WORLD TRADE ORGANIZATION

WT/DS345/R
29 February 2008

(08-0735)

Original: English

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

Report of the Panel

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US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

A. COMPLAINT OF INDIA

1.1 On 6 June 2006, India requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the *DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "*GATT 1994*"), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") and Article 30 of the Agreement on Subsidies and Countervailing Measures (the "*SCM Agreement*") with respect to certain measures imposed by the United States on imports of certain frozen warmwater shrimp from India[1]. India and the United States held consultations, which failed to resolve the dispute.

1.2 On 13 October 2006, India requested the establishment of a panel pursuant to Article XXIII of the *GATT 1994*, Articles 4 and 6 of the *DSU*, Article 17 of the *Anti-Dumping Agreement* and Article 30 of the *SCM Agreement*.[2]

1.3 At its meeting on 21 November 2006, the Dispute Settlement Body (the "DSB") established a Panel pursuant to the request of India in document WT/DS345/6, in accordance with Article 6 of the *DSU*.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS345/6, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

1.5 At its meeting on 26 October 2006, the DSB also established a Panel pursuant to the request of Thailand in document WT/DS343/7, which dealt substantially with the same matter.

1.6 On 19 January 2007, India requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the *DSU*. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 India also requested the Director General to select the same persons to serve as panelists for both DS343 and DS345, in accordance with Article 9.3 of the *DSU*, which provides:

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[1] WT/DS345/1.
[2] WT/DS345/6.
[3] WT/DS345/7.

> "If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

1.8 On 26 January 2007, the Director-General composed the Panel as follows:

Chairperson: Mr. Michael Cartland

Members: Mrs. Enie Neri de Ross
Mr. Graham Sampson

1.9 Brazil, China, the European Communities, Japan, and Thailand reserved their rights to participate in the Panel proceedings as third parties.[4]

1.10 The Panel held the first substantive meeting with the parties on 6 and 7 June 2007. The session with the third parties took place on 7 June 2007. The Panel's second substantive meeting with the parties was held on 24 and 25 July 2007.

1.11 On 4 September 2007, the Panel issued the Descriptive Part of its Panel Report. The Interim Report was issued to the parties on 9 October 2007 and the Final Report was issued to the parties on 13 November 2007.

II. FACTUAL ASPECTS

2.1 This dispute concerns the implementation of the enhanced continuous bond requirement (hereafter the "EBR")[5] by the United States and its application to certain frozen warmwater shrimp imported from India. India presents claims both *as such* and regarding its application.

A. THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR")

2.2 On 9 July 2004, US Customs and Border Protection (hereafter "US Customs") amended its existing bond requirements to include new guidelines specific for "covered cases" within "special categories" of merchandise. The EBR has been 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"), as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases (hereafter the "July 2004 Amendment")[6], the document entitled "Clarification to July 9 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases" (hereafter the "August 2005 Clarification")[7], the document entitled "Current Bond Formulas" posted by US Customs on its website on 24 January 2005 (hereafter "Current Bond Formulas")[8], and the Notice published in the United States Federal Register entitled Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements (hereafter the "October 2006 Notice").[9] The July 2004 Amendment, the August 2005 Clarification, the document Current Bond Formulas and the October 2006 Notice is referred to collectively as the "Amended CBD". US Customs has identified as a primary objective of the

[4] WT/DS345/7.
[5] In its Request for Establishment of the Panel, India uses the term "Continuous Bond Requirement", instead of EBR to refer to the measure at issue.
[6] Exhibit IND-3.
[7] Exhibit IND-4.
[8] Exhibit IND-5.
[9] Exhibit IND-6.

directive, "continued vigilance ... to ensure collection of all appropriate anti-dumping and countervailing duties."[10] On 1 February 2005, US Customs implemented the EBR with respect to all imports of certain frozen warmwater shrimp subject to anti-dumping duties (hereafter "subject shrimp").[11] Prior to 1 February 2005, the United States had also sent notices to 33 importers beginning on 6 August 2004, of which 12 importers furnished enhanced bonds.[12] To date, "agriculture/aquaculture merchandise" is the only merchandise designated as a "special category" and "shrimp covered by anti-dumping or countervailing duty cases" is currently the only "covered case" designated within the agriculture/aquaculture category.

B. IMPOSITION OF CONTINUOUS BONDS AND OTHER SECURITY REQUIREMENTS IN THE CONTEXT OF THE US RETROSPECTIVE ANTI-DUMPING AND COUNTERVAILING DUTY ASSESSMENT SYSTEM

2.3 According to the United States, the EBR in combination with cash deposits is imposed to ensure payment of anti-dumping or countervailing duties under its retrospective duty assessment system. Unlike the systems employed in many other countries, the US retrospective system determines final liability for anti-dumping and countervailing duties 12 months following the anniversary month of the relevant anti-dumping duty order after merchandise is imported into the country at the end of assessment or "administrative" reviews.[13] Certain of the following aspects of the US system discussed below, may prove relevant to an objective assessment of India's claim.

1. Overview of anti-dumping and countervailing duty procedures

2.4 Under the US retrospective duty assessment system, the United States determines, through an investigation, whether margins of dumping or countervailable subsidisation exist, and whether dumped imports or countervailable subsidisation cause or threaten to cause material injury to a domestic industry. During the preliminary phase of the investigation, the US International Trade Commission (hereafter "USITC") determines whether a reasonable indication exists that an industry in the United States is materially injured, whether a reasonable indication exists that an industry in the United States is threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of subject merchandise investigated. USDOC also preliminarily determines whether a reasonable basis exists to believe that dumping or countervailable subsidisation is occurring. If USDOC makes an affirmative determination, it will issue a preliminary determination, which permits the imposition of provisional measures, historically in the form of a cash deposit, bond, or other security requirement, to ensure payment if anti-dumping or countervailing duties are ultimately imposed. The preliminary determination sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Subsequently, USDOC makes a final determination as to whether dumping or countervailable subsidisation is occurring. If this determination is affirmative and USITC also issues a final determination that imports of subject merchandise in the investigation were causing material injury to the US domestic industry or threatening with material injury, or that the establishment of an industry in the United States is materially retarded by reason of subject merchandise in the investigation, thereafter USDOC issues a public notice, denominated under US law as an anti-dumping or countervailing duty order. In the anti-dumping or countervailing duty order, the US

[10] Exhibit IND-3.

[11] US Customs applied the EBR to all importers of subject shrimp under an anti-dumping order from Brazil, China, Ecuador, India, Thailand, and Viet Nam on 1 February 2005. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India, 70 Fed. Reg 5147 (1 February 2005), Exhibit IND-13.

[12] See United States' responses to First Set of Panel Questions, paras. 34-35.

[13] See generally Title VII of the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq.*; see also 19 C.F.R. § 351.101 *et seq.*

Department of Commerce sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Pursuant to the order, importers must post a cash deposit of estimated anti-dumping or countervailing duties for each import transaction. This cash deposit is based on the overall margin of dumping or countervailable subsidisation found for the exporter or producer during the investigation phase.

2.5 During the anniversary month following a final determination in the investigations phase, importers, exporters, producers, and domestic interested parties may request that USDOC conduct an assessment review, often referred to as an "administrative review" of the import transactions that occurred in the prior year. During this review, USDOC analyses all of the import transactions for the period of review (i.e., the prior 12 months) to determine the final amount of the anti-dumping or countervailing duty payable on imports from each producer or exporter for which USDOC received a request for review.

2.6 Upon USDOC's completion of an administrative review, US Customs applies the assessment rate provided by USDOC to the customs value of each entry to determine the amount of final liability. If the amount of the cash deposit is greater than the amount of final liability, US Customs refunds the amount collected in excess of the final liability, together with interest on the excess amount. Alternatively, if the amount of final liability exceeds the amount of the cash deposit, US Customs issues a bill to the importer for payment of the difference in the amounts together with interest on the difference in the amounts. During the administrative review, USDOC may establish a new cash deposit rate for each producer or exporter, on the basis of that producer or exporter's transactions over the period of review. This new ad valorem cash deposit rate will be applied to future imports from the producer or exporter. USDOC analyses the import transactions of each producer or exporter subject to the review to calculate a new cash deposit rate going forward. For those entries not covered by a request for an administrative review, USDOC instructs US Customs to assess anti-dumping or countervailing duties at the cash deposit rate required upon entry.

2.7 Due to the design of the US retrospective system, the dumping or subsidisation calculations in the administrative review are based on different transactions than those evaluated during the investigation. The investigation evaluates the pricing behaviour of producers and exporters based on transactions completed during a period of time prior to the initiation of the anti-dumping or countervailing duty investigation. In contrast, an administrative review evaluates pricing behaviour during later time periods.[14] As a result of this, the dumping or subsidisation margins calculated in the administrative review may be either higher or lower than the margins calculated in the investigation. According to the United States, the EBR attempts to ensure full collection of anti-dumping or countervailing duties by securing against the possibility that the margin will increase from the time of the investigation until calculation of the final duty liability during the administrative review, and that importers will default on payment of increased duties.[15]

2. Timeline for anti-dumping and countervailing duty procedures

2.8 Under US law, USDOC has a finite period to complete its anti-dumping or countervailing duty investigation and issue an anti anti-dumping or countervailing duty order, if any. USDOC may extend the deadlines for the preliminary and final determinations, but cannot extend the investigation beyond 407 days. US law provides that USDOC ordinarily must complete an administrative review within 365 days. USDOC may extend the deadlines for issuing preliminary and final results of the

[14] The first administrative review evaluates transactions occurring from the date of imposition of provisional measures (if any) in the preliminary determination through the end of the twelve-month period following imposition of the anti-dumping duty order, generally a period of 18 months. All subsequent administrative reviews generally evaluate transactions occurring during the preceding 12 months.

[15] United States' Responses to First Set of Panel Questions, para. 58.

assessment review, but the review may not exceed 545 days. Specifically, the following is an overview of applicable time limits:

- In the petition phase of an anti-dumping or countervailing duty investigation, USDOC has 20 days (which may be extended to 40 days, only in the case of an anti-dumping investigation) to determine whether to initiate an investigation after it receives a petition to investigate dumping or countervailable subsidisation.

- In the preliminary phase of an anti-dumping or countervailing duty investigation, after USDOC initiates the investigation, USITC has 45 days (which may be extended to 65 days) from the date the petition is filed to make a preliminary injury determination. If USITC makes a preliminary affirmative injury determination, then USDOC has 140 days (which may be extended to 190 days) in the case of a dumping investigation, or 65 days (which may be extended to 130 days) in the case of a countervailable subsidisation investigation, from the date it initiated the investigation to make its preliminary determination of the existence of dumping or countervailable subsidisation.

- In the final phase of an anti-dumping or countervailing duty investigation, USDOC has 75 days (which may be extended to 135 days, only in the case of an anti-dumping investigation) from its preliminary determination to make a final determination of the dumping or subsidisation margins of investigated producers and exporters. If USDOC makes an affirmative final determination, USITC has until 45 days (which may be extended to 75 days) after USDOC's final determination to make its final injury determination. If the USITC makes an affirmative final injury determination, USDOC issues an anti-dumping or countervailing duty order.

- One year after the date the anti-dumping or countervailing duty order is issued, and during the anniversary month of the order every year thereafter, interested parties may request that USDOC conduct an administrative review of individual producers or exporters. After initiating this review, USDOC is required to issue preliminary results of the actual margin of dumping or subsidisation for the entries of the reviewed producer or exporter during the period of review within 245 days (which may be extended to 365 days) after the last day of the anniversary month. USDOC then must issue the final results within 120 days (which may be extended to 180 days) after the preliminary results are published.

C. IMPLEMENTATION OF THE AMENDED CONTINUOUS BOND DIRECTIVE (THE "AMENDED CBD")

2.9 Following issuance of the anti-dumping duty order on imports of certain frozen warmwater shrimp on 1 February 2005, US Customs began requiring subject shrimp importers to maintain enhanced bond coverage additional to the cash security required on each entry, in compliance with the Amended CBD.[16]

2.10 Generally, to satisfy US Customs bond requirements, any importer of goods subject to an anti-dumping or countervailing duty order may obtain either a single entry bond, covering a single entry, or a continuous bond, which provides security for all entries filed by the bond principal during the period of time covered by the bond, typically one year. US Customs may also require additional security if US Customs believes that acceptance of an entry secured by a continuous bond would

[16] As indicated in para.2.2, the United States sent notices to 33 importers prior to publication of the anti-dumping order on 1 February 2005 beginning on 6 August 2004, of which 12 importers furnished enhanced bonds prior to 1 February 2005.

impair US Treasury revenue collection.[17] Previously, under the 1991 Customs Bond Directive, importers subject to an anti-dumping or countervailing duty order that selected the continuous bond option only needed to post a customs bond equal to the greater of $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded to the nearest multiple of $10,000. After publication of the Amended CBD, however, US Customs implemented the EBR and required select importers of merchandise designated as "covered cases" to provide continuous customs bonds in excess of amounts established under the 1991 Customs Bond Directive *and* in addition to cash deposits of estimated anti-dumping duties per entry. Thus, under the Amended CBD, in addition to a minimum of $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, US Customs requires importers subject to the EBR to secure a bond for an amount equal to the USDOC 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 Amended CBD does not apply to single entry bonds.

2.11 As noted, subject shrimp is currently the only category of merchandise subject to the EBR.

2.12 The following hypothetical example illustrates the combined total security obligations imposed on Indian shrimp importers subject to the EBR, including bond and cash deposit requirements:

(a) An importer of Certain Frozen Warmwater Shrimp from India subject to the "all others" anti-dumping duty rate imports US$1 million of subject shrimp during the previous 12 months.

(b) The value of subject shrimp entered in the present transaction amounts to US$ 10,000.

(c) The Bound rate under Harmonized Tariff Schedule (HTS) headings 0303.13.00 and 1605.20.10 is 0 per cent.

(d) The USDOC anti-dumping duty "all-others" rate (pursuant to anti-dumping order) is 10.17 per cent.

(e) US Customs applies the Amended EBR formula to the existing importer without making adjustments based on an individualized determination.

	Obligation	Description	Amount
1.	**Normal Duties:**	As per a 0 per cent bound rate under HTS headings	**$0**
2.	**Cash Deposit for Anti-dumping Duties:**	Upon issuance of an anti-dumping order but prior to an administrative review, US Customs orders the posting of a cash deposit based on the "all-others" rate.[18]	**$1,017**

[17] See 19 C.F.R. § 113.13(d). US Customs administers the powers under section 113.13(d) in accordance with 1991 Customs Bond Directive, which provides that "a bond may be demanded with a limit of liability amount greater than that computed using this formula, provided sufficient evidence of high risk is on hand to support the higher amount".

[18] See 19 C.F.R. § 351.211(a). If no administrative review is requested, anti-dumping duties will be assessed at the cash deposits rate for estimated anti-dumping duties as established in the anti-dumping Order and required on that merchandise at the time of entry. (See 19 C.F.R. § 351.212(c)).

	Obligation	Description	Amount
3.	**Continuous Bond Amount:**[19]	Basic Bond + EBR amounts (*see 3(a) + (b) below*), rounded up by increments of $10,000 up to $100,000, and then by increments of $100,000.	**$200,000**
	3(a). Basic Bond Amount:	*The greater of either $50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded.*[20]	***$50,000***
	3(b). EBR Amount:	*100 per cent of anti-dumping duty rate established in final Order or most recent administrative review * value of imports in previous 12 months.*	***$101,700***
4.	**Total Obligations:**	**= 1. + 2. + 3.**	***$200,000 continuous bond (covering all shipments in one year period) + $1017 cash deposit per shipment of $10,000***

2.13 The Amended CBD authorizes US Customs to use the standard formula or instead make individualised bond determinations for subject Indian importers to determine bond amounts. The Amended CBD (specifically the August 2005 Clarification and the October 2006 Notice), provides that US Customs may reconsider bond amounts for individual importers on a case-by-case basis to ensure that duties are collected. However, in order to receive a reduction in the overall bond coverage via an individualized bond determination, an importer must so request, and may submit information on its financial condition related to the risk of non-collection for that importer. US Customs will then determine bond amounts based on the financial information supplied by the importer, US Customs records on compliance history of the importer, the importer's or principal's ability to pay, and other relevant information available to US Customs. Thus, the October 2006 Notice provides that, "[a]bsent exceptional circumstances, the above formulas will determine the bond amounts where a submission has not been made by the principal".[21] To date, the US has indicated that it received 27 requests for individualized bond determinations, of which it has reviewed 22 requests and has granted no reductions to three importers, reductions of 25 per cent to eleven importers, 45 per cent to one importer, 75 per cent to two importers, 80 per cent to one importer and 85 per cent to two importers.[22]

[19] A continuous bond amount secures multiple transactions during its validity. In place of a continuous bond, an importer may elect to post a single-transaction bond, which is equal to the total entry value of merchandise plus all applicable duties, taxes, and fees.

[20] See the 1991 Customs Bond Directive, which fixes a minimum continuous bond amount of $50,000 and establishes the following formula: (1) In the case of 0 to $1 million duties/taxes, the bond limit of liability is fixed in multiples of $10,000 nearest to 10 per cent of duties, taxes and fees paid during the preceding calendar year; or (2) in the case of duties/taxes over $1 million, the bond liability is fixed in multiples of $100,000 nearest to 10 per cent of duties, taxes and fees paid during the preceding year.

[21] See Exhibit IND-6.

[22] See United States' responses to First Set of Panel Questions, para. 38; Exhibit US-12. The GAO Report, Exhibit IND-26, p. 42 indicates that the number of shrimp importers totalled 550 through June 2006. Exhibit US-17 refers to 530 shrimp importers in 2004.

2.14 The enhanced continuous bonds provided pursuant to the Amended CBD are released when final liability for anti-dumping duties on goods covered by the bond is assessed, and upon liquidation of the import entries made in account of the goods.[23] As explained in section II.B above, if an administrative review is requested, final liability for anti-dumping or countervailing duties will be determined through such a review. If an administrative review is not requested, final liability will equal the margin of dumping or subsidy published in the final determination; however, this liability will not be assessed until the conclusion of the time period for requesting an administrative review.

D. THE IMPACT OF THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR") ON SUBJECT SHRIMP IMPORTERS

2.15 Following the application of the EBR, subject shrimp importers have faced significantly higher security obligations than previously to enter merchandise. Specifically, as explained above, subject shrimp importers must satisfy both the Basic Bond and the EBR as well as provide cash deposits equal to the anti-dumping duty rate established in the final determination. Additionally, India submits that sureties have also "typically" required subject shrimp importers to post collateral equal to 100 per cent of the EBR to secure the increased bond amounts.[24] The United States contends that evidence presented to this Panel does not support the conclusion that a majority of companies eligible to act as sureties on bonds securing obligations to US Customs has required certain importers of subject shrimp to post collateral equal to 100 per cent of the EBR.[25] India further submits that subject shrimp importers/exporters have also been required to pay associated fees to secure the increased bond amounts.[26] Due to the fact that enhanced bonds are deemed valid for 12-month periods of liability, but are not released until final liability has been assessed for anti-dumping duties on the goods covered by the bond, shrimp importers/exporters subject to the EBR have also had to furnish concurrent enhanced bonds and concurrent rounds of collateral for bonds covering distinct 12-month periods of liability. In the context of the additional security, collateral and fee obligations, the Government Accountability Office (hereafter "USGAO") in a report (the "USGAO Report")[27] concluded that subject importers/exporters have likely had to forgo other commercial opportunities, although the effects of the EBR could not be fully isolated from other changes occurring at the same time.[28] The USGAO Report also indicated that some importers have required exporters to export on a Delivery Duty Paid ("DDP") basis, thereby making the exporter, as the importer of record, responsible for customs bond requirements.[29] The parties disagree on the impact of the increased security

[23] Under 19 USC § 1675(b), once the administering authority orders liquidation of entries pursuant to a review, goods are liquidated within 90 days after the instructions to Customs are issued, in most cases.

[24] In its Request for Review of the Interim Report, paragraph 4, India refers to the following statement by the US Court of International Trade (hereafter "USCIT") in *NFI v. US* (Exhibit IND-16, p. 38.): "the testimony of witnesses for two plaintiffs relating to the requirements imposed on plaintiffs seeking new term bonds corroborates the finding that sureties typically require 100 percent collateral in the situations occasioned by the new bonding requirements." See also Exhibit IND-15, which contains, among other documents, a request for collateral from an Indian shrimp importer.

[25] See United States' Request for Review of the Interim Report, para. 4. See also Exhibit US-13, which lists companies to act as sureties on bonds securing obligations to US Customs.

[26] The United States has emphasized that, as a third party beneficiary to the contract between the surety and the bond principal, it is not itself a party to the contract, and thus does not set market-based fees charged by sureties or receive payments: see also United States' first written submission, paras. 8 and 11.

[27] Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain* (hereafter, "USGAO Report"), GAO-07-50 (Washington D.C.: October 2006), Exhibit IND-26.

[28] See USGAO Report, pp. 6, 24 and 35, Exhibit IND-26; see also *NFI v. US*, Exhibit IND-16, p. 31.

[29] See USGAO Report, p. 6, Exhibit IND-26. See also United States' second written submission, para. 30, wherein the United States contends that the use of a DDP basis rather than Cost, Insurance and Freight (CIF) one does not affect the costs borne by the importer of record.

requirements and related collateral requirements and fees on the year-on-year volume of shrimp imports into the United States.[30]

2.16 In October 2006, USGAO concluded in the USGAO Report that the Amended CBD criteria were not transparent or consistently applied.[31] On 13 November 2006, the US Court of International Trade (hereafter "USCIT") ruled that US Customs appeared to have discretion under US law to consider potential anti-dumping or countervailing duty in setting continuous bond amounts[32]; however, it concluded that the administrative record supported the conclusion that the plaintiffs are likely to demonstrate that US Customs arbitrarily and capriciously selected the anti-dumping orders on shrimp as the only "covered case" of merchandise[33], and that the application of the Amended CBD to the eight complaining importers was arbitrary and capricious.[34] For this reason, the USCIT issued a preliminary injunction *status quo* in favour of eight of the 20 complaining importers, prohibiting the enforcement of any side agreements that limited importation[35], and ordered US Customs to review the sufficiency of certain EBR bonds amounts in excess of $1,500,000 posted by the eight complaining importers in the case.[36] The USCIT's final decision on the merits of the complainants' legal claims is pending. After the GAO Report was issued but prior to publication of the USCIT's ruling, US Customs published the Amended CBD criteria in the October 2006 Notice, which further described the process for obtaining individualized bond amounts.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 India requests the Panel:

(a) to find that the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with the provisions of: [37]

(i) Article 18.1 of the *Anti-Dumping Agreement* together with Article VI:2 of the GATT and Article 1 of the *Anti-Dumping Agreement* because the EBR is a specific action against dumping not in accordance with the provisions of the *Anti-Dumping Agreement*;

(ii) Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement* because the United States has not complied with its obligation to ensure conformity of its laws, regulations and administrative procedures with the provisions of each of these agreements;

(iii) Article 32.1 of the *SCM Agreement* together with Article VI:3 of the *GATT 1994* and Article 10 of the *SCM Agreement* because it is a specific action against subsidization not in accordance with the *SCM Agreement*;

[30] See e.g. India's first written submission, para. 53; India's first oral statement, para. 4; United States' first written submission, para. 46.
[31] See generally, USGAO Report, Exhibit IND-26.
[32] See Exhibit IND-16, p. 42.
[33] See Exhibit IND-16, p. 54
[34] See Exhibit IND-16, p. 58.
[35] See Exhibit IND-16, p. 73.
[36] See Exhibit IND-16, p. 72.
[37] India's first written submission, para. 115.

(iv) Articles VI:2 and VI:3 of the *GATT 1994* because it secures duties, and results in charges, in excess of the margin of dumping or in excess of the amount of the subsidy determined to have been granted, as the case may be;

(v) Articles 9.1, 9.2 and 9.3 (including Article 9.3.1) of the *Anti-Dumping Agreement* and Articles 19.2, 19.3 and 19.4 of the *SCM Agreement* because the EBR is imposed on top of, and in addition to, the collection of cash deposits calculated on the basis of the rate of antidumping or countervailing duties specified in the final determination which alone is permissible under these provisions;

(vi) Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* because the EBR is applied:

– on the basis of a risk of default in collections and not because it is judged necessary to prevent injury during the investigation as required by Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*;

– without regard to, and in excess of, the provisionally estimated amount of duty:

- equal to the provisionally estimated dumping margin as required by Article 7.2 of the *Anti-Dumping Agreement*; or
- equal to the provisionally calculated amount of subsidization in Article 17.2 of the *SCM Agreement*;

– for a duration that is not limited to as short a period as possible as required by Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement*;

(vii) The Ad Note to Article VI:2 and 3 of the *GATT 1994* (the "Ad Note") because the imposition of the EBR on top of the obligation to provide bonds or make cash deposits for the payment of antidumping or countervailing duties is not reasonable security for the payment of antidumping or countervailing duties and because it is not imposed pending final determination of the facts in any case of suspected dumping or subsidization;

(viii) Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* because the Amended CBD has made changes in the laws and regulations and/or in the administration of the laws and regulations of the United States that are relevant to these agreements and that were required to be notified by the United States to the relevant Committees; and

(ix) Article I:1 and Article II:1(a) and (b) of the *GATT 1994* to the extent that the EBR results in a duty or charge imposed on or in connection with importation or is a method of levying duties and charges or is a rule or formality in connection with importation that is inconsistent with these provisions; or

(x) Alternatively, Article XI of the *GATT 1994* to the extent that the EBR constitutes a restriction on imports other than "a duty, tax or other charge".

