BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

(AB-2008-3)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

May 20, 2008

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

(AB-2008-3)

SERVICE LIST

PARTICIPANT

H.E. Mr. Thawatchai Sophastienphong, Permanent Mission of Thailand

THIRD PARTICIPANTS

H.E. Mr. Ujal Singh Bhatia, Permanent Mission of India
H.E. Mr. Clodoaldo Hugueney Filho, Permanent Mission of Brazil
H.E. Mr. Mario Matus, Permanent Mission of Chile
H.E. Mr. Zhenyu Sun, Permanent Mission of China
H.E. Mr. Eckart Guth, Permanent Delegation of the European Commission
H.E. Mr. Shinichi Kitajima, Permanent Mission of Japan
H.E. Mr. Lee Sung-joo, Permanent Mission of the Republic of Korea
H.E. Mr. Fernando de Mateo Y Venturini, Permanent Mission of Mexico
Mr. Pham Quoc Tru, Minister Counsellor, Permanent Mission of Vietnam

Table of Contents

Table of Reports Cited

Panel report	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, notice of appeal filed 17 April 2008
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Brazil – Desiccated Coconut (AB)	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
EEC – Parts and Components	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Offset Act (Byrd Amendment) (AB)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. Introduction and Executive Summary

1. In its report, the Panel properly found that the Ad Note to Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") requires that security for antidumping and countervailing duties, such as that imposed pursuant to the enhanced bond requirement, be "reasonable"; that Articles 7 and 9 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") do not address security requirements of the type contemplated by the EBR; and that "reasonable" security for antidumping duties following imposition of an order is not otherwise prohibited by the Antidumping Agreement.

2. In appealing the Panel's analysis of the text of the Ad Note and the Antidumping Agreement, Thailand asks the Appellate Body to depart from customary rules of interpretation of public international law, and its own previous statements regarding the relationship between the Antidumping Agreement and GATT 1994, in at least four ways:

- First, Thailand ignores the immediate context in which the term "suspected dumping" appears in the Ad Note, and instead interprets that term in light of other, less relevant provisions of the Antidumping Agreement, using an overarching "concept" of dumping that does not in fact accord with the text of the Agreement;
- Second, ignoring the ordinary meaning of the text of the Agreement (and the facts), Thailand claims that "duty" is synonymous with "cash deposit."
- Third, Thailand renders an entire provision of GATT 1994 (the Ad Note to Article VI) inutile, on the theory that the Antidumping Agreement supersedes GATT 1994; and

- Fourth, Thailand treats statements in previous Appellate Body reports as dispositive of the interpretation of the Ad Note and its application to the present dispute, even though those reports did not discuss the Ad Note or security requirements for antidumping duties.

3. In the process, Thailand also resorts to a number of logical fallacies (including that if a "provisional measure" may take the form of a bond, all bonds must be "provisional measures"), misinterprets various aspects of U.S. law and the negotiating history of the GATT and Antidumping Agreement, and ignores or mischaracterizes much of the analysis provided by the Panel in rejecting the arguments that Thailand again advances in its Appellant Submission.

II. Factual Background

4. To understand the EBR, as the Panel recognized, it is necessary to understand how the U.S. system of retrospective duty assessment operates. Under its retrospective duty assessment system, the United States first determines, through an investigation, whether margins of dumping exist, and whether dumped imports cause or threaten to cause material injury to a domestic industry.[1] If injurious dumping is found, the U.S. Department of Commerce ("USDOC") issues an antidumping measure, known under U.S. law as an antidumping duty order. As the Panel explained, in an antidumping duty order, "USDOC sets forth ad valorem cash deposit rates . . . based on the overall margin of dumping . . . found for the exporter or producer during the investigation phase."[2] Cash deposits are collected at the border when merchandise subject to an order enters the United States.

---

[1] Panel report, para. 2.7.

[2] Panel report, para. 2.8.

5. Thereafter, every twelve months, during the anniversary month of the antidumping duty order, importers, exporters, producers, the exporting Member, and domestic interested parties have the opportunity to request that USDOC conduct an assessment review (often referred to as an "administrative review", "periodic review" or "annual review") to calculate the actual margin of dumping for the import transactions that occurred in the prior year.[3] In the United States, the dumping calculations in an assessment review are based on different transactions than those evaluated in the investigation.[4] Therefore, "[t]he dumping . . . margins calculated in the administrative review may be either higher or lower than the margins calculated in the investigation," and if higher, the cash deposit will not be sufficient to cover the final liability.[5]

6. During the administrative review, USDOC also establishes a new cash deposit rate for each producer or exporter subject to the review, on the basis of that producer or exporter's transactions during the period of review. This new *ad valorem* cash deposit rate will be applied to future imports from the producer or exporter. In subsequent reviews, margins of dumping or subsidization may once again be either higher or lower than the margins calculated in the previous review, and (as is the case with respect to the first administrative review), if higher, the cash deposit will not be sufficient to cover the final liability.

7. As explained in the U.S. Other Appellant Submission, in 2003 and 2004, U.S. Customs and Border Protection ("CBP") determined that importers were defaulting on hundreds of millions of dollars of antidumping duties lawfully owed to the United States. Often, the defaults

---

[3] Panel report, para. 2.8.

[4] Panel report, para. 2.9.

[5] Panel report, para. 2.9-2.10.

occurred when the final liability established in an administrative review exceeded the cash deposit rate established in the investigation, and thus the liability for the duties in question was not secured by cash deposits, sufficient bonds or other guarantees. Because they were unsecured, when importers defaulted, CBP could not recover the duties owed from the surety companies that protect CBP from default risk on secured liabilities.[6]

8. CBP developed the enhanced bond requirement to establish procedures for setting security requirements for merchandise with higher risk of default. It applied the bond requirement to importers of shrimp subject to the antidumping duty orders because it considered that the characteristics of the shrimp industry were similar to those of industries that had experienced significant defaults and because, with in excess of $2.5 billion in shrimp imports subject to the orders, it appeared likely that, if defaults occurred, they would have significant revenue consequences for CBP.[7]

---

[6] It should be noted that, while Thailand disagrees as to the cause of the problem and whether shrimp was a risk, it concedes that the United States faced a "collection problem" with respect to antidumping duties. Thailand Appellant Submission, para. 13 n.10.

