UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

(WT/DS343)

ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES IN CONNECTION WITH THE FIRST SUBSTANTIVE MEETING

June 22, 2007

Table of Reports Cited

Argentina – Footwear (Panel)	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Mexico – HFCS (Article 21.5) (AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
US – Cotton Subsidies (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – FSC (Article 21.5 II) (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
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 – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Zeroing (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 30 January 2007

I. The Anti-dumping Measure

Q1. US: During the First Substantive Meeting the Panel attempted to clarify the US position regarding Thailand's zeroing claim. The Panel would like to know whether or not the US accepts that the zeroing methodology used to calculate the anti-dumping duties at issue in these proceedings is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

1. The United States neither accepts nor disputes that the "zeroing" used to calculate the anti-dumping duties at issue in these proceedings is inconsistent with Article 2.4.2. The United States is not contesting Thailand's zeroing claim for purposes of this dispute. The United States recognizes that a measure using a similar calculation approach was the subject of the Appellate Body report in *US – Softwood Lumber Dumping*, and that the Dispute Settlement Body (DSB) ruled that the measure was inconsistent with Article 2.4.2, first sentence, because of that calculation.

Q3. Thailand/US: In what sense does the fact that in this case there is no "agreement" between the parties as was the case in US – Shrimps (Ecuador) changes the position of the US from its position in that case?

2. The lack of an agreement between the parties in this dispute as compared to *US – Zeroing (Ecuador)* does not have an impact on the U.S. position with regard to the "zeroing" at issue in this matter. As the United States explained in its First Written Submission, the United States does not disagree with Thailand that the U.S. Department of Commerce (USDOC) used the same calculation approach in the investigations of shrimp from Ecuador and shrimp from Thailand.[1] Further, as noted in that submission and in response to Question 1, the United States recognizes that a measure using a similar calculation approach was the subject of the *US – Softwood Lumber* report, and that the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence, because of that approach.[2] The U.S. position has not changed from that in *US – Zeroing (Ecuador)*. The United States did not contest Ecuador's claim in *US – Zeroing (Ecuador)*, and does not contest Thailand's claim in this proceeding.

Q4. Thailand/US: What should be the role of the Panel under Article 11 of the DSU in a dispute where the respondent does not contest the complaining party's claim? Or what should be the role of the Panel if the respondent is only not contesting the facts?

3. Regardless of whether the respondent does not contest a claim or the facts relating to a claim, the role of the Panel is to make an objective assessment of the matter before it, as required by Article 11 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.[3] With respect to the antidumping

---

[1] U.S. First Written Submission, paras. 79-80.

[2] U.S. First Written Submission, paras. 79-80.

[3] See *US-Zeroing (Ecuador)*, paras. 7.1-7.11.

measure at issue in this dispute, the matter before this Panel is a narrow one – whether USDOC's calculation of margins of dumping for exporters of shrimp from Thailand using a weighted average to weighted average comparison was inconsistent with the first sentence of Article 2.4.2.

II. The EBR

Q5. Thailand/US: In order to better understand the workings in practice of the various bonds and cash deposits that an importer of Thai subject shrimps may need to provide, the Panel has prepared the following hypothetical case. Is the hypothetical scenario an accurate depiction of the bond and cash deposit requirements imposed under the 9 July 2004 Amended Monetary guidelines and subsequent clarifications and documentation? If not, please kindly indicate where the example is incorrect and provide the relevant correction. This hypothetical case is based on the following scenario:

- ***Importer of agriculture/aquaculture merchandise subject to Anti-dumping duties for imports of <u>US$1 million</u> during the previous 12 months;***
- ***The value of goods imported entered in this transaction amounts to US$ 10,000;***
- ***Bound rate under Harmonized Tariff Schedule (HTS) headings 0303.13.00 and 1605.20.10: <u>0 per cent;</u>***
- ***US D.O.C. Final Determination AD Rate: <u>"All-others" rate: 6.0 per cent</u> (5.7 - 6.8 per cent range)***

			Thailand 6.0 per cent All-Others Rate
1.	***Normal Duties:***	*0 per cent bound rate under HTS headings*	***$0***
2.	***Cash Deposit for Anti-dumping Duties:***	*Following Administrative Review of an affirmative Final Determination, US Customs orders the posting of a cash deposit based on the all-others rate.*	***$600***
3.	***Continuous Bond Amount Total:***	*Basic + Enhanced continuous bond amounts (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***
	3(a). Basic Continuous Bond Amount:	*The greater of either $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded.*	***$50,000***
	3(b). Enhanced Continuous Bond 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 Liability:*	*= 1. + 2. + 3.*	***$200,600***

4. Line 1: Line 1 is correct.

5. Line 2: While the calculation of the amount of cash deposit required is correct, the description of this line appears to conflate the administrative review process with the issuance of the order following the investigation phase of a proceeding. To clarify, upon issuance of its antidumping duty order, *but prior to the administrative review*, USDOC directs U.S. Customs and Border Protection (CBP) to require importers of subject merchandise to deposit in cash estimated antidumping duties in an amount equal to the order rate times the value of the shipment. In the case of an entry for merchandise valued at $10,000 and subject to an order rate of 6%, the required cash deposit would be $600 ($10,000 x 6%).

6. Line 3: Line 3(a) is correct. With respect to Line 3(b), the enhanced bond amount required would depend on the bond principal's history of compliance with CBP laws and regulations and ability to pay, if the bond principal requests an individualized amount. If the bond principal does not so request, the amount required pursuant to the formula would be $60,000. Line 3 is correct; however, it should be noted that continuous bonds are bonds that may be used as security for multiple transactions, and therefore the bond would cover subsequent transactions, not just the $10,000 entry referenced in the question.