(xi) India also claims a violation of Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement*[38]; Articles 1 and 14 of the *SCM Agreement*[39]; Article 7.5 of the *Anti-Dumping Agreement* and 17.5 of the *SCM Agreement*[40]; Articles X:1 and X:2 of the *GATT 1994*[41];

(b) For the same reasons, India also requests the Panel to find that the EBR *as applied* to imports of shrimp from India is inconsistent with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 7.5, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the *Anti-Dumping Agreement*, of Article X:3(a) and of Articles I:1, II:1(a) and (b) or, alternatively, of XI:1 and XIII of the *GATT 1994*.[42] India also claims a violation of Article VI:2 of the *GATT 1994* (including the Ad Note); and Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement*.[43]

(c) Accordingly, India requests that the Panel recommend to the DSB in accordance with Article 19.1 of the *DSU* that the United States brings its measures into conformity with the provisions of the *Anti-Dumping Agreement*, *SCM Agreement* and the *GATT 1994* within a reasonable period of time.[44]

3.2 The United States requests that the Panel reject India's claims for the reasons provided in its first written submission.[45]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as set forth in their executive summaries submitted to the Panel, are attached to this Report as Annexes (see List of Annexes, page (vii)).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties as set forth in their executive summaries submitted to the Panel, i.e. Brazil, China, the European Communities, Thailand and Japan are attached to this Report as Annexes (see List of Annexes, page (vii)).

VI. INTERIM REVIEW

6.1 On 9 October 2007, the Panel issued its Interim Report to the parties. On 23 October 2007, both parties submitted written requests for the review of precise aspects of the Interim Report. The parties also submitted written comments on the other party's comments on 2 November 2007. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.4 of the *DSU*, this section of the Panel's Report sets out the Panel's response to the arguments made at the interim review stage, wherever the Panel felt that explanation was necessary. The Panel has also modified certain aspects of its Report in light of the parties' comments wherever the Panel considered it necessary. Due to the factual similarities in the disputes DS343 and DS345, the Panel wherever possible has modified the respective reports of these two disputes in parallel. The Panel has also made a limited number of editorial corrections to the

[38] Request for Establishment of the Panel, WT/DS345/6, para. (c).
[39] Request for Establishment of the Panel, WT/DS345/6, para. (d).
[40] Request for Establishment of the Panel, WT/DS345/6, para (g).
[41] Request for Establishment of the Panel, WT/DS345/6, para. (j).
[42] India's first written submission, para. 116.
[43] Request for Establishment of the Panel, WT/DS345/6.
[44] India's first written submission, para. 117.
[45] United States' first written submission, para. 98.

Interim Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

A. INDIA'S COMMENTS ON THE INTERIM REPORT

1. Sequence of events surrounding implementation of the EBR

6.3 Regarding paragraph 2.2 and footnote 11, India submits that US Customs began "official" implementation of the EBR immediately after the introduction of the July 2004 Amendment and prior to imposition of the anti-dumping order on certain frozen warmwater shrimp from India on 1 February 2005. India therefore requests that the Panel move text located in Footnote 11 into the main body text in paragraph 2.2 to emphasize that the EBR was implemented for certain importers prior to 1 February 2005. The United States requests the Panel to reject India's suggestions. Although acknowledging that 35 importers did receive notices prior to publication of the anti-dumping order, the United States considers the notion that the receipt of these notices constitutes "immediate implementation" to be misleading. Taking both parties' comments into consideration, the Panel has moved information contained in footnote 11 into the main body text, but has declined to designate these notices as constituting "immediate" or "official" implementation.

2. One hundred per cent surety collateral requirements

6.4 Regarding paragraph 2.15, India submits that the following statement is inaccurate: "at least one or more of 250 companies eligible to act as sureties on bonds securing obligations to US Customs has also required certain importers of subject shrimp to post collateral equal to 100 per cent of the EBR plus associated fees to secure the increased bond amounts". In reference to *NFI v. US* (Exhibit IND-16, p. 38), India notes the USCIT's statement that facts (in that case) support the inference that sureties require up to 100 per cent security for the EBR. In particular, as India notes, the USCIT indicated that testimony of witnesses for two plaintiffs in that case corroborated the finding that sureties typically require 100 per cent collateral to satisfy the EBR. In light of this statement, India requests the Panel to modify the factual aspects of the report to reflect the USCIT's conclusion. The United States requests the Panel to decline India's suggestions due to the fact that the proceedings in *NFI v. US* are ongoing, contain a different factual record and involve questions of US law (and not WTO law). In particular, the United States notes that the findings in *NFI v. US* pertain to 8 importers and should not be extrapolated. However, the United States requests the Panel to include evidence submitted by India and the United States on the issue of collateral requirements into the relevant footnotes. Taking both parties' comments into consideration, the Panel has modified paragraph 2.15 in order to reflect the parties' views with respect to the overall effect of the EBR on *all* subject shrimp importers/exporters from India, including additional references to Exhibit IND-15.

3. India's Article X:3(a) *as such* claim

6.5 Regarding paragraph 6.6, India requests that the Panel include a reference to India's *as such* claim relating to Article X:3(a) of the *GATT 1994*. The United States requests the Panel to reject this suggestion. The Panel notes that, in its Request for Establishment, India only claimed that the EBR *as applied* to subject shrimp is inconsistent with Article X:3(a), and did not refer to this provision in relation to its *as such* claims. Therefore, the Panel considers India's suggested modification without basis and rejects it.

4. The relationship of the Ad Note and the *Anti-Dumping Agreement*

6.6 Regarding paragraphs 6.65 – 6.90, India requests that the Panel modify its discussion of the relationship between the Ad Note and the *Anti-Dumping Agreement* to reflect India's arguments in its

second oral statement (see India's second oral statement, paras. 40-45). India argues that, based on Article 31(3) of the Vienna Convention, the Ad Note must be interpreted in light of the context provided by the *Anti-Dumping* and *SCM Agreements.* Specifically, India requests the Panel to modify the statement in the third sentence of footnote 107 that "India notes that the Ad Note is not expressly implemented through the *Anti-Dumping Agreement*". India would prefer, as provided in paragraph 6.80 of the Interim Report, that footnote 107 reflect India's argument that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*. The United States considers India's arguments to be fully addressed in paragraphs 6.91 – 6.107 in the section entitled "contextual considerations". The United States does not object to India's proposed changes to footnote 107, although it considers that the Panel addressed India's argument in paragraphs 6.91 – 6.95 of the Interim Report.

6.7 The Panel has made the change requested by India in footnote 107 (113 of its Final Report).

5. Classification of Appellate Body reasoning as dicta in *US – Zeroing (EC)* and *US – Zeroing (Japan)*

6.8 Regarding paragraph 6.101, India contends that the Appellate Body's statements in *US – Zeroing (EC)*, footnote 184, regarding its comments on the US retrospective duty assessment system found in footnote 109, are themselves based on the description contained in paragraph's 2.4-2.5 of the *US – Zeroing (EC)* Panel Report and thus do not constitute *dicta* of the Appellate Body. Instead, India contends that the Appellate Body is restating the Panel's analysis. India thus requests the Panel to modify paragraph 6.101 of the Interim Report to reflect this. The United States disputes India's assertion regarding footnote 184. The United States notes that *obiter dictum* is defined in Ballentine's Law Dictionary (West Publishing, 3d. ed.) as "expressions in an opinion of the court which are not necessary to support the decision". The United States submits that, the mere fact that the Appellate Body based its comments on paragraphs in the Panel report has no bearing on whether the Appellate Body's comments were necessary to support its actual findings.

6.9 The Panel sees no need to make the change requested by India. Given that panels themselves may state *dicta*, and that the scope of an appeal may be narrower than the scope of panel proceedings, the mere fact that the Appellate Body was restating the panel's analysis does not mean *ipso facto* that the Appellate Body's statement does not constitute *obiter dictum*.

6. Text of footnote 203

6.10 Regarding footnote 203, India requests that the text be amended to read "In its first oral submission, India notes that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion". The United States considers this proposed change unnecessary. Nevertheless, the United States requests the Panel to use the term "contends" instead of "notes" if it follows India's suggestion, since the verb "notes" could imply that the statement is one of fact. The Panel has modified the text of footnote 203 (of the Final Report) to read as follows: "In its first oral submission, India contends that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion".

7. India's claims under the *GATT 1994* and the United States' defence under Article XX(d) of the *GATT 1994*

6.11 Regarding paragraphs 6.286 – 6.313, India requests that the Panel address whether the United States should be permitted to defend the EBR simultaneously under the Ad Note and under Article XX(d) of the *GATT 1994*, and in any case, whether it should be permitted to defend the EBR under

Article XX(d) since, India submits, the Panel found that Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* read together constitute *lex specialis*. Finally, India requests the Panel to clarify whether the United States should be permitted to defend the EBR under Article XX(d) without having invoked footnote 24 of the *Anti-Dumping Agreement*. India requests the Panel to address these issues as threshold considerations, and in the case that the Panel considers it appropriate to evaluate the United States' defence under Article XX(d), the Panel also evaluate India's *as applied* claims under the *GATT 1994*.

6.12 The United States requests the Panel to reject India's proposal to conduct a threshold analysis regarding the appropriateness of its Article XX(d) defence. The United States contends that no basis exists in the *WTO Agreements* to conclude that a Member may not defend a measure under Article XX(d) simply because it also responds to a claim under the Ad Note. According to the United States, the analysis under Article XX(d) is independent from that of the Ad Note. Furthermore, the United States disagrees with India's assertion that the Panel should not consider Article XX(d) in view of its findings regarding *lex specialis*. The United States notes that the Panel found that "Article VI of the *GATT 1994* and the Ad Note" constitute *lex specialis*, and not the *Anti-Dumping Agreement*. Finally, the United States submits that it was not required to invoke footnote 24 of the *Anti-Dumping Agreement* since the Panel has found the United States in breach of the Ad Note.

6.13 The Panel is of the view that a respondent in a WTO dispute may simultaneously respond to claims presented by the claimant while also raising an affirmative defence under a relevant provision in Article XX of the *GATT 1994*. The Panel notes that the text of the chapeau to Article XX of the *GATT 1994* reads: " ... nothing in *this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures ... " (emphasis added). This text does not on its face limit a panel from considering an affirmative defence under Article XX where it has found a violation under a provision of the *GATT*, including Article VI and/or the Ad Note. In this regard, the Panel recalls its findings that the application of the EBR constitutes specific action against dumping which is not in accordance with the provisions of the *GATT 1994* since it is inconsistent with the Ad Note. The Panel also considers it proper to analyse the United States' defence under Article XX notwithstanding the finding presented in paragraph 6.171 that Article VI of the *GATT 1994* and the Ad Note to Article VI constitute *lex specialis*. In the findings, the Panel refers to Article VI and its Ad Note as *lex specialis* with respect to the other more general provisions of the *GATT 1994* cited by India. The Panel's findings with respect to the applicability of the principle of *lex specialis* do not refer to a defence under Article XX(d) in order to justify a potential violation of Article VI and its Ad Note. Accordingly, the Panel considers additional analysis of the United States' Article XX(d) defence unnecessary and rejects India's request for review of our findings on this issue. For the foregoing reasons, the Panel considers it unnecessary to evaluate whether a Member must invoke footnote 24 of the *Anti-Dumping Agreement* in order to assert an affirmative defence under Article XX.

B. THE UNITED STATES' COMMENTS ON THE INTERIM REPORT

1. Typographical errors

6.14 Regarding paragraph 1.10, the United States requests replacing the phrase "24 and 25 July 200" with "24 and 25 July 2007". The Panel has corrected this typographical error.

6.15 Regarding paragraph 1.11, the United States requests replacing the phrase "9 September 2007" with "9 October 2007". The Panel has corrected this typographical error.

6.16 Regarding paragraph 2.10, the United States submits that US Customs designates importers of certain merchandise, not importers, as "covered cases", and thus requests the Panel to modify the text

to read: "US Customs implemented the EBR and required select importers of merchandise designated as 'covered cases' ...". The Panel has corrected this error.

6.17 Regarding paragraph 6.20 (7.20 of the Final Report), the United States requests replacing the phrase "the amendment as issue" with "the amendment at issue". The Panel has corrected this typographical error.

2. Treatment of amendments as part of the measure at issue

6.18 Regarding paragraph 6.22, the United States construes the Panel's reference to the findings of the Appellate Body in *Chile – Price Band System* as suggesting that, by merely including certain language in a panel request regarding amendments to measures, a basis would exist to treat a measure as part of the measure at issue and within the panel's terms of reference. The United States requests the Panel to remove the third and final sentences from the paragraph and base the analysis on the nature of the measure in question. India considers that the third and final sentences are consistent with the rationale in *Chile – Price Band System*. The Panel has made minor modifications to the text in paragraph 6.22 (7.22 of the Final Report) in order to reflect the rationale presented in *Chile – Price Band System* that an amendment should not change the *essence* of the original measure into something different than what was in force before its issuance.

3. Description of the United States' argument regarding Article 18.1 of the *Anti-Dumping Agreement*

6.19 Regarding paragraph 6.37, the United States considers the Panel's description of the US argument regarding Article 18.1 of the *Anti-Dumping Agreement* to be redundant with paragraph 6.34. Thus, the United States requests the Panel to delete the paragraph in its entirety. The Panel has deleted para. 6.37 of the Interim Report.

4. The EBR formula

6.20 Regarding paragraph 6.47 (7.46 of the Final Report), the United States requests the Panel to replace the phrase "the formula would be invalid" in the final sentence of this paragraph with "the formula would not apply" to more accurately characterise the statute of the EBR formula in relation to the directive. India considers the phrase "the formula would be invalid" to be appropriate since the formula in the Amended CBD is based on the anti-dumping rate, which thus signifies that the constituent elements of dumping are built into the formula.

6.21 The Panel has made the change requested by the United States .

5. The relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment

6.22 Regarding paragraphs 6.86, 6.97 and note 114, the United States requests the Panel to modify language to more accurately reflect the relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment. First, the United States suggests that the Panel replace the parenthetical that the system is "specifically authorised by Article 9.3.1" with "which is specifically contemplated in Article 9.3.1)". Second, the United states suggests replacing the parenthetical "(which Members are entitled to apply by virtue of Article 9.3.1 of the *Anti-Dumping Agreement*)" with "(which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*)". India requests the Panel to reject the United States' suggestions since the Panel's rationale should be parallel to the reasoning in paragraph 6.97. India submits that in paragraph 6.97, the Panel concluded that there must be a source of authorisation for taking security. Accordingly, India submits that the Panel should also identify a source of authorisation for the retrospective

assessment system, and if none, consider the consequences of such a finding. By merely contemplating a retrospective assessment system, India submits that it would be equally plausible to presume the drafters had no intention of enabling Members to require security.

6.23 The Panel is not persuaded by India's comments, and therefore sees no reason not to make the changes requested by the United States.

6. Characterisation of the "enhanced" bond requirement

6.24 Regarding paragraph 6.108 (7.108 of the Final Report), the United States suggests replacing the term "extended" with "enhanced" to describe the bonds required under the Amended CBD.

6.25 The Panel has made the change requested by the United States.

7. The legal standard for determining whether or not the application of the EBR resulted in "reasonable" security requirements

6.26 Regarding paragraphs 6.116 – 6.128, the United States proposes a number of changes to language that, in its view, could be construed as inconsistent with the Panel's positions elsewhere in its Report. First, the United States proposes a number of changes to prevent the Panel from incorrectly paraphrasing the reasonableness standard set forth in the Ad Note. In general, the United States proposes to use the formulation "the likelihood of rates increasing", as the United States considers that the term "likely", or "likely amount" (as used by the Panel in the Interim Report), suggests that a Member must demonstrate substantial certainty.

6.27 Second, the United States considers that the Panel's use of the term "likely" in the Interim Report's discussion of increases in margins could be read to contradict its point elsewhere in the report that the information on which security requirements must be evaluated is that available "at the time that the [requirement]" is imposed, and not *ex post* rationalization.[46] The United States recalls the Panel's statement in paragraph 6.82 of its Interim Report that, due to the operation of the U.S. retrospective duty assessment system, "there is no certainty that imports entering the United States following imposition of an anti-dumping order are in fact dumped" and that until assessment "it is not possible to state with certainty whether or not those imports are dumped." Since likelihood would need to be evaluated based on information available to the customs authority at the time the security requirement is imposed, the United States has suggested, for example, changing "determine the amount" to "estimate the amount" in paragraph 6.118.

6.28 Third, the United States asserts that as in "ordinary cases of customs administration", there may be cases in which an importer has a history of defaulting on its obligations such that *additional* security may be the only means available to the United States to ensure that duties are paid, short of prohibiting that importer from entering goods entirely. The United States claims that the Panel failed to address US arguments regarding risks of default. The United States requests that the Panel consider clarifying its findings to confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require, such as cases in which importers have a demonstrated history of non-payment of liability owed.

6.29 The United States also asks the Panel to refer to estimates of the "amount" of final dumping liability rather than estimates of the amount of the final "rate" of dumping. The United States asserts that since security for antidumping duties (whether cash deposit or bond) is a quantity based on the total dumping liability, which depends both on the ad valorem rate and the customs value of imports

[46] Interim Report, para. 6.125.

entered at a given time, using the term “dumping liability” rather than the “rate of dumping” in discussing the amount of security that may be required.

6.30 Regarding para. 6.122 of the Interim Report, the United States asks the Panel to delete certain language describing an argument made by the United States early in the proceedings.

6.31 India requests the Panel to reject the United States' suggestions. Regarding paragraph 6.117, India considers changes suggested by the United States to be inconsistent with its argument that the final amount of liability is only established following an administrative review, as opposed to through the anti-dumping order. Regarding the changes suggested for paragraphs 6.118, 6.119, 6.122, 6.128, 6.226 and 6.312, India submits that these changes are inconsistent with the level or rigour of analysis that a Member must undertake before taking additional security, as discussed in paragraph 6.118. India considers the proposed changes to be inconsistent with the Panel's conclusion in paragraph 6.118, last sentence, that the rate in the anti-dumping order remains the best estimate of suspected dumping and a rigorous analysis is necessary to exceed this estimate. Regarding the changes suggested for paragraph 6.122, India submits that the Panel should retain the United States' assertion that "it is not uncommon for assessed duties to exceed cash deposits". India considers this statement to be an omission by the United States, and its removal is not justified based on footnote 29, which qualifies this assertion. Further, India considers that reasoning in paragraphs 6.120 – 6.121 provide support to reject the assertion that rates increased 33% of the time.

6.32 The Panel has made only a limited number of the changes requested by the United States regarding this first issue. In particular, the Panel has declined the US suggestion to replace its own language with references to "the likelihood of rates increasing", for the United States has failed to properly explain the advantages of its formulation over that of the Panel. Generally, the Panel is concerned that the changes proposed by the United States might weaken the standard that the Panel applied, consistent with the Ad Note, in the present case. In particular, the Panel is not persuaded that it is inappropriate to expect an investigating authority to make determinations of what is likely to happen in the future. The Panel is not persuaded by the US suggestion that the standard articulated in the Interim Report would require *ex post* rationalization. The Panel considers that an investigating authority is required to comply with the applicable standard by making a prospective determination of the likelihood of rates of dumping increasing on the basis of the information available to it at the relevant time.

6.33 The Panel declines to make any changes in respect of the US comments on the need to consider the risk of default as in “ordinary cases of customs administration”. The Panel considers that it already addressed the principal argument of the United States regarding risk of default in footnote 140 of the Interim Report. The Panel declines to further confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require. The Panel's findings are based on its interpretation of the Ad Note. The Panel does not have a mandate to consider whether or not additional security may be imposed under principles of ordinary customs administration. Although the Ad Note contains the phrase "[a]s in many other cases in customs administration", the Panel considers that such phrase is used for introductory purposes only. If such phrase had been intended to dictate the substantive circumstances under which "reasonable security" could be imposed under the Ad Note, details of such other cases of customs administration would have been spelled out in the Ad Note in detail.

6.34 The Panel accepts the US request to refer to use the term “dumping liability” rather than the “rate of dumping”. This is because the amount of security is not merely a function of the rate of dumping in the anti-dumping order, but also of the customs value of the relevant imports. The Panel is not persuaded by India's concern that such changes would be inconsistent with the US argument that the amount of liability is established finally only in an administrative review and not in the anti-dumping order. As noted at footnote 114 to the Interim Report, the final determination of dumping,

injury and causation is in fact the basis for collecting anti-dumping duties under prospective assessment systems. Regardless of when liability is actually deemed to arise, Article 9.3.1 of the *Anti-Dumping Agreement* stipulates that, under both the prospective and retrospective assessment systems, "[t]he amount of the anti-dumping duty shall not exceed the margin" of dumping. The Panel has modified paras 6.117 and 6.118 of the Interim Report accordingly. The Panel has not modified the reference to "the likely amount of such increase" in para. 6.119 of the Interim Report, in order to maintain consistency with the identical phrase in para. 6.118 of the Interim Report (in respect of which the United States did not ask the Panel to include references to duty liability).

6.35 Regarding paragraph 6.226, the United States requests the Panel to modify the penultimate sentence to incorporate modifications suggested for paragraphs 6.116-6.218. Specifically, the United States requests that the Panel replace phrasing "that anti-dumping liability was likely to increase" with the phrase "that there was a likelihood that anti-dumping liability would increase". For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

6.36 Regarding paragraph 6.312, the United States requests the Panel to modify the fourth and sixth sentences to incorporate modifications suggested for paragraphs 6.116 – 6.128. Specifically, the United States requests that the Panel replace the phrase "that rates of dumping provided for in the anti-dumping order were likely to increase" with the phrase "that there was a likelihood that rates of dumping provided for in the anti-dumping order would increase"; and the phrase "without adequately establishing that anti-dumping duties are likely to increase" with the phrase" without adequately establishing that there was a likelihood that anti-dumping duties would increase". For the same reasons discussed above, India requests the Panel to reject this change. For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

6.37 The Panel has made the deletion requested by the United States in respect of paragraph 6.122 of the Interim Report (7.122 of the Final Report), since such deletion does not impact negatively on the integrity of its findings.

8. Challenges to mandatory measures under the "mandatory/discretionary" distinction

6.38 Regarding paragraph 6.208, the United States requests the Panel to delete the phrase "challenged and" from the last sentence to better reflect the Panel's observations in the subsequent paragraph regarding the import of the "mandatory/discretionary" distinction. The Panel does not find this change appropriate, and thus declines to amend the text.

6.39 Regarding paragraph 6.226, the United States requests the Panel to modify the penultimate sentence to incorporate modifications suggested for paragraphs 6.116-6.218. Specifically, the United States requests that the Panel replace phrasing "that anti-dumping liability was likely to increase" with the phrase "that there was a likelihood that anti-dumping liability would increase". For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

9. Consistency between DS343 and DS345

6.40 The Panel has also made a number of changes to paras 6.98, 6.109, 6.121 and footnote 143 of the Interim Report, to maintain consistency with its findings in *United States – Measures Relating to Shrimp from Thailand* (DS 343). The Panel included paragraph 7.81 in its Final Report for the same reason.

VII. FINDINGS

A. PRELIMINARY ISSUES

1. Parallel panel proceedings in DS343 and DS345

7.1 This Panel was established by the DSB at its meeting on 21 November 2006. One month earlier, on 26 October 2006, the DSB had established a separate Panel in the dispute (DS343) *US – Shrimp (Thailand*) the terms of reference of which also included the application of the EBR to imports of subject shrimp. At the DSB meeting where the present Panel was established, Thailand stated that it had expected the establishment of a single Panel for both proceedings in accordance with Article 9.1 of the *DSU*. In the absence of that single Panel, Thailand indicated that, pursuant to Article 9.3 of the *DSU*, it expected that the same persons would be appointed as panelists in the two disputes and that the timetables would be harmonized. The representative of the United States responded that, although the Panel in DS343 had already been established, the same persons could be appointed to serve as panelists in the two proceedings and the timetables of the separate Panels could be harmonized.

7.2 The meetings to appoint the same members for this Panel and that of DS343 were held jointly between the two separate complainants, India and Thailand, and the common defendant, the United States. Since the parties were unable to agree on panelists to serve for these proceedings, on 19 January 2007, Thailand and India requested, in separate letters, that the Director-General determine the composition of the Panel pursuant to Article 8.7 of the *DSU*, and select the same persons to serve as panelists for both proceedings, pursuant to Article 9.3 of the *DSU*. On 26 January 2007, the Director-General composed two separate Panels consisting of the same members.

7.3 On 9 February 2007, India and Thailand sent separate letters to the Chairman of the two Panels requesting enhanced third party rights in each other's proceedings. On 15 February 2007, the Chairman met with the parties in a joint organizational meeting to hear comments on the proposed Timetable and Panel Working Procedures. At that meeting, as well as in a letter dated 16 February 2007, the United States argued that granting enhanced third party rights to Thailand and India was not necessary in the instant cases.

