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UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

Report of the Panel

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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

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US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
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Short Title	Full Case Title and Citation
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
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US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
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I. INTRODUCTION

A. COMPLAINT OF THAILAND

1.1 On 24 April 2006, Thailand requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "*DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "*GATT 1994*") and Articles 17.2, 17.3 and 17.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") with respect to certain issues relating to measures imposed by the United States on imports of certain frozen warmwater shrimp from Thailand.[1] Thailand and the United States held consultations, but failed to resolve the dispute.

1.2 On 15 September 2006, Thailand requested the establishment of a panel pursuant to Article XXIII of the *GATT 1994*, Articles 4 and 6 of the *DSU*, and Article 17 of the *Anti-Dumping Agreement*.[2]

1.3 At its meeting on 26 October 2006, the Dispute Settlement Body (DSB) established a Panel pursuant to the request of Thailand in document WT/DS343/7, in accordance with Article 6 of the *DSU*.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Thailand in document WT/DS343/7, the matter referred to the DSB by Thailand 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." [3]

1.5 At its meeting on 21 November 2006, the DSB also established a Panel pursuant to the request of India in document WT/DS345/6, which dealt substantially with the same matter.

1.6 On 19 January 2007, Thailand requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the *DSU*. This paragraph provides:

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

1.7 Thailand also requested the Director General to select the same persons to serve as panelists for both DS343 and DS345, in accordance with Article 9.3 of the *DSU*, which provides:

> "If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on

[1] WT/DS343/1.
[2] WT/DS343/7.
[3] WT/DS343/8.

each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

1.8 On 26 January 2007, the Director-General composed the Panel as follows:

Chairperson: Mr. Michael Cartland

Members: Mrs. Enie Neri de Ross
Mr. Graham Sampson

1.9 Brazil, Chile, China, the European Communities, India, Japan, Korea, Mexico and Viet Nam[4] reserved their rights to participate in the Panel proceedings as third parties.[5]

1.10 The Panel held the first substantive meeting with the parties on 6 and 7 June 2007. The session with the third parties took place on 7 June 2007. The Panel's second substantive meeting with the parties was held on 24 and 25 July 2007.

1.11 On 4 September 2007, the Panel issued the Descriptive Part of its Panel Report. The Interim Report was issued to the parties on 9 October 2007 and the Final Report was issued to the parties on 13 November 2007.

II. FACTUAL ASPECTS

2.1 This dispute concerns the use of "zeroing" and the application of the enhanced continuous bond requirement (hereafter the "EBR")[6] by the United States on certain frozen warmwater shrimp imported from Thailand.

A. THE ANTI-DUMPING MEASURE

2.2 The first measure at issue concerns the imposition of anti-dumping duties on imports of shrimp from Thailand. On 27 January 2004, the United States initiated an anti-dumping investigation of certain frozen and canned warmwater shrimp imported from Thailand, Brazil, China, Ecuador, India, and Viet Nam.[7] On 28 July 2004, the US Department of Commerce (hereafter "USDOC") preliminarily determined that certain frozen and canned warmwater shrimp from Thailand were being sold at less than fair value to the United States (the "Preliminary Determination").[8] On 1 February 2005, USDOC published an amended final determination of sales at less than fair value and an anti-dumping duty order imposing definitive anti-dumping duties only on imports of certain frozen warmwater shrimp from Thailand.[9]

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[4] In a letter directed to the DSB, dated 8 February 2007, Viet Nam reserved its third party rights. The parties did not oppose this request.

[5] WT/DS343/8/Rev.1.

[6] In its Request for Establishment of the Panel, Thailand uses the term "Continuous Bond Requirement", instead of EBR to refer to the measure at issue.

[7] *Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3876 (27 January 2004).

[8] *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 47100 (4 August 2004).

[9] *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (1 February 2005), Exhibit THA-14. On 23 December 2004, USDOC published a final determination that frozen and canned warmwater

2.3 In the anti-dumping order, the USDOC established margins of dumping for eleven individually-investigated Thai exporters ranging from 5.7% to 6.8%, and an "all others" margin of dumping of 6.0%.

2.4 The United States does not accept nor dispute that the "zeroing" used to calculate the anti-dumping duties at issue in these proceedings is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, and does not contest Thailand's zeroing claim for purposes of this dispute.[10]

B. THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR")

2.5 The second measure at issue concerns the imposition of the EBR on importers of shrimp from Thailand subject to an anti-dumping order. On 9 July 2004, US Customs and Border Protection (hereafter "US Customs") amended its existing bond requirements to include new guidelines specific for "covered cases" within "special categories" of merchandise. The EBR has been imposed pursuant to the Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991 (the "1991 Customs Bond Directive")[11], as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases (hereafter the "July 2004 Amendment")[12], the 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" (hereafter the "August 2005 Clarification")[13], the document entitled "Current Bond Formulas" posted by US Customs on its website on 24 January 2005 (hereafter "Current Bond Formulas")[14], and the Notice published in the United States Federal Register entitled Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements (hereafter the "October 2006 Notice").[15] The July 2004 Amendment, the August 2005 Clarification, the document Current Bond Formulas and the October 2006 Notice is referred to collectively as the "Amended CBD". US Customs has identified as a primary objective of the directive, "continued vigilance ... to ensure collection of all appropriate anti-dumping and countervailing duties."[16] On 1 February 2005, US Customs implemented the EBR with respect to all imports of certain frozen warmwater shrimp subject to anti-dumping duties (hereafter "subject shrimp").[17] Prior to 1 February 2005, the United States had also sent notices to 33 importers beginning on 6 August 2004, of which 12 importers furnished

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shrimp from Thailand was being sold at less than fair value in the United States. See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 76918 (23 December 2004), Exhibit THA-15. Thereafter, on 21 January 2005, the US International Trade Commission (hereafter "USITC") determined that imports of frozen warmwater shrimp from Thailand were causing material injury to the US domestic industry but concluded that imports of canned warmwater shrimp were not causing injury or threat thereof and should thus be excluded from the Order. See *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam: Investigations Nos. 1063-1068 (Final)*, 70 Fed. Reg. 3943 (27 January 2005) and USITC Publication 3748, *Certain Frozen* or *Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam: [Investigations Nos. 1063-1068 (Final)]* (January 2005).

[10] United States' responses to First Set of Panel Questions, para. 1.

[11] Exhibit THA-1.

[12] Exhibit THA-2.

[13] Exhibit THA-4.

[14] Exhibit THA-3.

[15] Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements, 71 Fed. Reg. 62276 (24 October 2006), Exhibit THA-5.

[16] Exhibit THA-2.

[17] US Customs applied the EBR to all importers of subject shrimp under an anti-dumping order from Brazil, China, Ecuador, India, Thailand, and Viet Nam. See Notice of Amended Final Determination of Sales at Less Than Fair Value and antidumping duty order: Certain Frozen Warmwater Shrimp from India, 70 Fed. Reg 5147 (1 February 2005).

enhanced bonds. 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 currently the only "covered case" designated within the agriculture/aquaculture category.

C. IMPOSITION OF CONTINUOUS BONDS AND OTHER SECURITY REQUIREMENTS IN THE CONTEXT OF THE US RETROSPECTIVE ANTI-DUMPING AND COUNTERVAILING DUTY ASSESSMENT SYSTEM

2.6 According to the United States, the EBR in combination with cash deposits is imposed to ensure payment of anti-dumping or countervailing duties under its retrospective duty assessment system. Unlike the systems employed in many other countries, the US retrospective system determines final liability for anti-dumping and countervailing duties after merchandise is imported into the country at the end of assessment or "administrative" reviews which are conducted 12 months following the anniversary month of the relevant anti-dumping order.[18] Certain of the following aspects of the US system discussed below, may prove relevant to an objective assessment of Thailand's claim.

1. Overview of anti-dumping and countervailing duty procedures

2.7 Under the US retrospective duty assessment system, the United States determines, through an investigation, whether margins of dumping or countervailable subsidisation exist, and whether dumped imports or countervailable subsidisation cause or threaten to cause material injury to a domestic industry. During the preliminary phase of the investigation, the US International Trade Commission (hereafter "USITC") determines whether a reasonable indication exists that an industry in the United States is materially injured, whether a reasonable indication exists that an industry in the United States is threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of subject merchandise investigated. USDOC also preliminarily determines whether a reasonable basis exists to believe that dumping or countervailable subsidisation is occurring. If USDOC makes an affirmative determination, it will issue a preliminary determination, which permits the imposition of provisional measures, historically in the form of a cash deposit, bond, or other security requirement, to ensure collection if anti-dumping or countervailing duties are ultimately imposed. The preliminary determination sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Subsequently, USDOC makes a final determination as to whether dumping or countervailable subsidisation is occurring. If this determination is affirmative and USITC also issues a final determination that imports of subject merchandise in the investigation were causing material injury to the US domestic industry or threatening with material injury, or that the establishment of an industry in the United States is materially retarded by reason of subject merchandise in the investigation, thereafter USDOC issues a public notice, denominated under US law as an anti-dumping or countervailing duty order. In the anti-dumping or countervailing duty order, USDOC sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Pursuant to the order, importers must post a cash deposit of estimated anti-dumping or countervailing duties for each import transaction. This cash deposit is based on the overall margin of dumping or countervailable subsidisation found for the exporter or producer during the investigation phase.

2.8 During the anniversary month following a final determination in the investigations phase, importers, exporters, producers, and domestic interested parties may request that USDOC conduct an assessment review often referred to as an "administrative review" of the import transactions that occurred in the prior year. During this review, USDOC analyses all of the import transactions for the

[18] See generally Title VII of the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq*.; see also 19 C.F.R. § 351.101 *et seq*.

period of review (i.e. , the prior 12 months) to determine the final amount of the anti-dumping or countervailing duty payable on imports from each producer or exporter for which USDOC received a request for review.

2.9 Upon USDOC's completion of an administrative review, US Customs applies the assessment rate provided by USDOC to the customs value of each entry to determine the amount of final liability. If the amount of the cash deposit is greater than the amount of final liability, US Customs refunds the amount collected in excess of the final liability, together with interest on the excess amount. Alternatively, if the amount of final liability exceeds the amount of the cash deposit, US Customs issues a bill to the importer for payment of the difference in the amounts together with interest on the difference in the amounts. During the administrative review, USDOC may establish a new cash deposit rate for each producer or exporter, on the basis of that producer or exporter's transactions over the period of review. This new ad valorem cash deposit rate will be applied to future imports from the producer or exporter. USDOC analyses the import transactions of each producer or exporter subject to the review to calculate a new cash deposit rate going forward. For those entries not covered by a request for an administrative review, USDOC instructs US Customs to assess anti-dumping or countervailing duties at the cash deposit rate required upon entry.

2.10 Due to the design of the US retrospective system, the dumping or subsidisation calculations in the administrative review are based on different transactions than those evaluated during the investigation. The investigation evaluates the pricing behaviour of producers and exporters based on transactions completed during a period of time prior to the initiation of the anti-dumping or countervailing duty investigation. In contrast, an administrative review evaluates pricing behaviour during later time periods.[19] As a result of this, the dumping or subsidisation margins calculated in the administrative review may be either higher or lower than the margins calculated in the investigation. According to the United States, the EBR attempts to ensure full collection of anti-dumping or countervailing duties by securing against the possibility that the margin will increase from the time of the investigation until calculation of the final duty liability during the administrative review, and that importers will default on payment of increased duties.[20]

2. Timeline for anti-dumping and countervailing duty procedures

2.11 Under US law, USDOC has a finite period to complete its anti-dumping or countervailing duty investigation and issue an anti-dumping or countervailing duty order, if any. USDOC may extend the deadlines for the preliminary and final determinations, but cannot extend the investigation beyond 407 days. US law provides that USDOC ordinarily must complete an administrative review within 365 days. USDOC may extend the deadlines for issuing preliminary and final results of the assessment review, but the review may not exceed 545 days. Specifically, the following is an overview of applicable time limits:

- In the petition phase of an anti-dumping or countervailing duty investigation, USDOC has 20 days (which may be extended to 40 days, only in the case of an anti-dumping investigation) to determine whether to initiate an investigation after it receives a petition to investigate dumping or countervailable subsidisation.

- In the preliminary phase of an anti-dumping or countervailing duty investigation, after USDOC initiates the investigation, USITC has 45 days (which may be extended

[19] The first administrative review evaluates transactions occurring from the date of imposition of provisional measures (if any) in the preliminary determination through the end of the twelve-month period following imposition of the anti-dumping duty order, generally a period of 18 months. All subsequent administrative reviews generally evaluate transactions occurring during the preceding 12 months.

[20] United States' responses to First Set of Panel Questions, para. 64.

to 65 days) from the date the petition is filed to make a preliminary injury determination. If USITC makes a preliminary affirmative injury determination, then USDOC has 140 days (which may be extended to 190 days) in the case of a dumping investigation, or 65 days (which may be extended to 130 days) in the case of a countervailable subsidisation investigation, from the date it initiated the investigation to make its preliminary determination of the existence of dumping or countervailable subsidisation.

- In the final phase of an anti-dumping or countervailing duty investigation, USDOC has 75 days (which may be extended to 135 days, only in the case of an anti-dumping investigation) from its preliminary determination to make a final determination of the dumping or subsidisation margins of investigated producers and exporters. If USDOC makes an affirmative final determination, USITC has until 45 days (which may be extended to 75 days) after USDOC's final determination to make its final injury determination. If the USITC makes an affirmative final injury determination, USDOC issues an anti-dumping or countervailing duty order.

- One year after the date the anti-dumping or countervailing duty order is issued, and during the anniversary month of the order every year thereafter, interested parties may request that USDOC conduct an administrative review of individual producers or exporters. After initiating this review, USDOC is required to issue preliminary results of the actual margin of dumping or subsidisation for the entries of the reviewed producer or exporter during the period of review within 245 days (which may be extended to 365 days) after the last day of the anniversary month. USDOC then must issue the final results within 120 days (which may be extended to 180 days) after the preliminary results are published.

D. IMPLEMENTATION OF THE AMENDED CONTINUOUS BOND DIRECTIVE (THE "AMENDED CBD")

2.12 Following issuance of the anti-dumping duty order on imports of certain frozen warmwater shrimp on 1 February 2005, US Customs began requiring subject shrimp importers to maintain enhanced bond coverage additional to the cash security required on each entry, in compliance with the Amended CBD.[21]

2.13 Generally, to satisfy US Customs bond requirements, any importer of goods subject to an anti-dumping or countervailing duty order may obtain either a single entry bond, covering a single entry, or a continuous bond, which provides security for all entries filed by the bond principal during the period of time covered by the bond, typically one year. US Customs may also require additional security if US Customs believes that acceptance of an entry secured by a continuous bond would impair US Treasury revenue collection.[22] Previously, under the 1991 Customs Bond Directive, importers subject to an anti-dumping or countervailing duty order that selected the continuous bond option only needed to post a customs bond equal to the greater of $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded to the nearest multiple of $10,000. After publication of the Amended CBD, however, US Customs implemented the EBR and required select importers of merchandise designated as "covered cases" to provide continuous customs bonds in excess of amounts established under 1991 guidelines *and* in addition to cash deposits of estimated

[21] As indicated in paragraph 2.5 above, the United States sent notices to 33 importers prior to publication of the Anti-dumping Order on 1 February 2005 beginning on 6 August 2004, of which 12 importers furnished enhanced bonds prior to 1 February 2005.

[22] See 19 C.F.R. § 113.13(d). US Customs administers the powers under section 113.13(d) in accordance with the 1991 Customs Bond Directive, which provides that "a bond may be demanded with a limit of liability amount greater than that computed using this formula, provided sufficient evidence of high risk is on hand to support the higher amount": See Exhibit THA-1, p. 3.

anti-dumping duties per entry. Thus, under the Amended CBD, in addition to a minimum of $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, US Customs requires importers subject to the EBR to secure a bond for an amount equal to the USDOC cash deposit rate in effect on the date of entry of the merchandise multiplied by the importer's value of imports from the previous year, as well as pay cash deposits equal to the amount of anti-dumping duties per entry. The Amended CBD does not apply to single entry bonds.

2.14 As noted, subject shrimp is currently the only category of merchandise subject to the EBR.

2.15 The following hypothetical example illustrates the combined total security obligations imposed on Thai shrimp importers subject to the EBR, including bond and cash deposit requirements:

(a) An importer of Certain Frozen Warmwater Shrimp from Thailand subject to the "all-others" anti-dumping duty rate imports US$1 million of subject shrimp during the previous 12 months.

(b) The value of subject shrimp entered in the present transaction amounts to US$10,000.

(c) The Bound rate under Harmonized Tariff Schedule (HTS) headings 0303.13.00 and 1605.20.10 is 0 per cent.

(d) The USDOC anti-dumping duty "all-others" rate (pursuant to anti-dumping order) is 6.0 per cent.

(e) US Customs applies the Amended EBR formula to the existing importer without making adjustments based on an individualized determination.

	Obligation	Description	Amount
1.	**Normal Duties:**	As per a 0 per cent bound rate under HTS headings	**$0**
2.	**Cash Deposit for Anti-dumping Duties:**	Upon issuance of an anti-dumping order but prior to an administrative review, US Customs orders the posting of a cash deposit based on the "all-others" rate.[23]	**$600**
3.	**Continuous Bond Amount:**[24]	Basic Bond + EBR (*see 3(a) + (b) below*), rounded up by increments of $10,000 up to $100,000, and then by increments of $100,000.	**$200,000**

[23] See 19 C.F.R. § 351.211(a). If no administrative review is requested, anti-dumping duties will be assessed at the cash deposit rate for estimated anti-dumping duties as established in the anti-dumping Order and required on that merchandise at the time of entry. (See 19 C.F.R. § 351.212(c)).

[24] A continuous bond amount secures multiple transactions during its validity. In place of a continuous bond, an importer may elect to post a single-transaction bond, which is equal to the assessed anti-dumping duty rate plus all applicable duties, taxes, and fees.

	Obligation	Description	Amount
	3(a). Basic Bond Amount:	*The greater of either $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded.*[25]	***$50,000***
	3(b). EBR Amount:	*100 per cent of Anti-dumping duty rate established in final Order or most recent Administrative Review * value of imports in previous 12 months.*	***$60,000***
4.	**Total Obligations:**	**= 1. + 2. + 3.**	***$200,000 continuous bond (covering all shipments in one year period) + $600 cash deposit per shipment of $10,000***

2.16 The Amended CBD authorizes US Customs to use the standard formula or instead make individualised bond determinations for subject Thai shrimp importers to determine bond amounts. The Amended CBD (specifically the August 2005 Clarification and the October 2006 Notice) provides that US Customs may reconsider bond amounts for individual importers on a case-by-case basis to ensure that duties are collected. However, in order to receive a reduction in the overall bond coverage via an individualized bond determination, an importer must so request, and may submit information on its financial condition related to the risk of non-collection for that importer. US Customs will then determine bond amounts based on the financial information supplied by the importer, US Customs records on compliance history of the importer, the importer's or principal's ability to pay, and other relevant information available to US Customs. Thus, the October 2006 Notice provides that, "[a]bsent exceptional circumstances, the above formulas will determine the bond amounts where a submission has not been made by the principal".[26] To date, the United States has indicated that it received 27 requests for individualized bond determinations, of which it has reviewed 22 requests, has granted no reductions to three importers, reductions of 25 per cent to eleven 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.[27]

2.17 The Enhanced continuous bonds provided pursuant to the Amended CBD are released when final liability for anti-dumping duties on goods covered by the bond is assessed, and upon liquidation of the import entries made in account of the goods.[28] As explained in Section II.C.2 above, if an administrative review is requested, final liability for anti-dumping or countervailing duties will be determined through such a review. If an administrative review is not requested, final liability will equal the margin of dumping or subsidy published in the final determination; however, this liability will not be assessed until the conclusion of the time period for requesting an administrative review.

[25] See 1991 Customs Bond Directive, Exhibit THA-1, which fixed a minimum continuous bond amount of $50,000 and establishes the following formula: (1) In the case of 0 to $1 million duties/taxes, the bond limit of liability is fixed in multiples of $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 $1 million, the bond liability is fixed in multiples of $100,000 nearest to 10 per cent of duties, taxes and fees paid during the preceding year.

[26] Exhibit THA-5.

[27] See United States' Responses to First Set of Panel Questions, para. 44; Exhibit US-12. The GAO Report, Exhibit THA-10, p. 42, indicates that the number of shrimp importers totalled 550 through June 2006. Exhibit US-17 refers to 530 shrimp importers in 2004.

[28] Under 19 USC § 1675(b), once the administering authority orders liquidation of entries pursuant to a review, goods are liquidated within 90 days after the instructions to Customs are issued, in most cases.

E. THE IMPACT OF THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR") ON SUBJECT SHRIMP IMPORTERS

2.18 Following the application of the EBR, subject shrimp importers have faced significantly higher security obligations than previously to enter merchandise. Specifically, as explained above, subject shrimp importers must satisfy both the Basic Bond and EBR as well as provide cash deposits equal to the anti-dumping duty rate established in the final determination. Additionally, Thailand explains that sureties have also "typically" required subject shrimp importers/exporters to post collateral equal to 100 per cent of the EBR to secure the increased bond amounts.[29] The United States contends that evidence presented to this Panel does not support the conclusion that a majority of companies eligible to act as sureties on bonds securing obligations to US Customs has required certain importers of subject shrimp to post collateral equal to 100 per cent of the EBR.[30] Thailand further explains that subject shrimp importers/exporters have also been required to pay associated fees to secure the increased bond amounts.[31] [32] Due to the fact that enhanced bonds are deemed valid for 12-month periods of liability, but are not released until final liability has been assessed for anti-dumping duties on the goods covered by the bond, shrimp importers/exporters subject to the EBR have also had to furnish concurrent enhanced bonds and concurrent rounds of collateral for bonds covering distinct 12-month periods of liability.[33] In the context of the additional security, collateral and fee obligations, the Government Accountability Office (hereafter "USGAO") in a report (the "USGAO Report")[34] concluded that subject importers/exporters have likely had to forgo other commercial opportunities, although the effects could not be fully isolated from other changes occurring at the same time.[35] 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.[36] The parties disagree on the impact of the increased security

[29] In its first written submission, paragraph 125, Thailand refers to the following statement by the US Court of International Trade (hereafter "USCIT") in *NFI v. US* (Exhibit THA-9, p. 38.): "[T]he testimony of witnesses for two plaintiffs relating to the requirements imposed on plaintiffs seeking new term bonds corroborates the finding that sureties typically require 100 percent collateral in the situations occasioned by the new bonding requirements." In paragraph 125 of its first written submission, Thailand also refers to communications between customs brokers and subject exporters (Exhibit THA-13) that discuss 100 per cent collateral requirements.

[30] See United States' Request for Review of the Interim Report, para. 4. See also Exhibit US-13, which lists companies to act as sureties on bonds securing obligations to US Customs.

[31] Thailand presents as evidence invoices (Exhibit THA-18) indicating that surety companies have charged Thai exporters 10 per cent of the amount of the enhanced bond as a fee for providing the bonds. The United States has emphasized that, as a third party beneficiary to the contract between the surety and the bond principal, it is not itself a party to the contract, and thus does not set market-based fees charged by sureties or receive payments: see United States' first written submission, paras. 7 and 10.

[32] See e.g. Exhibit THA-9, p. 38 ("the testimony of witnesses for two plaintiffs relating to the requirements imposed on plaintiffs seeking new term bonds corroborates the finding that sureties typically require 100 percent collateral in the situations occasioned by the new bonding requirements.").

[33] See e.g. Exhibit THA-18, wherein US Customs in separate communications to a Thai importer/producer, specified that the importer/producer must post separate enhanced bonds, each of which is deemed sufficient for one year.

[34] Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington D.C.: October 2006), Exhibit THA-10.

[35] See USGAO Report, pp. 6, 24 and 35, Exhibit THA-10; see also *NFI v. US*, Exhibit THA-9, p. 31.

[36] See USGAO Report, p. 6, Exhibit THA-10. See also United States' second written submission (WT/DS343), para. 30, wherein the United States contends that the use of a DDP basis rather than Cost, Insurance and Freight (CIF) one does not affect the costs borne by the importer of record.

requirements and related collateral requirements and fees on the year-on-year volume of shrimp imports into the United States.[37]

2.19 In October 2006, the USGAO concluded that the Amended CBD criteria were not transparent or consistently applied.[38] On 13 November 2006, the US Court of International Trade (hereafter "USCIT") ruled that US Customs appeared to have discretion under US law to consider potential anti-dumping or countervailing duty in setting continuous bond amounts[39]; however, it concluded that the administrative record supported the conclusion that the plaintiffs are likely to demonstrate that US Customs arbitrarily and capriciously selected the anti-dumping orders on shrimp as the only "covered case" of merchandise[40], and that the application of the Amended CBD to the eight complaining importers was arbitrary and capricious.[41] For this reason, the USCIT issued a preliminary injunction *status quo* in favour of eight of the 20 complaining importers, prohibiting the enforcement of any side agreements that limited importation[42], and ordered US Customs to review the sufficiency of certain EBR bonds amounts in excess of $1,500,000 posted by the eight complaining importers in the case.[43] The USCIT's final decision on the merits of the complainants' legal claims is pending. After the GAO Report was issued but prior to publication of the USCIT's ruling, US Customs published the Amended CBD criteria in the October 2006 Notice, which further described the process for obtaining individualized bond amounts.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Thailand requests the Panel;[44]

(a) to find that, regarding the application of the EBR to subject shrimp from Thailand, the United States acted inconsistently with:

(i) Article 18.1 of the *Anti-Dumping Agreement* by taking specific action against dumping that is not in accordance with the provisions of Article VI of the *GATT 1994* as interpreted by the *Anti-Dumping Agreement*;

(ii) subsidiarily, Articles 7 and 9[45] of the *Anti-Dumping Agreement*, Article VI:2 of the *GATT 1994*, and the Ad Note to Article VI:2 and 3 of the *GATT 1994* (the "Ad Note").

