BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2008-4)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

May 20, 2008

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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, India 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, India 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 that do not in fact support its position;
- Second, ignoring the ordinary meaning of the text of the Agreement (and the facts), India claims that "duty" is synonymous with "cash deposit."
- Third, India renders an entire provision of GATT 1994 (the Ad Note to Article VI) inutile, advancing a theory that suggests the Antidumping Agreement supersedes GATT 1994; and

- Fourth, India 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, India ignores or mischaracterizes much of the analysis provided by the Panel in rejecting the arguments that India 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.

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

[1] Panel report, para. 2.4. The following description of the U.S. retrospective duty assessment system also applies with respect to countervailing duties (CVD), though in a CVD case the investigating authority is evaluating countervailable subsidization, rather than dumping.

[2] Panel report, para. 2.5.

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 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,

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[3] Panel report, para. 2.5.

[4] Panel report, para. 2.6.

[5] Panel report, para. 2.6-2.7.

when importers defaulted, CBP could not recover the duties owed from the surety companies that protect CBP from default risk on secured liabilities.

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.

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.[6] 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-

[6] Panel report, para. 7.75.

> dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

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."[7] 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.[8] 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

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[7] Emphasis added.

[8] E.g., U.S. First Submission, para. 7.

collection of a duty or tax."[9] The "final determination" referenced in the Ad Note thus 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.[10] 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 India'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.[11] In particular,

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[9] Antidumping Agreement, Article 4.2 n.12; *see also* SCM Agreement Article 19.4 n.51.

[10] *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.").

[11] Panel report, para. 7.107.

the Panel rejected India's argument that the use of the term "suspected" means that the Ad Note only permits security prior to the imposition of an order.[12]

15. On appeal, India 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.[13] India's argument however, is premised on an incorrect understanding of the phrase "final determination", as that term is used in the Ad Note. According to India, the "final determination" is the determination that "precedes the imposition decision under Article 9.1."[14] As explained in paragraphs 10-12, this argument ignores the other terms used in the Ad Note – in particular "payment" – which suggest that the final determination in question is in fact the final determination of the facts with respect to payment of the duty. The Panel's discussion of the process of levying duties confirms that it shares the U.S. understanding of this term, and did not, as India now asserts (without citation or other support), adopt India's view of the meaning of the phrase.[15] Moreover, contrary to what India suggests, the Panel's analysis is not a "purposive" interpretation, but rather simply reflects its attempt to interpret the text and apply it to the facts before it – in this case, a security requirement in a system of retrospective duty assessment.[16]

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[12] Panel report, para. 7.83.

[13] India Appellant Submission, paras. 57-60.

[14] India Appellant Submission, para. 63.

[15] Panel report, para. 7.86.

[16] India Appellant Submission, para. 65, 68.

16. Nor does the Panel's reasoning create "disparities" between retrospective and prospective duty assessment systems.[17] Indeed, if India's argument were accepted, Members would not be permitted to maintain any security requirements pending final determination of liability. As the Panel noted, "the ability to require security is an essential element of a retrospective duty assessment system (which is specifically contemplated by Article 9.3.1 of the Antidumping Agreement)."[18] Precluding a Member with a retrospective system from requiring the posting of security prior to the determination of final liability would prevent such Members from collecting antidumping duties lawfully owed. The substantial defaults on unsecured liability which led CBP to develop the EBR themselves demonstrate the importance of security requirements to preventing circumvention of U.S. antidumping and countervailing duty laws.

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

17. Before considering India'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-

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[17] India Appellant Submission, para. 71-72.

[18] Panel report, para. 7.97. India's assertion that Members could bring imports to a "complete halt" ignores the fact that the Ad Note limits security to a "reasonable" amount. India Appellant Submission, para. 74. India's assumption that the absence of what it calls "bright lines" in the Ad Note would lead to such a result is without basis in fact (*see, e.g.,* Exh. US-11) and certainly would not justify reading a limit into the Ad Note other than what the ordinary meaning of the text provides.

