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

(WT/DS345)

COMMENTS OF THE UNITED STATES ON INDIA'S ANSWERS TO THE PANEL'S QUESTIONS TO THE PARTIES IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

August 21, 2007

Table of Reports Cited

EC – Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Chicken Cuts (Panel)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R, adopted 27 September 2005, as modified by the Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
EEC – Parts and Components	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
US – Section 301	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000
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 – Lumber CVD II (AB)	Appellate Body Report, *United States - Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997
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

Comment on India's Response to Question 1.

1. In its response, India now appears to concede that "[a] possible interpretation of the Ad Note" is that Article VI:2-3 "did not limit by implication the right (as in many other cases of customs administration) to take security for the payment of duties pending determination of the facts" and that "it could have been argued that the Ad Note provided for taking security for payment of antidumping or countervailing duties as a customs enforcement measure 'ancillary' to the right to collect duties and that was not 'specific' to dumping or subsidization."[1] The United States agrees with India that the language in the Ad Note to Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") supports an interpretation that, as the United States has argued, security requirements of the type contemplated by the enhanced bond directive are not "specific" action against dumping or subsidization.

2. However, India's argument that the *Agreement on Implemention of Article VI of GATT 1994* ("AD Agreement") and *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") render this interpretation "no longer plausible" is without basis in the text of either Agreement and is unsupported by previous Appellate Body reports examining Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. To establish a breach of Article 18.1, a Member must demonstrate that the action is (1) "specific" to dumping; (2) "against" dumping; *and* (3) not in accordance with the GATT 1994, as interpreted by the AD Agreement.[2] As the United States has explained in its submissions, the enhanced bond directive is neither "specific" to dumping nor action "against" it.[3] Even if it were found to be "specific action against

---

[1] *Answers of India to the Panel's Questions to the Parties Following the Second Substantive Meeting of the Panel*, August 14, 2007, para. 3 ("India Second Answers").

[2] *US – Offset Act (AB)*, para. 236.

[3] E.g., *Second Written Submission of the United States*, June 29, 2007, paras. 28-31 ("U.S. Second Submission"); *First Written Submission of the United States*, May 1, 2007, paras. 34-47 ("U.S. First Submission"). The United States notes that in its response India often uses the term "defense" to describe the U.S. position regarding the Ad Note. India Second Answers, para. 15. In this regard, it should be noted that India has claimed that the U.S. measure is inconsistent with the Ad Note as well as Article 18.1, and therefore the burden rests with India to prove each element of its case. E.g., *First Written Submission of India*, March 20, 2007, para. 115(f) ("India First Submission") (requesting that the Panel find that the directive and laws and regulations of the United States are inconsistent as such with Note 1 *Ad* paragraphs 2 and 3 of Article VI); *Second Written Submission of India*, June 29, 2007 ("India Second Submission"), para. 90 (claiming that the directive "is inconsistent and as applied to importers of shrimp from India with the Ad Note"). *US – Wool Shirts (AB)*, p. 14 (noting that "it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."). The U.S. argument regarding the Ad Note does not constitute an affirmative defense.

dumping" as the United States has additionally explained, it is in accordance with the GATT 1994, as interpreted by the AD Agreement.[4]

3. In support of its assertion, India misreads the text as well as the Appellate Body's reading of Article 18.1 in *US – 1916 Act* and *US – Offset Act* in several key respects. First, India's argument that a "specific action against dumping" taken *in accordance with Article VI* as interpreted by the AD Agreement would somehow breach Article 18.1 is not supported by either the text or the Appellate Body report cited for the proposition.[5] In *US – 1916 Act*, the Appellate Body was responding to an argument of the United States relating to action contemplated by provisions of the GATT 1994 *other than* Article VI.[6] Here, the United States has identified a provision of Article VI of the GATT 1994 – the Ad Note to Article VI:2-3 – that the directive is "in accordance with," and has demonstrated that its reading of the Ad Note is fully consistent with the AD Agreement. The U.S. position thus accords with the Appellate Body's analysis in *US – Offset Act*, and in particular its statement that "Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*."[7] Furthermore, India's assertion that the Appellate Body read Article 18.1 as precluding action that is *not* specific to dumping, if it is not consistent with other provisions of the GATT 1994, is likewise at odds with the analysis set forth by the Appellate Body in *US – Offset Act*.[8] As the Appellate Body has explained, measures that are not *both* "specific" to dumping *and* "against" dumping do not "fall within the scope of the prohibition[]" in Article 18.1.[9]

4. With regard to India's assertion that simply because provisional measures under Article 7 of the AD Agreement have been identified by the Appellate Body as a "response to dumping" under Article 18.1, "any security taken solely for the purpose of ensuring payment of antidumping and countervailing duties after the final determination under the Enhanced Bond Requirement" must be "specific" to and "against" dumping and subsidization,[10] the analogy

---

[4]U.S. Second Submission, paras. 32-34.

