

# **Guilt by association: US – Measures Relating to Shrimp from Thailand and US – Customs Bond Directive for Merchandise Subject to Anti-Dumping/ Countervailing Duties**

THOMAS J. PRUSA \*

*Rutgers University and NBER*

EDWIN VERMULST

*Vermulst, Verbaeghe & Graafisma*

**Abstract:** The United States’s enhanced continuous bond requirement [EBR] for goods subject to anti-dumping and countervailing duties was the focus of this dispute. Because of perceived problems with its ability to collect anti-dumping duties, the US amended its bonding requirements in 2004. Under the new rules, importers were required to secure a bond for an amount equal to the cash-deposit rate in effect on the date of entry of the merchandise multiplied by the importer’s value of imports from the previous year, as well as pay cash deposits equal to the amount of anti-dumping duties per entry. The US claimed the additional deposit was reasonable and necessary to guarantee duty payment in case the anti-dumping duty increased during the administrative review. Thailand and India claimed that the additional deposit was unreasonable and an additional action against dumping and was therefore impermissible under GATT 1994 and the Anti-Dumping Agreement. The Appellate Body upheld the Panel’s findings that while the Ad Note to Article VI:2 and 3 GATT 1994 authorizes the imposition of security requirements during the period following the imposition of an anti-dumping duty order, the additional security requirement resulting from the application of the EBR to shrimp was not ‘reasonable’ within the meaning of the Ad Note. The Appellate Body reversed the legal interpretation by the Panel that there is no obligation under the Ad Note to assess the risk of default by individual importers; however, the AB upheld the Panel’s finding that the EBR is not ‘necessary’ within the meaning of Article XX(d) of the GATT 1994. As a result, the AB upheld the Panel’s conclusion that the application of the EBR to

\* Email: prusa@econ.rutgers.edu

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shrimp was inconsistent with Article 18(1) of the Anti-Dumping Agreement because it was inconsistent with the Ad Note to Article VI:2 and 3 of the GATT 1994 and not justified by Article XX(d). We consider the AB's legal and economic reasoning to be largely correct. The US employed a sledgehammer to kill a mosquito and the AB used the concepts of 'reasonableness' in the Ad Note and 'necessity' in Article XX(d) to reject what fundamentally was a lack of proportionality, while leaving the door open for more reasonable application of bonding requirements.

## 1. Introduction

In February 2005, the United States imposed definitive anti-dumping duties on imports of certain frozen warmwater shrimp from a half-dozen countries, including Thailand and India. This dispute concerns measures related to this anti-dumping order. The focus of the dispute was a US bonding requirement that was imposed for the first time in this case.

Under US law, after the Department of Commerce makes its preliminary dumping determination, cash deposits will be collected or bonds may be posted by the importer on entries of merchandise being investigated. After the initial investigation is complete and an anti-dumping duty order is issued, importers are required to pay cash deposits on entries. Technically, because the US has a retrospective system for assessing anti-dumping duties (ADD) and countervailing duties (CVD) saying that deposits are paid is not the same as saying duties are assessed. To the contrary, ADD and CVD are assessed only after the conclusion of an administrative review by the Department of Commerce.<sup>1</sup> If the dumping margin decreases, importers receive (some portion of) their deposits back plus interest. If the dumping margin increases in the administrative review, importers have to pay additional duties (e.g., the value of subject imports times the increase in margin).

The US's combination of prospective deposits and retrospective assessment significantly complicates the collection issue. On the one hand, cash deposits are collected on new import entries at each *exporter's* assigned rate; therefore, all importers purchasing from a given exporter will pay the same cash-deposit rate regardless of the actual transaction price. On the other hand, each *importer* can be assessed a different amount for its ultimate ADD liability for past entries. It is possible, for instance, that even though a dumping margin for a certain exporter increases, not all importers will necessarily need to pay additional duties. For example, suppose importer A buys from exporter X at \$60, while importer B buys from exporter X at \$100. During an administrative review, importer B might find

<sup>1</sup> If no review is requested, the entries are liquidated at the rate in effect at the time of entry.

all of its cash deposits refunded, while importer A might be required to pay an additional duty beyond the cash deposit.<sup>2</sup>

Throughout 2002 and 2003, there were growing concerns in the US about uncollected ADD/CVD.<sup>3</sup> In an attempt to reduce the risk that assessed duties would not be collected, the US adopted new rules – referred to as the ‘enhanced continuous bond requirement’ (EBR). The new policy was imposed for the first time in February 2005. The maiden application involved imports of warmwater shrimp. Under the new rules, importers of shrimp from India and Thailand (and the other subject countries) had to secure a bond for an amount equal to the cash-deposit rate in effect on the date of entry of the merchandise multiplied by the importer’s value of imports from the previous year, as well as pay cash deposits equal to the amount of the ADD per entry.<sup>4</sup> India and Thailand complained that the new bonding requirement violated WTO rules. In addition to making cash deposits at the ADD rate, the new rules required importers to tie up hundreds of millions of dollars of capital (to cover the bond), thereby greatly limiting their ability to finance other business operations. India and Thailand also objected because these rules were imposed even though there had not been *any* defaults of warmwater shrimp anti-dumping duties by India or Thailand (or, for that matter, by any subject country); moreover, the US’s own studies indicated that there had been no significant defaults on any imported products from India or Thailand. While other agriculture/aquaculture products had defaulted on anti-dumping duties, Thailand and India believed warmwater shrimp exporters had done nothing to warrant being subjected to the EBR – that they had been found guilty by association rather than by action.

The Appellate Body (AB) found that the enhanced continuous bond requirement ‘as applied’ by the United States in *Shrimp* was not ‘reasonable’ within the meaning of the Ad Note to GATT Article VI:2 and 3. This Ad Note provides in relevant part that a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization. However, the AB rejected India’s claim that the Amended Customs Bond Directive, by virtue of which the enhanced continuous bond requirement was imposed, was inconsistent ‘as such’ with the Anti-Dumping Agreement.

2 Notwithstanding that importer B did not owe any ADD for past entries, importer B will still have to pay the cash-deposit rate levied on exporter X for future entries. Importer B could then get a refund after conclusion of the next administrative review if the same pricing facts continue to exist.

3 *United States – Measures Relating to Shrimp from Thailand* [hereinafter: *US–Shrimp (Thailand)*] (WT/DS343/AB/R, 16 July 2008) AB, footnote 194. According to the United States, while historically annual uncollected anti-dumping duties from importers had been relatively low (rarely exceeding US\$10 million a year), outstanding anti-dumping liability for 2004 alone reached an unprecedented US\$225 million for agriculture and aquaculture cases, that is for merchandise similar to shrimp.

4 Importers also were required to post the standard continuous bond requirement. The standard continuous bond amount is \$50,000 or 10% of the total taxes and fees paid in the previous 12-month period whichever is greater.

We consider the AB's legal and economic reasoning to be largely correct. The AB used the concepts of 'reasonableness' in the Ad Note and 'necessity' in Article XX(d) to reject what fundamentally was a lack of proportionality, while leaving the door open for more reasonable application of bonding requirements. In effect, the AB's decision suggests that had the US used a flyswatter rather than a sledgehammer to mitigate the problem of defaults, the additional bonding requirement could have been WTO-consistent. Our main criticism of the AB is that it could have been much sharper in its critique of the US's justification for the EBR. From an economic perspective, the unreasonableness of the EBR with respect to shrimp goes well beyond the AB's critique.

The remainder of the paper is organized as follows. In Section 2, we provide some background to the dispute. In Section 3, we discuss the key claims of the parties and provide an overview of the AB's findings. In Section 4, we will discuss legal and economic aspects of the determinations. In Section 5, we offer some concluding comments and perspectives on possible alternative policies toward reducing default risk under the retrospective system.