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."[19]

18. India's Appellant Submission is premised on the opposite view: that if the Antidumping Agreement is silent on a particular matter, it must be prohibited, even if GATT 1994 expressly permits it.[20] 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,[21] India 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.[22] 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."[23] A panel "should give meaning and legal effect to all the relevant provisions," including the Ad Note to Article VI.

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[19] Panel report, para. 7.74. *See also* para. 7.73 n.114 ("[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.").

[20] India Appellant Submission, para. 40.

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

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

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

19. Contrary to India's assertion, the Panel's interpretation does not render the phrase "as interpreted by this Agreement" "redundant and inutile."[24] Rather, under the Panel's approach, the phrase "as interpreted by this Agreement" means that GATT 1994 Article VI must be read in conjunction with the Antidumping Agreement. Where the Antidumping Agreement expressly addresses the same issue, then in the event of conflict, the Antidumping Agreement prevails.[25] In this case, as explained below, the Antidumping Agreement does not address security of the type required pursuant to the EBR. Absent the phrase "as interpreted by this Agreement", a treaty interpreter might consider the text of the GATT 1994 without regard to the Antidumping Agreement – in effect allowing the GATT 1994 to "supersede" the Antidumping Agreement, contrary to the approach adopted by the Panel. Indeed, it is *India's* approach that renders inutile the reference to "the provisions of GATT 1994" (and as the Panel noted, the Ad Note itself[26]) for if all action must be specified in the Antidumping Agreement in order to be permissible, there would be no reason to consider GATT 1994 at all.[27] India is simply incorrect in asserting that a "striking consequence" of the Panel's interpretation is that "a specific action against dumping

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[24] India Appellant Submission, para. 16.

[25] See General Interpretative Note to Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (providing that "in the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A . . . the provision of the other agreement shall prevail to the extent of the conflict.").

[26] Panel report, para. 7.73 n.114 ("India's argument would result in the Ad note being rendered inutile, simply because it has not been expressly implemented through the Anti-Dumping Agreement.").

[27] As the Panel noted, this interpretation would render other parts of Article VI inutile. Panel report, para. 7.73 n.115 (noting observation of Panel in *Brazil – Desiccated Coconut* that the Antidumping Agreement does not address the issues covered in GATT Article VI:5 or VI:6(b) and (c)).

that is expressly contemplated by the Antidumping Agreement would not be permissible unless it is expressly authorized by Article VI."[28] The Panel made no such assertion, nor does this conclusion logically flow from its position.[29]

20. 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 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.[30] 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.[31] Indeed, India's position appears to be based on a misquotation of the Appellate Body: It claims that the Appellate Body found that "Members . . . reached agreement on an 'entire package of rights and obligations' in subsequent agreements"[32] (implying that the

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[28] India Appellant Submission, para. 16, 25.

[29] India's claim that the Panel's interpretation would "re-write" the phrase "as interpreted by this Agreement" to "if interpreted by this Agreement" is unfounded. India Appellant Submission, para. 26. "If interpreted by this Agreement" would suggest that GATT 1994 provisions would only be relevant *if* they were interpreted by the Antidumping Agreement. This is in fact precisely what the Panel, in rejecting India's argument, said the text does *not* provide.

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

[31] Panel report, para. 7.76.

[32] India Appellant Submission, para. 33.

"package" is the Antidumping Agreement only) when in fact the Appellate Body was describing Article VI *and* the Antidumping Agreement as the package of rights and obligations.

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

21. India 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 "implement[s]" the Ad Note.[33] India's argument is premised on an incorrect understanding of the relationship between the Antidumping Agreement and GATT 1994 and in effect reads the Ad Note out of the GATT 1994 entirely.

22. As the Panel found, "the application of the EBR is not a provisional measure and therefore falls outside the scope of Article 7."[34] Article 7 contains rules with respect to 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.