(iii) Article XI:1 of the *GATT 1994* by imposing an impermissible restriction on imports of shrimp from Thailand; or, alternatively, that the United States acted inconsistently with Article II:1(a) and the first and second sentences of Article II:1(b) of the *GATT 1994* by imposing impermissible duties or charges on imports of shrimp from Thailand.

[37] See e.g. Thailand's first written submission, paras. 144-145; United States' first written submission, para. 41.
[38] See generally, USGAO Report, Exhibit THA-10.
[39] See Exhibit THA-9, p. 42.
[40] See Exhibit THA-9, p. 54
[41] See Exhibit THA-9, p. 58.
[42] See Exhibit THA-9, p. 73.
[43] See Exhibit THA-9, p. 72.
[44] Thailand's first written submission, paras. 288-290.
[45] In its Request for Establishment of the Panel, para. 2 (vi), Thailand also claimed a violation of Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*. In response to Question 42 from the Panel, Thailand stated that it did not pursue further a violation under Article 9.1.

(iv) Article X:3(a) of the *GATT 1994* by failing to administer its customs laws and regulations relating to bonds in a uniform, impartial and reasonable manner.

(v) Article I of the *GATT 1994* by failing to extend to imports of subject shrimp advantages that are provided to imports of shrimp from other countries.

(b) to find that, regarding the Anti-Dumping Measure, the United States acted inconsistently with:

(i) Article 2.4.2 of the *Anti-Dumping Agreement* by using the zeroing methodology to calculate margins of dumping.[46]

(c) to proceed to address Thailand's claims regarding the consistency of the EBR with Articles XI, II, X:3(a), and I of the *GATT 1994*, even if the Panel were to agree with Thailand on the claim that the application of the Enhanced Bond Requirement constitutes specific action against dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

(d) to recommend, in accordance with Article 19.1 of the *DSU*, that the DSB request the United States to bring the measures at issue into conformity with the *Anti-Dumping Agreement* and the *GATT 1994* within a reasonable period of time.

(e) to suggest, pursuant to its authority under Article 19.1, that the United States bring its measure into conformity by immediately releasing any bonds held by US Customs for imports of subject shrimp from Thailand pursuant to the EBR, so that those imports, like all other US imports subject to anti-dumping duties would be secured by the Basic Bond Requirement.

3.2 The United States requests that the Panel reject Thailand's claims for the reasons provided in its first written submission.[47]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as set forth in their executive summaries submitted to the Panel, are attached to this Report as Annexes (see List of Annexes, page v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties as set forth in their executive summaries submitted to the Panel, i.e. Brazil, Chile, China, the European Communities, India, Korea, Japan and Mexico, are attached to this Report as Annexes (see List of Annexes, page v).[48]

VI. INTERIM REVIEW

6.1 On 9 October 2007, the Panel issued its Interim Report to the parties. On 23 October 2007, both parties submitted written requests for the review of precise aspects of the Interim Report. The

[46] In its Request for Establishment of the Panel, paras. 2 (a) (ii), (iii) and (iv), Thailand also claimed a violation of Articles 2.1, 2.4 and 9.3 of the *Anti-Dumping Agreement*. In Thailand's Answers to First Set of Panel Questions, question 2, Thailand stated that it did not pursue further a violation under these articles.

[47] United States' first written submission, para. 81.

[48] China and Viet Nam informed the Panel that they would not be providing written submissions.

parties also submitted written comments on the other party's comments on 2 November 2007. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.4 of the *DSU*, this section of the Panel's Report sets out the Panel's response to the arguments made at the interim review stage, wherever the Panel felt that explanation was necessary. The Panel has also modified certain aspects of its Report in light of the parties' comments wherever the Panel considered it necessary. Due to the factual similarities in the disputes DS343 and DS345, the Panel wherever possible has modified the respective reports of these two disputes in parallel. The Panel has also made a limited number of editorial corrections to the Interim Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

A. THAILAND'S COMMENTS ON THE INTERIM REPORT

1. The impact of the EBR on subject importers

6.3 Regarding paragraph 2.18 and collateral requirements, Thailand requests the Panel to modify its statement that at least one or more sureties has required subject importers to provide 100 per cent collateral, based on statements made by the USCIT that sureties "typically" require 100 per cent collateral (see *NFI v. U.S.*, Exhibit THA-9, at 38). Thailand submits that the dictionary definition of "typically" is "representatively, characteristically." (see New Shorter Oxford dictionary, vol. 2 (1993), Brown, L. Ed. (Clarendon Press: Oxford) p. 3442). Further, Thailand requests the Panel to refer to evidence disclosed in email communications between customs brokers and exporters discussing collateral requirements (see Exhibit THA-13). The United States requests the Panel to decline Thailand's suggestions due to the fact that the proceedings in *NFI v. US* are ongoing, contain a different factual record and involve questions of US law. In particular, the United States notes that the findings in *NFI v. US* pertain to 8 importers and should not be extrapolated. The United States further notes that evidence on record, such as Exhibit THA-13, does not support the conclusion that all or a majority of sureties require collateral. However, the United States does request the Panel to include evidence submitted by Thailand and the United States on the issue of collateral requirements into the relevant footnotes. Taking both parties' comments into consideration, the Panel has modified paragraph 2.18 in order to reflect both parties' views with respect to the overall effect of the EBR on *all* subject shrimp importers/exporters from Thailand.

6.4 Regarding paragraphs 2.18, 6.59 and 6.75, footnote 103 and fees and the stacking effect, Thailand requests the Panel to refer to Exhibit THA-18 as evidence to support a finding that sureties have charged associated fees to secure increased bond amounts. Thailand further requests the Panel to refer to Exhibit THA-18 as discussed in paragraphs 132-134 of Thailand's first written submission, or *NFI v. US*, Exhibit THA-9 as discussed in paragraphs 59-62 and 113 of Thailand's first written submission to support its explanation of the stacking effect of bonds on imports. The United States does not object to inclusion of citation to Exhibit THA-18, but requests the Panel to retain the existing text in the main body. If the Panel refers to Thailand's arguments regarding stacking, the United States requests the Panel to also refer to US arguments presented in paragraphs 7, 10-11, and 40-44 of its first written submission. In relation to fees, the Panel has added citation to invoices provided in Exhibit THA-18 and the United States' first written submission, in footnotes to paragraph 2.18 of the Interim Report. The Panel has also cited to Exhibits THA-18 and THA-13 in paragraph 2.18 when discussing the stacking of enhanced bonds and its effect on collateral requirements.

6.5 Regarding paragraph 2.18, Thailand also requests the Panel to modify the phrase "certain importers may have required exporters to export on a DDP basis" to reflect a statement by the USGAO that importers "now require" exporters to export on a DDP basis (see USGAO Report, Exhibit THA-10, p. 6). Thailand also asks the Panel to consider a Thai shrimp industry survey (see

Exhibit THA-12) in support of the finding that exporters are required to ship on a DDP basis. The United States requests the Panel to modify the Interim Report to reflect the US position that the use of a DDP basis rather than a Cost, Insurance, and Freight (CIF) basis does not affect the costs faced by the importer of record. The Panel has modified the phrasing of its descriptive section in paragraph 2.18 to reflect statements by the USGAO regarding whether importers of subject shrimp have required exporters to export on a DDP basis, and has included citation to the United States arguments on the impact of a shift to a DDP basis.

2. Findings by the USCIT in *NFI v. U.S.*

6.6 Regarding paragraph 2.19, Thailand requests the Panel to additionally refer to findings by the USCIT from section 2(b) of *NFI v. U.S.* (see Exhibit THA-9, p. 54). Thailand submits that, as pertains to the decision on whether to issue a preliminary injunction, the USCIT concluded that the administrative record supported the conclusion that the plaintiffs are likely to demonstrate that US Customs arbitrarily and capriciously selected the anti-dumping orders on shrimp as the only "covered case" of merchandise. The United States construes the current language in the report as accurately describing the USCIT's decision with respect to the eight complaining importers. The Panel has retained the original language discussing the USCIT holding while also seeking to clarify its description of the US court's holding through the addition of language in paragraph 2.19. The paragraph now reflects the USCIT's findings that plaintiffs are likely to demonstrate that US Customs both arbitrarily and capriciously selected the anti-dumping order as the only covered case, and arbitrarily and capriciously applied the Amended CBD to the eight complaining importers.

3. Parallel panel proceedings

6.7 Regarding paragraph 6.1, Thailand requests the Panel to consider substituting the word "should" for "would" in the final sentence so that it does not appear that the decision to appoint the same panellists in DS343 and DS345 and to harmonise the timetable for the two cases was made by the representative of the United States. The United States notes that the US representative stated on record that "the same panellists *could* consider on the same timetable the matters in the two requests". (see WT/DSB/M/222, emphasis added). The Panel has amended paragraph 6.1 (7.1 of the Final Report) to reflect the statement made by the US representative.

4. "Specific action" in response to dumping

6.8 Regarding paragraphs 6.55 and 6.61, Thailand requests the Panel to refer to additional arguments and evidence provided by Thailand in paragraphs 162 – 176 of its first written submission. Thailand submits that the Panel has only referred selectively to its argumentation regarding whether the application of the EBR constitutes "specific action" in response to dumping. In particular, Thailand submits that paragraph 6.61 contains no reference to Thailand's responses to the United States' arguments, including those presented in paragraphs 19 – 27 of Thailand's first oral statement, and paragraphs 8 – 15 of Thailand's second oral statement. The United States considers the Panel to have adequately represented Thailand's arguments in paragraphs 162 – 176 of the Interim Report, as well as Thailand's responses to US arguments, and doesn't believe further changes are necessary. In the case that the Panel were to refer to argumentation offered by Thailand in subsequent submissions, the United States requests the Panel to refer to US arguments in response to these additions.

6.9 In making its findings, the Panel has set out the main arguments of the parties. The Panel does not consider that it is required to provide an exhaustive description of all of the parties' arguments, sub-arguments and supporting evidence when making its findings, particularly since the parties' own summaries of their arguments are annexed to the Report. Thailand's main argument regarding the specificity of the relevant action is that the EBR may only be applied to goods subject to US anti-dumping orders. This argument is repeated on numerous occasions in the extracts identified

by Thailand in its interim comments, and is properly reflected in para. 6.55 of the Interim Report (7.55 of the Final Report).

5. Specific action "against" dumping

6.10 Regarding paragraph 6.59, Thailand requests the Panel to refer to additional arguments and evidence provided by Thailand in paragraphs 182 – 190 of its first written submission. Thailand submits that the Panel has only referred selectively to its argumentation regarding whether the application of the EBR constitutes specific action "against dumping". In particular, Thailand submits that paragraphs 6.64, and 6.75 – 6.77 contain no reference to Thailand's submissions or evidence, such as Thailand's argumentation as to why the effects of the collateral requirements and fees charged by sureties are relevant considerations when determining that the measure is "against" dumping (as found by the Panel in footnote 103 of the Interim Report), and argumentation that the EBR does not simply facilitate the collection of anti-dumping duties (as found by the Panel in paragraph 6.76). The United States considers the Panel to have adequately represented Thailand's submissions and evidence in the Interim Report, including arguments regarding collateral and fees in paragraph 6.75 of the Interim Report, and Thailand's argument that the EBR does not solely facilitate the collection of anti-dumping duties. In the case that the Panel were to refer to argumentation offered by Thailand in subsequent submissions, the United States requests the Panel to refer to US arguments in response to these additions.

6.11 The Panel considers that it has appropriately summarized the main arguments of Thailand regarding the impact of the application of the EBR. The Panel does not consider that it is required to provide an exhaustive description of all of the parties' arguments, sub-arguments and supporting evidence when making its findings, particularly since the parties' own summaries of their arguments are annexed to the Report.

6. Application of the Ad Note

6.12 Regarding paragraphs 6.81 – 6.87, Thailand submits that the Panel's discussion of Thailand's arguments regarding the application of the Ad Note is incomplete. In particular, Thailand submits that the Panel only discusses arguments regarding the relationship between the Ad Note and the *Anti-Dumping Agreement*, but not other arguments related to other issues discussed in Section VI.C.4, such as the proper interpretation of the Ad Note (see e.g. Thailand's first oral statement, paras. 9 – 16).

6.13 Thailand requests the Panel to address the following arguments: (a) Thailand's argument regarding the ordinary meaning of the term "suspected dumping", based on its ordinary meaning and the context of the authority to impose anti-dumping duties in Article VI:2 (see Thailand's responses to the Panel's first set of questions, paras. 47 – 49; Thailand's second written submission, paras. 27, 30 – 31); (b) Thailand's argument that Article VI and the *Anti-Dumping Agreement* require a simultaneous finding of the existence of dumping and injury (see Thailand's first oral statement, paras. 13 – 14, Thailand's second written submission, paras. 26, 31); (c) Thailand's argument that the term "cash deposit" as used in the *Anti-Dumping Agreement* refers only to provisional measures (see Thailand's second oral statement, paras. 38 – 42); and (d) Thailand's argument that the purpose of cash deposits of estimated anti-dumping duties collected after the imposition of an anti-dumping order is to protect domestic industries rather than to secure the payment of potential increases in liability (see Thailand's second oral statement, para. 54).

6.14 In addition, Thailand submits that the Panel has not discussed Thailand's responses to the United States' arguments, such as in paragraph 6.87 of the Interim Report, regarding the United States' contention that Thailand's arguments would mean that security pending final assessment of anti-dumping duties was nowhere permitted by the *Anti-Dumping Agreement* or the *GATT 1994* (see e.g. Thailand's first oral statement, paras. 5 – 7; Thailand's second written submission, paras. 8 – 12;

Thailand's response to the Panel's second set of questions, paras. 23 – 25; Thailand's second oral statement, para. 7).

6.15 The United States considers the Panel to have adequately represented Thailand's arguments regarding the ordinary meaning of "suspected dumping", Article VI, the meaning of "cash deposit" and the alleged "purpose" of cash deposits in the Interim Report. The United States considers unwarranted Thailand's request to respond to arguments regarding what Thailand claims would not prevent the United States from administering its retrospective duty assessment system. The United States, contends that this argument is premised on a claim that "cash deposits" are "duties", which the Panel has discussed and rejected in paragraphs 6.110 – 6.121 of the Interim Report.

6.16 Thailand's main argument regarding the ordinary meaning of the term "suspected dumping" is that "[t]he ordinary meaning of 'suspected' is 'that one suspects to exist or to be such' " (footnote omitted). Given that an investigation under Article 5.1 of the *Anti-Dumping Agreement* is to determine the "existence" of dumping, dumping can no longer be said to be merely "suspected" once a final determination in such an investigation has been made.[49] This argument is premised on the view that the existence of dumping is established once the anti-dumping order is imposed. The Panel addresses this issue – and therefore the premise of Thailand's argument - at para. 6.102 of the Interim Report. The Panel addresses this issue further – with specific reference to Thailand's argument regarding Article 5.1 of the *Anti-Dumping Agreement* – in paras 6.107 – 6.109 of the Interim Report.

6.17 Thailand's argument that Article VI and the *Anti-Dumping Agreement* require a simultaneous finding of the existence of dumping and injury is necessarily addressed in our view, expressed at para. 6.108 of the Interim Report, that the conditions for imposing anti-dumping measures (including therefore the existence of injury and causation) are established in respect of the "current situation" prevailing at the time of imposition. Our point remains, though, that a finding of dumping (and injury and causation) at the time of imposition does not mean that there will necessarily be dumping in respect of future import entries.

6.18 Thailand's argument that the term "cash deposit", as used in the *Anti-Dumping Agreement*, refers only to provisional measures is necessarily addressed by our consideration of the negotiating history of the Ad Note, which makes it clear that the Ad Note is not limited to provisional measures taken prior to the final determination of dumping. This argument is further addressed by our review of the relationship between the Ad Note and the *Anti-Dumping Agreement*, for it is premised on an assumption that the terms of Article 7.2 of the *Anti-Dumping Agreement* somehow trump those of the Ad Note.

6.19 We have included footnote 170 at paragraph 7.122 of our Final Report to address Thailand's argument in respect of the purpose of cash deposits collected after the imposition of an anti-dumping order.

6.20 To the extent that Thailand's comment in respect of paragraph 6.87 of the Interim Report would suggest that the United States is entitled to continue its current practice of collecting cash deposits, we note Thailand's argument that "the United States is authorised under Article 9 of the *Anti-dumping Agreement* to maintain its current practice of collecting cash deposits of estimated anti-dumping duties following the imposition of definitive anti-dumping duties."[50] This argument is necessarily addressed – and rejected - through our findings on the possible treatment of cash deposits as anti-dumping duties. To the extent that Thailand's comment refers to its argument that the United

[49] See para. 47 of Thailand's Responses to the First Set of Panel Questions.
[50] See Thailand's second written submission, para. 9.

States could collect security under the Basic Bond Requirement,[51] we note that these proceedings concern the WTO-consistency of the specific facts surrounding the application of the EBR. Whether or not the United States might legitimately take action under some other provision of its domestic law does not affect our analysis of the application of the EBR in light of the relevant provisions of the covered agreements, including Article 18.1 of the *Anti-Dumping Agreement* and the Ad Note. While we examined other forms of security that might potentially be applied under the Ad Note, we did so in order to shed light on the interpretation of that provision. Thailand's arguments regarding possible security under the Basic Bond Requirement would not serve this function, for Thailand has made it clear that the Basic Bond Requirement would not apply under the Ad Note, which it considers to be superseded by the *Anti-Dumping Agreement*.

7. Ordinary meaning of the text of the Ad Note

6.21 Regarding paragraphs 6.100 – 6.106, Thailand submits that the Panel has not discussed the ordinary meaning of the term "suspected dumping" in the Ad Note as interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties. Thailand contends that the Panel has instead interpreted the term "suspected dumping" solely by reference to the processes of the United States' investigating authority. Thailand therefore requests the Panel to verify that the interpretation of the ordinary meaning of the text of the Ad Note is based on the ordinary meaning of the text, in accordance with Article 31 of the Vienna Convention, and not strictly on US administrative practice. Thailand also requests the Panel to provide reference to the records in paragraphs 6.101 – 6.102 regarding discussion of US administrative processes. The United States disagrees with Thailand's request to modify the discussion of "suspected dumping". The United States does not consider the Panel to suggest that "suspected" dumping should not be interpreted based on its ordinary meaning, nor that the Panel adopted a meaning of "suspected" that is inconsistent with its ordinary meaning. The United States also considers that the Panel's evaluation of the US duty assessment system in this context appears intended not to interpret the term "suspected", but to assess how that term applies to the particular facts of this dispute. Nevertheless, if the Panel chooses to include reference and citations to the record describing duty assessment, the United States suggests the Panel refer to the description of the US retrospective duty assessment system set forth in paragraphs 2.7 – 2.10 of the Interim Report.

6.22 The Panel had not understood there to be any disagreement between the parties regarding the ordinary meaning of the term "suspected dumping". Rather, the disagreement concerned the question of whether or not there could still be "suspected dumping" after the imposition of an anti-dumping order. Since in this case the relevant anti-dumping order was imposed by the United States, the Panel considered this issue in the context of the US system. The Panel did not refer to the context of the US system to interpret the terms "suspected dumping" *per se*. We have included paragraph 7.101 in the Final Report to clarify our interpretation of the phrase "suspected dumping".

6.23 Regarding Thailand's suggestion that we include references for our description of the US administrative processes, we note that this description is based on descriptions of the relevant processes provided by the parties (both orally and in writing) during the course of these proceedings.

[51] See, for example, para. 7 of Thailand's oral statement at the first substantive meeting. We understand that this argument does not include the US practice of collecting cash deposits, for Thailand's argument pre-supposes that action under the Basic Bond Requirement will not constitute "specific action against dumping" (see para. 17 of Thailand's comments on the Interim Report), whereas cash deposits are necessarily "specific action against dumping".

8. Administrative reviews and exporter-specific assessment rate assignments

6.24 Regarding paragraph 6.109 and footnote 136, Thailand requests the Panel to clarify through references to the record the finding that the United States in its administrative reviews initially assesses whether the export price for particular exports was below normal value. Thailand submits that evidence before the Panel, including the preliminary determination in the first administrative review of shrimp from Thailand, indicates that the United States' actual determination in assessment reviews is based on an overall calculation of a single dumping margin for each exporter, based on all of the exporters' transactions within the review period (see Exhibits US-5, US-6). The United States considers the discussion of how the United States calculates the anti-dumping margin to be accurate in its current form. Regardless, the United States highlights the Panel's finding that the existence of dumping is established after imports are made.

6.25 Thailand also requests the Panel to explain the statement that the calculation of an exporter-specific assessment rate in an administrative review is done "for the sake of administrative convenience." Specifically, Thailand requests the Panel to explain the meaning of "administrative convenience" and how this concept differs from a published determination of a margin of dumping within the meaning of the *Anti-Dumping Agreement* for each exporter. The United States does not consider it necessary for the Panel to elaborate on the meaning of the term "administrative convenience".

6.26 The Panel has made a number of changes to footnote 155 to its Final Report in order to address the concerns raised by Thailand.

9. Cash deposits

6.27 Regarding paragraph 6.113, Thailand also requests the Panel to explain the statement that "a cash deposit is not cash and is not a payment to yield public revenue at the time it is provided", and in what sense cash deposits of estimated duties paid on entry of goods subject to US anti-dumping orders are not "cash". Thailand submits that the parties did not dispute that cash deposits of estimated duties are, in fact, "cash" paid to the general fund of the US treasury at the time of importation. Thailand requests the Panel to clarify its position through reference to US law and the record and to clarify what is the process where a cash deposit "is converted from a deposit or security, into a form of payment". The United States disputes Thailand's reading of the Panel's finding, contending the Panel to have meant that cash deposits are not liquidated revenue without the same attributes as cash. However, if the Panel were to include citation to the record on the transformation of cash deposits into a form of payment, the United States suggests referring to the description of the assessment review process in paragraphs 6.110 – 6.121 and 2.8 – 2.9 of the Interim Report.

6.28 The Panel has made a number of changes to paragraph 6.113 (now 7.114 of its Final Report) and inserted footnote 170 in its Final Report order to address the concerns raised by Thailand.

10. Negotiating history of the Ad Note

6.29 Regarding paragraph 6.124, Thailand submits that, in its submissions, it referred to the 1959 Report of the Group of Experts as well as the 1948 Report of the Working Party that adopted the Ad Note, when discussing the negotiating history of the Ad Note (see Thailand's first oral statement, para. 15, Thailand's response to the first set of Panel questions, para. 10, and Thailand's response to the second set of Panel questions, para. 42). Accordingly, Thailand requests the Panel to revise paragraphs 6.124 – 6.125 to reflect *both* of these references to the negotiating history. The United States does not consider changes to this section necessary because it views the Panel's analysis as more than adequate. The United States also notes the Panel's statement that it is not referring to the negotiating history because it does not consider it determinative of the issue before it. The United

States considers that Thailand's reference to the 1948 Working Party Report does not detract from the Panel's conclusions concerning the negotiating history, but is instead fully consistent with the Panel's interpretation, under which dumping is suspected until anti-dumping duties are finally assessed and collected.

6.30 The Panel has inserted paragraphs 7.127 and 7.128 in its Final Report addressing this issue.

11. Likelihood of increase of dumping margin for future imports as a best proxy

6.31 Regarding paragraphs 6.137 – 6.138, Thailand submits that if a Member may also make a separate prospective determination of the likely dumping margin for future imports, and if the Member properly determines that the rates of dumping found in the final determination of dumping are likely to increase, then the rate of dumping found in the final determination is no longer the "best and only available proxy for duties that ultimately may be assessed". In light of this, Thailand requests the Panel to revise these paragraphs to clarify that, if a Member determines that the rates of dumping provided in the anti-dumping order are likely to *decrease*, then that determination also constitutes "the best estimate of suspected dumping for which security may be required pursuant to the Ad Note". Thailand submits, in this sense, that a Member could collect security only in this lower amount as "reasonable" under the Ad Note.

6.32 The United States disagrees with Thailand's assertions but nonetheless requests the Panel to make clarifications to this section. The United States disagrees with the assertion that a Member must also make a separate prospective determination of the likely dumping margin for future imports in addition to determining the margin of dumping for the period of investigation. The United States contends that the Panel did not conclude that the only evidence that a Member may offer to support the establishment of a "reasonable" security would be through a prospective determination of the likely dumping margin. According to the United States, this conclusion is without basis in the Ad Note and would not accord with the Panel's observation in paragraph 6.111 that Members are entitled to operate retrospective duty assessment systems. The United States contends that, in accord with the Panel's conclusion that dumping is suspected until final assessment under the US retrospective assessment system, likelihood needs to be evaluated based on information available to the customs authority at the time the security is imposed, which may or may not include the type identified by Thailand.

6.33 The Panel declines Thailand's request, since this case does not concern a situation in which a Member determined that the rates of dumping provided in the anti-dumping order are likely to decrease.

12. The phrase "error or fraud on the part of import specialists"

6.34 Regarding paragraph 6.141, the Panel refers to "error or fraud on the part of import specialists." Thailand submits that the term "import specialists" is generally used to describe US Customs officers responsible for issues relating to specific products, but that Thailand made no allegations of fraud by US Customs officers. Thus, Thailand requests the Panel remove the phrase "on the part of import specialists" to avoid inference of such an allegation. The United States does not object to this change.