## 2. Background to the dispute

According to the United States General Accounting Office (GAO), shortfalls in collecting ADD/CVD did not exist or at least were not widely publicized until about 2000.<sup>5</sup> Around that time, inadequacies in the US's long-standing duty-collection procedures began to be exploited and the US experienced a significant increase in the amount of unpaid ADD/CVD.<sup>6</sup> US Customs and Border Protection ('Customs') reported that it was unable to collect \$130 million in ADD/CVD in fiscal year 2003, \$260 million in fiscal year 2004, and \$93 million in fiscal year 2005.<sup>7</sup> In comparison, the United States reported to the WTO that prior to 2000 uncollected duties rarely exceeded \$10 million annually.<sup>8</sup>

Awareness of and passions about the unpaid duties were stoked by the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) or, as it is more commonly known, the 'Byrd Amendment'.<sup>9</sup> CDSOA modified the Tariff Act of 1930 and instructed Customs to put all ADD/CVD into special accounts, one for each case. Previously, ADD and CVD revenue went directly into the general US

<sup>5</sup> United States Government Accountability Office, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, GAO-08-391, March 2008 [hereinafter GAO (2008)], p. 9.

<sup>6</sup> *US-Shrimp (Thailand)* AB, para. 190.

<sup>7</sup> United States Government Accountability Office, *International Trade: Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about Uneven Implementation and Effects Remain*, GAO-07-50, October, 2006 [hereinafter GAO (2006)], p. 1.

<sup>8</sup> *US-Shrimp (Thailand)* AB, footnote 194.

<sup>9</sup> See Henrik Horn and Petros C. Mavroidis (2006), 'United States – Continued Dumping and Subsidy Offset Act of 2000', in Henrik Horn and Petros C. Mavroidis (eds.), *The WTO Case Law of 2003 – The American Law Institute Reporters' Studies*, Cambridge: Cambridge University Press.

Treasury. Under CDSOA, at the end of each fiscal year the money collected in each case-by-case account was paid out directly to the companies who participated in the original investigation.<sup>10</sup> The first CDSOA payouts were made late in 2001. The amount of money flowing to eligible domestic firms was quite large, with hundreds of millions of dollars of payments annually flowing to eligible domestic firms.<sup>11</sup> If the duties were not collected, however, Byrd payouts could not be made.

By 2003, the United States perceived it had an ADD/CVD collection problem, at least in part because some CDSOA eligible industries were not receiving the payment to which they were entitled. Under existing Customs rules importers needed to post a continuous customs bond equal to US\$50,000 or 10 % of the annual estimated duties, taxes, and fees paid during the preceding year, whichever is greater. Of course, the standard continuous customs bond was not designed with ADD/CVD in mind. Customs concluded that the standard bond did not provide sufficient protection in light of the retrospective system, which created a risk that Customs would not be able to collect the full amount of ADD/CVD owed. Customs' analysis revealed that the collection problem was particularly severe for agriculture/aquaculture products. Customs deduced that agriculture/aquaculture products had certain characteristics, such as low capitalization, that made them high risk for defaults on ADD/CVD owed.<sup>12</sup>

On 9 July 2004, Customs announced a revision to its standard bond policy for bonds covering certain imports subject to ADD/CVD orders. The revised policy – referred to as the enhanced continuous bond requirement – required importers to obtain a bond equal to 100 % of the estimated ADD/CVD for items imported over the previous 12 months. The EBR was originally imposed pursuant to the Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991 (the '1991 Customs Bond Directive'); it was later amended by a number of subsequent measures. Collectively, the EBR and its amendments are referred to as the 'Amended CBD'.<sup>13</sup>

Customs' internal analysis of the new requirement suggested the EBR would essentially double the amount of ADD/CVD revenue protected<sup>14</sup> and hence would reduce the amount of uncollected revenue. Customs recognized the extra funds would often not be required and believed that the posting of additional bonds would not be burdensome to importers. In particular, premiums required by surety companies for the standard continuous bond were generally small. Furthermore,

<sup>10</sup> Details on the rules governing CDSOA duty disbursement can be found on the US Customs website, [http://www.cbp.gov/xp/cgov/trade/priority\\_trade/add\\_cvd/cont\\_dump/](http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/).

<sup>11</sup> According to GAO, more than \$1 billion in CDSOA payments were made during the 2001–2004 period. See *United States Government Accountability Office, International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, GAO-05-979, September 2005.

<sup>12</sup> *US–Shrimp (Thailand)* AB, para. 59.

<sup>13</sup> *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* [hereinafter: *US–Customs Bond (India)*] (WT/DS345/AB/R, 16 July 2008) Panel, para. 2.2.

<sup>14</sup> GAO (2008), p. 27.

Customs did not design the EBR to apply to all existing ADD/CVD orders or even to all new orders. Rather, the new guidelines would apply only to ‘covered cases’ within ‘special categories’ of merchandise. The scope and applicability would be determined on a case-by-case basis.

In January 2004, an anti-dumping investigation involving warmwater shrimp from six countries (Brazil, China, Ecuador, India, Thailand, and Vietnam) was initiated.<sup>15</sup> According to the US government, imports of warmwater shrimp were a suitable test case for the revised bond policy, because:

- (1) warmwater shrimp shared characteristics with other agriculture/aquaculture products that indicated a risk that Customs and Border Protection may not be able to collect the full amount of duties owed; (2) it represented a large volume of imports and faced potentially high anti-dumping duties; and (3) shrimp imports were duty-free, therefore, most shrimp importers had no history of normal duty payments and had minimum \$50,000 bonds.<sup>16</sup>

Said differently, even though shrimp importers had never defaulted on any ADD/CVD payments, Customs believed they were at high risk of doing so because importers of similar products (e.g., crawfish tail meat) had defaulted in the past.

A final affirmative injury determination on warmwater shrimp was made in January 2005. On 1 February 2005, Customs applied the revised EBR policy to imports of shrimp from the six countries subject to ADD. To date, agriculture/aquaculture merchandise remains the only merchandise designated as a ‘special category’ and shrimp is the only ‘covered case’ designated within the agriculture/aquaculture category.

### 3. Claims

#### 3.1 *Panel stage*

There were several substantive claims before the Panel. India and Thailand challenged the EBR ‘as applied’ in the shrimp anti-dumping investigation under a number of provisions of the Anti-Dumping Agreement [hereinafter: ADA], the Agreement on Subsidies and Countervailing Measures [hereinafter: SCM Agreement] and the GATT. India also challenged the EBR ‘as such’ under various GATT provisions. Thailand challenged the use of model zeroing in the original anti-dumping investigation under ADA Article 2.4.2.

The Panel found that the US Department of Commerce [USDOC] acted inconsistently with ADA Article 2.4.2 by using model zeroing when calculating dumping margins. The US did not appeal this decision to the AB. Given that the issue

<sup>15</sup> US Department of Commerce investigations A-351-838, A-570-893, A-331-802, A-533-840, A-549-822, and A-552-802; US International Trade Commission investigations 731-TA-1063-731-TA-1068.

<sup>16</sup> GAO (2006), p. 4.

was not appealed to the AB and given the large body of scholarship on zeroing, we will not discuss the issue in this paper.<sup>17</sup>

The heart of the dispute involves the Panel's determinations with respect to the EBR. First, and perhaps the most significant determination, the Panel concluded that the application of EBR 'constitutes "specific action against dumping"' and is not in 'accordance with the provisions of the GATT 1994 as interpreted by the ADA'.<sup>18</sup> Therefore, the Panel concluded the application of the EBR is inconsistent with ADA Article 18.1.