[7] Contrary to Thailand's suggestion, Thailand Appellant Submission, para. 14, CBP did not develop the EBR or apply it to shrimp for political reasons, nor did the Panel find otherwise. Furthermore, regarding the impact on importers, the United States notes that Thailand makes a number of factual assertions in its Appellant Submission that were not part of the Panel's factual findings and that the United States disputed. As Thailand has not even claimed that the Panel's factual findings do not accord with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") – let alone provide any basis for concluding that they do – the Appellate Body should disregard these assertions.

For example, Thailand incorrectly claims that sureties "normally" required importers to provide cash collateral. Thailand Appellant Submission, para. 2, 12. The Panel did not make this finding, and instead noted it only as an assertion made by Thailand. Panel report, para. 2.18. As the United States explained to the Panel, the United States did not require collateral, and the facts presented to the Panel do not support the conclusion that the more than 200 companies eligible to act as sureties "normally" did so or that the "practical effect of the EBR was to double the cash burden of the antidumping measure on the importers"). Panel report, para. 2.18; *see*

III. Legal Argument

A. The Panel Correctly Found that the Ad Note to GATT 1994 Article VI Limits Security to that Which Is "Reasonable"

9. A central question before the Panel was whether any provisions of the Antidumping Agreement or the GATT 1994 apply to a security requirement for the payment of an antidumping duty assessed after an order has been imposed, such as that contemplated by the EBR. As the Panel found, the Ad Note to Article VI does apply to such a security requirement, and it is the sole provision that specifically limits security requirements of this type.[8] The Panel reached this conclusion by interpreting the text of the Ad Note based on its ordinary meaning and the context in which the terms appear, including with reference to the Antidumping Agreement.

10. The Ad Note to paragraphs 2 and 3 of Article VI of the GATT 1994 states:

> 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.

---

also Panel report, para. 7.75 (discussing costs associated with additional bonds). More generally, the United States notes that, while the Panel did conclude that the bond requirement resulted in additional costs for importers, other data – including import data and the study of the U.S. General Accountability Office ("GAO") cited by Thailand – contradicts Thailand's assertion that the EBR adversely affected imports of merchandise subject to the antidumping order on shrimp from Thailand. GAO Study, p. 24 (Exh. THA-10); Exh. US-11. Thailand also cites various statements in a preliminary injunction opinion issued by the U.S. Court of International Trade (USCIT). Thailand Appellant Submission, para. 14, citing Exh. THA-9. The USCIT opinion addressed issues of U.S. municipal law, not U.S. WTO obligations, involved a different factual record, and, given that the opinion was issued in connection with a preliminary injunction, did not constitute the final opinion of the court on this matter. Indeed, as the Panel noted, the case is still pending. Panel report, para. 2.19.

[8] Panel report, para. 7.96.

Under the Ad Note, a Member "may require" that an importer provide "reasonable security" for "the payment of antidumping or countervailing duty."

11. As the United States explained before the Panel, the "final determination of the facts" in the Ad Note refers to the determination of the facts with respect to the "*payment* of anti-dumping or countervailing duty."[9] In the context of a retrospective duty assessment system, the "determination of the *final* liability for payment of anti-dumping duties," referenced in Article 9.3.1, must be made in order for the facts with respect to payment to be determined. Thus, the "*final* determination of the facts" in the Ad Note follows an assessment review as described in Article 9.3.1.

12. This interpretation is consistent with the immediate context in which the phrase appears. The Ad Note refers to "security for payment" and "other cases in customs administration." As the United States explained before the Panel, in other cases in customs administration, security for payment of duties is required upon entry when the actual amount of liability is not known, and this security is required until the final liability is determined and duties are finally assessed and paid.[10] This interpretation is also consistent with GATT 1994 Article VI:2 and 3, the provisions to which the Ad Note is appended, and the Antidumping Agreement. GATT 1994 Article VI:2 and 3 address the "levy[ing]" of antidumping and countervailing duties. In the Antidumping Agreement, the term "levy" refers to "the definitive or final legal assessment or collection of a duty or tax."[11] The "final determination" referenced in the Ad Note thus

---

[9] Emphasis added.

[10] E.g., U.S. First Submission, para. 6.

[11] Antidumping Agreement, Article 4.2 n.12.

encompasses security pending final legal assessment of duties – an event that in a retrospective duty assessment system under Article 9.3.1 does not occur at the time the order is imposed.

13. The context provided by the Antidumping Agreement also supports the Panel's interpretation of the Ad Note. Article 9.3 states that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." The "margin of dumping" established following the assessment review described in Article 9.3.1 is a margin of dumping "as established under Article 2" – meaning, a margin of dumping calculated in accordance with the general requirements of Article 2.[12] The cash deposit and bond secure payment of this amount of duty and ensure that the United States is able to collect duties in that amount, in accordance with Article 9.2. Article 9.3.1 additionally makes clear that "final" liability for payment of antidumping duties in retrospective systems occurs at the end of an assessment period – the terminology used therein coincides with the reference to the "final" determination of the facts with respect to "payment" in the Ad Note, further supporting the view that the Ad Note addresses security pending completion of assessment.

14. The Panel rejected Thailand's argument that the Ad Note only addresses provisional measures taken prior to imposition of an antidumping order, and does not address security for payment of antidumping or countervailing duties after an order has been imposed.[13] In particular,

---

[12] *See Argentina – Poultry*, para. 7.357 (with respect to the phrase "under Article 2", stating that: "In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2.").

[13] Panel report, para. 7.130.

the Panel rejected Thailand's argument that the use of the term "suspected" means that the Ad Note only permits security prior to the imposition of an order.[14]

15. On appeal, Thailand again asserts that the imposition of an antidumping order means that dumping is no longer "suspected" and that therefore the Ad Note does not address security for payment of antidumping duties if that security is required after the order is imposed.[15]

16. However, rather than interpret the term "suspected" based on its *immediate* context, Thailand asserts that the "text of the Ad Note does not provide any guidance as to what constitutes the 'final determination of the facts in any case of suspected dumping.'"[16] Thailand instead proceeds to argue that dumping is no longer "suspected" because the use of the present tense in GATT Article VI and various provisions of the Antidumping Agreement suggests that dumping is a "continuous" and "ongoing" state. Thailand also invokes its theory that Article VI (and the Ad Note) is "governed" by the Antidumping Agreement and that anything not addressed in the Antidumping Agreement is prohibited.[17] Thailand's arguments comport neither with the text nor with the customary rules of treaty interpretation.