[5]India Second Answers, para. 7.

[6]*US – 1916 Act (AB)*, paras. 17 and 19 (U.S. discussing Article III:4 of the GATT 1994 in support of an argument that the 1916 Act is not governed by Article 18.1).

[7]*US – 1916 Act (AB)*, para. 124.

[8]India Second Answers, para. 7.

[9]*US – Offset Act (AB)*, para. 236.

[10]India Second Answers, para. 11.

advanced by India does not hold. With respect to action that is "specific" to dumping, as the United States has explained, the directive is not "specific" to dumping, but rather addresses a particular noncollection risk, a risk that in the present case happened to be associated with antidumping duties.[11] In this regard, it may be contrasted with a provisional measure, since, when the United States requires bonds associated with the directive, it has been established that it is entitled to collect duties, and the only remaining question is, in what amount.[12] As India concedes, requiring security of the particular group of importers subject to a noncollection risk in those circumstances is typical practice in customs administration, whether, as in India's example, the risk relates to sanitary and phytosanitary matters, or, as in the instant case, the risk happens to relate to antidumping duty liability.[13] Indeed, India does not explain why the mere fact that a noncollection problem pertains to antidumping duties automatically leads to the conclusion that action to secure the duties in question is "specific action against dumping." With regard to action "against" dumping, while India does not explain precisely why in its view Article 7 requires the conclusion that all bonds for antidumping or countervailing duty liability are action "against" dumping, as the United States explained in its Responses, this conclusion is unwarranted.[14]

5. Finally, with regard to India's observations regarding the U.S. argument under Article XX, nothing in the text of the Agreement supports the conclusion that the United States is not entitled to rely on Article XX(d) as a defense simply because the Ad Note addresses security requirements. As the United States explained in its response to Panel Question 15, the two provisions are substantively distinct, and there is no basis to read Article XX out of the Agreement simply because another provision addresses security requirements. Indeed, elsewhere in its Answers, India appears to recognize that the text of the two provisions, and the legal analysis with respect to each, would not be the same.[15]

Comment on India's Response to Question 3.

6. India's response to this question reflects the two fundamental flaws in its interpretation of Article 9 of the AD Agreement: first, that "duty" means "security" (and that cash deposits are duties), and, second, that "margin of dumping" refers to the margin of dumping in the

[11]U.S. First Submission, paras. 27-29; U.S. Second Submission, para. 28.

[12]This includes the possibility that no duties will be collected at all, if no dumping is found with respect to the entries in question.

[13]India Second Answers, para. 12.

[14]U.S. Second Answers, para. 4.

[15]India Second Answers, para. 71.

antidumping order issued following the investigation, but not the margin of dumping established for purposes of assessment through the administrative review process. As the United States has explained, neither of these assertions are supported by the text, and India fails to respond to the U.S. arguments on this issue.[16] Indeed, elsewhere in its Response, India appears to concede that "[b]ased on the ordinary meaning and the meaning in legal parlance of the terms 'provisional duties' and 'security'...there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of a security in the form of bonds or cash deposits."[17] India does not explain how it can conclude that Articles 9.1, 9.2, and 9.3, which refer to "duties", in fact address cash deposits, when as it elsewhere acknowledges "there is clearly a difference" between duties and cash deposits. Moreover, India elsewhere appears to acknowledge that "it is permissible for a Member to collect the duties finally assessed in an administrative review even if they are above the level of the dumping margin or amount of subsidy found to exist in the final determination,"[18] yet fails to explain how it can reconcile this statement with its assertion that Article 9.1 only permits a Member to collect duties "to the extent of the dumping margin or the amount of subsidy found to exist in the antidumping or countervailing duty order."[19]

