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 SECOND SUBSTANTIVE MEETING

August 14, 2007

Table of Reports Cited

Dominican Republic – Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
Dominican Republic – Cigarettes (Panel)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R
Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
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
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US – Zeroing (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 30 January 2007
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005
US – 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

Q1. US: What does the US anti-dumping investigating authority do during the Administrative Review? Is an investigation into the existence of dumping carried out, or is only a calculation of anti-dumping duty made? How does what actually occurs in this assessment review differ from what occurs in the original dumping investigation? What are the differences between methodologies applied in the Administrative Review and the anti-dumping duty investigation? Please explain.

1. In an administrative (or assessment) review, the U.S. Department of Commerce ("USDOC") reviews specific entries of merchandise of individual producers or exporters during a defined period of review and determines the amount of any antidumping duty that should be assessed by comparing the normal value to the export price of each entry of subject merchandise reviewed. *See* 19 U.S.C. § 1675(a). USDOC only evaluates whether specific producers or exporters are dumping merchandise that is subject to an existing antidumping duty order by reviewing and calculating individual margins of dumping, as indicated above. If no dumping is found for the entries reviewed, no antidumping duties are assessed on these entries. Furthermore, for a company found to have a zero or *de minimis* dumping margin in the assessment review, cash deposits are no longer required upon entry of its merchandise. 19 U.S.C. § 1675(a)(2)(C). The results of an assessment review are applied only to the entries of producers and exporters for which a review has been completed.

2. In investigations, USDOC determines whether there exist margins of dumping sufficient to justify the imposition of a measure (assuming that findings of injury and causation are also made by the U.S. International Trade Commission). While methodologies for calculating normal value and export price are similar, how the particular methodologies are applied in an investigation versus a review will depend on the facts. Because a review analyzes different entries, the facts with respect to a particular review will differ from those in the underlying investigation. There are a number of other differences between investigations and reviews. For example, at the conclusion of an investigation, USDOC calculates producer- and exporter-specific margins of dumping that are only used to set the cash deposit rate.[1] Furthermore, the period of investigation ("POI") is typically of a different duration than the period of review, and, in investigations, USDOC normally compares a POI-average normal value to a POI-average export price. In contrast, in assessment reviews, USDOC compares, on a model- and level-of-trade-specific basis, monthly-average normal value to transaction-specific export prices.

Q2. US: Thailand argues in para. 26 of its Second Oral Statement that US anti-dumping law provides that the export price shall be reduced by the amount of "any additional costs, charges, or expenses, and United States import duties" incurred. Thailand considers this to include any expenses paid by the producer/exporter or its affiliates to surety companies in the US in order to be able to import the merchandise. In light of this, could the US explain whether surety expenses are deducted from the export price and thus whether the EBR has the effect of increasing the margin of dumping?

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[1]The margins of dumping calculated in investigations are not used to assess duties on the entries examined during the investigation. However, these margins may be used to assess duties on subsequent entries if parties do not request an assessment review.

3. Thailand's claim that the enhanced bond directive has the effect of increasing the margin of dumping is founded on an incorrect citation to a provision in U.S. law, and a fundamentally incorrect understanding how the USDOC interprets and applies the relevant legal provisions.[2] As the United States explained in its Comments on Certain Additional Factual Information, Thailand mis-cites a provision of U.S. law dealing with *transportation* expenses, to argue that bond expenses are treated as *selling* expenses.[3] Costs associated with the enhanced bond are not treated as transportation expenses, nor are they selling expenses. Selling expenses are expenses incurred in the United States by the seller on behalf of the purchaser in selling the subject merchandise, such as office rent or salesmen's salaries. Nothing in the statute or sample questionnaire cited by Thailand supports the proposition that costs associated with the bond would be considered selling expenses, and the provision of U.S. law that does address such expenses nowhere suggests that is the case.[4]

Q4. US: In the last sentence of para. 14 of the US' Second Oral Statement, the US states that "a bond ... is distinct from the measure it is enforcing – the antidumping duty – and is not itself an action against dumping". If a provisional measure is taken in the form of a bond, would that action be specific action against dumping? Why is the EBR not also a specific action against dumping?

4. The Appellate Body has identified provisional measures enumerated in Article 7 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") as one type of "specific action against dumping."[5] The enhanced bond directive is not a provisional measure within the meaning of Article 7 – unlike those measures, it is not required during the investigation, prior to imposition of an antidumping duty order. There is no basis in the Agreement to conclude that all bonds are "specific action against dumping," simply because some bonds may be considered as such.

5. The enhanced bond directive is not a specific action against dumping because it is neither "specific" to dumping nor "against" dumping.[6] In particular, with respect to the question of whether it is "against" dumping, unlike a bond required as a provisional measure, the enhanced bond directive provides for security after the existence of dumping has been established, pending determination of the facts with respect to payment of duties. As such, it "facilitates the exercise

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[2]*See Comments of the United States on Certain Additional Factual Information Submitted by Thailand in Connection with Its Oral Statement During the Second Panel Meeting* (August 1, 2007), paras. 2-3 ("U.S. Comments on Certain Additional Factual Information").

[3]U.S. Comments on Certain Additional Factual Information, para. 3.

[4]U.S. Comments on Certain Additional Factual Information, para. 3.

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

[6]*See e.g., Second Written Submission of the United States*, June 29, 2007, paras. 27-32 ("U.S. Second Submission").

of WTO-consistent rights"[7] – *i.e.*, the collection of duties owed following the imposition of an order. By contrast, certain bonds required before an antidumping duty order has been imposed may not be viewed as "facilitating" the exercise of WTO-consistent rights, insofar as, before the order is imposed, it has not been established that a Member is entitled to collect duties. In this regard, references to duty collection in the AD Agreement, such as that contained in Article 9.2, are consistent with the view that the right to collect duties is established "when an anti-dumping duty is imposed."[8] Thus, unlike the enhanced bond directive, a bond requirement prior to imposition of an order may be considered an action "against" dumping, even though a bond requirement afterward is not.

Q6. Thailand/US: Is it possible that "reasonable security" under the Ad Note refers to an instrument that guarantees a Member's ability to secure the collection of anti-dumping duties (being one of the three permissible responses to dumping) and is <u>not</u> meant to create a 4th permissible response to dumping?

6. As the United States has noted in its previous submissions, "reasonable security" as contemplated by the Ad Note is not a "specific action against dumping." It secures the collection of antidumping duties once an order has been imposed, but is not itself a duty. The Ad Note permits security that is "reasonable," and such security is not prohibited by Article 18.1 of the AD Agreement.[9]

Q7. US: Is US Customs entitled in the future to apply the Amended CBD to a product after a preliminary determination, taking into account that the October 2006 Notice "clarifies" though not "supersedes" the Amended CBD? Would it be WTO-consistent to apply the Amended CBD to a product after a preliminary determination?

7. As stated in the October 2006 Notice, the Notice represents the "*comprehensive* and *exclusive*" statement of the policies and processes expressed in the documents that predated it. As such, it is the sole authoritative expression of the additional bond directive and is the sole

[7] *US – Offset Act (Byrd Amendment) (AB)*, para. 248 ("[A] measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent.").

[8] See AD Agreement, Article 9.2 ("*When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected* in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.") (Emphasis added). AD Agreement Article 10.7 provides for the retroactive collection of duties in certain limited circumstances, though even under that provision, a definitive duty has been levied (retroactively) when duty collection occurs. *See* AD Agreement Article 10.6 (permitting the levying of a definitive anti-dumping duty on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures in certain circumstances).