17. First, Thailand asserts that the use of the present tense in various provisions requires the conclusion that dumping is "considered to be an ongoing, continuous act or state of affairs."[18] However, this interpretation lacks any basis in the text. Nowhere in the Ad Note, Article VI, or the Antidumping Agreement is it stated that dumping is an "ongoing" or "continuous" act –

---

[14] Panel report, para. 7.104.

[15] Thailand Appellant Submission, paras. 21-78.

[16] Thailand Appellant Submission, para. 22.

[17] Thailand Appellant Submission, para. 23.

[18] Thailand Appellant Submission, paras. 25-27.

indeed, the only source Thailand cites in support of its use of these terms is an arbitral award having nothing at all to do with dumping.[19] In fact, other provisions of the Antidumping Agreement directly contradict Thailand's theory. For example, Article 11 discusses the "continuation or *recurrence* of dumping and injury" – the use of the term "recurrence" suggests that the Antidumping Agreement also contemplates dumping that is not "continuous" but rather is episodic in nature. Likewise, as the Panel explained, Article 9.3.1 refers to "final liability for payment of anti-dumping duties" and "part of the process of determining 'final liability for payment of anti-dumping duties' is to determine whether or not those entries were dumped." If dumping were a "continuous" act, presumably entries would "continuously" be dumped such that duties would always be owed following the assessment review – yet as footnote 22 of the Antidumping Agreement indicates, this is not always the case. Footnote 22 states that a finding in an assessment review under Article 9.3.1 "that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." Thus, the order may remain in place even after it has been determined that no duties are owed with respect to entries from one period.

18. Moreover, the immediate context – that is, the Ad Note itself – provides that security in a case of "suspected dumping" relates to "payment" "pending final determination of the facts." These terms – and the use of similar language in Article 9.3.1 of the Antidumping Agreement –

---

[19] Thailand Appellant Submission para. 27 (citing *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616 (1 August 2005)). Later, Thailand argues that the use of the present tense in U.S. law means that dumping is "continuous". Thailand Appellant Submission, para. 43. The Panel declined to accept Thailand's characterization of U.S. law, and as Thailand concedes, "domestic law is not determinative" of the meaning of WTO agreements. As with its interpretation of the WTO agreements, the significance Thailand attaches to the use of the present tense in U.S. law is misplaced.

suggest that the reference to "suspected dumping" in the Ad Note is not to be interpreted as Thailand proposes, but rather must be understood in the context of *assessment*: the final determination of whether and in what amount duties must be paid. As the Panel found, in a retrospective system of duty assessment, whether and in what amount duties are owed is not known until completion of assessment,[20] and thus dumping – with respect to the entries subject to the assessment review – is "suspected" during the intervening period.[21] Only by incorrectly divorcing the term "suspected" from its immediate context – which pertains to the process of *assessing and collecting* duties – can Thailand reach the conclusion it does.

19. Thailand proceeds to argue that GATT 1994 Article VI and Article 5.1 of the Antidumping Agreement support its interpretation of "suspected" dumping. As the Panel found, however, neither provision supports the conclusion that the Ad Note is limited to addressing security requirements prior to imposition of an antidumping order. With regard to Article VI, Thailand simply asserts (without citation or supporting legal argument) that "[t]he only determination referred to in those provisions [GATT 1994 Article VI:2 and 3] is the finding of dumping and injury . . . necessary to authorise the imposition of dumping measures" – apparently, in Thailand's view, the antidumping duty order.[22] Yet, as noted in paragraph 12, this interpretation is flatly contradicted by the use of the term "levy" in Article VI:2 and the definition

---

[20] Panel report, para. 7.104.

[21] If no assessment review is requested, entries are liquidated at the cash deposit rate in effect at the time of entry. As the Panel noted, "Irrespective of whether or not the final assessment in cases where no interested party requests a review may be deemed 'automatic', there remains no means of knowing whether or not an assessment review wil be conducted at the time that the import entry is made . . . . At the time of entry, therefore, such imports may only be suspected of being dumped." Panel report, para. 7.107.

[22] Thailand Appellant Submission, para. 36.

of that term in the Antidumping Agreement, which encompasses assessment and collection of duties.

20. With respect to Article 5.1, as the Panel noted, "The fact that Article 5.1 requires the United States to establish the existence of dumping at the time it imposes such [an antidumping duty] order, does not mean that the United States is at the same time establishing the existence of dumping in respect of future import entries covered by that order."[23] Thailand's argument regarding the definition of "existence" (a term that, it should be noted, is not used in the Ad Note) thus misses the point. While the United States satisfies the requirements of Article 5.1 in an investigation to impose an antidumping order, until the assessment review, it is not known whether entries subject to the order are dumped such that antidumping duties must be paid. Thus, as the term is used in the Ad Note and as the Panel found, dumping is "suspected" as to those future entries.[24]

21. The various panel and Appellate Body reports cited by Thailand likewise do nothing to detract from the Panel's reasoning in this case. First, contrary to Thailand's suggestion,[25] the Panel expressly did not address the issue of whether dumping is determined on a product- or transaction-specific basis (nor is that question relevant for this dispute). Rather, it simply evaluated the meaning of the Ad Note in view of the *timing* of assessment and recognized that,

---

[23] Panel report, para. 7.109.

[24] Thailand Appellant Submission, para. 41. Thailand's argument that the word "alleged" is a "close synonym" for the word "suspected" simply begs the question of why, if Article 5.1 was intended to refer to "suspected" dumping as the basis for initiation of an antidumping proceeding, it did not use the same terminology as the Ad Note.

[25] Thailand Appellant Submission, para. 28 (citing *EC – Bed Linen (AB)*, *US – Zeroing (Japan) (AB)*, *US – Zeroing (EC) (AB)*, *US – Softwood Lumber V*).

because whether and in what amount duties are owed is not determined until a later date, "at the time of entry. . . imports may only be suspected of being dumped."[26] With regard to *Mexico – Rice*, again contrary to Thailand's assertion, the Panel nowhere states or implies that "the imposition of definitive measures operates to end the validity of the finding of 'existing and present' dumping."[27] Rather, the Panel (like the Appellate Body in *Mexico – Rice*)[28] simply recognized that, at the time an order is imposed, a Member is not required to establish the "existence of dumping" for all future entries covered by the order.[29] Indeed, as the Panel noted, "Members applying a retrospective system of antidumping duty assessment choose not to do so," and instead determine the final liability through an assessment review process that occurs after an antidumping order is imposed.[30]

---

[26] Panel report, para. 7.107. See also para. 7.109 n.155 (noting, in response to Thailand's argument that an assessment review makes "overall determinations of assessment rates", that "[w]e need not examine the factual accuracy of this argument, since . . . 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 . . . .").