7. More fundamentally, India does not explain how a *bond* requirement would be prohibited by an obligation pertaining to "duties" when it elsewhere acknowledges that bonds are not the same as duties.[20] To the extent that India's analysis is premised on the incorrect notion that anything not specifically permitted by the WTO Agreement is prohibited by it, the United States notes that the Agreement sets forth specific obligations – in the case of Article 9.1, the obligation relates to a limit on the amount of duties that may be collected. If, as India appears to recognize, the measure in question is not governed by the terms of that provision, the only permissible conclusion is that it does not breach Article 9.1, not that it is prohibited by it.[21] India has not explained how the obligation to "collect duties in an amount equal to the margin of dumping" is breached by a bond requirement. Bonds are not duties, and the United States does not "collect" bonds (bonds are held by the bondholder), nor any fees associated with the bonds (fees are determined by private sureties, and remitted to them, not the United States). The amount

[16]U.S. Second Submission, paras. 14-20.

[17]India Second Answers, para. 33.

[18]India Second Answers, para. 24.

[19]India Second Answers, para. 16.

[20]India Second Answers, para. 16.

[21]*Compare US – Offset Act (AB)*, para. 236 (noting that measures that are not "specific" action "against" dumping "will not be governed by Article 18.1 of the *Anti-Dumping Agreement* or by Article 32.1 of the *SCM Agreement*.").

reflected on the face of the bond (to which India refers in paragraph 18 of its response) is not what is remitted by the company to the surety, nor "collected" by the United States unless, following the assessment review, it is determined that the final liability equals that amount.

8. Likewise, with regard to Article 7 of the AD Agreement, India has failed to demonstrate that the additional bond required pursuant to the directive is a "provisional measure." Article 7 addresses security requirements imposed during the investigation but prior to the determination of the existence of dumping. It does not address security requirements imposed after that time, and India has failed to explain how the terms of that provision would apply to a security requirement imposed after an antidumping duty order is issued.

Comment on India's Response to Question 6.

9. See comment on India's response to Question 3.

Comment on India's Response to Question 8.

10. See paragraphs 6-8, supra.

Comment on India's Response to Question 9.

11. India's assertion that, under Article 9.1, a Member may only collect duties "in the form of cash deposits after the final determination under both the prospective and the retrospective system of duty assessment" cannot be reconciled with its observation that "duties" are not the same as "cash deposits". Furthermore, the United States notes that India's statement suggests that it believes that *only* cash deposits can be collected – a position at odds with both the retrospective and prospective systems of duty assessment, both of which involve the collection of *duties*. With respect to India's arguments regarding the U.S. statute, as a threshold matter, there is no basis to conclude that one Member's use of a particular term in a provision of its municipal law is relevant to the interpretation of a term used in the WTO Agreement.[22] Even were that not the case and were U.S. law somehow relevant, the provisions that India cites would provide no support for its assertion that "cash deposits" are themselves "duties." 19 U.S.C. 1673e(a)(3) and 19 U.S.C. 1671e(a)(3) both mean that importers are required to make cash deposits in an amount that is equal to an estimate of the duties ultimately owed. Neither states that a cash deposit is itself a duty, and there is no evidence that the terms are used interchangeably in U.S. law. More fundamentally, as the United States has explained in its submissions and as India appears elsewhere to recognize, there is no basis in the text of the WTO

[22] *US – Lumber CVD II (AB)*, para. 56, 65 ("[T]he manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements."); *see also US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 87 n.87.

Agreement to conclude that a "cash deposit" is itself a "duty."[23] The former is a type of "security," as is evident from the text of the GATT 1994 and AD Agreement (both of which refer to cash deposits as "security").[24] Furthermore, the ordinary meaning of the terms, as well as the text of the Agreement (including Article 7 of the AD Agreement) support the conclusion that "security" is not the same as a "duty." Article 31(1) of the *Vienna Convention on the Law of Treaties* states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." To read the text of the Agreement as India suggests would not accord with this basic rule of treaty interpretation.[25]

Comment on India's Response to Question 10.

12. The United States agrees with India that "there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."[26] As noted in paragraph 7, supra, India's assertion that this means that Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement "may not be interpreted as including the right to take security instead of collecting duties" is premised on the incorrect belief that anything not addressed by a particular WTO discipline is prohibited.[27]

Comment on India's Response to Question 11.

13. With regard to the term "levy", the United States has explained in its submissions that its reading of the Ad Note is supported by paragraphs 2 and 3 of Article VI, which pertain to "levy[ing]" antidumping and countervailing duties.[28] The definition of "levy" supports the U.S.

---

[23]*E.g.*, U.S. Second Submission, paras. 15-16.