[9] *E.g.,* U.S. Second Submission, paras. 33-35.

basis on which U.S. Customs and Border Protection ("CBP") administers the directive.[10] Nothing in the Notice requires additional bonds prior to the issuance of an order, and the Notice refers to merchandise subject to an order as the basis for the additional bond calculation based on the formula.[11] In the documents that pre-dated the Notice, a formula was included that suggested that additional bond amounts may be required prior to the issuance of the order if there were "sudden changes in declared values, claimed country of origin, or declared classification"[12] – however, that formula is not included in the Notice and therefore is not a basis for requiring additional bond amounts based on the directive.

8. Since the enhanced bond directive does not in fact apply to imports entered after a preliminary determination but prior to imposition of an order, and does not contain a mechanism for doing so, without knowing the particular circumstances in which security would be required after a preliminary determination and prior to a final determination in an investigation, the United States cannot speculate on whether such action would be WTO-inconsistent. If a bond constitutes a "provisional measure" within the meaning of Article 7 of the AD Agreement, it may be subject to the additional disciplines contained in that provision, and its WTO-consistency would be evaluated in relation to those disciplines.

Q8. Thailand/US: If a cash deposit were determined to be a form of security and not a duty, what would be the relevant WTO provision governing cash deposits?

9. The Ad Note to Article VI limits security for payment of antidumping and countervailing duty, such as a cash deposit, to "reasonable security."[13] A cash deposit that is security for payment of antidumping duties, required after the imposition of an antidumping duty order, would be subject to the limitation specified in the Ad Note. Other types of cash deposits could be subject to other provisions of the Agreement. For example, a cash deposit that is a "provisional measure" may be limited to an amount that does not exceed the margin of dumping established in the preliminary determination, pursuant to Article 7.2 of the AD Agreement.[14]

Q9. Thailand/US: Under a retrospective system, could cash deposits be considered as an estimate of future duties that will be owed, particularly in consideration of Article 9 of the Anti-Dumping Agreement which provides that refunds be made for cash deposits

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[10]Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements, 71 Fed. Reg. 62,276, 62,277 (Oct. 24, 2006) ("October 2006 Notice") (Exh. THA-8) (emphasis added).

[11]October 2006 Notice, 71 Fed. Reg. at 62,277 (Exh. THA-8).

[12]Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases (July 9, 2004), p. 2 ("July 2004 Amendment") (Exh. THA-2).

[13]GATT 1994 Article VI:2-3, Ad Note.

[14]AD Agreement, Article 7.2 ("Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping.").

that exceed the margin of dumping following a determination of final liability?

10. Under the U.S. retrospective duty assessment system, cash deposits are security in an amount equal to an estimate of the duties that may be owed following a determination of final liability. As the United States has explained, in connection with Article 9, there are two key features of cash deposits for purposes of this dispute. First, cash deposits are not themselves "duties." The refund provisions in Article 9 are consistent with this understanding of the cash deposit requirement in a retrospective system. For example, whereas Article 9.3.2, which deals with prospective duty assessment, describes the refund required as a "refund of any such *duty* paid in excess of the margin of dumping," Article 9.3.1, which deals with retrospective duty assessment, does not characterize what is being refunded as a "duty."[15] As the language suggests, the cash deposit is not itself a duty or the final liability, but rather is security based on an estimate of the final liability.

11. Second, the amount of the cash deposit is an *estimate* of the final liability – it is not itself the final liability, and generally, the final liability does not equal the cash deposit rate. When the cash deposit rate is lower than the amount of final liability, security in the form of a bond is what allows CBP to ensure that the difference is collected. The enhanced bond directive provides for such security – in an amount that reduces the likelihood of significant losses in the event that an importer defaults on the difference between the cash deposit and the final liability.

Q10. Thailand/US: Does the language in Article 7.2, which provides that "provisional measures may take the form of a provisional duty or, preferably a security – by cash deposit or bond ..." suggest by its choice of phrasing that a difference exists between a provisional duty and a form of security, either a cash deposit or bond?

12. Yes. The preference expressed in Article 7.2 for requiring security rather than imposing provisional duties indicates that there is a substantive difference between a provisional duty and security, whether in the form of a cash deposit or bond. Were there no substantive difference, there would be no reason for the text to express a preference for one over the other.

Q11. Thailand/US: Footnote 12 of the Anti-Dumping Agreement states that "levy" means "the definitive or final assessment or collection of a duty or tax". Under the US retrospective duty assessment system, could the term "final assessment" used in Footnote 12 correspond with the final assessment taken during an Administrative Review under US anti-dumping law?

13. Yes. In the retrospective duty assessment system, the term "final assessment" used in footnote 12 refers to the final assessment established through the administrative review process.

[15]AD Agreement, Article 9.3.1-2 (emphasis added).

Q13. US: In para. 49 and footnote 51 of Thailand's Second Oral Statement, Thailand asserts that the textual difference between "cash deposits" and "security" permitted as provisional measures under the Ad Note and Article 7, and the "duties" permitted under Article 9 is also reflected in US regulations Section 733(d)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673b(d)(1)(B), and 19 C.F.R. 351.211(a). Thailand argues that US regulations describe the cash deposits that may be required as a provisional measure simply as "cash deposits", while the cash deposits required after the imposition of an anti-dumping order are described differently as "cash deposits of estimated duties". Thailand considers the plain meaning of this reference to "of estimated duties" is the following – "that these payments are indeed, payments of duties, even if more payments might also be required later". Could the US please comment on this in relation to Thailand's previous assertions that cash deposits are duties?

14. 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.[16] Even were that not the case and were U.S. law somehow relevant, the provisions that Thailand cites would provide no support for its assertion that "cash deposits" are themselves "duties." Section 733(d)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673b(d)(1)(B), states that "the administering authority . . . shall order the posting of a cash deposit, bond or other security . . . for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable."[17] 19 C.F.R. 351.211(a) states that "[g]enerally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties."[18] These provisions simply reflect two slightly different ways of saying the same thing: 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.

15. More fundamentally, as the United States has explained in its submissions, there is no basis in the text of the WTO Agreement to conclude that a "cash deposit" is itself a "duty."[19] 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").[20] Furthermore, the ordinary meaning of the terms, as well as the text of the Agreement (including Article 7 of the AD

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[16] *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.

[17] Section 733(d)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. 1673b(d)(1)(B).

[18] 19 C.F.R. 351.211(a).

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

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

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 Thailand suggests would not accord with this basic rule of treaty interpretation.[21]

Q14. US: Thailand refers to the use of the term "levy" under Article 17.4 of the Anti-Dumping Agreement, which provides that a Member may refer a matter to the DSB only "if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings" (See Thailand's Second Written Submission, para. 29). Thailand claims the US interpretation of the term "levy" would not permit members to challenge an anti-dumping measure in a WTO proceeding until a final assessment proceeding has concluded in a retrospective duty assessment system (See Thailand's Second Written Submission, para. 29). Could the US please comment on Thailand's position?

16. The United States has offered an interpretation of the Ad Note that is supported by its terms and their immediate context. Furthermore, it has explained in its submissions that its interpretation of the Ad Note is supported by paragraphs 2 and 3 of Article VI, which pertain to "levy[ing]" antidumping and countervailing duties.[22] The definition of "levy" supports the U.S. interpretation 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 Thailand's suggestion – that the Ad Note *only* addresses security required pending a final determination in an investigation[23] – 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 17.4 of the AD Agreement, Members would only be permitted to challenge the final determination in an investigation, but not the final results of an assessment review.

Q15. US: In para. 52 of Thailand's Second Oral Statement, Thailand claims that at the time the Ad Note was adopted, the US' anti-dumping duty assessment system was not

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

[22]*Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting*, June 22, 2007, para. 32 ("U.S. 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 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").