[27] Thailand Appellant Submission, para. 31.

[28] *Mexico – Rice (AB)*, para. 165.

[29] Panel report, para. 7.109 ("The fact that Article 5.1 requires the United States to establish the existence of dumping at the time it imposes [an antidumping] 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.").

[30] Panel report, para. 7.109. The Group of Experts Report discussing the "impracticability of establishing dumping *ab initio* on each individual shipment" is simply not relevant to this dispute. Insofar as Thailand is suggesting that retrospective duty assessment itself is somehow "impracticable", the United States submits that its experience demonstrates otherwise. *See also* Thailand Appellant Submission, para. 90 ("Members cannot have intended, and the text of Article VI and the Agreement do not permit, two simultaneous complex and burdensome determinations that fulfil essentially the same purpose of determining whether and how to offset injurious dumping.").

22. Thailand also attempts to draw from various negotiating documents – none of which pertains to the Ad Note itself – in an attempt to support its interpretation of the term "suspected". As a threshold matter, it should be noted that the Panel considered the text sufficiently clear, and therefore stated that it was "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."[31] The United States agrees that the text is sufficiently clear such that it is not necessary to resort to negotiating history, and Thailand does not in fact claim otherwise.

23. As for the particular documents Thailand cites, the Panel also correctly concluded that, even if relevant, none support the position Thailand advanced. With respect to the 1948 Working Party Report,[32] as the Panel noted, the portion of the report in which the term "suspected" was used "did not relate to the Ad Note" and "the reference to the period 'before anti-dumping duties are actually brought into operation' might equally refer to the period prior to assessment of the anti-dumping duties."[33] With regard to the other reports cited by Thailand, a single use of the word "suspected" in each of two reports, one issued ten years after the GATT 1947 and the other nearly twenty years thereafter, cannot be the basis for concluding that the Ad Note was limited to security requirements prior to imposition of an order. Neither report addresses the Ad Note or the meaning of "suspected" in that context, or whether it may also be

---

[31] Panel report, para. 7.129.

[32] Thailand Appellant Submission, para. 37 and n.51.

[33] Panel report, para. 7.127-7.128.

appropriate to consider dumping "suspected" after an order has been imposed but prior to duty assessment and collection. Likewise, the 1967 memorandum from Canada (which also does not discuss the Ad Note) offers no insight into whether any other Contracting Parties (let alone *all* Contracting Parties, as Thailand claims) shared Thailand's view that an investigation determination is "the final determination 'on the question of dumping" for purposes of Article VI.[34] Indeed, as noted in paragraph 12, this conclusion would be contrary to the text of Article VI.[35]

B. The Panel Properly Found that the Antidumping Agreement Does Not Prohibit Security Requirements Such as the EBR, Provided They Are "Reasonable"

24. Before considering Thailand's arguments regarding the Antidumping Agreement, it is worthwhile to recall the Panel's observations regarding the relationship between the GATT 1994 and the Antidumping Agreement. Citing the Appellate Body's observation in *Brazil – Desiccated Coconut* that "the other goods agreements in Annex 1A" do not "supersede" the GATT 1994, the Panel stated that "if the Ad Note authorises conduct, and reference to the Anti-Dumping Agreement confirms that such conduct is not prohibited by the Antidumping Agreement, we see no basis in the Antidumping Agreement, the GATT 1994, or the. . . findings of the panel and Appellate Body, to prohibit such conduct."[36]

---

[34] Thailand Appellant Submission, para. 42.

[35] Thailand Appellant Submission, para. 42.

[36] Panel report, para. 7.94. *See also* para. 7.94 n.142 ("[C]onsistent 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.").

25. Thailand's Appellant Submission is premised on the opposite view: that the Antidumping Agreement "governs" GATT 1994 Article VI and therefore, if the Antidumping Agreement is silent on a particular matter, it must be prohibited, even if GATT 1994 expressly permits it.[37] The United States fully agrees with the Panel's approach. Instead of "reading Article VI in conjunction with the Antidumping Agreement," as the Appellate Body in *US – 1916 Act* suggested,[38] Thailand attempts to read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning. The GATT 1994, including the Ad Note to Article VI, is an "integral part" of the WTO Agreement.[39] As past panels and the Appellate Body have noted, Article VI is "part of the same treaty" as the Antidumping Agreement, and "should not be interpreted in a way that would deprive it or the Antidumping Agreement of meaning."[40] A panel "should give meaning and legal effect to all the relevant provisions," including the Ad Note to Article VI.

26. Neither the Appellate Body report in *US – Offset Act* nor the Appellate Body report in *US – 1916 Act* supports the conclusion that an action permitted by the Ad Note, and not addressed by the Antidumping Agreement, is prohibited under Article 18.1. The Appellate Body's observation that a measure "must be consistent" with Article VI of the GATT 1994 *and* the provisions of the Antidumping Agreement, and that Article VI must be "read in conjunction

---

[37] For example, Thailand argues that because "the Agreement contains no rules governing" security after imposition of an order, such security must be prohibited. Thailand Appellant Submission, para. 89.

[38] *US – 1916 Act (EC) (AB)*, para. 137.

[39] WTO Agreement, Art. II:2.

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

with" the Antidumping Agreement do not mean that a measure is inconsistent simply because the Antidumping Agreement is silent on the particular issue in question.[41] Likewise, as the Panel explained, the Appellate Body's statement in *Brazil – Desiccated Coconut* that GATT Article VI and the Antidumping Agreement form a "package of rights and obligations" must be understood in the context of the explanation that followed regarding the continued relevance of GATT Article VI.[42]

1. The Panel properly found that Antidumping Agreement Article 7 does not address security requirements after imposition of an order

27. Thailand asserts that the Panel's reasoning regarding the Ad Note is "inconsistent with Article 7" of the Antidumping Agreement, because Article 7 of the Agreement "governs the application of" the Ad Note.[43] Beyond the fact that its argument is premised on an incorrect understanding of the relationship between the Antidumping Agreement and GATT 1994, it relies upon a basic logical fallacy: the notion that, if provisional measures within the meaning of Article 7 may take the form of security, all security requirements must constitute "provisional measures." In so doing, it in effect reads the Ad Note out of the GATT 1994 entirely.