Second, the Panel concluded that the 'additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note' and found that 'the application of the EBR was not "in accordance with the provisions of the GATT 1994, as interpreted by" the Anti-Dumping Agreement'.<sup>19</sup>

Third, the Panel found that the application of the EBR, prior to imposition of the anti-dumping order, in conjunction with the initial provisional measures resulted in the imposition of provisional measures 'in excess of "the amount of the anti-dumping duty provisionally estimated"', contrary to Article 7.2 of the Anti-Dumping Agreement'.<sup>20</sup>

Fourth, the Panel found that the Amended Customs Bond Directive allows US Customs to exercise discretion to designate 'covered cases' and 'special category' merchandise in order to impose the EBR, and is thus not mandatory in nature and hence rejected all of India's 'as such' claims.<sup>21</sup>

### 3.2 *Key issues analyzed by the Appellate Body*

India and Thailand appealed a number of the Panel's findings and legal interpretations, including those related to the meaning of the Article VI:2 and 3 Ad Note and the standard for determining 'reasonableness' under the Ad Note. India also appealed issues related to its 'as such' claims and the consistency of the

17 See Edwin Vermulst (2005), 'The WTO Anti-Dumping Agreement', *Oxford Commentaries on International Law: Oxford Commentaries on the GATT/WTO Agreements*, Oxford: Oxford University Press, pp. 51–62; Edwin Vermulst and Daniel Ikenson (2007), 'Zeroing under the WTO Anti-Dumping Agreement: Where Do We Stand?', *Global Trade and Customs Journal*, 2(6): 231–242; Merit E. Janow and Robert W. Staiger (2003), 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', in Henrik Horn and Petros C. Mavroidis (eds.), *The WTO Case Law of 2001 – The American Law Institute Reporters' Studies*, Cambridge: Cambridge University Press; Chad Bown and Alan Sykes (2008), 'The Zeroing Issue: A Critical Analysis of Softwood V', *World Trade Review*, 7(1): 121–142; Thomas J. Prusa and Edwin Vermulst, 'United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) and United States – Measures Relating to Zeroing and Sunset Reviews?', forthcoming *World Trade Review*, 2009.

18 *US–Shrimp (Thailand)* Panel, paras. 7.77–7.79; *US–Customs Bond (India)* Panel, paras. 7.51–7.53.

19 *US–Shrimp (Thailand)* Panel, paras. 7.150–7.151; *US–Customs Bond (India)* Panel, paras. 7.128–7.129.

20 *US–Customs Bond (India)* Panel, paras. 7.143–7.146.

21 *US–Customs Bond (India)* Panel, para. 7.227.



Amended CBD with ADA Article 9 and SCM Agreement Article 19; the United States raised issues regarding the Panel's findings on the 'reasonableness' of the EBR and also its findings under GATT Article XX(d).

We note that the same panelists examined the complaint by Thailand (*US–Shrimp (Thailand)*) and the complaint by India (*US–Customs Bond Directive*); the Panel determined the two complaints covered 'substantially ... the same matter'.<sup>22</sup> The WTO issued separate Panel reports;<sup>23</sup> however, given the considerable overlap, the two disputes were consolidated into a single Appellate Body report.

### 3.2.1 'As applied' claims

#### 3.2.1.1 Temporal scope of GATT Article VI:2 and 3 Ad Note

Thailand and India argued that the EBR was a 'specific action against dumping' pursuant to ADA Article 18.1. Per the jurisprudence of the AB, three conditions must be met to prove a violation of Article 18.1: (1) the measure must be specific to dumping; (2) the measure acts against dumping; and (3) the measure has not been taken in accordance with the provisions of the GATT as interpreted by the ADA.<sup>24</sup>

The Panel had found that the first two conditions were demonstrated by Thailand and India, and these findings were not appealed by either party.<sup>25</sup> A key issue for condition 3 is the relationship between the Ad Note to GATT Article VI:2 and 3 and the ADA. The Ad Note provides that:

As in many other cases in customs administration, a Member may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

Thailand and India argued that the Ad Note is inapplicable once an action is found to be a specific action against dumping because the Ad Note cannot be applied independently of the ADA and the Ad Note cannot provide an independent basis to create a fourth permissible response to dumping. Thailand and India further argued that the 'temporal scope of the Ad Note is restricted to securities taken as provisional measures' and that, consequently, the Ad Note did not apply once final measures were imposed.<sup>26</sup>

<sup>22</sup> *US–Customs Bond (India)* and *US–Shrimp (Thailand)* Panel, para. 1.5.

<sup>23</sup> *US–Customs Bond (India)*, Panel Report, WT/DS345/R, 29 February 2008 and *US–Shrimp (Thailand)*, Panel Report, WT/DS343/R, 29 February 2008.

<sup>24</sup> *US–Shrimp (Thailand)* Panel, para. 7.41.

<sup>25</sup> *US–Shrimp (Thailand)* AB, paras. 196–201.

<sup>26</sup> *Ibid.*, paras. 203–204.



### 3.2.1.1.1 Interpretation of the phrase ‘pending final determination of the facts in any case of suspected dumping’

The AB began by analyzing ‘whether the Ad Note authorizes security requirements after the imposition of an anti-dumping duty order and, accordingly, whether the application of the EBR falls within the temporal scope of the Ad Note’.<sup>27</sup> In making its determination, the AB first examined the meaning of the phrase ‘final determination of the facts’. The AB pointed out that at issue was which final determination is being referred to in the Ad Note in the case of a retrospective duty-assessment system: ‘the determination pursuant to which an anti-dumping duty order is imposed at the end of an original investigation; or the determination of the final liability for payment of anti-dumping duties pursuant to an assessment review under a retrospective duty assessment system’.<sup>28</sup> The AB concluded that the Ad Note’s reference to ‘the payment of a duty is key to ascertaining the temporal scope of the Ad Note because it reveals the nature of the obligation whose performance the security seeks to guarantee’.<sup>29</sup> The AB also stated that in ‘a retrospective duty assessment system, this risk might also exist after the anti-dumping duty order has been imposed, arising from the difference between the amount collected at the time of import entry and the final liability assessed in an assessment review’. The AB therefore determined that ‘the term “final determination” in the Ad Note includes the determination that is made to assess the final liability for payment of anti-dumping duties under Article 9.3.1 in a retrospective duty assessment system’.<sup>30</sup>

Next, the AB pondered the ordinary meaning of the terms ‘suspected dumping’. Is dumping ‘suspected’ only up to the imposition of the ADD order, or does it continue to remain suspected until the final liability is determined in successive assessment reviews? Regarding this issue, the Panel had concluded that ‘under the retrospective duty assessment system of the United States, dumping remains suspected even after the issuance of an anti-dumping duty order’,<sup>31</sup> because the existence of dumping is established only after an assessment review is undertaken. The AB disagreed with the Panel’s legal reasoning, noting that the existence of dumping is determined in an original investigation under Article 5; the subsequent uncertainty pertains only to the *amount* of dumping liability. However, the AB argued that the term ‘dumping’ in the Ad Note covers both the existence of dumping and the amount or margin of dumping. The AB concluded that the Ad Note ‘authorizes the taking of a reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final liability for payment of the anti-dumping duty’.

27 Ibid., para. 219.

28 Ibid., para. 220.

29 Ibid., para. 221.

30 Ibid., para. 221.

31 Ibid., para. 225.

### 3.2.1.1.2 EBR constitutes an additional response to dumping

Thailand and India also claimed that the security required under the EBR constitutes a fourth permissible response to dumping. However, the AB ruled that any security taken for guaranteeing the payment of a lawfully established duty liability would not *necessarily* constitute a ‘specific action against dumping’. Rather, the security ‘should be evaluated in the light of the nature and characteristics of the security and the particular circumstances in which it is applied’.<sup>32</sup> Because a security is generally ‘ancillary to the principal obligation that it guarantees’,<sup>33</sup> the AB concluded that ‘a reasonable security taken in accordance with the Ad Note for potential additional anti-dumping duty liability does not necessarily, in and of itself, constitute a fourth autonomous category of response to dumping’.<sup>34</sup>

### 3.2.1.1.3 Relationship between EBR and ADA Article 7

Thailand and India argued that ADA Article 7, on provisional measures, ‘interprets, governs, and implements the Ad Note to Article VI:2 and 3 of the GATT 1994, and that, therefore, a security cannot be justified under the Ad Note independently of Article 7’.<sup>35</sup> This implies that ‘the scope of the Ad Note should therefore be limited to securities taken as a provisional measure in accordance with Article 7’.<sup>36</sup>

While acknowledging the overlap between the Ad Note and Article 7, the AB considered that the Ad Note ‘allows the taking of a reasonable security for payment of the final liability of anti-dumping duties after an anti-dumping duty order has been imposed where such security may be needed to ensure that the difference between the duty collected on import entries and the final duty liability is collected’.<sup>37</sup> The AB therefore rejected Thailand and India’s claim that the Ad Note ‘is completely subsumed under Article 7 so that the taking of a reasonable security is not allowed after a definitive anti-dumping duty is imposed’.<sup>38</sup>

### 3.2.1.2 Reasonableness of the bond requirement

On the question of whether the EBR as applied to shrimp was ‘reasonable’ under the Article VI Ad Note, the Panel had found that the US ‘could not properly have found, on the basis of the evidence relied on by the United States at the time it applied the EBR, that the rates of dumping established in the subject shrimp order were likely to increase’.<sup>39</sup> As a result, the Panel had concluded that the additional

<sup>32</sup> *Ibid.*, para. 230.