7. Line 4: The use of the term "liability"to describe the amount in this line is inaccurate. Consistent with how those terms are used in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement) and by customs authorities, cash deposits and bonds are "security", not "liability." They secure payment of the obligation or liability in question: the amount of duty ultimately assessed. Assuming the bond principal does not request an individualized bond amount, the amount of security required would be $600 in cash deposits plus a $200,000 bond.

Q6. US: What happens to the EBR amount if a 0% cash deposit rate is determined during an administrative review for a subject importer? If the cash deposit rate is 0%, will the EBR amount necessarily be $0 as well?

8. If 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.

Q7. US: Could the US please explain in detail how the retrospective system works? What is the timeframe from the beginning to the end and for each of the various formal steps of the process?

Retrospective System

9. 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. If injurious dumping is found, USDOC issues an antidumping measure, known under U.S. law as an antidumping duty order. In its antidumping 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.

10. Pursuant to the antidumping duty order, importers must post a cash deposit of estimated antidumping 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.

11. Thereafter, 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 (often referred to as an "administrative review" or "annual review") of the import transactions that occurred in the prior year.

12. During that review, USDOC analyzes all of the import transactions for the period of review (*i.e.*, the prior 12 months) to determine the final amount of the antidumping duty payable on imports from each producer or exporter for which USDOC received a request for review. For

those entries not covered by a request for an assessment review, USDOC instructs CBP to assess antidumping duties at the cash deposit rate required upon entry.

13. It is important to note that the dumping calculations in the assessment review are based on different transactions than those evaluated during the investigation, the dumping margins calculated in the assessment review may be – and typically are – different (either higher or lower) than the dumping margins calculated in the investigation. The investigation evaluates the pricing behavior (normal value and export price) of producers and exporters based on transactions completed during a period of time prior to the initiation of the antidumping duty investigation. In contrast, an assessment review evaluates pricing behavior during later time periods (entries made no earlier than the preliminary determination). Specifically, the first assessment review evaluates transactions occurring from the date of imposition of provisional measures (if any) in the preliminary determination through the end of the12-month period following imposition of the antidumping duty order – generally a period of 18 months. All subsequent assessment reviews generally evaluate transactions occurring during the preceding 12 months.

14. CBP applies the assessment rate provided by USDOC to the 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, CBP 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, CBP issues a bill to the importer for payment of the difference in the amounts together with interest on the difference in the amounts.

15. During the administrative review, USDOC also establishes 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 analyzes the import transactions of each producer or exporter subject to the review to calculate a new cash deposit rate going forward.

Time frame

16. The time frame for an investigation and assessment review is explained as follows. As an illustration of how the time frames operate in practice, a timeline of the proceedings involving certain shrimp from India and Thailand is contained in Exhibit US-9.

17. Under U.S. law, USDOC has 267 days from the date the investigation is initiated to complete its antidumping duty investigation and issue an antidumping duty order, if any. USDOC may extend the deadlines for the preliminary and final determination determinations, but cannot extend the investigation beyond 407 days (consistent with Article 5.10 of the AD Agreement, which contains an 18 month time frame for investigations). For assessment reviews, U.S. law provides that USDOC ordinarily is to complete the review within 365 days; it may extend the deadlines for issuing preliminary and final results, but the review may not exceed 545

days (consistent with Article 9.3.1, which contains an 18 month time frame for assessment reviews).

- *Investigation - petition phase.* When USDOC receives a petition to investigate dumping, it has 20 days to determine whether to initiate the investigation. (This time may be extended to 40 days.)

- *Investigation - preliminary phase.* If USDOC initiates the investigation, the U.S. International Trade Commission (USITC) has 45 days from the date the petition is filed to make a preliminary injury determination. (This time may be extended to 65 days.) If USITC makes a preliminary affirmative injury determination, then USDOC has until 140 days from the date it *initiated the investigation* to make its preliminary determination of sales at less than fair value – that is, a preliminary calculation of the dumping margins of investigated producers and exporters. (This time may be extended to 190 days.)

- *Investigation - final phase*. USDOC has 75 days from its *preliminary determination* to make a final determination (*i.e.*, its final calculation of the dumping margins of investigated producers and exporters, adjusted based on any additional information gathered since the preliminary determination). (This time may be extended to 135 days.) If USDOC makes an affirmative final determination, the USITC has until 45 days after *USDOC's final determination* to make its final injury determination. (This time may be extended to 75 days.) If the USITC makes an affirmative final injury determination, USDOC issues an antidumping duty order. Based upon the antidumping duty rates published in the antidumping duty order, new cash deposit rates are established for imports entering the United States on or after the publication date of the antidumping duty order.

- *Assessment review*. One year after the date the antidumping duty order is issued, and during the anniversary month of the order every year thereafter, interested parties may request that USDOC conduct an assessment review of individual producers or exporters. For those entries not covered by a request for review, the amount of the cash deposits collected by CBP becomes the final liability for payment of anti-dumping duties. USDOC therefore initiates an assessment review of producers and exporters for which a review is requested, and instructs CBP to assess antidumping duties in the amount of the cash deposits on entries not covered by the request. After initiating the assessment review, USDOC is required to issue preliminary results – *i.e.*, the preliminary calculation of the actual margin of dumping for the entries of the reviewed producer or exporter during the period of review – within 245 days after the last day of the anniversary month. (This time may be extended to 365 days.) USDOC then must issue the final results within 120 days after the preliminary results are published. (This time may be extended to 180 days.) The final results represent the determination of the final liability for payment of anti-dumping duties for the specific producers or exporters reviewed during the period under consideration.