28. As the Panel found, "Article 7 contains disciplines regarding the imposition of provisional measures,"[44] and, with respect to "the application of EBR after the imposition of the anti-dumping order. . . Article 7 is not applicable."[45] Article 7 contains rules with respect to

---

[41] *US – 1916 Act (AB)*, para. 137; *US – Offset Act (AB)*, para. 265.

[42] Panel report, para. 7.76.

[43] Thailand Appellant Submission, paras. 46-52.

[44] Panel report, para. 7.96 n.145.

[45] Panel report, para. 7.96 n.145.

provisional measures – measures (including security) taken prior to a final determination in an investigation. Article 7 does not, however, address security requirements imposed after a final determination has been made, and there is no basis to conclude that it places limitations on those requirements beyond the limitations established in the Ad Note.

29. Contrary to Thailand's assertion, the Panel did not conclude that "'provisional measures' can continue to be collected after the time limits set forth in Article 7.4 " – rather, it found (correctly) that the EBR was *not* a "provisional measure."[46] Thus, Thailand's argument that "Article 7 must necessarily be interpreted as providing that no other provisional measures are permitted" is irrelevant.[47] The sole support Thailand offers for its position that Article 7 applies to the EBR is the fact that the Ad Note and Article 7 both identify cash deposits and bonds as forms of security. This is the *only* sense in which the language in the Ad Note is, as Thailand puts it, "virtually identical" to that in Article 7, yet on this basis alone Thailand concludes that Article 7 was intended to "govern" the Ad Note. It simply does not follow, however, that because provisional measures may take the form of security requirements, all security must be a "provisional measure" subject to Article 7.

30. Thailand's assertion that the Panel "acknowledged a link" between the Ad Note and provisional measures is based purely on a misquotation of the Panel report. The Panel did not "declare that the Ad Note was introduced to provide security in the form of provisional

[46] Thailand Appellant Submission, para. 47.

[47] Thailand Appellant Submission, para. 47.

measures"; rather it found precisely the opposite.[48] Regarding the negotiating history, the Panel reviewed the full text of the paragraph cited in part by Thailand and noted that:[49]

> [i]n 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, 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.

Thailand now argues that the Group of Experts simply meant that Article VI and the Ad Note "do not use the term 'provisional measures.'"[50] However, were this the only significance of the statement, it is unclear why the Group of Experts would have bothered to note it, or why it would have used the phrase "made no mention of them" (which connotes something more than use of a particular term) in doing so. Thailand additionally cites to an exchange between the United States and the United Kingdom in 1965, which quotes U.S. law at the time regarding the use of certain bonds as provisional measures, and attempts to argue that this requires the conclusion that the Ad Note does not address bonds after the imposition of an order.[51] As noted previously, the

---

[48] *Compare* Thailand Appellant Submission, para. 50 *with* Panel report, para. 7.129 ("If the Ad Note was not introduced to provide for reasonable security in the form of provisional measures, one might legitimately ask what it [was] 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, 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.").

[49] Panel report, para. 7.125.

[50] Thailand Appellant Submission, para. 52.

[51] With regard to Thailand's suggestion that U.S. law at the time required security only until imposition of an order, as discussed below, it is factually incorrect, and the Panel so found.

mere fact that *some* bonds may be "provisional measures" does not merit the conclusion that *all* bonds are "provisional measures", as Thailand seems to believe.[52]

31. As the Panel found, nothing in the text of the Ad Note suggests that it is limited to "provisional measures" and nothing in the text of Article 7 supports the conclusion that it is intended to address security requirements after the imposition of an order. Beyond a logical fallacy, misquotation of the Panel report, and mischaracterization of the negotiating history, Thailand has failed to offer any support for its claim otherwise.

2. The Panel properly found that Antidumping Agreement Article 9 does not address security requirements

32. Thailand now advances two arguments regarding the significance of Article 9, both of which were rejected by the Panel, and both of which illustrate the basic flaws in Thailand's approach. First, Thailand argues that Article 9 supports its view that "suspected" dumping cannot encompass the assessment phase of a proceeding and that security after imposition of an order must be prohibited[53] – an argument premised on its incorrect view that "cash deposits" are "duties", that Article 9 limits the amount of the cash deposit that may be collected to the margin of dumping determined in the most recently completed review, and that the Antidumping Agreement prohibits all that is not expressly permitted. This position cannot be reconciled with the text of the Antidumping Agreement or the Ad Note, or the ordinary meaning of either of the terms in question.

---

[52] Nor is Thailand's argument even consistent – under this logic, all cash deposits would also be "provisional measures" (since they too are mentioned in Article 7), yet Thailand elsewhere argues (incorrectly) that some cash deposits are in fact "duties".

[53] Thailand Appellant Submission, paras. 57-60.

a. The Panel interpreted the Ad Note consistently with Article 9

33. Contrary to Thailand's assertion, Article 9 is fully consistent with the Panel's interpretation of "suspected" dumping. As explained in paragraphs 11-12, the "final determination of the facts" in the Ad Note refers to the determination of the facts with respect to the "*payment* of anti-dumping or countervailing duty."[54] As the Panel noted, Article 9.3.1 refers to "the determination of the final liability for payment of antidumping duties"[55] – which in the context of a retrospective duty assessment system, must be made in order for the facts with respect to payment to be determined. Thus, the "final determination of the facts" in the Ad Note follows an assessment review as described in Article 9.3.1. Article 9.3.1 makes clear that "final" liability for payment of antidumping duties occurs at the end of an assessment period – the terminology used therein coincides with the reference to the "final" determination of the facts with respect to "payment" in the Ad Note, further supporting the view that the Ad Note addresses security pending completion of assessment. Thus, contrary to what Thailand suggests, the "amount of the antidumping duty" is not merely a "subsidiary" determination but rather is the central issue in the context of the Ad Note.[56] As the Panel properly concluded, until this determination is made, dumping is "suspected" because whether imports are dumped and any amount of liability is not known.

34. Ignoring the parallels in language between Article 9.3 and the Ad Note, Thailand's entire argument incorrectly assumes that the term "suspected" must relate to the determination of the

---

[54] Emphasis added.

[55] Panel report, para. 7.110.

[56] Thailand Appellant Submission, para. 63.