[23]*Thailand's Responses to the Panel's Questions Following the First Substantive Meeting of the Panel With the Parties*, June 22, 2007, paras. 47-49 ("Thailand Responses to Panel Questions"); *Rebuttal Submission of Thailand*, June 29, 2007 ("Thailand Second Submission"), paras. 24-26.

retrospective "either in law or in practice." Can the US please comment on this?

17. As the United States has explained, the Antidumping Act, 1921, established a retrospective system of duty assessment, involving an "investigation" process (described in section 201) that was distinct from the "appraisal" process (set forth in sections 201(b), 202 and 209).[24] The "investigation" process resulted in a "finding" regarding the existence of dumping and injury. "Appraisal" (the assessment phase of the proceeding) was withheld pending the determination of whether and to what extent dumping had occurred on individual transactions subject to this "finding."

18. The sole documentary support Thailand offers for its assertion that the United States did not have a retrospective duty assessment system until 1979 is: (1) a reference to determinations made on an "entry-by-entry" basis in the Statement of Administrative Action accompanying the 1979 Trade Agreements Act; and (2) a statement regarding the absence of "delay" in the process for levying antidumping duties in a 1957 committee report on antidumping practices among GATT contracting parties.[25] With respect to the first statement, as the United States noted in its Second Submission, "entry-by-entry" assessment is a type of calculation methodology for assessment – it does not mean that assessment occurs at the time of entry, which for purposes of security requirements is in principle the relevant distinction between a retrospective and prospective system.[26] Moreover, the report cited by Thailand does not indicate that the 1979 law created a separate assessment phase, but rather that it "expedite[d] the administration of the assessment phase."[27] The only logical conclusion from this statement is that there existed a separate assessment phase prior to 1979, and that the period between entry and final assessment prior to 1979 was *longer* than that after 1979, not that final assessment occurred at the time of entry prior to 1979 and that the retrospective assessment system was only created thereafter.

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[24]Antidumping Act, 1921, 46 Stat. 201 and 209 (Exh. US-15).

[25]*Second Oral Statement of Thailand*, July 24, 2007, para. 52 ("Thailand Second Oral Statement"); Thailand Responses to Panel Questions, para. 9. It should also be noted that Thailand's attempt in its Responses to rely on the fact that Brazil introduced the Ad Note and that Article 9.3.1 may have contained the first reference to retrospective systems is equally unavailing. The Ad Note was agreed to by all of the contracting parties, the system Brazil had at the time is not known, and how Brazil might have used security pursuant to the Ad Note is unknown. Furthermore, the suggestion that, because Article 9.3.1 contained a reference to retrospective systems, this means such systems did not exist prior to that provision, is without merit. Article 9.3.2 also refers to prospective systems – under Thailand's logic this would mean such systems also did not exist prior to introduction of the Antidumping Code.

[26]As noted in previous submissions, if the amount of duties to be assessed is known at the time of entry, the customs authority need not require security and may simply demand payment of the duty as a condition for entry. See U.S. Second Submission, para. 21. It should be noted, however, that there may be circumstances in which Members maintaining prospective systems of duty assessment require security after the completion of the investigation, and pending final assessment, pursuant to the Ad Note. *Id*., para. 21 n.33. The European Communities, which has elsewhere characterized its system as a prospective system of duty assessment, has stated that the Ad Note permits "reasonable security" pending "final assessment under either Article 9.3.1 or 9.3.2 of the Anti-dumping Agreement." *Third Party Oral Statement of the European Communities*, June 7, 2007, para. 12.

[27]S. Rep. No. 96-249, at 77 (1979) (Exh. US-15).

19. With respect to the statement regarding "delay," the question posed by the Committee was how the United States ensured that the "length of time involved in the procedure for determining whether an anti-dumping duty is to be levied is not unreasonably long."[28] The United States responded that "normally" the information required for appraisal was available, and therefore there would be no delay in the final appraisement, and that delays in the investigation may be "longer" than those for appraisement.[29] The U.S. response reflected its view at the time that its procedures both for the investigation and for appraisal did not generate unreasonable delays, but nowhere indicates or suggests that appraisal occurred at the time of entry, and indeed both the text of the Antidumping Act, 1921, and the legislative history for the 1979 Act, demonstrate otherwise.

Q16. US: In para. 54 of Thailand's Second Oral Statement, Thailand comments that when it established the current retrospective system, the US Congress expressly described the function of payment of estimated duties at the time of importation not as to secure potential increases in liability, but rather as to "reduce the damage which delayed assessment may cause a domestic industry". Thailand argues that this signifies that Congress considered these payments of estimated duties to fulfil the same function as anti-dumping measures of remedying injury to a domestic industry, and should therefore be governed by Article 9. Could the US please comment on this statement?

20. As an initial matter, the text of Article 9, by its terms, addresses "duties", not "security," and the Statement of Administrative Action for the Trade Agreements Act of 1979 (which as noted above did not establish the current retrospective system) provides no basis to extend the scope of that provision beyond the ordinary meaning of its terms, whether to security requirements or to a measure that, as Thailand puts it, "fill[s] the function... of ...remedying injury to a domestic industry."[30] The statement cited from the Statement of Administrative Action reflects the fact that delayed assessment may result in noncollection of duties – the longer it takes to assess duties, the more difficult it is to collect when bills are issued, particularly when the duties in question are unsecured. Cash deposits, like bonds, do not themselves remedy injury, but ensure that the duties that do remedy injury are collected once assessment is complete. Because the cash deposit facilitates collection of duties lawfully owed, the cash deposit requirement may be considered to "reduce the damage which delayed assessment may cause a domestic industry."

Q17. Thailand/US: What do you consider to be the legal standard for assessing what is "reasonable" under the Ad Note?

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[28]General Agreement on Tariffs and Trade, Twelfth Session, Anti-dumping and Countervailing Duties, Secretariat Analysis of Legislation, 23 October 1957, L/712, page 121.

[29]General Agreement on Tariffs and Trade, Twelfth Session, Anti-dumping and Countervailing Duties, Secretariat Analysis of Legislation, 23 October 1957, L/712, page 121.

[30]Thailand Second Oral Statement, para. 54.

21. Consistent with the rule of interpretation reflected in the Vienna Convention, the term "reasonable" should be interpreted based on its ordinary meaning in context. The ordinary meaning of the term "reasonable" is "in accordance with reason; not irrational or absurd."[31] With respect to amounts, "reasonable" is additionally defined as "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate."[32] Thus, if the security is "in accordance with reason" and "not irrational or absurd," and the amount is "not greatly less or more than might be thought likely or appropriate", it should be deemed "reasonable" security for purposes of the Ad Note.

22. With respect to the context, the reference to "other cases in customs administration" suggests that it is appropriate to consider ordinary customs practice in evaluating whether security is "reasonable." As the United States noted in its First Submission, a bond is security against the prospect of a future liability.[33] To establish the amount of security in other cases in customs administration, CBP considers the amount of potential liability being secured and the likelihood of default. In this case, because the amount of liability is calculated on an *ad valorem* basis following the assessment review, the amount of potential liability depends on the margin of dumping established in the assessment review and the total value of shipments subject to that margin of dumping.[34] As the United States explained in its previous submissions, CBP relied on historical evidence regarding fluctuations in dumping margins as applied to importers in cases involving agriculture/aquaculture merchandise in order to evaluate the potential margin of dumping and information on prior shipments of shrimp in order to evaluate the total value of shipments likely to be subject to that margin of dumping.[35] CBP routinely relies on historical evidence and experience with similar merchandise to evaluate risk.