Q8. US: Was the US applying a retrospective duty assessment system at the time the Ad Note to Article VI:2 and 3 was negotiated in Havana?

18. At the time the Ad Note to Article VI:2 and 3 was negotiated, the United States had a retrospective duty assessment system in place. Under the U.S. Antidumping Act, 1921, the United States adopted a 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 1921 Act equivalent of an antidumping duty "order" under the current U.S. antidumping statute).[4]

Q9. US: Is the existence of dumping confirmed once the Final Determination is rendered? If not, at which precise moment is the existence of dumping confirmed or established?

19. The term "existence of dumping," which is not used in the Ad Note to Article VI, is used in Article 5.1 of the AD Agreement to refer to the investigation phase of the proceeding.[5] In that context, the existence of dumping is finally established when USDOC issues a final determination in an investigation. However, whether a particular import has been dumped – and thus whether duties are owed – is not confirmed until the completion of the assessment review (or, if no review is requested, the end of the period for requesting a review).

Q10. US: Regarding para. 6 of the US Oral Statement, at what point in time do the relevant anti-dumping duties become "lawfully owed"? Is the liability triggered upon importation, or only at final assessment? Do anti-dumping duties become payable at the time the merchandise crosses the border?

20. Liability for payment of antidumping duties is triggered upon importation of merchandise. At the time of entry into the customs territory of the United States, cash deposits for estimated antidumping duties are collected. The determination of the final liability for payment of anti-dumping duties for the specific producers or exporters reviewed, however, does not normally occur until completion of the assessment review.

Q12. US: The US argued para. 7 of its Oral Statement that "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'". Does this mean that one of the facts to be finally determined is the fact of whether or not the applicable duty has been paid? If so, what other "facts" are to be finally determined?

---

[4] *See* Antidumping Act of 1921, 46 Stat. 201(b), 202, and 209. *See also*, Trade Agreements Act of 1979, H.R. 4537, Sen. Fin. Rpt., 75 and 77 (discussing U.S. law prior to the enactment of the 1979 Act).

[5] *See* Article 5.1 ("Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.").

21. Whether or not the applicable duty has in fact been paid is a relevant fact with respect to the "payment of anti-dumping or countervailing duty." Another relevant fact is the amount of applicable duty to be paid, if any. In the context of a retrospective duty assessment system, that determination is referenced in Article 9.3.1 of the AD Agreement, which addresses the "determination of the final liability for payment of anti-dumping duties." Until the assessment review is completed – and the facts of individual producers and exporters actual pricing behavior during that review period are analyzed – USDOC does not know whether antidumping duties will be assessed on the entries in question.

Q13. US: Regarding the remainder of para. 7 of the US Oral Statement, could the US please explain how final "determination of the facts with respect to the 'payment of anti-dumping or countervailing duty' refers to the "determination of the final liability". Are "payment" and "liability" one and the same thing?

22. No, although the terms are related. "Liability", in this context, refers to the obligation to pay a customs duty. The "final liability" is the amount an importer must pay in duties for entries made during a particular period. "Payment" is the mechanism by which the obligation to pay duties is satisfied. The amount of "payment" due is equal to the "final liability."

Q14. US: The US argues at para. 5 of its Oral Statement that Thailand's arguments "would compromise Members' ability to maintain retrospective duty assessment systems". Is this because Thailand's arguments would, in the view of the US, also compromise the ability to impose shipment-specific cash deposits?

23. If accepted, Thailand's arguments would mean that *no* security is permissible pending final assessment, whether cash deposits or bonds. This would prevent a customs authority from using ordinary principles of customs administration to establish security amounts for antidumping and countervailing duties, thereby severely undermining the ability of a Member to finally assess and obtain payment of duties equal to the margin of dumping determined with respect to the entries subject to assessment.

24. For example, conflating the Ad Note with Article 7 of the AD Agreement, Thailand claims that the bond directive "does not take the form of a permitted provisional measure" within the meaning of Article 7 of the AD Agreement or the Ad Note to GATT Article VI "as it is applied *after* the definitive determination of dumping."[6] If accepted, Thailand's interpretation of the Ad Note would mean that no security is permitted after the definitive determination of dumping.

25. Thailand then argues that the bond is not a price undertaking or a definitive duty. Only in its conditional analysis of Article 9 does Thailand appear to attempt to draw a distinction between the cash deposit requirement and the bond amount, by characterizing – without

[6] First Written Submission of Thailand, para. 196.

explanation – the cash deposit as a "duty" and then claiming that Article 9 precludes collection of duties in excess of the margin of dumping established in the most recently completed administrative review.[7] Cash deposits, however, are not themselves "duties" within the meaning of Article 9. Like the bond amount, the cash deposit is a form of security – it is an *estimate* of the amount of duties that will ultimately be owed on a given entry. The margin of dumping determined in the assessment review may be lower or higher than the cash deposit rate, and assessed duties may exceed the cash deposits as well as the bond amount. Thailand offers no explanation for why a rate determined for an entirely different set of entries would be the "appropriate amount" to be collected under Article 9 for subsequent entries, and such a reading would lack any basis in the text or common sense. Contrary to what Thailand suggests, nothing in the AD Agreement, and in particular Article 9, proscribes a Member from obtaining payment of duties equal to the amount determined to be owed on the particular entries at issue, and this is precisely the amount that the cash deposit and bond requirements are intended to secure.