7.4 After having heard the parties' views, the Panel decided not to grant enhanced third party rights to India and Thailand but instead, opted for a practical approach aimed at ensuring that the parties to both disputes enjoyed adequate opportunity to participate in the proceedings where appropriate. On 23 February 2007, the Panel sent to the parties a joint Timetable as well as separate, albeit similarly worded, Working Procedures**.** In this joint communication, the Panel informed the parties that it had decided the following:

> "[The Panel] intends to conduct both proceedings so as to ensure that the parties who are also third parties in each other's proceedings, have adequate opportunity and ability to participate to the fullest extent in a manner which is compatible with the provisions of the *DSU*. To this end, after having heard the parties' views, the Panel intends to take the following steps:
>
> > (i) holding consolidated substantive meetings with the parties (Thailand, India and US);
> >
> > (ii) allowing the complainants during the joint meetings to comment on each others' argumentation, provided they limit themselves to those claims they have in common;

(iii) holding separate Third-Party Sessions, starting with DS343 and asking the Members which are not third-parties to DS345 (i.e., Chile, Mexico, Korea and Viet Nam) to leave the meeting room once the Third-Party Session for DS343 is over. Note that since Thailand and India are third parties to each other's cases, and parties in their own, they would be in the room during the entirety of the joint meetings, including third party sessions;

(iv) *not* allowing submissions in one case to be deemed to be submitted in the other case. The parties could however attach to their third party submissions, their submissions made as parties in the case in which they are complaining party;

(v) issuing separate reports;

(vi) allowing all parties to respond to all questions posed by the Panel in writing."

2. Overview of the Panel's approach to consideration of India's claims

7.5 India has made two types of claims concerning the EBR: (i) It has challenged *as such* the laws, regulations and instruments of the United States that comprise the Amended CBD and authorize the imposition of the EBR, together with a US statutory provision (19 U.S.C. § 1623) and a US Customs regulation (19 C.F.R. § 113.13); and (ii) it has challenged the *application* of the Amended CBD, i.e. the imposition of the EBR, to subject shrimp from India.

7.6 India's *as such* claims concern: the consistency of the Amended CBD and the abovementioned US statutory and regulatory provisions with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*; their consistency with Article VI and the Ad Note; their consistency with Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement*; their consistency with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*; their consistency with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement*; their consistency with Articles I, II:1(a) and II:1(b), first and second sentences, of the *GATT 1994*; and, in the alternative, their consistency with Article XI of the *GATT 1994*.

7.7 As regards its *as applied* claims, India challenges the consistency of the EBR with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 7.5, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the *Anti-Dumping Agreement*, and Articles I:1, II:1(a) and (b), VI:2 , X:3(a) of the *GATT 1994*, and alternatively, Articles XI:1 and XIII of the *GATT 1994*.

7.8 India also claims that the United States has acted inconsistently with Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* by not notifying the Amended CBD to the Anti-Dumping and SCM Committees.

7.9 The Panel notes that India, in its Request for Establishment, additionally made claims under Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement, as such* and *as applied*; Articles 1 and 14 of the *SCM Agreement, as such*; Article 7.5 of the *Anti-Dumping Agreement, as such*; and Article 17.5 of the *SCM* Agreement, *as such*. However, India did not present arguments nor request Panel findings

on these claims in any of its submissions. The Panel will therefore not address these claims in its Report.[47]

3. Order of analysis

7.10 India has presented its *as such* and *as applied* claims sometimes together, and in other instances separately. The Panel, for the sake of clarity and consistency with the parallel proceedings in DS343 *US – Shrimp (Thailand)*[48], has decided first to address India's *as applied* claims followed by the consideration of its *as such* claims. Finally, we will consider India's claim under Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement.*

B. INDIA'S *AS APPLIED* CLAIMS

1. Scope of the measure concerned

7.11 India's *as applied* claims concern the application of the Amended CBD, i.e. the EBR, to imports of subject shrimp from India. Before entering into an analysis of each of the *as applied* claims raised by India, the Panel first must identify which are the legal instruments that comprise the Amended CBD.

7.12 We recall that the terms of reference that govern the present dispute are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS345/6, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements." [49]

7.13 In its Request for Establishment, India specified that the measure at issue consists of the following legal instruments:[50]

(a) the 1991 Customs Bond Directive;

(b) the July 2004 Amendment;[51]

(c) the document Current Bond Formulas;[52]

(d) the August 2005 Clarification;[53] and

(e) "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs."[54]

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[47] The Panel further notes that, in its first written submission, India requested the Panel to find that the application of the EBR violates Article 7.5 of the *Anti-Dumping Agreement*. However, India did not present any arguments for this claim. Accordingly, the Panel declines to make any findings for the claim.

[48] Section *VII.A.1* concerning the organization of the parallel proceedings.

[49] WT/DS345/7.

[50] India's first written submission, para. 17. We note that India has explained in its first oral statement that, although it had referred interchangeably to the Amended CBD and EBR in the context of its *as such* claims, its claim only addresses the Amended CBD "to the extent that it *authorize*s, imposes and describes the EBR". (See India's first oral statement, para. 14).

[51] Exhibit IND-3.

[52] Exhibit IND-4.

[53] Exhibit IND-5.

[54] India's first written submission, para. 17.

7.14 In its first written submission, India submitted to the Panel that the October 2006 Notice,[55] which was published on 24 October 2006 following the submission of India's Request for Establishment, should also be considered as one of the instruments comprising the Amended CBD.[56] The United States has not contested the inclusion of the October 2006 Notice within this Panel's terms of reference.

7.15 We recall that the Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their own motion if the parties to the dispute remain silent on those issues.[57] Whether a measure falls within our terms of reference is clearly an issue that goes to the root of our jurisdiction. Therefore, even though the United States does not contest the inclusion of the October 2006 Notice, we must determine whether this Notice is within our terms of reference.

7.16 Article 7 of the *DSU*, governing the Panel's terms of reference, Article 4 of the *DSU*, governing a complainant's request for consultations, and Article 6 of the *DSU*, governing a complainant's request for establishment of a panel are relevant to this issue. Article 7.1 of the *DSU* provides:

> "Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> > To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

7.17 Article 4.4 of the *DSU* provides:

> "All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and *shall give the reasons for the request, including identification of the measures at issue* and an indication of the legal basis for the complaint."(emphasis added)

7.18 Article 6.2 of the *DSU* provides:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."(emphasis added).

7.19 The Appellate Body affirmed in *US – Upland Cotton* that, "pursuant to Article 7 of the *DSU*, a panel's terms of reference are governed by the request for establishment of a panel".[58] As evident

[55] Exhibit IND-6.
[56] India's first written submission, para. 18.
[57] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; see also Appellate Body Report, *US – Carbon Steel*, para 123.
[58] See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing Appellate Body Report, *US – Carbon Steel*, para. 124.

from the text of Articles 4 and 6 of the *DSU*, the complainant must identify the measure at issue in both the request for consultations and request for panel establishment.

7.20 The Appellate Body considered in *Chile – Price Band System* whether an amendment to a measure that was enacted *after* the Panel had been established should nevertheless be considered as within the Panel's terms of reference.[59] In that case, the Appellate Body determined that the amendment at issue should be considered as part of the measure at issue since the amendment served the purpose of clarifying the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment.[60] This determination was considered consistent with earlier jurisprudence[61] and was also found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the *DSU*, to "secure a positive solution to a dispute". The Appellate Body explained:

> "If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[62]

7.21 In the case before us, we note that the October 2006 Notice further describes the process to determine enhanced continuous bond amounts for importations involving what the United States describes as elevated collection risks, and seeks public comment concerning that process. We also note that the United States describes the 2006 Notice as 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".[63] In addition, we note that neither India or the United States stated that the 2006 Notice should be excluded when asked directly whether the Panel should consider the 2006 Notice within its terms of reference.[64] Instead, both India and the United States agreed to the October 2006 Notice's inclusion and both referred to the Appellate Body's findings in *Chile – Price Band System* in this regard.[65]

7.22 We agree with and adopt as our own the Appellate Body's rationale as provided in *Chile – Price Band System*. In the dispute before us, the United States published the October 2006 Notice after this Panel had been established. Moreover, in our view, India's inclusion of the language "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs" in its Request for Establishment is broad enough to allow for the inclusion of the 2006 Notice. The October 2006 Notice seeks to clarify the legislation that established the measure at issue and does not change the essence of the original

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[59] Appellate Body Report, *Chile – Price Band System*, para. 137.

[60] Appellate Body Report, *Chile – Price Band System*, para. 137.

[61] The Appellate Body in *Chile – Price Band System* cited to a passage from the Panel's finding in *Argentina – Footwear (EC)* which concluded that modifications made to the measure at issue during the panel proceedings did:

> "… not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint."

(See Appellate Body Report, *Chile – Price Band System*, para. 138.)

[62] Appellate Body Report, *Chile – Price Band System*, para. 144.

[63] See Exhibit IND-6, p. 62,277.

[64] India's responses to First Set of Panel Questions, paras. 51 and 52, United States' responses to First Set of Panel Questions, para. 65.

[65] India's responses to First Set of Panel Questions, para. 51 and United States' responses to First Set of Panel Questions, para. 55.

measure into something different than what was in force before its issuance (in this regard, we recall that the October 2006 Notice includes in its text the statement that it is 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 [US Customs'] Web site, and the August 2005 Clarification"). In our view, the inclusion of October 2006 Notice allows the Panel to achieve a positive resolution to the dispute, and additionally, accords with the interests of both parties.

7.23 The Panel therefore finds that the October 2006 Notice is properly part of the measure at issue and within the Panel's terms of reference.

2. Articles 1 and 18.1 of the *Anti-Dumping Agreement*, and the Ad Note

7.24 India claims that the application of the EBR to subject shrimp is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and the Ad Note thereto. We shall begin by assessing India's claim under Article 18.1 of the *Anti-Dumping Agreement*.

7.25 For the most part, the issues arising in respect of India's Article 18.1 claim under these proceedings are the same as those that we considered in the context of the same claim made by Thailand in *US – Shrimp (Thailand)*. This is reflected in the fact that there is significant overlap in the arguments of India and Thailand regarding these issues.[66] Similarly, the arguments made by the United States in respect of this claim are virtually identical to the arguments that it made in respect of the same claim in *US – Shrimp (Thailand)*.[67] As a result, the findings that we make in respect of India's Article 18.1 claim closely resemble those that we made in respect of the same claim by Thailand in *US – Shrimp (Thailand)*.

7.26 India submits that the application of the EBR to subject shrimp from India is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Article 1 provides that:

> "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of *GATT 1994* and pursuant to investigations initiated (*footnote omitted*) and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

7.27 Article 18.1 provides that:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement."

7.28 India submits that the application of the EBR to subject shrimp from India constitutes specific action against dumping in a form other than a permitted response to dumping under the provisions of the *GATT 1994* as interpreted by the *Anti-Dumping Agreement*. The United States rejects India's claim.

7.29 We begin our evaluation of India's claim by considering whether or not the application of the EBR constitutes "specific action against dumping". Thereafter, we turn to the issue of whether or not

[66] E.g. at para. 79 of its second written submission, India refers to "the differences in interpretation of the Ad Note between India and Thailand, on the one hand, and the United States, on the other," thereby indicating that India and Thailand share the same interpretation of the Ad Note.

[67] This is further reflected in the fact that the oral statement made by the United States at each of our substantive meetings with the parties addressed the claims of India and Thailand jointly.

the EBR is applied "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

(a) Does the application of the EBR constitute "specific action against dumping"?

(i) Main arguments of India

7.30 India asserts that the application of the EBR constitutes "specific action against dumping" because it is (i) "specific action" in response to dumping that (ii) also acts "against" dumping.

"Specific action" in response to dumping

7.31 India submits that the Appellate Body has defined "specific action" against dumping or subsidization as "action that is taken in response to situations presenting the constituent elements"[68] of dumping or subsidization and has explained further that the measure must "… be inextricably linked to or have a strong correlation with the constituent elements of dumping or of a subsidy. Such a link … may be derived from the text of the measure itself."[69] India asserts that it is indisputable that the EBR is "specific" to dumping or subsidization because the Amended CBD expressly states that it applies only to importers of designated merchandise that is subject to anti-dumping or countervailing duties, i.e., when all the conditions for imposition of anti-dumping or countervailing duties have been fulfilled. India asserts that, accordingly, and as the United States argued before the Appellate Body in *US – Offset Act (Byrd Amendment)*, to the extent that the EBR "… imposes … liability on importers/producers/exporters when dumping or subsidization is found …", it is clearly "specific action" with respect to dumping and subsidization.[70] India states, in addition, that one important element of the formula for calculating the bond liability amount is the amount of anti-dumping or countervailing duties owed based on the dumping margin or the individual net subsidy rate. India submits that there is therefore clearly an inextricable link between the EBR and the constituent elements of dumping or of a subsidy. India also notes that one of the stated purposes of the EBR is to ensure that anti-dumping and countervailing duties are collected for payment to domestic industry under the Continued Dumping and Subsidy Offset Act (hereafter the "CDSOA"), which the Appellate Body has found to be a "specific action" against dumping or subsidization. According to India, regulations or administrative procedures by US Customs to implement the CDSOA also constitute specific action against dumping.

Specific action "against" dumping

7.32 India asserts that, to be "against" dumping, the measure must have "…an adverse bearing on, or more specifically, [have] the effect of dissuading the practice of dumping …."[71] India asserts that the application of the EBR has a serious, adverse impact on importers and, therefore, on dumping. India asserts that the demand of 100 per cent collateral by sureties acceptable to US Customs for the issuance of enhanced bonds, together with high bond premiums and other charges associated with providing the collateral, impose a heavy burden on importers. India further asserts that the bonds initially posted by importers inevitably get exhausted or saturated well before the first administrative review and liquidation of entries are completed, with the result that importers are forced to post additional, enhanced bonds. India states that sureties again subject importers to additional demands for collateral and high bond premiums, which result in further charges and further depletion of their capital and credit. Relying on findings of the USCIT, India asserts that importers are forced to incur serious losses in profits and business opportunities. India argues that this in turn has a serious

[68] Appellate Body Report, *US – 1916 Act*.
[69] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 239.
[70] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 16-17.
[71] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

deterrent effect on exporters of the merchandise subject to the EBR as is evident from the sharp drop between 2005 and 2006 in the quantity and value of shrimp exported from India as well as in the total number of exporters from India.

(ii) Main arguments of the United States

7.33 The United States denies that the application of the EBR is either "specific action" in response to dumping, or specific action "against" dumping.

"Specific action" in response to dumping

7.34 Regarding India's argument that the EBR is specific to dumping because it may be and has been applied only to importers of goods subject to a US anti-dumping order and the formula it contains uses the anti-dumping rate as one variable in determining the amount of additional security that may be prescribed, the United States asserts that these features merely reflect the fact that the directive is, like various measures referred to by the Appellate Body in *US – Offset Act (Byrd Amendment)*, "related to" dumping or subsidies insofar as the unsecured liability it is designed to secure is anti-dumping and countervailing duty liability. The United States asserts that, according to the Appellate Body, "an action that is not 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[72] The United States asserts that the directive is applied in response to noncollection risk – the mere fact that the particular noncollection risk at issue relates to anti-dumping duties is not a sufficient basis to conclude that the directive itself is "taken in response to the constituent elements of dumping or a subsidy." The United States submits that "the constituent elements of 'dumping'" are not "built into the essential elements" of the additional bond directive,[73] since US Customs does not determine anti-dumping or countervailing duty margins, and the directive does not purport to establish margins of dumping or subsidization. The United States also asserts that the additional bond directive does not apply to all entries subject to anti-dumping or countervailing duties – rather it only applies to those for which a specific noncollection risk has been identified. The United States submits that the sole reason the directive is designed to secure anti-dumping liability is because the vast majority of unsecured liability that has resulted in noncollection happens to be anti-dumping duty liability.

7.35 According to the United States, the fact that the additional bond directive is based on noncollection risk, rather than the constituent elements of dumping or subsidization, is evident in the text of the directive itself and associated materials. The United States asserts that none of the information US Customs uses to determine that merchandise should be identified as "special category" merchandise subject to the amended directive – previous collection problems, payment history, indications that the liquidated duty rates may exceed existing security – has any relation to the constituent elements of dumping or subsidization.[74] Likewise, none of the information US Customs requests for purposes of establishing individual bond amounts – prior history of paying import duties, the value of the merchandise to be secured, the degree of supervision US Customs exercises over the transaction, the prior record of the importer in honouring bond commitments, and evidence of the importer's ability to pay duties assessed – has any bearing on the constituent elements of dumping or subsidization.[75] The United States submits that all of these factors are, however, relevant to establishing noncollection risk.

[72] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262.
[73] Appellate Body Report, *US – 1916 Act*, para. 130.
[74] Exhibit IND-6 at 62,277.
[75] Exhibit IND-6 at 62,277.

7.36 The United States acknowledges that the formulas for determining bond amounts incorporate the anti-dumping rate, but only because from the standpoint of US Customs it is the best and only available baseline proxy of duties that ultimately may be assessed. According to the United States, the inclusion of the anti-dumping rate in the formulas thus does not support the conclusion that the directive itself relies on the constituent elements of dumping or subsidization.

Specific action "against" dumping

7.37 The United States asserts that the sole evidence that India cites in support of its argument that the directive operates "against" dumping is either inaccurate or irrelevant.

7.38 First, the United States asserts that the record does not support India's assertion that the directive reduced shipments from countries subject to it.[76] The United States refers to the USGAO Report, which indicates that the effects of the bond directive "cannot readily be isolated from other changes occurring at the same time, such as the imposition of AD duties."[77]

7.39 Second, with regard to India's argument concerning surety fees, the United States asserts that US Customs neither sets surety fees, nor requires importers to post collateral in support of bonds. The United States argues that US Customs is a third party beneficiary to bond contracts, which are private contracts negotiated between the surety and the importer. The United States further asserts that US Customs neither requested nor encouraged sureties to require collateral with respect to the bonds at issue.

7.40 Furthermore, the United States asserts that the Appellate Body noted in *US – Offset Act (Byrd Amendment)* that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."[78] According to the United States, the *GATT 1994* and the *Anti-Dumping Agreement* do not prohibit the United States from obtaining payment for the anti-dumping duties in question, and the bond requirement facilitates its ability to do so.

(iii) Evaluation by the Panel

7.41 In considering the text of Article 18.1 of the *Anti-Dumping Agreement*, we note that the relevant language was considered in detail by the Appellate Body in *US – Offset Act (Byrd Amendment)*. In that case, the Appellate Body found:

> "Looking to the ordinary meaning of the words used in these provisions, we read them as establishing two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be "specific" to dumping or subsidisation. The second is that a measure must be "against" dumping or subsidisation. These two conditions operate together and complement each other. If they are not met, the measure will not be governed by Article 18.1 of the *Anti-Dumping Agreement* or by Article 32.1 of the *SCM Agreement*. If, however, it is established that a measure meets these two conditions, and thus falls within the scope of the prohibitions in those provisions, it would then be necessary to move to a further step in the analysis and to determine whether the measure has been "taken in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement* or the *SCM Agreement*. If it is determined that this is not the

[76] India's first written submission, para. 62.
[77] USGAO Report, p. 24, Exhibit IND-26.
[78] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

> case, the measure would be inconsistent with Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."[79]

7.42 We agree with this analysis by the Appellate Body, and adopt it as our own. Accordingly, in order to establish whether the application of the EBR constitutes "specific action against dumping", we shall first examine whether or not the application of the EBR is "*specific*" to dumping. If so, we shall then consider whether or not the application of the EBR acts "*against*" dumping.

Whether or not the application of the EBR is "specific" to dumping

7.43 The degree of specificity needed for action to fall within the scope of Article 18.1 was addressed by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*. In its report in *US – 1916 Act*, the Appellate Body found that:

> "[T]he ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present."[80]

7.44 In *US – Offset Act (Byrd Amendment)*, the Appellate Body explained further that:

> "The criterion we set out in *US – 1916 Act* for specific action in response to dumping is not whether the constituent elements of dumping or of a subsidy are explicitly referred to in the measure at issue, nor whether dumping or subsidization triggers the application of the action, nor whether the constituent elements of dumping or of a subsidy form part of the essential components of the measure at issue. Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy. In noting that the "wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of 'dumping'", we did not *require* that the language of the measure include the constituent elements of dumping or of a subsidy. This is clear from our use of the word "also", which suggests that this aspect of the 1916 Act was a supplementary reason for our finding, and not the basis for it. Indeed, we required that the constituent elements of dumping (or of a subsidy) be "present", which in our view can include cases where the constituent elements of dumping and of a subsidy are implicit in the measure."[81]

7.45 We agree with the Appellate Body's interpretation of the phrase "specific action", and adopt it as our own. Accordingly, we shall determine whether or not the application of the EBR is "specific" to dumping by examining whether or not the application of the EBR is inextricably linked to, or has a strong correlation with, the constituent elements of dumping.

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[79] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 236.

[80] Appellate Body Report, *US – 1916 Act*, para. 122 (footnote omitted, original emphasis). Although the Appellate Body's finding refers to the phrase "specific action against dumping" in its entirety, the Appellate Body confirmed in *US – Offset Act (Byrd Amendment)* (para. 245) that its finding concerned the phrase "specific action", rather than the word "against".

[81] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 244 (footnote omitted).

7.46 In our view, the constituent elements of dumping are implicit in the express conditions for the application of the EBR, since the EBR may be applied only to goods subject to a US anti-dumping (or countervailing) duty order.[82] If there were no finding that the constituent elements of dumping were present, there would be no anti-dumping order against subject shrimp, and therefore no basis for applying the EBR in respect of subject shrimp imports. For this reason, the existence of the constituent elements of dumping is a legal pre-requisite for the application of the EBR. This is further confirmed by the fact that the formula in the Amended CBD for calculating the EBR includes direct reference to the anti-dumping duty rate, and therefore the constituent elements of dumping. If the constituent elements of dumping were not present, the US would not have found cause to determine an anti-dumping rate, and the formula would not apply.

7.47 We note the US argument that although the application of the EBR may be related to dumping, the application of the EBR is not "specific" to dumping because it is based on non-collection risk rather than the constituent elements of dumping, in the sense that the EBR does not "apply to all entries subject to anti-dumping or countervailing duties – but only to those for which a specific non-collection risk has been identified". We recall, though, that the Appellate Body has already determined[83] that a measure need not be *triggered* by the constituent elements of dumping in order for that measure to constitute "specific action" in respect of dumping. Nor does the existence of "additional requirements" transform a "specific action against dumping" into something else.[84] Even though the application of the EBR might ultimately be triggered by a risk of non-collection, the fact remains that the EBR is only applied in respect of imports subject to anti-dumping (or countervailing duty) orders. There remains, therefore, a significant degree of correlation between the application of the EBR and the constituent elements of dumping. In our view, such a degree of correlation demonstrates that the application of the EBR is "specific", rather than merely related, to dumping.

Whether or not the application of the EBR acts "against" dumping

7.48 In our view, a measure will only act "against" dumping if it has some form of adverse bearing on dumping. This is consistent with the approach of the Appellate Body in *US – Offset Act (Byrd Amendment)*, where it found that:

> "[T]o determine whether a measure is 'against' dumping or a subsidy, [] it is necessary to assess whether the design and structure of a measure is such that the measure is 'opposed to', has an adverse bearing on, or, more specifically, has the effect of

[82] The United States has not disputed the factual accuracy of India's argument (see India's first written submission, para. 60) that the July 2004 Amendment limits the application of the EBR to merchandise upon which USDOC has issued an anti-dumping order, setting out that "[a]ny increase in bond liability will become effective when the Department of Commerce (DOC) issues its Order on the case", and that the August 2005 Clarification characterises the July 2004 Amendment as containing "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*".

[83] *US – Offset Act* (Byrd Amendment) (para. 243), the Appellate Body found that the relevant measure constituted "specific action against dumping" notwithstanding the US argument that the relevant measure was not triggered by the constituent elements of dumping, but rather by an applicant's qualification as an "affected domestic producer" which has incurred qualifying expenditures. We further recall that *in US – 1916 Act*, the Appellate Body held that "an additional requirement" for the taking of action (in that case, a finding of intent) did "not transform the 1916 Act into a statute which does not provide for 'specific action against dumping'" (Appellate Body Report, *US – 1916 Act*, para. 132).

[84] In *US – 1916 Act*, the Appellate Body held that "an additional requirement" for the taking of action (in that case, a finding of intent) did "not transform the 1916 Act into a statute which does not provide for 'specific action against dumping'" (Appellate Body Report, *US – 1916 Act*, para. 132).

> dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices."[85]

7.49 In light of the ordinary meaning of the term "against", we consider it appropriate to adopt a similar approach in determining whether or not the application of the EBR acts "against" dumping. In doing so, we note that the Appellate Body concluded that the measure at issue in *US – Offset Act (Byrd Amendment)* had an adverse bearing on the foreign producers/exporters because it "created an incentive" for those foreign producers/exporters "not to engage in the practice of exporting dumped or subsidized products or to terminate such practices".[86] In our view, a similar incentive arises as a result of the application of the EBR on imports of subject shrimp. Ordinarily, the application of the EBR results in additional costs[87] that, although initially borne by importers, ultimately impact on foreign producers/exporters of the subject merchandise, just as anti-dumping duties do.[88] As a result of the formulas used to calculate the amount of the EBR, the amount of the EBR, like the amount of anti-dumping duty, is directly linked to a given foreign producer's/exporter's margin of dumping. The higher the margin of dumping, the higher the amount of the EBR, and the higher the cost of the EBR.[89] In order to maintain its level of sales and/or profitability, despite the increased costs for importers as a result of the application of the EBR, foreign producers/exporters have an incentive to reduce, or even eliminate, their margin of dumping (just as they have an incentive to reduce their margin of dumping in order to reduce the amount of anti-dumping duties levied on their goods).[90] Furthermore, shrimp importers have an incentive to avoid the costs associated with the application of the EBR by importing shrimp from foreign producers/exporters whose produce has not been found to have been dumped, and is therefore not subject to the shrimp anti-dumping order. As a result of such incentives, which affect the relevant entities in much the same way as anti-dumping duties do, we find that the application of the EBR constitutes specific action "against" dumping.

