the relevant provision of the GATT 1994 is Article VI.[5]

2. The Panel erred in its conclusion (and related findings) that, in principle, the EBR was authorized by the Ad Note because the *Anti-Dumping Agreement* did not prohibit it.[6] In particular:

(a) The Panel erred in rejecting India's argument that the Ad Note was implemented through Article 7 of the *Anti-Dumping Agreement* and could not be applied independently of Article 7 by finding that the Ad Note was not "… expressly limited to provisional measures taken prior to a final determination of dumping".[7]

(b) The Panel erred also in finding that, while in the case of the prospective system of assessment of anti-dumping duties, the phrase "final determination" in the Ad Note could be interpreted as the final determination that precedes the decision to impose duties,[8] in the case of the retrospective system followed by the United States, the same phrase could be interpreted as the "determination of the final liability for the payment of anti-dumping duties" referred to in Article 9.3.1 of the *Anti-Dumping Agreement*.[9]

(c) Further, the Panel erred in finding that, for purposes of taking security under the Ad Note, under the retrospective system of assessment followed by the United States, the anti-dumping duty order at the end of the original investigation and again at the end of each new assessment review gave rise to a suspicion of dumping with respect to import entries into the United States after each such anti-dumping duty order and such suspicion lasted until the subsequent assessment review with respect to such import entries, in which both the existence and amount of dumping could be determined with precision.[10]

3. The Panel erred in its conclusion (and related findings) that the Amended CBD was not inconsistent as such with the provisions of (a) Articles 1 and 18.1 of the *Anti-Dumping Agreement* and (b) Articles 10 and 32.1 of the *SCM Agreement*.[11] In particular:

---

[4]*See* Panel Report, para. 7.76.
[5]*See* Panel Report, para. 7.73 and footnote 113.
[6]*See* Panel Report, paras. 7.71 – 7.84; 7.86 – 7.90; 7.95 – 7.107; 7.116 – 7.118 and footnotes 111-114.
[7]*See* Panel Report, paras. 7.91 – 7.95.
[8]*See* Panel Report, para. 7.86.
[9]*See* Panel Report, paras. 7.86 – 7.87.
[10]*See* Panel Report, paras. 7.80 – 7.87.
[11]*See* Panel Report, paras. 7.236 – 7.238.

(a) The Panel did not make an objective assessment of the matter before it in accordance with the requirements of Article 11 of the DSU when it concluded that the Amended CBD was discretionary in character.[12]

(b) The Panel also erred in concluding that every application of the EBR under the Amended CBD would not necessarily constitute an impermissible specific action against dumping or subsidization, as the case may be.[13]

4. The Panel erred in concluding that the Amended CBD was not inconsistent with the provisions of Article 18.4 of the *Anti-Dumping Agreement* and of Article 32.5 of the *SCM Agreement*.[14] In the event that the Appellate Body concludes that the Amended CBD is inconsistent as such with the provisions of (a) Article 18.1 of the *Anti-Dumping Agreement* and (b) Article 32.1 of the *SCM Agreement*, India requests the Appellate Body to complete the analysis and rule in India's favour that the Amended CBD is inconsistent with the provisions of Article 18.4 of the *Anti-Dumping Agreement* and of Article 32.5 of the *SCM Agreement* also.

5. The Panel erred in its conclusion (and related findings) that the Amended CBD was not inconsistent either as such[15] or as applied[16] with the provisions of Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* and was not inconsistent as such with the provisions of Articles 19.2, 19.3 and 19.4 of the *SCM Agreement*.[17] In particular:

(a) The Panel erred in finding that the definition of the term "duty" in Article 9 of the *Anti-Dumping Agreement* is not broad enough to encompass cash deposits.[18]

(b) The Panel erred in finding that the statement of the Appellate Body in *U.S. – Zeroing (Japan)*[19] that, under the retrospective system of assessment, "… [a]t the time of importation, an administering authority may collect duties, in the form of cash deposits, on all export sales …." constituted *obiter dictum*.[20]

6. The Panel erred in its conclusion (and related findings) that certain provisions of U.S. law, i.e., 19 U.S.C. §1623 and 19 C.F.R. §113.13, did not form part of the Panel's terms of reference.[21]

7. Further, in the event that the Appellate Body upholds the Panel's conclusion that the Ad Note authorized the imposition of the EBR in principle, India considers that the Panel erred in its conclusion (and related findings) that the United States did not have any obligation to assess the risk of default by importers prior to imposing the EBR.[22]

---

[12]*See* Panel Report, paras. 7.216 – 7.222; 7.227.
[13]*See* Panel Report, paras. 7.225 – 7.227; 7.236.
[14]*See* Panel Report, para. 7.271.
[15]*See* Panel Report, paras. 7.262 – 7.263.
[16]*See* Panel Report, paras. 7.97 – 7.105; 7.159 – 7.161.
[17]*See* Panel Report, para. 7.264.
[18]*See* Panel Report, paras. 7.98 – 7.106 and para. 7.160.
[19]Appellate Body Report on *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted on 23 January 2007 ("*U.S – Zeroing (Japan)*").
[20]*See* Panel Report, para. 7.101.
[21]*See* Panel Report, paras. 7.181 – 7.196.
[22]*See* Panel Report, paras. 7.118 and footnote 148.