23. India appears to believe that if some security requirements are addressed by Article 7, all security requirements – including additional security required after imposition of an order – must fall within Article 7's ambit.[35] However, even if one were to accept India's view that Article 7 represents an "implementation of the Ad Note. . . to the extent that security. . . is taken as a provisional measure," this would provide no basis to conclude that security that is not a

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[33] India Appellant Submission, para. 76.

[34] Panel report, para 7.75.

[35] India Appellant Submission, 80.

provisional measure must comport with the requirements for provisional measures contained in Article 7.[36] Indeed, India appears to acknowledge that Article 7 only implements the Ad Note "to the extent that" security is a provisional measure.

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

24. India 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 India's approach. First, India argues that Article 9 prohibits security after imposition of an order[37] – 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.

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

25. Contrary to India's assertion, the Panel did not "read into Article 9" of the Antidumping Agreement "the right to impose security requirements";[38] rather, it found that such security was not prohibited by Article 9 since Article 9 addresses "duties" not "security" and that its interpretation of the Ad Note is fully consistent with Article 9. As explained in paragraphs 11-12, the "final determination of the facts" in the Ad Note refers to the determination of the facts

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[36] India Appellant Submission, para. 78.

[37] India Appellant Submission, para. 100.

[38] India Appellant Submission, para. 99.

with respect to the "*payment* of anti-dumping or countervailing duty."[39] As the Panel noted, Article 9.3.1 refers to "the determination of the final liability for payment of antidumping duties"[40] – 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. 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.

26. Referring to the maxim *expressio unius est exclusio alterius* (*i.e.*, the expression of one thing is the exclusion of another) and the presence of "detailed disciplines" in the Antidumping Agreement, India claims that "the specific mention of the right to impose and collect duties alone" means that Article 9 "intends to exclude any other rights."[41] Article 9, however, says none of this – and in particular, Article 9 does not "mention ... the right to impose and collect duties *alone*." That extra word is telling: it shows that India's argument in fact assumes what it wishes to prove. India's *expressio unius* argument must be rejected because there is no textual basis for believing that the provisions in Article 9 concerning one type of action (namely, duties) permit

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[39] Emphasis added.

[40] Panel report, para. 7.86.

[41] India Appellant Submission, paras. 101-102.

any inference with respect to (let alone implicitly prohibit) other types of actions. To the contrary: Article 9 simply does not address bonds or other security.

27. Moreover, India'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. Likewise, rather than "confirm[ing]" India's interpretation, Article 18.1 supports the opposite conclusion.[42] Were the text of Article 9 to be interpreted as India suggests, it is unclear why the negotiators would have included Article 18.1 since, under India's logic, Article 9 itself would prohibit "specific action against dumping" other than definitive duties. 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.

28. India additionally mischaracterizes the Panel's analysis of Article 9.3.1. In its report, the Panel discussed Article 9.3.1 as context in connection with its analysis of the meaning of the Ad Note. It did not find that Article 9.3.1 "authorized" retrospective duty assessment, nor is such "authorization" required.[43] Rather it noted that retrospective assessment "is specifically contemplated by Article 9.3.1 of the Antidumping Agreement" and that "the ability to require

[42] India Appellant Submission, para. 102.

[43] India Appellant Submission, para. 104. India's argument proceeds as if the Panel did not correct two erroneous uses of the term "authorise" during the Interim Review, when in fact it did.

security is an essential element" of such a system.[44] After considering the implications of India's argument for cash deposits, it concluded that India's interpretation of the Ad Note as only addressing security prior to imposition of an antidumping order was incorrect.[45]

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

29. As the Panel found, a "cash deposit" is security for a duty owed, but is not itself a duty.[46] 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.[47] 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.[48] 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.[49]

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

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[44] Panel report, para. 7.97.

[45] Panel report, para. 7.107.

[46] Panel report, para. 7.98-7.106.

[47] Panel report, para. 7.98.

[48] Panel report, para. 7.99.

[49] Panel report, para. 7.100.

refers to the refund of "duties", Article 9.3.1 simply uses the term "refund" without specifying what must be refunded.[50] 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 cash deposit* or bond . . . .,"[51] 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.[52] All of these factors supported the conclusion that "cash deposits" are not "duties."