Q15. Thailand/US: Is the cash deposit that the US requires per entry further to a final affirmative determination of dumping and injury a "specific action against dumping"? Please explain.

26. Like a bond, a cash deposit is not "specific action against dumping," but rather is a reasonable means of ensuring payment of duties ultimately assessed. As the Appellate Body noted in *US – Offset Act (Byrd Amendment)*, "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."[8] As with the bond, the cash deposit simply allows the United States to obtain payment of duties lawfully owed to it.

Q17. US: The US asserted at the oral hearing that cash deposits are authorized by the Ad Note. (i) Are there any other provisions of the Anti-Dumping Agreement, or GATT 1994, that authorize the collection of cash deposits? (ii) Does the Anti-Dumping Agreement and / or the GATT 1994 allow the collection of cash deposits in excess of the margin of dumping established in the order / latest administrative review? Please explain. (iii) Would it be "reasonable", in the meaning of the Ad Note, to collect cash deposits in excess of the margin of dumping established in the order / latest administrative review?

27. (i) The Ad Note permits Members to require "reasonable security (cash deposit or bond)" for the payment of antidumping and countervailing duties. No other provision of the AD Agreement or 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.[9] As the United States explained in

[7] First Written Submission of Thailand, para. 208.

[8] *US – Offset Act (Byrd Amendment) (AB)*, para. 248.

[9] Article 7 of the AD Agreement permits the application of provisional measures, "preferably ... by cash deposit or bond" after the preliminary affirmative determination and prior to the final determination.

its First Written Submission, the Ad Note does not specify a particular amount of security that a Member may require pending determination of the final liability for payment of antidumping duties, but rather provides that the amount required must be "reasonable." This interpretation of the Ad Note is consistent with provisions of the AD Agreement, including Article 9. Article 9.2 allows Members to collect antidumping duties "in the appropriate amounts in each case." Article 9.3 states that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Following the administrative review described in Article 9.3.1, the amount of antidumping duty assessed by the United States equals the margin of dumping for the entries subject to that review. Thus, the cash deposit and bond serve to facilitate the receipt of payment for the antidumping duties owed for the entries in question.

28. (ii) See response to (i). The Ad Note does not specify a particular amount of security that a Member may require pending determination of the final liability for payment of antidumping duties, but rather provides that the amount required must be "reasonable." Consistent with Articles 9.2 and 9.3, in a retrospective duty assessment system, the margin of dumping as established under Article 2 for specific entries is the margin of dumping established during an assessment review covering those entries, not the margin of dumping established in the order or the margin of dumping established for a previous set of entries in the administrative review.

(iii) In the context of the Ad Note, the "reasonableness" of a security requirement must be evaluated in the context of ordinary customs administration. Whether it would be "reasonable" in a given case for a customs authority to require cash deposits in excess of the margin of dumping established in the order or most recent administrative review depends on the risk of noncollection in that case and whether additional cash deposits are a reasonable means to secure the risk. In the instant case, the United States did not consider additional cash deposits a reasonable means to secure the risk at issue and thus required an additional bond amount instead.

Q18. Thailand/US: The Ad Note provides that any Contracting Party may require reasonable security in the form of a bond or cash deposit, can you reconcile this?

29. India and Thailand suggest that "or" in the phrase "cash deposit or bond" can only be read in the exclusive sense rather than the inclusive sense.[10] However, nothing in the text nor context supports this reading of the term. The phrase "bond or cash deposit" is a parenthetical that appears after the term "reasonable security" and that term provides relevant context for interpretation. While Thailand and India discuss at length their concerns with the *amount* of security required by CBP, neither explain how requiring two types of security instead of one is relevant to determining what constitutes "reasonable security". Neither 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. Indeed, Thailand has asked the panel to direct CBP to apply the basic bond requirement coupled with the cash deposit to its

[10] See First Written Submission of Thailand, para. 200; Exh. IND-1, para. 95.

importers.[11] Thailand's own request would not accord with its reading of the phrase "cash deposit or bond."

30. The Appellate Body has interpreted other uses of "or" in the WTO Agreements as covering one or the other item, as well as both items, in a phrase. For example, in its report in *US – FSC (Article 21.5 II)*, the Appellate Body interpreted DSU Article 21.5 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.[12]

31. 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."[13] Like the language interpreted by the Appellate Body in *US – FSC (Article 21.5) (AB)*, based on the text and context, the "or" in the Ad Note encompasses a cash deposit, a bond, or a combination of both.

Q19. US: The US argues that there is still a "case of suspected dumping" until the determination of the final liability for payment. The Panel understands the US to argue that the suspicion of dumping derives from the results of the anti-dumping investigation reflected in the anti-dumping order (or the latest administrative review in respect of review proceedings). (i) If that is the case, does the US agree that the reasonableness of the security should be determined by reference to the elements of suspected dumping – including the margin of dumping - set forth in the order? Please explain. (ii) If the order determines a margin of dumping of 5% for exporter A, and 15% for exporter B, is there any basis in the Ad Note (or any provision of the Anti-Dumping Agreement or the GATT 1994) for requiring security for the payment of a 15% anti-dumping duty for imports from exporter A?