6.35 The Panel has amended its text to address the concern raised by Thailand.

13. Documentation on likelihood of anti-dumping rate increases

6.36 Regarding paragraphs 6.141 et seq., Thailand contends that the Panel is incorrect in asserting that the United States did not submit any documentary evidence that anti-dumping rates increased 33

per cent of the time. Thailand submits that in response to question 24 from the Panel following the first substantive meeting with the parties, the United States addressed this via Exhibit US-10 (see US response to the second set of Panel questions, para. 38). According to Thailand, Exhibit US-10 consists of the following: (i) 1 page that contains a chart plotting "Number of Cases" against "Percentage Change" with figures ranging from 0% to 2500% (but the X axis does not extend from -1% to -100%) without: (1) a further definition of the term "cases", (2) details of the anti-dumping duty orders, and period of time covered by these "cases", (3) details on each individual "case", including figures for the extent of increase/decrease in the "case", the order concerned, date of entry and value of trade, or, (4) figures for aggregate number of "cases" where margins increased, decreased or remained the same; (ii) 1 page that provides figures for uncollected duties on *crawfish* for fiscal year 2003 with deposit and final rates; (iii) 5 pages of undefined figures ("FirstOfTotalAmt","ADZCaseNbr","Sum","Rate Increase") that relate only to particular exporters of *crawfish* from China; and (iv) 3 pages that set out the amount of uncollected duties for fiscal year 2003 on *all* anti-dumping and countervailing duty orders. Thailand further notes that the United States described Exhibit US-10 as a US Customs analysis of "historical rate fluctuations in individual cases" (see US response to the first set of Panel questions, para. 26). Thailand also asserts that the United States referred to Exhibit US-10 (at para. 38 of its responses to the Panel's Second Set of Questions) in support of its assertion that rates increased approximately 33 per cent of the time. Therefore, Thailand requests the Panel to revise paragraph 6.141 to indicate that the United States submitted documentary evidence in support of the assertion that anti-dumping rates increased 33 per cent of the time, but such evidence is unclear and unreliable.

6.37 In Thailand's view, however, the analysis in Exhibit US-10 does not have a precise scope and methodology and does not clearly concern 13 anti-dumping cases involving 340 exporters, as claimed by the United States in its responses to the second set of Panel questions, footnote 46. According to Thailand the analysis is also problematic because it appears to be limited to a subset of agriculture/aquaculture cases, does not contain weighting by trade value or volume, and includes cases involving new shipper reviews. Thailand submits that, given that the cash deposit rate was zero in new shipper reviews, all affirmative dumping determinations would have been considered as cases of "increases" in dumping rates, resulting in an exaggerated estimate that cannot be extrapolated to ordinary assessment reviews or a situation where the new shippers bonding privilege has been removed. Accordingly, Thailand requests the Panel to specifically cite portions of Thailand's submissions that set out objections to Exhibit US-10. In light of these changes, nevertheless, even if there were clear and reliable documentary evidence to support the United States' analysis, Thailand submits that this analysis should not change the Panel's conclusion in paragraphs 6.142 – 6.146.

6.38 Thailand further submits that, in footnote 167 to paragraph 6.141 of the Interim Report, the Panel's statement that the "United States' evidence in respect of rate increases extends beyond the crawfish case and covers each agriculture/aquaculture order" is inaccurate as it is unsupported by evidence on record. Thailand notes that the Panel has based this statement on footnote 45 of the United States' responses to the second set of Panel questions. According to Thailand, however, the United States provided no evidence to support the assertion that *all* agriculture/aquaculture orders are covered in its analysis. Thailand submits that the United States did not provide a list of the agriculture/aquaculture orders examined by the CBP in Exhibit US-10. Moreover, Thailand submits that the United States instead provided Exhibit US-19 which, according to the United States, updated Exhibit US-10. Thailand asserts, however, that Exhibit US-19 does not cover "each agriculture/aquaculture order" as it excludes, at a minimum, 2 anti-dumping orders on pasta and 1 anti-dumping order on frozen raspberries (see Thailand's responses to the first set of Panel questions, footnote 55). Moreover, Thailand contends that the United States' assertion that the CBP examined 13 anti-dumping orders (see United States' responses to the second set of Panel questions, footnote 46), suggests that US Customs' analysis was incomplete, as there appear to be more than 13 anti-dumping orders in effect on agriculture/aquaculture merchandise (see Thailand's responses to the first set of Panel questions, footnote 55 (listing "at least" 22 orders); Exhibit US-19 (listing 17 orders);

and Exhibit US-21 (listing 21 orders)). Accordingly, Thailand requests the Panel to also revise this statement in footnote 167.

6.39 The United States notes that it has *not* cited Exhibit US-10 in support of the argument that rates increased 33 per cent of the time. According to the United States, Exhibit US-10 addresses the question of the *amount* by which rates increase in cases where an increase occurs, leaving this Exhibit irrelevant to the Panel's analysis of the likelihood of a rate increase. The United States asserts that Exhibit US-19 is relevant to the question of the likelihood of increase. The United States contends that this Exhibit examines each assessment for each agriculture/aquaculture order and compares it to the cash deposit rate at the time to determine the likelihood that rates would increase (38 per cent, in that study). However, due to the Exhibit's inclusion in footnote 167, the United States considers the Panel to have only concluded that the United States did not provide documentary evidence in support of its argument that rates increased 33 per cent of the time, not more generally to arguments regarding rate increases.

6.40 The Panel declines to find that the United States submitted Exhibit US-10 in support of its argument that rates of dumping had increased in 33 per cent of cases. Regarding Thailand's reference to para. 38 of the US Responses to the Panel's Second Set of Questions, we note that the United States merely cited Exhibit US-10 in support of its assertion that "[w]hen rates increased, they increased by, on average, 285%". Since this was not an issue that we were required to examine, we had no need to examine the parties' arguments in respect of the contents of Exhibit US-10. While the United States submitted evidence of rate increases in Exhibit US-19, the United States made no argument that such evidence demonstrated that rates increased in 33 per cent of cases.

6.41 We have amended footnote 187 of the Final Report in light of the concerns raised by Thailand.

14. The United States defence under Article XX(d) of the *GATT 1994*

6.42 Regarding Section VI.6(b), Thailand submits that, to the extent that the *Anti-Dumping Agreement* constitutes *lex specialis* with respect to the measure at issue, the panel should only consider defences available within the *Anti-Dumping Agreement* and not the United States' defence under Article XX(d) of the *GATT 1994*. Thailand submits that consideration of the United States' Article XX(d) defence is inconsistent with the finding that Article 18.1 of the *Anti-Dumping Agreement*, read in conjunction with the Ad Note, authorises the taking of reasonable security based on future increases in dumping margins. Accordingly, Thailand requests the Panel to either *not* exercise judicial economy with respect to Thailand's other claims under the *GATT 1994* or to *also* exercise judicial economy with respect to the United States' defence under Article XX(d). Otherwise, Thailand requests the Panel to explain why it has considered the United States' Article XX(d) defence while exercising judicial economy with respect to Thailand's *GATT 1994* claims.

6.43 The United States considers Thailand's request without basis since, it contends, the Panel found that the application of the EBR to subject Thai shrimp importers breached the Ad Note to Article VI of the *GATT 1994*. Because Article XX(d) applied to claims under the *GATT 1994* and the Ad Note is a provision of the *GATT 1994*¸ the United States considers it appropriate to reach the United States' Article XX(d) defence. Furthermore, the United States disagrees with Thailand's assertion that the Panel should not consider Article XX(d) in view of its findings regarding *lex specialis*. The United States notes that the Panel found that "Article VI of the *GATT 1994* and the Ad Note" constitute *lex specialis*, and not the *Anti-Dumping Agreement*.

6.44 The Panel is of the view that a respondent in a WTO dispute may simultaneously respond to claims presented by the claimant while also raising an affirmative defence under a relevant provision in Article XX of the *GATT 1994*. The Panel notes that the text of the chapeau to Article XX of the

GATT 1994 reads: " ... nothing in *this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures ... " (emphasis added). This text does not on its face limit a panel from considering an affirmative defence under Article XX where it has found a violation under a provision of the *GATT*, including Article VI and/or the Ad Note. In this regard, the Panel recalls its findings that the application of the EBR constitutes specific action against dumping which is not in accordance with the provisions of the *GATT 1994* since it is inconsistent with the Ad Note. The Panel also considers it proper to analyse the United States' defence under Article XX notwithstanding the finding presented in paragraph 6.159 that Article VI of the *GATT 1994* and the Ad Note to Article VI constitute *lex specialis*. In the findings, the Panel refers to Article VI and its Ad Note as *lex specialis* with respect to the other more general provisions of the *GATT 1994* cited by Thailand. The Panel's findings with respect to the applicability of the principle of *lex specialis* do not refer to a defence under Article XX(d) in order to justify a potential violation of Article VI and its Ad Note. Accordingly, the Panel considers additional analysis of the United States' Article XX(d) defence unnecessary and rejects Thailand's request for review of our findings on this issue.

15. Factual findings on risk of default

6.45 Regarding the Panel's analysis of the meaning of "reasonable" in the Ad Note and "necessary" under Article XX(d) of the *GATT 1994*, Thailand submits that these concepts should involve consideration of both the likelihood that anti-dumping duties will increase and the risk of default by importers of subject merchandise due to increased duty liability. With respect to its analysis of the Ad Note, Thailand notes that the Panel commented that "there is no additional obligation under the Ad Note to assess the risk of default of individual importers", and made no factual findings regarding the risk of default on increased duty liability. With respect to its analysis of Article XX(d), Thailand notes that the Panel also did not consider the risk of default. Thailand requests the Panel to make factual findings on the relevance of the risk of default, and whether the United States properly determined an increased default risk. The United States does not consider it necessary for the Panel to evaluate evidence regarding risk of default. However, the United States contends that the Panel should clarify its findings by inserting a statement confirming that the Panel is not suggesting that a Member is precluded from requiring security as in "other cases of customs administration", such as when an importer has a significant risk of default.

6.46 In view of the analytical approach adopted by the Panel in this case, we do not consider that it is appropriate for us to address the parties' evidence regarding the risk of default. In particular, the analytical approach of the Panel does not provide any standard against which to assess that evidence.

B. THE UNITED STATES' COMMENTS ON THE INTERIM REPORT

1. Typographical errors

6.47 Regarding paragraph 1.10, the United States requests replacing the phrase "24 and 25 July 200" with "24 and 25 July 2007". The Panel has corrected this typographical error.

6.48 Regarding paragraph 1.11, the United States requests replacing the phrase "9 September 2007" with "9 October 2007". The Panel has corrected this typographical error.

2. Factual aspects to the dispute

6.49 Regarding paragraph 2.10, the United States requests replacing the phrase "prior to initiation of the anti-dumping or countervailing duty order" with the phrase "prior to initiation of the anti-dumping or countervailing duty investigation." The Panel has corrected this error.

6.50 Regarding paragraph 2.13, the United States submits that US Customs designates importers of certain merchandise, not importers, as "covered cases", and thus requests the Panel to modify the text to read: "US Customs implemented the EBR and required select importers of merchandise designated as 'covered cases' ...". The Panel has corrected this error.

3. Treatment of amendments as part of the measure at issue

6.51 Regarding paragraph 6.48, the United States construes the Panel's analysis as suggesting that the inclusion of certain language in a panel request concerning amendments to measures, or the need to secure a positive resolution to a dispute could be the basis for treating a measure as part of the measure at issue and within the panel's terms of reference. The United States requests the Panel to remove the third and final sentences from the paragraph and base the analysis on the nature of the measure in question. Thailand disagrees with the United States' suggestion to delete the third and final sentences of paragraph 6.48. Thailand notes that the finding by the Appellate Body in *Chile Price Band System* considered both the extent to which the new measure amended the existing measure, and the fact that the request for the establishment included language to encompass amendments. Thailand contends it would be misleading to include the October 2006 Notice within the Panel's terms of reference without basing the decision in part on the statement in Thailand's request for establishment that the measure at issue included any amendments. The Panel has made minor modifications to the text in paragraph 6.48 (7.48 of the Final Report) in order to reflect the rationale presented in *Chile – Price Band System* that an amendment should not change the *essence* of the original measure into something different than what was in force before its issuance.

4. The EBR formula

6.52 Regarding paragraph 6.72 (7.72 of the Final Report), the United States requests the Panel to replace the phrase "the formula would be invalid" in the final sentence of this paragraph with "the formula would not apply" to more accurately characterise the status of the EBR formula in relation to the directive.

6.53 The Panel has made the change requested by the United States.

5. **The relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment**

6.54 Regarding paragraphs 6.108 (7.109 of the Final Report) and 6.111 (7.112 of the Final Report), the United States requests the Panel to modify language to more accurately reflect the relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment. First, the United States suggests that the Panel replace the parenthetical that the system is "(specifically authorised by Article 9.3.1)" with "(which is specifically contemplated in Article 9.3.1)". Second, the United states suggests replacing the parenthetical "(which Members are entitled to apply by virtue of Article 9.3.1 of the *Anti-Dumping Agreement*)" with "(which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*)".

6.55 The Panel has made the changes requested by the United States.

6. Characterisation of the "enhanced" bond requirement

6.56 Regarding paragraph 6.128 (7.131 of the Final Report), the United States suggests replacing the term "extended" with "enhanced" to describe the bonds required under the Amended CBD.

6.57 The Panel has made the change proposed by the United States.

7. The legal standard for determining whether or not the application of the EBR resulted in "reasonable" security requirements

6.58 Regarding paragraphs 6.136 – 6.146, the United States proposes a number of changes to language that, in its view, could be construed as inconsistent with the Panel's positions elsewhere in its Report. First, the United States proposes a number of changes to prevent the Panel from incorrectly paraphrasing the reasonableness standard set forth in the Ad Note. In general, the United States proposes to use the formulation "the likelihood of rates increasing", as the United States considers that the term "likely", or "likely amount" (as used by the Panel in the Interim Report), suggests that a Member must demonstrate substantial certainty.

6.59 Thailand disagrees that the standard applied by the Panel requires a showing of substantial certainty. Thailand also disagrees with the US proposal to use the term "likelihood", for Thailand is concerned that reference to "a likelihood" might mean that so long as one possible outcome is that the amount of final liability may increase over the rate of dumping established in the investigation, there would be "a" likelihood that rates may increase.

6.60 Second, the United States considers that the Panel's use of the term "likely" in the Interim Report's discussion of increases in margins could be read to contradict its point elsewhere in the report that the information on which security requirements must be evaluated is that available "at the time that the [requirement]" is imposed, and not *ex post* rationalization.[52] The United States recalls the Panel's statement in paragraph 6.102 of its Interim Report that, due to the operation of the U.S. retrospective duty assessment system, "there is no certainty that imports entering the United States following imposition of an anti-dumping order are in fact dumped" and that until assessment "it is not possible to state with certainty whether or not those imports are dumped." Since likelihood would need to be evaluated based on information available to the customs authority at the time the security requirement is imposed, the United States has suggested, for example, changing "determine the amount" to "estimate the amount" in paragraph 6.138.

6.61 Thailand submits that the textual changes requested by the United States would reduce the objective standard articulated in the Interim Report to a question of what "roughly approximates" potential margins.[53] As the Appellate Body has made clear in the context of sunset reviews, the mere fact that a determination requires a prospective analysis does not justify a departure from the standard of an objective, impartial and reasoned determination of probability. Thailand asserts that the Panel should not make any revisions to the Interim Report that would suggest that "reasonable security" can be based on a possibility of rates increasing, rather than the "best estimate" by an "objective and impartial investigating authority" that rates "were likely to increase" and a proper determination of "the likely amount of such increase."

6.62 Third, the United States asserts that as in "ordinary cases of customs administration", there may be cases in which an importer has a history of defaulting on its obligations such that *additional* security may be the only means available to the United States to ensure that duties are paid, short of prohibiting that importer from entering goods entirely. The United States claims that the Panel failed to address US arguments regarding risks of default. The United States requests that the Panel consider clarifying its findings to confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require, such as cases in which importers have a demonstrated history of non-payment of liability owed.

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[52] Interim Report, para. 6.144.

[53] US Request for interim Review, para. 13.

6.63 Thailand asserts that none of the parties has argued that a risk of default constitutes a basis *separate* from the amount of liability on which to determine the amount of security. Instead, Thailand considers that any security must be capped at the amount of potential liability and then may be adjusted below the total potential liability based on the default risk of the individual importer. Thailand also asserts that the United States is not correct to state that the Panel does not directly address the United States' arguments regarding risk of default. Thailand asserts that the Panel considered whether it was necessary to consider risk of default and concluded that it was not.[54] Furthermore, Thailand notes that the Panel found that security measures such as the EBR constitute specific action against dumping. As specific action against dumping, such measures may be imposed only in response to situations covered by Article VI and the *Anti-Dumping Agreement*, *i.e.*, injurious dumping. Thailand asserts that the United States' proposal to impose security requirements *above* the amount of potential liability for dumping duties, however, would impose additional burdens on importers based on their financial wellbeing. Thailand asserts that this is not permitted under the Ad Note, which permits only action against dumping. Accordingly, to permit additional security above the potential liability for dumping duties, or security solely on the basis of a risk of default, would expand the scope of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* beyond dumping and include within their scope matters such as the financial structure and strength of importers that they were not intended to address or regulate. Thailand submits that any question of additional security relating to the risk of default could arise only under provisions of the GATT unrelated to "specific action against dumping." [55]

6.64 The United States also asks the Panel to refer to estimates of the "amount" of final dumping liability rather than estimates of the amount of the final "rate" of dumping. The United States asserts that since security for antidumping duties (whether cash deposit or bond) is a quantity based on the total dumping liability, which depends both on the ad valorem rate and the customs value of imports entered at a given time, using the term "dumping liability" rather than the "rate of dumping" in discussing the amount of security that may be required is more appropriate.

6.65 Thailand asserts that the United States has failed to clearly articulate any good reason for the Panel to make the suggested changes. Furthermore, Thailand notes the US argument that liability for anti-dumping duties arises on importation following a finding that dumping is occurring and the publication of an anti-dumping order. Since the Panel finds that the order gives rise to a suspicion of dumping, Thailand is concerned that the changes proposed by the United States would imply that liability for anti-dumping duties may be established on the basis of merely a suspicion of dumping.

6.66 Regarding para. 6.142 of the Interim Report, the United States asks the Panel to delete certain language describing an argument made by the United States early in the proceedings. Thailand did not comment on the change requested by the United States.

6.67 The Panel has made only a limited number of the changes requested by the United States regarding this first issue. In particular, the Panel has declined the US suggestion to replace its own language with references to "the likelihood of rates increasing", for the United States has failed to properly explain the advantages of its formulation over that of the Panel. Generally, the Panel is concerned that the changes proposed by the United States might weaken the standard that the Panel

[54] Interim Report, para. 6.139, footnote 164.

[55] While the Panel failed to address this argument in the Interim Report, Thailand has persistently argued in these proceedings that the Ad Note permits only provisional security measures now further regulated under Article 7 of the *Anti-Dumping Agreement*. The authority for any additional security for duties imposed as definitive dumping measures is regulated by the GATT, including Article XX(d) thereof, rather than the Ad Note or the *Anti-Dumping Agreement*. See Thailand's Request, para. 17 and accompanying citations at note 20; Thailand's Second Oral Statement, para. 61. Thailand again requests the Panel to address this argument in its final report.

applied, consistent with the Ad Note, in the present case. In particular, the Panel is not persuaded that it is inappropriate to expect an investigating authority to make determinations of what is likely to happen in the future. The Panel is not persuaded by the US suggestion that the standard articulated in the Interim Report would require *ex post* rationalization. The Panel considers that an investigating authority is required to comply with the applicable standard by making a prospective determination of the likelihood of rates of dumping increasing on the basis of the information available to it at the relevant time.

6.68 The Panel declines to make any changes in respect of the US comments on the need to consider the risk of default as in "ordinary cases of customs administration". The Panel considers that it already addressed the principal argument of the United States regarding risk of default in note 164 of the Interim Report. The Panel declines to further confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require. The Panel's findings are based on its interpretation of the Ad Note. The Panel does not have a mandate to consider whether or not additional security may be imposed under principles of ordinary customs administration. Although the Ad Note contains the phrase "[a]s in many other cases in customs administration", the Panel considers that such phrase is used for introductory purposes only. If such phrase had been intended to dictate the substantive circumstances under which "reasonable security" could be imposed under the Ad Note, details of such other cases of customs administration would have been spelled out in the Ad Note in detail.

6.69 The Panel accepts the US request to refer to use the term "dumping liability" rather than the "rate of dumping". This is because the amount of security is not merely a function of the rate of dumping in the anti-dumping order, but also of the customs value of the relevant imports. The Panel is not persuaded by Thailand's concerns regarding any suggestion that liability for anti-dumping duties arises pursuant to imposition of an anti-dumping order following a determination of dumping, injury and causation. As noted at paragraph 6.108 of the Interim Report, this is in fact the basis for collecting anti-dumping duties under prospective assessment systems. Regardless of when liability is actually deemed to arise, Article 9.3 of the *Anti-Dumping Agreement* stipulates that, under both the prospective and retrospective assessment systems, "[t]he amount of the anti-dumping duty shall not exceed the margin" of dumping. The Panel has modified paragraphs 7.140 and 7.141 of the Final Report accordingly. The Panel has not modified the reference to "the likely amount of such increase" in paragraph 7.141 of the Final Report in order to maintain consistency with the identical phrase in para. 7.140 of the Final Report (in respect of which the United States did not ask the Panel to include references to duty liability).

6.70 Regarding paragraph 6.188, the United States requests the Panel to modify the fourth and sixth sentences to incorporate modifications suggested for paragraphs 6.136 – 6.146. Specifically, the United States requests that the Panel replace the phrase "that rates of dumping provided for in the anti-dumping order were likely to increase" with the phrase "that there was a likelihood that rates of dumping provided for in the anti-dumping order would increase"; and the phrase "without adequately establishing that anti-dumping duties are likely to increase" with the phrase" without adequately establishing that there was a likelihood that anti-dumping duties would increase". For the same reasons discussed above, Thailand requests the Panel to reject this change. Thailand does not consider the United States to have explained why this change is appropriate in the context of a review of the standard of "necessary" under Article XX(d). For the reasons set forth above in respect of paragraphs 6.136 – 6.146, the Panel declines to make the changes requested by the United States.

6.71 In the absence of any objection from Thailand, the Panel sees no reason not to make the deletion requested by the United States in respect of paragraph 6.142 of the Interim Report (7.144 of the Final Report).

VII. FINDINGS

A. PRELIMINARY ISSUES

1. Parallel panel proceedings in DS343 and DS345

7.1 On 21 November 2006, a month after the establishment of the present Panel, the DSB established a separate Panel in (DS345) *US – Customs Bond Directive* the terms of reference of which also included the application of the EBR to imports of subject shrimp. At that meeting of the DSB, Thailand stated that it had expected the establishment of a single Panel for both proceedings in accordance with Article 9.1 of the *DSU*. In the absence of that single Panel, Thailand indicated that, pursuant to Article 9.3 of the *DSU*, it expected that the same persons would be appointed as panelists in the two disputes and that the timetables would be harmonized. The representative of the United States responded that, although the Panel in DS343 had already been established, the same persons could be appointed to serve as panelists in the two proceedings and the timetables of the separate Panels could be harmonized.

7.2 The meetings to appoint the same members for this Panel and DS345 were held jointly between the two separate complainants, Thailand and India, and the common defendant, the United States. Since the Parties were unable to agree on panellists to serve for these proceedings, on 19 January 2007, Thailand and India requested, in separate letters, that the Director-General determine the composition of the Panel pursuant to Article 8.7 of the *DSU*, and select the same persons to serve as panelists for both proceedings, pursuant to Article 9.3 of the *DSU*. On 26 January 2007, the Director-General composed the two separate Panels consisting of the same members.

7.3 On 9 February 2007, Thailand and India sent separate letters to the Chairman of the two Panels requesting enhanced third party rights in each other's proceedings. On 15 February 2007, the Chairman met with the parties in a joint organisational meeting to hear comments on the proposed Timetable and Panel Working Procedures. At that meeting, as well as in a letter dated 16 February 2007, the United States argued that granting enhanced third party rights to Thailand and India was not necessary in the instant cases.

7.4 After having heard the parties' views, the Panel decided not to grant enhanced third party rights to India and Thailand but instead, opted for a practical approach aimed at ensuring that the parties to both disputes enjoyed adequate opportunity to participate in the proceedings where appropriate. Thus, on 23 February 2007, the Panel sent to the parties a joint Timetable as well as separate, albeit similarly worded, Working Procedures. In this joint communication, the Panel informed the parties that it had decided the following:

> "[The Panel] intends to conduct both proceedings so as to ensure that the parties who are also third parties in each other's proceedings, have adequate opportunity and ability to participate to the fullest extent in a manner which is compatible with the provisions of the *DSU*. To this end, after having heard the parties' views, the Panel intends to take the following steps:
>
> > (i) holding consolidated substantive meetings with the parties (Thailand, India and US);
> >
> > (ii) allowing the complainants during the joint meetings to comment on each others' argumentation, provided they limit themselves to those claims they have in common;

(iii) holding separate Third-Party Sessions, starting with DS343 and asking the Members which are not third-parties to DS345 (i.e., Chile, Mexico, Korea and Viet Nam) to leave the meeting room once the Third-Party Session for DS343 is over. Note that since Thailand and India are third parties to each other's cases, and parties in their own, they would be in the room during the entirety of the joint meetings, including third party sessions;

(iv) *not* allowing submissions in one case to be deemed to be submitted in the other case. The parties could however attach to their third party submissions, their submissions made as parties in the case in which they are complaining party;

(v) issuing separate reports;

(vi) allowing all parties to respond to all questions posed by the Panel in writing."