7.50 The United States argues that, rather than being specific action "against" dumping, the application of the EBR merely facilitates the collection of anti-dumping duties. In assessing this argument, we note that in *US – Offset Act (Byrd Amendment)* the Appellate Body disagreed with the panel's finding that the CDSOA is a measure against dumping because the CDSOA provides a

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[85] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

[86] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 256.

[87] The financial costs of obtaining enhanced bonds include the fees and collateral requirements imposed by surety companies for providing such bonds. Although the United States does not itself determine the terms and conditions under which surety companies provide bonds, the United States must have been aware that importers would necessarily incur costs in procuring the bonds that it required them to provide.

[88] Although the parties have made arguments regarding the actual impact of the EBR on the volume and market share of imports from India, we do not consider these to be relevant to the issue before us. In our view, Article 18.1 of the *Anti-Dumping Agreement* is concerned with the effect of actions on the practice of dumping, rather than trade flows in the relevant imports. We note that the Appellate Body has confirmed that "the test should focus on dumping [or subsidization] as practices" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 253), and that the appropriate "analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 257).

[89] In this regard, the adverse bearing of the application of the EBR is similar to that of the measure at issue in *US – Offset Act (Byrd Amendment)* (where the adverse bearing resulted from the collected anti-dumping duties being transferred to domestic producers), in the sense that the adverse bearing is directly linked to the margin of dumping of the foreign producer/exporter. Indeed, the adverse bearing of the EBR is similar to that of an anti-dumping duty, in the sense that both result in increased costs that the relevant entities have an incentive to avoid or mitigate.

[90] In reply to Question 2 from the First Set of Panel Questions, para. 5, the United States asserted that "[i]f the cash deposit rate in the most recently completed administrative review is determined to be zero, any new continuous bond obtained after completion of the administrative review would reflect an enhanced bond amount of $0."

financial incentive for domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, and that such an incentive would likely result in a greater number of applications, investigations and orders. In particular, we note that the Appellate Body found that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."[91] Upon careful reflection, we do not consider that the Appellate Body's reasoning should preclude our finding that the application of the EBR constitutes specific action "against" dumping. Instead, the Appellate Body's reasoning means that we would be precluded from concluding that the application of the EBR constitutes specific action "against" dumping *simply* because it may also facilitate the collection of WTO-consistent anti-dumping duties. However, this does not preclude us from concluding, as the Appellate Body and panel did in *US – Offset Act (Byrd Amendment)*, that the application of the measure at issue constitutes specific action "against" dumping on the basis of other considerations, notwithstanding the fact that the application of that measure might also facilitate the collection of WTO-consistent anti-dumping duties.

7.51 Our finding that the application of the EBR constitutes "specific action against dumping" is supported by the United States' view that provisional measures taken in the form of bonds constitute "specific action against dumping".[92] If a bond applied as a *provisional* measure should be treated as a "specific action against dumping", it would appear reasonable to conclude that a bond applied as a *definitive* measure should be similarly categorized: in both cases, the adverse bearing of the bond on foreign producers/exporters and importers (and the correlation with the constituent elements of dumping) is the same. The United States asserts, though, that 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. The United States submits that the application of the EBR "facilitates the exercise of WTO-consistent rights"[93] – *i.e.*, the collection of duties owed following the imposition of an order. The United States asserts that, by contrast, certain bonds required before an anti-dumping 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. We are not persuaded by the US argument, however, since we have already concluded that the fact that the application of the EBR may facilitate the exercise of WTO-consistent rights is not determinative of whether or not the application of the EBR constitutes "specific action against dumping" (in the sense that this fact does not preclude a finding that a measure constitutes "specific action against dumping" on the basis of other considerations).

Conclusion

7.52 In light of the above, we conclude that the application of the EBR constitutes "specific action against dumping" in the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

7.53 Accordingly, we must now consider the remaining elements of Article 18.1, regarding the question of whether or not the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*.

[91] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

[92] See United States' responses to Second Set of Panel Questions, para. 4, in which the United States asserts that "a bond requirement prior to imposition of an order may be considered an action 'against' dumping".

[93] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

(b) Was the EBR applied "in accordance with" the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*?

7.54 The United States submits that the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*, because the application of the EBR is authorized by the Ad Note. India rejects the US reliance on the Ad Note.

(i) Main arguments of India

7.55 India notes that the Appellate Body found in *US – 1916 Act* that:

> "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."[94]

7.56 India further notes that similarly, in *US – Offset Act (Byrd Amendment)*, the Appellate Body found that:

> "The *GATT 1994* and the *[SCM] Agreement* provide four responses to a countervailable subsidy: (i) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally sanctioned countermeasures under the dispute settlement system. No other response to subsidization is envisaged in the text of the *GATT 1994*, or in the text of the *[SCM] Agreement*. Therefore, to be 'in accordance with the *GATT 1994*, as interpreted by' the *[SCM] Agreement*, a response to subsidization must be in one of those four forms."[95]

7.57 India asserts that the application of the EBR does not involve the collection of a definitive (anti-dumping or countervailing) duty or a price undertaking by exporters. India asserts that it is also not a provisional measure to the extent that it is applied (a) in addition to, and on top of, the provisional measures contemplated by Article 7 of the *Anti-Dumping Agreement* such as cash deposits or bonds in an amount not greater than the provisionally estimated margin of dumping, and (b) even after these provisional measures have run their course and the decision to impose definitive duties has been taken under Article 9.1 of the *Anti-Dumping Agreement*, as the case may be. India further submits that the application of the EBR is inconsistent with the requirements of Articles 7 and 9 of the *Anti-Dumping Agreement*.

7.58 India asserts that in *US – 1916 Act*, the Appellate Body found that "[t]he *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." India submits that, accordingly, "Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement* …"[96] India states that, as an interpretative note to paragraphs 2 and 3 of Article VI of the *GATT 1994*, it is clear that the Ad Note is part and parcel of Article VI and cannot be separated from it. For this reason, India submits that the Ad Note therefore cannot support any response to dumping or subsidization other than those recognized by the Appellate Body in *US – Offset Act (Byrd Amendment)*.

7.59 India also asserts that the Ad Note limits the permissible measures to a single security in the form of a "cash deposit or bond", rather than a combination of both cash deposits and bonds.

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[94] Appellate Body Report, *US – 1916 Act*, para 137. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 265.

[95] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 269.

[96] Appellate Body Report, *US – 1916 Act*, para. 114.

(ii) Main arguments of the United States

7.60 The United States submits that India offers an interpretation of the Ad Note in relation to the *Anti-Dumping Agreement* that is inconsistent with the terms of the *Anti-Dumping Agreement* and fails to give the Ad Note any meaning or legal effect, contrary to the relationship between the *GATT 1994* and other WTO Agreements contemplated by the *WTO Agreement*. The United States asserts that the *GATT 1994*, including the Ad Note, is an "integral part" of the *WTO Agreement*.[97] The United States argues that past panels and the Appellate Body have noted that Article VI is "part of the same treaty" as the *Anti-Dumping Agreement*, and "should not be interpreted in a way that would deprive it or the *Anti-Dumping Agreement* of meaning."[98] The United States argues that panels "should give meaning and legal effect to all the relevant provisions," including the Ad Note. According to the United States, the Ad Note permits Members to require "reasonable security (cash deposit or bond)" for the payment of anti-dumping and countervailing duties. For the United States, no other provision of the *Anti-Dumping Agreement* or the *GATT 1994* specifically addresses security for the payment of duties after the final determination in an investigation, including the collection of cash deposits, and, moreover, no provision prohibits a Member from requiring this security.

7.61 The United States submits that, instead of "reading Article VI in conjunction with the *Anti-Dumping Agreement*," as the Appellate Body in *US – 1916 Act* suggested, India, through a misreading of Articles 7 and 9 of the *Anti-Dumping Agreement*, attempts to read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning. The United States asserts that, if accepted, India's various theories would mean that security pending final assessment of anti-dumping and countervailing duties is nowhere permitted by the *Anti-Dumping Agreement*, *SCM Agreement*, or the *GATT*. The United States asserts that, if India's arguments were accepted, Members would not be permitted to maintain security requirements pending final determination of liability. The United States argues that to preclude a Member with a retrospective system from requiring the posting of security prior to the determination of final liability would create a disparity between retrospective and prospective systems. The United States argues that such a conclusion would compromise Members' ability to maintain retrospective duty assessment systems, despite the fact that these systems are specifically contemplated by the text of the Agreement.

(iii) Evaluation by the Panel

7.62 At this juncture, we are examining the issue of whether or not the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*. The parties agree that the relevant provision of the *GATT 1994* in this regard is Article VI, and specifically the Ad Note thereto.[99] This is also consistent with the view expressed by the Appellate Body in *US – 1916 Act*. [100] The Ad Note provides that:

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[97] Article II:2 of the *WTO Agreement*.

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

[99] We note that the *GATT 1994* consists *inter alia* of the *GATT 1947*. Article XXXIV of the *GATT 1947* provides that the annexes to the *GATT 1947* are "an integral part" thereof. The Ad Note, which is contained in Annex I to the *GATT 1947*, is therefore "an integral part" of the *GATT 1947*. As such, the Ad Note is necessarily part of the *GATT 1994*. We conclude from the fact that the Ad Note is included under the heading "Ad Article VI" that the Ad Note is part of Article VI of the *GATT 1994*. Both parties agree with this approach (See e.g. para. 44 of India's second oral statement, and para. 14 of the United States' second written submission).

[100] In particular, the Appellate Body clarified "Since the only provisions of the *GATT 1994* "interpreted" by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any "specific action against dumping" of exports from another Member be in accordance with the relevant provisions of Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*". Appellate Body Report on *US – 1916 Act*, para. 124. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.214-218 and 6.264; and Panel Report on *US – 1916 Act (EC)*, paras. 6.197-6.199.

> "As in many other cases in customs administration, 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."

7.63 We first consider the relationship between the Ad Note and the *Anti-Dumping Agreement*, and the question of whether or not the Ad Note may authorize the imposition of security requirements that are not expressly envisaged by the *Anti-Dumping Agreement*. If we find that the Ad Note may authorize such security requirements, we consider the temporal scope of the security requirements that Members may impose pursuant to the Ad Note. Thereafter, we consider the question of whether or not Members may require security combining both cash deposits and bonds. Finally, we examine whether the application of the EBR constitutes "reasonable" security.

The relationship between the Ad Note and the *Anti-Dumping Agreement*

7.64 India submits that the relationship between the *WTO Agreement* and the *Anti-Dumping Agreement* and the *SCM Agreement* has been explored by the Appellate Body in previous disputes. According to India, it is in light of this relationship that the Appellate Body interpreted Article VI of the *GATT 1994*, as interpreted by the provisions of these Agreements, to permit only the specific responses to dumping and subsidization contemplated by these Agreements.

7.65 India asserts that, in *Brazil – Desiccated Coconut*, the Appellate Body found that "… the authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system". India states that the Appellate Body based its reasoning on (a) the preamble to the *WTO Agreement*, (b) the provisions of Article II:2 of the *WTO Agreement* providing that the Multilateral Trade Agreements form an "integral part" of the *WTO Agreement*, (c) the single undertaking reflected in the provisions of the *WTO Agreement*, and (d) the "integrated dispute settlement system" established under the *DSU* "… allowing all relevant provisions of the *WTO Agreement* to be examined in one proceeding".[101]

7.66 India asserts that it is based on this reasoning that, unlike the position while the Tokyo Round Subsidies Code was in force, the Appellate Body found that, after the *WTO Agreement* entered into force, Article VI of the *GATT 1994* could not be applied independently of the *SCM Agreement*.[102] India notes that the Appellate Body agreed with the Panel further that:

> "[T]he question for consideration is not whether the *SCM Agreement* supersedes Article VI of *GATT 1994*. Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction."[103]

7.67 India notes that the Appellate Body went on to find that, after the *WTO Agreement* entered into force, both Article VI and the *SCM Agreement* must be read together.

7.68 According to India, therefore, it is clear that, even if the provisions of Article VI of the *GATT 1994*, the *Anti-Dumping Agreement* and the *SCM Agreement* must all be read together as a single legal instrument, the provisions of these Agreements themselves may set out rules that govern the relationship between the *GATT 1994* and the Agreements. Such provisions also must be given

[101] Appellate Body Report, *Brazil – Dessicated Coconut*, p. 18.
[102] Appellate Body Report, *Brazil – Dessicated Coconut*, p. 17.
[103] Appellate Body Report, *Brazil – Dessicated Coconut*, p. 14.

meaning. India asserts that, in fact, the Appellate Body took this into account in *US – Antidumping Act of 1916* when it found that:

> "Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI …' Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9."[104]

7.69 India submits that the Appellate Body also found that Article 1 of the *Anti-Dumping Agreement* provides that "'an anti-dumping measure' must be consistent with Article VI of the *GATT 1994* and the provisions of the *Anti-Dumping Agreement*"[105] and that "… the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*".[106] India further asserts that it is worth noting that, after the Appellate Body concluded that the Antidumping Act of 1916 was inconsistent with Article VI:2 and the *Anti-Dumping Agreement*, it agreed with the conclusion of the Panel that "the 1916 Act violates Article VI:2 of the *GATT 1994*" only after recording "… the caveat that Article VI:2 must be read together with the relevant provisions of the *Anti-Dumping Agreement*".[107]

7.70 According to India, therefore, the Appellate Body's conclusion that "Article VI, and in particular, Article VI:2 read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings"[108] was based on an exhaustive analysis and interpretation of the provisions of the *Anti-Dumping Agreement* that govern the relationship between Article VI and the *Anti-Dumping Agreement*. India asserts that, because the application of the EBR is neither a provisional measure, a price undertaking, or a definitive anti-dumping duty, the application of the EBR is not envisaged by the Ad Note, and therefore cannot be authorized by the Ad Note.

7.71 We note that the Appellate Body found in *Brazil – Desiccated Coconut* that "Article VI of the *GATT 1994*" cannot "be applied independently of the *SCM Agreement* in the context of the WTO" as "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system".[109] At first glance, this finding might seem to support India's view regarding the non-applicability of the Ad Note, which is an integral part of Article VI of the *GATT 1994*. However, we also note that the Appellate Body findings relied on by India were prefaced by the following observations:

> "The relationship between the *GATT 1994* and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the *GATT 1947* were incorporated into, and became a part of the *GATT 1994*, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the *GATT 1994* alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in

[104] Appellate Body Report, *US – 1916 Act*, para. 114.
[105] Appellate Body Report, *US – 1916 Act*, para. 119.
[106] Appellate Body Report, *US – 1916 Act*, para. 121.
[107] Appellate Body Report, *US – 1916 Act*, para. 138.
[108] Appellate Body Report, *US – 1916 Act*, para. 137.
[109] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

> many ways, represent a substantial elaboration of the provisions of the *GATT 1994*, and to the extent that the provisions of the other goods agreements conflict with the provisions of the *GATT 1994*, the provisions of the other goods agreements prevail. *This does not mean, however, that the other goods agreements in Annex 1A, such as the SCM Agreement, supersede the GATT 1994.* As the Panel has said:
>
> > *... the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994.* Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction."[110] (emphasis supplied, footnote omitted)

7.72 Thus, despite the complexity of the issue under consideration, the Appellate Body was abundantly clear in stating that Article VI of the *GATT 1994* was not superseded by the *SCM Agreement*. The findings of the panel, which were upheld by the Appellate Body without modification, similarly excluded the possibility that the *SCM Agreement* might be superseded by Article VI of the *GATT 1994*. Thus, neither the panel nor Appellate Body findings in *Brazil – Desiccated Coconut* provide any basis for concluding that Article VI of the *GATT 1994* is superseded by the *SCM Agreement*.[111] We emphasise this point because, in our view, India's specific argument regarding the relationship between the Ad Note and the *Anti-Dumping Agreement* suggests that the latter supersedes the former.

7.73 Thus, although the Panel and Appellate Body in *Brazil – Desiccated Coconut* found that Article VI could not be applied "without reference" to, or independently of, the *SCM Agreement*, this finding cannot mean that the Ad Note may not authorize action that is not envisaged by the *SCM* or *Anti-Dumping Agreement*.[112] In our view, the findings in *Brazil – Desiccated Coconut* that Article VI may not be applied independent of, or without reference to, the *Anti-Dumping Agreement* simply mean (consistent with the conflict mechanism set forth in the general interpretative note to Annex 1A) that Article VI may not be interpreted to justify action that is prohibited by the *Anti-Dumping Agreement*. It is in this sense that Article VI must be applied with reference to the *Anti-Dumping Agreement*. If the Ad Note authorizes conduct, and reference to the *Anti-Dumping Agreement* confirms that such conduct is not prohibited by the *Anti-Dumping Agreement*, we see no basis in the *Anti-Dumping Agreement*, the *GATT 1994*, or the abovementioned findings of the panel and Appellate Body, to prohibit such conduct.[113] Any other approach would deprive the Ad Note of meaning and

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[110] Appellate Body Panel, *Brazil – Desiccated Coconut*, p. 14.

[111] Although the findings of the panel and Appellate Body in *Brazil – Desiccated Coconut* were concerned with the relationship between Article VI of the *GATT 1994* and the *SCM Agreement*, we see no reason why (and the parties have not argued that) those findings should not guide us in assessing the relationship between Article VI and the *Anti-Dumping Agreement*, especially since the Appellate Body's findings concerned the broader "relationship between the *GATT 1994* and the other goods agreement in Annex 1A" to the *WTO Agreement*.

[112] Such result would conflict with the Appellate Body's conclusion that the *SCM Agreement* does not supersede Article VI of the *GATT 1994*.

[113] We note India's argument that Article 18.1 refers to "the provisions of *GATT 1994, as interpreted by this Agreement*" (emphasis added). According to India, this means that the relevant provisions of the *GATT 1994* are those that have been implemented through the *Anti-Dumping Agreement*. India notes that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*. We note that this was not the approach adopted by the Appellate Body in *US – Offset Act (Byrd Amemndment).* In that case, the Appellate Body did not consider whether any of the relevant provisions of Article VI of the *GATT 1994* had been expressly implemented through the *Anti-Dumping Agreement*. Instead, the Appellate Body simply interpreted

legal effect, and would effectively mean that it has been superseded by the *Anti-Dumping Agreement*.[114]

7.74 In our view, such an approach to the relationship between the Ad Note and the *Anti-Dumping Agreement* is entirely consistent with the interpretation set forth by the Appellate Body in *Brazil – Desiccated Coconut*. It also respects the Appellate Body's concern that the WTO system should not reintroduce "the fragmentation that had characterized the previous system".[115] The fragmentation with which the Appellate Body was concerned in *Brazil – Desiccated Coconut* resulted from the fact that, under the GATT regime, Contracting Parties could take anti-dumping action under Article VI even if they had not signed – and were therefore not bound by – the Tokyo Round Anti-Dumping Code. Non-signatories of the Code could therefore act (under Article VI) "independently" of, or "without reference" to the Code. Such fragmentation, which is precluded under the "single undertaking" in the WTO regime, would not be re-introduced by our interpretation of the relationship between Article VI and the *Anti-Dumping Agreement*, since our interpretation is premised on the notion that Article VI may not be applied "independently" of, or "without reference" to, the *Anti-Dumping Agreement*.

7.75 India claims that the application of the EBR is inconsistent with Articles 7 and 9 of the *Anti-Dumping Agreement*. This claim is concerned with the application of the EBR *after* the imposition of the anti-dumping order. Accordingly, the application of the EBR is not a provisional measure and therefore falls outside the scope of Article 7 of the *Anti-Dumping Agreement*. We reject India's Article 9 claim for the reasons set forth at paragraphs 7.96 - 7.107. India has not identified any other provision of the *Anti-Dumping Agreement* that would prohibit the security requirements resulting from the application of the EBR. Nor are we able to identify any. As a matter of law, therefore, such security requirements would be authorized by the Ad Note, provided they are in conformity with the substantive provisions thereof. This is the issue we will turn to shortly.

7.76 Before concluding on the relationship between the Ad Note and the *Anti-Dumping Agreement*, though, we must consider India's specific argument that the Appellate Body has found that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping*

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the phrase "the provisions of *GATT 1994*, as interpreted by this Agreement" as a reference to Article VI of the *GATT 1994*. (see *US – Offset Act (Byrd Amemndment) (AB)* paras. 264 and 265). We therefore conclude that the phrase "as interpreted by [the Anti-Dumping] Agreement" is simply designed to clarify that the relevant provision of the *GATT 1994* is Article VI, since that is the provision interpreted by the *Anti-Dumping Agreement*. Furthermore, we note that India's argument would result in the Ad note being rendered inutile, simply because it has not been expressly implemented through the *Anti-Dumping Agreement*. In light of our findings regarding the relationship between the Ad Note and the *Anti-Dumping Agreement*, and particularly bearing in mind the Appellate Body jurisprudence to the effect that the provisions of Article VI, including the Ad Note, are not superseded by the *Anti-Dumping Agreement*, we are unable to accept the interpretation proposed by India. We also note that Article 1 of the *Anti-Dumping Agreement* provides in relevant part that the provisions of the *Anti-Dumping Agreement* "govern the application of Article VI of *GATT 1994*". Consistent with our reasoning above, we consider that the *Anti-Dumping Agreement* can only govern the application of Article VI to the extent that it expressly addresses issues covered by Article VI. In our view, the *Anti-Dumping Agreement* cannot govern the application of Article VI in respect of security for definitive anti-dumping duties if the *Anti-Dumping Agreement* contains no provisions expressly dealing with such security.

[114] Any other approach would also render other parts of Article VI, such as paragraph 6(b) thereof, inutile. As noted by the panel in *Brazil – Desiccated Coconut* (note 60), the *Anti-Dumping Agreement* "does not replicate or elaborate on Article VI:5 of the *GATT 1994*, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of *GATT 1994*. If the [Anti-Dumping] Agreement were considered to supersede Article VI of the *GATT 1994* altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended."

[115] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings".[116] While we acknowledge that such statements were made by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*, we note that the Appellate Body was not considering the WTO-consistency of security imposed pursuant to the Ad Note in those cases. By contrast, we have conducted a careful examination of the relationship between the Ad Note and the *Anti-Dumping Agreement*, and find that the Ad Note may permit responses to dumping in the form of particular security requirements. In doing so, we note that Appellate Body jurisprudence clearly indicates that the Ad Note has not been superseded by the *Anti-Dumping Agreement*. In such circumstances, we are not prepared to find that the Ad Note has been rendered superfluous by dicta in an Appellate Body Report that does not even refer to the provisions of the Ad Note. Instead, we shall base ourselves on the clear-cut guidance that has been provided by the Appellate Body in *Brazil – Desiccated Coconut*.

7.77 For all the above reasons, we find that the relationship between the Ad Note and the *Anti-Dumping Agreement* is not such as to preclude the Ad Note authorizing certain types of security that are not expressly envisaged by the *Anti-Dumping Agreement*.

The temporal scope of the Ad Note

7.78 We recall that the EBR was applied on imports entering the United States after the shrimp anti-dumping order was imposed. The first substantive issue we must consider is whether the temporal scope of the Ad Note covers the period of application of the anti-dumping order (as alleged by the United States), or whether it is limited to provisional measures taken prior to the final determination of dumping preceding the imposition of the anti-dumping order (as alleged by India).

Ordinary meaning of the text of the Ad Note

7.79 By its express terms, the Ad Note is applicable "pending final determination of the facts in any case of suspected dumping or subsidization". The United States argues that the temporal scope of the Ad Note covers the period of application of the anti-dumping order since, in a retrospective system such as the US system, there remains a "case of suspected dumping" pending completion of the assessment review. India agues that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, regarding the application of provisional measures. According to India, therefore, the application of the Ad Note is expressly limited to provisional measures taken prior to a final determination of dumping.

7.80 The Ad Note refers to "suspected dumping." We interpret "dumping" in light of Article 2.1 of the *Anti-Dumping Agreement*. Having regard to the dictionary definition,[117] we understand the term "suspected" to refer to dumping that is suspected to exist, in the sense that its existence may be likely.[118]

7.81 In order to determine whether or not there remains "a case of suspected dumping" after the determination of dumping preceding the imposition of a US anti-dumping order, we must carefully consider the analyses of dumping undertaken in the US retrospective system. In order to impose an anti-dumping order, the United States first determines, through an analysis of import entries during a given period of investigation, whether margins of dumping exist, and whether dumped imports cause

[116] Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.

[117] *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th Ed. 1993), page 3162 (which defines the word "suspected" in relevant part as "that one suspects to exist or to be such; imagined to be possible or likely").

[118] As noted below at note 148, we do not consider that the mere possibility of dumping would be sufficient to justify reasonable security under the Ad Note.

or threaten to cause material injury to a domestic industry. If a determination of injurious dumping is made, the United States issues an anti-dumping duty order. In its anti-dumping duty order, the United States sets forth *ad valorem* cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other subject producers/exporters. Pursuant to the anti-dumping duty order, importers must post a cash deposit of estimated anti-dumping duties for each import transaction. This cash deposit is based on the overall margin of dumping found for the exporter or producer during the investigation phase. Thereafter, the US retrospective duty assessment system provides that, every twelve months, during the anniversary month of the anti-dumping duty order, importers, exporters, producers, and domestic interested parties have the opportunity to request that USDOC conduct an assessment review of the import entries that occurred in the prior year (but following imposition of the anti-dumping order). During any such review, the United States analyses all of the import entries for the relevant period of review (i.e., the prior 12 months) to determine the final amount of the anti-dumping duty payable on imports from the relevant producer or exporter. For those entries not covered by a request for an assessment review, USDOC instructs US Customs to assess anti-dumping duties at the cash deposit rate required upon entry.