23. Likelihood of default depends in part on the structure of the importers in question. In this regard, CBP routinely relies on experience with a particular industry to draw conclusions about a particular group of importers. In this case, it relied on a range of such evidence, including its historical experience with significant defaults in the agriculture/aquaculture industry and evidence of low capitalization in that industry and with respect to shrimp importers in particular, to conclude that there was a higher risk of default with respect to shrimp.[36] Given that on average 825,000 entities import into the United States annually and CBP has relatively little company-specific information available to it unless that information is provided by the importers themselves, CBP does not ordinarily conduct individual risk assessments with respect to particular companies in establishing security amounts. Instead, it typically relies on industry-wide similarities to draw conclusions about the riskiness of given merchandise to establish bond amounts. However, to further minimize burdens on companies subject to the enhanced bond

[31] *New Shorter Oxford English Dictionary*, p. 2496 (Exh. US-20).

[32] *New Shorter Oxford English Dictionary*, p. 2496 (Exh. US-20).

[33] *First Written Submission of the United States*, May 1, 2007, paras. 25-28 ("U.S. First Submission").

[34] U.S. Second Submission, para. 24.

[35] U.S. First Submission, paras. 26-27; U.S. Second Submission, paras. 23-24; Exhs. US-10 and 11.

[36] *E.g.*, U.S. First Submission, paras. 27-28; Exh. US-10.

directive, CBP also provided a process for importers subject to the additional bond directive to provide company-specific information on individual risk so that CBP could establish an individual bond amount for those companies. All of these factors are relevant to determining whether the security in question was "reasonable."

24. By contrast, certain other factors would not be appropriate indicators of "reasonableness." For example, because all security requirements are based on potential liability – liability which may or may not ultimately accrue – the mere fact that the amount of final liability, if any, is not known at the time the security is required cannot be a basis for concluding that the security in question is not reasonable. Likewise, the mere fact that a particular importer has not previously defaulted on duties cannot alone be a basis for concluding that the security in question is unreasonable – security protects against the risk of default, and in order to avoid substantial losses, customs authorities must be able to predict defaults before they in fact occur.[37]

Q18. Thailand/US: What relationship, if any, do you consider exists between the margin of dumping cited in an Anti-Dumping Order and the standard of "reasonable" security under the Ad Note?

25. The margin of dumping in an anti-dumping order is a baseline proxy of the amount of duties ultimately owed, based on an individual evaluation of a previous set of entries made by the importer. As such, it provides some indication of the amount of potential liability, which is a relevant factor in determining the amount of security that is "reasonable" in a given case. However, contrary to Thailand's suggestion, it does not operate as a *per se* "cap" on the security that is "reasonable" (by contrast, rather than using the term "reasonable", security governed by Article 7 of the AD Agreement is expressly capped at the margin of dumping established in the preliminary determination). Because the amount of duties actually assessed may be, and often is, higher than the margin of dumping in the order, one must consider the factors described in response to Question 17 in determining whether additional security is "reasonable."

Q19. Thailand/US: Do you consider that the test of what is "reasonable" under the Ad Note includes an assessment of the EBR's effect on the importation of subject shrimp? If no, why not?

26. Ordinary customs administration may include consideration of the impact that a security requirement is likely to have on imports of the merchandise in question. Indeed, contrary to the view that prohibiting imports would be a legitimate alternative to the bond directive, CBP views security requirements as preferable to prohibiting importation entirely from companies that are at increased risk, even significantly increased risk, of default, because security requirements facilitate the collection of duties owed without preventing imports.

[37]To suggest otherwise would be akin to asserting that a mortgagor may not require a mortgagee to obtain fire insurance until the mortgagee's house itself has a fire.

27. CBP did take into consideration the impact that the directive would have on imports in this case, as evidenced by its coordination with importers, brokers, and other interested parties prior to issuance of the directive,[38] and its decision to establish the security amount at a level considerably lower than that which would secure all potential duties owed.[39] The data regarding shrimp imports supports the conclusion that the directive did not have an appreciable adverse impact on importation of shrimp.[40]

Q20. Thailand/US: If the EBR is found to be not "reasonable" within the meaning of the AD Note, on what basis might it be considered "necessary" within the meaning of Article XX(d)? What criteria would apply under a Article XX(d) "necessary" analysis that would not apply under the Ad Note's "reasonable" analysis?

28. The analysis under Article XX(d) is distinct from the analysis required for purposes of the Ad Note. The Appellate Body has stated that the necessity analysis under Article XX(d) requires consideration of, for example, the relative importance of the common interest or values that the law or regulation to be enforced is intended to protect and whether other alternatives exist to achieve the objective in question.[41] "Reasonableness" under the Ad Note, by contrast, requires an evaluation of whether the security is "in accordance with reason," in view of the principles for establishing security used in ordinary customs administration. Thus, there may be circumstances in which security that is not reasonable for purposes of the Ad Note (perhaps because it results in security in an amount that would exceed the appropriate range based on ordinary customs practices for establishing security), may nonetheless be necessary to secure compliance with a particular law or regulation given the importance of the interests that the law or regulation is intended to protect, or because other measures are not reasonably available that preserve the Member's right to achieve the objective pursued.

29. In this case, the security required was "reasonable" – as explained in response to Question 17, it was "in accordance with reason" in view of ordinary customs administration. Even if the Panel were to conclude that the security required was not "reasonable", it may find that the security is nonetheless necessary, for reasons explained in response to Question 36.

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[38]Proactive Approach to Revenue Protection for Antidumping Duty, p. 72 (Exh. THA-6).

[39]See U.S. First Submission, para. 28.

[40]Exh. US-11.

[41]*Korea – Beef (AB)*, para. 164 (noting that "necessity" analysis "involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue [and] the importance of the common interests or values protected by that law or regulation..."); *US – Gambling (AB)*, para. 308 (discussing "necessity" analysis in connection with analysis of alternatives and noting that "[a]n alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.").

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Q21. Thailand/US: Should the analysis of "reasonable" under the Ad Note take into account whether the measure is "necessary" as is the case under Article XX(d)? Is the reverse true?

30. No. As noted, Article XX(d) and the Ad Note are distinct provisions of GATT 1994 and use different terminology with different meaning. Nothing in the text of either provision suggests that analysis of one is dependent on analysis of the other, and as explained in response to Question 20, the two analyses would be distinct.

Q23. US: In para. 82, Thailand states that US failed to address Thailand's previous assertions that new shipper review problems, non-market economy cases, and surety bankruptcy cases influenced the amount of uncollected anti-dumping duties. Did the US factor in the effect of using adverse facts available on the calculation of dumping margins for certain crawfish exporters in non-market economies, the occurrence of any large surety bankruptcies, and the entry of new shippers in the crawfish import market subject to an anti-dumping order when determining that the circumstances in the crawfish import industry were similar to those in the shrimp import industry, thus meriting imposition of the EBR to subject shrimp?