2. Overview of the Panel's approach to consideration of Thailand's claims

7.5 Thailand has challenged two measures applied by the United States that affect the import of subject shrimp from Thailand. Thailand has first challenged the United States' use of zeroing to calculate the margin of dumping for importers of Thai shrimp subject to definitive anti-dumping duties. Thailand claims that the United States' use of zeroing in this instance is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[56]

7.6 Thailand has also challenged the application of the EBR to subject shrimp from Thailand. Specifically, Thailand challenges the consistency of the application of the EBR, which it claims imposes an impermissible restriction on imports of subject shrimp from Thailand, with the provisions of Article 18.1 of the *Anti-Dumping Agreement*. Subsidiarily and alternatively, Thailand claims that the EBR is also inconsistent with the provisions of Articles 7.1, 7.2, 7.4 and 7.5 of the *Anti-Dumping Agreement*; Article VI:2 of the *GATT 1994* and the Ad Note, which it claims govern the application of provisional anti-dumping measures; and Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, which it claims govern the imposition and collection of anti-dumping duties.

7.7 In addition, Thailand claims that the EBR is inconsistent with XI:1 of the *GATT 1994* by imposing an impermissible restriction on imports of subject shrimp from Thailand; or, alternatively, with Article II:1(a) and the first and second sentences of Article II:1(b) of the *GATT 1994* by imposing impermissible duties or charges on imports of subject shrimp from Thailand. Thailand further claims that the United States acted inconsistently with X:3(a) of the *GATT 1994* by failing to administer its customs laws and regulations relating to bonds in a uniform, impartial and reasonable manner and with Article I of the *GATT 1994* by failing to extend to imports of subject shrimp from Thailand advantages that are provided to imports of shrimp from other countries.

3. Order of analysis

7.8 The Panel will first address Thailand's claim related to zeroing, and will then proceed to address Thailand's claims challenging the application of the EBR.

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[56] As indicated in footnote 46 above, Thailand informed the Panel that it had abandoned its original claims under Articles 2.1, 2.4 and 9.3 of the *Anti-Dumping Agreement* in respect to its zeroing claim. The Panel will therefore not address these claims in this Report.

B. THAILAND'S CLAIM AGAINST THE USE OF ZEROING IN THE ORIGINAL INVESTIGATION

7.9 Thailand submits that the United States used zeroing when calculating the dumping margins for Thai exporters on the basis of weighted average-to-weighted average comparisons in the Final Determination that served as a basis for the Anti-dumping order on subject shrimp from Thailand.[57] According to Thailand, the "zeroing" in which USDOC engaged in this investigation is the same as the "zeroing" in which USDOC engaged in *US – Softwood Lumber V* and *US – Shrimp (Ecuador)*. Thailand submits that the use of such zeroing is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

7.10 In response to a Question from the Panel, the United States asserted that it "is not contesting Thailand's zeroing claim for purposes of this dispute".[58]

1. Main arguments of the parties

7.11 Thailand asserts that WTO panels and the Appellate Body have repeatedly found that the use of zeroing when calculating dumping margins on the basis of weighted average-to-weighted average comparisons is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[59] Thailand notes in this regard that the Appellate Body stated in *US – Softwood Lumber V* that:

> "Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole."[60]

7.12 Thailand further notes that the panel in *US – Shrimp (Ecuador)* recently stated that:

> "There is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2. We have, as is our duty, carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration the consistent line of Appellate Body Reports as mentioned in the previous paragraph. We find the Appellate Body's reasoning persuasive and adopt it as our own."[61]

7.13 Thailand asserts that even the USDOC itself has admitted that it used zeroing in calculating the dumping margins of Thai shrimp exporters on the basis of average-to-average comparisons in the Final Determination and the Anti-Dumping Measure. According to Thailand, the USDOC Decision Memorandum rejected arguments from the Thai exporters and the Government of Thailand urging it not to use zeroing and explained its use of zeroing in the following terms:

> "(i) We disagree with the respondents and the Government of Thailand that we should discontinue our practice of not offsetting dumped sales with non-dumped sales in the

[57] See Exhibit THA-14.
[58] See United States' Responses to First Set of Panel Questions, para. 1.
[59] See e.g. Panel Report, *US – Zeroing (Japan)*, para. 7.86; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Panel Report, *US – Softwood Lumber V*, paras. 7.224 and 8.1(a)(i); Panel Report, *US – Zeroing (EC)*, paras. 7.31-32; Appellate Body Report, *EC – Bed Linen*, paras. 46-66.
[60] Appellate Body Report, *US – Softwood Lumber V*, para. 101.
[61] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.40 *et seq.*

> calculation of the overall weighted-average dumping margin, and thus we have not changed our calculation of the weighted-average dumping margins for the final determination. Specifically, we made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise. See section 773(a) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act."[62]

7.14 Thailand submits that there can therefore be no dispute that this is exactly the same methodology as was found to be inconsistent with Article 2.4.2 in *US – Softwood Lumber V*. Thailand also asserts that this is exactly the same methodology as was found to be inconsistent with Article 2.4.2 by the *US – Shrimp (Ecuador)* panel.

7.15 Thailand submits that, for the same reasons as articulated by the Appellate Body in *US – Softwood Lumber V* and the recent panel in *US – Shrimp (Ecuador)*, the use of this zeroing methodology by the USDOC in calculating the dumping margins of Thai shrimp exporters was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Accordingly, Thailand requests that the Panel find that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the dumping margins of the Thai exporters in the Final Determination and the Anti-Dumping Measure.

7.16 As noted above, the United States is not contesting Thailand's Article 2.4.2 claim. Furthermore, the United States acknowledges that the same type of "zeroing" occurred in the investigation of shrimp from Thailand as in the relevant investigation *US – Shrimp (Ecuador)*. The United States further recognizes that a measure using a similar calculation was the subject of the *US - Softwood Lumber V* report, and the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence, because of that calculation.

2. Evaluation by the Panel

7.17 As is evident from the arguments of the parties, the issue we are confronted with in respect of Thailand's Article 2.4.2 claim is very similar to the issue addressed by the panel in *US – Shrimp (Ecuador)*. Since we agree with the approach adopted by that panel, our findings regarding Thailand's claim closely resemble, and refer extensively to, the findings of that panel. Given that the United States does not contest Thailand's claim, we first consider our role under Article 11 of the *DSU*, and the burden of proof to be discharged by Thailand if it is to succeed in its claim. We then consider the more substantive issues of whether Thailand has established that the USDOC "zeroed" in the measure at issue, and whether Thailand has established that the methodology used by USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*. Thereafter, we consider whether Thailand has established that the methodology applied by USDOC is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

(a) The role of the Panel under Article 11 of the *DSU*

7.18 Article 11 of the *DSU* provides:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, *a panel should make an objective assessment of the matter before it, including an objective assessment of the*

[62] Decision Memorandum, Exhibit THA-16, p. 8.

> *facts of the case and the applicability of and conformity with the relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."[63] (emphasis added)

7.19 Notwithstanding the US decision not to contest Thailand's claim, we are still bound by Article 11 of the *DSU* to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

(b) Burden of proof

7.20 The panel in *US – Shrimp (Ecuador)* made the following findings in respect of burden of proof:

> "Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof.
>
> The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence. Ecuador, as the complaining party, must therefore make a prima facie case of violation of the relevant provisions of the relevant WTO agreements. The burden would then shift to the responding party (here the United States), to adduce evidence to rebut the presumption that Ecuador's assertions are true. In this context, we recall that 'a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.'
>
> In our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's

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[63] Article 11 of the *DSU*. We note that Article 17.6 of the *Anti-Dumping Agreement* – setting forth the special standard of review applicable to disputes under the *Anti-Dumping Agreement* – also applies to this dispute. Article 17.6 provides that:

> "17.6 In examining the matter referred to in paragraph 5:
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Given that the United States does not contest Thailand's claims, it is not necessary for us to consider in detail the implications of the standard of review in this dispute.

> claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a prima facie case.
>
> (...)
>
> Thus, notwithstanding the fact that the United States is not seeking to refute Ecuador's claims, we must satisfy ourselves that Ecuador has established a prima facie case of violation, and notably that it has presented 'evidence and argument... sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.' "[64] (footnotes omitted)

7.21 In support, the panel relied on Appellate Body rulings in *EC – Hormones* and *US – Gambling* stressing the importance of the obligation on complaining parties to establish a prima facie case. We agree with this reasoning of the panel in *US – Shrimp (Ecuador)*, and adopt it as our own. Accordingly, notwithstanding the fact that the United States is not seeking to refute Thailand's claims, we must satisfy ourselves that Thailand has established a prima facie case of violation of Article 2.4.2 of the *Anti-Dumping Agreement*.

(c) Has Thailand established that the USDOC "zeroed" in the measure at issue?

7.22 We now consider whether Thailand has established that USDOC "zeroed" in the measure at issue.

7.23 Thailand has referred to USDOC's Decision Memorandum in support of its factual assertion that USDOC "zeroed" in the measure at issue. Furthermore, the United States acknowledges that USDOC did zero as alleged by Thailand. In these circumstances, we are satisfied that Thailand has provided sufficient evidence that USDOC zeroed in the measure at issue.

(d) Has Thailand established that the methodology used by USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*?

7.24 We now determine whether the "zeroing" methodology used by the USDOC to calculate the dumping margins at issue here was, as alleged by Thailand, the same in all legally relevant respects as the one the Appellate Body, in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

7.25 The Appellate Body in *US – Softwood Lumber V*, described "zeroing" as applied by the USDOC in that investigation as follows:

> "First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the 'dumping margin' for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no "dumping margin" for that comparison. USDOC aggregated the results

[64] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.7 – 7.11.

> of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price—those where the USDOC considered there was a "dumping margin"—after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada)."(emphasis original)[65]

7.26 The Appellate Body also added that:

> "Thus, as we understand it, by zeroing, the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price. Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole."[66]

7.27 In order to demonstrate that USDOC engaged in similar weighted average-to-weighted average zeroing in the investigation at issue, Thailand relies on the abovementioned USDOC Decision Memorandum. That document establishes that USDOC "made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise (...) [and] then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin."[67]

7.28 Furthermore, we note that the United States acknowledges that the same type of "zeroing" occurred in the investigation of shrimp from Thailand as in the relevant investigation *US – Shrimp (Ecuador)*, and that that panel found that the zeroing methodology at issue in *US – Shrimp (Ecuador)* was the same methodology as at issue in *US – Softwood Lumber V*.[68]

7.29 Having examined the description of the methodology employed by the USDOC in its Decision Memorandum, we are satisfied that Thailand has demonstrated that the methodology applied by the USDOC in calculating the margins of dumping for subject merchandise from Thailand was the same in all legally relevant respects as the methodology which was found by the Appellate Body in *US – Softwood Lumber V* to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. In our view, the abovementioned acknowledgement by the United States lends support to our conclusion that Thailand has met its burden to make a prima facie case.

(e) Has Thailand established that the methodology applied by USDOC is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*?

7.30 We now turn to the legal analysis of Thailand's claim, i.e. whether the measure it challenges is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Article 2.4.2 provides as follows:

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[65] Appellate Body Report, *US – Softwood Lumber V*, para. 64 (footnote omitted).
[66] Appellate Body Report, *US – Softwood Lumber V*, para. 65.
[67] Decision Memorandum, Exhibit THA-16, p. 8.
[68] See *US – Shrimp (Ecuador)*, para. 7.34.

"Article 2

Determination of Dumping

...

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.31 Thailand has relied on the Appellate Body Report in *US – Softwood Lumber V* and the panel report in *US – Shrimp (Ecuador)* in support of its claim of inconsistency with Article 2.4.2 and, in particular, on the Appellate Body's finding that margins of dumping may only be calculated for a product as a whole under the weighted average-to-weighted average methodology provided for in the first sentence of Article 2.4.2.

7.32 While we are not bound by the reasoning in prior Appellate Body and/or panel reports, adopted Reports create legitimate expectations among WTO Members,[69] and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[70]

7.33 The panel in *US – Shrimp (Ecuador)* explained its understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* as follows:

"The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centered on whether a Member could take into account 'all' comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the *Anti-Dumping Agreement*. The Appellate Body found that 'it [was] clear from the texts of [Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by the investigating authority'. The Appellate Body further considered that the definition of 'dumping' contained in Article 2.1 applies to the entire *Agreement*, including Article 2.4.2, and that '"[d]umping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type,

[69] See Appellate Body Report, *Japan Alcoholic Beverages II*, p. 14; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109; Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112.

[70] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

> model, or category of that product."[71] Next, the Appellate Body relied on its Report in *EC – Bed Linen*, in which it stated that '[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole.' Thus, the Appellate Body noted that "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product." The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole. On this basis, the Appellate Body held that zeroing, as applied by the USDOC in *US – Softwood Lumber V*:
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> > mean[t], *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.
>
> The Appellate Body on this basis concluded that the treatment of comparisons for which the weighted average normal value is less than the weighted average export price as "non-dumped" comparisons was not in accordance with the requirements of Article 2.4.2 of the *Anti-Dumping Agreement*. As a result, the Appellate Body upheld the Panel's finding that the United States had acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing."[72]

7.34 The panel in *US – Shrimp (Ecuador)* further found that "there is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2."[73]

7.35 We have carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration the finding of the panel in *US – Shrimp (Ecuador)* that there is a consistent line of Appellate Body Reports condemning "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations. Given that the issues raised by Thailand's claim are identical in all material respects to those addressed by the Appellate Body in *Softwood Lumber V*, we are satisfied that Thailand has established a prima facie case that the use of zeroing by the USDOC in the calculation of the margins of dumping in respect of the measure at issue is inconsistent with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement*

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[71] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.
[72] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.38 and 7.39 (footnotes omitted).
[73] Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.

because the USDOC did not calculate these dumping margins on the basis of the "product as a whole" in that it failed to take into account all comparable export transactions in calculating the margins of dumping.

7.36 In light of our finding that Thailand has made a prima facie case of violation in respect of the measure at issue, and in the absence of arguments from the United States to the contrary, we rule in favour of Thailand. We therefore conclude that the USDOC, by using "zeroing" in the manner described above, has acted inconsistently with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement*.

C. THAILAND'S CLAIM AGAINST THE APPLICATION OF THE EBR TO SUBJECT SHRIMP FROM THAILAND

1. Scope of the measure concerned

7.37 Thailand's claims concern the application of the Amended CBD, i.e. the EBR, to imports of subject shrimp from Thailand. Therefore, before entering into an analysis of each of Thailand's claims, the Panel first must identify which are the legal instruments that comprise the Amended CBD.

7.38 We recall that our 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 Thailand in document WT/DS343/7, the matter referred to the DSB by Thailand 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." [74]

7.39 In its Request for Establishment, Thailand specified that the measure at issue consists of the following legislative/legal instruments:

(a) the July 2004 Amendment;[75]

(b) the August 2005 Clarification;[76]

(c) the document Current Bond Formulas;[77] and

(d) "any amendments or extensions to the [EBR], and any related or implementing measures."[78]

7.40 In its first written submission, Thailand additionally identified the October 2006 Notice[79], which was published on 24 October 2006 following the submission of Thailand's Request for Establishment, as one of the four instruments that amends and clarifies the United States' policy related to continuous customs bonds and the operation and application of the EBR.[80] The United States has not contested the inclusion of the October 2006 Notice within this Panel's terms of reference.

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[74] WT/DS343/8.
[75] Exhibit THA-2.
[76] Exhibit THA-4.
[77] Exhibit THA-3.
[78] WT/DS343/7, p. 3.
[79] Exhibit THA-5.
[80] Thailand's first written submission, para. 51.

7.41 We recall that the Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their own motion if the parties to the dispute remain silent on those issues.[81] Whether a measure falls within our terms of reference is clearly an issue that goes to the root of our jurisdiction. Therefore, even though the United States does not contest the inclusion of the October 2006 Notice, we must determine whether this Notice is within our terms of reference.

7.42 Article 7 of the *DSU*, governing the Panel's terms of reference, Article 4 of the *DSU*, governing a complainant's request for consultations, and Article 6 of the *DSU*, governing a complainant's request for establishment of a panel are relevant to this issue. Article 7.1 of the *DSU* provides:

> "Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> > To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

7.43 Article 4.4 of the *DSU* provides:

> "All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and *shall give the reasons for the request, including identification of the measures at issue* and an indication of the legal basis for the complaint." (emphasis added)

7.44 Article 6.2 of the *DSU* provides:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference." (emphasis added)

7.45 The Appellate Body affirmed in *US – Upland Cotton* that, "pursuant to Article 7 of the *DSU*, a panel's terms of reference are governed by the request for establishment of a panel".[82] As evident from the text of Articles 4 and 6 of the *DSU*, the complainant must identify the measure at issue in both the request for consultations and request for panel establishment.

7.46 The Appellate Body previously considered in *Chile – Price Band System* whether an amendment to a measure that was enacted *after* the Panel had been established should nevertheless be considered as within the Panel's terms of reference.[83] In that case, the Appellate Body determined that the amendment at issue should be considered as part of the measure at issue since the amendment

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[81] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; see also Appellate Body Report, *US – Carbon Steel*, para. 123.

[82] See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing to Appellate Body Report, *US – Carbon Steel*, para. 124.

[83] Appellate Body Report, *Chile – Price Band System*, para. 137.

served the purpose of clarifying the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment.[84] This determination was considered consistent with earlier jurisprudence[85] and was also found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the *DSU*, to "secure a positive solution to a dispute". The Appellate Body explained:

> "If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[86]

7.47 In the case before us, we note that the October 2006 Notice further describes the process to determine enhanced continuous bond amounts for importations involving what the United States describes as elevated collection risks, and seeks public comment concerning that process. We also note that the United States describes the 2006 Notice as the "comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on CBP's Web site, and the August 2005 Clarification".[87]

7.48 We agree with and adopt as our own the Appellate Body's rationale as provided in *Chile – Price Band System*. In the dispute before us, the United States published the October 2006 Notice after this Panel had been established. Moreover, in our view, Thailand's inclusion of the language "any amendments or extensions to the [EBR], and any related or implementing measures" in its Request for Establishment of a Panel[88] is broad enough to allow for the inclusion of the 2006 Notice. The October 2006 Notice seeks to clarify the legislation that established the measure at issue and does not change the essence of the original measure into something different than what was in force before its issuance (in this regard, we recall that the October 2006 Notice includes in its text the statement that it is the "comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on [US Customs'] Web site, and the August 2005 Clarification"). In our view, the inclusion of October 2006 Notice allows the Panel to achieve a positive resolution to the dispute, and additionally, accords with the interests of both parties.

7.49 The Panel therefore finds that the October 2006 Notice is properly part of the measure at issue and within the Panel's terms of reference.

2. Article 18.1 of the *Anti-Dumping Agreement* and the Ad Note

7.50 Thailand submits that the application of the EBR to subject shrimp from Thailand is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*. Article 18.1 provides that:

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[84] Appellate Body Report, *Chile – Price Band System*, para. 137.

[85] The Appellate Body in *Chile – Price Band System* cited to a passage from the Panel's finding in *Argentina – Footwear (EC)* which concluded that modifications made to the measure at issue during the panel proceedings did:

"… not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint." (See Appellate Body Report, *Chile – Price Band System*, para. 138.)

[86] Appellate Body Report, *Chile – Price Band System*, para. 144.

[87] See Exhibit THA-5, p. 62277.

[88] WT/DS343/7, p. 3.

> "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."

7.51 Thailand submits that the application of the EBR to subject shrimp from Thailand constitutes specific action against dumping in a form other than a permitted response to dumping under the provisions of *GATT 1994* as interpreted by the *Anti-Dumping Agreement*. The United States rejects Thailand's claim.

7.52 We begin our evaluation of Thailand's claim by considering whether or not the application of the EBR constitutes "specific action against dumping". Thereafter, we turn to the issue of whether or not the EBR is applied "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

3. Does the application of the EBR constitute "specific action against dumping"?

(a) Main arguments of Thailand

7.53 Thailand asserts that the application of the EBR constitutes "specific action against dumping" because it is (i) "specific action" in response to dumping that (ii) also acts "against" dumping.

(i) "Specific action" in response to dumping

7.54 Thailand notes that in *US – Offset Act (Byrd Amendment)*, the Appellate Body stated that:

> "[A] measure that may be taken only when the constituent elements of dumping … are present, is a 'specific action' in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement* … [i]n other words, the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping …"[89]

7.55 According to Thailand, the key consideration for the Appellate Body was the "strength of the link between the measure and the elements of dumping" and the "degree of correlation between the scope of application of the measure and the constituent elements of dumping".[90] For this reason, the Appellate Body stated that the test "is met not only when the constituent elements of dumping are 'explicitly built into' the action at issue, but also where … they are implicit in the express conditions for taking such action".[91] Thailand submits that the constituent elements of dumping are implicit in the express conditions for the application of the EBR since it may be applied only to goods subject to a US anti-dumping duty order.

(ii) Specific action "against" dumping

7.56 According to Thailand, the Appellate Body in *US – Offset Act (Byrd Amendment)* interpreted the term "against" in Article 18.1 of the *Anti-Dumping Agreement* as relating to "an idea of opposition, hostility or adverse effect".[92] Thailand asserts that the Appellate Body held that for a measure to be "against" dumping:

> "[I]t is necessary to assess whether the design and structure of a measure is such that the measure is "opposed to", has an adverse bearing on, or, more specifically, has the

[89] *US – Offset Act (Byrd Amendment)*, para. 239.
[90] *US – Offset Act (Byrd Amendment)*, para. 244.
[91] *US – Offset Act (Byrd Amendment)*, citing with approval Thailand's Appellee Submission, para. 14.
[92] *US – Offset Act (Byrd Amendment)*, para. 250.

> effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices."[93]

7.57 Thailand further asserts that the Appellate Body clarified that action "against" dumping does not require direct contact between the measure and the dumped product or entities responsible for the product. The Appellate Body stated that:

> "[T]here is no requirement that the measure must come into direct contact with the imported product, or entities connected to, or responsible for, the imported good such as the importer, exporter, or foreign producer."[94]

7.58 Thailand argues that the Appellate Body and panel agreed that "the test should focus on dumping … as *practices*".[95]

7.59 Thailand submits that the application of the EBR to subject shrimp from Thailand has an adverse bearing on, and the effect of dissuading, the practice of dumping. Furthermore, the EBR comes into direct contact with the imported product and entities connected to its import such as the importer, exporter or foreign producer. First, Thailand asserts that the application of the EBR dissuades the practice of dumping by dissuading imports into the United States of subject shrimp. Second, Thailand asserts that the EBR has an adverse bearing on both the practice of dumping and the entities responsible for the dumped goods as it results in enhanced bonds significantly greater than those required of other goods solely because those goods are subject to anti-dumping measures. Thailand asserts that the adverse bearing of the EBR is compounded by the demands of sureties for 100 per cent collateral to secure the enhanced bonds.[96] According to Thailand, the adverse bearing of the EBR is further compounded by the "stacking" of bonds, and accompanying collateral, year after year.[97] Thailand argues that the adverse effects of the EBR include the tying up of assets and cash that forces companies to forego business opportunities, and the fees charged by surety companies.

(b) Main arguments of the United States

7.60 The United States denies that the application of the EBR is either "specific action" in response to dumping, or specific action "against" dumping.

(i) "Specific action" in response to dumping

7.61 Regarding Thailand's argument that the EBR is specific to dumping because it may be and has been applied only to importers of goods subject to a US anti-dumping order[98] and the formula it contains uses the anti-dumping rate as one variable in determining the amount of additional security that may be prescribed,[99] the United States asserts that these features merely reflect the fact that the directive is, like various measures referred to by the Appellate Body in *US – Offset Act (Byrd Amendment)*, "related to" dumping or subsidies insofar as the unsecured liability it is designed to secure is anti-dumping and countervailing duty liability.[100] The United States asserts that, according

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[93] *US – Offset Act (Byrd Amendment)*, para. 254.
[94] *US – Offset Act (Byrd Amendment)*, para. 253.
[95] *US – Offset Act (Byrd Amendment)*, para. 253.
[96] See paragraph 2.18 above discussing collateral requirements to secure enhanced bonds.
[97] See paragraph 2.18 above discussing collateral requirements to secure enhanced bonds.
[98] Thailand's first written submission, paras. 162-4 and 169.
[99] Thailand's first written submission, paras. 165-67.
[100] With regard to the decision of the USCIT that Thailand cites in support of its position that the directive as applied to importers of shrimp from Thailand is "specific" to dumping (Thailand's first written submission, para. 167), the United States notes that the litigation relates to certain claims under US law (rather than the *WTO Agreements*) and is ongoing. Moreover, the October 2006 Notice was issued just prior to the

to the Appellate Body, "an action that is not 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[101] The United States asserts that the directive is applied in response to noncollection risk – the mere fact that the particular noncollection risk at issue relates to anti-dumping duties is not a sufficient basis to conclude that the directive itself is "taken in response to the constituent elements of dumping or a subsidy." The United States submits that "the constituent elements of 'dumping'" are not "built into the essential elements" of the additional bond directive,[102] since US Customs does not determine anti-dumping or countervailing duty margins, and the directive does not purport to establish margins of dumping or subsidization. The United States also asserts that the additional bond directive does not apply to all entries subject to anti-dumping or countervailing duties – rather it only applies to those for which a specific noncollection risk has been identified. The United States submits that the sole reason the directive is designed to secure anti-dumping liability is because the vast majority of unsecured liability that has resulted in noncollection happens to be anti-dumping duty liability.