32. The final dumping order provides the basis for "suspicion of dumping" with respect to entries subject to the determination, for purposes of security requirements described in the Ad Note. The "suspicion" is not extinguished until final liability for duties is determined, because prior to that time the amount of payment required (if any) with respect to the entries in question is not known. Thus, in this context, dumping or subsidization is "suspected" until final liability for payment of antidumping duties is determined. This interpretation is also supported by

[11] First Written Submission of Thailand, para. 290.
[12] DSU Article 21.5 (Emphasis added).
[13] *US – FSC (Article 21.5 II) (AB)*, para. 60 (emphasis added).

paragraphs 2 and 3 of Article VI, to which the Ad Note refers. Those paragraphs of the GATT 1994 pertain specifically to "levy[ing]" antidumping and countervailing duties. In the AD Agreement, the term "levy" refers to "the definitive or final legal assessment or collection of a duty or tax."[14] This context supports the conclusion that the Ad Note governs security pending final assessment of duties, and that the term "suspected" dumping in the Ad Note refers to the fact that the amount of duties to be finally assessed, if any, is not known until assessment is complete.

33. (i) The reasonableness of security must be determined based on principles of ordinary customs administration – as the United States explained in its First Written Submission, this requires consideration of the amount of unsecured liability and the risk of default.[15] The margin of dumping contained in the final determination in the investigation or administrative review, as the case may be, may be one factor in estimating the amount of unsecured liability at issue, but it is not the only relevant factor in that respect, nor is it the only relevant factor in determining the amount of security that is "reasonable." The likelihood that the rate will increase, the likelihood that the amount of duties owed in the event of an increase will be significant (*e.g.*, where, as with shrimp, the value of shipments is so great that even a modest increase in the rate will result in substantial unsecured liability), the likelihood that an importer will not pay the duties owed – all of these factors are relevant to determining "reasonable" security.

34. (ii) There may be circumstances in which it is appropriate to require, as the question suggests, an amount of security from an importer of merchandise from exporter A equal to three times the margin of dumping determined for that exporter during the investigation. This amount of security may be "reasonable", and therefore permitted under the Ad Note, if, for example, there is a very high risk of the importer defaulting on duties owed once they are finally assessed, or if the risk of a large unsecured liability is significant. The fact that another exporter subject to the order at issue was found to have a margin of dumping of 15% in the investigation is irrelevant to determining the "reasonableness" of a security requirement for importers of merchandise from exporter A.

Q20. US: Might one argue that the EBR is not necessary to secure an importer's compliance with increased liability for anti-dumping duties in the sense of Article XX(d) of the GATT 1994 if that increased liability is not established at the time that the EBR is imposed? Is there any need for the EBR in the absence of demonstrated increased liability?

35. Security requirements, such as those envisioned by the additional bond directive, are designed to secure against the *risk* of an increased liability. They are not designed for "demonstrated increased liability" – this is because increased liability, if "demonstrated" or known prior to entry, can be collected. There is no need for security if the amount of liability is

[14] AD Agreement, Article 4.2, n.12.
[15] US First Written Submission, paras. 25-28.

known at the time of entry and thus capable of being collected at that time. Thus, the necessity of security arises precisely where there is a *risk* of increased liability in the absence of *demonstrated* increased liability.

Q21. US: Given that the EBR secures against future, potential increased liability, please explain how the anti-dumping rate determined by USDOC provides a "baseline proxy of duties that ultimately may be assessed" (para. 37, US First Written Submission). What does the anti-dumping rate determined by USDOC tell US Customs (CBP) of potential increases in an importer's future anti-dumping liability?

36. The antidumping rate established in the investigation or most recently completed administrative review provides a "baseline proxy of duties that ultimately may be assessed" insofar as it indicates the margin of dumping for entries made by an importer during a period of time preceding the period that is the basis for final assessment. To the extent that the margin of dumping in this period correlates to the margin in subsequent periods, the rate serves as an indicator of what the actual assessed rate will be. As explained in the U.S. First Written Submission, however, this correlation is imperfect: the actual assessment rate may be – and typically is – higher or lower than the antidumping rate established in the investigation or previous administrative review.[16] To analyze the likelihood of potential increases, CBP used historical data on increases in the antidumping rate.[17] CBP did not rely on the antidumping rate itself as information regarding potential increases in an importer's future antidumping liability. Finally, it should be noted that the likelihood of an increase in the margin is not the only factor relevant to determining the amount of security necessary to ensure payment of duties. As explained in the U.S. First Written Submission, other relevant factors include the amount of unsecured liability if an increase occurs, and the likelihood of default.[18]

Q23. US: When applying the Amended CBD, does the US ask importers to provide any information regarding the likelihood of exporters increasing their margin of dumping in the future?

37. When applying the directive, CBP maintains a process to allow bond principals subject to the directive to obtain a bond amount based on an individualized risk assessment. Consistent with the process outlined in the October 2006 Notice, the information requested of importers pertains to their ability to pay any additional duties owed and their history of compliance with CBP laws and regulations. CBP does not request that importers provide information regarding the likelihood of exporters increasing their margin of dumping in the future. As noted in response to Question 21, CBP did review historical information on rate fluctuations in developing the enhanced bond directive.

---

[16] US First Written Submission, para. 26.
[17] US First Written Submission, para. 26, n.28.
[18] US First Written Submission, para. 26.

38. It is doubtful whether importers would be able to provide specific information regarding pricing behavior at the time the bond is obtained – *i.e.*, before the entries secured by the bond have been made. Whether or not a company's pricing behavior in a given period has resulted in a higher margin of dumping than exhibited for previous periods is not known until USDOC completes the administrative review process.

Q24. US: During the first substantive meeting, the US referred to an historical analysis conducted by US Customs regarding the average increase in exporters' margins of dumping. (i) Please provide a copy of that analysis. (ii) When was the analysis prepared?