<sup>33</sup> *Ibid.*, para. 231.

<sup>34</sup> *Ibid.*, para. 231.

<sup>35</sup> *Ibid.*, para. 232.

<sup>36</sup> *Ibid.*, para. 232.

<sup>37</sup> *Ibid.*, para. 233.

<sup>38</sup> *Ibid.*, para. 233.

<sup>39</sup> *Ibid.*, para. 249.

security requirements resulting from the application of the EBR are not ‘reasonable’ within the meaning of the Ad Note.

Two aspects of the Panel’s decision were appealed. First, the United States appealed the ‘not reasonable’ finding. In addition, Thailand and India questioned the Panel statement that ‘in 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’.<sup>40</sup>

#### 3.2.1.2.1 Obligation to assess risk of individual importers

The AB set out a two-step approach to the issue of how ‘reasonableness’ under the Ad Note is to be assessed. The first step, it explained, ‘involves a determination of the “likelihood” of an increase in the margin of dumping of an exporter as a result of which there will be a significant additional liability to be secured. This determination should have a rational basis and be supported by sufficient evidence.’<sup>41</sup> The second step ‘involves a determination of the “likelihood of default” on the part of importers in respect of whom such additional liability is likely to arise’.<sup>42</sup>

The AB added three clarifying comments: (i) the ‘evaluation of the reasonableness of the amount of security demanded would depend on the magnitude of the likely additional liability and the risk of default by importers’; (ii) the required ‘security must obviously reflect and be commensurate with the likely magnitude of the non-payment or non-collection risk that has been established on a proper basis’; and (iii) ‘security requirements that impose excessive additional costs on the importers may convert the security into an impermissible specific action against dumping’.<sup>43</sup> The AB then stated that additional security could be taken only:

if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping).<sup>44</sup>

The AB went further and stated that the ‘Member would also need to determine the likely amount of the additional liability arising from such increase in order to ensure that the amount of the security requirement is commensurate with that additional liability’; and it agreed with the Panel that ‘it would not be reasonable to require additional security simply because of the possibility of rates of dumping increasing’, since ‘a mere possibility is not sufficient to establish likelihood of increase’.<sup>45</sup>

40 Ibid., para. 253.

41 Ibid., para. 258.

42 Ibid., para. 258.

43 Ibid., para. 258.

44 Ibid., para. 259.

45 Ibid., para. 260.

The AB disagreed with the Panel's suggestion that risk of default of individual importers need not be assessed. To the contrary, the AB considered 'the risk of default of individual importers ... an important factor in an analysis of the reasonableness of a security'.<sup>46</sup>

### 3.2.1.2.2 Reasonableness of the likelihood rates would increase

According to the US submissions, the decision by Customs 'to apply the EBR to subject shrimp was mainly based on the following elements, namely, that: (i) in agriculture and aquaculture sectors, the margin of dumping increased in about one third of cases, and such increase was significant; (ii) importers of agriculture and aquaculture merchandise were the source of the bulk of defaults on the payment of anti-dumping duties; and (iii) the potential additional liability was significant because of the heavy volume of shipments subject to the anti-dumping duty orders'.<sup>47</sup>

Because the US had not demonstrated any likelihood of an increase in the margin of dumping at the time the EBR was applied, the AB rejected the US argument that the EBR was 'reasonable'. In particular, the AB said that the US's statement that margins of dumping had increased in 38 % of cases in the agriculture and aquaculture sectors as a whole did not constitute sufficient evidence to conclude that margins of dumping were likely to increase for subject shrimp.

Moreover, the AB considered that the EBR assumes that the final liability for payment of ADD will approximately double in each assessment review compared to the previously established margin. The AB saw 'no credible basis for this assumption underlying the EBR'.<sup>48</sup>

Finally, the AB noted that it did not 'see how the total value of subject shrimp shipments (US\$2.5 billion, according to the United States) is, in and of itself, a relevant factor for determining whether there is significant additional liability, unless there is a significant increase in the margin of dumping of an exporter as well, because the cash deposits capture the liability on the total value of the shipments at the level of the existing estimated anti-dumping rates'.<sup>49</sup>

On this basis, the AB agreed with the Panel's conclusion that the United States 'could not have properly found, on the basis of the evidence relied upon by it, that the margins of dumping in respect of subject shrimp were likely to increase'. As a result, it upheld the finding of the Panel that the application of the EBR to subject shrimp is inconsistent with Article 18.1 of the Anti-Dumping Agreement.<sup>50</sup>

46 *Ibid.*, para. 263.

47 *Ibid.*, para. 264.

48 *Ibid.*, para. 266.

49 *Ibid.*, para. 267.

50 *Ibid.*, para. 269.

### 3.2.2 ‘As such’ claims

#### 3.2.2.1 Amended CBD is inconsistent with Articles 1 and 18.1 of the ADA and Articles 10 and 32.1 of the SCM Agreement

India appealed the Panel’s finding that the Amended CBD is not inconsistent ‘as such’ with ADA Articles 1 and 18.1 and SCM Agreement Articles 10 and 32.1.

The AB reasserted the Panel’s mandatory vs. discretionary distinction as crucial for evaluating India’s ‘as such’ claims. The AB confirmed the Panel’s determination that the Amended CBD provisions were not a mandatory part of US practice, but rather just provided criteria for identifying ‘covered cases’ or ‘special categories’, and did not require US customs to designate ‘covered cases’ or ‘special category’ merchandise. The AB also rejected India’s claim that the Amended CBD is ‘as such’ inconsistent because it imposes the EBR in every case in which the United States concludes that there is a likelihood of increase in margins because of the AB’s earlier determination that the imposition of additional security is authorized under the Ad Note, provided it is reasonable.

#### 3.2.2.2 ADA Article 9 and SCM Agreement Article 19

India appealed the Panel’s finding that the Amended CBD is not inconsistent ‘as such’ and ‘as applied’ with ADA Articles 9.1, 9.2, 9.3, and 9.3.1 and ‘as such’ with SCM Agreement Articles 19.2, 19.3, and 19.4.

With respect to ADA Article 9, the Panel had concluded that the EBR falls outside the scope of this provision because Article 9 is concerned with the ‘imposition and collection of anti-dumping duties’.<sup>51</sup> By contrast, the Panel asserted that ‘a bond is not a “duty” and the term “duty” does not encompass bonds, because a bond does not yield public revenue at the time it is provided’.<sup>52</sup> The same logic applies to the SCM Agreement Article 19, ‘the enhanced bond is not a countervailing duty’, which means the EBR also falls outside the scope of Article 19.

The AB considered that ‘the EBR imposed pursuant to the Amended CBD cannot be characterized as a “duty” within the meaning of the relevant provisions’, and therefore it agreed with the Panel that bonds provided under the Amended CBD ‘are not anti-dumping duties or countervailing duties’, so that they ‘fall outside’ the scope of Articles 9 and 19.<sup>53</sup>

### 3.2.3 US claim – the Panel’s analysis of the term ‘necessary’ in Article XX(d) of the GATT 1994

The United States requested that, ‘if the Appellate Body does not reverse the Panel’s finding that the EBR is not a “reasonable security” within the meaning of the Ad

<sup>51</sup> Ibid., para. 276.