7.62 The United States rejects Thailand's argument that the directive is "not specifically related to matters other than dumping."[103] According to the United States, the fact that the additional bond directive is based on noncollection risk, rather than the constituent elements of dumping or subsidization, is evident in the text of the directive itself and associated materials. The United States asserts that none of the information US Customs uses to determine that merchandise should be identified as "special category" merchandise subject to the amended directive – previous collection problems, payment history, indications that the liquidated duty rates may exceed existing security – has any relation to the constituent elements of dumping or subsidization.[104] Likewise, none of the information US Customs requests for purposes of establishing individual bond amounts – prior history of paying import duties, the value of the merchandise to be secured, the degree of supervision US Customs exercises over the transaction, the prior record of the importer in honoring bond commitments, and evidence of the importer's ability to pay duties assessed – has any bearing on the constituent elements of dumping or subsidization.[105] The United States submits that all of these factors are, however, relevant to establishing noncollection risk.

7.63 The United States acknowledges that the formulas for determining bond amounts incorporate the anti-dumping rate, but only because from the standpoint of US Customs it is the best and only available baseline proxy of duties that ultimately may be assessed. According to the United States, the inclusion of the anti-dumping rate in the formulas thus does not support the conclusion that the directive itself relies on the constituent elements of dumping or subsidization.

(ii) Specific action "against" dumping

7.64 The United States further submits that a review of Thailand's assertions demonstrates that the additional bond directive does not meet the second prong of the test set forth by the Appellate Body under Article 18.1: it is not an action taken "against" dumping or subsidization. The United States rejects Thailand's argument that the bond directive is an action "against" dumping because "it results in enhanced bonds significantly greater than those required of other goods solely because those goods

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release of the decision referenced by Thailand, and the court did not squarely address the Notice in its findings. See Exhibit THA-9.

[101] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262.
[102] Appellate Body Report, *US – 1916 Act*, para. 130.
[103] Thailand's first written submission, para. 175.
[104] Exhibit THA-5, p. 62,277.
[105] Exhibit THA-5, p. 62,277.

are subject to anti-dumping measures."[106] The United States asserts that the higher bond is not required "solely because those goods are subject to anti-dumping measures."[107] Rather, the directive is applied to importers of certain goods because US Customs has determined that those importers pose a higher risk of default. The United States argues that the fact that this potential liability and risk of default happen to be attributable to certain anti-dumping and countervailing duties does not permit the conclusion that the directive is an action "against" dumping and subsidization.

7.65 The United States asserts that actions by sureties and other private parties, including sureties' fees and collateral requirements associated with these imports, do not constitute evidence that the directive itself is an action "against" dumping or subsidization. The United States submits that US Customs does not set surety fees, nor does it require importers to post collateral in support of bonds. The United States asserts that US Customs is a third party beneficiary to bond contracts, which are private contracts negotiated between the surety and the importer.

7.66 Furthermore, the United States asserts that the Appellate Body noted in *US – Offset Act (Byrd Amendment)* that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."[108] According to the United States, the *GATT 1994* and the *Anti-Dumping Agreement* do not prohibit the United States from collecting the anti-dumping duties in question, and the bond requirement facilitates its ability to do so.

(c) Evaluation by the Panel

7.67 In considering the text of Article 18.1 of the *Anti-Dumping Agreement*, we note that the relevant language was considered in detail by the Appellate Body in *US – Offset Act (Byrd Amendment)*. In that case, the Appellate Body found:

> "Looking to the ordinary meaning of the words used in these provisions, we read them as establishing two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be "specific" to dumping or subsidisation. The second is that a measure must be "against" dumping or subsidisation. These two conditions operate together and complement each other. If they are not met, the measure will not be governed by Article 18.1 of the *Anti-Dumping Agreement* or by Article 32.1 of the *SCM Agreement*. If, however, it is established that a measure meets these two conditions, and thus falls within the scope of the prohibitions in those provisions, it would then be necessary to move to a further step in the analysis and to determine whether the measure has been "taken in accordance with the provisions of *GATT 1994*", as interpreted by the *Anti-Dumping Agreement* or the *SCM Agreement*. If it is determined that this is not the case, the measure would be inconsistent with Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[109]

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[106] Thailand's first written submission, para. 186.

[107] Thailand's first written submission, para. 186.

[108] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258. The fact that the Appellate Body was analysing a measure affecting private parties' ability to file petitions does not provide a basis to distinguish the instant facts from those before the Appellate Body in *US – Offset Act (Byrd Amendment)*. Contrary to Thailand's assertion, the "WTO-consistent" right in question was not the right of a private party to file a petition, as actions by private parties are not themselves subject to a finding of WTO-consistency. Rather, as here, the Appellate Body was evaluating a measure that facilitated the exercise of "WTO-consistent rights" by the government (in that case, accepting applications, conducting investigations, and imposing orders; here, collecting duties owed). *US – Offset Act (Byrd Amendment)*, para. 258.

[109] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 236.

7.68 We agree with this analysis by the Appellate Body, and adopt it as our own. Accordingly, in order to establish whether the application of the EBR constitutes "specific action against dumping", we shall first examine whether or not the application of the EBR is "*specific*" to dumping. If so, we shall then consider whether or not the application of the EBR acts "*against* dumping".

(i) Whether or not the application of the EBR is "specific" to dumping

7.69 The degree of specificity needed for action to fall within the scope of Article 18.1 was addressed by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*. In its report in *US – 1916 Act*, the Appellate Body found that:

> "[T]he ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'. 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present."[110]

7.70 In *US – Offset Act (Byrd Amendment)*, the Appellate Body explained further that:

> "[T]he criterion we set out in *US – 1916 Act* for specific action in response to dumping is not whether the constituent elements of dumping or of a subsidy are explicitly referred to in the measure at issue, nor whether dumping or subsidization triggers the application of the action, nor whether the constituent elements of dumping or of a subsidy form part of the essential components of the measure at issue. Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy. In noting that the 'wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of 'dumping', we did not *require* that the language of the measure include the constituent elements of dumping or of a subsidy. This is clear from our use of the word "also", which suggests that this aspect of the 1916 Act was a supplementary reason for our finding, and not the basis for it. Indeed, we required that the constituent elements of dumping (or of a subsidy) be "present", which in our view can include cases where the constituent elements of dumping and of a subsidy are implicit in the measure."[111]

7.71 We agree with the Appellate Body's interpretation of the phrase "specific action", and adopt it as our own. Accordingly, we shall determine whether or not the application of the EBR is "specific" to dumping by examining whether or not the application of the EBR is inextricably linked to, or has a strong correlation with, the constituent elements of dumping.

7.72 In our view, the constituent elements of dumping are implicit in the express conditions for the application of the EBR, since the EBR may be applied only to goods subject to a US anti-dumping (or countervailing) duty order.[112] If there were no finding that the constituent elements of dumping were

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[110] Appellate Body Report, *US – 1916 Act*, para. 122 (footnote omitted, original emphasis). Although the Appellate Body's finding refers to the phrase "specific action against dumping" in its entirety, the Appellate Body confirmed in *US – Offset Act (Byrd Amendment)* (para. 245) that its finding concerned the phrase "specific action", rather than the word "against".

[111] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 244 (footnotes omitted).

[112] The United States has not disputed the factual accuracy of Thailand's argument (see Thailand's first written submission, para. 163) that the 9 July 2004 Amendment limits the application of the EBR to merchandise upon which USDOC has issued an anti-dumping order, setting out that "[a]ny increase in bond

present, there would be no anti-dumping order against subject shrimp, and therefore no basis for applying the EBR in respect of subject shrimp imports. For this reason, the existence of the constituent elements of dumping is a legal pre-requisite for the application of the EBR. This is further confirmed by the fact that the formula in the Amended CBD for calculating the EBR includes direct reference to the anti-dumping duty rate, and therefore the constituent elements of dumping. If the constituent elements of dumping were not present, the US would not have found cause to determine an anti-dumping rate, and the formula would not apply.

7.73 We note the US argument that although the application of the EBR may be related to dumping, the application of the EBR is not "specific" to dumping because it is "based on non-collection risk rather than the constituent elements of dumping",[113] in the sense that the EBR does not "apply to all entries subject to antidumping or countervailing duties – but only to those for which a specific non-collection risk has been identified".[114] We recall, though, that the Appellate Body has already determined[115] that a measure need not be *triggered* by the constituent elements of dumping in order for that measure to constitute "specific action" in respect of dumping. Nor does the existence of "additional requirements" transform a "specific action against dumping" into something else.[116] Even though the application of the EBR might ultimately be triggered by a risk of non-collection, the fact remains that the EBR is only applied in respect of imports subject to anti-dumping (or countervailing duty) orders. There remains, therefore, a significant degree of correlation between the application of the EBR and the constituent elements of dumping. In our view, such a degree of correlation demonstrates that the application of the EBR is "specific", rather than merely related, to dumping.

(ii) Whether or not the application of the EBR acts "against" dumping

7.74 In our view, a measure will only act "against" dumping if it has some form of adverse bearing on dumping. This is consistent with the approach of the Appellate Body in *US – Offset Act (Byrd Amendment)*, where it found that:

> "[T]o determine whether a measure is "against" dumping or a subsidy, [] it is necessary to assess whether the design and structure of a measure is such that the measure is "opposed to", has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices."[117]

7.75 In light of the ordinary meaning of the term "against", we consider it appropriate to adopt a similar approach in determining whether or not the application of the EBR acts "against" dumping. In doing so, we note that the Appellate Body concluded that the measure at issue in *US – Offset Act (Byrd Amendment)* had an adverse bearing on the foreign producers/exporters because it "created an incentive" for those foreign producers/exporters "not to engage in the practice of exporting dumped or

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liability will become effective when the Department of Commerce (DOC) issues its Order on the case", and that the 10 August 2005 Clarification characterises the 9 July 2004 Amendment as containing "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*".

[113] United States' first written submission, para. 35.

[114] United States' first written submission, para. 39.

[115] In *US – Offset Act (Byrd Amendment)*, the Appellate Body found that the relevant measure constituted "specific action against dumping" notwithstanding the US argument that the relevant measure was not triggered by the constituent elements of dumping, but rather by an applicant's qualification as an "affected domestic producer" which has incurred qualifying expenditures. Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 243.

[116] In *US – 1916 Act*, the Appellate Body held that "an additional requirement" for the taking of action (in that case, a finding of intent) did "not transform the 1916 Act into a statute that does not provide for 'specific action against dumping'". (see Appellate Body Report, *US – 1916 Act*, para. 132).

[117] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

subsidized products or to terminate such practices".[118] In our view, a similar incentive arises as a result of the application of the EBR on imports of subject shrimp. Ordinarily, the application of the EBR results in additional costs[119] that, although initially borne by importers, ultimately impact on foreign producers/exporters of the subject merchandise, just as anti-dumping duties do.[120] As a result of the formulas used to calculate the amount of the EBR, the amount of the EBR, like the amount of anti-dumping duty, is directly linked to a given foreign producer's/exporter's margin of dumping.[121] The higher the margin of dumping, the higher the amount of the EBR, and the higher the cost of the EBR.[122] In order to maintain its level of sales and/or profitability, despite the increased costs for importers as a result of the application of the EBR, foreign producers/exporters have an incentive to reduce, or even eliminate, their margin of dumping (just as they have an incentive to reduce their margin of dumping in order to reduce the amount of anti-dumping duties levied on their goods).[123] Furthermore, shrimp importers have an incentive to avoid the costs associated with the application of the EBR by importing shrimp from foreign producers/exporters whose produce has not been found to have been dumped, and is therefore not subject to the shrimp anti-dumping order. As a result of such incentives, which affect the relevant entities in much the same way as anti-dumping duties do, we find that the application of the EBR constitutes specific action "against" dumping.

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[118] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 256.

[119] The financial costs of obtaining enhanced bonds include the fees and collateral requirements imposed by surety companies for providing such bonds. (See paragraph 2.18 above discussing fee and collateral requirements to secure enhanced bonds). Although the United States does not itself determine the terms and conditions under which surety companies provide bonds, the United States must have been aware that importers would necessarily incur costs in procuring the bonds that it required them to provide.

[120] Although the parties have made arguments regarding the actual impact of the EBR on the volume and market share of imports from Thailand, we do not consider these to be relevant to the issue before us. In our view, Article 18.1 of the *Anti-Dumping Agreement* is concerned with the effect of actions on the practice of dumping, rather than trade flows in the relevant imports. We note that the Appellate Body has confirmed that "the test should focus on dumping [or subsidization] as practices" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 253), and that the appropriate "analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 257).

[121] Thailand also argues that the EBR acts "against" dumping by inflating the margin of dumping for a given shipment. Thailand asserts that the export price on which the determination of dumping is based is a net price from which all shipping costs, including duties, charges, and other costs of importation, including the cost of the EBR, are deducted. Thailand argues that when the cost of the EBR is deducted from the invoiced export price to arrive at the net export price used to determine dumping margins, the result is a lower export price and, therefore, higher dumping margins. The United States submits that Thailand's argument is founded on an incorrect citation to a provision in US law, and a fundamentally incorrect understanding how the USDOC interprets and applies the relevant legal provisions. We recall that we are presently examining Thailand's claim against the EBR as applied against imports of shrimp. Since Thailand has provided no evidence that, in applying the EBR against imports of shrimp, the United States treated the costs of obtaining enhanced bonds as shipping costs to he deducted from the export price, there is no basis for us to conclude that any such application of the EBR acted "against" dumping.

[122] In this regard, the adverse bearing of the application of the EBR is similar to that of the measure at issue in *US – Offset Act (Byrd Amendment)* (where the adverse bearing resulted from the collected anti-dumping duties being transferred to domestic producers), in the sense that the adverse bearing is directly linked to the margin of dumping of the foreign producer/exporter. Indeed, the adverse bearing of the EBR is similar to that of an anti-dumping duty, in the sense that both result in increased costs that the relevant entities have an incentive to avoid or mitigate.

[123] In response to Question 6 from the Panel after the first substantive meeting, the United States asserted that "[i]f the cash deposit rate in the most recently completed administrative review is determined to be zero, any new continuous bond obtained after completion of the administrative review would reflect an enhanced bond amount of $0."

7.76 The United States argues that, rather than being specific action "against" dumping, the application of the EBR merely facilitates the collection of anti-dumping duties. In assessing this argument, we note that in *US – Offset Act (Byrd Amendment)* the Appellate Body disagreed with the panel's finding that the Continued Dumping and Subsidy Offset Act (hereafter the "CDSOA") is a measure against dumping because the CDSOA provides a financial incentive for domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, and that such an incentive would likely result in a greater number of applications, investigations and orders. In particular, we note that the Appellate Body found that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."[124] Upon careful refection, we do not consider that the Appellate Body's reasoning should preclude our finding that the application of the EBR constitutes specific action "against" dumping. Instead, the Appellate Body's reasoning means that we would be precluded from concluding that the application of the EBR constitutes specific action "against" dumping *simply* because it may also facilitate the collection of WTO-consistent anti-dumping duties. However, this does not preclude us from concluding, as the Appellate Body and panel did in *US – Offset Act (Byrd Amendment)*, that the application of the measure at issue constitutes specific action "against" dumping on the basis of other considerations, notwithstanding the fact that the application of that measure might also facilitate the collection of WTO-consistent anti-dumping duties.

7.77 Our finding that the application of the EBR constitutes "specific action against dumping" is supported by the US view that provisional measures taken in the form of bonds constitute "specific action against dumping".[125] If a bond applied as a *provisional* measure should be treated as a "specific action against dumping", it would appear reasonable to conclude that a bond applied as a *definitive* measure should be similarly categorized: in both cases, the adverse bearing of the bond on foreign producers/exporters and importers (and the correlation with the constituent elements of dumping) is the same. The United States asserts, though, that unlike a bond required as a provisional measure, the EBR provides for security after the existence of dumping has been established, pending determination of the facts with respect to payment of duties. The United States submits that the application of the EBR "facilitates the exercise of WTO-consistent rights"[126] – *i.e.*, the collection of duties owed following the imposition of an order. The United States asserts that, by contrast, certain bonds required before an antidumping duty order has been imposed may not be viewed as "facilitating" the exercise of WTO-consistent rights, insofar as, before the order is imposed, it has not been established that a Member is entitled to collect duties. We are not persuaded by the United States' argument, however, since we have already concluded that the fact that the application of the EBR may facilitate the exercise of WTO-consistent rights is not determinative of whether or not the application of the EBR constitutes "specific action against dumping" (in the sense that this fact does not preclude a finding that a measure constitutes "specific action against dumping" on the basis of other considerations).

(iii) Conclusion

7.78 In light of the above, we conclude that the application of the EBR constitutes "specific action against dumping" in the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

7.79 Accordingly, we must now consider the remaining elements of Article 18.1, regarding the question of whether or not the EBR was applied "in accordance with the provisions of *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*.

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[124] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

[125] See United States' Responses to Second Set of Panel Questions, para. 5, in which the United States asserts that "a bond requirement prior to imposition of an order may be considered an action 'against' dumping".

[126] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

4. Was the EBR applied "in accordance with" the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*

7.80 The United States submits that the EBR was applied "in accordance with the provisions of *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*, because the application of the EBR is authorised by the Ad Note. Thailand rejects the US reliance on the Ad Note.

(a) Main arguments of Thailand

7.81 Thailand submits that the Ad Note cannot be read independently of the provisions of the *Anti-Dumping Agreement* to create a fourth permissible response to dumping not provided for in the *Anti-Dumping Agreement*. Thailand further asserts that, in any event, the text of the Ad Note expressly limits its application to provisional measures taken while dumping is "suspected", that is, prior to a final determination of dumping.

7.82 Thailand asserts that Article VI of the *GATT 1994*, which includes as an "integral part" the Ad Note, cannot be read independently of the *Anti-Dumping Agreement*. Thailand notes that Article 1 of the *Anti-Dumping Agreement* provides that the provisions of the *Anti-Dumping Agreement* "govern the application of Article VI of *GATT 1994* in so far as action is taken under anti-dumping legislation or regulations." Thailand argues that the Appellate Body found in *US – 1916 Act* that "Article 1 states that 'an anti-dumping measure' must be consistent with Article VI of the *GATT 1994* and the provisions of the *Anti-Dumping Agreement*."[127] Thailand also states that, similarly, in *Brazil – Desiccated Coconut*, the Appellate Body emphasised that "Article VI of the *GATT 1994*" cannot "be applied independently of the *SCM Agreement* in the context of the WTO" as "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system".[128] According to Thailand, the Appellate Body identified a clear distinction between the previous GATT system, in which Article VI could be invoked separately from the Tokyo Round SCM Code, and the WTO system, in which Article VI cannot be so invoked.[129] Thailand asserts that this distinction applies equally to the *Anti-Dumping Agreement*.

7.83 Thailand submits that, when read in conjunction with the *Anti-Dumping Agreement*, Article VI and the Ad Note permit only three responses to dumping. According to Thailand, the Appellate Body has consistently found 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 ".[130] Thailand asserts that these responses are governed by Articles 7, 8, and 9 of the *Anti-Dumping Agreement*. Thailand further asserts that the United States has also argued this position in recent panel proceedings.[131]

7.84 Thailand understands the United States to argue that the Ad Note permits the imposition of cash deposit and bond amounts in excess of the amount of the margin of dumping currently in effect during the period following the imposition of definitive anti-dumping duties. For Thailand, therefore, the United States argues that Article 9 of the *Anti-Dumping Agreement*, governing the imposition and collection of anti-dumping duties, does not limit the amounts of cash deposits and bonds that may be imposed. Thailand asserts that, in these circumstances, there is a conflict between the provisions of Article 9 of the *Anti-Dumping Agreement*, which expressly limits the measures that may be taken

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[127] Appellate Body Report, *US – 1916 Act*, para. 119.
[128] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.
[129] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.
[130] Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.
[131] Thailand refers in this regard to United States' first written submission to the Panel, *Mexico – Anti-Dumping Measures on Rice*, (WT/DS294) 22 March 2004, para. 274.

following the imposition of definitive anti-dumping duties, and the United States' reading of the Ad Note. Thailand notes that, in cases of conflict between a provision of a multilateral trade agreement, such as the *Anti-Dumping Agreement*, and the *GATT 1994*, the General Interpretative Note to Annex 1A of the *Marrakesh Agreement Establishing the WTO* provides that the provisions of the multilateral trade agreement shall prevail.[132] Thailand submits that for this reason also, the Ad Note cannot be read to confer rights to take action against dumping following the imposition of definitive dumping duties that are not found in Article 9 of the *Anti-Dumping Agreement*.

7.85 Thailand also asserts that the Ad Note limits the permissible measures to a single security in the form of a " cash deposit or bond", rather than a combination of both cash deposits and bonds.

(b) Main arguments of the United States

7.86 The United States submits that Thailand offers an interpretation of the Ad Note in relation to the *Anti-Dumping Agreement* that is inconsistent with the terms of the *Anti-Dumping Agreement* and fails to give the Ad Note any meaning or legal effect, contrary to the relationship between the *GATT 1994* and other WTO Agreements contemplated by the *WTO Agreement*. The United States asserts that the *GATT 1994*, including the Ad Note, is an "integral part" of the *WTO Agreement*.[133] The United States argues that past panels and the Appellate Body have noted that Article VI is "part of the same treaty" as the *Anti-Dumping Agreement*, and "should not be interpreted in a way that would deprive it or the Antidumping Agreement of meaning."[134] The United States argues that panels "should give meaning and legal effect to all the relevant provisions," including the Ad Note. According to the United States, the Ad Note permits Members to require "reasonable security (cash deposit or bond)" for the payment of antidumping and countervailing duties. For the United States, no other provision of the *Anti-Dumping Agreement* or the *GATT 1994* specifically addresses security for the payment of duties after the final determination in an investigation, including the collection of cash deposits, and, moreover, no provision prohibits a Member from requiring this security.

7.87 The United States submits that, instead of "reading Article VI in conjunction with the Antidumping Agreement," as the Appellate Body in *US – 1916 Act* suggested,[135] Thailand, through a misreading of Articles 7 and 9 of the *Anti-Dumping Agreement*, attempts to read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning. The United States asserts that, if accepted, Thailand's various theories would mean that security pending final assessment of anti-dumping and countervailing duties is nowhere permitted by the *Anti-Dumping Agreement*, *SCM Agreement*, or the *GATT 1994*. The United States asserts that, if Thailand's arguments were accepted, Members would not be permitted to maintain security requirements pending final determination of liability. The United States argues that to preclude a Member with a retrospective system from requiring the posting of security prior to the determination of final liability would create a disparity between retrospective and prospective systems. The United States argues that such a conclusion would compromise Members' ability to maintain retrospective duty assessment systems, despite the fact that these systems are specifically contemplated by the text of the Agreement.

[132] The General Interpretative Note states that: "In the event of a conflict between a provision of the General Agreement on Tariffs and Trade and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "*WTO Agreement*"), the provision of the other agreement shall prevail to the extent of the conflict."

[133] Article II:2 of the *WTO Agreement*..

[134] Panel Report, *US – 1916 Act (EC)*, para. 6.97.

[135] Cf. Thailand's Responses to First Set of Panel Questions, paras. 34-37.

(c) Evaluation by the Panel

7.88 At this juncture, we are examining the issue of whether or not the EBR was applied "in accordance with the provisions of *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*. The parties agree that the relevant provision of the *GATT 1994* in this regard is Article VI, and specifically the Ad Note thereto.[136] This is also consistent with the view expressed by the Appellate Body in *US – 1916 Act*.[137] The Ad Note provides that:

> "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."

7.89 We first consider the relationship between the Ad Note and the *Anti-Dumping Agreement*, and the question of whether or not the Ad Note may authorize the imposition of security requirements that are not expressly envisaged by the *Anti-Dumping Agreement*. If we find that the Ad Note may authorize such security requirements, we consider the temporal scope of the security requirements that Members may impose pursuant to the Ad Note. Thereafter, we consider the question of whether or not Members may require security combining both cash deposits and bonds. Finally, we examine whether the application of the EBR constitutes "reasonable" security.

(i) The relationship between the Ad Note and the Anti-Dumping Agreement

7.90 Thailand's basic argument is that Article VI of the *GATT 1994*, including the Ad Note, may not be applied "independently" of the *Anti-Dumping Agreement*, in the sense that it may not provide an independent basis for taking specific action against dumping outside of the provisions of the *Anti-Dumping Agreement*. In this regard, Thailand asserts that the Appellate Body found in *Brazil – Desiccated Coconut* that "Article VI of the *GATT 1994*" cannot "be applied independently of the *SCM Agreement* in the context of the WTO" as "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system".[138] In other words, Thailand argues that if Article VI of the *GATT 1994* were found to provide an independent basis for taking specific action against dumping, such finding would result in fragmented anti-dumping regimes.

7.91 In considering Thailand's argument, we note that the Appellate Body findings relied on by Thailand were prefaced by the following observations:

> "The relationship between the *GATT 1994* and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the *GATT 1947* were incorporated into, and became a part of the *GATT 1994*, they are not the sum total of the rights and obligations of WTO Members

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[136] We note that the *GATT 1994* consists *inter alia* of the *GATT 1947*. Article XXXIV of the *GATT 1947* provides that the annexes to the *GATT 1947* are "an integral part" thereof. The Ad Note, which is contained in Annex I to the *GATT 1947*, is therefore "an integral part" of the *GATT 1947*. As such, the Ad Note is necessarily part of the *GATT 1994*. We conclude from the fact that the Ad Note is included under the heading "Ad Article VI" that the Ad Note is part of Article VI of the *GATT 1994*. Both parties agree with this approach (See e.g. Thailand's second written submission, para. 3, and United States' second written submission, para. 14).

[137] In particular, the Appellate Body clarified "Since the only provisions of the *GATT 1994* "interpreted" by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any "specific action against dumping" of exports from another Member be in accordance with the relevant provisions of Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*". Appellate Body Report, *US – 1916 Act*, para. 124. See also Panel Report, *US – 1916 Act (Japan)*, paras. 6.214-218 and 6.264; and Panel Report, *US – 1916 Act (EC)*, paras. 6.197-6.199.