7.82 In our view, there is no certainty that imports entering the United States following imposition of an anti-dumping order are *in fact* dumped. The determination of dumping made during the initial investigation underlying the anti-dumping order does not apply to these imports, since that determination was made on the basis of imports occurring during an earlier period of investigation. Rather, the final determination (of the existence and amount) of dumping is only made in respect of imports entering the United States following imposition of the anti-dumping order when an assessment review is undertaken. Until that time, it is not possible to state with certainty whether or not those imports are dumped. Indeed, the assessment review may demonstrate that those import entries were not dumped, such that no anti-dumping duties may be collected.

7.83 While there is no certainty that import entries subject to an anti-dumping order are dumped, there is a reasonable basis for *suspecting* that they might be. Such suspicion of dumping results from the finding of dumping made in respect of import entries of subject merchandise during the initial period of investigation, i.e., the finding of dumping that gave rise to the anti-dumping order. In our view, that suspicion of dumping may last until a final determination of dumping is made in the assessment review, whereupon both the existence and amount of dumping may be determined with precision.[119]

7.84 We acknowledge that the United States must determine the existence of dumping (and injury and causality) in order to impose an anti-dumping order. That determination, however, relates to imports during the period of investigation underlying the initial investigation. It does not relate to imports entering the United States after the anti-dumping order is imposed. Accordingly, the initial determination does not remove the suspicion of dumping in respect of those later imports. In fact, as noted above, that initial determination is actually the basis for the suspicion of dumping in respect of those later imports.

7.85 India raises arguments regarding the meaning of the phrase "final determination" in the Ad Note. India argues that it is no coincidence that, in almost every context in the *Anti-Dumping Agreement* in which the term "final determination" occurs, it is referred to in the singular in the context of the determination immediately preceding the application of "final measures" or "definitive

[119] A new determination of dumping in an assessment review would, of course, give rise to a further suspicion of dumping. Even if the results of the first assessment review indicate that there was no dumping during the period under review, we consider it reasonable to continue to suspect – on the basis of the initial investigation underlying the anti-dumping order – that future imports may be dumped. This interpretation is consistent with, and indeed supported by, note 22 of the *Anti-Dumping Agreement*.

duties". In this regard, India notes that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body found that:

> "Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, … Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* … indicate that a definitive duty is imposed subsequent to a final affirmative determination. We are of the view... that a duty becomes 'definitive' … at the time of the investigating authority's final affirmative determination.
>
> … The Agreements therefore use the term 'definitive'" to distinguish duties imposed after a *final* determination (following an investigation) from 'provisional' duties that may be imposed under certain conditions during the course of an investigation, namely, after a *preliminary* determination."[120] (emphasis in original)

India further notes that in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body found that:

> "Members have the right to impose and collect anti-dumping duties only *after* the completion of an investigation in which it *has been established* that the requirements of dumping, injury, and causation '*have been fulfilled*'. In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link.[121] (emphasis in original)

7.86 We recall that the *Mexico – Anti-Dumping Measures on Rice* and *EC – Bed Linen (Article 21.5 – India)* cases concerned anti-dumping measures applied in the context of prospective assessment systems. In such systems, one may legitimately refer to anti-dumping duties being levied pursuant to the "final determination" at the end of the initial investigation. In the present case, though, we are concerned with the US retrospective assessment system. Under that system, anti-dumping duties are not levied pursuant to the final determination at the end of the initial investigation. Accordingly, we see no reason why the "final determination" in the Ad Note may not be interpreted (in the context of a retrospective duty assessment system) as the "determination of the final liability for payment of anti-dumping duties" referred to in Article 9.3.1 of the *Anti-Dumping Agreement*.[122] Since we are not prepared to interpret the Ad Note in a way that would not make sense in the context

[120] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 345-346.
[121] Appellate Body Report, *EC –Bed Linen (Article 21.5 – India)*, para. 123.
[122] In particular, we see no reason why the determination referred to in Article 9.3.1 may not be considered as a final determination. Furthermore, we note that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "the conditions to impose [an anti-dumping duty] are to be assessed with respect to the current situation" (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165). We understand this to mean that, according to the Appellate Body, the conditions for imposing anti-dumping duties, including the existence of dumping, must be established in respect of the "current situation" (at the time of imposition). There is no obligation on Members, at the time of imposition, to establish the existence of dumping prospectively, by reference to any *future* situation. Indeed, any such obligation would be impossible to fulfil. While Members applying a prospective system of anti-dumping duty collection may use their findings in respect of the period of investigation as a proxy for the period following imposition of a definitive anti-dumping measure, there is no obligation on Members to do so. Indeed, Members applying a retrospective system of anti-dumping duty assessment (which is specifically contemplated by Article 9.3.1) choose not to do so. Accordingly, we see no basis to conclude that the United States, which applies a retrospective system, already determines the existence of dumping in respect of future import entries at the time that it imposes an anti-dumping order. The fact that Article 5.1 requires the United States to establish the existence of dumping at the time it imposes such order, does not mean that the United States is at the same time establishing the existence of dumping in respect of future import entries covered by that order.

of a retrospective duty assessment system,[123] we reject India's argument that the phrase "final determination" in the Ad Note necessarily refers to the final determination made at the end of the initial investigation.

7.87 India further argues that, even going by the arguments of the United States, there cannot be a single "final determination" of the liability for payment of anti-dumping duties because, under Article 9.3.1, there will be as many determinations of the final liability for payment as there are administrative reviews. As noted by the United States,[124] though, in the US system of duty assessment, each set of entries is covered by only one assessment review. Thus, while there may be multiple determinations over the life of an anti-dumping duty order, for each entry, there is only one final determination of the facts with respect to payment.

7.88 India also argues that the arguments of the United States beg the question of why the Ad Note was not implemented by introducing similar provisions and associated disciplines on the taking of security in Article 9 of the *Anti-Dumping Agreement*. India asserts that, if Members had wanted, or perceived a need, to do so, they would have introduced additional provisions in Article 9 of the *Anti-Dumping Agreement* to permit the taking of security after the final determination. In light of our findings regarding the relationship between the Ad Note and the *Anti-Dumping Agreement*, we are not persuaded that Members would have needed to incorporate a specific authorization into the *Anti-Dumping Agreement* in order for the United States to be entitled to require security in respect of imports entering after imposition of an anti-dumping order. In our view, the United States is entitled to require such security on the basis of the authorization provided for in the Ad Note.

7.89 We note India's argument that the above analysis fails to take into account that in many cases no assessment review is conducted.[125] The United States argues that in no case is assessment – whether at the cash deposit rate or otherwise – conducted at the time of entry, and in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability. The United States assert that while, in some cases, the amount of the cash deposit happens to equal the amount of the final liability, it cannot be known at the time of entry whether this will be the case (since it cannot be known whether an interested party intends to request a review).

7.90 Although there may be cases in which no assessment review ultimately takes place, there is no means of knowing this at the time that the import entry is made. Whether or not an assessment review is to take place will only be known once either the assessment review is requested, or the deadline for requesting such review has passed without any such request having been made. Thus, even though imports may ultimately be liquidated at the cash deposit rate in the anti-dumping order, there remains the possibility that an assessment review may be requested, and that such review may indicate that those imports are not dumped (i.e., that no anti-dumping duties are to be assessed). At the time of entry, therefore, such imports may only be suspected of being dumped.

Contextual considerations regarding Article 7 of the *Anti-Dumping Agreement*

7.91 India asserts that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, and may not be applied independently of that provision. Accordingly, India submits that the Ad Note may only justify imposing security for provisional measures, as envisaged by Article 7.

[123] We recall in this regard that the *Anti-Dumping Agreement* is "neutral as between different systems for levy and collection of anti-dumping duties" (Appellate Body Report, *US – Zeroing (Japan)*, para. 163).
[124] See United States' second written submission, note 2.
[125] See India's second written submission, para. 81.

7.92 The United States asserts that nothing in the text of the Ad Note suggests that it is limited to "provisional measures". The United States also contends that neither Article 7 nor the concept of "provisional measures" existed at the time the Ad Note was negotiated.

7.93 In support of its view that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, India argues that the Ad Note only provides for provisional security measures, i.e., security measures applied before the final determination prior to the imposition of anti-dumping order. For the reasons set forth in the preceding sub-section, we are unable to accept that the temporal scope of the Ad Note is limited in this way.

7.94 In support of its argument, India relies on a single paragraph in a 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties to assert that the "reasonable security (bond or cash deposit)" referred to in the Ad Note "is the same as the provisional measures referred to in Article 7 of the *Anti-Dumping Agreement*."[126] That paragraph provides:

> *"Provisional anti-dumping measures*
>
> 19. The Group discussed the question of provisional anti-dumping measures. It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the product under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed."

7.95 In the second sentence of the above extract from their Report, therefore, the Group of Experts "noted that Article VI made no mention of [provisional measures]". Since the Ad Note was introduced into *GATT 1947* in 1948,[127] and was therefore an integral part of Article VI of the *GATT 1947* at the time that the Group of Experts issued its Report, this statement by the Group of Experts must mean that neither Article VI generally, nor the Ad Note specifically, provided for provisional anti-dumping measures. This statement by the Group of Experts is therefore fundamentally at odds with India's argument that the Ad Note is expressly limited to provisional measures taken prior to a final determination of dumping.

[126] India's first written submission, para. 92.

[127] The Ad Note to Article VI was included in Article 34 of the Havana Charter and was incorporated into the *GATT 1947* in conjunction with the rest of Article 34 in 1948 (see Report of Working Party No. 3 on Modifications to the General Agreement, GATT/CP.2/22/Rev.1 (Aug. 30, 1948)).

Contextual considerations regarding Article 9 of the *Anti-Dumping Agreement*, and the WTO-conformity of cash deposits

7.96 A further contextual consideration arises from the United States' assertion that India's arguments would mean that no security is permissible pending final assessment, including cash deposits. India rejects this argument, asserting instead that cash deposits could be collected pursuant to Article 9 of the *Anti-Dumping Agreement*. India argues that, from the standpoint of both the United States, as the Member collecting anti-dumping duties, and the importer, who is liable to pay the anti-dumping duties following the decision to impose definitive duties, there is no substantive difference between accepting (or paying) "cash deposits" instead of "cash" in payment of anti-dumping duties. India asserts that whether cash is accepted as a "cash deposit" or as "payment of duties" is a difference only in nomenclature and not in substance. India refers in this regard to the statement by the Appellate Body in *US – Zeroing (Japan)*, where it held that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales …".[128] The United States maintains that cash deposits are not duties within the meaning prescribed under Article 9 of the *Anti-Dumping Agreement*, but instead are a form of security or estimate of the amount of duties that will ultimately be owed on a given entry. The United States also calls attention to the fact that Article 7.2 of the *Anti-Dumping Agreement* distinguishes cash deposits from duties by stating that "provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond ... ."[129]

7.97 We consider that the United States' argument raises an extremely important consideration, for the ability to require security is an essential element of a retrospective assessment system (which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*). If security, including even cash deposits, may not be required pursuant to the Ad Note, we consider it important to establish what provision of the *GATT 1994* or *Anti-Dumping Agreement* it may be required under. If security, including even cash deposits, may not be imposed under such other provisions, we consider that an interpretation of the Ad Note permitting such security would be further justified. Thus, even though we are not required to rule on whether or not cash deposits may be imposed pursuant to the Ad Note in order to resolve the dispute before us, this issue is an important contextual consideration to which we should have regard when interpreting the Ad Note.

7.98 As to the question of whether or not cash deposits may be justified under other provisions of the *GATT 1994* or *Anti-Dumping Agreement*, India argues that cash deposits may be imposed pursuant to Article 9 of the *Anti-Dumping Agreement*. We are not persuaded by this argument, though, for Article 9 provides only for the imposition of definitive anti-dumping *duties*. As noted by India,[130] the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods …".[131] In our view, this definition of the term "duty" is not broad enough to encompass cash deposits. Unlike duties, cash deposits do not yield public revenue, in the sense that cash deposits have no intrinsic value in and of themselves. Although cash may have intrinsic value, a cash deposit, on the other hand, is not liquidated revenue is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. A cash deposit will not yield public revenue until some point in the future. In the context of the US retrospective assessment system, that point comes when – and only when – either duties are assessed pursuant to an assessment review, or the cash deposits are liquidated once the deadline for requesting an assessment review has expired (without any assessment review having been requested). Until that point, a cash deposit has no intrinsic value in and of itself. Indeed, India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security",

[128] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.
[129] United States' second written submission, para. 16.
[130] See India's responses to Second Set of Panel Questions, para. 29.
[131] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.

there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."[132] Since we are required to interpret the relevant provisions of the covered agreements by reference to the ordinary meaning of the terms,[133] (and since the ordinary meaning of the terms reflects fundamental differences in the substantive consequences of those terms), we are unable to accept India's argument that whether cash is accepted as a "cash deposit" or as "payment of duties" is a difference only in nomenclature and not in substance.

7.99 Furthermore, we note that Article 9.3.1 of the *Anti-Dumping Agreement* refers to circumstances "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis". If the cash deposit applied in a retrospective system were a duty, it would make no sense to talk of the amount of the duty being assessed on a *retrospective* basis, as the amount of the cash deposit, which India refers to as a "duty", is fixed *prospectively*.

7.100 In addition, we observe that Article 9.3 of the *Anti-Dumping Agreement* provides that the amount of the anti-dumping duty "shall not exceed the margin of dumping as established under Article 2". The Appellate Body has confirmed that the margin of dumping established in an assessment review is a margin of dumping "as established under Article 2".[134] This is also consistent with note 22 to the *Anti-Dumping Agreement*, which applies "when the amount of the anti-dumping duty is assessed on a retrospective basis", and which envisages definitive duties being levied pursuant to "assessment proceeding[s]". Since note 22 accepts that amounts of anti-dumping duties, which (according to Article 9.3) must not exceed the margin of dumping established under Article 2, may be assessed pursuant to assessment proceedings, necessarily note 22 also accepts that the margins of dumping established in assessment proceedings are margins of dumping "established under Article 2". Accordingly, and consistent with Article 9.3, the margin of dumping in the assessment review operates as a ceiling for the amount of anti-dumping duty. If the cash deposit were an anti-dumping duty, and the cash deposit were in excess of the margin of dumping established subsequently in the assessment review, the imposition of that cash deposit would violate Article 9.3. This cannot be a correct interpretation, though, for under this interpretation it would be impossible for a Member requiring cash deposits to know, at the time of application, whether or not it was acting in conformity with Article 9.3.

7.101 We recall India's reference[135] to the statement by the Appellate Body in *US – Zeroing (Japan)* that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales…".[136] However, in that case the Appellate Body was not addressing, and

[132] See India's responses to Second Set of Panel Questions, para. 33.

[133] Article 3.2 of the DSU provides that WTO Members recognise that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31 of the Vienna Convention on the Law of Treaties, considered as one such rule, reads 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." Appellate Body Report on *US – Gasoline*, p. 17. See also Appellate Body Report on *India – Patents (US)*, para. 46; Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 10-12; and Panel Report on *US – DRAMS*, para. 6.13.

[134] In *US – Zeroing (EC)* (para. 130) the Appellate Body stated that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding." In the context of that case (starting with the Appellate Body's reference to the need to establish a margin of dumping (under Article 2) for the product as a whole, and for each exporter or foreign producer (see paras. 127-129)) it is clear to us that the Appellate Body was referring to the margin of dumping established in an assessment review as a margin of dumping "established under Article 2".

[135] See India's second written submission, para. 71.

[136] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

did not need to address, the issue of whether or not cash deposits constitute duties. The Appellate Body's statement therefore constitutes *obiter dictum* in the discussion of a different issue, which we do not feel compelled to treat as authoritative guidance on the issue before us here. Furthermore, in its earlier Report on *US – Zeroing (EC)*, the Appellate Body included dicta to the effect that, under the US retrospective duty assessment system, "the United States collects security in the form of a cash deposit at the time a product enters the United States, *and determines the amount of duty due on the entry at a later date*."[137] This suggests that in that earlier case the Appellate Body treated cash deposits as a form of security for duties to be collected later, rather than as duties *per se*. Thus, even if we were required to follow Appellate Body dicta, it is unclear exactly how this dicta should be interpreted.

7.102 In addition, we observe that Article 9.3.1 of the *Anti-Dumping Agreement* refers to "refund[s]" to be made in the context of retrospective assessment systems. Article 9.3.1 does not stipulate what precisely must be refunded. Article 9.3.2, by contrast, which applies in the context of prospective assessment systems, refers to "refund[s] ... of any ... duty paid". Unlike Article 9.3.2, therefore, Article 9.3.1 does not characterize what is being refunded as a "duty", even though (as acknowledged by India[138]) Article 9.3.1 is the mechanism by which cash deposits are refunded. If cash deposits were duties, there would have been no need to use different language in Articles 9.3.1 and 9.3.2.

7.103 India also argues that the *Anti-Dumping Agreement* expressly mentions the interpretative and supplementary notes to Article VI that are not subsumed by the provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. India notes in this regard that Article 2.7 of the *Anti-Dumping Agreement* expressly states that "[t]his Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to *GATT 1994*." India asserts that if the drafters of the *Anti-Dumping Agreement* had intended to keep the Ad Note available to Members after the final determination, they would similarly have said so. India also submits that the arguments of the United States beg the question of why the Ad Note was not implemented by introducing similar provisions and associated disciplines on the taking of security in Article 9 of the *Anti-Dumping Agreement* in the case of the retrospective system. India asserts that if Members had wanted, or perceived a need, to do so, they would have introduced additional provisions in Article 9 of the *Anti-Dumping Agreement* during the Tokyo Round or the Uruguay Round process to permit the taking of security after the final determination.

7.104 The implication of India's argument regarding Article 2.7 of the *Anti-Dumping Agreement* is that the Ad Note, together with the majority of other Notes and Supplementary Provisions to Article VI of the *GATT 1994*, are superseded by the *Anti-Dumping Agreement*. We have already explained that there is no basis for reaching any such conclusion. We have also already explained that, based on our interpretation of the relationship between the Ad Note and the *Anti-Dumping Agreement*, there was no need for Members to include an express authorization for collection security (after imposition of the anti-dumping order) in Article 9, for the authorization provided for in the Ad Note remains valid.

7.105 As further contextual support for our view that cash deposits required following imposition of an anti-dumping order are not anti-dumping duties, we note that Article 7.2 of the *Anti-Dumping Agreement*, regarding provisional measures, draws a clear distinction between a (provisional) "duty" and a "cash deposit". India's argument that cash deposits are duties is therefore at odds with the plain language of Article 7.2.

[137] Appellate Body Report, *US – Zeroing (EC)*, para. 109.
[138] See e.g. India's first written submission, para. 79.

7.106 Accordingly, we are not persuaded by India's argument that cash deposits may be imposed pursuant to Article 9 (as anti-dumping duties). Nor has India advanced any other basis for Members to require security in the form of cash deposits. We recall, though, that we consider that the ability of Members to require security such as cash deposits pending final assessment is an essential requirement for the operation of a retrospective assessment system. Such contextual considerations support our interpretation of the ordinary meaning of the Ad Note as permitting such security.

7.107 In light of the above, we find that the application of the EBR falls within the temporal scope of the Ad Note, in the sense that the Ad Note authorizes the imposition of security requirements during the period following the imposition of a US anti-dumping order.

The combined use of bonds and cash deposits

7.108 We recall that the EBR was applied in conjunction with cash deposits, in the sense that importers had to provide both enhanced bonds and cash deposits covering the same subject import entries. We next consider whether the Ad Note allows the imposition of security requirements combining both cash deposits and bonds, or whether the Ad Note requires Members to choose between either (i) cash deposits or (ii) bonds.

7.109 India asserts that the plain meaning of the disjunctive "or" between the terms "bond" and "cash deposit" is that either a bond or a cash deposit may be required as security for the potential liability for anti-dumping or countervailing duties and not both at the same time.

7.110 The United States submits that nothing in the text or context supports this reading of the term. According to the United States, the phrase "bond or cash deposit" is a parenthetical that appears after the term "reasonable security" and that term provides relevant context for interpretation. The United States asserts that India fails to explain how requiring two types of security instead of one is relevant to determining what constitutes "reasonable security". The United States also argues that India fails to explain why the Agreement should be read to proscribe US Customs from, for example, replacing a portion of the existing cash deposit requirement with a bond requirement. The United States argues that the Appellate Body has interpreted other uses of "or" in the *WTO Agreement*s as covering one or the other item, as well as both items, in a phrase. The United States notes that, in its report in *US – FSC (Article 21.5 II)*, the Appellate Body interpreted Article 21.5 of the *DSU* in this manner. Article 21.5 states:

> "Where there is disagreement as to the existence *or* consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."[139]

7.111 The United States argues that the Appellate Body interpreted this provision to mean that "an Article 21.5 panel may be called upon to examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or, when such measures exist, the 'consistency' of those measures with the covered agreements, *or a combination of both*, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."[140] The United States submits that, like the language interpreted by the Appellate Body in *US – FSC (Article 21.5 – EC)*, based on the text and context, the "or" in the Ad Note encompasses a cash deposit, a bond, or a combination of both.

[139] Article 21.5 of the *DSU* (emphasis added).
[140] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60 (emphasis added).

7.112 The Ad Note authorizes the imposition of "reasonable security (bond or cash deposit)". In our view, the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. In terms of form, the phrase "(cash deposit or bond)" in the Ad Note serves to clarify that both cash deposits and bonds constitute reasonable forms of security. Since that is the case, we see nothing in the text of the Ad Note to suggest that the combination of both (otherwise reasonable) forms of security necessarily results in a measure that is unreasonable. In particular, the text of the Ad Note does not provide that the form of security will only be reasonable if *either* (i) cash deposits *or* (ii) bonds are required.

7.113 We consider that an interpretation of the word "or" to permit the combined use of bonds and cash deposits is consistent with the Appellate Body's interpretation of the word "or" in *US – FSC (Article 21.5 – EC II)*. In that case, the Appellate Body found[141] that the word "or" in respect of the phrase "existence or consistency" in Article 21.5 of the *DSU* should be interpreted to permit Article 21.5 proceedings addressing both the "existence" and the "consistency" of implementation measures, not only one or the other. Since the Appellate Body was interpreting a similar use of the word "or" in *US – FSC (Article 21.5 – EC II)*, the Appellate Body's findings regarding that matter offer useful guidance that we consider it appropriate to follow in these proceedings.

7.114 In light of the above, we find that the application of the EBR is consistent with the temporal scope of the Ad Note, and that the United States is entitled to impose security requirements combining both cash deposits and bonds. The final substantive issue for us to examine is whether or not the security requirements established by the EBR in this case were "reasonable" in the meaning of the Ad Note.

Whether the application of the EBR resulted in "reasonable" security requirements

7.115 The Ad Note only permits the imposition of "reasonable" security requirements. Thus, the application of the EBR may only be found to be in accordance with the Ad Note to the extent that it provides for "reasonable" security. The United States asserts that the application of the EBR provided for reasonable security, whereas India contends that the resultant security requirements were not reasonable. As noted in the preceding section, the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. Having already dealt with India's claim regarding the form of the security required by the United States, in this section we consider the reasonableness of the amount thereof.

7.116 The United States submits that the ordinary meaning of the term "reasonable" is "in accordance with reason; not irrational or absurd."[142] The United States further asserts that, 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."[143] We consider it appropriate to consider the meaning of the term "reasonable" in light of this definition.[144] We believe it equally important, though, to consider the context in which the term "reasonable" is used. In particular, since the Ad Note only permits security in a given "case of suspected dumping", the reasonableness of that security should be assessed in light of the circumstances of that case of suspected dumping.

7.117 In this regard, we recall that the EBR is applied in conjunction with cash deposits. While the cash deposits are designed to secure the duty liability established as a result of the anti-dumping order (or most recent assessment review), the EBR is applied to secure against liability resulting from increases in the rate of dumping over and above that established in the order (or most recent

[141] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.
[142] The United States refers to *New Shorter Oxford English Dictionary*, p. 2496.
[143] The United States refers to *New Shorter Oxford English Dictionary*, p. 2496.
[144] We note that India has not challenged the definition proposed by the United States.

assessment review).[145] Since the amount of cash deposits is limited to the rate of dumping established in the anti-dumping order (or most recent assessment review), such security corresponds to the given case of suspected dumping, and is therefore in principle "reasonable" within the meaning of the Ad Note. The same reasoning does not cover the application of the EBR, however, since the application of the EBR increases the level of security beyond the dumping liability established as a result of the anti-dumping order. By virtue of the reasonableness requirement in the Ad Note, such increased security would only be permitted if there were some other basis which renders it reasonable in a particular case.