<sup>52</sup> Ibid., para. 276.

<sup>53</sup> Ibid., para. 281.

Note, it should reverse the Panel's finding that, unless a Member demonstrates that the rates established in the anti-dumping duty order "are likely to increase", an additional security requirement cannot be considered to be "necessary" within the meaning of Article XX(d) of the GATT 1994'.<sup>54</sup>

India challenged 'the Panel's decision not to address "as a threshold question" whether Article XX(d) remains available to justify a "specific action against dumping or subsidization"'. India argued that if a measure is found to be a 'specific action against dumping' in violation of ADA Article 18.1, then a defense under Article XX(d) is not available.

The AB tackled the claim in two steps. First, the AB assumed, *arguendo*, that an Article XX(d) defense is available to the United States and would, therefore, proceed to consider the US appeal of the Panel's finding that the EBR is not 'necessary' to secure compliance with certain US laws and regulations within the meaning of Article XX(d). Second, assuming the answer to the first step is in the affirmative, it would then return to the question of the availability of an Article XX(d) defense.

As to the necessity issue, the AB recalled the Panel's finding that the EBR, as applied to subject shrimp, is not 'necessary' within the meaning of Article XX(d), given the Panel's earlier finding that the United States had failed to establish that rates of dumping in the anti-dumping duty order were likely to increase, such that it had also failed to demonstrate that additional security provided by the EBR reasonably correlated to any case of suspected dumping in excess of the dumping margin established in the anti-dumping duty order.<sup>55</sup> On appeal, the United States asserted that the Panel's necessity test 'was the same flawed test that it used to find that the EBR is not a "reasonable security" under the Ad Note' and, similar to arguments it advanced against the 'reasonableness' test adopted by the Panel in that context, the United States contended that 'a security may be "necessary" where there is a "likelihood" that the liability will accrue, but it is not "likely" (in the sense of substantial certainty) that this will occur'.<sup>56</sup>

The AB considered that 'the "necessity" test under Article XX(d) is different from the "reasonableness" test under the Ad Note'.<sup>57</sup> Past AB precedent established the following factors to be relevant in determining whether a measure is 'necessary':

- (i) the relative importance of the values or objectives the law or regulation is intended to protect; (ii) the extent to which the measure contributes to the realization of the end pursued – the securing of compliance with the law or regulation at issue; and (iii) the restrictive impact of the measure at issue on imports.<sup>58</sup>

54 *Ibid.*, para. 304.

55 *Ibid.*, para. 313.

56 *Ibid.*, para. 314.

57 *Ibid.*, para. 316.

58 *Ibid.*, para. 316.

The AB then stated the ‘United States has not demonstrated that the margins of dumping for subject shrimp were likely to increase significantly so as to result in significant additional liability over and above the cash deposit rates’.<sup>59</sup> It concluded, ‘we do not, therefore, see how taking security, such as the EBR, can be viewed as being “necessary” in the sense of it contributing to the realization of the objective of ensuring the final collection of anti-dumping or countervailing duties in the event of default by importers’.<sup>60</sup>

In light of this conclusion, the AB found it unnecessary to express a view on the second step of the analysis.

## 4. Legal and economic analysis

### 4.1 Legal issues

#### 4.1.1 Background discussion

##### 4.1.1.1 Retrospective vs. prospective collection of ADD/CVD

Most users of the anti-dumping instrument use a prospective duty-collection system, supposedly because it is administratively more convenient. Indeed, to the best of our knowledge, the United States is the only user that collects anti-dumping duties retrospectively.

Under a prospective duty-collection system, the duty rate is fixed at the end of the initial investigation and laid down in the final determination. This rate will then be imposed for the next five years, whether or not subsequent export transactions are actually dumped. Indeed, under a prospective system, an importer ironically will pay a higher amount of anti-dumping duties in cases where the exporter raises his export prices following the imposition of the duty, in other words, dumps less.<sup>61</sup> As a result, it may happen in prospective systems that, following the imposition of definitive duties, export prices decrease further because exporters and importers decide to share the burden of the payment of the duty.<sup>62</sup> Furthermore, as there is normally at least a 15-month gap between the initiation of

<sup>59</sup> Ibid., para. 317.

<sup>60</sup> Ibid., para. 317.

<sup>61</sup> Anti-dumping duties are typically imposed in the form of ad valorem – percentage – duties. If, for example, in the original investigation period the normal value was \$100, while the export price was \$80, the dumping duty normally imposed would be  $[(\$100-\$80)/\$80=]$  25%. Suppose that the exporter raises his export price to the non-dumped level of \$100, the importer will have to pay a deposit of \$25. If, on the other hand, the exporter continues to sell at \$80, the importer will have to pay a deposit of only \$20. Suppose that the exporter decides to sell at an export price of \$60, e.g. dump even more, the importer would pay a deposit of only \$15.

<sup>62</sup> Some users with a prospective system, such as the EU, have enacted special provisions in their anti-dumping law to act against ‘absorption’ of anti-dumping duties by the exporter. However, empirical evidence indicates that anti-absorption investigations are relatively rare.



an investigation and the final determination, and the investigation period used to determine dumping (and injury) margins tend to end at the last full quarter of the calendar year preceding the month of initiation of the investigation, the duties collected are by definition based on 'stale' data.<sup>63</sup> Thus, under a prospective system, the rates are in principle set for five-year periods.<sup>64</sup> Furthermore, in a prospective system, both the calculation of the duty level and the payment of the duties are essentially exporter-specific. Suppose that the duty rate imposed on exporter X is 25%; all importers purchasing from exporter X will have to pay the 25% duty, regardless of the prices they pay. Thus, if importer A pays \$60, while importer B pays \$100, importer A will have to pay \$15 while importer B will have to pay \$25.

The US retrospective duty-assessment system, on the other hand, is a two-step system.<sup>65</sup> The first stage is the original investigation, culminating in a notice of anti-dumping duty order and imposition of an estimated anti-dumping duty deposit rate for each individually examined exporter and an 'all others' rate for all others. Importers subsequently purchasing from an exporter will then either pay the cash-deposit rate set for an individually examined exporter or the 'all others' cash-deposit rate, depending on their supplier. The second stage is the assessment of the final liability for payment of anti-dumping duties. Once a year, during the anniversary month of the order, interested parties may request the USDOC to conduct an assessment or periodic review to determine the final liability for payment of the ADD owed on entries that occurred during the previous year. If such a request is made, the USDOC will calculate a duty-assessment rate for each *importer* that sources from the exporters concerned and determine the final liability for the payment of the anti-dumping duties by that importer. The actual assessment of the ADD is therefore importer-specific. At the same time, the USDOC will then calculate a new cash-deposit rate for the *exporters* concerned, which will apply to all importers sourcing from such exporters. If no request is made, the cash deposits made on entries during the previous year are automatically assessed as the final duties. Thus, the advantage of the retrospective system is that it is very accurate and stimulates exporters to dump less because then the importers will get (part of) their cash deposits back. The disadvantage of the system is that it is costly because in principle there is a periodic review every year. Thus, it seems likely that multinationals with vertically integrated operations can use a retrospective system to their benefit by avoiding or minimizing dumping margins, while smaller exporters (and importers) may not find it worthwhile to go through the process every year.

63 Suppose, for example, that an investigation is initiated on 14 March 2009; the investigation period would then typically be the calendar year 2008. The final results of the investigation would probably be published around 13 June 2010. Thus, by that time, the original dumping findings would be based on data of a year and a half ago.

64 Unless interested parties request an interim review.

65 *US-Shrimp (Thailand)* AB, paras. 184–185.