30. India again argues that "there is no substantive difference between" cash deposits and duties.[53] As the Panel observed, however, this position is contradicted by the text of the Antidumping Agreement, which does not use the term "cash deposit" interchangeably with "duty", and indeed in Article 7 expresses a preference for cash deposits over duties. India provides no response to the entirety of the Panel's textual analysis, and instead cites to various statements in U.S. submissions to the Negotiating Group on Rules and in other dispute settlement proceedings (none of which, it should be noted, were presented to the Panel) that it claims imply that the United States believes that cash deposits and duties are one and the same.[54] Quite simply, none of the documents cited by India support this conclusion, and such submissions are not in any event a basis on which to depart from the ordinary meaning of the text of the WTO

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[50] Panel report, para. 7.102.

[51] Panel report, para. 7.103.

[52] See Antidumping Agreement, Article 7.2.

[53] India Appellant Submission, para. 109.

[54] India Appellant Submission, paras. 111-112.

agreements. With respect to the dispute settlement submissions, the arguments therein do not involve the question of whether a "cash deposit" is a "duty" and elsewhere do not use the term "cash deposit" interchangeably with "duty".[55] With respect to the negotiating submissions, each of the relevant citations identified by India amounts to a single sentence attempting to briefly summarize the text of both Article 9.3.1 and 9.3.2 in order to introduce a proposal unrelated to the question of whether a "cash deposit" is a "duty".[56] Moreover, the statements in question do not attempt to capture every nuance of difference in the text of these provisions (indeed, it is doubtful whether such a feat could be accomplished in a single sentence), and in particular they do not address a critical difference for purposes of India's argument: the fact that, as the Panel noted, Article 9.3.2 uses the term "duty" to describe what is refunded and Article 9.3.1 does not. If "cash deposits" were "duties", there would be no reason for the Antidumping Agreement to use the term "duties" in one provision but not the other.

31. India's assertions regarding the significance of the Appellate Body's statement in *US – Zeroing (Japan)* that "an administering authority may collect duties, in the form of a cash deposit," are equally unfounded. As the Panel stated:

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[55] *E.g.*, US Opening Statement at the Second Substantive Meeting of the Panel, *US – Zeroing (EC)*, para. 9 (describing the process of refund under Article 9.3.2 as a refund of "excess deposits" and the process of refund under 9.3.1 as a refund of "any duty paid"); Second Written Submission of the United States, *US – Section 129(c)(1),* para. 35 (discussing collection of cash deposits in U.S. retrospective duty assessment).

[56] TN/RL/W/98 (sentence describing Articles 9.3.1 and 9.3.2 in connection with proposal on accrual of interest); TN/RL/W/168 (same). With respect to TN/RL/GEN/131, India Appellant Submission, para. 111(d), India's interpretation relies upon its erroneous supposition that "the rate of antidumping duty" on completion of an assessment review "can only mean changes to the rate of cash deposits levied." *See* Part II.

> [I]n that case the Appellate Body was not addressing, and did not need to address, the issue of whether or not cash deposits constitute duties . . . . Furthermore, in its earlier Report on US – Zeroing (EC) the Appellate Body included dicta to the effect that, under the US retrospective duty assessment system, 'the United States collects security in the form of a cash deposit at the time a product enters the United States, and determines the amount of duty due on the entry at a later date.' This suggests that in the earlier case the Appellate Body treated cash deposits as a form of security for duties to be collected later, rather than as duties per se.[57]

India's argument that the statement in *US – Zeroing (Japan)* was somehow more significant than the statement in *US – Zeroing (EC)* because, in the latter, the Appellate Body noted that its description was based on the underlying panel report, is not persuasive[58] – the fact that the Appellate Body refers to the panel report in describing its position in *US – Zeroing (EC)* does not mean that its statement is of lesser consequence.