7.118 In light of the abovementioned dictionary definition (whereby reasonableness may be defined as "not irrational or absurd" and, with respect to amounts, as "not greatly less or more than might be thought likely or appropriate"), we consider that there would only be an appropriate basis for such increased security 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).[146] The Member would also need to determine the likely amount of such increase, in order to ensure that the amount of the additional security requirement is not greatly more than the amount by which the final dumping liability would likely exceed the dumping liability established as a result of the anti-dumping order. Only then could that Member demonstrate that the additional security properly and reasonably relates to an established case of suspected dumping, consistent with the requirements of the Ad Note. Without this type of analysis, the rate in the anti-dumping order remains "the best and only available baseline proxy of duties that ultimately may be assessed",[147] and therefore the best estimate of suspected dumping for which security may be required pursuant to the Ad Note. Security exceeding this estimate would not be "reasonable" in the meaning of the Ad Note.

7.119 We shall therefore examine whether the United States properly determined that the rate of dumping envisaged in the anti-dumping order would likely increase. If we find that it did, we shall then examine whether the United States properly established the likely amount of such increase.[148]

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[145] India has not argued that the United States would not be entitled to collect duties in respect of any amount by which the rate of dumping established in an assessment review exceeds the cash deposits made in respect of the relevant import entries.

[146] Both parties argue that the reasonableness of the application of the EBR should be assessed in light of the likelihood of increases in the rates of dumping. See e.g. United States' responses to First Set of Panel Questions. para. 27, and para. 7 of India's oral statement at the second substantive meeting. We acknowledge that rates of dumping may increase, and that the United States would be entitled to collect anti-dumping duties commensurate with the full amount of dumping. In our view, though, it would not be reasonable to require additional security simply because of the possibility of rates of dumping increasing. (Otherwise, since rates may also possibly decrease, one could argue that a reduction in security would be equally reasonable.) The possibility of rates increasing beyond a reasonable level of security, and importers defaulting on that excess, is a risk inherent in the retrospective system. The Ad Note does not allow Members to seek to eliminate that risk through the application of unreasonably excessive security requirements.

[147] United States' first written submission, para. 37.

[148] The United States also argues that the application of the EBR is reasonable because, in addition to the likelihood of anti-dumping rates increasing, it also reflects the amount of potential liability in the event of default and the likelihood of default (see para. United States' second written submission, para. 24). Both parties submitted argumentation regarding the US assessment of the risk of shrimp importers defaulting on anti-dumping duties in excess of the cash deposits. If the United States had properly established the likelihood of rates increasing, and the amount of likely increase, we consider that the United States would have been able to introduce additional security requirements up to that amount. 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. By virtue of the Ad Note, security may be imposed once a case of suspected dumping is established, such that anti-dumping duties may be payable. There is nothing in the Ad Note to suggest that security may only be required if it is further established that importers would not otherwise pay the relevant anti-dumping duties. It is the case of

7.120 The United States asserts that "[t]o analyse the likelihood of potential increases, US Customs used historical data on increases in the anti-dumping rate".[149] In this regard, the United States refers to note 29 to para. 27 of its first written submission, where it is stated that "CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 per cent of the time, did not change 11 per cent of the time, and decreased 56 per cent of the time".

7.121 We note that the United States has not submitted any documentary evidence in support of its assertion that anti-dumping rates increased 33 per cent of the time. It is, therefore, impossible to assess the rigour of the United States' analysis. In particular, it is impossible to verify how the United States treated cases where the rate may have increased as a result of error on the part of Customs, or error or fraud on the part of other parties.[150] [151] In our view, apparent rate increases resulting from error or fraud should not be confused with genuine increases in exporters' actual rates of dumping.

7.122 Leaving aside the lack of supporting documentary evidence, we are in any event not persuaded that an objective and impartial investigating authority could properly conclude that rates of dumping for subject shrimp were likely to increase on the basis of a finding that, historically, rates only increased in one third of agriculture/aquaculture cases generally. [152]Furthermore, the United States has 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 specifically. In addition, we recall that the EBR is applied on all imports of subject shrimp. A finding that, historically, rates have increased 33 per cent of the time in respect of agriculture/aquaculture cases generally is not sufficient, in our view, to demonstrate that all rates for subject shrimp (in respect of all imports, from all sources) are likely to increase.

7.123 The United States seeks to support its conclusion that rates of dumping would likely increase by asserting that " USDOC's preliminary results suggest higher assessment rates for 63 of 70 Indian companies subject to the original order – 17 of these companies, which had been making cash

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suspected dumping that triggers the right to impose security requirements under the Ad Note, not the risk of default of individual importers. (If this were not the case, the United States would be required to assess the risk of individual importers defaulting before imposing cash deposits.) Although the risk of default does not provide a basis for requiring security under the express terms of the Ad Note, we see no reason why a Member could not choose to impose security requirements authorized under the Ad Note only in respect of those importers with a greater risk of default.

[149] See United States' Responses to First Set of Panel Questions, para. 20.

[150] See e.g. Exhibit IND-8, bottom of p. 10.

[151] India argues that "the real source of defaults in payment of anti-dumping duties appears to be associated with non-market economy cases, surety bankruptcies, new shipper reviews, etc." (see India's responses Second Set of Panel Questions, para. 76). India also asserts that a "GAO Report concluded that most defaults in payments of anti-dumping duties arose out of one country (China) and one sector (crawfish)" (see India's second written submission, para. 87). We do not consider it necessary to review these arguments, though, since at this juncture we are addressing US evidence regarding cases in which the rates of dumping increased, rather than cases resulting in uncollected, or defaulted, anti-dumping duties more generally. (As illustrated at page 8 of Exhibit IND-8, not all uncollected anti-dumping duties in the crawfish case resulted from increased rates of dumping. Scenario 1, e.g. which concerns the majority of the unpaid anti-dumping duties in the crawfish case, concerned the problem of importers from new shippers being allowed to post single entry bonds, rather than cash deposits, and then defaulting on those bonds (with CBP not able to collect from the surety because the latter had gone bankrupt).) Furthermore, Exhibit US – 10 suggests that the United States had evidence of rate increases extending beyond the crawfish case (the United States claims that it had evidence of rate increases in respect of 13 anti-dumping cases involving 340 exporter/producers; see United States' responses to Second Set of Panel Questions, note 28; see also the Amendment, which although it refers explicitly to the crawfish case, also states that "[r]ecent anti-dumping cases for agriculture/aquaculture merchandise have also resulted in considerable rate increases"). Given the broad nature of this evidence, there is no basis to query such evidence by reference to the alleged particularities of a single case.

[152] See United States' first written submission, para. 27.

deposits at the 10.17% rate established in the investigation, may be subject to an assessment rate in excess of 82%.[153] Increases such as these result in unsecured liability, often in excess even of the additional bond amount."[154]

7.124 India retorts that the US reliance on the preliminary results of the first administrative review for Indian shrimp exporters to support its argument that shrimp exporters pose a genuine non-collection risk is clearly misplaced. First, the preliminary results issued on 9 March 2007 cannot justify the imposition of the EBR on 9 July 2004. Second, the results are "preliminary," by definition, and remain subject to correction in the final results of the administrative review. Third, major Indian exporters have complained that there are obvious calculation errors that, if corrected, will lower duty rates considerably. Fourth, the EBR is a self-fulfilling prophecy: US Customs allegedly imposed the EBR on the basis of its prediction that duty rates will be significantly higher at the end of the administrative review; however, exporters who are forced to quit the US market on account of the high costs and collateral requirements of complying with the EBR will not cooperate in the review and will, therefore, suffer higher duty rates. Fifth, contrary to US suggestions, an initial analysis by India's Marine Products Export Development Authority ("MPEDA") reveals that only about 4 % of total shrimp exports by value from India during the period of review were subject to the highest duty rate of 82%. India submits that, if non-producer exporters are excluded on the ground that the shrimp they exported was covered in the responses of the actual producers, only about 1.5% of total shrimp exports from India would be subject to the highest rate of 82%. India further asserts that, in fact, of the 17 exporters who have been subjected to an adverse rate of 82%, eight have not exported at all during the period of review, three are not producer exporters and six have insignificant exports, with total exports of less than $2,000,000. 44 exporters subject to the "all others rate" have an average rate of 10.54% against 10.17% in the original investigation, a minor difference of 0.37%. India states that the three largest exporters received rates of 4.03%, 11.05% and 24.52% respectively, and that this will result in a refund of $2.88 million to the first company and payments of approximately $250,000 and $1,000,000 by the other two companies. According to India, therefore, the US assertion that 63 out of 70 companies have suffered higher rates, though factual, does not correctly represent the facts.

7.125 In principle, we do not consider that the preliminary results of the first administrative review of the shrimp anti-dumping order are relevant to a determination of whether or not an objective and impartial investigating authority could properly have found, at the time that the EBR was imposed on shrimp, that rates of dumping by shrimp exporters were likely to increase. We therefore decline to base our findings on such *ex post* rationalization. Even if such analysis were relevant, though, it would not favour the position of the United States, for India has demonstrated – and the United States has not disputed – that rates only increased for a very small proportion of shrimp imports from India, and then only to a minor degree.

7.126 For these reasons, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the evidence relied on by the United States at the relevant time, that the rates of dumping established in the shrimp order were likely to increase.

7.127 In light of our conclusion in the preceding sub-section, we see no need to consider whether or not the United States properly determined the amount by which rates of dumping were likely to increase.

[153] Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,658, 10,667-68 (9 Mar. 2007) (Exhibit US-6).

[154] See United States' first written submission, para. 27.

(iv) Summary

7.128 As a result of our finding that the United States failed to properly establish that the rates of dumping provided for in the anti-dumping order were likely to increase, we find that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order. Accordingly, we conclude that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note.

(v) Finding on whether or not the application of the EBR was "in accordance with" the Ad Note

7.129 In light of our finding that the application of the EBR was not "reasonable" within the meaning of the Ad Note, we further find that the application of the EBR was not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

(c) Conclusion

7.130 Since we have found that the application of the EBR constitutes "specific action against dumping" that is not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*, we conclude that the application of the EBR is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*. In light of the above analysis, we also find that the application of the EBR to subject shrimp is inconsistent with the Ad Note.

7.131 We note that India has also made a claim under Article 1 of the *Anti-Dumping Agreement*. That claim is necessarily dependent on India's Article 18.1 claim. Since we have found that the application of the EBR to subject shrimp is inconsistent with Article 18.1, we likewise find that it is in violation of Article 1 of the *Anti-Dumping Agreement*.

3. Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement*

(a) Main arguments of India

7.132 India submits that the application of the EBR is inconsistent with the requirements of Article 7 of the *Anti-Dumping Agreement as applied* to importers of shrimp from India. India explains that it considers it necessary to evaluate the consistency of the EBR with the provisions of Article 7 of the *Anti-Dumping Agreement as applied* for two reasons:

(1) The United States served notices requiring importers of shrimp from India to provide enhanced, continuous bonds shortly after the preliminary affirmative determination dated 4 August 2004 and well before the Anti-dumping Order on 1 February 2005. Further, the Amended CBD does not make provision for the termination of the EBR after the issuing of the Order in the case. Rather, it requires the enhanced bond to be renewed so as to reflect the duty rate currently specified in the Order.

(2) The United States may seek to defend the EBR as being a "provisional measure" consistent with Article 7 of the *Anti-Dumping Agreement* even in cases where the United States imposed the EBR on importers after the order in an anti-dumping or countervailing duty case. India submits that the United States may argue that the EBR is intended to secure the collection of duties after the final liability is assessed in administrative review proceedings under its retrospective assessment system.

7.133 India submits that, in both instances, the application of the EBR is inconsistent with Article 7 of the *Anti-Dumping Agreement*.

7.134 India asserts that, under Article 7.1(iii) of the *Anti-Dumping Agreement*, it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". According to India, the stated reasons for introducing the EBR, however, do not mention injury being caused during the investigation at all and focus rather on protecting revenue against any failure on the part of importers to pay the duties finally assessed and ensuring that payments are made to domestic industry pursuant to the CDSOA that was held to be inconsistent with the obligations of the United States in *US – Offset Act (Byrd Amendment)*. India therefore submits that, if the EBR is a provisional measure, it is inconsistent with Article 7.1(iii) of the *Anti-Dumping Agreement*.

7.135 India asserts that the EBR is also inconsistent with Article 7.2 of the *Anti-Dumping Agreement*, since provisional measures, whether in the form of a cash deposit or a bond, may not be for an amount in excess of the "provisionally estimated margin of dumping" or the "provisionally calculated amount of subsidization", as the case may be.

7.136 India also submits that the EBR is inconsistent with Article 7.4 of the *Anti-Dumping Agreement*, which limits application of provisional measures to "a period not exceeding four months," to the extent that the EBR on importers is introduced or remains in place on any date after six months have elapsed in the anti-dumping case from the date on which provisional measures are first imposed.

(b) Main arguments of the United States

7.137 The United States submits that Article 7 of the *Anti-Dumping Agreement* does not apply to the EBR. The United States argues that India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the *Anti-Dumping Agreement* regarding provisional measures (i.e., measures taken prior to a final determination of dumping or subsidization).[155] The United States asserts that the bond directive, however, is a security requirement imposed *after* the final determination of dumping or subsidization, pending "determination of the final liability for payment of anti-dumping duties," and is therefore not a "provisional measure" within the meaning of Article 7 of the *Anti-Dumping Agreement*.

7.138 With respect to India's argument that EBR was applied in certain cases prior to the issuance of the order and therefore constitutes a "provisional measure" inconsistent, *as applied*, with Article 7 of the *Anti-Dumping Agreement*,[156] the United States asserts that the October 2006 Notice makes clear that the directive no longer covers additional bond amounts requested prior to issuance of an order.[157]

(c) Evaluation by the Panel

7.139 We first note the relevant provisions as discussed by India in its claims under Article 7 of the *Anti-Dumping Agreement*:

7.140 Article 7.1(iii) provides:

> "Provisional measures may be applied only if:
>
> (iii) the authorities concerned judge such measures necessary to prevent injury being caused."

[155] India's first written submission, para. 92 (asserting that "[i]t is clear that the 'reasonable security (bond or cash deposit)' referred to in the Ad Note is the same as the provisional measures referred to in Article 7 of the *Anti-Dumping Agreement*.").

[156] India's first written submission, para. 85.

[157] Exhibit IND-6, p. 62,277 (cf. Exhibit IND-3, p. 2-3).

7.141 Article 7.2 provides:

> "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. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures."

7.142 Article 7.4 provides:

> "The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively."

7.143 We recall that India advanced two reasons for raising its Article 7 claims. First, India alleged application of the EBR as a provisional measure, prior to the imposition of the anti-dumping order. Second, in the event that the United States would seek to defend the application of the EBR by reference to Article 7 of the *Anti-Dumping Agreement*. In view of the US arguments set forth above, it is evident that the United States has not sought to defend the application of the EBR under Article 7. Accordingly, we shall focus our evaluation on India's claim regarding the alleged application of the EBR prior to the imposition of the anti-dumping order.

7.144 Prior to the imposition of the anti-dumping order on subject shrimp from India on 1 February 2005, and on the basis of its preliminary determination of dumping, injury, and causality, in August 2004 the United States imposed provisional measures on imports of subject shrimp in the form of cash deposits or (non-EBR) bonds. We refer to these as the "initial provisional measures". The amount of these initial provisional measures was "equal to the weighted-average amount by which the [normal value] exceeds the [export price]".[158]

7.145 In response to a question from the Panel, the United States acknowledges that, prior to the publication of the anti-dumping order on 1 February 2005, certain importers were also requested to submit enhanced bonds in addition to the abovementioned initial provisional measures. In particular, the United States accepts that, from 6-10 August 2004, officers in one US Customs office sent requests for additional bonds to eleven importers of shrimp (including one importer of shrimp from Thailand and India), referring to the enhanced bond directive. Subsequently, on 22 October 2004, once in November 2004 and three times in January 2005, US Customs officers sent requests for additional bonds to a total of 21 importers.[159] In our view, these additional bond requests should be treated as provisional measures, since they were issued prior to the publication of the anti-dumping order.

7.146 In accordance with Article 7.2 of the *Anti-Dumping Agreement*, provisional measures may not exceed "the amount of the anti-dumping duty provisionally estimated." Since the United States applied initial provisional measures in "the amount of the anti-dumping duty provisionally estimated", the application of the EBR (prior to imposition of the anti-dumping order) in conjunction with the initial provisional measures necessarily resulted in the imposition of provisional measures (i.e., the

[158] See Notice of Preliminary Determination, page 47,119.
[159] See United States' responses to First Set of Panel Questions, paras. 34-35.

initial provisional measures together with the EBR) in excess of "the amount of the anti-dumping duty provisionally estimated," contrary to Article 7.2 of the *Anti-Dumping Agreement*.

7.147 In light of our finding under Article 7.2 of the *Anti-Dumping Agreement*, we do not consider it necessary to examine India's claims under Articles 7.1(iii) and 7.4 of the *Anti-Dumping Agreement*.

4. Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, and Article VI:2 of the *GATT 1994*

(a) Main arguments of India

7.148 India also claims that the EBR *as applied* to importers of shrimp from India is inconsistent with Article 9 of the *Anti-Dumping Agreeement* because "it is impermissible to demand an enhanced, continuous bond in addition to the duties collected in an amount equal to the dumping margin or the amount of the subsidy found to exist"[160] following a final determination in the initial investigation.

7.149 India asserts that Article 9.2 of the *Anti-Dumping Agreement* only permits the imposition of anti-dumping duties in "appropriate amounts." As an "appropriate amount," India claims that Article 9.3 of the *Anti-Dumping Agreement* does not permit anti-dumping duties that exceed the margin of dumping.

7.150 Additionally, India argues that Article 9.3.1 of the *Anti-Dumping Agreement* does not confer any right to Members operating a retrospective duty assessment system to impose any additional measure except for anti-dumping duties. According to India, this was confirmed by the Appellate Body in *US – 1916 Act*, with the finding that the *Anti-Dumping Agreement* limits permissible responses to dumping to definitive anti-dumping duties, provisional measures, or price undertakings.[161] Thus, after issuance of an anti-dumping order, India argues that the United States may only collect anti-dumping duties in an amount no greater than specified dumping margins, and not additionally a bond as a provisional measure. India claims that Article 9.3.1of the *Anti-Dumpnig Agreement* would not have referred to a refund unless some amount had already been collected prior to determination of final liability, i.e. cash deposit that are collected in the United States' retrospective system. Moreover, India believes that discussion of a refund in Article 9.3.1 of the *Anti-Dumping Agreement* presupposes the collection of duties in cash or cash deposits, and not the taking of a bond or other measure based on this language choice.

(b) Main arguments of the United States

7.151 The United States argues that the context provided by Article 9 of the *Anti-Dumping Agreement* supports its interpretation that the Ad Note permits a Member to take reasonable security during the period in a retrospective assessment system following a final determination and prior to a final assessment review for a transaction of goods. The United States argues that Article 9.2 of the *Anti-Dumping Agreement* does not preclude a Member from requiring security after the final determination in the investigation and pending final determination of the facts with respect to payment of duties. The United States submits that Article 9.2 of the *Anti-Dumping Agreement* allows Members to collect anti-dumping duties "in the appropriate amounts in each case." Moreover, Article 9.3 states that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." According to the United States, the margin of dumping established following the assessment review described in Article 9.3.1 of the *Anti-Dumping Agreement* is a margin of dumping that is calculated in accordance with Article 2 of the *Anti-Dumping Agreement*.

[160] See India's first written submission, para. 77.

[161] Appellate Body Report, *US – 1916 Act (EC)*, para. 114; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 269.

The United States argues that the cash deposit and EBR ensure or secure payment of this amount of duty in accordance with Article 9.2 of the *Anti-Dumping Agreement*. The United States submits that Article 9.3.1 of the *Anti-Dumping Agreement* reaffirms this. According to the United States, Article 9.3.1 of the *Anti-Dumping Agreement* also clarifies that final liability for payment of anti-dumping duties occurs as the final determination of the facts with respect to payment—the end of an assessment period—like the terminology used in the Ad Note.[162]

7.152 The United States criticises India's argument that the phrase "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* refers to the margin of dumping established in a dumping investigation or during a previous administrative review.[163] The United States argues that the margin of dumping is based on actual analysis of particular entries during an assessment review in order to establish the final liability for payment of anti-dumping duties.

(c) Evaluation by the Panel

7.153 We first note the relevant provisions as discussed by India in its claims under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994.*

7.154 Article 9.1 provides:

> "The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

7.155 Article 9.2 provides:

> "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. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

7.156 Article 9.3 provides:

> "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.157 Article 9.3.1 provides:

[162] United States' second written submission, para. 6-7.
[163] United States' second written submission, para. 18.

> "When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.(footnote omitted) Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested."

7.158 Article VI:2 of the *GATT 1994* provides:

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

7.159 As indicated by the title to that provision, Article 9 of the *Anti-Dumping Agreement* is concerned with the "imposition and collection of anti-dumping *duties*" (emphasis added). Consistent with this title, the disciplines set forth in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* concern the imposition and collection of anti-dumping *duties*. In our view, therefore, measures other than anti-dumping duties fall outside the scope of those provisions. Accordingly, we shall begin our analysis of India's claim by considering whether or not the enhanced bond required by the EBR is an anti-dumping duty. If it does not, India's claim must necessarily fail.

7.160 In the context of our review of India's claim under Article 18.1 of the *Anti-Dumping Agreement*, we noted India's argument[164] that the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods …".[165] In our view, this definition of the term "duty" is not broad enough to encompass the enhanced bond requirements imposed in respect of subject shrimp. Unlike duties, bonds do not yield public revenue, in the sense that bonds have no intrinsic value in and of themselves. A bond is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. A bond will not yield public revenue until some point in the future when it is converted from a security into a form of payment. Indeed, we recall that India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security", there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."[166]

7.161 For these reasons, we conclude that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement*.

7.162 We also note India's claim under Article VI:2 of the *GATT 1994*. Like Article 9 of the *Anti-Dumping Agreement*, that provision contains disciplines regarding the levy of anti-dumping "duties". Accordingly, the application of the EBR also falls outside the scope of Article VI:2 of the *GATT 1994*.

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[164] See India's responses to Second Set of Panel Questions, para. 29.
[165] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.
[166] See India's responses to Second Set of Panel Questions, para. 33.

5. Other *as applied* claims by India under the *GATT 1994*

7.163 The Panel notes that India has made a number of additional *as applied* claims under the *GATT 1994*. In particular, India has requested the Panel to find that the EBR *as applied* to imports of shrimp from India is inconsistent with Article X:3(a) of the *GATT 1994* and with Articles I:1, II:1(a) and (b) of the *GATT 1994* or, alternatively, with Articles XI:1 and XIII of the *GATT 1994*.

7.164 We recall that we have found that the application of the EBR is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* because it does not constitute reasonable security in accordance with the provisions of the Ad Note. We have also found that the application of the EBR to importers prior to imposition of the anti-dumping order violated Article 7.2 of the *Anti-Dumping Agreement.*

7.165 The Panel, after careful consideration, on the basis of judicial economy, refrains from ruling on India's claims under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*. The Panel recalls that the principle of judicial economy is recognized in WTO law. The Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party. In fact, a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims are within its terms of reference.[167] The Appellate Body has relied on the explicit aim of the dispute settlement mechanism, which is to secure a positive solution to a dispute, as provided in Article 3.7 of the *DSU*, or a satisfactory settlement of the matter as per Article 3.4 of the *DSU*. The Appellate Body has stressed that the basic aim of dispute settlement in the WTO is to settle disputes and not to "make law" by clarifying existing provisions of the *WTO Agreement* that fall outside the context of resolving a particular dispute:

> "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[168],[169]

7.166 We bear in mind that, in *Australia – Salmon*, the Appellate Body cautioned panels against false judicial economy arguing that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[170]

7.167 The Panel believes that this is not the case in the current proceedings. In making findings under Article 18.1 of the *Anti-Dumping Agreement*, the Panel believes that it has effectively resolved

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[167] Appellate Body Report. *India – Patents (US)*, para. 87.

[168] (*footnote original*) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

[169] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340. See also Panel Report, *US – Steel Safeguards*, para. 10.701.

[170] Appellate Body Report, *Australia – Salmon*, para. 223. See also Panel Report, *EC – Sardines*, paras. 7.148-7.152; Appellate Body Report, *US – Steel Safeguards*, para. 10.703.

this aspect of the dispute. The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings. For example, as regards India's claim under Article XI:1 of the *GATT 1994*, the Panel in *US – 1916 Act (Japan)*, after finding a violation of Article VI, held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article XI although this did not mean that Article VI applied to the exclusion of Article XI:1. On that occasion, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.[171] Precedent also exists as regards India's claim under Article X:3(a) of the *GATT 1994*. In previous disputes, after having found violations of, inter alia, Article I of the *GATT 1994*[172], Article 11.2 of the *Anti-Dumping Agreement*[173] and Article 2.4.1 of the *Anti-Dumping Agreement*[174], the respective Panels did not consider it necessary to examine the Article X:3(a) claims.

7.168 Even if the Panel would have found that the application of the EBR is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, the Panel is of the view that it would not be appropriate to proceed and rule on India's additional *GATT 1994* claims. We note that the text of Article 18.1 of the *Anti-Dumping Agreement* provides that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement." We recall that this reference to the provisions of *GATT 1994* has been interpreted by the Appellate Body as referring to Article VI of the *GATT 1994*. We further recall that the Ad Note is an integral part of Article VI of the *GATT 1994*. We therefore interpret these provisions to mean that the *WTO Agreement*s allow for the imposition of measures which are considered to be specific action against dumping provided they are in accordance with Article VI of the *GATT 1994*, including its Ad Note.[175] Accordingly, we are unable to accept that a measure which constitutes specific action against dumping in accordance with the provisions of the Ad Note, can nevertheless be found inconsistent with other provisions of the *GATT 1994*. For example, if we were to find that the Amended CBD violates the MFN provision of Article I of the *GATT 1994*, such a finding would, as a consequence, render *inutile* the provision in Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note.