8. The Panel also erred in its conclusion (and related findings) that it was permissible for the United States to defend the EBR under Article XX(d) even though the Panel had found the EBR to be a specific action against dumping which was not in accordance with the provisions of the GATT 1994.[23]

9. In the event that the Appellate Body concludes that Article XX(d) of the GATT 1994 remained available to the United States to justify the EBR, India considers that the Panel nevertheless acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it when it found that, for the purpose of considering the defence of the United States under Article XX(d), the law or regulation at issue was 19 U.S.C. §1673e(a)(1) read together with 19 U.S.C. §1673e(b)(1), 19 U.S.C. §1673, 19 C.F.R. §351.212(b)(1) and 19 C.F.R. §351.211(c)(1).[24]

In sum, India considers that the Panel erred in law in the interpretation and application of Articles 1, 7, 9.1, 9.2, 9.3, 9.3.1, 18.1 and 18.4 of the *Anti-Dumping Agreement*, of Articles 10, 19.2, 19.3, 19.4, 32.1 and 32.5 of the *SCM Agreement*, of Article VI, the Ad Note and Article XX(d) of the GATT 1994 and of Articles 3.2, 3.3 and 11 of the DSU.

---

[23]*See* Panel Report, paras. 6.11 – 6.13.
[24]*See* Panel Report, para 7.300.

ANNEX III

WORLD TRADE ORGANIZATION

WT/DS343/11
5 May 2008

(08-2112)

Original: English

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

Notification of an Other Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 29 April 2008, from the Delegation of the United States, is being circulated to Members.

---

1. Pursuant to Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Measures Relating to Shrimp from Thailand* (WT/DS343/R) ("Panel Report") and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the enhanced bond requirement is not consistent with the Ad Note to Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") because it does not constitute "reasonable" security (e.g., Panel Report, para. 7.150) and, related to this, the Panel's conclusion that the enhanced bond requirement is not consistent with Article 18.1 of the *Agreement on Implementation of Article VI of GATT 1994* ("Antidumping Agreement") because it is not "in accordance with the provisions of the GATT 1994, as interpreted by the Antidumping Agreement" (e.g., Panel Report, paras. 7.151, 8.1). These findings are in error and are based on erroneous findings on issues of law and legal interpretations, including that additional security may only be considered "reasonable" within the meaning of the Ad Note if a Member demonstrates, first, that antidumping rates in the order "are likely to increase" and, second, properly determines the "likely amount" of the increase (e.g., Panel Report, paras. 7.138-7.149).

3. The United States also seeks review of the Panel's conclusion that the enhanced bond requirement is not justified pursuant to GATT 1994 Article XX(d) (e.g., Panel Report, para. 7.192), including its finding that unless a Member demonstrates that rates in the order "are likely to increase", an additional security requirement cannot be considered "necessary" within the meaning of Article XX(d) (e.g., Panel Report, para. 7.191). In these circumstances, the United States additionally requests that the Appellate Body complete the Panel's analysis with respect to Article XX(d). The Appellate Body would not need to reach the U.S. appeal under this paragraph where the Appellate Body has reversed the Panel findings and conclusions referenced in paragraph 1.

ANNEX IV

WORLD TRADE ORGANIZATION

WT/DS345/10
5 May 2008

(08-2114)

Original: English

UNITED STATES – CUSTOMS BOND DIRECTIVE FOR MERCHANDISE SUBJECT TO ANTI-DUMPING/COUNTERVAILING DUTIES

Notification of an Other Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 29 April 2008, from the Delegation of the United States, is being circulated to Members.

---

1. Pursuant to Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Customs Bond Directive for Merchandise Subject to Antidumping/Countervailing Duties* (WT/DS345/R) ("Panel Report") and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the enhanced bond requirement is not consistent with the Ad Note to Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") because it does not constitute "reasonable" security (e.g., Panel Report, para. 7.130) and, related to this, the Panel's conclusion that the enhanced bond requirement is not consistent with Articles 1 and 18.1 of the *Agreement on Implementation of Article VI of GATT 1994* ("Antidumping Agreement") because it is not "in accordance with the provisions of the GATT 1994, as interpreted by the Antidumping Agreement" (e.g., Panel Report, paras. 7.131, 8.2(i)). These findings are in error and are based on erroneous findings on issues of law and legal interpretations, including that additional security may only be considered "reasonable" within the meaning of the Ad Note if a Member demonstrates, first, that antidumping rates in the order "are likely to increase" and, second, properly determines the "likely amount" of the increase (e.g., Panel Report, paras. 7.116-7.126).

3. The United States also seeks review of the Panel's conclusion that the enhanced bond requirement is not justified pursuant to GATT 1994 Article XX(d) (e.g., Panel Report, para. 7.313), including its finding that unless a Member demonstrates that rates in the order "are likely to increase", an additional security requirement cannot be considered "necessary" within the meaning of Article XX(d) (e.g., Panel Report, para. 7.312). In these circumstances, the United States additionally requests that the Appellate Body complete the Panel's analysis with respect to Article XX(d). The Appellate Body would not need to reach the U.S. appeal under this paragraph where the Appellate Body has reversed the Panel findings and conclusions referenced in paragraph 1.