32. India fails even to address the multiple additional factors cited by the Panel in support of its conclusion that "cash deposits" are not "duties", including its discussion of Article 7 of the Antidumping Agreement and its analysis of Article 9.3 and the requirement that the amount of the anti-dumping duty "not exceed the margin of dumping." For all of the reasons identified by the Panel[59], India's argument that the EBR is inconsistent with Articles 9.1, 9.2, and 9.3 should be rejected.

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[57] Panel report, para. 7.101.

[58] India Appellant Submission, para. 116.

[59] Panel report, paras. 7.96-7.107.

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

33. A central argument advanced by India is that statements in the Appellate Body reports in *US – 1916 Act* and *US – Offset Act* must be read to prohibit additional security. On this issue, the Panel stated:[60]

> [W]e must consider India's specific argument 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", and definitive antidumping duties. 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*.

34. 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.[61] 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

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[60] Panel report, para. 7.76.

[61] India Appellant Submission, para. 43-52.

the Agreements set forth in *Brazil – Desiccated Coconut*. India's characterization of the Panel report as "disregard[ing] settled WTO jurisprudence" is thus flawed – since none of the reports discussed the Ad Note in relation to Article 18.1, none contain any "jurisprudence" on the question posed to the Panel.[62]

4. Article XX(d)

35. Having concluded that the United States acted inconsistently with the Ad Note to GATT Article VI, the Panel properly proceeded to address the U.S. argument that the security requirement is justified under GATT Article XX(d). Contrary to India's suggestion, nothing in the text of the covered agreements suggests that the United States was required to "invoke" footnote 24 of the Antidumping Agreement in order to justify the EBR under Article XX(d). Furthermore, it is not even clear what India means by the requirement to "invoke" a particular provision:[63] As the United States argued before the Panel, India's emphasis on footnote 24 rests on a misinterpretation of the Appellate Body report in *US – Offset Act*. There, the Appellate Body found that footnote 24 means that provisions other than Article VI are not among the provisions "interpreted by" the Antidumping Agreement for purposes of analyzing Article 18.1.[64] In this case, the relevant provision – the Ad Note to GATT 1994 Article VI – is a provision that is part of GATT 1994 Article VI. Nothing in the Appellate Body's reasoning suggests that the footnote precludes a Member from defending under GATT 1994 Article XX a measure found inconsistent with GATT 1994 Article VI, or otherwise places additional requirements on a

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[62] India Appellant Submission, para. 49.

[63] India Appellant Submission, para. 138.

[64] *US – Offset Act (AB)*, para. 261.

Member in asserting such a defense. As the Panel noted, the text of Article XX "does not on its face limit a panel from considering an affirmative defence under Article XX where it has found a violation under a provision of the GATT, including Article VI and/or the Ad Note."[65] Finally, while India asserts that the availability of Article XX as a defense would somehow render Article 18.1 of the Antidumping Agreement inutile, it offers no explanation, nor is the United States aware, of why this would be the case.[66]

36. India also challenges the Panel's finding that the law or regulation at issue for purposes of evaluating the U.S. Article XX(d) defense was "19 U.S.C. 1673e(a)(1), read together with 19 U.S.C. 1673e(b)(1), 19 U.S.C. 1673, 19 C.F.R. 351.212(b) and 19 C.F.R. 351.211(c)(1), all of which together govern the final collection of antidumping or countervailing duties." India claims that in so finding, the Panel improperly "supplemented the affirmative defense of the United States."[67] India's argument rests on a mischaracterization of the U.S. argument before the Panel. Contrary to what India suggests, the United States did not refer *solely* to 19 U.S.C. 1673e(a)(1) as the relevant law or regulation. Rather, the United States argued that the directive was necessary to secure compliance with "U.S. antidumping and countervailing duty assessment laws, in particular 19 U.S.C. 1673e(a)(1) governing the assessment of antidumping duties, and general customs laws and regulations requiring the payment of duties owed to the U.S. Treasury."[68] Moreover, the fact that the Panel read 19 U.S.C. 1673e(a)(1) "together with" other provisions of

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[65] Panel report, para. 6.13.