[24]AD Agreement, Article 7.2; GATT 1994 Article VI:1-2, Ad Note.

[25]U.S. Second Submission, paras. 15-16.

[26]India Second Answers, para. 33.

[27]India Second Answers, para. 37. It should be noted that India states that single-entry bonds may also be permitted under its theory, but that a continuous bond could not be, yet provides no explanation for why this would be the case. *Id.* This statement again reflects the inconsistencies in India's argument.

[28]*Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting*, June 22, 2007, para. 26 ("U.S. First Answers to Panel Questions") ("In the AD Agreement, the term 'levy' refers to 'the definitive or final legal assessment or collection of a duty or tax.' This context supports the conclusion that the Ad Note governs

reading because "the definitive or final legal assessment or collection of a duty or tax" encompasses the assessment review process (the "definitive or final legal assessment"). This further supports the interpretation of the Ad Note as addressing security for payment required prior to final legal assessment. The United States notes that India's suggestion – that the Ad Note *only* addresses security required pending a final determination in an investigation[29] – would imply a reading of the term "levy" as addressing the investigation phase of a proceeding, but *not* the assessment review. However, this would also mean that under Article 4.2 of the AD Agreement, Members would only be required to limit the duty to a particular area in its territory during the investigation.

Comment on India's Response to Question 12.

14. The United States agrees with India's position that what is "reasonable" under the Ad Note must be evaluated based on the ordinary meaning of the term and its context.[30] With regard to India's assertion that it "may be necessary to determine also whether the suspicion of dumping or subsidization and of consequent injury is reasonable", the United States notes that the security in question is required after an affirmative determination of the existence of dumping. While, as the United States has noted, whether particular entries have been dumped has not been determined (and thus dumping continues to be suspected because whether duties will be owed on those entries has not been finally established), the existence of a final affirmative determination in the investigation provides a strong basis to conclude that the "suspicion" is well-grounded and thus that requiring security for the final liability is "reasonable."

15. India's analysis of Article 7 in the context of "reasonableness" however, further illustrates the flaws in its claim that "the Ad Note has been implemented in Article 7 of the Antidumping Agreement." India's reading of Article 7 as "provid[ing] guidance on the standards to judge the 'reasonableness' of security" of any type in effect both understates the significance of Article 7 with respect to provisional measures (by suggesting that it is "guidance" only) and overstates its significance with respect to security that is not a provisional measure. Article 7 sets forth specific disciplines with respect to provisional measures, including provisional measures required in the form of security. The additional bond amounts required pursuant to the directive are not provisional measures, and therefore Article 7 does not apply to them. To suggest that the disciplines contained in Article 7 may be imported into the Ad Note as "context", and on that basis should be applied to a type of security that is not addressed by

---

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."); *Second Oral Statement of the United States*, July 24, 2007, para. 5 ("U.S. Second Oral Statement").

[29]E.g., India Second Submission, para. 79.

[30]India Second Answers, paras. 43-44.

Article 7 itself, does not accord with the ordinary meaning of the text of the Ad Note and is not a proper use of context in interpretation. As the United States has noted, to the extent Article 7 is relevant to interpreting the Ad Note, it suggests that "reasonableness" does not equate to a particular specific limit on the amount of security. Thus India is incorrect in asserting that security equal to the dumping margin in the investigation "is not merely a reasonable estimate of the duties that are likely to be owed...it is the only possible estimate."[31] Furthermore, the suggestion that the remainder of the disciplines in Article 7 apply to security requirements of any variety under the Ad Note further illustrates the flaws in India's argument: for example, were one only permitted to require security for four months, security would be prohibited for much of the period in which the "final determination of the facts" is pending.

Comment on India's Response to Question 14.

16. Regarding the impact of the directive on shrimp imports, the United States refers the Panel to its response to Panel Question 14. India's assertion that it has experienced a "year on year decrease in exports of shrimp" is simply unsupported by the data. See Exhibit US-11. India's exports of shrimp have fluctuated between 2004 and 2006, and there is no evidence of a correlation between these fluctuations and implementation of the enhanced bond directive.[32]

Comment on India's Response to Question 15.