31. As explained, there are numerous variables that can affect default risk. However, none of the factors identified by Thailand explain the significant defaults experienced with respect to antidumping duties in recent years, and for that reason CBP did not factor in the purported effects of these factors in applying the bond directive to shrimp. First, with respect to the argument that non-market economy ("NME") cases necessarily correlate to significant defaults, and the related assertion that adverse facts available would be more prevalent or somehow more likely to result in higher liability in non-market economy cases, Thailand has offered no evidence to suggest that this is in fact the case. As a threshold matter, at the time that security is required, CBP has no information regarding the likelihood that facts available will be applied to a particular importer, and therefore that likelihood cannot be used to predict the need for additional security. Even assuming that NMEs tend to have higher dumping margins than market economies, this alone does not necessarily correlate to increased risk: the unsecured risk at issue arises when margins *increase* over the cash deposit rate, not simply when they are high. Finally, it should be noted that CBP has not had difficulty in collecting duties in all cases involving NMEs, as Thailand's assertion would suggest. For example, with respect to the recent order on wooden bedroom furniture from China cited by Thailand, CBP has issued bills in excess of $6.5 million, and to date none are in default. As explained, the factors that CBP considered – such as structural similarities between the industries that experienced significant defaults – are simply better indicators of likely default than the factors identified by Thailand.

32. With respect to surety bankruptcies, even under Thailand's analysis, bankruptcies accounted for a very small portion (less than 10%) of the over $600 million in unpaid

antidumping duties outstanding.[42] Surety bankruptcies only affect collections when an importer defaults on duties that are secured. The vast majority of the unpaid duties at issue are unsecured duties.

33. Finally, the change in the "new shipper" law that Thailand references does not resolve the problem CBP was trying to address with the additional bond directive. Section 1632 of Pub. L. No. 109-280 temporarily suspended the new shipper bonding privilege, and as a result new shippers now must post cash deposits rather than bonds. It did not alter the amount of security required from new shippers. As was the case when new shippers were eligible to use bonds, the cash deposit requirement does not protect CBP from the risk of default on liability in excess of the amount secured. It is losses associated with this liability that the additional bond directive is designed to address, and it was this liability that was the source of the noncollection problem.

Q24. US: From the list of factors in the October 2006 Notice that the US has identified as being relevant to its analysis of products or industries where unsecured liability is likely to increase, please provide the Panel with the data used in relation to Thai shrimp companies that confirmed that said products satisfied the factors identified. Also, please list the factors that the US analysis (to be provided) found were present in and not present/relevant to Thai subject shrimp imports.

34. CBP used each of the factors enumerated in the October 2006 Notice[43] in its analysis to conclude that additional bond amounts may be required of importers of shrimp subject to the antidumping orders in order to ensure the payment of duties determined to be due to the United States.

35. Previous collection problems concerning the industry involved. CBP has experienced substantial noncollection problems in the agriculture/aquaculture sector. At the time it developed the directive, importers of agriculture/aquaculture merchandise had failed to pay all but $8.8 million of $327 million billed for duties that exceeded cash deposits. Exhibit US-16 contains data on unpaid duties through FY2004 that was the basis for CBP's analysis of previous collection problems when it developed the directive. Through fiscal year 2004, CBP had $467 million in antidumping duty bills that were uncollected. Of this amount, the majority of the uncollected antidumping duty bills were for agriculture/aquaculture antidumping cases, even though agriculture/aquaculture merchandise only accounted for 35% of total bills issued.

36. Similarity to previous cases or industries experiencing uncollected revenue problems. Based on analysis by CBP import specialists that had experience dealing with importers of

[42]Thailand Second Submission, paras. 90-93.

[43] October 2006 Notice, p. 62,277 ("1. Previous collection problems concerning the industry involved; 2. The similarity to previous imports or industries experiencing uncollected revenue problems; 3. Payment history; 4. Indications that liquidated duty rates may exceed existing security; 5. Any other factors that are deemed relevant.").

agriculture/aquaculture merchandise, including shrimp,[44] CBP determined that the shrimp importers were similar to importers of other merchandise that had in the past failed to pay significant antidumping duties. Prior to development of the directive, import specialists alerted policy makers to the challenges they faced in trying to locate and contact the importers of subject merchandise involved in agriculture/aquaculture cases. In many cases, the import specialists found that the importers of record had merely a phone and a desk to move freight, and no capital structure existed to provide CBP with recourse if companies defaulted on financial obligations. CBP import specialists reviewed the payment history of companies importing shrimp in 2003 and, as part of that analysis, found that importers of shrimp, like importers of crawfish, garlic, and mushrooms, tended to be undercapitalized and highly leveraged. Their analysis of payment history included analysis of publicly available data on the top 10 importers of shrimp, obtained from Dunn & Bradstreet, which indicated that most of the largest importers had "Limited" or "Fair" credit ratings, suggesting that they were at significant risk of being unable to pay duties owed. Exhibit US-17. It should be noted that the data received in the individual reviews is consistent with CBP's assessment of the importers at the time. Several of the companies reviewed either had negative working capital ratios, extremely high debt to equity ratios, or both, suggesting that they are at high risk for default. Exhibit US-18.

37. Payment history. Because shrimp was duty-free prior to imposition of the antidumping orders, shrimp importers had limited history of paying duties in any significant amount. Exhibit US-17. Lacking any significant history of paying bills, it was uncertain whether shrimp importers would be able to pay duties ultimately owed (similarly, importers of crawfish did not have experience paying significant duties prior to imposition of the antidumping duty order, and defaulted on a substantial share of duties billed).

38. Indications that liquidated duty rates may exceed existing security. CBP reviewed historical data on fluctuations in antidumping duty rates in cases involving agriculture/aquaculture merchandise. Based on its analysis, rates increased approximately 33% of the time.[45] When rates increased, they increased by, on average, 285%. *See* Exhibit US-10.[46]

39. Other factors deemed relevant. The magnitude of shrimp imports subject to the antidumping duty orders was an important consideration in applying the directive to shrimp. At

[44]CBP Import Specialists are located in the ports of entry and are responsible for processing import transactions. Import Specialists are assigned import transactions based upon the commodity involved. On a daily basis, they interact with the importing community, especially those importers and consignees of merchandise in their assigned commodities, whether or not the importers in question owe duties on the merchandise.

[45]The 33% analysis was conducted on an exporter/producer specific basis, by examining each assessment instruction issued for each agriculture/aquaculture order and comparing it to the cash deposit rate in effect at the time. Exhibit US-19 contains CBP's analysis through 2006. With the most recent data incorporated, the analysis indicates that rates increase 38% of the time.

[46]It should be noted that the table showing the distribution of rate increases in previous cases involving agriculture/aquaculture merchandise contained in Exhibit US-10 is not based on a single product or case, as Thailand suggests, but rather 13 antidumping cases involving 340 exporter/producers.

the time the directive was issued, the entered value of shrimp imports subject to the antidumping investigation was substantially higher than that of imports in previous cases. In FY2003, the entered value of imports of subject merchandise exceeded $2.5 billion. By contrast, the annual entered value of imports of subject merchandise in cases involving crawfish, garlic, mushrooms, and frozen fish fillets was in each case less than $100 million. *See* Exhibit US-8. Because antidumping duties are assessed on an *ad valorem* basis, the value of imports subject to the order is an important indicator in determining the amount of potential liability. Where the value of imports subject to an order is high, all other factors being equal, it is more likely that an increase in the margin of dumping between the investigation and assessment will result in high unsecured liability. The entered value of shrimp imports in 2003 suggested that even a 1% increase in the antidumping margin would result in $25 million in unsecured antidumping liability.

Q25. US: Taking into consideration the fact that defaults can also occur at the stage of the yearly administrative review, could the US explain why the EBR was not applied to other Special Category cases that were under review, such as crawfish or honey importers?

40. The crawfish and honey antidumping duty orders were imposed prior to issuance of the directive. CBP decided to apply the directive to importers of merchandise subject to a new order, rather than existing orders, because it would facilitate its ability to monitor and administer the new bond requirement at its inception.

Q26. Thailand/US: Does Thailand/US consider the October 2006 Notice to be within the scope of claims "as applied" against the EBR?