[66] India Appellant Submission, para. 145.

[67] India Appellant Submission, paras. 147-155.

[68] U.S. Second Submission, para. 51.

U.S. law in response to an argument *made by India* that those provisions were also relevant, cannot be the basis for finding that the United States inadequately stated its defense with respect to Article XX(d).[69] Indeed, the Panel did precisely what the Appellate Body suggested in *US – Gambling* – it "rule[d] on whether the challenged measure is justified under the relevant defence, *relying on arguments advanced by the parties* . . . ."[70] The Panel's findings on this issue thus should be sustained.

C. The Panel Properly Rejected India's Claim that the EBR Is Inconsistent "As Such" with Articles 1, 9 and 18.1 of the Antidumping Agreement and Articles 10, 19, and 32.1 of the SCM Agreement

1. The EBR is not "as such" inconsistent with Articles 1 and 18.1 of the Antidumping Agreement and Articles 10 and 32.1 of the SCM Agreement

37. The Panel rejected India's "as such" claims relating to the EBR following a careful analysis of the text of the measure and by using the mandatory/discretionary distinction in accordance with the guidance of previous panels and the Appellate Body.[71] Reviewing the text of each instrument comprising the EBR, it concluded that "the provisions are not binding on Port Directors, or US Customs more broadly. In other words, the Amended CBD on its face does not appear to require U.S. Customs to designate a particular 'covered case' or 'special category' of

[69] Panel report, para. 7.298-7.299 (noting India's argument that 19 U.S.C. 1673e(a)(1) does not "exclusively . . . govern" the obligation to require payment of duties owed, and concluding that additional provisions are also relevant after "[t]aking the parties' views into consideration.").

[70] *US – Gambling (AB)*, para. 282.

[71] Panel report, paras. 7.215-7.227.

merchandise in order to further impose the EBR on the subject merchandise."[72] Furthermore, it noted that "US Customs has as of yet only designated one 'covered case' and thus has only applied the EBR to subject shrimp importers" and that therefore other importers of other agriculture/aquaculture merchandise have not being required to provide additional security as contemplated by the EBR.[73] It referenced the decision of the U.S. Court of International Trade, in which the court found that US Customs had "*discretion* under US law to consider potential antidumping or countervailing duty in setting continuous bond amounts."[74]

38. Second, it recalled its finding that "the Ad Note authorises the imposition of security requirements during the period following imposition of a US anti-dumping (or countervailing) duty order so long as the security is reasonable."[75] Thus, according to the Panel, "it would be possible for the United States to apply reasonable security to protect against increases in future antidumping duty rates as long as an appropriate basis existed to determine that rates of dumping provided for in the anti-dumping order were likely to increase following a final determination in the original investigation. Based on these findings, we are unable to conclude that a violation will occur for every application of the EBR to importers of a designated category of merchandise."

39. Finally, it responded to India's argument (again advanced in its Appellant Submission) that the reasoning in the panel and Appellate Body reports in *Mexico – Rice* support its "as such"

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[72] Panel report, para. 7.220.

[73] Panel report, para. 7.221.

[74] Panel report, para. 7.222.

[75] Panel report, para. 7.226.

claims.[76] Noting that the panel and Appellate Body in *Mexico – Rice* agreed that the measure at issue in that case "stipulated" that the ministry impose fines in cases where conditions of the measure were met, "in our case we do not find that in every occasion that the United States imposes the EBR on importers of a category of merchandise subject to an antidumping order that its imposition constitutes an impermissible specific action against dumping or subsidisation."[77]