#### 4.1.1.2 Customs bonds in the US

All regular US importers are obliged to post a basic customs bond, equal to the greater of US\$50,000 or 10% of the duties, taxes, and fees paid by the importer during the prior calendar year. The purpose of such bonds is to secure liabilities that may arise out of failure to perform various obligations imposed on importers under US laws or regulations. Importers subject to an anti-dumping duty order must also post such a bond in addition to the applicable cash-deposit rate.<sup>66</sup>

The EBR operates in addition to the basic bond rules and, as we have seen in Section 2 *supra*, requires importers in a ‘covered case’ (shrimp) within a ‘special category’ (agriculture and aquaculture) to post an enhanced continuous bond equal to 100% of the anti-dumping duty rate multiplied by the value of imports of the product concerned in the previous 12 months. The objective of the EBR is to ensure that in cases where the level of the anti-dumping duties owed turns out to be higher than the cash-deposit rate, there will be sufficient guarantees that the importers will pay the higher duties. Although parties disagreed before the Panel on the impact of the EBR in the shrimp case,<sup>67</sup> it seems relatively clear that there is a substantial impact, both because the posting of additional bonds costs money and because such posting may have a deterrent effect on importers, particularly in cases where there are many alternative sources of supply available, as was the case for shrimp.

Thus, it seems to us that, while the EBR in itself seems to pursue an acceptable objective, the basic issue is whether the EBR, as applied in the shrimp case, is a reasonable means to achieve that objective.<sup>68</sup> The Panel and the AB clearly found this not to be the case.

#### 4.1.2 *The Ad Note Article VI:2 and 3 GATT 1994*

In order to determine whether the EBR, as applied in the shrimp case, constituted a ‘specific action against dumping’ not authorized within the meaning of Article 18(1) ADA, the Panel had followed the three-prong test set out by the AB in *US-1916 Act* and *US-Offset Act (Byrd Amendment)*. The Panel’s findings that the application of the EBR was ‘specific’ to dumping and acted ‘against’ dumping were not appealed. However, part of the Panel’s analysis that the EBR was not in accordance with the provisions of the GATT 1994, as interpreted by the ADA, more particularly the Ad Note, was appealed by India and Thailand. India and Thailand claimed both before the Panel and before the AB that the temporal scope of the Ad Note was restricted to securities taken as provisional measures and could therefore not be used as a justification for the EBR which, by definition, applied

<sup>66</sup> *Ibid.*, paras. 186–189.

<sup>67</sup> *Ibid.*, para. 195.

<sup>68</sup> Although WTO law does not recognize the principle of proportionality as such, it seems to us that certain concepts implicitly incorporate this principle.

only during the second stage of the US retrospective system. However, the Panel and the AB disagreed, albeit it on different grounds, with the AB, emphasizing the phrase ‘*payment of anti-dumping duty*’ and considering that in the retrospective US system the factual determination of the amounts of ADD payable takes place only in the duty-assessment review.<sup>69</sup> Although the AB did not agree with the Panel’s view that the existence of dumping remains suspected even after the anti-dumping duty order has been imposed, it considered that the term ‘dumping’ in the Ad Note covers both the existence of dumping and the dumping amount/margin (the latter of which is only fixed in the course of the assessment review).

As regards the reasonableness of the application of the EBR to shrimp, the Panel had considered that it might be appropriate to apply an increased security such as the EBR if the authorities had properly determined that the rates of ADD established in the anti-dumping duty order were ‘likely to increase’ to the effect that the cash deposits would not provide sufficient security for the final liability, *quod non*. On the other hand, the Panel had also held that it was not necessary under the Ad Note to assess the risk of default of individual importers. The US appealed the former finding, while the latter was challenged by India and Thailand.

On appeal, the AB noted that the EBR applied to all importers of shrimp from the targeted countries. Yet, there were various scenarios possible under which an increased liability might not occur; for example, if no assessment review is requested, if the rate for an exporter goes down or – even if the dumping margin of an exporter were to go up – specific importers might still benefit from a lower assessment rate, in which case the cash deposits would have to be refunded. The AB considered a two-step approach necessary to assess the reasonableness of a security such as the EBR. First of all, there should be a determination of a likelihood of an increase in the dumping margin of an exporter as a result of which there would be a significant additional liability to be secured. Second, there should be a determination of a likelihood of default on the part of the (individual) importers in respect of whom the additional liability would be likely to arise. The AB therefore upheld the ‘likely’ standard applied by the Panel, but rejected the Panel finding that importer-specific analysis of the default risk was not necessary. The AB further agreed with the Panel’s assessment that the US could not have properly found that the dumping margins for shrimp were likely to increase on the basis of the evidence before it. As the first step of the analysis was not satisfied, the AB upheld the Panel’s findings that the EBR as applied to shrimp was not reasonable within the meaning of the Ad Note and therefore violated Article 18.1 of the ADA.

Thus, while the AB rejected the EBR, as applied to shrimp, it seems clear that the door is open for the US to come up with a more polished version of the EBR that would allow a more targeted use of additional bonding requirements.

<sup>69</sup> *US – Shrimp (Thailand)* AB, paras. 221–222.

### 4.1.3 Article XX(d) GATT 1994

With regard to the United States affirmative Article XX(d) defense, the Panel had found that, unless a Member demonstrates that the rates established in the anti-dumping duty order are likely to increase, an additional security requirement cannot be considered as ‘necessary’ within the meaning of Article XX(d). The United States appealed this finding. India, in turn, appealed the finding on the ground that, if a measure is found to be a specific action against dumping not authorized under Article 18.1 ADA, an Article XX(d) defense is not available.

The AB considered the US appeal first on the assumption that an Article XX(d) defense would not be precluded by a finding of inconsistency with Article 18.1 ADA. It considered that the ‘necessity’ test of Article XX(d) was different from the ‘reasonableness’ test of the Ad Note and that the factors relied upon by the Panel to evaluate ‘necessity’ were correct. These were (i) the relative importance of the values or objectives the law or regulation is intended to protect; (ii) the extent to which the EBR contributes to the realization of the end pursued; and (iii) the restrictive impact of the EBR on imports. Like the Panel, the AB did not consider the second condition satisfied in light of the US failure to demonstrate that the margins of dumping for shrimp were likely to increase significantly so as to result in significant additional liability. As a result, the AB did not consider the EBR as being ‘necessary’ as it did not contribute to the end pursued, and declined to rule on India’s claim.

One may wonder whether this analysis is correct. The purported objective of the EBR is to secure potential additional liability that might arise from significant increases in the amount of dumping after the imposition of an anti-dumping duty order.<sup>70</sup> The AB accepts the legitimacy of this objective. Supposedly, the EBR does contribute to achieving this objective because it limits the risk of default and therefore it would appear to meet the second prong, too. The problem with the EBR, as applied in shrimp, is that it overshoots and therefore constitutes a disproportionate tool to achieve the stated objective. However, it seems to us that this would have been tackled more appropriately under the third prong of the test.

## 4.2 Economic issues

There are two areas of the AB’s decision that require further discussion: the risk of default and the reasonableness of the EBR.

### 4.2.1 Risk of default for shrimp

We agree with the Panel and AB’s finding that (i) the US must demonstrate that the rates of dumping established in the subject shrimp order were likely to increase and (ii) that such a determination was not possible on the basis of the evidence relied on by the US at the time it applied the EBR. The first point is self-evident. On the

<sup>70</sup> Ibid., para. 317.

second point, however, we think the AB could have commented more forcefully regarding the evidence provided by the US.

In its submissions, the United States 'CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 % of the time, did not change 11 % of the time, and decreased 56 % of the time'.<sup>71</sup> The US also submitted that '[w]hen rates increased, they increased by, on average, 285 %'.<sup>72</sup> The Panel did not find the US submission probative because the US did not provide any break-out as to the causes for the rate increases, the sizes of the rate increases, and whether defaults were associated. This final point is particularly crucial as rate increases are a necessary but not sufficient condition for payment default. The Panel also noted that US submissions made it impossible to know what fraction was a result of error on the part of Customs, or error or fraud on the part of other parties.<sup>73</sup> Furthermore, the United States had provided no explanation as to how any alleged historical trend in respect of dumping rates for agriculture/aquaculture cases generally might justify conclusions regarding the likelihood of dumping rates for subject shrimp.<sup>74</sup> The AB affirmed the Panel's views.