[138] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

> concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the *GATT 1994* alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the *GATT 1994*, and to the extent that the provisions of the other goods agreements conflict with the provisions of the *GATT 1994*, the provisions of the other goods agreements prevail. *This does not mean, however, that the other goods agreements in Annex 1A, such as the SCM Agreement, supersede the GATT 1994.* As the Panel has said:
>
> > *... the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994.* Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction."[139]

7.92 It is important to note that, despite the complexity of the issue under consideration, the Appellate Body was abundantly clear in stating that Article VI of the *GATT 1994* was not superseded by the *SCM Agreement*. The findings of the panel, which were upheld by the Appellate Body without modification, similarly excluded the possibility that the *SCM Agreement* might be superseded by Article VI of the *GATT 1994*. Thus, neither the panel nor Appellate Body findings in *Brazil – Desiccated Coconut* provide any basis for concluding that Article VI of the *GATT 1994* is superseded by the *SCM Agreement*.[140] We emphasise this point because, in our view, Thailand's position regarding the relationship between the Ad Note and the *Anti-Dumping Agreement* suggests that the latter supersedes the former.

7.93 Thailand correctly notes that the panel and Appellate Body in *Brazil – Desiccated Coconut* found that Article VI could not be applied "without reference" to, or independently of, the *SCM Agreement*. This finding cannot mean, though, that the Ad Note may not authorise action that is not envisaged by the *SCM Agreement* or *Anti-Dumping Agreement*.[141]

7.94 In our view, the findings in *Brazil – Desiccated Coconut* that Article VI may not be applied independent of, or without reference to, the *Anti-Dumping Agreement* simply mean (consistent with the conflict mechanism set forth in the general interpretative note to Annex 1A) that Article VI may not be interpreted to justify action that is prohibited by the *Anti-Dumping Agreement*. It is in this sense that Article VI must be applied with reference to the *Anti-Dumping Agreement*. If the Ad Note authorises conduct, and reference to the *Anti-Dumping Agreement* confirms that such conduct is not prohibited by the *Anti-Dumping Agreement*, we see no basis in the *Anti-Dumping Agreement*, the *GATT 1994*, or the abovementioned findings of the panel and Appellate Body, to prohibit such

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[139] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14 (emphasis added, footnote omitted).

[140] Although the findings of the panel and Appellate Body in *Brazil – Desiccated Coconut* were concerned with the relationship between Article VI of the *GATT 1994* and the *SCM Agreement*, we see no reason why (and the parties have not argued that) those findings should not guide us in assessing the relationship between Article VI and the *Anti-Dumping Agreement*, especially since the Appellate Body's findings concerned the broader "relationship between the *GATT 1994* and the other goods agreement in Annex 1A" to the *WTO Agreement*.

[141] Such result would conflict with the Appellate Body's conclusion that the *SCM Agreement* does not supersede Article VI of the *GATT 1994*.

conduct.[142] Any 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*.[143]

7.95 In our view, such an approach to the relationship between the Ad Note and the *Anti-Dumping Agreement* is entirely consistent with the interpretation set forth by the Appellate Body in *Brazil – Desiccated Coconut*. Contrary to Thailand's argument, we do not consider that our approach reintroduces "the fragmentation that had characterized the previous system".[144] The fragmentation with which the Appellate Body was concerned in *Brazil – Desiccated Coconut* resulted from the fact that, under the GATT regime, Contracting Parties could take anti-dumping action under Article VI even if they had not signed – and were therefore not bound by – the Tokyo Round Anti-Dumping Code. Non-signatories of the Code could therefore act (under Article VI) "independently" of, or "without reference" to the Code. Such fragmentation, which is precluded under the "single undertaking" in the WTO regime, would not be re-introduced by our interpretation of the relationship between Article VI and the *Anti-Dumping Agreement*, since our interpretation is premised on the notion that Article VI may not be applied "independently" of, or "without reference" to, the *Anti-Dumping Agreement*.

7.96 Thailand has not identified any provision of the *Anti-Dumping Agreement* that would prohibit the security requirements resulting from the application of the EBR.[145] Nor are we able to identify any. As a matter of law, therefore, such security requirements would be authorized by the Ad Note, provided they are in conformity with the substantive provisions thereof. This is the issue we will turn to shortly.

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[142] In this regard, we note that Thailand argued in its reply to Question 16 of the First Set of Panel Questions (at para. 38) that "the provisions of Article VI cannot be read to expand on or undermine the specific rules contained in the *Anti-Dumping* and *SCM Agreement*s". This statement is not inconsistent with our interpretation of the relationship between Article VI and the *Anti-Dumping Agreement*: provided there are no "specific rules" contained in the *Anti-Dumping Agreement* regarding security for definitive anti-dumping duties, there is no risk that security action authorized by Article VI would "expand on or undermine" those specific rules. We also note Thailand's reliance on Article 1 of the *Anti-Dumping Agreement*, which provides in relevant part that the provisions of the *Anti-Dumping Agreement* "govern the application of Article VI of *GATT 1994*". Consistent with our reasoning above, we consider that the *Anti-Dumping Agreement* can only govern the application of Article VI to the extent that it expressly addresses issues covered by Article VI. In our view, the *Anti-Dumping Agreement* cannot govern the application of Article VI in respect of security for definitive anti-dumping duties if the *Anti-Dumping Agreement* contains no provisions expressly dealing with such security.

[143] Any other approach would also render other parts of Article VI, such as paragraph 6(b) thereof, inutile. As noted by the panel in *Brazil – Desiccated* Coconut (note 60), the *Anti-Dumping Agreement* "does not replicate or elaborate on Article VI:5 of *GATT 1994*, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of *GATT 1994*. If the *[Anti-Dumping] Agreement* were considered to supersede Article VI of *GATT 1994* altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended."

[144] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

[145] Thailand has not advanced any primary claim that the imposition of reasonable security requirements is inconsistent with any provisions of the *Anti-Dumping Agreement* other than Article 18.1. Since we are examining the applicability of the Ad Note precisely in order to resolve Thailand's Article 18.1 claim, that provision provides no basis – at this stage – for concluding that the application of the EBR is prohibited by the *Anti-Dumping Agreement*. Thailand has argued, by way of "subsidiary and alternative" claims, that the EBR is inconsistent with the provisions of Articles 7.1, 7.2, 7.4, and 7.5, and Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* (see note 266 to Thailand's first written submission). Article 7 contains disciplines regarding the imposition of provisional measures. Since we are presently assessing the application of EBR after the imposition of the anti-dumping order, i.e., as a definitive anti-dumping measure, Article 7 is not applicable. Furthermore, Article 9 is concerned with the imposition and collection of anti-dumping *duties* (see paragraph 7.113). Since the EBR is not an anti-dumping *duty*, the EBR is not governed – let alone prohibited - by that provision.

7.97 Before concluding on the relationship between the Ad Note and the *Anti-Dumping Agreement*, though, we must consider Thailand's assertion that the Appellate Body has found 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'".[146] While we acknowledge that such statements were made by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*, we note that the Appellate Body was not considering the WTO-consistency of security imposed pursuant to the Ad Note in those cases. By contrast, we have conducted a careful examination of the relationship between the Ad Note and the *Anti-Dumping Agreement*, and find that the Ad Note may permit responses to dumping in the form of particular security requirements. In doing so, we note that Appellate Body jurisprudence clearly indicates that the Ad Note has not been superseded by the *Anti-Dumping Agreement*. In such circumstances, we are not prepared to find that the Ad Note has been rendered superfluous by dicta in an Appellate Body Report that does not even refer to the provisions of the Ad Note. Instead, we shall base ourselves on the clear-cut guidance that has been provided by the Appellate Body in *Brazil – Desiccated Coconut*.

7.98 For all the above reasons, we find 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*.

(ii) The temporal scope of the Ad Note

7.99 We recall that the EBR was applied on imports entering the United States after the shrimp anti-dumping order was imposed. The first substantive issue we must consider is whether the temporal scope of the Ad Note covers the period of application of the anti-dumping order (as alleged by the United States), or whether it is limited to provisional measures taken prior to the imposition of the anti-dumping order (as alleged by Thailand).

Ordinary meaning of the text of the Ad Note

7.100 By its express terms, the Ad Note is applicable "pending final determination of the facts in any case of suspected dumping or subsidization". The United States argues that the temporal scope of the Ad Note covers the period of application of the anti-dumping order since, in a retrospective system such as the US system, there remains a "case of suspected dumping" pending completion of the assessment review. Thailand agues that the application of the Ad Note is expressly limited to provisional measures taken while dumping is "suspected", that is, prior to a final determination of dumping. Thailand asserts that the existence of dumping is confirmed once a final determination of dumping is made by the USDOC, such that there can no longer be "any case of suspected dumping" as of the imposition of the anti-dumping order.

7.101 The Ad Note refers to "suspected dumping." We interpret "dumping" in light of Article 2.1 of the *Anti-Dumping Agreement*. Regarding the term "suspected", the United States asserts that this refers to dumping that is "imagined to be possible or likely."[147] Thailand asserts that the ordinary meaning of "suspected" is "that one suspects to exist or to be such".[148] Despite the apparent differences between the definitions advanced by the parties, in fact the parties have merely proposed different elements of one of the definitions set forth in *The New Shorter Oxford English Dictionary* (which defines the word "suspected" in relevant part as "that one suspects to exist or to be such; imagined to be possible or likely"). There is, therefore, no disagreement between the parties in this

[146] Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.
[147] *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th Ed. 1993), p. 3162.
[148] *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th Ed. 1993), p. 3162.

regard. We understand the term "suspected" to refer to dumping that is suspected to exist, in the sense that its existence may be imagined to be likely.[149]

7.102 In order to determine whether or not there remains "a case of suspected dumping" after imposition of a US anti-dumping order, we must carefully consider the analyses of dumping undertaken in the US retrospective system. In order to impose an anti-dumping order, the United States first determines, through an analysis of import entries during a given period of investigation, whether margins of dumping exist, and whether dumped imports cause or threaten to cause material injury to a domestic industry. If a determination of injurious dumping is made, the United States issues an anti-dumping duty order. In its anti-dumping duty order, the United States sets forth *ad valorem* cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other subject producers/exporters. Pursuant to the anti-dumping duty order, importers must post a cash deposit of estimated anti-dumping duties for each import transaction. This cash deposit is based on the overall margin of dumping found for the exporter or producer during the investigation phase. Thereafter, the US retrospective duty assessment system provides that, every twelve months, during the anniversary month of the antidumping duty order, importers, exporters, producers, and domestic interested parties have the opportunity to request that USDOC conduct an assessment review of the import entries that occurred in the prior year (but following imposition of the anti-dumping order). During any such review, the United States analyses all of the import entries for the relevant period of review (i.e. , the prior 12 months) to determine the final amount of the antidumping duty payable on imports from the relevant producer or exporter. For those entries not covered by a request for an assessment review, USDOC instructs US Customs to assess anti-dumping duties at the cash deposit rate required upon entry.

7.103 In our view, there is no certainty that imports entering the United States following imposition of an anti-dumping order are *in fact* dumped. The determination of dumping made during the initial investigation underlying the anti-dumping order does not apply to these imports, since that determination was made on the basis of imports occurring during an earlier period of investigation. Rather, the final determination (of the existence and amount) of dumping is only made in respect of imports entering the United States following imposition of the anti-dumping order when an assessment review is undertaken. Until that time, it is not possible to state with certainty whether or not those imports are dumped. Indeed, the assessment review may demonstrate that those import entries were not dumped, such that no anti-dumping duties may be collected.

7.104 While there is no certainty that import entries subject to an anti-dumping order are dumped, there is a reasonable basis for suspecting that they might be. Such suspicion of dumping results from the finding of dumping made in respect of import entries of subject merchandise during the initial period of investigation, i.e. , the finding of dumping that gave rise to the anti-dumping order. In our view, that suspicion of dumping may last until a final determination of dumping is made in the assessment review, whereupon both the existence and amount of dumping may be determined with precision.[150]

7.105 Thailand asserts that there is no longer any suspicion of dumping once there is a determination of dumping giving rise to the imposition of an anti-dumping order. That determination, however, relates to imports during the period of investigation underlying the initial investigation. It

[149] As noted below at note 184, we do not consider that the mere possibility of dumping would be sufficient to justify reasonable security under the Ad Note.

[150] A new determination of dumping in an assessment review would, of course, give rise to a further suspicion of dumping. Even if the results of the first assessment review indicate that there was no dumping during the period under review, we consider it reasonable to continue to suspect – on the basis of the initial investigation underlying the anti-dumping order – that future imports may be dumped. This interpretation is consistent with, and indeed supported by, note 22 of the *Anti-Dumping Agreement*.

does not relate to imports entering the United States after the anti-dumping order is imposed.[151] Accordingly, the initial determination does not remove the suspicion of dumping in respect of those later imports. In fact, as noted above, that initial determination is actually the basis for the suspicion of dumping in respect of those later imports.

7.106 We note Thailand's argument that the above analysis fails to take into account that in many cases no assessment review is conducted.[152] In those cases, Thailand asserts that, by automatic operation of law, the entries are liquidated at the margin of dumping in effect at the time of importation, i.e. , the amount of the cash deposit of estimated duties. The United States asserts that Thailand's emphasis on "automatic assessment" in its response is misleading. The United States argues that in no case is assessment – whether at the cash deposit rate or otherwise – conducted at the time of entry, and in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability. The United States assert that while, in some cases, the amount of the cash deposit happens to equal the amount of the final liability, it cannot be known at the time of entry whether this will be the case (since it cannot be known whether an interested party intends to request a review).

7.107 Irrespective of whether or not the final assessment in cases where no interested party requests a review may be deemed to be "automatic", there remains no means of knowing whether or not an assessment review will be conducted at the time that the import entry is made. This will only be known once either the assessment review is requested, or the deadline for requesting such review has passed without any such request having been made. Thus, even though imports may ultimately be liquidated at the cash deposit rate in the anti-dumping order, there remains the possibility that an assessment review may be requested, and that such review may indicate that those imports are not dumped (i.e., that no anti-dumping duties are to be assessed). At the time of entry, therefore, such imports may only be suspected of being dumped.

Contextual considerations regarding Articles 5.1 and 9.3.1 of the *Anti-Dumping Agreement*

7.108 Turning to broader contextual considerations regarding Articles 5.1 and 9.3.1 of the *Anti-Dumping Agreement*, Thailand asserts that there is a fundamental difference between the determination in an original investigation of whether dumping exists – and thus is not merely "suspected" – and the determination in a retrospective assessment review of the amount of duties to be collected on particular entries. According to Thailand, this difference is reflected in the text of the

[151] In support of its argument, Thailand refers to a number of provisions of US law. Thus, Thailand asserts that the US anti-dumping law uses the word "suspect" to refer to the period between a preliminary and final determination of dumping. According to Thailand, section 733(b) of the Tariff Act of 1930 provides for a preliminary determination of "whether there is a reasonable basis to believe or *suspect* that the merchandise is being sold, or is likely to be sold, at less than fair value." Thailand asserts that, in contrast, section 735(a)(1) of the Tariff Act provides for a "final determination of whether the subject merchandise *is* being, or is likely to be, sold in the United States at less than fair value." Thailand argues that the USDOC's regulations similarly characterise the final determination of dumping investigation as one that "constitutes a final decision by the Secretary [of Commerce] as to whether dumping or countervailable subsidization *is occurring*." Thailand submits that under US law, therefore, dumping is only "suspected" during the period between the preliminary and final determinations of dumping. This dispute is governed by the covered agreements, not US law. Accordingly, our findings are based on the text of Article VI of the *GATT 1994* (including the Ad Note), and the *Anti-Dumping Agreement* This is consistent with the finding by the Appellate Body in *US – Softwood Lumber IV* that "[t]he manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements." (Appellate Body Report, *US – Softwood Lumber IV*, paras. 56, 65; see also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87 and note 87.) Since our findings are not based on the provisions of US law, we shall disregard Thailand's arguments in respect thereof.

[152] See e.g. Thailand's Responses to Second Set of Panel Questions, paras. 34-39.

Anti-Dumping Agreement, with Article 5.1 referring to an investigation to determine the "existence ... of dumping", and Article 9.3.1 referring only to the "determination of the final liability for payment of anti-dumping duties." Thailand argues 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 (and injury) exist and that the imposition of anti-dumping duties is merited. Thailand argues that if dumping is merely "suspected" after the conclusion of the original investigation and until the final liability for duties on particular imports is determined, all US anti-dumping orders are inconsistent with the basic requirement of Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* that anti-dumping measures may only be imposed when imports are found to be dumped and to be causing, or threatening to cause, material injury to the domestic industry.

7.109 We note that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "the conditions to impose [an anti-dumping duty] are to be assessed with respect to the current situation."[153] We understand this to mean that, according to the Appellate Body, 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 imposition). There is no obligation on Members, at the time of imposition, to establish the existence of dumping prospectively, by reference to any *future* situation. Indeed, any such obligation would be impossible to fulfil. While Members applying a prospective system of anti-dumping duty collection may use their findings in respect of the period of investigation as a proxy for the period following imposition of a definitive anti-dumping measure, there is no obligation on Members to do so.[154] Indeed, Members applying a retrospective system of anti-dumping duty assessment (which is specifically contemplated in Article 9.3.1) choose not to do so. Accordingly, we see no basis to conclude that the United States, which applies a retrospective system, already determines the existence of dumping in respect of future import entries at the time that it imposes an anti-dumping order. The fact that Article 5.1 requires the United States to establish the existence of dumping at the time it imposes such 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.

7.110 Regarding Article 9.3.1, we note that this provision refers to "the determination of the final liability for payment of anti-dumping duties". In a retrospective system, this determination necessarily takes place after the relevant import entries have been made. In our view, part of the process of determining "final liability for payment of anti-dumping duties" is to determine whether or not those entries were dumped.[155] If they were not dumped, there is no "final liability for payment of anti-dumping duties". Conversely, if they were dumped, there is "final liability for payment of anti-dumping duties" (commensurate with the amount of dumping found to exist). Accordingly, we do not accept Thailand's argument that the reference in Article 9.3.1 to the determination of final liability for

[153] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165. Although an investigating authority generally assesses the current situation on the basis of historical data pertaining to a past period of investigation, the panel found that such historical data "is being used to draw conclusions about the current situation" (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58).

[154] Besides, the refund mechanism provided for in Article 9.3.2 of the *Anti-Dumping Agreement* is designed to ensure that Members applying a prospective duty assessment system do not collect anti-dumping duties in excess of the actual amount of dumping.

[155] Thailand asserts that, in an assessment review, the United States does not assess whether the export price for *particular* imports was below normal value to determine the amount of liability under Article 9.3.1. Instead, Thailand asserts that the United States makes *overall* determinations of assessment rates for importers/exporters based on all imports during the period covered by an administrative review, and establishes a single assessment rate for each importer/exporter. We need not examine the factual accuracy of this argument, since in any event it would not change the fact that the existence of dumping – whether for import entries individually, or for import entries overall – is established after those import entries are made. Until such time, the United States may reasonably (on the basis of the anti-dumping order) view those import entries as a "case of suspected dumping".

payment of anti-dumping duties necessarily implies that there has previously been a determination that dumping exists in respect of subsequent imports, and that the levying of anti-dumping duties is merited. Rather, it simply means that there is a case of suspected dumping, and that the levying of anti-dumping duties may be merited.

Contextual considerations regarding the WTO-conformity of cash deposits

7.111 A further contextual consideration arises from the United States' assertion that Thailand's arguments would mean that no security is permissible pending final assessment, including cash deposits. Thailand rejects this argument, asserting instead that the cash deposits required by the United States following the imposition of an anti-dumping order are definitive anti-dumping duties permissible under Article 9 of the *Anti-Dumping Agreement*.[156] Thailand asserts that this is consistent with the view of the Appellate Body in *US – Zeroing (Japan)*, where it held that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales …".[157] The United States maintains that cash deposits are not duties within the meaning prescribed under Article 9 of the *Anti-Dumping Agreement*, but instead are a "form of security" or "estimate of the amount of duties that will ultimately be owed on a given entry."[158] The United States also calls attention to the fact that Article 7.2 of the *Anti-Dumping Agreement* distinguishes cash deposits from duties by stating that "provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond ... ."[159]

7.112 We consider that the US argument raises an extremely important consideration, for the ability to require security is an essential element of a retrospective assessment system (which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*). If security, including even cash deposits, may not be required pursuant to the Ad Note, we consider it important to establish what provision of the *GATT 1994* or *Anti-Dumping Agreement* it may be required under. If security, including even cash deposits, may not be imposed under such other provisions, we consider that an interpretation of the Ad Note permitting such security would be further justified. Thus, even though we are not required to rule on whether or not cash deposits may be imposed pursuant to the Ad Note in order to resolve the dispute before us, this issue is an important contextual consideration to which we should have regard when interpreting the Ad Note.

7.113 As to the question of whether or not cash deposits may be justified under other provisions of the *GATT 1994* or *Anti-Dumping Agreement*, Thailand argues that cash deposits are anti-dumping duties that may be imposed pursuant to Article 9 of the *Anti-Dumping Agreement*. We are not persuaded by this argument, though, for the definition of the term "duty" is not broad enough to encompass cash deposits. In this regard, Thailand has relied on *Black's Law Dictionary* to define "duty" as "4. A tax imposed on a commodity or transaction, esp. on imports" (Black's Law Dictionary, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 523)("*Black's*").[160] Thailand has further asserted that the definition of the term "tax" is "A monetary charge imposed by the government on persons, entities, or property to yield public revenue" (Ibid., p.1469), and that the relevant definition of "charge" is "7. price, cost or expense" (Ibid., p.227).[161] Thailand also distinguished duties from bonds in the following terms:

> "A 'duty' involves a monetary expense to yield public revenue. *A duty has an intrinsic value in itself* and can yield public revenue without further transformation. In

[156] See Thailand's Responses to First Set of Panel Questions, paras. 29-30.
[157] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.
[158] United States' Responses to First Set of Panel Questions, para. 25.
[159] United States' second written submission, para. 16.
[160] See Thailand's first written submission, note 270.
[161] Thailand's first written submission, note 218.

> contrast, a 'bond' is a 'security' instrument reflecting a written promise to pay money if certain circumstances occur. *Its value is not intrinsic to itself*, but rather depends on the transformation of that bond into something of value through, for example, payment of the duties by the surety. Thus:
>
> > Securities differ from most other commodities in which people deal. *They have no intrinsic value in themselves* – they represent rights in something else. The value of a bond, note or other promise to pay depends on the financial condition of the promisor."[162]

7.114 Thailand therefore distinguishes duties from bonds on the basis of whether or not those instruments have intrinsic value in and of themselves. In our view, the notion of intrinsic value provides an equally valid basis for distinguishing duties from cash deposits. Just as security in the form of a bond is without intrinsic value, so too is security in the form of a cash deposit. Although cash may have intrinsic value, a cash deposit, on the other hand, is not liquidated revenue and is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security like a bond. Based on the distinctions drawn above, a cash deposit will not yield public revenue until some point in the future. In the context of the US retrospective assessment system, that point comes when – and only when – either duties are assessed pursuant to an assessment review, or the cash deposits are liquidated once the deadline for requesting an assessment review has expired (without any assessment review having been requested).[163] Until that point, a cash deposit has no intrinsic value in and of itself.

7.115 Furthermore, we note that Article 9.3.1 of the *Anti-Dumping Agreement* refers to circumstances "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis". If the cash deposit applied in a retrospective system were a duty, it would make no sense to talk of the amount of the duty being assessed on a *retrospective* basis, as the amount of the cash deposit, which Thailand refers to as a "duty", is fixed *prospectively*.

7.116 In addition, we observe that Article 9.3 provides that the amount of the anti-dumping duty "shall not exceed the margin of dumping as established under Article 2". The Appellate Body has confirmed that the margin of dumping established in an assessment review is a margin of dumping "as established under Article 2".[164] This is also consistent with note 22 to the *Anti-Dumping Agreement*,

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[162] Thailand's first written submission, para. 204. (emphasis added)

[163] Thailand asserts that the United States' anti-dumping regulations expressly recognize that cash deposits are estimated duties that differ from a security in that "upon the issuance of an order [i.e. following a final determination of dumping], importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a *cash deposit of estimated duties*" (19 CFR § 351.211(a)). Thailand also notes that the US Tariff Act provides that following final determinations of dumping and injury, the USDOC must publish an anti-dumping order that "requires the *deposit of estimated anti-dumping duties* pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited" (Section 736(a)(3) of the Tariff Act, 19 USC § 1673e(a)(3)). According to Thailand, cash deposits of estimated anti-dumping duties are themselves duties. We have already indicated that we shall resolve this dispute on the basis of the provisions of the covered agreements, rather than the provisions of US law. That being said, by definition a security for *estimated* duties is not a duty *per se*. A security for *estimated* duties is merely a security for duties that *may* possibly be collectible in the future. There is no duty in the absence of any such future collection.