40. India's assertion that "anti-dumping and countervailing duty measures are inherently discretionary" is both inaccurate and a *non sequitur*.[78] Several such measures (including the measure at issue in *Mexico – Rice*) have been deemed mandatory by panels and the Appellate Body. The relevant question is whether the particular characteristics of a given measure are such that it can be considered to require a Member to act inconsistently with the particular obligation in question in every instance – as the Panel's analysis of the EBR demonstrates, it does not. In this regard, the supposed "admissions" of CBP cited by India simply reflect the fact that CBP is responsible for collecting duties lawfully owed to the United States and *in some cases* CBP *may* consider it appropriate to require additional security to accomplish that task.[79] India's request that the Appellate Body find the EBR inconsistent "as such" with Articles 1 and 18.1 "if the Appellate Body were to conclude that the Ad Note could never provide legal cover for the EBR even in principle and that every time the United States resorts to it, it would be an impermissible specific action against dumping" begs the question of whether the EBR requires WTO-

[76] Panel report, para. 7.225.

[77] Panel report, para. 7.226.

[78] India Appellant Submission, para. 86.

[79] India Appellant Submission, para. 91.

inconsistent action and relies wholly on the Appellate Body accepting India's flawed interpretation of the text of Article 18.1.[80]

41. Finally, India's reliance on *US – Corrosion-Resistant Steel Sunset Review (AB)* is misplaced.[81] The question in that dispute was whether the instrument in question constituted a "measure". The question here is not whether the EBR is a "measure", but whether it "as such" violates the various provisions of the Antidumping Agreement cited by India. As the Panel found, it does not.

2. The Panel properly concluded that the EBR is not "as such" inconsistent with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Antidumping Agreement and Articles 19.2, 19.3 and 19.4 of the SCM Agreement

42. In rejecting India's assertion that the EBR is "as such" inconsistent with Articles 9.1, 9.2, 9.3, and 9.3.1 of the Antidumping Agreement, the Panel recalled its finding that "the disciplines set forth in Articles 9.1, 9.2, 9.3, and 9.3.1 concern the imposition and collection of anti-dumping duties" and that therefore "measures other than antidumping duties fall outside the scope of those provisions."[82] As it found that "the enhanced bond is not an anti-dumping duty," it concluded that India's as such claims under Article 9 of the Antidumping Agreement and Article VI:2 must also fail.[83] Noting that the provisions of the SCM Agreement cited by India were considered "substantively similar" to those of the Antidumping Agreement, the Panel likewise concluded

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[80] India Appellant Submission, para. 90.

[81] India Appellant Submission, para. 88.

[82] Panel report, para. 7.262.

[83] Panel report, para. 7.263.

that the bond "is not a countervailing duty" and therefore that the application of the EBR falls outside the scope of Article 19 of the SCM Agreement and Article VI:3 of the GATT 1994.[84]

43. As explained above, the Panel's conclusions regarding the meaning of these provisions and their applicability to the EBR were fully consistent with the text, and India's argument otherwise would require an interpretation at odds with the ordinary meaning of the terms used therein. India has failed even to offer a theory of how the bond requirement is "as such" inconsistent with these provisions, and thus the Panel's reasoning should be sustained.

3. The Panel properly concluded that the EBR is not "as such" inconsistent with Article 18.4 of the Antidumping Agreement and Article 32.5 of the SCM Agreement

44. Having found that India "failed to establish that an as such violation has occurred under any specific obligation of the covered agreements," the Panel declined to find that the EBR was inconsistent "as such" with Article 18.4 of the Antidumping Agreement and Article 32.5 of the SCM Agreement.[85] India now conditionally appeals the Panel's finding, and requests that the Appellate Body reverse in the event that it concludes that the EBR is inconsistent as such with Articles 1, 9.1, 9.2, 9.3, 9.3.1, and 18.1 of the Antidumping Agreement and Articles 10, 19.2, 19.3, 194., and 32.1of the SCM Agreement. Because, as explained above, India has failed to demonstrate that the EBR is inconsistent as such with these provisions, India's request should be rejected and the Panel's findings regarding Antidumping Agreement Article 18.4 and SCM Agreement Article 32.5 upheld.

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[84] Panel report, para. 7.264.

[85] Panel report, para. 7.271.