7.169 We find additional support for our conclusion in the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. We have found that the Amended CBD constitutes specific action against dumping or subsidisation in accordance with Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*, and thus, is consistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Therefore, our findings under these provisions of the *Anti-Dumping Agreement* must prevail over any potential finding of violation under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*.

7.170 Finally, we consider the Panel's discussion in *US – 1916 Act (Japan)* further relevant to this issue. After finding a violation of Article VI of the *GATT 1994*, the Panel considered whether it must also analyse a claim under Article III:4 of the *GATT 1994*. It held that, in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article III:4. In doing so, the Panel referred to the international law principle *lex specialis derogat legi generali* in

[171] Panel Report, *US – 1916 Act (Japan)*, para. 6.281.
[172] Panel Report, *Indonesia – Autos*, para. 14.152.
[173] Panel Report, *US – DRAMS*, para. 6.92.
[174] Panel Report, *US – Stainless Steel*, para. 6.55.
[175] This finding is, of course, without prejudice to the operation and application of note 24 to Article 18.1 of the *Anti-Dumping Agreement*. In this regard, we note and agree with the Appellate Body's finding in *US – Offset Act (Byrd Amendment)* (para. 262) that "an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidisation, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*." Such action would be governed by other provisions of the *GATT 1994*.

support of its reasoning.[176] The Panel did so by virtue of the Appellate Body's finding in *EC – Bananas III* that:

> "Although Article X:3(a) of the *GATT 1994* and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the *GATT 1994*."[177]

7.171 We agree that the principle of *lex specialis* should apply in such circumstances. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping and countervailing duties, those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by India. Article VI and the Ad Note therefore constitute *lex specialis* that should prevail over the more general *GATT 1994* provisions cited by India.

7.172 For the above reasons, we conclude that it would not be appropriate for us to proceed and rule on India's claims under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*, and we decline to do so.

C. INDIA'S *AS SUCH* CLAIMS

1. Scope of the measure concerned

7.173 As a necessary first step in the analysis of India's *as such* claims, the Panel is to identify the scope of the measure at issue. For its *as such* claims, India has identified as the relevant measure any amendments, clarifications, or extensions comprising the Amended CBD, any related implementing measures, the statutory provision 19 U.S.C. § 1673, and finally the regulatory provision 19 C.F.R. § 113.13.

(a) Scope of the Amended CBD

7.174 As we concluded in Section VII.B.1 above when dealing with the scope of the measure at issue in respect to India's *as applied* claims, the Amended CBD comprises (i) the Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts, published on 23 July 1991; (ii) the July 2004 Amendment;[178] (iii) the document Current Bond Formulas;[179] (iv) the August 2005 Clarification;[180] and (v) as India indicated in its Request for Establishment, "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs."[181] We also recall that a later instrument, the October 2006 Notice, which was not yet published when India submitted its Request for Establishment, has been found by this Panel to be part of the measure concerned and thus within its terms of reference.

(b) The statutory provision 19 U.S.C. § 1673 and the regulatory provision 19 C.F.R. § 113.13

7.175 Having clarified which legal instruments comprise the Amended CBD, the Panel must also address one additional coverage issue: India's request to include the statutory provision 19 U.S.C. §

[176] Panel Report, *US – 1916 Act (Japan)*, para. 6.269.
[177] Appellate Body Report, *EC – Bananas III*, para. 204.
[178] Exhibit IND-3.
[179] Exhibit IND-4.
[180] Exhibit IND-5.
[181] India's first written submission, para. 17.

1673 and the regulatory provision 19 C.F.R. § 113.13 within the scope of the measure at issue. Both provisions were mentioned in India's Request for Establishment but were not included in its Request for Consultations. Unlike with the October 2006 Notice, the United States has strongly contested the inclusion of both provisions within our terms of reference. The United States argues that we should not consider them because they were not mentioned in India's Request for Consultations.

7.176 The Panel will thus consider whether it may consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 as within its terms of reference. The Panel will first look at the circumstances surrounding the inclusion of these two provisions in India's claim. As mentioned, India did *not* refer to these statutory or regulatory provisions in its Request for Consultations.[182] However, in its Request for Establishment, in addition to identifying the legal instruments encompassing the Amended CBD, India stated:

> "[India] understands that the Amended CBD was adopted pursuant to the laws and regulations of the United States that authorize [US Customs] to administer customs laws and regulations including 19 U.S.C. §1484, 19 U.S.C. §1502, 19 U.S.C. §1505, 19 U.S.C. §1623, and 19 U.S.C. §1673g, and the regulations governing the amount and imposition of bonds codified at 19 C.F.R. §113.13, 19 C.F.R. §113.40, 19 C.F.R. §113.62 and 19 C.F.R. §142.2."[183]

7.177 India has commented on the inclusion of these United States customs laws and regulations (which include among them, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13) in its later submissions to the Panel. In its first written submission, India submits that the United States had indicated during the course of consultations that these identical statutory and regulatory provisions authorize US Customs to impose the EBR.[184] India also specified in its first written submission that it considered 19 U.S.C. § 1623(a), 19 C.F.R. § 113.1, and 19 C.F.R. § 113.13 as the authorizing provisions. Subsequently, India clarified that it would focus on 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 with respect to its *as such* claims, claiming that the United States admitted these were the relevant provisions.[185]

7.178 Therefore, for purposes of its *as such* claims, India requests that the Panel consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 alongside the Amended CBD. As an explanation as to why the Panel should consider these provisions within its terms of reference, India argues that the Request for Establishment of a Panel defines the scope of the Panel's terms of reference and there is no requirement of a "precise and exact identity" between the measures subject to consultations and the measures identified in India's Panel request.[186]

7.179 The United States argues that India's claim with respect to 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 is improper since these provisions were not included in India's Request for Consultations and thus do not fall within the Panel's terms of reference. The United States contends that panels are limited to evaluating what was included in the Request for Consultations. Moreover, the United States submits that what may or may not have taken place during consultations is not relevant when reviewing whether a consultation requirement has been met.[187] Regardless of this omission, the

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[182] See WT/DS345/1. India concedes that these measures were not included in its Request. (See India's second written submission, para. 7).

[183] See WT/DS345/6.

[184] India's first written submission, para. 16.

[185] See India's first oral statement, para. 15; India's responses to First Set of Panel Questions, para. 38. In its answers to the First Set of Panel Questions, India reiterated that it wishes to "limit its claims in respect of statute and regulatory provisions to 19 USC. [§]1623 and 19 C.F.R. [§]113.13".

[186] India's second written submission, para. 8.

[187] United States' second written submission, para. 41, citing to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para. 58.

United States argues that these provisions are strictly authorizing provisions and do not require WTO-inconsistent action.

7.180 With the parties views in mind, we now address whether the measure at issue should include 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 within its terms of reference. We indicated what are the terms of reference governing this dispute in paragraph 7.12 above. We explained in paragraphs 7.16-7.19 above that Article 7 of the *DSU* governs the Panel's terms of reference, Article 4 of the *DSU* governs a complainant's request for consultations, and Article 6 of the *DSU* governs a complainant's request for establishment of a panel. We also noted that a panel's terms of reference are governed by the Request for Establishment of a panel.[188] We note that the issue of whether the October 2006 Notice should be included with the Panel's terms of reference has no bearing on whether 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 should also be included, since these provisions are not amendments or modifications to the measure at issue, but altogether separate provisions.

7.181 We adopt the view of the Appellate Body that a panel's terms of reference are governed by the request for establishment of a panel.[189] We also consider this in light of the Article 6.2 of the *DSU*, which requires that the request for establishment of a panel "identify the *specific* measure at issue" (emphasis added), and Article 4.4 of the *DSU*, which provides that any request for consultations must give "identification of the measures at issue". Necessarily then, a panel's terms of reference will include the specific measure as identified in the request for establishment of a panel, and moreover, such a measure should also have been identified in a complainant's request for consultations, to some degree that is less than "specific". Articles 4 and 6, however, do not indicate to what degree the identification of the measure in the request for consultations must relate to the identification of the measure in the request for establishment.

7.182 We therefore must consider if any basis exists, in light of Articles 4 and 6 of the *DSU*, to permit the inclusion of a measure that is mentioned in India's Request for Establishment but not in its Request for Consultations. In attempting to answer this question, we note that the Appellate Body in *Brazil – Aircraft* stated: "Articles 4 and 6 of the *DSU* … set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[190] In this same Report the Appellate Body, however, also rejected the notion that "Articles 4 and 6 of the *DSU* ... require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request of the establishment of a panel."[191] Adhering to its view in *Brazil – Aircraft*, the Appellate Body in *US – Upland Cotton* later cautioned the following:

> "We emphasize that consultations are but the first step in the WTO dispute settlement process. They are intended to 'provide the parties an opportunity to define and delimit the scope of the dispute between them'.[192] We also note that Article 4.2 of the *DSU* calls on a WTO Member that receives a request for consultations to 'accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member'. As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the 'precise and exact identity'[193] between the scope of consultations and

[188] See para. 7.19 above, discussing Appellate Body Report, *US – Upland Cotton*, para. 284.
[189] See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing to Appellate Body Report on *US – Carbon Steel*, para. 124.
[190] Appellate Body Report, *US – Certain EC Products*, para. 70, citing to Appellate Body Report, *Brazil – Aircraft*, para. 131.
[191] Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis orignal).
[192] *(footnote original)* Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[193] *(footnote original)* Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis omitted).

> the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the *DSU*, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise.[194],[195]

7.183 In addition to its views presented in *Brazil – Aircraft* and *US – Upland Cotton*, the Appellate Body has also found that a measure challenged by a party does *not* properly fall within a panel's terms of reference simply because that measure was referred to in the panel request. In *US – Certain EC Products*, the Appellate Body addressed a situation where an action undertaken after the consultations was not identified in the Request for Consultations although it was included in the Request for Establishment.[196] The measure was not the subject of the consultations because it happened after the submission of the consultations request. In its analysis, the Appellate Body developed a standard to consider whether an instrument included in the Request for Establishment but absent from the Request for Consultations could nevertheless be considered as a measure at issue and therefore part of the Panel's mandate: whether the alleged measures at issue are *separate* and *legally distinct* measures.[197]

7.184 In the case before us, India's Request for Consultations is clearly silent in respect of 19 U.S.C. § 1623 and 19 C.F.R. § 113.13. The text of India's Request for Consultations (including its footnotes)[198] refers only to the legal instruments that comprise the Amended CBD (with the exception

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[194] *(footnote original)* Appellate Body Report, *US – Carbon Steel*, para. 124.

[195] Appellate Body Report, *US – Upland Cotton*, para. 293.

[196] See Appellate Body Report, *US – Certain EC Products*, paras. 69-70.

[197] The Appellate Body evaluated one measure at issue in this dispute, the "increased bonding requirements as of 3 March on EC listed products", against a separate measure, the "19 April action" governing the imposition of 100 per cent duties on certain designated products imported from the European Communities. See Appellate Body Report, *US – Certain EC Products*, para. 60.

[198] India's Request for Consultations provides, in relevant part:

> "My authorities have instructed me to request consultations with the United States of America (the 'United States') pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the 'GATT'), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the '*Anti-Dumping Agreement*') and Article 30 of the Agreement on Subsidies and Countervailing Measures (the '*Subsidies Agreement*') with respect to the Customs Bond Directive 99 3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991, as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise subject to Antidumping/Countervailing Duties dated 9 July 2004[1], and any clarifications and amendments thereof[2] (together, the 'Amended Bond Directive').
>
> …
>
> Pursuant to the Amended Bond Directive, the United States has imposed the enhanced bond requirement on importers of the subject merchandise from India.
>
> The Government of India considers that the Amended Bond Directive is inconsistent *as such* ..."

[1] Posted on the Internet Website of the United States Customs and Border Protection Service at http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml, as accessed on 26 May 2006

[2] These include, for example, (i) the document entitled 'Current Bond Formulas', posted on the Internet Website of the United States Customs and Border Protection Service at http://www.cbp.gov /linkhandler/cgov/import/communications_to_trade/pilot_program/

of the October 2006 Notice, an issue which we have already addressed above in Section VII.B.1 above. India in fact concedes that its Request for Consultations does not refer to any US statutory and regulatory provisions.[199]

7.185 With respect to India's reference to 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 in its Request for Establishment, we note that paragraph 7.176 above lists both of these provisions alongside several other US statutory and regulatory measures.

7.186 We thus consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13, as identified in India's Request for Establishment of a Panel but *not* its Request for Consultations. The Panel will not consider the actual statements made during consultations, but only the consultation request and the measures themselves in determination of the scope of the measure. As the Appellate Body in *US – Upland Cotton* explained, referring to the approach adopted by the Panel in *Korea – Alcoholic Beverages*, "...[w]hat takes places in ...consultations is not the concern of a panel".[200]

7.187 In light of the Appellate Body's findings in *US – Certain EC Products* that it is necessary to examine what two measures actually *do* in order to determine the legal relationship between these two measures, we will examine, on the basis of factual findings of the Panel, what the Amended CBD, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 each actually do, or provide for.

7.188 We begin our assessment with the Amended CBD. The texts of the instruments comprising the Amended CBD indicate on their face that the measure addresses the imposition of the EBR to "covered cases" of "special category" merchandise. The August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".[201] To accomplish this end, in particular, the instruments provide formulas to determine the amount of the EBR, establish a methodology for making individualized determinations of enhanced bond amounts for individual exporters/producers, and describe notification and publication requirements. We note finally that the 2004 Amendment[202], 2005 Clarification[203], and October 2006 Notice[204] also each expressly refer to 19 C.F.R. § 113.13 as constituting the laws and regulations for which United States Customs intends to ensure compliance.[205]

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current_bond.ctt/current_bond.doc, on 9 July 2004, as accessed on 26 May 2006; and (ii) the document entitled 'Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases', posted on the Internet Website of the United States Customs and Border Protection Service at http://www.cbp.gov/linkhandler/cgov/import/add_cvd/bonds/bond_clarification.ctt/bond_clarification.doc, as accessed on 26 May 2006." (See WT/DS345/1, p. 1).

[199] See India's second written submission, para. 7

[200] Appellate Body Report, *US – Upland Cotton*, para. 287, citing to Panel Report, *Korea – Alcoholic Beverages*, para. 10.19. The Appellate Body emphasised that no public record of what actually occurs in consultations exists, and parties are also likely to disagree about what was discussed.

[201] Exhibit IND-3, p. 2.

[202] Exhibit IND-3, p. 1.

[203] Exhibit IND-5, p. 1.

[204] Exhibit IND-6, p. 62,276.

[205] The 2006 Notice identifies 19 C.F.R. § 113.13 as the regulation that governs determination of bond amounts. The 2005 Clarification provides that United States Customs has "broad authority under 19 C.F.R. § 113.13 to formulate guidelines to set the amount of continuous bonds". The 2004 Amendment also refers to 19 C.F.R. § 113.13 as the laws and regulations that *authorize* United States Customs to determine if continuous bond amounts are adequate.

7.189 We next turn to 19 U.S.C. § 1623. Section 19 U.S.C. § 1623 permits the Secretary of the Treasury to authorize US Customs to require bonds or other security to facilitate US Treasury revenue collection or to enforce US laws or regulations. This provision provides in pertinent part:

> "In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce."[206]

7.190 Generally, the provisions of 19 U.S.C. § 1623 also govern the conditions and form of the bond, cancellation of a bond, validity of a bond, and making of deposits in lieu of bonds.[207]

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[206] See 19 U.S.C.. § 1623(a).

[207] 19 U.S.C. § 1623 provides in full:

(a) Requirement of bond by regulation. In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

(b) Conditions and form of bond. Whenever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may—

(1) Except as otherwise specifically provided by law, prescribe the conditions and form of such bond and the manner in which the bond may be filed with or, pursuant to an authorized electronic data interchange system, transmitted to the Customs Service, and fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum: Provided, That when a consolidated bond authorized by paragraph 4 of this subsection is taken, the Secretary of the Treasury may fix the penalty of such bond without regard to any other provision of law, regulation, or instruction.

(2) Provide for the approval of the sureties on such bond, without regard to any general provision of law.

(3) Authorize the execution of a term bond the conditions of which shall extend to and cover similar cases of importations over such period of time, not to exceed one year, or such longer period as he may fix when in his opinion special circumstances existing in a particular instance require such longer period.

(4) Authorize, to the extent that he may deem necessary, the taking of a consolidated bond (single entry or term), in lieu of separate bonds to assure compliance with two or more provisions of law, regulations, or instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce. A consolidated bond taken pursuant to the authority contained in this subsection shall have the same force and effect in respect of every provision of law, regulation, or instruction for the purposes for which it is required as though separate bonds had been taken to assure compliance with each such provision.

(c) Cancellation of bond. The Secretary of the Treasury may authorize the cancellation of any bond provided for in this section, or of any charge that may have been made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient. In order to assure uniform, reasonable, and equitable decisions, the Secretary of the Treasury shall publish guidelines establishing standards for setting the terms and conditions for cancellation of bonds or charges thereunder.

(d) Validity of bond. No condition in any bond taken to assure compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce shall be held invalid on the ground that such condition is not specified in the law, regulation, or instruction authorizing or requiring the taking of such bond. Any bond transmitted to the Customs Service pursuant to an authorized electronic data interchange system shall have the same force and effect and be binding upon the parties thereto as if such bond were manually executed, signed, and filed.

(e) Deposit of money or obligation of US in lieu of bond. The Secretary of the Treasury is authorized to permit the deposit of money or obligations of the US, in such amount and upon such conditions as he may by

7.191 Lastly, we consider the provision 19 C.F.R. § 113.13. Section 19 C.F.R. § 113.13, which similarly authorizes a US Customs officer to require security in order to facilitate US Treasury revenue collection or enforce US Customs laws or regulations, provides in pertinent part:

> "Notwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback officer believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security."[208]

7.192 Generally, the provisions in 19 C.F.R. §113.13 also govern minimum bond amounts, guidelines for determining the bond amounts and periodic review of bond sufficiency.[209]

7.193 Based on our analysis of each of the Amended CBD, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 on its face, and in line with the analysis undertaken in *US - Certain EC Products*, we conclude for several reasons that 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are legally distinct from the legal instruments comprising the Amended CBD. As in *US - Certain EC Products*, the Amended CBD and 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 do not provide for the same action. On the one hand, the Amended CBD specifically permits the imposition of the EBR to "covered cases" of "special category" merchandise to secure collection of *anti-dumping* and/or *countervailing duties*, and provides formulas to determine the amount of the EBR as well as a methodology for making individualized determinations. As we noted, the August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".[210] On the other

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regulation prescribe, in lieu of sureties on any bond required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce.

[208] See 19 C.F.R. § 113.13(d).

[209] 19 C.F.R. § 113.13 provides in full:

(a) Minimum amount of bond. The amount of any Customs bond shall not be less than $100, except when the law or regulation expressly provides that a lesser amount may be taken. Fractional parts of a dollar shall be disregarded in computing the amount of a bond. The bond always shall be stated as the next highest dollar.

(b) Guidelines for determining amount of bond. In determining whether the amount of a bond is sufficient, the port director or drawback office in the case of a bond relating to repayment of erroneous drawback payment (See §113.11) should at least consider:

(1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments;

(2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations;

(3) The value and nature of the merchandise involved in the transaction(s) to be secured;

(4) The degree and type of supervision that Customs will exercise over the transaction(s);

(5) The prior record of the principal in honouring bond commitments, including the payment of liquidated damages; and

(6) Any additional information contained in any application for a bond.

(c) Periodic review of bond sufficiency. The port directors and drawback offices shall periodically review each bond filed in their respective port or drawback office in the case of a bond relating to repayment of erroneous drawback payment (See §113.11) to determine whether the bond is adequate to protect the revenue and insure compliance with the law and regulations. If the port director or drawback office determines that the bond is inadequate, the principal shall be immediately notified in writing. The principal shall have 30 days from the date of notification to remedy the deficiency.

(d) Additional security. Notwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback office believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security.

[210] Exhibit IND-3, p. 2.

hand, 19 U.S.C. § 1623 provides the Secretary of the Treasury with a general regulatory power to require or authorize customs officers to require bonds or other forms of security in order to protect the revenue or to assure compliance with a US Treasury or US Customs law, regulation, or instruction. Similarly, 19 C.F.R. § 113.13 generally authorizes a port director to require security in the form of a continuous bond in order to protect Treasury revenue or enforce Customs laws or regulations. In our view, the provisions 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 could in fact address many more circumstances entirely distinct from those envisioned through application of an enhanced bond requirement to "covered cases" of "special category" merchandise. Moreover, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 do not in any way specify particular requirements or limitations related to the imposition of continuous bonds or other types of security requirements, for imports subject to anti-dumping or countervailing duties, other than a $100 minimum amount, as does the Amended CBD. On the basis of these aspects alone of each the Amended CBD, U.S.C. § 1623 and 19 C.F.R. § 113.13, we consider that the Amended CBD is legally distinct from 19 U.S.C. § 1623 and 19 C.F.R. § 113.13.

7.194 We also note that if the Amended CBD were condemned *as such*, the United States would no longer be permitted to require security in the period following a final determination in the original anti-dumping or countervailing duty investigation until final assessment of liability in order to ensure collection of anti-dumping and/or countervailing duties. However, to condemn 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 would limit the United States' ability to impose security requirements to ensure revenue collection in a wide array of circumstances. Based on its design, the Amended CBD does not encompass or necessarily relate to the same breadth of actions or circumstances. This, in our view, enforces the notion that the Amended CBD is legally distinct from the provisions of 19 U.S.C. § 1623 and 19 C.F.R. § 113.13.

7.195 Finally, we address the fact that the Amended CBD refers to 19 C.F.R. § 113.13 as providing authority for the Amended CBD. We do not consider this fact requires us to conclude that the measures (or 19 U.S.C. § 1623) are somehow inextricably linked. Foremost, the Amended CBD and 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are each distinct legal instruments—one a directive, one a statute, and the third a regulation, respectively. Additionally, as we indicated, the authority embodied in 19 C.F.R. § 113.13 applies broadly and generally to many possible situations and circumstances entirely distinct from that provided for in the Amended CBD. When considering the text of 19 U.S.C. § 1623 (i.e. the fact that both the US Treasury Secretary and US Customs Service are authorized to require security), there are even more occasions for which 19 U.S.C. § 1623 authorizes the US Treasury or US Customs to act that in the case of 19 C.F.R. § 113.13. Thus, both 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are inextricably linked to various additional circumstances and occasions that have no connection with or context relevant to the Amended CBD. As we explained, 19 C.F.R. § 113.13 authorizes US Customs officials to require security under any circumstances where a US Customs official considers revenue to be in jeopardy or US Customs laws to be inhibited, and 19 U.S.C. § 1623 more broadly authorizes US Customs officials or US Treasury officials to require security under any circumstances to assure compliance with *any* provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce. Neither of these provisions strictly addresses the purpose of ensuring collection of anti-dumping or countervailing duties for "covered cases" of "special category" merchandise.

7.196 Accordingly, in light of the fact that we concluded that both 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are legally distinct from the Amended CBD we find that 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 should not be considered within the scope of the measure at issue, and thus, are not within Panel's terms of reference.

7.197 Based on the foregoing conclusions, the Panel will consider the October 2006 Notice and other instruments comprising the Amended CBD for purposes of resolving India's *as such* claims, but will not address 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 in connection with this dispute.

2. Whether the measure at issue may be challenged "*as such*"

7.198 We next consider whether the measure at issue in this dispute may properly be challenged *as such*. According to India, the Amended CBD may be challenged *as such* because together these provisions constitute "rules and norms of general and prospective application that require US Customs to undertake impermissible specific actions against dumping and subsidization by taking security in every case in which it perceives a risk of being unable to collect anti-dumping or countervailing duties at liquidation that it fears may be higher than the duty rates determined on the basis of the final affirmative determination".[211] The United States has argued that India has not sufficiently stated its *as such* claims to merit consideration by this Panel.

7.199 Under WTO law, an *as such* claim challenges "laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations."[212]

7.200 The Appellate Body indicated in *US — Corrosion-Resistant Steel Sunset Review* that "in principle, any act or omission attributable to a WTO Member can be a 'measure' of that Member for purposes of dispute settlement proceedings".[213] The Appellate Body further elaborated on this concept:

> "[I]nstruments of a Member containing rules or norms could constitute a 'measure' irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if ... instruments could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged *as such*, but only in the instances of their application. Thus, allowing claims against measures, *as such*, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[214]

7.201 The concept of what constitutes a measure that may be challenged *as such* was discussed in GATT jurisprudence:

> "In the practice under the GATT, most of the measures subject, *as such*, to dispute settlement, were *legislation*. We nevertheless observed in *Guatemala – Cement I* that, in fact, a broad range of measures could be submitted, *as such*, to dispute settlement:
>
> > In the practice established under the *GATT 1947*, a 'measure' may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government

[211] India's responses to First Set of Panel Questions, para. 42. In its first oral submission, India contends that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion. (See India's first oral statement, para. 16; see also India's second written submission, para. 18).