41. 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."[47] Each of the documents that the October 2006 notice clarifies were identified in Thailand's panel request and consultation request.[48] As a restatement of policies and processes already expressed in those documents, including the availability of individual bond amounts, the October 2006 notice may properly be considered within the scope of Thailand's "as applied" claims insofar as those processes were applied to shrimp imports from Thailand prior to that time. The United States notes that Thailand does not appear to have challenged particular individualized bond determinations issued pursuant to the process described in the Notice. Since these determinations were issued after October 2006, this claim would not properly be within the Panel's terms of reference.

Q27. US: At the outset, did the US rely on any of the factors listed in the October 2006 Notice when assessing the likelihood of default of subject shrimp importers, or risk of

[47]October 2006 Notice, 71 Fed. Reg. at 62,277 (Exh. THA-8) (emphasis added).

[48]WT/DS343/1 (April 24, 2006); WT/DS343/7, p. 2-3 (September 15, 2006).

non-payment of anti-dumping duties by subject shrimp importers, such as: (i) previous collection problems concerning the industry; (ii) payment history, indication that liquidated duty rates may exceed existing security; and (iii) similarity to previous imports or industries experiencing uncollected revenue problems? If so, does documentation of this analysis exist and can it be provided to the Panel?

42. See response to Question 24.

Q28. US: At the outset, did the US make assessments on an individual subject importer basis of the likelihood of or risk of non-payment of anti-dumping duties, by considering factors in the October 2006 Notice, such as (i) the prior record of the principal regarding timely payment of duties; (ii) the prior record of the principal in honouring bond commitments, including the value and nature of merchandise involved; and (iii) the importer/principal's capitalisation? If so does the documentation of this analysis exist and can it be provided to the Panel?

43. CBP did conduct an overall assessment of individual importers' history of bill payment in its analysis of the industry as a whole.[49] With respect to individual bond amounts, as the Notice states, CBP considers the factors regarding an individual importer's liability when an importer responds to a notice indicating that it may be subject to a higher bond amount "by providing evidence of factors that could support a bond amount other than that resulting from the formula."[50] The first such response was received by CBP in November 2006. Exhibit US-12 contains information on the individual bond amounts determined by CBP pursuant to those requests. 19 C.F.R. 113.13 also contains the factors enumerated in the notice, and therefore port directors were permitted to use those factors to establish individual bond amounts even prior to issuance of the Notice.[51] However, before the October Notice was issued, CBP did not have a centralized process for tracking such requests, and therefore the extent to which these requests were made (and their disposition) is not known.

44. As noted in response to Question 24, in determining whether there was an elevated risk for importers of shrimp as a whole, CBP did conduct an analysis of industry capitalization, including by reviewing publicly available financial information for the largest importers and discussing with import specialists with experience with the industry in question.

Q29. US: Before the US' decision to apply the EBR, given that subject shrimp importers had no record of dumping and thus were duty-free, what records or information does US Customs have available to assess that subject importers are under-capitalised?

45. See response to Question 24 and Exhibit US-17.

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[49] *See* Exh. US-17.

[50] October 2006 Notice, 71 Fed. Reg. at 62,278 (Exh. THA-8).

[51] *Compare* October 2006 Notice, 71 Fed. Reg. at 62,278 (Exh. THA-8) *with* 19 C.F.R. 113.13(b).

Q30. US: Did the US factor in the effect of using adverse facts available on the calculation of dumping margins for certain crawfish exporters in non-market economies, the occurrence of any large surety bankruptcies, and the entry of new shippers in the crawfish import market subject to an anti-dumping order when determining that the circumstances in the crawfish import industry were similar to those in the shrimp import industry, thus meriting imposition of the EBR to subject shrimp?

46. See response to Question 23.

Q31. US: Could the US confirm what were the causes for the increased defaults in 2003-2005 that preceded the application of the EBR to subject shrimp exporters/principals, and how does the application of EBR address each cause? How did these causes relate to the circumstances surrounding Thai exporters/principals?

47. The increased defaults since 2003 are attributable to importers' inability or unwillingness to pay antidumping duties, particularly in cases where the importer has little experience paying duties, is undercapitalized or highly leveraged, and is involved in an industry with low barriers to entry and exit. CBP's analysis indicated that these were the common characteristics among importers in antidumping cases that have been the source of the largest share of defaults, and that shrimp importers also have these characteristics. *See* response to Question 24. CBP's inability to collect the duties was attributable to the fact that the vast majority of the duties in question were unsecured, because the antidumping duty assessed exceeded the margin of dumping determined in the investigation that was the basis for the cash deposit. The enhanced bond directive addresses the problem by ensuring that CBP will be able to collect, at least in part, duties owed to it in the event that an importer defaults.

Q32. US: Please provide precise documentation of the evidence available to the US at the time that the decision to target subject shrimp was made, relating to the risk of default by subject shrimp importers on said increased liability, which directly resulted in the decision to apply the EBR to subject shrimp.

48. See response to Question 24.

Q33. US: Could the US comment on the following statement made in Thailand's Rebuttal Submission at para. 107 that "even if the value of trade cumulatively covered by the six orders on shrimp is larger than several other individual orders on agriculture/aquaculture merchandise, the US has not provided any comparative analysis which shows that the cumulative value of trade covered by these six orders is of a magnitude that necessitates additional bonding requirements when compared to various combinations of the approximately 242 other antidumping orders in place given that one recent order covers over $1 billion in trade".

49. First, Thailand's statement appears to presume that import value is the only factor CBP considers, or should consider, in applying the directive. This is incorrect. CBP considers a range of factors in determining whether the directive should be applied in a particular case, as explained in response to Question 24, and only by evaluating all of these factors is CBP able to identify importers from whom additional security may be required.

50. The merits of this approach are evident from the example that Thailand cites. As Thailand notes, imports of wooden bedroom furniture from China subject to an antidumping order are annually in excess of $1 billion. However, the industry in question is characterized by a few highly capitalized firms, with extensive history of paying duties, and strong credit ratings. It does not share similarities to the agriculture/aquaculture sector, the sector to which previous substantial defaults are attributable. Of the $6.5 million in bills issued to date to importers of subject merchandise in that case, none are in default.

Q34. US: Thailand stated in para. 6 and footnote 3 of its Second Oral Statement that US Customs financial statements show that in 2004, 2005, and 2006, unpaid anti-dumping and countervailing duties accounted for around 10% of total accounts receivable, and that uncollected normal duties in each of those years was more than four times greater than amounts of uncollected anti-dumping duties. Could the US please comment on this?

51. First, CBP's total accounts receivable include a number of items – most significantly, fines and penalties – that are not themselves duties and are otherwise not comparable to AD/CVD duties or otherwise relevant to the instant dispute. Furthermore, Thailand's assertion that the amount of uncollected normal duties was more than four times greater than uncollected anti-dumping duties is simply incorrect. As the data from the financial statements (reproduced below) demonstrates, in absolute terms, uncollected AD/CVD duties in fact have exceeded uncollected regular duties in each of the years in question.[52] Moreover, Thailand's reliance on this data to challenge the U.S. argument – that, as Thailand puts it, "antidumping duties are completely different than other duties in terms of the potential for nonpayment and the need to secure potential increases in liability" – is utterly misplaced.[53] In fact, the data cited by Thailand demonstrate precisely this point. As the financial statements indicate, in each of the years in question, CBP sent out in excess of $1 billion in bills for regular duties, and received payment on average for all but 8.3% of those bills. By contrast, with respect to AD/CVD duties, CBP sent out on average $200 million in bills annually, of which on average fully 72% have been deemed uncollectible. Thus, Thailand's suggestion that AD/CVD duties have the same potential for nonpayment as regular duties is clearly contradicted by the facts.

