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 to definitive anti-dumping duties, provisional measures and

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[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*").

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:

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[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]

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

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[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.

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.