[164] In *US – Zeroing (EC)* (para. 130) 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 entries of the subject product (from that exporter) covered by the duty assessment proceeding." In the context of that case (starting with the Appellate Body's reference to the need to establish a margin of dumping (under Article 2) for the product as a whole, and for each exporter or foreign producer (see paras 127-129)) it is clear to us that the Appellate Body was referring to the margin of dumping established in an assessment review as a margin of dumping "established under Article 2".

which applies "when the amount of the anti-dumping duty is assessed on a retrospective basis", and which envisages definitive duties being levied pursuant to "assessment proceeding[s]". Since note 22 accepts that amounts of anti-dumping duties, which (according to Article 9.3) must not exceed the margin of dumping established under Article 2, may be assessed pursuant to assessment proceedings, necessarily note 22 also accepts that the margins of dumping established in assessment proceedings are margins of dumping "established under Article 2". Accordingly, and consistent with Article 9.3, the margin of dumping in the assessment review operates as a ceiling for the amount of anti-dumping duty. If the cash deposit were an anti-dumping duty, and the cash deposit were in excess of the margin of dumping established subsequently in the assessment review, the imposition of that cash deposit would violate Article 9.3. This cannot be a correct interpretation, though, for under this interpretation it would be impossible for a Member requiring cash deposits to know, at the time of application, whether or not it was acting in conformity with Article 9.3.

7.117 We recall Thailand's reliance on the statement by the Appellate Body in *US – Zeroing (Japan)* that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales…".[165] However, in that case the Appellate Body was not addressing, and did not need to address, the issue of whether or not cash deposits constitute duties. The Appellate Body's statement therefore constitutes *obiter dictum* in the discussion of a different issue, which we do not feel compelled to treat as authoritative guidance on the issue before us here. Furthermore, in its earlier Report on *US – Zeroing (EC)*, the Appellate Body included dicta to the effect that, under the US retrospective duty assessment system, "the United States collects security in the form of a cash deposit at the time a product enters the United States, *and determines the amount of duty due on the entry at a later date*."[166] This suggests that in that earlier case the Appellate Body treated cash deposits as a form of security for duties to be collected later, rather than as duties *per se*. Thus, even if we were required to follow Appellate Body dicta, it is unclear exactly how this dicta should be interpreted.

7.118 In addition, we observe that Article 9.3.1 of the *Anti-Dumping Agreement* refers to "refund[s]" to be made in the context of retrospective assessment systems. Article 9.3.1 does not stipulate what precisely must be refunded. Article 9.3.2, by contrast, which applies in the context of prospective assessment systems, refers to "refund[s] ... of any ... duty paid". Unlike Article 9.3.2, therefore, Article 9.3.1 does not characterize what is being refunded as a "duty", even though (as acknowledged by Thailand[167]) Article 9.3.1 is the mechanism by which cash deposits are refunded. If cash deposits were duties, there would have been no need to use different language in Articles 9.3.1 and 9.3.2.

7.119 As further contextual support for our view that cash deposits required following imposition of an anti-dumping order are not anti-dumping duties, we note that Article 7.2 of the *Anti-Dumping Agreement*, regarding provisional measures, draws a clear distinction between a (provisional) "duty" and a "cash deposit". Thailand's argument that cash deposits are duties is therefore at odds with the plain language of Article 7.2.

7.120 Thailand submits that a failure to treat the application of cash deposits as the levying of anti-dumping duties would restrict the right of Members to bring dispute settlement proceedings under Article 17.4 of the *Anti-Dumping Agreement*, which provides that a Member may refer a matter to the Dispute Settlement Body only "if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings ..."[168]

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[165] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.
[166] Appellate Body Report, *US – Zeroing (EC)*, para. 109.
[167] See e.g. Thailand's second written submission, para. 39.
[168] Article 17.4 also provides that "a provisional measure" can be referred to the DSB when considered to be taken contrary to Article 7.1.

Thailand suggests that if definitive anti-dumping duties are only levied pursuant to a final assessment of duties in an administrative review, a US anti-dumping order could not be challenged in WTO dispute settlement proceedings until after that final assessment has taken place (rather than when cash deposits are applied pursuant to the anti-dumping order).

7.121 We do not share Thailand's concerns, though, since Article 17.4 refers to "final action ... by the administering authorities ... to levy definitive anti-dumping duties". Thus, Article 17.4 does not state that definitive anti-dumping duties must have been levied. Rather, Article 17.4 merely requires that final action to levy definitive anti-dumping duties must have been taken. In this context, the word "to" should in our view be interpreted adverbially, to express purpose.[169] Accordingly, the imposition of an anti-dumping order by the United States constitutes "final action ... *to* levy of definitive anti-dumping duties" (emphasis added), in the sense that the order puts in place a mechanism providing for the levying of definitive anti-dumping duties (even though the amount of those duties – if any – is not calculated until some time in the future). If the drafters of Article 17.4 had meant that Members should wait until definitive anti-dumping duties were actually levied before initiating dispute settlement proceedings, the relevant phrase in Article 17.4 would have read "if definitive anti-dumping duties have been levied, or price undertakings accepted".

7.122 Accordingly, we are not persuaded by Thailand's argument that cash deposits may be imposed pursuant to Article 9 of the *Anti-Dumping Agreement* (as anti-dumping duties).[170] Nor has Thailand advanced any other basis for Members to require security in the form of cash deposits. We recall, though, that we consider that the ability of Members to require security such as cash deposits pending final assessment is an essential requirement for the operation of a retrospective assessment system. Such contextual considerations support our interpretation of the ordinary meaning of the Ad Note as permitting such security.

Negotiating history

7.123 Thailand also submits that the negotiating history of the Ad Note and Article VI makes clear that the reference in the Ad Note to "suspected dumping" referred to the period "before anti-dumping duties are actually brought into operation."[171] Thailand refers in this regard to the 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties, wherein "[t]he Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI."[172] According to Thailand, the Ad Note was, in effect, superseded by the adoption of Article 10 of the 1967 Agreement on Implementation of Article VI, the forerunner of Article 7 of the current *Anti-Dumping Agreement*, which provided a more comprehensive regulation of the use of provisional measures.

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[169] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol II, provides that, when used with an infinitive in adverbial relation, the word "to" "indicat[es] a specified purpose, use, function, or intention".

[170] Thailand also asserts that, when it established the current retrospective system, the United States Congress expressly described the function of cash deposits of estimated duties not as to secure potential increases in liability, but rather as to reduce the damage which delayed assessment may cause a domestic industry. According to Thailand, therefore, the Congress considered these payments of estimated duties to fill the same function as anti-dumping measures of remedying injury to a domestic industry. Thailand asserts that cash deposits should, therefore, be governed by Article 9. Consistent with our mandate, our findings are based on a thorough consideration of the relevant covered agreements. We decline to depart from those findings on the basis of statements allegedly made by the United States Congress.

[171] See UN Conference on Trade and Employment, Third Committee: Commercial Policy, Report of the Working Party to Sub-Committee C, 22 January 1948, E/CONF.2/C.3/C/18, paras. 3(vii); 9 and 10.

[172] Thailand refers in this regard to the 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties, L/978, para. 19 (BISD 8S 151).

7.124 The United States rejects Thailand's reliance on negotiating history, arguing that neither Article 7 nor the concept of "provisional measures" existed at the time the Ad Note was negotiated. The United States asserts that the Group of Experts relied on by Thailand stated explicitly that "Article VI made no mention of them [provisional measures]".

7.125 Thailand's argument regarding negotiating history refers to a single paragraph in the 1959 Report of the Group of Experts on Anti-Dumping and Countervailing Duties entitled "Provisional anti-dumping measures". That paragraph provides:

> "19. The Group discussed the question of provisional anti-dumping measures. It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the product under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed."

7.126 In the second sentence of the above extract from their Report, therefore, the Group of Experts "noted that Article VI made no mention of [provisional measures]". Since the Ad Note was introduced into the *GATT 1947* in 1948,[173] and was therefore an integral part of Article VI of the *GATT 1947* at the time that the Group of Experts issued its Report, this statement by the Group of Experts is therefore fundamentally at odds with Thailand's argument that the Ad Note is expressly limited to provisional measures taken prior to a final determination of dumping.

7.127 Regarding Thailand's argument that the 1948 Report of the Working Party that actually adopted the Ad Note understood the term "suspected dumping" to refer to the period "before anti-dumping duties are actually brought into operation", we note that the language cited by Thailand actually arises in paragraph 10 of that Report, which concerns a proposal (item (viii)) from the Netherlands regarding the inclusion of a consultation mechanism. The language is not used in respect of Brazil's proposal (item (vii)) regarding the inclusion of the Ad Note. In particular, the Report reads:

> "10. Item (viii)
>
> In connection with the new paragraph proposed by him in the paper submitted to the Sub-Committee on 9 January the representative of the Netherlands pointed out that the proposal was intended to:

[173] The Ad Note to Article VI was included in Article 34 of the Havana Charter and was incorporated into the GATT in conjunction with the rest of Article 34 in 1948 (see Report of Working Party No. 3 on Modifications to the General Agreement, GATT/CP.2/22/Rev.1 (30 Aug. 1948)).

(a) provide facilities for consultation between Members in cases of suspected dumping before anti-dumping duties are actually brought into operation."

7.128 Since the language of the Report relied on by Thailand did not relate to the Ad Note, its relevance in the present dispute is questionable. In addition, it is by no means clear that the phrase "before anti-dumping duties are actually brought into action" necessarily refers to the period prior to the imposition of an anti-dumping order, since it might equally refer to the period prior to assessment of the anti-dumping duties. Furthermore, that language is in any event not sufficient to contradict the very clear statement of the abovementioned Group of Experts.

7.129 We are considering the relevant negotiating history because Thailand referred to it in support of its claim under Article 18.1 of the *Anti-Dumping Agreement*. We are not referring to the negotiating history pursuant to Article 32 of the *Vienna Convention*, i.e., because we find that our interpretation of the relevant provisions "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." Nor are we referring to the negotiating history because we find it determinative of the issues before us. However, if the Ad Note was not introduced to provide for reasonable security in the form of provisional measures, one might legitimately ask what it introduced for. Since the United States appears to have been applying a form of retrospective assessment system at the time the Ad Note was introduced,[174] one might reasonably speculate that the Ad Note may have been intended to provide for reasonable security for definitive anti-dumping duties, pending final assessment.

7.130 In light of the above, we find 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 US anti-dumping order.

(iii) The combined use of bonds and cash deposits

7.131 We recall that the EBR was applied in conjunction with cash deposits, in the sense that importers had to provide both enhanced bonds and cash deposits covering the same subject import entries. We next consider whether the Ad Note allows the imposition of security requirements combining both cash deposits and bonds, or whether the Ad Note requires Members to choose between either (i) cash deposits or (ii) bonds.

7.132 Thailand asserts that the word "or" in the phrase "cash deposit or bond" in the Ad Note can only be read in the exclusive sense rather than the inclusive sense, so that only a single security in the form of either (i) a cash deposit or (ii) a bond may be applied. Thailand further argues that the question of whether a measure is "reasonable" within the meaning of the Ad Note cannot be resolved simply by reference to the amount of the security. According to Thailand, the manner in which any security is imposed must also be "reasonable". Thailand submits that by mandating that security required specifically for the collection of anti-dumping duties should take the form of either a bond or a cash deposit, the drafters of the Ad Note sought to limit the burdens placed on importers by ensuring that importers would not be required to provide specific anti-dumping security in two different forms at the same time.

[174] The parties disagree on whether or not the United States was applying a retrospective assessment system at the time the Ad Note was introduced into the *GATT 1947*. The United States claims that it was, whereas Thailand claims that it was not. Since this issue is not central to our findings, there is little to be gained in seeking to resolve this issue definitively. We note, though, that even Thailand acknowledges that there may have been cases (outside of the "normal" situation) in which the United States was required to assess anti-dumping after the time of entry of goods (see Thailand's comments on the United States' reply to Question 15 from the Panel at the second substantive meeting, para. 12). The United States must necessarily have applied some form of retrospective assessment in respect of such cases.

7.133 The United States submits that nothing in the text or context supports this reading of the term. According to the United States, the phrase "bond or cash deposit" is a parenthetical that appears after the term "reasonable security" and that term provides relevant context for interpretation. The United States asserts that Thailand fails to explain how requiring two types of security instead of one is relevant to determining what constitutes "reasonable security". The United States also argues that Thailand fails to explain why the Agreement should be read to proscribe Customs from, for example, replacing a portion of the existing cash deposit requirement with a bond requirement. The United States argues that the Appellate Body has interpreted other uses of "or" in the *WTO Agreement*s as covering one or the other item, as well as both items, in a phrase. The United States notes that, in its report in *US – FSC (Article 21.5 – EC II)*, the Appellate Body interpreted Article 21.5 of the *DSU* in this manner. Article 21.5 states:

> "Where there is disagreement as to the existence *or* consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."[175]

7.134 The United States argues that the Appellate Body interpreted this provision to mean that "an Article 21.5 panel may be called upon to examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or, when such measures exist, the 'consistency' of those measures with the covered agreements, *or a combination of both*, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."[176] The United States submits that, like the language interpreted by the Appellate Body in *US – FSC (Article 21.5 – ECII)*, based on the text and context, the "or" in the Ad Note encompasses a cash deposit, a bond, or a combination of both.

7.135 We agree with Thailand's argument that the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. In terms of form, the purpose of the phrase "(cash deposit or bond)" in the Ad Note is to clarify that both cash deposits and bonds constitute reasonable forms of security. Since that is the case, we see nothing in the text of the Ad Note to suggest that the combination of both (otherwise reasonable) forms of security necessarily results in a measure that is unreasonable. In particular, the text of the Ad Note does not provide that the form of security will only be reasonable if *either* (i) cash deposits *or* (ii) bonds are required.

7.136 We consider that an interpretation of the word "or" to permit the combined use of bonds and cash deposits is consistent with the Appellate Body's interpretation of the word "or" in *US – FSC (Article 21.5 – EC II)*. In that case, the Appellate Body found[177] that the word "or" in respect of the phrase "existence or consistency" in Article 21.5 of the *DSU* should be interpreted to permit Article 21.5 proceedings addressing both the "existence" and the "consistency" of implementation measures, not only one or the other. Since the Appellate Body was interpreting a similar use of the word "or" in *US – FSC (Article 21.5 – EC II)*, the Appellate Body's findings regarding that matter offer useful guidance that we consider it appropriate to follow in these proceedings.

7.137 In light of the above, we find that the application of the EBR is consistent with the temporal scope of the Ad Note, and that the United States is entitled to impose security requirements combining both cash deposits and bonds. The final substantive issue for us to examine is whether or not the security requirements established by the EBR in this case were "reasonable" in the meaning of the Ad Note.

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[175] Article 21.5 of the *DSU* (emphasis added).
[176] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60 (emphasis added).
[177] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.

(iv) Whether the application of the EBR resulted in "reasonable" security requirements

7.138 The Ad Note only permits the imposition of "reasonable" security requirements. Thus, the application of the EBR may only be found to be in accordance with the Ad Note to the extent that it provides for "reasonable" security. The United States asserts that the application of the EBR provided for reasonable security, whereas Thailand contends that the resultant security requirements were not reasonable. As noted in the preceding section, the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. Having already dealt with Thailand's claim regarding the form of the security required by the United States, in this section we consider the reasonableness of the amount thereof.

7.139 The United States submits that the ordinary meaning of the term "reasonable" is "in accordance with reason; not irrational or absurd."[178] The United States further asserts that, with respect to amounts, "reasonable" is additionally defined as "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate."[179] We consider it appropriate to consider the meaning of the term "reasonable" in light of this definition.[180] We believe it equally important, though, to consider the context in which the term "reasonable" is used. In particular, since the Ad Note only permits security in a given "case of suspected dumping", the reasonableness of that security should be assessed in light of the circumstances of that case of suspected dumping.

7.140 In this regard, we recall that the EBR is applied in conjunction with cash deposits. While the cash deposits are designed to secure the duty liability established as a result of the anti-dumping order (or most recent assessment review), the EBR is applied to secure against liability resulting from increases in the rate of dumping over and above that established in the order (or most recent assessment review).[181] Since the amount of cash deposits is limited to the rate of dumping established in the anti-dumping order (or most recent assessment review), such security corresponds to the given case of suspected dumping, and is therefore in principle "reasonable" within the meaning of the Ad Note. The same reasoning does not cover the application of the EBR, however, since the application of the EBR increases the level of security beyond the dumping liability established as a result of the anti-dumping order. By virtue of the reasonableness requirement in the Ad Note, such increased security would only be permitted if there were some other basis which renders it reasonable in a particular case.

7.141 In light of the abovementioned dictionary definition (whereby reasonableness may be defined as "not irrational or absurd" and, with respect to amounts, as "not greatly less or more than might be thought likely or appropriate"), we consider that there would only be an appropriate basis for such increased security 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).[182] The

[178] The United States refers to the *New Shorter Oxford English Dictionary*, p. 2496.

[179] The United States refers to the *New Shorter Oxford English Dictionary*, p. 2496.

[180] We note that Thailand has not challenged the definition proposed by the United States.

[181] Thailand has not argued that the United States would not be entitled to collect duties in respect of any amount by which the rate of dumping established in an assessment review exceeds the cash deposits made in respect of the relevant import entries.

[182] Both parties argue that the reasonableness of the application of the EBR should be assessed in light of the likelihood of increases in the rates of dumping. See e.g. United States' Responses to First Set of Panel Questions, para. 51, and para. 68 of Thailand's second written submission. We acknowledge that rates of dumping may increase, and that the United States would be entitled to collect anti-dumping duties commensurate with the full amount of dumping. In our view, though, it would not be reasonable to require additional security simply because of the possibility of rates of dumping increasing. (Otherwise, since rates may also possibly decrease, one could argue that a reduction in security would be equally reasonable.) The possibility of rates increasing beyond a reasonable level of security, and importers defaulting on that excess, is a

Member would also need to determine the likely amount of such increase, in order to ensure that the amount of the additional security requirement is not greatly more than the amount by which the final dumping liability would likely exceed the dumping liability established as a result of the anti-dumping order. Only then could that Member demonstrate that the additional security properly and reasonably relates to an established case of suspected dumping, consistent with the requirements of the Ad Note. Without this type of analysis, the rate in the anti-dumping order remains "the best and only available baseline proxy of duties that ultimately may be assessed",[183] and therefore the best estimate of suspected dumping for which security may be required pursuant to the Ad Note. Security exceeding this estimate would not be "reasonable" in the meaning of the Ad Note.

7.142 We shall therefore examine whether the United States properly determined that the rate of dumping envisaged in the anti-dumping order would likely increase. If we find that it did, we shall then examine whether the United States properly established the likely amount of such increase.[184]

7.143 The United States asserts that "[t]o analyse the likelihood of potential increases, US Customs used historical data on increases in the antidumping rate".[185] In this regard, the United States refers to note 28 to para. 26 of its first written submission, where it is stated that "CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, 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".

7.144 We note that the United States has not submitted any documentary evidence in support of its assertion that anti-dumping rates increased 33 per cent of the time. It is, therefore, impossible to assess the rigour of the United States' analysis. In particular, it is impossible to verify how the United States treated cases where the rate may have increased as a result of error on the part of Customs, or error or fraud on the part of other parties.[186] [187] In our view, apparent rate increases resulting from error or fraud should not be confused with genuine increases in exporters' actual rates of dumping.

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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.

[183] See United States' first written submission, para. 37.

[184] The United States also argues that the application of the EBR is reasonable because, in addition to the likelihood of anti-dumping rates increasing, it also reflects the amount of potential liability in the event of default and the likelihood of default (see para. United States' second written submission, para. 24). Both parties submitted argumentation regarding the US assessment of the risk of shrimp importers defaulting on anti-dumping duties in excess of the cash deposits. If the United States had properly established the likelihood of rates increasing, and the amount of likely increase, we consider that the United States would have been able to introduce additional security requirements up to that amount. In 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. By virtue of the Ad Note, security may be imposed once a case of suspected dumping is established, such that anti-dumping duties may be payable. There 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. It is the case of suspected dumping that triggers the right to impose security requirements under the Ad Note, not the risk of default of individual importers. (If this were not the case, the United States would be required to assess the risk of individual importers defaulting before imposing cash deposits.) Although the risk of default does not provide a basis for requiring security under the Ad Note, we see no reason why a member could not choose to only impose security requirements otherwise authorized under the Ad Note in respect of importers with a greater risk of default.

[185] See United States' Responses to First Set of Panel Questions, para. 36.

[186] See e.g. Exhibit THA-6, bottom of page 10.

[187] Thailand argues extensively that the major proportion of uncollected anti-dumping duties concerned imports covered by the anti-dumping order on crawfish, and that such uncollected anti-dumping duties resulted from the special circumstances of that case. We do not consider it necessary to review those arguments, though, since at this juncture we are addressing US evidence regarding cases in which the rates of dumping increased, rather than cases resulting in uncollected anti-dumping duties more generally. As illustrated at page 8 of Exhibit

7.145 Leaving aside the lack of supporting documentary evidence, we are in any event not persuaded that an objective and impartial investigating authority could 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.[188] Furthermore, 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. In addition, we recall that the EBR is applied on all imports of subject shrimp. A finding that, historically, rates have increased 33 per cent of the time in respect of agriculture/aquaculture cases generally is not sufficient, in our view, to demonstrate that all rates for subject shrimp (in respect of all imports, from all sources) are likely to increase.

7.146 The United States seeks to support its conclusion that rates of dumping would likely increase by asserting that "USDOC's preliminary results from the first administrative review of the antidumping order with respect to shrimp indicate that 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%."[189] Thailand retorts that USDOC's preliminary results from the first administrative review of the anti-dumping order with respect to shrimp actually indicate that "[f]or 17 out of the 18 exporters for whom actual margins (rather than punitive facts-available margins) were determined, the assessment rates were actually *lower* than the cash deposit rates. In other words, for 94 per cent of exporters for whom actual margins were calculated, the "unsecured liability" that the United States refers to did not even arise."[190] Thailand also asserts that, even including exporters for whom actual margins were not determined, assessment rates increased for only eight exporters. According to Thailand, Thai "export statistics indicate that exporters whose assessment rates increased accounted for only 1.92 per cent of the value of trade for the period covered by the administrative review."[191] Thai asserts that rates of dumping have therefore declined or remained the same for approximately 98 per cent of the value of entries of Thai shrimp.[192]

7.147 In principle, we do not consider that the preliminary results of the first administrative review of the shrimp anti-dumping order are relevant to a determination of whether or not an objective and impartial investigating authority could properly have found, at the time that the EBR was imposed on shrimp, that rates of dumping by shrimp exporters were likely to increase. We therefore decline to base our findings on such *ex post* rationalization. Even if such analysis were relevant, though, it would not favour the position of the United States, for Thailand has demonstrated – and the United

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THA-6, not all uncollected anti-dumping duties in the crawfish case resulted from increased rates of dumping. Scenario 1, e.g. which concerns the majority of the unpaid crawfish duties, concerned the problem of importers from new shippers being allowed to post single entry bonds, rather than cash deposits, and then defaulting on those bonds (with CBP not able to collect from the surety because the latter had gone bankrupt). Furthermore, Exhibit US – 10 suggests that the United States had evidence of rate increases extending beyond the crawfish case (the United States claims that it had evidence of rate increases in respect of 13 antidumping cases involving 340 exporter/producers; see United States' Responses to Second Set of Panel Questions, note 46; see also the Amendment, which although it refers explicitly to the crawfish case, also states that "[r]ecent antidumping cases for agriculture/aquaculture merchandise have also resulted in considerable rate increases"). Given the broad nature of this evidence, there is no basis to query such evidence by reference to the allegedly special circumstances of a single case.

[188] See United States' first written submission, para. 26.

[189] See United States' first written submission, para. 26.

[190] See Thailand's oral statement at the first substantive meeting, para. 66.

[191] See Thailand's Responses to First Set of Panel Questions, para. 112. In response to Question 50 from the Panel, Thailand also suggested (at para. 119) that "the CBP *may* have improperly limited its analysis to cases in which administrative reviews were conducted" (emphasis added). Since Thailand did not confirm the factual basis for this argument in its subsequent submissions to the Panel, we shall not consider this argument further.

[192] See Thailand's second written submission, para. 69.

States has not disputed – that rates only increased for a very small proportion of shrimp imports from Thailand.

7.148 For these reasons, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the evidence relied on by the United States at the relevant time, that the rates of dumping established in the shrimp order were likely to increase.

7.149 In light of our conclusion in the preceding sub-section, we see no need to consider whether or not the United States properly determined the amount by which rates of dumping were likely to increase.

(d) Summary

7.150 As a result of our finding that the United States failed to properly establish that the rates of dumping provided for in the anti-dumping order were likely to increase, we find that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order. Accordingly, we conclude that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note.

(i) Finding on whether or not the application of the EBR was "in accordance with" the Ad Note

7.151 In light of our finding that the application of the EBR was not "reasonable" within the meaning of the Ad Note, we further find that the application of the EBR was not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

5. Conclusion in respect of Thailand's Article 18.1 claim

7.152 Since we have found that the application of the EBR constitutes "specific action against dumping" that is not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*, we conclude that the application of the EBR is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*.

6. Other claims by Thailand

(a) Articles 7 and 9 of the *Anti-Dumping Agreement*, Article VI:2 of the *GATT 1994*, and the Ad Note

7.153 Thailand has made separate claims that the EBR is inconsistent with the provisions of Articles 7.1, 7.2, 7.4 and 7.5 of the *Anti-Dumping Agreement*; Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*; Article VI:2 of the *GATT 1994*; and the Ad Note. In note 266 to its first written submission, Thailand has explained that "these claims are subsidiary and alternative to Thailand's Article 18.1 claim and, to the extent that the Panel finds in Thailand's favour on the Article 18.1 claim, the Panel need not further address Thailand's separate claims" under the abovementioned provisions.

7.154 In light of Thailand's characterisation of these additional claims as "subsidiary and alternative" to its claim under Article 18.1 of the *Anti-Dumping Agreement*, and in view of our finding in respect of Thailand's Article 18.1 claim, we do not consider it necessary to address Thailand's claims under Articles 7 and 9 of the *Anti-Dumping Agreement*, Article VI:2 of the *GATT 1994*, and the Ad Note.