[52]Thailand appears to have used the gross receivable column rather than the amounts uncollectible column to calculate the amount of uncollected duties. Uncollected duties are reflected in the amounts uncollectible column in the notes to CBP's financial statements.

[53]Thailand Second Oral Statement, para. 6.

Duties Receivables (from CBP Financial Statements, 2004-2006)

(Thousands)	2004 Duties	2004 AD/CVD	2005 Duties	2005 AD/CVD	2006 Duties	2006 AD/CVD
Gross Receivable	$1,036,974	$115,581	$1,142,830	$240,494	$1,553,714	$260,929
Amounts Uncollectible	$95,263	$102,466	$96,774	$142,126	$117,932	$200,777
Total Net Receivables	$941,711	$13,115	$1,046,056	$98,368	$1,435,782	$60,152
Uncollectible /Gross Receivable	9.2%	88.7%	8.5%	59.1%	7.6%	76.9%

Q35. US: Thailand comments in para. 72 of its Second Oral Statement before the Panel that US Customs' methodology for determining that anti-dumping margins will increase by 100% from year to year is flawed. Citing an excel spreadsheet provided by the US on 10 July 2007, Thailand argues that the 285% calculation of the average anti-dumping rate of increase provided by the US is not an overall average. Instead, Thailand argues the 285% calculation was based only on the records in which the dumping margins increased, on 33% of occasions (and not where dumping margins decreased or remained unchanged). Thailand, contends that taking an average of all cases would result in an average rate change of 54% rather than 285%, and would result in a median rate change of minus 18% rather than plus 100%. Would the US please comment on this?

52. Thailand's argument is incorrect and in effect conflates the question of *frequency* of rate increases with the question of the *amount* by which rates increase when rate increases occur. CBP analyzed potential liability associated with margin increases as follows. First, it analyzed the frequency with which rates increase. On the basis of this analysis, as noted in previous submissions, CBP concluded that rates increase approximately 33% of the time. This figure was used by CBP to establish the risk that rates would go up and unsecured liability would accrue. Next, it considered the amount by which rates increase when rate increases occur, to determine the amount of potential unsecured liability in the event that rates increase. The table in Exhibit US-10, which was provided in response to a question regarding CBP's "historical analysis...regarding the average increase" of approximately 285% in exporters' margins of dumping, addresses the amount by which rates increase when rate increases occur.

53. Collections and refunds are made on an importer-specific basis. A decrease in the margin in one antidumping case for one importer does not change the amount of duties owed by another importer on merchandise subject to another proceeding in which rates increase. Therefore, simply averaging the margins in the manner suggested by Thailand would not provide an accurate indicator of how much security would protect CBP in the event that an increase occurs. While the

United States does not dispute that the frequency with which rates increase is relevant to an assessment of potential liability – as noted, CBP conducted that analysis and took it into consideration in developing the formulas reflected in the additional bond directive, the two questions must be analyzed separately in order to develop an accurate assessment of potential liability.

Q36. Thailand/US: The Appellate Body in Korea – Various Measures on Beef listed the following as relevant factors to consider under Article XX(d)'s "necessary" analysis: (i) the relative importance of the common interest or values that the law or regulation to be enforced is intended to protect; (ii) the extent to which the measure contributes to the realisation of the end pursuit, the securing of compliance with the law or regulation at issue; and (iii) the extent to which the compliance measure produces restrictive effects on international commerce. (See Appellate Body Report on Korea – Various Measures on Beef, paras. 162-163). How do these factors relate to this dispute?

54. Based on the factors enumerated by the Appellate Body in *Korea – Beef*, the directive should be found "necessary" to secure compliance with WTO-consistent laws or regulations, and thus permitted by Article XX(d).

55. First, with regard to the relative importance of the common interest or value that the law or regulation to be enforced is intended to protect, as the panel stated in *Dominican Republic – Cigarettes*, "the collection of tax revenue (and, conversely, the prevention of tax evasion) is a most important interest."[54] Collection of duties, including antidumping and countervailing duties, and the prevention of evasion of duty obligations, is likewise "a most important interest." The power to collect duties, taxes, and other revenue is enshrined in the U.S. Constitution, reflecting its centrality to the basic functioning of the United States, as with any sovereign nation.[55] The importance of collecting antidumping duties in particular is reflected in the terms of the GATT 1994 itself, which expressly recognizes the right of Members to collect antidumping duties lawfully owed and states that dumping that causes or threatens material injury "is to be condemned."[56] 19 U.S.C. 1673e(a)(1) is intended to protect these interests. Likewise, 19 C.F.R. 113.13(c) requires CBP officers to determine whether a bond is adequate to protect the revenue and ensure compliance with the law and regulations, and require additional security if it is not. The bond directive ensures that, in cases in which there is an increased risk of default, CBP officers review bonds and require additional security as necessary.

56. Second, the directive substantially contributes to the realization of the end pursued. The directive sets forth guidelines for requiring security for merchandise subject to higher risk of default. As explained previously, in order to prevent defaults, CBP must be able to predict risk,

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[54]*Dominican Republic – Cigarettes (Panel)*, para. 7.21; see also *Dominican Republic – Cigarettes (AB)*, para. 59.

[55]U.S. Const. Art. 8, cl. 1.

[56]GATT 1994, Article. VI:1.

and the criteria enumerated in the directive provide an effective basis for doing so. Shrimp was identified as merchandise with a higher risk of default, based on the criteria set forth in the directive.[57] The additional security required of shrimp importers ensured that CBP would be able to collect duties in the event that defaults occurred.

57. Finally, the directive does not restrict international commerce. As was the case in *Dominican Republic – Cigarettes*, the evidence demonstrates the importers in question have been able to export shrimp to the United States since the directive was imposed, and in some cases their imports have even increased since the directive was issued.[58] As the United States has explained in its submissions, Thailand's assertions as to the impact of the directive on trade are either unsubstantiated or do not support the conclusion that international commerce was restricted.[59]

Q37. US: Can the US confirm in the context of Article XX(d), whether 19 U.S.C. 1673e(a)(1) is the sole law or regulation for which the EBR is necessary to secure compliance?

58. The enhanced bond directive is necessary to secure compliance with 19 U.S.C. 1673e(a)(1), which prescribes the assessment of antidumping duties. In addition, 19 C.F.R. 113.13 and 19 U.S.C. 1623 provide CBP with the authority to require bonds in order to obtain payment of duties, and pursuant to 19 C.F.R. 113.13(c), port directors are required to obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."[60] The directive is necessary to secure compliance with 19 C.F.R. 113.13(c) and associated customs laws because it ensures that port directors obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."

Q38. Thailand/US: Can Thailand/US comment on whether the obligation that is entrenched in 19 U.S.C. 1673e(a)(1) is "the obligation to require payment of duties owed to US Treasury" as indicated in US' Second Written Submission, para. 51?

59. 19 U.S.C. 1673e(a)(1) governs the assessment of antidumping duties and obliges CBP to require payment of the duties in question. General customs laws and regulations – in particular 19 C.F.R. 113.13 and 19 U.S.C. 1623 – provide CBP with the authority to require bonds in order

[57]For an explanation of the analysis CBP conducted to conclude that shrimp was at a higher risk of default, see response to Question 24.

[58]*Dominican Republic – Cigarettes (Panel)*, para. 7.215.