39. At the time CBP developed the policy it analyzed rate fluctuation in previous cases. Analysis of historical rate fluctuations in individual cases was prepared in 2003 and 2004.[19] In 2005, CBP consolidated this analysis into a table showing the distribution of rate increases in previous cases. *See* Exhibit US-10.

Q25. US: Has the EBR ever been applied to importers of subject shrimp before the final affirmative determination of dumping and injury was published? If so, when and in how many instances was the EBR applied prior to the final affirmative determination?

40. From August 6-10, 2004, officers in one CBP office sent requests for additional bonds to eleven importers of shrimp (including one importer of shrimp from Thailand and India), referring to the enhanced bond directive. Subsequently, on October 22, once in November and three times in January 2005, CBP officers sent requests for additional bonds to a total of 21 importers.

41. Of the importers that received these requests, twelve obtained additional bonds in the amount demanded. Three obtained bonds in lower amounts after CBP review. One importer did not obtain an additional bond and was permitted to continue importing under its original bond. CBP sent letters to two other importers rescinding its request. The remainder did not obtain additional bonds.

Q26. US: Since July 2004, have there been any anti-dumping orders against "agriculture/aquaculture merchandise" other than shrimps? If orders have been imposed, what was the reason for not including the subject merchandise at issue as a Special Category subject to the EBR?

42. On March 9, 2006, USDOC published an antidumping duty order on certain orange juice from Brazil, which is classifiable in subheadings 2009.11.00, 2009.12.25, 2009.12.45, and 2009.19.00 of the U.S. Harmonized Tariff Schedule (HTSUS). While orange juice is considered an agricultural product for purposes of the HTSUS, the industry does not share the same

[19] This analysis was the basis for statements in the documents contained in Exh. THA-6 at 5 and 68 (discussing rate fluctuations in crawfish case) and the Amended Bond Directive (Exh. THA-6 at 102).

characteristics as agriculture/aquaculture merchandise of the type covered by the enhanced bond directive. Orange juice importers engage in significant additional manufacturing and packaging activities and thus do not have the same capital structure as companies involved in importing agriculture/aquaculture merchandise in the sense that term was used in the directive. No other orders have been imposed on merchandise of this type since the directive was issued.

Q27. Thailand/US: Please provide on a per country and monthly basis, the volume and dollar value of subject shrimp imported into the US for the years 2001, 2002, 2003, 2004, 2005 and 2006. Please include the information with respect to subject shrimp types imported from the countries subject to the anti-dumping Order as well as from preferred countries not subject to the Order.

43. Exhibit US-11 provides, on a monthly basis, by country, the volume and dollar value of subject shrimp imported into the United States between calendar year 2001 and 2006.

Q28. Thailand/US: Could you please provide evidence on importers that requested and received individualized bond amounts substantially lower than those required under the Amended CBD (in other words, those importers mentioned in para. 18 of the US' First Written Submission)? In particular, could you please specify:

(i) the number of importers that fall into this category,
(ii) the value and volume of shrimp imported by each of them,
(iii) their percentage share of imports in comparison to the total share of importers of all subject importers, i.e. those that have asked for a reduction plus those that have not asked for a reduction,
(iv) the actual amount of the reduction, and
(v) the amount that had been initially required before the application of the reduction.

44. With respect to question (i), as of June 14, 2007, CBP received 27 requests for individualized bond amounts. Exhibit US-12 provides responses to questions (ii) - (v).

Q29. US: In the context of the EBRs, could the US explain how US Customs selects surety companies and what requirements surety companies must meet to receive approval? Is this a competitive selection process? Can the US explain how many surety companies are approved currently? Are these available per point of entry basis or at national basis? How often are the surety companies on the list re-evaluated or new companies added?

45. CBP does not select surety companies. The Department of the Treasury maintains a list of sureties acceptable on bonds securing obligations to the United States. In order to be certified eligible, a company must file an application with the Secretary of the Treasury in accordance with the procedures outlined at http://fms.treas.gov/c570/howapply-surety.htmland and (1) be

incorporated under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States; (2) be permitted under those laws to guarantee the fidelity of persons holding positions of trust and bonds and undertakings in judicial proceedings and be authorized to do so by its articles of incorporation; (3) have paid-up capital of at least $250,000 in cash or its equivalent; and (4) be able to carry out its contracts.

46. Over 250 companies are currently eligible to act as sureties on bonds securing obligations to the United States. The geographical region in which a surety is permitted to do business depends on the U.S. jurisdiction in which it is licensed. Most sureties hold licenses in multiple U.S. states. *See* Exhibit US-13 for a complete listing of sureties currently acceptable for bonds securing obligations to the United States, as well as the jurisdiction in which each operates.

Q30. US: Was the 9 July 2004 Amendment immediately applied to imports of shrimp from Thailand after the publication of the Preliminary Determination of 4 August 2004?

47. In a small number of cases, additional bond amounts were requested of importers pursuant to the enhanced bond directive shortly after the preliminary determination was published. See response to Question 25. Of the 28 importers that received requests, one imported shrimp from Thailand.

Q31. US: Is the EBR ever applied during the period between preliminary and final determinations?

48. While there were some instances in which bond requests were made pursuant to the directive prior to a final determination, the enhanced bond directive is not intended to be applied during the period between a preliminary and final determination.