17. Setting aside the procedural defects in India's claim, the United States notes that it has to date not explained how 19 U.S.C. 1623 or 19 C.F.R. 113.13 constitute "specific action against dumping or subsidization." With regard to India's claim that if the directive "fails to meet the requirements set out in the Ad Note...Article XX(d) cannot be deployed to justify" it, as explained above in paragraph 5, there is no basis for this interpretation of the GATT 1994.[33] With respect to its assertions regarding the alleged lack of analysis of dumping margins, CBP's basis for applying the directive to shrimp, and the claimed burdens of the additional bonds required, none are supported by the evidence.[34]

---

[31]India Second Answers, para. 52.

[32]With respect to India's claim that importers with "higher duty rates" have "suffered heavily", see U.S. Second Submission, para. 30 and n.55.

[33]India Second Answers, paras. 60-62.

[34]See U.S. First Answers, paras. 30, 60-61 (discussing CBP's historical analysis of the likelihood of increases in dumping margins and responding to India's argument that only the assessment calculation itself can be used to predict increases); U.S. First Submission, paras. 27-29 (describing CBP's reasons for applying the directive to shrimp); U.S. Second Submission, paras. 30-31 (responding to India's arguments regarding the alleged burdens of the additional

Comment on India's Response to Question 17.

18. The United States has provided information on the underlying data and analysis that was used as the basis for its conclusion that shrimp shares similar characteristics to agriculture/aquaculture merchandise, and otherwise has addressed the majority of India's points in previous submissions, arguments which it will not repeat here.[35] With respect to Indian importers of shrimp, first, it should be noted that the companies for which India has reported data did not import a substantial share of shrimp from India at the time the directive was developed, and therefore India's analysis suggests, if anything, that companies with stronger financial positions are importing more shrimp today than at the time the directive was issued. Second, two of the companies requested an individualized bond amount, and currently are required to obtain a bond in an amount that is 85% lower than that contemplated by the formula. The remaining six companies have not requested an individualized bond amount, for reasons unknown to the United States. Were they to do so (by supplying CBP with the same basic information that India appears to have managed to obtain in this proceeding without difficulty), CBP would evaluate that information as it did for the other importers and provide the companies with individualized bond amounts.[36]

Comment on India's Response to Question 26.

19. It should be noted that India's analysis of "likely increases in dumping margins" based on the first assessment review is not directly relevant to an assessment of whether the security required was "reasonable." While it may be the case that the face value of the bonds requested will exceed the final liability in the first administrative review, this cannot be known at the time of entry. The relevant question for purposes of the Ad Note is whether, based on the information available to it at the time CBP required the additional security, it was "reasonable." Furthermore, India's analysis appears to understate the amount of bills issued to importers subject to the shrimp orders, if the final results of the assessment review are the same as the preliminary results. Rather than $2,000,000, CBP data indicates that it will be required to issue almost $5,600,000 in bills to importers.

Comment on India's Responses to Questions 32-36.

---

bond amounts); U.S. First Submission, paras. 46-47 (same).

[35]U.S. Second Answers, paras. 26-31; Exhibit US-16, US-17, and US-19.

[36]In this regard, India's statements regarding the bond process set forth in the October 2006 Notice are without merit – CBP informed all importers of the process for obtaining individual bond amounts through publication of a *Federal Register* notice, and there is no basis to conclude that the process is burdensome.

20. With regard to India's assertions regarding the import of the mandatory/discretionary distinction and 19 U.S.C. 1623 and 19 C.F.R. 113.13, the United States will not repeat the points it has made in previous submissions, but would note that India has not responded to the arguments of the United States other than to reiterate the same incorrect assertions it previously advanced. With respect to the directive, the United States would note that India is factually incorrect in stating that "in every case in which the United States concludes that there is a likelihood of increase in dumping margins or the amount of subsidy found to exist between the final determination and the final assessment in an administrative review, it will impose the Enhanced Bond Requirement."[37] The likelihood of an increase in dumping margins is just one factor that the United States considers in deciding whether to require additional bonds of importers, and there is no basis to conclude that the directive *requires* the United States to demand additional security in any circumstance, even "in future cases of non-collection risk". The United States has required additional security of importers of shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam because, using the criteria in the directive, it identified a significant non-collection risk. Furthermore, it is simply incorrect that "when the conditions set out in the Amended Bond Directive are met, the Enhanced Bond Requirement must be applied,"[38] and India offers no support for this assertion.

Comment on India's Response to Question 38.

21. While India describes a variety of statutory provisions in U.S. law, none contradict the conclusion that 19 U.S.C. 1673e(a)(1) contains the obligation for CBP to require payment of antidumping duties.

[37]India Second Answers, para. 85.

[38]India Second Answers, para. 88.