[59]See e.g., Exh. US-10. *See also* U.S. Second Submission, para. 30 (noting that the cost to the importer of record is the same regardless of whether DDP or CIF is used). With regard to Thailand's assertion that the number of importers and exporters was affected, Thailand First Submission, para. 144, it is unclear how this would be relevant to establishing that *imports* were adversely affected (and demonstrably imports were not affected). Even were it relevant, it is not the case that the number of importers declined following implementation of the directive, and as GAO notes, the apparent decline in the number of exporters occurred before the directive was issued. GAO Study, p. 6 (Exh. THA-10).

[60]*See* U.S. First Submission, paras. 85-87.

to obtain payment of duties, and require port directors to obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."[61]

Q39. US: Thailand commented in para. 81 of its Second Oral Statement that the Basic Bond Requirement in conjunction with cash deposit requirements and civil recovery proceedings is a "different, less trade-restrictive and less WTO-inconsistent measure" that the US applies to control the non-payment of antidumping duties, in approximately 240 other anti-dumping orders. Could the US please comment on the sufficiency of the Basic Bond Requirement together with cash deposits in light of the foregoing?

60. With regard to the cash deposit, it secures the payment of antidumping duties up to the amount of the order rate or the rate determined in a previous administrative review. The cash deposit does not provide security for the amount of duties owed should the final antidumping duties assessed on the entries exceed that rate. It was this unsecured liability that was the source of the noncollection problem CBP experienced, and the cash deposits did nothing to address that problem. The same was true of civil recovery proceedings – once defaults occur, the United States is rarely able to collect the duties in question through civil recovery, as evidenced by the large share of AD/CVD duties deemed uncollectible in CBP's financial statements.[62]

61. The Basic Bond is established at 10% of duties, taxes, and fees paid during the previous calendar year, or a minimum amount of $50,000. It likewise was not sufficient to secure the potential liability associated with the orders in question, and indeed as evidenced by the data supplied in Exhibit US-8, despite the basic bond requirement, the United States was unable to collect hundreds of millions of dollars in AD/CVD duties that were unsecured.

62. The shrimp case illustrates the limitations of the cash deposit and basic bond requirement. Shrimp importers for the most part did not pay any duties in the year prior to imposition of the antidumping order, and therefore generally maintained $50,000 minimum bonds. Extrapolating the $50,000 in bond coverage to the approximately 237 importers of shrimp that were subject to the antidumping duty order in 2004, the basic bond requirement resulted in approximately $12 million in security – in the context of the $2.5 billion in shrimp imports at issue, this was enough security to cover an increase in the AD/CVD margin of 0.5%. If the AD/CVD margin increased by more than 0.5%, CBP would be unsecured for the difference. As explained previously, CBP determined that historically, rate increases occurred for agriculture/aquaculture cases 33% of the time. In instances where the rate increased, CBP found that on average the increase was 285%. Therefore CBP concluded that the risk of significant potential unsecured liability was high.

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[61] *See* U.S. First Submission, paras. 85-87.

[62] As an ancillary point, it should also be noted that Thailand misstates the test under Article XX, which is whether there exists a less trade restrictive measure that is WTO-consistent, not wether there exists a less trade restrictive measure that is "less WTO inconsistent."

Q40. US: US Customs first applied the EBR to subject shrimp in 2005 February 1 to secure against the possibility that anti-dumping duties will increase and against the risk of default by subject shrimp importers. US Customs has classified the application of the EBR to subject shrimp as a "test case" (See Exhibit THA-10, p. 21). More than two years later, subject shrimp remains the only "test case" for the EBR while the US relies on the Basic Bond Requirement in conjunction with cash deposit requirements for approximately 240 other anti-dumping orders. Can the US please explain why the US has not been able to conclude over more than 2 years about the effectiveness of the EBR towards meeting its objectives, and why the EBR has not been applied to any other case?

63. CBP decided to apply the directive to importers of merchandise subject to a new order, rather than existing orders, because it would facilitate its ability to monitor and administer the new bond requirement at its inception. The AD orders on shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam were the first agriculture/aquaculture orders imposed after the enhanced bond guidelines were issued. CBP's decision to date not to extend the directive to other merchandise does not reflect an assessment of the directive's effectiveness toward meeting its objectives, and in several respects the processes set forth in the directive have only recently been tested. For example, it has been only nine months since CBP received the first request for an individual analysis of an importer's ability to pay, a process which has required CBP to develop expertise in conducting individual financial assessments. Furthermore, shrimp imports have not been liquidated and therefore the extent to which defaults in fact occur, and their magnitude, is not known.

Q41. US: In para. 57 of Thailand's Second Oral Statement, Thailand states that bonds required under the Basic Bond Requirement are to secure payment on any increase in liability determined after entry. Can the US please comment on this?

64. This is correct.[63] However, Thailand's apparent attempt to draw a distinction between a cash deposit and a bond based on the fact that the bond secures payment of any increase in liability is without basis. Both cash deposits and bonds *secure* payment of a future liability: the duty finally assessed. If the amount of that duty is lower than the total amount of security, CBP will not seek recourse to the security in question, whether a cash deposit or bond. The cash deposit is not, as Thailand claims, a "partial payment" – U.S. law provides for a single assessment, not multiple "partial payments" of duties. More fundamentally, the language of the AD Agreement does not contemplate such a distinction between cash deposits and bonds.

Q42. US: US Customs stated in a document entitled "Anti-Dumping Duty Collection" dated May 27, 2004 (See Exhibit-THA-6, Exhibit 6, p. 8): "[w]e have shown how we are going to shore up our safety net, but we don't want to rely on this as the regular course of

[63]However, as noted in response to Question 39, the basic bond requirement has not been sufficient to secure increases in liability of the type that have resulted in substantial uncollected duties.

business for protecting potential revenue exposure. We need to also address our up-front vulnerabilities". Please clarify the following: (i) what is meant by "regular course of business"; (ii) why does US Customs not want to rely on the Amended CBD as a "regular course of business"; (iii) what are "upfront vulnerabilities"; and (iv) what are the options to address "upfront vulnerabilities"?

65. "Regular course of business" refers to CBP's regular process for establishing bond sufficiency for imports generally. CBP was addressing a particular risk it had identified with respect to some imports, a risk that was not evident with respect to all imports, or even all imports subject to antidumping and countervailing duties. Thus, it did not want to rely on the directive as its "regular course of business" because it considered that doing so would be neither a necessary nor appropriate exercise of its revenue collection function.

66. The term "upfront vulnerabilities" refers to the impact on the agency of changing its approach to bonding, including the impact on stakeholders, and CBP's administration of the customs system as a whole. The options to address these "vulnerabilities" included extensive efforts to communicate to the various groups that would be affected to ensure that the reasons for issuing the directive were understood. Some of these efforts are described in the remaining slides in the exhibit.

Q43. US: Can the US provide a listing of all recently-concluded or ongoing dumping investigations involving agriculture/aquaculture merchandise, with their corresponding tariff-line, that have been initiated since the issuance of the Amended CBD?

67. Exhibit US-21 lists all recently-concluded or ongoing dumping investigations involving agriculture/aquaculture merchandise (defined as merchandise classifiable in chapters 1 through 24 of the Harmonized Tariff Schedule of the United States).

LIST OF U.S. EXHIBITS

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

U.S. Exhibit	Description
16	Data on Unpaid Duties through FY2004
17	Payment History Assessment (2004)
18	Working Capital Ratios and Debt To Equity Ratios for Importers Requesting Individual Bond Amounts
19	Frequency of Increases in Margins of Dumping in Agriculture/Aquaculture Cases (Through 2006)
20	*New Shorter Oxford English Dictionary*, p. 2496
21	Recently-concluded or Ongoing Dumping Investigations Involving Agriculture/Aquaculture Merchandise