

US – SHRIMP (THAILAND), US – CUSTOMS BOND DIRECTIVE¹
(DS343, 345)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	Thailand India	ADA Arts. 18.1; GATT Ad Art.VI paras. 2 and 3, Article XX(d)	Establishment of Panel	26 October 2006 (DS343) 21 November 2006 (DS345)
			Circulation of Panel Report	29 February 2008
Respondent	United States		Circulation of AB Report	16 July 2008
			Adoption	1 August 2008

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The enhanced continuous bond requirement (the "EBR").
- Product at issue: frozen warmwater shrimp.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 18.1 and GATT Ad Art. VI, paras. 2 and 3:

("Specific action against dumping"): The Panel found that the EBR, as applied, constituted "specific action against dumping". The Appellate Body did not express a view on this finding as it was not appealed.

("Temporal scope"): The Appellate Body followed the Panel's approach in considering first whether the EBR had been taken "in accordance with the provisions of the GATT 1994", in particular, GATT Ad Art. VI, paras. 2 and 3. The Appellate Body preliminarily determined the temporal scope of the Ad Note, and agreed with the Panel that the phrase "pending final determination of the facts in any case of suspected dumping" authorizes the taking of reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final liability for the payment of the anti-dumping duty.

("Reasonable security"): The Appellate Body developed a two-step test for determining the reasonableness of security. First, there should be a rational determination, based on sufficient evidence, that the margins of dumping of exporters are likely to increase, so that there is significant additional liability to be secured. Next, there must be a determination of whether the security is commensurate with the magnitude of the non-payment risk. In this case, the Appellate Body upheld the Panel's conclusion that the EBR was not reasonable because the evidence was insufficient to demonstrate that there was a likelihood of an increase in margins of dumping for subject shrimp.

- GATT Art. XX(d): The Appellate Body upheld the Panel's finding that the EBR is not "necessary" to secure compliance with certain United States "laws and regulations" governing the final collection of anti-dumping duties since the United States had not demonstrated that the margins of dumping were likely to increase resulting in significant additional unsecured liability. Consequently, the Appellate Body did not find it necessary to express a view whether a defence under Article XX(d) was available in respect of a measure that had been found to be inconsistent with ADA Art. 18.1 and GATT Ad Art. VI, paras. 2 and 3

3. OTHER ISSUES²

- Terms of reference: The Appellate Body upheld the Panel's decision not to include in its terms of reference two United States provisions mentioned in India's panel request, but not in its request for consultations, because their inclusion would have "expanded the scope of the dispute".
- DSU Art. 11: The Appellate Body found that the Panel did not breach Art. 11 when, in considering the United States' defence under GATT Art XX(d,) it included among the "laws and regulations" with which the EBR was designed to secure compliance, not only laws and regulations cited by the United States, but also those cited by Thailand and India.

¹ *United States – Measures Relating to Shrimp from Thailand, and United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*

² Other issues addressed: ADA Arts. 1, 9, 18.1, 18.4 and ASCM Arts. 10, 19, 32.1 and 32.5; burden of proof uncontested claim (DS343).