D. The Panel Properly Concluded that 19 U.S.C. 1623 and 19 C.F.R. 113.13 Were Not Part of Its Terms of Reference

45. The Panel's finding that 19 U.S.C. 1623 and 19 C.F.R. 113.13 were not within its terms of reference was based on the fact that (as India concedes) neither provision was included in India's request for consultations and that they are "separate and legally distinct" from the EBR.[86] Consistent with the statements of the Appellate Body in *Brazil – Aircraft*, *US – Upland Cotton*, and *US – Certain EC Products*, the Panel carefully considered the relationship between 19 U.S.C 1623 and 19 C.F.R. 113.13 and the EBR in order to determine whether the measures were "separate and legally distinct" from the measures within the terms of reference. In its Appellant Submission, India catalogues several of the factors that the Panel identified in support of its conclusion that the measures were in fact "separate and legally distinct" – including that the statutory provisions, unlike the EBR, "do not in any way specify particular requirements or limitations related to the imposition of continuous bonds or other types of security requirements", and that (unlike the EBR) they relate to matters such as "the conditions and form" of bonds generally and provide general authority to CBP officers to require security in the form of a continuous bond in order to facilitate collection of revenue.[87] Based on these and other facts, the Panel correctly concluded that the general provisions of U.S. law regarding bonding in question are separate and legally distinct from the EBR and not within the Panel's terms of reference.[88]

46. Contrary to what India suggests in its Appellant Submission, the Panel fully considered its argument regarding the significance of the fact that 19 U.S.C. 1623 and 19 C.F.R. 113.13

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[86] Panel report, para. 7.193.

[87] Panel report, para. 7.193.

[88] Panel report, para. 7.196.

contain general legal authority for CBP to require bonds, including action to require additional bonds such as that contemplated by the EBR.[89] The Panel simply found that this fact is not enough to support the conclusion that the measures are legally inseparable from the EBR.[90] Indeed, were India's theory accepted, any number of laws and regulations providing "authority" to collect revenue – ranging from Article I, section 8 of the United States Constitution to the 1789 Act of Congress establishing the U.S. Treasury Department[91] – could be implicated in a dispute without any mention of them in the consultations request. This result would be illogical and directly contrary to Articles 4 and 6 of the DSU, which, as the Appellate Body stated in *Brazil – Aircraft*, "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[92]

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

47. 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."[93] India expresses concern that "[t]he Panel failed to keep in view that the EBR is premised on taking additional security after having collected duties in the form of cash deposits to the full

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[89] Panel report, para. 7.195.

[90] Panel report, para. 7.193.

[91] U.S. Const. Art. I, sec. 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); 1789 Act of Congress, Chapter XII, sec. 2 (providing that "it shall be the duty of the Secretary of the Treasury. . . to superintend the collection of revenue").

[92] *Brazil – Aircraft (AB)*, para. 132.

[93] Panel report, n.148.

extent of the dumping margin specified in the anti-dumping order. . . . In these circumstances, India considers that it is necessary to impose the additional requirement that the Member imposing the EBR assess the likelihood that individual importers will default in order to render it 'reasonable' under the Ad Note."[94] India has therefore appealed the Panel's interpretation of "reasonable" security.

48. 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 requirement was "reasonable" within the meaning of the Ad Note. The United States therefore agrees with India that risk of default may be among the factors that are relevant to determining whether under the circumstances any additional security required was "reasonable."[95] The United States disagrees, however, with India's suggestion that there is an "additional requirement that the Member imposing the EBR assess the likelihood that individual importers will default in order to render it 'reasonable' under the Ad Note."[96]

49. Nothing in the text of the Ad Note, however, suggests that "reasonableness" requires an importer-specific assessment of default risk before application of the EBR. (Indeed, if one were to accept India'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

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[94] India Appellant Submission, paras. 134-35.

[95] India Appellant Submission, para. 131.

[96] India Appellant Submission, para. 135.

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 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.

50. Moreover, India'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. An individual importer's risk of default may equally support *increasing* security requirements. 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".

IV. Conclusion

51. 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.