From what we have been able to ascertain, the US provided no information that directly demonstrated that warmwater shrimp exporters and importers (i) had defaulted or (ii) were likely to default. With respect to (i), given that the EBR was imposed coincidental with the final ADD order, there was no history of defaults to justify the decision to impose the EBR. With respect to (ii), the US's justification for the EBR was the following: other agriculture/aquaculture products had defaulted; therefore, shrimp was likely to default. Said differently, shrimp was guilty by association.

We believe the AB was correct in challenging the value of the US statistics for determining the risk of default, but could have made its critique much more forcefully. If nothing else, given the skewed nature of defaults, other summary statistics may have been more probative. Whether the mean or median is the preferred measure of 'typical' significantly depends on the distribution. For example, according to GAO (2008) most unpaid ADD/CVD bills are quite small, less than \$300; a few large unpaid bills result in the mean being over 80 times larger than the median.<sup>75</sup> The US's reliance on mean values hides the fact that very few exporters and importers were involved in large defaults. In fact, the US knew that just four importers were responsible for over one-third of the defaults.<sup>76</sup> We note that the US's main point – that a small identifiable set of exporters and importers account for a large amount of defaults – may still be valid. The more problematic

71 *US–Shrimp (Thailand)* Panel, para. 7.143; *US–Customs Bond (India)* Panel, para. 7.120.

72 *US–Shrimp (Thailand)* Panel, para. 6.40.

73 *US–Shrimp (Thailand)* Panel, para. 7.143; *US–Customs Bond (India)* Panel, para. 7.121.

74 *US–Shrimp (Thailand)* Panel, para. 7.144; *US–Customs Bond (India)* Panel, para. 7.122.

75 GAO (2008), p. 17.

76 *Ibid.*, p. 16.

aspect of the case is that the US did not present compelling evidence that shrimp exporters/importers would be large defaulters.

Specifically, the AB should have made it clear that the US needed to clearly distinguish the risk for default in shrimp as an agriculture/aquaculture case from the other characteristics that might lead to default. There are a number of other factors that contribute to the risk of default, most of which suggest warmwater shrimp was not like the other products with large defaults.

#### 4.2.1.1 What was known about defaulters?

A US study performed at the same time as the WTO AB hearings revealed far more information about the risk of default than apparently was shared with the Panel or AB. GAO (2008) found the uncollected duties were highly concentrated in five key ways:<sup>77</sup>

1. **Industry:** The agriculture/aquaculture industry represented 87% of the total amount of uncollected ADD/CVD.
2. **Product:** Four products were responsible for about 85% of the total amount of uncollected ADD/CVD. These four products are crawfish tail meat (\$354 million), garlic (\$75 million), honey (\$43 million), and mushrooms (\$41 million).
3. **Country of Origin:** Importers purchasing products from China are associated with 90% of the total amount of uncollected duties.
4. **Importers:** A single importer accounted for 20% of the total amount of uncollected ADD/CVD. Four importing companies (out of the 27,000 subject to ADD/CVD duties) accounted for more than one-third of the total, and 20 companies accounted for 63% of the total.
5. **Shipper Status:** Importers purchasing from companies undergoing a special ‘new shipper’ review accounted for about 40% of uncollected ADD/CVD.

Of the five characteristics, Customs appears to have focused on just one – industry. The US knew at the time it imposed the EBR that neither India nor Thailand had defaulted on ADD/CVD payments and that an astonishing 90% of the defaults were associated with Chinese products; the US also knew that a small number of importers were responsible for the majority of defaults.

The fact that new shippers account for such a large fraction of payment defaults is problematic because the EBR does not discourage new shippers from ‘dumping and running’. Under the new-shipper bonding option, which has now been suspended, an exporter that did not have its own deposit rate under an ADD or CVD order – and that did not ship to the US during the period covered by the original investigation – could obtain its own rate by undergoing a ‘new shipper’ administrative review. Importers could satisfy the duty deposit requirement on imports shipped by an exporter undergoing a new-shipper review by posting a bond. Cash deposits were not required for new shippers. Moreover, the EBR would not result

<sup>77</sup> Ibid., pp. 13–16.

in any additional bonding requirement. Whether the EBR is ‘reasonable’ should depend in part on the extent to which it mitigates the default problem; the fact that new shippers are a major loophole in the EBR challenges the notion that it is reasonable.<sup>78</sup>

#### 4.2.1.2 Is shrimp like other defaulters?

Shrimp had never been subject to a US ADD order and so had never been the source of any uncollected ADD/CVD. Nor was there any evidence that imports from Thailand or India had resulted in significant defaults.<sup>79</sup> Even though the US appears to have ignored other attributes associated with default, it is possible that the one factor the US focused on – industry – trumps the other factors. Specifically:

United States Customs concluded that: agriculture/aquaculture industries were characterized by low capitalization and high debt-to-equity ratios; importers of this type of merchandise had been responsible for significant defaults in the past; and shrimp importers of merchandise were therefore likely to have a heightened risk of default due to similarities with these other agriculture/aquaculture importers.<sup>80</sup>

Even if the AB accepted the US’s argument on the relationship between capitalization and default, the AB should have demanded the US demonstrate that the shrimp market is ‘like’ the other cases with significant default.

It is well known that the trade effects of ADD/CVD vary by the size of the margin, the number of subject countries, and the total import market share under order.<sup>81</sup> A case with plentiful non-subject (unrestrained) suppliers might provide importers little incentive to purchase from subject exporters; likewise, all else equal, a case with lower margins will likely lead to less default as there will be less incentive to significantly change pricing and sourcing in response to the duties.

To get a sense of the risk of how the shrimp case compared with the other cases with large payment defaults, we compiled some easily available public information on the cases – information to which the US government undoubtedly had access.<sup>82</sup>

<sup>78</sup> Legislation was put forth in July 2005 to close the ‘new shipper’ loophole. See Vivian C. Jones, ‘New Shipper Reviews’, *CRS Report for Congress*, 5 October 2005.

<sup>79</sup> Only three countries were mentioned in GAO (2008) as being major exporters with significant payment default, China (\$550 m), Argentina (\$11 m), and Vietnam (\$12 m). All other countries accounted for just \$40 m in defaults (page 15).

<sup>80</sup> *US–Shrimp (Thailand)* AB, para. 59.

<sup>81</sup> See Thomas J. Prusa (1997), ‘The trade effects of US antidumping actions’, in Robert C. Feenstra (ed.), *Effects of US Trade Protection and Promotion Policies*, Chicago: University of Chicago Press; Thomas J. Prusa (2001), ‘On the Spread and Impact of Antidumping’, *Canadian Journal of Economics* 34(3): 591–611. For an analysis focusing solely on agricultural products, see Colin A. Carter and Caroline Gunning-Trant (2009), ‘US Trade Remedy Law and Agriculture: Trade Diversion and Investigation Effects’, University of California, Davis Agricultural & Resource Economics working paper, January 2009.

<sup>82</sup> Chad P. Bown (2007) ‘Global Antidumping Database’ (Version 3.0), June, available online at [www.brandeis.edu/~cbown/global\\_ad/](http://www.brandeis.edu/~cbown/global_ad/).