(b) Articles I:1, II:1(a), II:1(b), X:3(a) and XI:1 of the *GATT 1994*.

7.155 Thailand has made additional claims under Articles 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*. However, unlike its alternative claims under Articles 7 and 9 of the *Anti-Dumping Agreement*, and Article VI of the *GATT 1994* and its Ad Note, Thailand has requested that the Panel address its claims regarding the consistency of the EBR with Articles XI, II, X:3(a), and I of the *GATT 1994* even if it were to find a violation of its main claim under Article 18.1 of the *Anti-Dumping Agreement*. In Thailand's view, the Panel should make findings "to assist the DSB in making recommendations or rulings aimed at achieving a satisfactory settlement of the matter and to ensure that on appeal the Appellate Body can, if necessary, fully address those claims or, at a minimum, complete any necessary analysis to rule on those claims".[193]

7.156 The Panel, after careful consideration, on the basis of judicial economy, refrains from ruling on Thailand's claims under Articles XI, II, X:3(a), and I of the *GATT 1994*. The Panel recalls that the principle of judicial economy is recognized in WTO law. The Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party. In fact, a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims are within its terms of reference.[194] The Appellate Body has relied on the explicit aim of the dispute settlement mechanism, which is to secure a positive solution to a dispute, as provided in Article 3.7 of the *DSU* or a satisfactory settlement of the matter as per Article 3.4 of the *DSU*. The Appellate Body has stressed that the basic aim of dispute settlement in the WTO is to settle disputes and not to "make law" by clarifying existing provisions of the *WTO Agreement* that fall outside the context of resolving a particular dispute:

> "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[195]"[196]

7.157 We bear in mind that, in *Australia – Salmon*, the Appellate Body cautioned panels against false judicial economy arguing that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[197]

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[193] Thailand's first written submission, para. 289.

[194] Appellate Body Report, *India – Patents (US)*, para. 87.

[195] (*footnote original*) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

[196] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340. See also Panel Report, *US – Steel Safeguards*, para. 10.701.

[197] Appellate Body Report, *Australia – Salmon*, para. 223. See also Panel Report, *EC – Sardines*, paras. 7.148-7.152; Panel Report, *US – Steel Safeguards*, para. 10.703.

7.158 The Panel believes that this is not the case in the current proceedings. In making findings under Article 18.1 of the *Anti-Dumping Agreement* and the Ad Note, the Panel believes that it has effectively resolved this aspect of the dispute. The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings. For example, as regards Thailand's claim under Article XI:1 of the *GATT 1994*, the Panel in *US – 1916 Act (Japan)*, after finding a violation of Article VI, held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article XI, although this did not mean that Article VI applied to the exclusion of Article XI:1. On that occasion, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.[198] Precedent also exists as regards Thailand's claim under Article X:3(a) of the *GATT 1994*. In previous disputes, after having found violations of, inter alia, Article I of the *GATT 1994*[199], Article 11.2 of the *Anti-Dumping Agreement*[200] and Article 2.4.1 of the *Anti-Dumping Agreement*[201], the respective Panels did not consider it necessary to examine the Article X:3(a) claims.

7.159 Even if the Panel would have found that the application of the EBR is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, the Panel is of the view that it would not be appropriate to proceed and rule on Thailand's additional *GATT 1994* claims. We note that the text of 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." We recall that this reference to the provisions of the *GATT 1994* has been interpreted by the Appellate Body as referring to Article VI of the *GATT 1994*. We further recall that the Ad Note is an integral part of Article VI of the *GATT 1994*. We therefore interpret these provisions to mean that the *WTO Agreement*s allow for the imposition of measures which are considered to be specific action against dumping provided they are in accordance with Article VI of the *GATT 1994*, including its Ad Note.[202] Accordingly, we are unable to accept that a measure which constitutes specific action against dumping in accordance with the provisions of the Ad Note, can nevertheless be found inconsistent with other provisions of the *GATT 1994*. For example, if we were to find that the Amended CBD violates the MFN provision of Article I of the *GATT 1994*, such a finding would, as a consequence, render *inutile* the provision in Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note.

7.160 We find additional support for our conclusion in the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. We have found that the Amended CBD constitutes specific action against dumping in accordance with Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*, and thus, is consistent with Article 18.1 of the *Anti-Dumping Agreement*. Therefore, our findings under the *Anti-Dumping Agreement* must prevail over any potential finding of violation under Articles XI, II, X:3(a), and I of the *GATT 1994*.

7.161 Finally, we consider the Panel's discussion in *US – 1916 Act (Japan)* further relevant to this issue. After finding a violation of Article VI of the *GATT 1994*, the Panel considered whether it must also analyse a claim under Article III:4 of the *GATT 1994*. It held that, in the case before it,

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[198] Panel Report, *US – 1916 Act (Japan)*, para. 6.281.
[199] Panel Report, *Indonesia – Autos*, para. 14.152.
[200] Panel Report, *US – DRAMS*, para. 6.92.
[201] Panel Report, *US – Stainless Steel*, para. 6.55.
[202] This finding is, of course, without prejudice to the operation and application of note 24 to Article 18.1 of the *Anti-Dumping Agreement*. In this regard, we note and agree with the Appellate Body's finding in *US – Offset Act (Byrd Amendment)* (para. 262) that "an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidisation, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*." Such action would be governed by other provisions of the *GATT 1994*.

Article VI addressed the "basic feature" of the measure at issue more directly than Article III:4. In doing so, the Panel referred to the international law principle *lex specialis derogat legi generali* in support of its reasoning.[203] The Panel did so by virtue of the Appellate Body's finding in *EC – Bananas III* that:

> "Although Article X:3(a) of the *GATT 1994* and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the *GATT 1994*."[204]

7.162 We agree that the principle of *lex specialis* should apply in such circumstances. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping duties, those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by Thailand. Article VI and the Ad Note therefore constitute *lex specialis* that should prevail over the more general *GATT 1994* provisions cited by Thailand.

7.163 For the above reasons, we conclude that it would not be appropriate for us to proceed and rule on Thailand's claims under Articles I, II:1(a), the first and second sentences of Article II:1(b), X:3(a), and XI:1 of the *GATT 1994*, and we decline to do so.

7. United States' defence under Article XX(d) of the *GATT 1994*

7.164 Having found that the EBR constitutes "specific action against dumping" and that it is not a "reasonable security" under the Ad Note, and thus it is not "in accordance with the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*", the Panel will proceed to examine the United States' defence under Article XX(d) of the *GATT 1994*.

(a) Main arguments of the United States

7.165 The United States argues that the Amended CBD is justified under Article XX(d) of the *GATT 1994* as a measure necessary to secure compliance with United States anti-dumping and countervailing duty assessment laws. According to the United States, the Amended CBD is necessary to secure compliance with 19 U.S.C. 1673e(1), which governs the assessment of anti-dumping duties, as well as general customs regulations related to the payment of duties. Specifically, according to the United States' argument, the Amended CBD is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. The United States has stated that it considers that problems of "significant potential unsecured liability" and "significant risk of default" exist with respect to subject shrimp entries.[205] The United States submits that 19 U.S.C. 1673e(1) and the other relevant laws and regulations that authorise the Amended CBD are not themselves WTO-inconsistent. The United States also argues that no reasonable alternative is available to ensure revenue collection.[206]

7.166 The United States further argues that the Amended CBD is consistent with the chapeau to Article XX. In this regard, the United States submits that the Amended CBD does *not* constitute a

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[203] Panel Report, *US – 1916 Act (Japan)*, para. 6.269.
[204] Appellate Body Report, *EC – Bananas III*, para. 204.
[205] United States' first written submission, para. 68.
[206] United States' first written submission, paras. 69-70.

disguised restriction on international trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In support of this position, the United States submits that the measure applies to designated merchandise subject to anti-dumping or countervailing duties regardless of origin, and applies to all countries subject to the anti-dumping order on subject shrimp. In addition, the United States submits that bond amounts may be determined based on individualised risk assessments which are available to all importers/principals. Finally, the United States emphasizes that the Amended CBD was published on US Customs' web site when initially introduced. The October 2006 Notice, which was later published in the Federal Register, is described by the United States as a complete statement of the measure's contents and how it would be applied, which allows importers to comment formally on the EBR and its administration, and presents the directive's objective as addressing revenue collection problems.

(b) Main arguments of Thailand

7.167 Thailand argues that the United States has not met its burden under Article XX(d) of the *GATT 1994* to demonstrate that the application of the EBR is necessary to secure compliance with US laws and regulations imposing anti-dumping duties. Thailand notes in general that the United States has relied exclusively on the Basic Bond Requirement as sufficient to secure compliance with its laws and regulations imposing anti-dumping duties in the overwhelming majority of antidumping duty cases (specifically, in 242 out of 248 cases, representing 98 per cent of anti-dumping orders according to Thailand).[207] Thailand also argues, based on the facts on record, that the United States cannot demonstrate that assessment rates for subject shrimp are likely to significantly exceed the cash deposit rate established in the final determination of the original dumping investigation. Thailand also disputes the United States' assumption that subject Thai importers are more likely to default on payment of anti-dumping duties than other products subject to anti-dumping duties. Accordingly, Thailand argues that the Basic Bond Requirement in conjunction with cash deposit system and civil recovery proceedings constitutes both a sufficient and less restrictive alternative measure, thereby rendering ineffective the United States' argument that EBR is necessary to secure compliance.

7.168 Thailand also argues that the EBR does not meet the conditions set out in the chapeau to Article XX(d) because its application constitutes "arbitrary" or "unjustifiable" discrimination and a "disguised restriction on trade". Thailand argues that the actual objective of the EBR is to burden the shrimp import industry in order to restrict the import of foreign shrimp products into the United States. Thailand seeks support for its position by the fact that the EBR has only been applied to subject shrimp imports, and that the United States has not demonstrated that subject shrimp importers from Thailand present a comparatively greater risk of default or non-payment than importers from other countries. Thailand also argues that the lack of any nexus between the objective of collection of United States revenue and the manner in which it was applied constitutes a disguised restriction on international trade in subject shrimp. In this regard, Thailand reiterates that the EBR has not been applied to entries of other products with established histories of revenue collection problems.

(c) Evaluation by the Panel

7.169 Before examining whether the EBR is justified by Article XX(d) of the *GATT 1994*, we recall that it is the United States who has the burden to prove to the Panel that this is the case.[208]

7.170 We will now look at the text of Article XX(d) and the chapeau of Article XX which provide:

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[207] Thailand's first written submission, para. 272.

[208] In *US – Wool Shirts and Blouses*, the Appellate Body held that " the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> > (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]"

7.171 We note that, in *US – Gasoline*, the Appellate Body concluded that the analysis of a measure under one of the paragraphs of Article XX is a "two-tiered" approach:

> "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under [in that case] XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX ..."[209]

7.172 We agree and adopt as our own the Appellate Body's reasoning. Therefore, the Panel shall first look at whether the EBR is necessary to secure compliance with the relevant provisions of US law that direct US Customs to assess and collect anti-dumping duties. We will only proceed to analyse whether the EBR meets the requirements of the *chapeau* to Article XX, i.e whether the EBR allows for "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or constitutes a "disguised restriction on international trade", if we have first determined that the EBR has met the requirements under paragraph (d).

(i) Whether the EBR is necessary to secure compliance with US laws and regulations as provided in Article XX(d) of the GATT 1994

7.173 The Appellate Body has indicated that two elements should be satisfied in order for a measure to be provisionally justified under paragraph (d) of Article XX:

> "For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the *GATT 1994*. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."[210]
>
> <u>First element: Whether the EBR has been "designed" to secure compliance with US laws and regulations that are not in themselves WTO-inconsistent</u>

7.174 We shall therefore commence our analysis by examining whether the EBR has been "designed" to secure compliance with US laws and regulations that are not themselves inconsistent

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[209] Appellate Body Report, *US – Gasoline*, p. 22.
[210] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

with the *GATT 1994*. A necessary step in this analysis is thus to identify which are those US laws or regulations the compliance with which the EBR is aimed at securing, whether they are not themselves WTO-inconsistent, and whether the EBR is itself designed to secure compliance with the aim expressed in the relevant US laws or regulations.

7.175 The United States claims that the Amended CBD secures compliance with 19 U.S.C. § 1673e(a)(1), which governs assessment of anti-dumping duties and reads as follows:

> "Within 7 days after being notified by the Commission of an affirmative determination under section 1673d (b) of this title, the administering authority shall publish an antidumping duty order which—
>
> > (1) directs customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—
> >
> > (A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or
> >
> > (B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of that merchandise."

7.176 The United States further submits that the Amended CBD is necessary to ensure compliance with 19 C.F.R. § 113.13(c), which requires port directors to obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."[211]

7.177 Thailand submits that 19 U.S.C. § 1673e(a)(1) exclusively does not require importers to pay duties, but in combination with 19 U.S.C. § 1673e(a)(3) instead directs US Customs to assess anti-dumping duties. 19 U.S.C. § 1673e(a)(1) "... directs US Customs to assess anti-dumping duties ... ", and 19 U.S.C. § 1673e(a)(3) "... requires the deposit of estimated anti-dumping duties pending liquidation ... ". Thailand considers that 19 U.S.C. § 1673 titled "Imposition of Antidumping Duties", more accurately refers to the United States' obligation to collect anti-dumping duties. This provision states that USDOC shall "impose[] upon such merchandise an antidumping duty, in addition to any other duty imposed in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." Thailand considers the obligation to collect anti-dumping duties is additionally reflected in USDOC implementing obligations. 19 C.F.R. § 351.212(b)(1) requires that "the Secretary will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise". Alternatively, 19 C.F.R. § 351.211(c)(1) provides that the cash deposit rate will be assessed as the rate of final liability if an administrative review is not requested.

7.178 Taking the parties' views into consideration, in our view, 19 U.S.C. § 1673e(a)(1) in combination 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) encompass the United States' obligation to collect anti-dumping duties.

[211] United States' Responses to Second Set of Panel Questions, para. 58.

Whereas 19 U.S.C. § 1673e(a)(1) directs customs officers to "assess" an antidumping duty, the obligations under 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) require that entries of merchandise subject to an anti-dumping order be subject to the imposition of antidumping duties. As we mentioned, 19 U.S.C. § 1673 requires that USDOC "impose[] upon such merchandise an antidumping duty, in addition to any other duty imposed in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise" 19 C.F.R. § 351.212(b)(1) requires that "the Secretary will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise". Alternatively, 19 C.F.R. § 351.211(c)(1) provides that the cash deposit rate will be assessed as the rate of final liability if an administrative review is not requested. We note that 19 U.S.C. § 1673e(a)(3) requires the deposit of " ... *estimated* anti-dumping duties pending liquidation ... ".

7.179 Accordingly, the Panel provisionally concludes for the purpose of considering the United States' defence under Article XX(d), the law or regulation at issue is 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), all of which together govern the final collection of anti-dumping or countervailing duties. We do not consider it necessary to expand our discussion to include analysis of 19 U.S.C. § 1673e(a)(3), governing the deposit of estimated antidumping duties pending liquidation, or 19 U.S.C. § 1673f, governing treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order.

7.180 The Panel must next consider for the purpose of examining the United States' arguments under Article XX(d) whether 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) are in themselves not inconsistent with any provision of the *GATT 1994*. When considering the relevant provisions of the *GATT 1994* governing anti-dumping duties, the Panel recognizes that Article VI:2 expressly recognizes Members' ability to levy anti-dumping duties where lawfully owed. As we have established in Section VII.C.4, the Ad Note permits Members to require reasonable security in a case of suspected dumping until a final determination of dumping is made in the assessment review. The Panel further notes that Thailand has not expressly challenged any of these laws as inconsistent with any provision of the *GATT 1994*. Moreover, regardless of Thailand's expansion of what constitutes the relevant law enforced by the Amended CBD, the Panel does not interpret Thailand's commentary as a challenge to the right of the United States to collect anti-dumping or countervailing duties. Accordingly, the Panel concludes that, for the purpose of its analysis of the US defence under Article XX(d) of *GATT 1994*, 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) are not in themselves inconsistent with any provision of the *GATT 1994*.

7.181 As a final preliminary matter, the Panel will next consider whether the Amended CBD, which authorises application of the EBR, has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 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). We note that the August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the antidumping and countervailing duties at liquidation and ensuring that the revenue is protected".[212] The August 2005 Clarification states that the continuous bond guidelines were modified as "necessary in order to ensure the revenue is adequately protected".[213] The October 2006 Notice explains:

> "Congress has provided [US Customs] authority to require security in order to ensure the payment of all duties determined to be due to the United States, including revenue

[212] Exhibit THA-2, p. 2.
[213] Exhibit THA-4, p. 1.

> collection gaps between estimated duty deposits and final assessed duties that the importer fails to satisfy."[214]

7.182 We note that the stated goal of collecting "antidumping and countervailing duties at liquidation" or "final assessed duties" potentially includes both the collection of the amount of duties established during the final determination in the original investigation as well as any increases in anti-dumping duties that may arise in the period following a final determination but prior to assessment of final liability.

7.183 In our view, the text of the instruments comprising the Amended CBD clearly indicates that the stated goals of the measure at issue align with the objectives that 19 U.S.C. § 1673e(a)(1), 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) are designed to secure the final collection of anti-dumping or countervailing duties equal to the amount by which normal value of subject merchandise exceeds to export price of that merchandise. Thus, for the purpose of examining the United States' arguments under Article XX(d), it is sufficient for the Panel to conclude that the Amended CBD which authorises the imposition of the EBR has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 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).

> Second element: Whether the EBR is "necessary to secure compliance with" 19 U.S.C. § 1673e(a)(1), 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)

7.184 Once we have established that the EBR has been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 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), the WTO-compatibility of which is not being contested, we will next examine whether the EBR is "necessary" to ensure such a compliance.

7.185 In this regard, the United States argues that the Amended CBD, which authorises the imposition of the EBR, is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. In particular, the United States argues that the application of the measure to subject shrimp importers was and remains necessary to secure against "significant potential unsecured liability" and "significant risk of default" associated with merchandise entries.[215] According to the United States, the Amended CBD was issued in a year following defaults of more than $225 million on payment of anti-dumping duties, which reached $629 million as of end of fiscal year 2006.[216] The United States has estimated that the value of subject shrimp imports exceeds $2.5 billion[217] and thus poses a significant additional risk for uncollected revenue in the event that importer/principals were to default. The United States claims that the likelihood of default by subject shrimp importers, and importers/principals of agriculture/aquaculture merchandise more broadly, is significant due to the fact that such entities tend to be undercapitalised and discontinue operations before payment of final anti-dumping duty liability.[218] With respect to agriculture/aquaculture anti-dumping cases not including subject shrimp, US Customs concluded that anti-dumping duties increased 33 per cent of the time, did not change 11 per cent of the time, and declined 56 per cent of

[214] Exhibit THA-5, p. 62278.
[215] United States' first written submission, para. 68.
[216] United States' first written submission, para. 12.
[217] United States' first written submission, para. 2.
[218] United States' first written submission, para. 14.

the time.[219] In cases where anti-dumping duties increased, the United States claims that final liability for anti-dumping duties often exceeded the amount secured by cash deposit and ordinary basic bond.

7.186 Thailand disputes the US' determination that subject shrimp importers' dumping margins are likely to increase and that subject shrimp importers present a heightened risk of default in comparison to importers of other products subject to anti-dumping orders. Thailand submits that evidence does not support a finding that substantial increases in the assessment rate were more likely to occur for subject shrimp than other products. Thailand argues that the problems of the United States with collecting anti-dumping duties correlate almost exclusively to non-market economy cases, (in particular crawfish and garlic cases) as a result of how dumping margins are calculated in non-market economies, surety bankruptcies, and exemptions from cash deposit requirements for new shippers of products subject to anti-dumping duties.[220] According to Thailand, these factors were determinative in the finding that assessment rates would increase in excess of cash deposit rates and that a higher incidence of default in payments would occur for agriculture/aquaculture products. In support of its position, Thailand cites to findings by the USCIT in *NFI v. US* that the United States did not offer sufficient evidence to establish that cash deposits would be insufficient to cover final rates of liquidation,[221] or that significant numbers of subject shrimp importers are defaulting or have defaulted on any obligation to pay anti-dumping duties on their imports of shrimp.[222] Thailand also cites to evidence on record which it claims demonstrates that non-Chinese agriculture/aquaculture cases accounted for only 4 per cent of total uncollected duties while Chinese agriculture/aquaculture cases accounted for 69 per cent of total uncollected duties.[223] Finally, Thailand claims that no basis for comparison exists that shrimp and other agriculture/aquaculture merchandise share similar characteristics related to capitalization rates, history of customs duties payments, reliance on asset-based financing, and levels of cash flow that would indicate a high risk of going out of business and/or being unable to pay final anti-dumping duty liability. Thailand submits that United States has only cited to one page in the Agency Record to support its conclusion that agriculture/aquaculture importers which defaulted "were not heavily capitalized", and this statement applies to crawfish and not subject shrimp[224]

7.187 We first look at the ordinary meaning of the word "necessary":

> "[t]hat which is indispensable; an essential ...; ...[that] which is required for a given situation; ...[t]hat cannot be dispensed with or done without; requisite, essential, needful ...; [d]etermined by predestination or natural processes, and not by free will; ... resulting inevitably from the nature of things or of the mind itself ...; [i]nevitably determined or produced by a previous state of things ...".[225]

7.188 The Appellate Body has already examined the concept of "necessary" in the context of Article XX(d) of the *GATT 1994* in *Korea – Various Measures on Beef*. In this case, the Appellate Body concluded that, in order to be considered "necessary" to secure compliance, a measure does not need to be "indispensable", but should constitute something more than strictly "making a contribution to":

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[219] United States' first written submission, footnote 28.
[220] Thailand's first written submission, para. 281.
[221] Thailand's first written submission, para. 277, citing to *NFI v. US*, p. 55, Exhibit THA-9.
[222] Thailand's first written submission, para. 278, citing to *NFI v. US*, p. 54, Exhibit THA-9.
[223] Thailand's responses to Second Set of Panel Questions, para. 77 and footnote 59, citing to Exhibit THA-6, p. 17.
[224] Thailand's responses to Second Set of Panel Questions, para. 74.
[225] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3118.

> "We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. as used in Article XX(d), the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[226]

7.189 The Appellate Body weighed additional factors in evaluating the necessity of a measure, such as: (i) the relative importance of the common interests or values that the law or regulation to be enforced 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 on imported goods. In *Korea – Various Measures on Beef* the Appellate Body stated:

> "It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument ... There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is 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. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce,[footnote omitted] that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects ..."[227]

7.190 As pertains to this importance of the interest which the EBR allegedly intends to protect, we consider that the assessment and collection of anti-dumping or countervailing duties carries significant importance, specifically in the context of US efforts to enforce trade remedies permissible under the WTO agreements, and generally, for the purpose of securing collection of US Treasury revenue within the context of its retrospective duty assessment system. It is in this regard that Article VI:1 of the *GATT 1994* expressly recognizes WTO Members' ability to collect anti-dumping duties where lawfully owed. It also stands to reason that taking security logically serves the purpose of collecting the full amount of anti-dumping or countervailing duties owed. The United States argues that the Amended CBD which allows for the imposition of the EBR, secures an otherwise unsecured liability – any additional anti-dumping duties owed upon assessment that exceed cash deposits.[228] We agree that this would logically aid in the collection of revenue. Thailand does not seem to dispute that this is the case.[229]

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[226] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[227] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-163.
[228] United States' first written submission, para. 68.
[229] See Exhibit THA-6, Exhibit 5, p. 6.

7.191 As the EBR makes clear on its face, however, we are not dealing with a measure that is designed to secure the collection of anti-dumping duties generally. Instead, we are considering a measure designed to protect against the likelihood of anti-dumping duties exceeding cash deposit rates. We have explained earlier that there could only be an appropriate basis for taking such increased security under the Ad Note if a WTO 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). Notwithstanding that, we found that the United States had failed to properly establish that rates of dumping provided for in the anti-dumping order were likely to increase and therefore concluded that the United States had failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the case of dumping provided for in the anti-dumping order. Accordingly, we found that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note. In our view, without adequately establishing that anti-dumping duties are likely to increase above the cash deposit rates, it does not logically follow that a security is necessary within the meaning of Article XX(d) of the *GATT 1994*. Given that the likelihood of increased anti-dumping duties has not been properly established by the United States, we do not see the *need* to impose the EBR to secure against such an outcome.

(ii) Conclusion

7.192 Therefore, in light of our findings that that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order, we cannot determine that the EBR as applied to shrimp is in fact necessary within the meaning of Article XX(d) of the *GATT 1994*. Accordingly, we consider that the United States has failed to establish that the EBR as applied to shrimp is justified as being necessary to secure compliance with 19 U.S.C. § 1673e(a)(1), 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) or any other relevant laws.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, we *uphold* Thailand's claims that the application of the EBR to subject shrimp from Thailand is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, and the Ad Note. We *reject* the United States' argument that the application of the EBR is justified under Article XX(d) of the *GATT 1994*.

8.2 We further *uphold* Thailand's claim that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using zeroing to calculate margins of dumping in respect of the Anti-Dumping Measure.

8.3 In light of the above findings, we *decline to rule* separately on Thailand's claims that the application of the EBR to subject shrimp from Thailand is inconsistent with Articles I, II:1(a), the first and second sentences of Article II:1(b), X:3(a), and XI:1 of the *GATT 1994*.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the *GATT 1994*, it has nullified or impaired benefits accruing to Thailand thereunder.

8.5 Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> "[i]t shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted)

8.6 We therefore recommend that the United States bring its measures into conformity with its obligations under the *Anti-Dumping Agreement* and the *GATT 1994*.