"existence" of dumping pursuant to Article 5.1, and not the determination of final liability.[57] Thailand's argument regarding the significance of footnote 22 is likewise misplaced.[58] As the Panel stated, *the Panel's* "interpretation is consistent with, and indeed supported by, note 22 of the Anti-dumping Agreement."[59] Note 22 recognizes that termination or revocation of an order is not required merely because final liability may be zero with respect to particular entries or a particular time period. Thus, contrary to Thailand's theory that dumping is a "continuous" state, not all entries subject to an order may be dumped. Moreover, contrary to what Thailand suggests, footnote 22 does not mean that a finding of zero liability for a given set of entries must extinguish "suspicion"[60] – as the Panel observed, "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."[61] Thailand's assertion that the Panel's position is somehow "contradictory" is baseless – the Panel's position is not that an assessment review resulting in a final determination of zero liability "does not have [the] effect [of] a 'final determination of the facts'",[62] but, rather, the Panel's position is that an assessment review is a

---

[57] Thailand Appellant Submission, para. 64.

[58] Thailand Appellant Submission, para. 65-66.

[59] Panel report, para. 7.104 n.150

[60] Thailand Appellant Submission, para. 66.

[61] Panel report, para. 7.104 n.150.

[62] Thailand Appellant Submission, para. 66.

final determination of the facts with respect to the *entries subject to that review* and may not extinguish suspicion of dumping as to subsequent entries.[63]

35. Based on its "comprehensive regulation" theory of the Antidumping Agreement, Thailand makes a number of additional arguments that lack any basis in the text of Article 9 or the agreement as a whole.[64] For example, Thailand argues that "Article 9 contemplates only one type of action – definitive duties – as action against dumping" and that, because the bond is not a definitive duty, it is impermissible.[65] Article 9 does not say this, however. While it is certainly true that Article 9 *contains certain obligations with respect to* one type of action (namely, duties), it does not follow that Article 9 "contemplates" that *that* type of action is the *only* type of action permitted. To the contrary: Article 9 simply does not address bonds or other security.

36. Moreover, Thailand's argument proves far too much – for example, as discussed below, because cash deposits are not themselves "definitive duties", under its theory, cash deposits would also be prohibited. And, as explained previously, this interpretation would suggest that the Antidumping Agreement supersedes GATT 1994 (since even if GATT 1994 permitted a particular action, Article 9's silence would mean that it is prohibited), contrary to the Appellate Body's observations in *Brazil – Desiccated Coconut* regarding the relationship between GATT 1994 and the Antidumping Agreement.

---

[63] Furthermore, contrary to what Thailand suggests, whether or not an assessment review is conducted, a "final determination of the facts" with respect to payment is made for all entries subject to an order. Thailand Appellant Submission, para. 69.

[64] Thailand Appellant Submission, para. 76-77 (claiming that "it is impossible to believe" that the negotiators of the Antidumping Agreement would have been "satisfied that the Ad Note adequately regulated these measures . . . .").

[65] Thailand Appellant Submission, para. 61.

37. Finally, in support of its claim that the negotiators could not have anticipated the need for security after imposition of an order, Thailand again asserts that the United States did not have a retrospective system of duty assessment at the time the Ad Note was adopted. Quite simply, Thailand's argument is factually incorrect – the Antidumping Act, 1921, established a retrospective system of duty assessment that was in effect at the time the Ad Note was negotiated.[66] On this issue, which was exhaustively discussed during the Panel proceedings, the Panel rejected Thailand's position, stating that:

> [T]he United States appears to have been applying a form of retrospective duty assessment system at the time the Ad Note was introduced . . . . [E]ven Thailand acknowledges that there may have been cases (outside of the 'normal' situation) in which the United States was required to assess antidumping after the time of entry of goods . . . . The United States must necessarily have applied some form of retrospective assessment in respect of such cases.[67]

Thailand now repeats the same factually incorrect arguments it made to the Panel, arguments that again should be rejected.[68]

---

[66] The Antidumping Act, 1921, established a retrospective duty assessment system, whereby assessment or appraisement of antidumping duties was withheld pending the determination of whether and to what extent dumping had occurred on individual transactions subject to an antidumping "finding." The Antidumping Act, 1921, also included provisions for security pending final assessment, which prior to enactment of the Trade Agreements Act of 1979 was usually required in the form of "a bond equal to the estimated value of the merchandise." *See* Exh. US-15.

[67] Panel report, para. 7.129 & n.174. While claiming that the U.S. system was not "retrospective" until 1979, Thailand again refers to "inordinate delays" in assessment as the reason for introducing the changes in 1979. Thailand Appellant Submission, para. 74. As the United States noted before the Panel, the problem of delays in assessment suggests that assessment occurred even *longer* after entry prior to 1979 than it did afterward, not that, as Thailand claims, assessment was prospective until 1979.

[68] It should also be noted that whether the United States had a retrospective duty assessment system in 1948 is a question of fact. Thailand has not challenged the Panel's finding in this regard, and if it had, it would have been required to demonstrate that the Panel acted inconsistently with DSU Article 11.

b. A "cash deposit" is not a "duty"

38. As the Panel found, a "cash deposit" is security for a duty owed, but is not itself a duty.[69] The Panel based this finding on the substantive differences between "cash deposits" and "duties" (such as the fact that a cash deposit "is not liquidated revenue" and has no intrinsic value until duties are assessed) and textual analysis of various provisions of the WTO agreements.[70] With regard to Article 9.3, the Panel observed, for example, that the reference to retrospective duty assessment in Article 9.3.1 would make no sense if "cash deposits" were "duties" since cash deposits are established on a prospective basis.[71] Furthermore, it noted that:

> If the cash deposit were an antidumping 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.[72]

The Panel noted textual differences between Article 9.3.1 and 9.3.2 in describing what is refunded in a retrospective versus a prospective duty assessment system – whereas Article 9.3.2 refers to the refund of "duties", Article 9.3.1 simply uses the term "refund" without specifying what must be refunded.[73] The Panel also noted that Article 7.2 of the Antidumping Agreement likewise distinguishes a "cash deposit" as a form of "security" from "duties" in stating that "provisional measures may take the form of a provisional duty *or, preferably, a security – by*

---

[69] Panel report, para. 7.113-7.118.

[70] Panel report, para. 7.113.

[71] Panel report, para. 7.115.

[72] Panel report, para. 7.116.