Table 1. Cases with significant ADD/CVD payment defaults

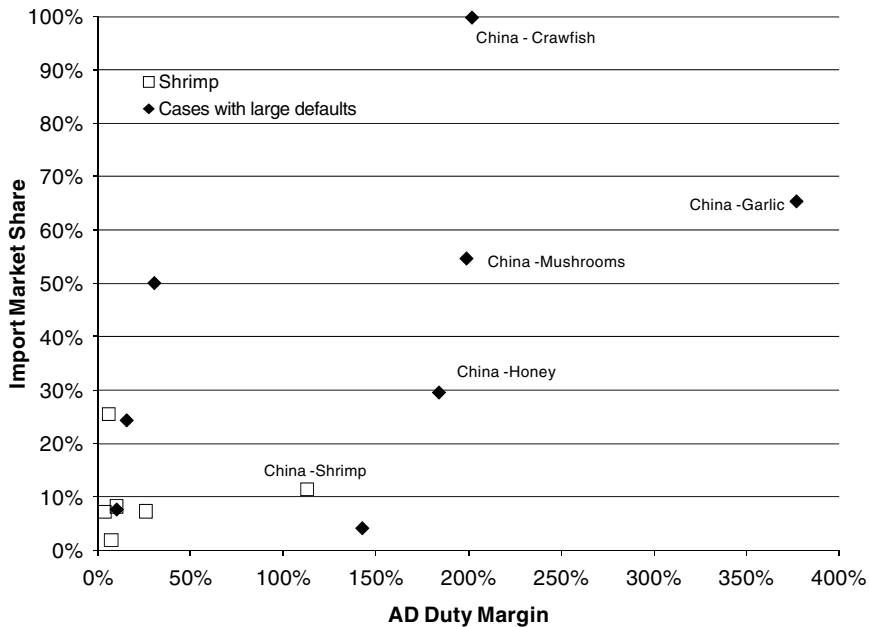
Product	Subject countries	Original invest. final dumping margin (%)	Import market share (%)
Fresh garlic (1994)	China	376.67	65.4
Honey (2000)	Argentina	30.24	50.1
	China	183.80	29.6
Crawfish (1996)	China	201.63	99.8
Certain preserved mushrooms (1998)	Chile	142.43	4.2
	China	198.63	54.7
	India	9.97	7.7
	Indonesia	15.35	24.4
Warmwater shrimp (2004)	Brazil	7.05	1.9
	China	112.81	11.4
	Ecuador	3.58	7.2
	India	10.17	8.2
	Thailand	5.95	25.5
	Vietnam	25.76	7.3

We begin by reporting some basic case information, including margins (Table 1). We note that China is subject to orders in each case. In addition, in each case the duties on China are quite large, over 100%.

In most other respects, the cases differ. Garlic and crawfish only involve a single subject country, while honey involved two countries and mushrooms involved four. Shrimp involve six countries. In all of the cases (except shrimp), China was the single largest subject supplier. The two cases with the largest defaults (crawfish and garlic) both had just a single country subject to ADD and the final original margins were extraordinarily large (201% and 377%, respectively). In crawfish, China accounted for essentially all imports. In garlic, China sourced almost two-thirds of imports. Hence, the incentive to avoid the ADD/CVD margin was particularly acute in those cases. By contrast, the margins in the shrimp case were modest and there appear to be many alternative suppliers.

The difference between shrimp and the other four cases with large defaults can also be seen if we plot the import market shares and the ADD margins (Figure 1). All else equal, the larger a single country's market share, the less viable are the alternative subject and non-subject suppliers. All else equal, the larger the ADD, the greater the incentive to avoid paying the duty. Taken together, we expect cases closer to the origin (i.e., lower market share and lower margin) to be less likely to default. As seen in the scatter plot, the countries involved in the shrimp case (depicted by a hollow square marker) lie far closer to the origin than the countries in the other cases (depicted by the solid diamonds). At face value, the incentive to default on payments in the shrimp case appears to be far less than in the other cases.

Figure 1. ADD margin and import market share



Easily identifiable differences between the shrimp case and the other cases with large default make it difficult to assume that the risk of default was inordinately high in the shrimp case, especially for the Thai and Indian shippers.

#### 4.2.2 *The need to evaluate exporter and importer risk*

The US argued that in 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. The US argued that only the risk of exporter default needed to be considered. The AB disagreed and stated ‘the risk of default of individual importers is an important factor in an analysis of the reasonableness of a security’.<sup>83</sup>

We do not see how it is possible to assess risk of default without examining importer risk. Under the US system, an exporter will be assigned an ADD rate but importers must post the bond and/or pay the cash deposit. Even if an exporter is willing to adjust pricing in such a way that will result in larger final duties, the importer will determine whether default occurs. If the US had knowledge, for instance, that the same importers who defaulted on catfish ADD were ready to import shrimp, it would be reasonable to assume there was a high risk of default. On the other hand, if the US had knowledge that large, long-time established

<sup>83</sup> *US–Shrimp (Thailand) AB*, para. 263.

importers were ready to import shrimp, it would not necessarily be reasonable to assume there was a high risk of default. The US not only presented no evidence that it considered the importer risk, but in fact rejected the notion that importer risk mattered. This ignores the behavior of the agent primarily responsible for the defaults.

#### 4.2.3 *Cost of EBR*

The EBR imposed higher costs on exporters than Customs analysis predicted. Customs analysis prior to the enactment of the EBR apparently was limited to the possible bond premium increases that shrimp importers might incur. However, the premium increases are arguably the least significant cost imposed by the EBR. For example, suppose US\$1 million of shrimp product is imported and the dumping margin is 15%. An importer would have to pay \$150,000 cash deposit and purchase another \$150,000 bond. Historically, a surety company charges about 5% premium for the bond, which implies an additional cost of \$7,500. Customs appears to have anticipated an increase in the premium and that is indeed what occurred. The EBR resulted in a doubling of the premium, meaning the cost of the above hypothetical bond might rise to \$15,000.<sup>84</sup> Relative to the dollar value of imports, the bond premium is small in either case (0.75% and 1.5% in the two scenarios). To the extent that this would have been the full cost, we agree that the EBR would not be inordinately burdensome.

Customs overlooked, however, two other costs associated with the EBR. First, sureties began to require 100% collateral to secure the EBR.<sup>85</sup> Thus, in addition to the \$150,000 cash deposit and \$15,000 bond payment the importer also needed to set aside \$150,000 in assets; these assets were held by the sureties to protect them in case of a major increase in ADD liability and could not be used by the importer to back other types of investments.<sup>86</sup> Second, the lengthy delays associated with the retrospective system meant that the costs of the bonds were ‘stacked’ over several years. That is, even though the administrative review might be initiated after 12 months, the review takes at least 12 months to complete; if either party appeals the determination, then several years can easily pass before the deposits are liquidated – and the whole time the surety will be imposing ongoing payments for the bond and will be holding the full amount in collateral. On average, the lag between entry of the merchandise and liquidation was about 3.3 years.<sup>87</sup> Hence, what at first glance appears to be a policy that imposes a small additional cost but yields huge benefits to US Customs turns out in fact to impose significant costs and cash constraints on exporters and importers. The process repeats each subsequent year. When one considers that Thailand exports about

<sup>84</sup> See Annex C, Executive Summaries of the First Written Submission of the Third Parties, WT/DS345/R, (18 May 2007), p. C-21.

<sup>85</sup> GAO (2006), p. 6.

<sup>86</sup> *Ibid.*, p. 6.

<sup>87</sup> GAO (2008), p. 23.

US\$1 billion of warmwater shrimp to the US every year, the 100% collateral charge will mean that hundreds of millions of dollars were held as collateral during the review process.

## 5. Concluding comments

The Appellate Body found that the EBR, as applied in the shrimp case, was neither a reasonable security within the meaning of the GATT 1994 Note Ad Article VI:2 and 3, nor was it a 'necessary' enforcement mechanism within the meaning of Article XX(d) GATT 1994. It therefore constituted an additional action against dumping not authorized under Article 18(1) ADA. As explained in detail above, we consider the AB's findings and reasoning largely correct.

The AB report does not preclude an authority from imposing additional bonding requirements to cover the risk of default by importers. However, in a retrospective system, such as the one employed by the United States, such bonding requirements probably could only be imposed on the basis of an importer-specific assessment of its default risk. Thus, designation of categories of merchandise and covered cases will almost certainly not be sufficient, no matter the motivation.

New shippers accounted for about 40% of the unpaid ADD. Given that the EBR did not address the new-shipper issue, the US amended its new-shipper policy. Previously, an importer purchasing from a new shipper could satisfy the duty deposit requirement on imports shipped by an exporter undergoing a new-shipper review by posting a bond. In 2006, the US Congress amended the new-shipper rules and now requires importers to submit a cash deposit to cover the entire estimated ADD/CVD for the subject merchandise. By doing this the new shippers were put on a level playing field with existing shippers. This policy strikes us as a much more proportionate response and targeted to the problem of unpaid duties.