Q32. US: At para. 14 of its First Written Submission, the US asserts that US Customs (CBP) determined that the principal entities responsible for uncollected duties were importers of agriculture/aquaculture merchandise subject to antidumping duties". (i) Since July 2004, how many anti-dumping orders have been imposed on imports of "agriculture/aquaculture merchandise"? (ii) Is it possible to impose the EBR in respect of continuing anti-dumping orders imposed prior to July 2004?

49. (i) See response to Question 26.

50. (ii) Yes.

Q33. US: What was the reason for the issuance of the October 2006 Notice following the issuance of the 9 July 2004 Amendment? In particular, does the October 2006 Notice cover cases where additional bond amounts were requested prior to the issuance of the Anti-dumping Order?

51. The October 2006 Notice was intended to "provide additional information on the process used to determine bond amounts for importations involving elevated collection risks and to seek public comment on that process."[20] The October 2006 Notice "represents 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."[21] In providing a comprehensive statement of the policy, the October 2006 Notice clarifies that the enhanced directive does not require additional bond amounts prior to the issuance of the order.

Q34. US: What is the average period of time (measured in days or months) between the date when subject shrimp is liquidated and the date the EBR bond amount is released?

52. While CBP informs importers of liquidation, it is the surety, not CBP, that "releases" bonds (as noted in the U.S. First Written Submission, CBP is a third party beneficiary to the bond contract but is not a party to the contract).[22] Thus, the timing of release of a bond depends on the terms of the contract between the surety and the importer. The United States does not have the requisite information available to it to calculate an average period of time between the date of liquidation and the date a bond is released.

Q35. US: When the conditions of the bond are fulfilled does US Customs advise the sureties that the bond can be released? In response to this question from the Panel, the US stated during the First Substantive Meeting that US Customs sends letters to importers explaining how the amount of the extended bond is determined. Please provide copies of three such letters.

53. To clarify, during the First Substantive Meeting, the United States explained that CBP advises importers that entries have been liquidated, but does not advise sureties that bonds can be released (because release depends on the terms of the contract between the surety and the importer). Three notices informing importers that entries have been liquidated are attached. *See* Exhibit US-14. As explained in response to Question 34, depending on the terms of the contract between the surety and the importer, the surety may release the bond once it is informed (either by the importer or through its own tracking systems) of liquidation.

Q36. US: In para. 10 of its Oral Statement, the US refers to the figure of $2.5 billion when describing "the amount of potential liability". The US notes that "no other U.S. antidumping case relating to agriculture or aquaculture merchandise has involved imports of this magnitude". The Panel understands that the EBR concerns the risk of increased duty liability, over and above the shipment-specific cash deposits. If that is the case, how is the risk of <u>increased</u> duty liability related to the value of the trade at

[20] 71 Fed. Reg. at 62,276 (Exh. THA-5).
[21] 71 Fed. Reg. at 62,276 (Exh. THA-5).
[22] U.S. First Written Submission, para. 7.

issue. Is there a greater risk that the margins of dumping will increase simply because the value of trade is significant?

54. To determine the amount of security necessary, one must consider both the *risk* of unsecured liability and the *amount* of that potential unsecured liability. Thus, creditors typically require greater security against a 10% risk of losing $1 million than against a 10% risk of losing $1000. With respect to antidumping liability, the likelihood that the margin will increase is a factor in determining the risk of unsecured liability. The total dollar value of entries for which importers would be required to pay additional duties in the event of an increase is a factor in determining the amount of potential unsecured liability.[23] This is because the amount of duties finally assessed is equal to the margin of dumping determined for the entries at issue in a given administrative review multiplied by the total entered value of those entries. All other factors being equal, in the event of an increase in the margin, if the total entered value of the entries is higher, the amount of duties finally assessed will be higher.

55. Imports of shrimp were substantial and unprecedented for agriculture/aquaculture merchandise subject to an AD/CVD order. The entered value of imports in 2003 suggested that even a modest 1% increase in the antidumping margin between the investigation rate and the assessment rate would translate into $25 million in unsecured antidumping liability. Thus, the significant volume of imports at issue support increased security.

56. It should be noted that, in addition to the significant value of imports, CBP also took into consideration other factors relating both to the risk of unsecured liability and the amount of that liability in applying the bond requirements to shrimp importers. With respect to the risk of default, as the United States explained in its First Written Submission, after facing hundreds of millions of dollars in unpaid antidumping and countervailing duties, CBP determined that importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty liability faced an elevated risk of default, due in part to low capitalization and high turnover rates in the industry as a whole.[24] With respect to the risk of an increase in margins, CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 percent of time, did not change 11 percent of the time, and decreased 56 percent of the time.

Q37. US: In paragraph 52 of its First Written Submission, the US alleges that among the reasons for the US Customs to apply the Amended CBD to subject shrimp was that it "had experienced $ 225 million in defaults on similar merchandise where anti-dumping orders were concerned". Could the US clarify which is that similar merchandise and why it is similar to subject shrimps?

[23] The amount of potential unsecured liability may also bear on the likelihood of default. Some evidence suggests that importers are more likely to have difficulty paying bills that are high, particularly where, as with shrimp, there is evidence that the companies at issue are undercapitalized.

[24] *See e.g.*, CBP, Proactive Approach to Revenue Protection for Antidumping Duty (June 23, 2004), at 68 (Exh. IND-8) (Exh. THA-6).

57. CBP has found that companies within the agriculture/aquaculture industry share certain characteristics that result in a greater likelihood of default. Serious collection problems within the agriculture/aquaculture industry were experienced with merchandise including garlic, crawfish, mushrooms, honey, and catfish.