[73] Panel report, para. 7.118.

cash deposit or bond . . . .,"[74] and that the fact that the text indicates a preference for requiring payment of cash deposits rather than duties confirms that there is in fact a substantive difference between a cash deposit requirement and a duty.[75] All of these factors supported the conclusion that "cash deposits" are not "duties."

39. Virtually ignoring the reasoning of the Panel with regard to the text of Article 9, Thailand argues that Article 9.1 provides that "what is imposed" pursuant to an assessment review is a "duty" and that because cash deposits are "imposed" they too must be duties.[76] Thailand's logic is entirely circular: the mere fact that what is, as Thailand puts it, "imposed" under Article 9 is a "duty" does not mean that a cash deposit is also a "duty" subject to the disciplines contained in Article 9. Likewise, Thailand's assertions that "cash deposits" in U.S. law are not "anything other than 'duties' within the meaning of the Agreement" are equally without basis in fact.[77] With respect to the references in U.S. law to "cash deposits of estimated antidumping duties," these provisions simply reflect the fact that cash deposits are required *in an amount equal to* the estimated antidumping duty. As the Panel found, "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."[78]

---

[74] Panel report, para. 7.119.

[75] See Antidumping Agreement, Article 7.2.

[76] Thailand Appellant Submission, para. 110-111. It should be noted that cash deposits are not "imposed" but rather are collected.

[77] Thailand Appellant Submission, para. 120.

[78] Panel report, para. 7.114 n.163.

40. Thailand's other arguments are *non sequiturs*. The fact that a cash deposit is "paid in cash" does not support the conclusion that it is a duty – were that the case, all cash deposits would be "duties" and there would have been no reason for the text of Article 7.2 to distinguish between the two.[79] Likewise, the fact that a cash deposit may be in an amount less than the final liability does not mean that it is something other than security[80] – indeed, it is because the cash deposit is sometimes less than the final liability (and because importers have then failed to pay hundreds of millions of dollars in duties lawfully owed) that CBP developed the EBR.[81] Finally, with regard to Thailand's assertion regarding the supposed "purpose" of cash deposits, based on a Senate report issued in 1979, as the Panel stated, "[c]onsistent 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."[82] Beyond the fact that Thailand misinterprets them, the Appellate Body should decline, as the Panel did, to conclude on the basis of a single statement in a Senate report that cash deposits "counteract injurious dumping" and are therefore subject to Antidumping Agreement Article 9.

c. Article 9 does not limit "margin of dumping" to margin determined for previous entries

41. Moreover, in an attempt to support its assertion that, rather than permitting "reasonable" security, the GATT 1994 and Antidumping Agreement prohibit any security in excess of the

---

[79] Thailand Appellant Submission, para. 124.

[80] Thailand Appellant Submission, para.125.

[81] Thailand Appellant Submission, para. 125.

[82] Panel report, para. 7.122 n.170.

margin of dumping determined in the investigation or most recent administrative review, Thailand misinterprets the term "margin of dumping" in Article 9.3 to refer, alternately, to the margin of dumping established in the investigation or to the margin established for a previous set of entries in a prior administrative review.[83] This reading of Article 9.3, however, is both illogical and inconsistent with the text of that provision and previous reports of the Appellate Body examining that text. Inexplicably, Thailand ignores the one type of margin of dumping that is based on actual analysis of the particular entries in question and which is used to establish the "final liability" for payment of antidumping duties, referenced in Article 9.3.1: a margin of dumping established in the assessment review. It is this margin (which, contrary to what Thailand asserts, is a margin "as established under Article 2" that is the "margin of dumping" referenced in Article 9.3,[84] and it is payment of duties resulting from this margin that the cash deposit and bond are intended to secure.

42. The Appellate Body's findings in *US – Zeroing (EC)* are fully consistent with this reading of Article 9. As the Appellate Body stated, "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."[85] The "margin of dumping established for an exporter or producer" referenced in that section of the Appellate Body's report is the margin of dumping established in an *assessment*

---

[83] Thailand Appellant Submission, para. 130 (asserting that, pursuant to Article 9.3, "the cash deposit after a final determination of dumping and injury must be based on the margin of dumping in the definitive determination or the most recently-completed administrative review.").

[84] Thailand Appellant Submission, paras. 73, 155(d).

[85] *US – Zeroing (EC) (AB)*, para. 130.

proceeding, not the margin of dumping established in an investigation.[86] Furthermore, as the Appellate Body explained:[87]

> Although Article 9.3 sets out a requirement regarding the amount of the assessed antidumping duties, it does not prescribe a specific methodology according to which the duties should be assessed.

43. Article 9.3 specifies the amount of "assessed" antidumping duties – an amount determined through the administrative review. The margin of dumping it describes is thus a margin of dumping established in that review. Article 9.3 does not prescribe the specific methodology by which duties should be assessed, nor the amount of security that a Member may require pending final assessment.

44. Finally, setting aside the question of cash deposits, it is notable that Thailand has nowhere explained how Article 9 can be read to address bonds, such as those required under the EBR. A bond is not a definitive duty, nor a cash deposit, and Thailand has not dedicated a single sentence of its submission to explaining how a bond could be prohibited by a provision that addresses duties. Thus, the Appellate Body should reject Thailand's request that it "clarify" that "Article VI, as interpreted by the Antidumping Agreement, limits the amount of any definitive duties, which include the 'cash deposits of estimated anti-dumping duties'. . . , to the amount of the previously-determined margin of dumping . . . ."[88]

---

[86] *See e.g.*, *US – Zeroing (EC) (AB)*, para. 128 (explaining that the discussion that follows relates to U.S. argument regarding "duty assessment proceedings").

[87] *US – Zeroing (EC) (AB)*, para. 131.

[88] Thailand Appellant Submission, para. 155(d).

3. Prior Appellate Body reports regarding "actions against dumping" did not address security requirements or analyze the Ad Note

45. Thailand again argues that statements in the Appellate Body reports in *US – 1916 Act* and *US – Offset Act* must be read to prohibit additional security.[89] On this issue, the Panel stated:[90]

> [W]e 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 antidumping duties, provisional measures and price undertakings.'" While we acknowledge that such statements were made by the Appellate Body. . . , 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 Antidumping 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 Antidumping Agreement . . . . [W]e 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*.

46. The Panel was fully correct in so finding. As the Panel noted, the Appellate Body reports in question did not contain any analysis of the Ad Note (or even refer to it indirectly), nor did they discuss the question of how Members may guard against the risk that one of the "permissible responses" to dumping might be circumvented. To read these reports as prohibiting security otherwise permitted by the Ad Note would imply that the reports inadvertently altered the balance of rights and obligations contained in the Agreements, contrary to the DSU, and would not accord with the Appellate Body's views on the relationship between the Agreements set forth in *Brazil – Desiccated Coconut*.

---

[89] Thailand Appellant Submission, para. 79-84.

[90] Panel report, para. 7.97.

4. Article XX(d)

47. Thailand additionally argues that because the Ad Note does not apply, security for antidumping duties may only be permitted if justified under Article XX(d).[91] If, as Thailand asserts, Article XX(d) is the only provision that provides authority to require "necessary security in cases of a risk of noncollection,"[92] it is unclear why the Ad Note (or any provision dealing with security) would have been included in the GATT 1994. The U.S. argument in *EEC – Parts and Components* provides no support for Thailand's argument and is fully consistent with the position of the United States in this proceeding. There, as here, the United States took the view that Article XX(d) "authorized a contracting party to take actions necessary to enforce a customs duty."[93] The United States did not argue, as Thailand seems to suggest, that Article XX(d) was the *only* provision in the GATT 1994 addressing actions facilitating the collection of duties,[94] and the particular action that was the subject of the U.S. argument in that case was not security, but rather anticircumvention measures not governed by the Ad Note.[95] The ordinary meaning of the Ad Note is that it limits security for payment of antidumping duties to "reasonable security", pending final determination of the facts – an event that does not occur until after assessment is complete. If a security requirement is not inconsistent with the GATT 1994, including the Ad Note, Article XX(d) is irrelevant to an analysis of its WTO-consistency.

---

[91] Thailand Appellant Submission, para. 95-104.

[92] Thailand Appellant Submission, para. 95.

[93] *EEC – Parts and Components*, para. 4.37.

[94] Thailand Appellant Submission, paras. 96-97.

[95] *EEC – Parts and Components*, para. 4.37 (discussing anticircumvention and customs fraud measures).

48. The purported "distinction" Thailand attempts to draw between "action against dumping" subject to Article 18.1 and "acting under Article XX(d)" simply begs the question of which provisions of the Agreements limit security for antidumping duties.[96] "Reasonable" security within the meaning of the Ad Note is not merely security required for a "dumped good"[97] – as explained in the U.S. Appellant Submission, the amount of potential liability and the risk of default may be relevant in determining whether security was "reasonable."[98] Reasonable security facilitates trade – it allows the uncreditworthy importer to import goods even if it is at risk of defaulting on its obligations.

C. The Panel Erred in Finding that Risk of Default May Not Be Considered in Establishing a "Reasonable" Security Requirement

49. The Panel found that "[i]n the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers."[99] Thailand expresses concern that the Panel took into account only the likelihood of increase in likelihood and magnitude of increases in dumping rates, but not the likelihood of default for a particular importer.[100] Thailand has therefore appealed the Panel's interpretation of "reasonable" security.

50. As the United States explained in its Other Appellant Submission, the Panel relied on an incorrect standard to determine whether the additional security required under the enhanced bond

---

[96] Thailand Appellant Submission, para. 100.

[97] Thailand Appellant Submission, para. 102.

[98] Thailand Appellant Submission, para. 102.

[99] Panel report, n.194.

[100] Thailand Appellant Submission, para. 150.

requirement was "reasonable" within the meaning of the Ad Note. The United States therefore agrees with Thailand that risk of default may be among the factors that are relevant to determining whether under the circumstances any additional security required was "reasonable."[101] The United States disagrees, however, with Thailand's assertion that "[a]ny assessment of whether security demanded from a particular importer is reasonable must. . . take into account the likelihood of default for a particular importer" and that security may only be required "where there is a direct and substantial risk of non-collection" of antidumping duties.[102]

51. Nothing in the text of the Ad Note suggests that "reasonableness" requires an importer-specific assessment of default risk before application of the EBR. (Indeed, if one were to accept Thailand's argument that Article 7 is a further elaboration of the Ad Note, then it is noteworthy that Article 7 contains no requirement for "importer-specific" security.) As noted, customs authorities may consider a range of factors to determine risk of default in case of an increase in the dumping rate, including the industry's characteristics, its ability to pay, and its compliance history. To analyze whether additional security should be required in a given case, customs authorities use historical data, and draw conclusions from available information regarding companies and commodities with similar characteristics. With respect to shrimp importers, CBP concluded that agriculture/aquaculture industries were characterized by low capitalization and high debt to equity ratios, that importers of this merchandise had been responsible for significant defaults in the past, and that shrimp importers were therefore likely to also have a heightened risk of default due to similarities with these other agriculture/aquaculture importers. Indeed, if

---

[101] Thailand Appellant Submission, para. 150.

[102] Thailand Appellant Submission, para. 152.

customs authorities were precluded from establishing risk of default unless they assessed information about an individual importer, then the very revenue losses that customs authorities use security to avoid would have to have already occurred in order for a security requirement to be imposed: CBP cannot conduct an assessment of individual risk without collecting information from the importer or waiting until that importer defaults.

52. Moreover, Thailand's argument appears to be premised on the notion that consideration of the risk of default may only be used to support a reduction in security requirements. While Thailand states that risk of default may be taken into consideration in "waiv[ing] or reduc[ing]" security requirements, an individual importer's risk of default may equally support *increasing* security requirements.[103] Thus, if, for example, importers in a certain industry are particularly more likely to default than importers in a different industry, it may be appropriate to require *more* security for importers of the high-default goods because the overall risk to the revenue associated with those imports is higher. The Panel, however, concluded that the EBR was not "reasonable" without even considering the evidence provided by the United States regarding risk of default with respect to importers of shrimp subject to antidumping duties. Because it failed to consider that evidence, it could not know whether the risk of default was such that additional security was in fact "reasonable".

[103] Thailand Appellant Submission, para. 151; *see also* para. 152 (characterizing test as "a narrow interpretation of the term 'reasonable'" that limits security to situations in which there is "direct and substantial risk" of noncollection).

IV. Conclusion

53. For the foregoing reasons, the United States respectfully requests that the Appellate Body uphold the Panel's findings as discussed in Part II.A-C. With respect to the Panel's findings discussed in Part II.D, the United States requests that the Appellate Body modify the Panel's findings in the manner described in the U.S. Other Appellant Submission.