58. Shrimp was similar in that (1) the industry is characterized by low capitalization rates and relatively low barriers to entry and exit; (2) like importers of garlic (which was subject to a very low duty), crawfish (which was duty-free) and other agriculture/aquaculture products, shrimp importers had very little history of paying customs duties prior to imposition of the AD order; and (3) shrimp importers were highly leveraged and often rely on asset-based financing due to a lack of cash flow. All of these factors suggested that, as with other agriculture/aquaculture merchandise, there was a significant risk of default associated with importers of shrimp.

Q38. US: Is it correct that crawfish and garlic importers have significant actual defaults? If so, what is the reason behind the US' decision of not targeting crawfish and garlic imports as "test" cases?

59. Yes, significant actual defaults were experienced with crawfish and garlic importers. CBP did not target crawfish and garlic imports because defaults in these cases had already occurred. CBP intended the bond directive as a proactive measure to address defaults before they occurred. As noted in response to Question 37, similarities between companies within the agriculture/aquaculture industry and the large volume and value of shrimp imports subject to the antidumping duty order on shrimp led CBP to apply the bond directive to shrimp.

Q39. US: Is crawfish and garlic still subject to anti-dumping orders?

60. Yes.

Q40. US: In para. 26 of the US' First Written Submission, the US states that Thai importers that have made cash deposits at a 6% rate may actually be subject to an assessment rate in excess of 57 %, could the US explain why there is such a difference in dumping rates?

61. In a retrospective system, cash deposits are estimates of the final liability for antidumping duties, and are based upon dumping margins determined for sales examined in the investigation or a prior assessment review (*e.g.*, a group of sales that were transacted *prior* to the initiation of the investigation). By contrast, an assessment review pertains to sales transacted at a later period, as described in response to Panel Question 7. Because the investigation phase and the assessment review phase examine wholly distinct sets of sales, the margin of dumping determined in an investigation may vary – and typically does vary – from the margin of dumping, if any, in an assessment review.

62. In the cases of shrimp from India and Thailand, USDOC determined rates ranging from 4.94 to 15.36 percent, with a 10.17 percent all-others rate, and 5.29 to 6.82, with a 5.95 percent all-others rate, respectively, in the investigation phase. On March 9, 2007, USDOC issued preliminary results for the first assessment review for India and Thailand. The preliminary results ranged from 4.03 to 82.3 percent for India, and from 2.34 to 57.64 for Thailand. The preliminary rates of 57 and 82 percent highlighted by the Panel are based upon USDOC's determination that some exporters or producers elected not to cooperate in the assessment review. Because of their decision not to cooperate, USDOC had to make preliminary determinations based upon facts available for these exporters or producers.

63. Accordingly, the reasons for the difference in the dumping rates between an investigation and an assessment review, as highlighted by the Panel, are as follows: (1) the sales examined in the investigation phase establish an *estimate* of the antidumping duties to be finally assessed; (2) an assessment review examines sales from a later time period from that of the investigation, which may have different price characteristics than those analyzed during the investigation; and (3) the preliminary dumping rates from the first assessment reviews in the cases of Thailand and India indicate that the companies receiving rates of 57 percent and 82 percent, respectively, did not cooperate in the proceedings, and thus USDOC had to make preliminary determinations based upon facts available.

Q41. US: Please confirm whether the Panel is correct in understanding that the EBR safeguards against a double risk: first, that the margin of dumping – and consequent duty liability - might increase above the cash deposit rate; and, second, that the importer might default on such increased duty liability.

64. The Panel is correct: The risk of increased liability is affected both by the likelihood that the margin of dumping will increase above the cash deposit rate and the likelihood that the importer will default on the increased liability. As noted in response to Question 36, above, CBP also takes into consideration the *amount* of potential unsecured liability in establishing the bond amount required.

Q47. US: Please explain how the EBR "formulas … calculate CBP's best estimate of the amount of unsecured liability for which CBP requires additional security". Why does US Customs (CBP) estimate that the potential increase in liability will equate to 100 per cent of the cash deposit rate? Why would the increase not be just as likely to be 50, or 150, per cent of the cash deposit rate?

65. As noted in response to question 24, CBP conducted an analysis to determine the average increase in antidumping rates. While the average rate increase was 285 percent, CBP decided that 100 percent of the cash deposit rate was a reasonable amount of security, taking into consideration both the need to ensure that duties are paid as well as the potential burden on importers.

Q50. US: In footnote 28 of your First Written Submission you indicated that " CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 percent of time, did not change 11 percent of the time, and decreased 56 percent of the time." Could you explain how this supports US Customs alleged determination of risk that justified the imposition of the EBR?

66. This analysis supports CBP's conclusion that increases in rates – which result in the unsecured liability that historically has been the source of most unpaid duties – occur with some frequency in agriculture/aquaculture cases. Coupled with the fact that agriculture/aquaculture companies tend to be highly leveraged and undercapitalized, and the significant amount of potential unsecured liability involved, this information demonstrates that CBP's decision to apply the enhanced bond directive to importers of shrimp was reasonable.

LIST OF U.S. EXHIBITS

United States – Measures Relating to Shrimp from Thailand
(WT/DS343)

U.S. Exhibit	Description
9	Timeline: *Certain Warmwater Shrimp from Thailand* and *Certain Warmwater Shrimp from India*
10	Historical Analysis of AD Duty Rate Increases
11	Shrimp Imports, 2001-2006
12	Importers Requesting Individual Bond Amounts
13	Department of Treasury Listing of Certified Companies: Surety Bonds
14	Sample Liquidation Notices to Importers