[212] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[213] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[214] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

> (see *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116)[215]."[216]

7.202 The Appellate body has clarified that both mandatory and non-mandatory measures alike could be challenged *as such* in relation to claims brought under the *Anti-Dumping Agreement*[217]:

> "Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the *Anti-Dumping Agreement*. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.[218] If some of these types of measure could not, *as such*, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of 'conformity' set forth in Article 18.4."[219]

7.203 Regarding the form that a measure must take in order for it to be challenged *as such*, in *US – Zeroing (EC)*, the Appellate Body explained the following:

> "[w]hen an '*as such*' challenge is brought against a 'rule or norm' that is expressed in the form of a written document – such as a law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged."[220]

7.204 In the dispute before us, we note that the Amended CBD is indeed a rule or norm in the form of a written document that directs the United States to act –in this case, to impose continuous bond security requirements on designated "covered cases" of "special category" merchandise, i.e. shrimp imported from India currently subject to an anti-dumping order. We therefore conclude that the Panel may properly evaluate the measure at issue, the Amended CBD, with respect to India's *as such* claims, regardless of whether these measures are mandatory or discretionary.

3. The "mandatory/discretionary" distinction as an analytical tool

7.205 As a final preliminary matter, we consider whether the "mandatory/discretionary" distinction should be applied when evaluating India's *as such* claims.

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[215] (*footnote original*) Appellate Body Report on *Guatemala – Cement I*, footnote 47 to para. 69. We note, too, that the panel in *Japan – Semi-Conductors* referred (in para. 107) to another GATT case, *Japan – Agricultural Products I*, where the panel also examined a measure composed, at least in part, of administrative guidance.

[216] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 85. The Appellate Body also refers to the finding in *US – 1916 Act* that Article 17.4 does not place any limit on a panel's jurisdiction to entertain claims against legislation *as such* (See Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 83).

[217] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

[218] (*footnote original*) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

[219] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

[220] Appellate Body Report, *US – Zeroing (EC)*, para. 197.

7.206 India submits that the "mandatory/discretionary" distinction is no longer applicable. India argues that the discretion provided by the Amended CBD assessed together with 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 to undertake impermissible specific action against dumping and subsidisation, renders these provisions WTO-inconsistent *as such*.[221]

7.207 The United States argues that Amended CBD provides US Customs with discretion to apply additional bond requirements on importers, and thus, in light of the "mandatory/discretionary" distinction, is not *as such* WTO-inconsistent.

7.208 The controversial "mandatory/discretionary" distinction was early on developed as an approach under the GATT system to address *as such* claims. Panels that applied the distinction considered whether a disputed measure may only be inconsistent with a GATT or WTO obligation because it *mandates* a violation, or *precludes* action that is consistent with an obligation, or whether the disputed measure may be considered as inconsistent even where the national authorities have *discretion* to apply the measure. In *US – Tobacco*[222] and *US – 1916 Act*[223], for instance, legislation that merely gave discretion to an authority to violate GATT or WTO obligations could not be condemned *as such* but could still be challenged and condemned *as applied*.

7.209 The scope of applicability of the "mandatory/discretionary" distinction has been a source of debate among WTO members and in WTO jurisprudence. We are aware that the Appellate Body has explained that panels are *not* obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory.[224] For the Appellate Body, "this issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, *as such*, inconsistent with particular obligations."[225] However, the Appellate Body in the same Report commented more broadly on the need to exercise caution when applying the "mandatory/discretionary" distinction[226]:

> "[W]e have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the Mandatory/Discretionary distinction.[227] Nor do we

[221] In its first oral statement, India does not substantively differentiate between amending a provision in a United States anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion: See India's first oral statement, para. 16.

[222] See GATT Panel Report, *US – Tobacco*, para. 118.

[223] Appellate Body Report, *US – 1916 Act*, para. 88.

[224] See Section VII.C.2 above.

[225] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also, *US – Export Restraints*: The Panel declined to consider the "mandatory/discretionary" distinction as a threshold consideration, and instead identified and addressed the relevant WTO obligations first to assess how the legislation at issue addressed those obligations and whether any violation arose from that (*US – Export Restraints*, paras. 8.11-8.13); *US – Tobacco*: The GATT Panel first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and then considered in light of those findings whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules (*US – Tobacco*, para. 123).

[226] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[227] (*footnote original*) In our Report in *United States – 1916 Act* , we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the "mandatory/discretionary" distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the *Anti-Dumping Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*". (Appellate Body Report, *US – 1916 Act*, para. 99). We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United

> consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'Mandatory/Discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."[228]

7.210 Other recent Appellate Body and panel reports have also recognized the import of the distinction as a technique for evaluating *as such* claims and applied the tool to their analysis, but similarly declined to examine its continuing relevance.[229]

7.211 We likewise consider it unnecessary to undertake a comprehensive examination of the "mandatory/discretionary" distinction in the abstract. Instead, we will address this issue only to the extent necessary in light of our analysis of each of the provisions challenged *as such* by India in this proceeding.

States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

[228] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93. In that case, the Appellate Body reversed Panel's finding that the Sunset Policy Bulletin was *not* a mandatory legal instrument, thereby eliminating the need to assess the continuing relevance of the "mandatory/discretionary" distinction. See Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 100.

[229] E.g. in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the United States argued that the Panel had erred when it considered whether Section 751(c)(4)(B) of the Tariff Act *could* breach Article 11.3 of the *Anti-Dumping Agreement*, rather than considering whether the statute *mandates* a breach. The Appellate Body concluded that the amended waiver provisions do not preclude the USDOC from making a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the *Anti-Dumping Agreement*, and do not preclude the USDOC from considering other evidence on the record of the sunset review. (See Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 14–20, 120-121). In *US – Zeroing (EC)* the Appellate Body reiterated its previous statements on the "mandatory/discretionary" distinction in *US – Corrosion-Resistant Steel Sunset Review* that "... as with any such analytical tool, the import of the '"mandatory/discretionary" distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.) (See Appellate Body Report, *US – Zeroing (EC)*, paras. 206-214.) In *Mexico – Anti-Dumping Measures on Rice*, Mexico argued that a provision was WTO consistent because it was not mandatory. The Panel had found that "...by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, [the provision] of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the [*Anti-Dumping Agreement*] or *SCM Agreement*". Moreover, the Panel stated, "[w]hen a law like the Act provides that it 'shall be the responsibility of the Ministry to punish the following infringements', (citation omitted) it does more than just dividing competences among the government, but rather stipulates that fines are to be imposed in case the conditions of [the provision] of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines." [See Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.278 and 7.279.] Mexico argued on appeal that the Panel had failed to read the challenged provisions in the light of another provision, which would have would have led the Panel to conclude that the measure allowed for discretion to act in a manner consistent with its obligations under the *WTO Agreement*s. The Appellate Body rejected this argument. (See Appellate Body Report on *Mexico – Anti-Dumping Measures on Rice*, paras. 271-272.) In *Korea – Commercial Vessels* the Panel found that there had *not* been a rejection by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* of the use of the traditional "mandatory/discretionary" distinction *per se*. The Panel proceeded to resolve the EC's "*as such*" claims on the basis of whether or not the measure at issue mandates the provision of export subsidies. (See Panel Report, *Korea – Commercial Vessels*, paras. 7.58-7.67.) In *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated in footnote 334: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation." (See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, footnote 334.)

7.212 In reviewing each of India's claims *as such*, we will consider each of the instruments comprising the Amended CBD on its face. The Appellate Body has pronounced on the burden of proof and relevant evidence to sustain an *as such* claim with respect to legislation:

> "A responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, *as such*, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[230]

7.213 The Appellate Body has also emphasized that the following:

> "When a measure is challenged '*as such*', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure *as such* can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required …"[231]

7.214 Accordingly, this Panel will apply the "mandatory/discretionary" distinction as an analytical tool where necessary to evaluate India's *as such* claims. We are, however, cognizant of the need to avoid applying it mechanistically.

4. Application of the "mandatory/discretionary" distinction in this dispute

7.215 Due to our import of the "mandatory/discretionary" distinction for the purpose of evaluating each of India's *as such* claims, we will analyse whether the measure is on its face mandatory or discretionary. The Panel will thus analyse each of the instruments that comprise the Amended CBD on its face.

7.216 We first consider the July 2004 Amendment. The July 2004 Amendment provides that "Port Directors *will be required to review* continuous bonds for importers who import agriculture/aquaculture merchandise subject to anti-dumping and countervailing duty cases *and obtain larger bonds where necessary*".[232] The July 2004 Amendment further provides that Port Directors will be required to review continuous bonds for cases where USDOC has issued a preliminary affirmative determination in an agriculture/aquaculture case, or in the case of new shippers with no prior history of agriculture/aquaculture imports. Finally, we note that the July 2004 Amendment provides that "if [United States Customs] determines any comparable risk with other commodities, a similar review of bond coverage will be performed".[233]

7.217 Similar to the July 2004 Amendment, the August 2005 Clarification authorizes US Customs to designate a "covered case" of "special category" merchandise and apply the EBR to importers

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[230] Appellate Body Report, *US – Carbon Steel*, para. 157 (footnote omitted); Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111 and Appellate Body Report, *US – Gambling*, para. 138.

[231] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112.

[232] See Exhibit IND-3, p. 1 (emphasis added).

[233] Exhibit IND-3, p. 2..

whether subject to an anti-dumping duty order or an affirmative preliminary determination, and for new importers with no prior history of importers of the subject merchandise. The 2005 Clarification reiterates that "[s]pecial categories can be designated where additional bond requirements in the form of greater continuous entry bonds or other security *may be required*".[234] Unlike the July 2004 Amendment, however, the Clarification provides that "[US Customs] may adjust the rates used in the formulas set forth above to calculate different bond amounts as circumstances warrant and to address risks experiences with cases where the [USDOC] deposit rate is 0 percent".[235]

7.218 We next consider the October 2006 Notice. The United States describes the October 2006 Notice as constituting 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".[236] Similar to the August 2005 Clarification, the October 2006 provides that "[US Customs] will only designate Special Categories, that is, merchandise for which an enhanced bond amount *may be required*"[237], and, "Special Categories *may be designated* when additional requirements in the form of greater continuous entry bonds or other security *may be required*."[238] However, the 2006 Notice provides that "[US Customs] *may* decide not to require an increased bond amount even though the principal imports Special Category merchandise".[239] The October 2006 Notice also refers to a process that permits importers to attain individualized determinations for EBR amounts. According to the October 2006 Notice, "[i]mporters will be offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and [United States Customs] will determine bond amounts based on that information, the importer's compliance history, and other relevant information available..."[240] Without an importer's submission, the Notice indicates: "[US Customs] *may calculate* the bond amount using the formulas determined on the basis of the risk of non-collection".[241] The 2006 Notice concludes with the statement: "Congress has provided [US Customs] authority to require security in order to ensure the payment of all duties determined to be due to the United States..."[242]

7.219 The document titled "Current Bond Formulas" contains illustrations of the application of the formulas provided in the Amended CBD. We do not find it necessary to consider this document for purposes of determining whether the measure at issue is mandatory or discretionary.

7.220 Based on a review of the text of each of these instruments, we preliminarily conclude that the provisions are not binding on Port Directors, or US Customs more broadly. In other words, the Amended CBD on its face does not appear to require US Customs to designate a particular "covered case" or "special category" of merchandise in order to further impose the EBR to the subject merchandise. In particular, the October 2006 Notice, which represents the United States' most recent publication describing the Amended CBD, indicates that Congress has provided US Customs with the authority to impose enhanced continuous bond amounts. We interpret the language of the October 2006 Notice to reflect an important and inherent limitation on the scope of the Amended CBD. Namely, the Amended CBD instructs US Customs that it may impose the EBR of "covered cases" of "special category" merchandise, and even provides specific instructions for applying the standard formula or making individualized determinations for particular importers. However, the instruments that comprise the Amended CBD (the July 2004 Amendment, August 2005 Clarification, and October

[234] Exhibit IND-4, p. 2 (emphasis added).
[235] Exhibit IND-4, p. 4.
[236] Exhibit IND-6, p. 62,277.
[237] Exhibit IND-6, p. 62,277 (emphasis added).
[238] Exhibit IND-6, p. 62,277 (emphasis added).
[239] Exhibit IND-6, p. 62,278.
[240] Exhibit IND-6, p. 62,277.
[241] Exhibit IND-6, p. 62,278 (emphasis added).
[242] Exhibit IND-6, p. 62,277.

2006 Notice) do not require that US Customs designate "covered cases" or "special category" merchandise subject to an anti-dumping order prior to applying the EBR. It is in this sense that the August 2005 Clarification provides that "Special Categories of merchandise can be designated where additional bond requirements in the form of greater continuous entry bonds or other security may be required".[243] The October 2006 Notice uses identical language.[244] Rather, the August 2005 Clarification and October 2006 Notice only provide criteria that may be considered to identify "special categories" or "covered cases", such as previous collection problems of a specific industry, the capitalization level of the industry, the projected ability of the industry to pay future duty liabilities, whether the industry is highly leveraged, the history of revenue collection problems of the industry, whether the industry has low duty rates or was duty free previously, and other factors.[245]

7.221 We supplement our analysis with an evaluation of the application of the Amended CBD to date. Primarily, we observe that US Customs has as of yet only designated one "covered case", and thus has only applied the EBR to subject shrimp importers. This has occurred in practice, despite the fact, as the United States revealed, that US Customs has imposed an anti-dumping order on at least one other product in the agriculture/aquaculture category of merchandise, certain orange juice from Brazil, since publication of the Amended CBD. Potentially, US Customs' decision not to apply the EBR to importers of certain orange juice from Brazil could relate to the inherent characteristics of the industry as assessed by US Customs, such as previous collection problems in the industry, the capitalization level of the industry, the projected ability of the industry to pay future duty liabilities, whether the industry is highly leveraged, and so forth. In addition, outstanding anti-dumping orders are in place on other categories of agriculture/aquaculture merchandise, such as crawfish and honey, yet importers of these products are not subject to the EBR. These realities, in our view, indicate that the Amended CBD does not require US Customs to impose the EBR on importers, which would, as India argues, mandate WTO-inconsistent behaviour. In particular, this is telling in the case of outstanding orders on products such as crawfish, where risks of margins increases and default have been alleged, thus suggesting enhanced continuous bond amounts would also be "necessary" within the meaning of the Amended CBD. Instead the Amended CBD functions as a guideline to US Customs officials. Indeed the instruments that comprise the Amended CBD define themselves as "guidelines" in their titles.

7.222 We further note the decision by the USCIT from 13 November 2006 regarding several importers' request for a preliminary injunction against the EBR. The USCIT found US Customs appeared to have *discretion* under US law to consider potential anti-dumping or countervailing duty in setting continuous bond amounts.[246]

7.223 We will also address India's position that the Amended CBD is *as such* inconsistent because the Amended CBD allows for impermissible specific action against dumping or subsidisation by imposing the EBR in every case in which the United States concludes that there is a likelihood of increase in dumping margins or the amount of subsidy found to exist between the final determination and the final assessment in an administrative review. India considers this approach to be consistent with that taken by the panel and upheld by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*[247]. In that case, the United States argued that a Mexican anti-dumping provision allowing for the imposition of a fine for importers which enter products subject to anti-dumping or countervailing duty investigations while such investigations are underway was an impermissible specific action against dumping. Mexico argued that this provision was WTO consistent because it was not

[243] See Exhibit IND-4, p. 2.
[244] See Exhibit IND-6, p. 62,277.
[245] See Exhibit IND-4, pp. 2-3; Exhibit IND-6, p. 62,277.
[246] See Exhibit IND-16, p. 42.
[247] See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 330; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.278-7.279.

mandatory. The Panel concluded that "...by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, [the provision] of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the [*Anti-Dumping Agreement*] or *SCM Agreement*"[248]. With respect to Mexico's argument that the provision was discretionary and thus, not WTO-inconsistent, the Panel provided:

> "When a law like the Act provides that it 'shall be the responsibility of the Ministry to punish the following infringements',[249] it does more than just dividing competences among the government, but rather stipulates that fines are to be imposed in case the conditions of [the provision] of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines."[250]

7.224 Mexico subsequently argued before the Appellate Body that the Panel erred in failing to recognize that the challenged provisions of the FTA are "discretionary" measures that permit the investigating authority to apply them in a WTO-consistent manner.[251] The Appellate Body rejected this argument and found that Mexico improperly failed to bring its claim under Article 11 of the *DSU*.[252]

7.225 We cannot conclude that India's position concerning the findings in *Mexico – Anti-Dumping Measures on Rice* is relevant to the dispute before us. In that case, the Panel found and the Appellate Body agreed that the measure at issue was an impermissible specific action against dumping and subsidization and was therefore, *as such* inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* because it "stipulated" that the ministry responsible for anti-dumping and countervailing duty investigations impose fines in cases where conditions of the measure were met. However, in our case, we do not find that in every occasion that the United States imposes the EBR on importers of a category of merchandise subject to an anti-dumping order its imposition constitutes an impermissible specific action against dumping or subsidisation.

7.226 In our findings presented in Section VII.B.2(b)(iii) above, we determined that the application of the EBR to subject shrimp from India was unreasonable. However, despite the fact that the application of the EBR to subject shrimp constituted an impermissible specific action against dumping in violation of Article 18.1 of the *Anti-Dumping Agreement*, we explained in Section VII.B.2(b)(iii) above that the Ad Note authorises the imposition of security requirements during the period following imposition of a US anti-dumping (or countervailing) duty order so long as the security is reasonable. Thus it would be possible for the United States to apply reasonable security to protect against increases in future anti-dumping duty rates as long as an appropriate basis existed to determine that rates of dumping provided for in the anti-dumping order were likely to increase following a final determination in the original investigation. Based on these findings, we are unable to conclude that a violation will occur for *every* application of the EBR to importers of a designated category of merchandise. In contrast, the measure in *Mexico – Anti-Dumping Measures on Rice* was determined to be an impermissible specific action against dumping which was not permitted under any provision of the *GATT 1994*, the *Anti-Dumping Agreement* or the *SCM Agreement*.

7.227 We therefore find that the Amended CBD on its face allows US Customs to exercise discretion to designate "covered cases" and "special category" merchandise in order to impose the

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[248] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.278.
[249] (*footnote original omitted*).
[250] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.279.
[251] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 271.
[252] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 272-274.

EBR, and is thus not mandatory in nature. Moreover, contrary to India's stance, each application of the EBR via the Amended CBD may not constitute an impermissible specific action against dumping in violation of the *GATT 1994* and the *Anti-Dumping Agreement* or a specific action against subsidisation in violation of the *GATT 1994* and the *SCM Agreement*.

5. Whether the Amended CBD is inconsistent *as such* with Articles 1 and 18.1 of the *Anti-Dumping Agreement,* Articles 10 and 32.1 of the *SCM Agreement,* and the Ad Note

7.228 The Panel notes that India originally made separate *as such* claims with respect to Articles 1 and 18.1 of the *Anti-Dumping Agreement*, on the one hand and the Ad Note, on the other hand. For purposes of our analysis, we are considering these claims together. Additionally, in the context of India's *as such* claims under the *SCM Agreement*, India originally made separate *as such* claims with respect to Articles 10 and 32.1 of the *SCM Agreement* and the Ad Note. We will also consider these claims together.

(a) Main arguments of India

7.229 We note that India's arguments related to its *as such* claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement*, Articles 10 and 32.1 of the *SCM Agreement*, and the Ad Note are substantially the same as those made in relation to its *as applied* claims under those provisions. India claims that the Amended CBD provides for specific action against dumping and subsidisation that is inconsistent *as such* with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*, and is not in accordance with the provisions of the Ad Note. According to India, the Amended CBD is a "specific action" with respect to dumping and subsidisation because an inextricable link exists between the measure and the constituent elements of dumping or of subsidisation as evidenced by the text of the directive. India also submits that the Amended CBD has a serious, adverse impact on importers due to increased bond amounts and surety requirements and, therefore, is "against" dumping or subsidisation. India contends that the Amended CBD is not a permissible response to dumping or subsidisation in accord with any provision Article VI of the *GATT 1994* (including the Ad Note) as interpreted by the *Anti-Dumping Agreement* or *SCM Agreement*. India submits that the measure does not involve a price undertaking by exporters, is not a provisional measure within the meaning of Articles 7 of the *Anti-Dumping Agreement* and Articles 17 of the *SCM Agreement*, and is not within the meaning of the Ad Note. India also submits that it does not satisfy the restrictions imposed by Article 9 of the *Anti-Dumping Agreement* or Article 19 of the *SCM Agreement* governing the collection of definitive anti-dumping or countervailing duties. Finally, India claims that the Amended CBD cannot be justified under either footnote 24 of the *Anti-Dumping Agreement* or footnote 56 of the *SCM Agreement* because the Amended CBD is not merely related to dumping or subsidisation but is specific action against dumping or subsidisation governed by Article VI of the *GATT 1994*.

7.230 Assuming *arguendo* that the Amended CBD is permitted under the Ad Note, India contends that application of the EBR to any case of subject merchandise could not constitute reasonable security within the meaning of the Ad Note. India considers the requirement for security at a rate of 100 per cent of the duties owed on the previous 12 months' imports at the rate set in the relevant anti-dumping or countervailing duty order is overly burdensome.

(b) Main arguments of the United States

7.231 The United States rejects India's claims that the Amended CBD *as such* constitutes impermissible specific action against dumping and subsidisation that is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. According to the United States, the Amended CBD *as such c*annot constitute specific action against dumping because it does not require importers to comply with the EBR. Moreover, the United States submits

that US Customs retains discretion as to whether to impose the EBR at all, either to an entire category of merchandise or on an individual importers/principal basis. According to the United States, the Amended CBD addresses non-collection problems related to anti-dumping duties and is thus only related to dumping or subsidisation in the sense that unsecured liability is anti-dumping or countervailing duty liability. The United States points to the text and design of the Amended CBD in arguing that the constituent elements of dumping or subsidisation are not built into the directive. The United States submits that the Amended CBD is not "against" dumping or subsidisation because evidence does not support the conclusion that the Amended CBD adversely affected subject imports or dissuaded dumping.

7.232 The United States also argues that bond amounts required under the Amended CBD constitute reasonable security during the period following a final determination but prior to a final assessment review in a dumping or subsidisation investigation, under the Ad Note and therefore, the Amended CBD is in accordance with the provisions of *GATT 1994*. The US argues that the "final determination of the facts" in the text of the Ad Note refers to the determination of the facts with respect to the payment of anti-dumping or countervailing duty which occurs in a retrospective assessment system following an assessment review. In a retrospective system, the US argues that dumping or subsidisation is suspected until completion of an assessment review.

(c) Evaluation by the Panel

7.233 The provisions of Article 1 and 18.1 of the *Anti-Dumping Agreement* appear in paragraphs 7.26-7.27 above.

7.234 We note that the provisions in Articles 10 and 32.1 of the *SCM Agreement* governing countervailing duty investigations are substantively similar to those in Articles 1 and 18.1 of the *Anti Dumping Agreement*. Article 10 of the *SCM Agreement* reads:

> *"Application of Article VI of GATT 1994*[253]
>
> Members shall take all necessary steps to ensure that the imposition of a countervailing duty[254] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of the *GATT 1994* and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[255] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture."

[253] (*footnote original*) The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[254] (*footnote original*) The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of *GATT 1994*.

[255] *(footnote original*) The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

7.235 Article 32.1 of the *SCM Agreement* reads: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement."[256]

7.236 We recall in Section VII.C.4 above that we concluded that the Amended CBD is not a mandatory measure, in the sense that the United States has discretion to impose the EBR on designated categories of designated merchandise subject to an anti-dumping or countervailing duty order. More importantly, however, we recall our finding that the EBR does not constitute an impermissible specific action against dumping or subsidisation in *every* occasion that it is imposed on importers of a "covered case" or "special category" merchandise subject to an anti-dumping or countervailing duty order. We based this finding on our earlier determination in Section VII.B.2(b)(iii) above related to India's *as applied* claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement* that the Ad Note permits a WTO Member to require reasonable security in the period between a final determination in the original investigation until the final assessment review in a retrospective duty assessment system. In light of this finding, we do not agree with India's position that the Amended CBD *as such* necessarily constitutes an impermissible specific action against dumping in every case to which it is applied. For the foregoing reasons, we accordingly conclude that the Amended CBD *as such* does not violate Article 18.1 of the *Anti-Dumping Agreement* or the Ad Note.

7.237 We note that India has also made an *as such* claim under Article 1 of the *Anti-Dumping Agreement*. That claim is necessarily dependent on India's Article 18.1 claim. Since we have found that the Amended CBD *as such* is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, we likewise find that it does not *as such* violate Article 1 of the *Anti-Dumping Agreement*.

7.238 Based on our reasoning that the Amended CBD does not constitute an impermissible specific action against dumping in every case to which it is applied, we also conclude that the Amended CBD *as such* does not constitute an impermissible specific action against subsidisation, and thus does not violate Article 32.1 of the *SCM Agreement as such*. Due to the consistency of the Amended CBD with Article 32.1 of the *SCM Agreement*, we also find that the Amended CBD *as such* does not violate Article 10 of the *SCM Agreement.*

6. Articles 7.1(iii), 7.2, and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c). 17.2 and 17.4 of the *SCM Agreement*

(a) Main arguments of India

7.239 India argues that the Amended CBD *as such* violates Articles 7.1(iii), 7.2, and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c), 17.2 and 17.4 of the *SCM* Agreement. These arguments are similar to those made in relation to India's claim that the EBR *as applied* to subject shrimp importers violates Article 7 of the *Anti-Dumping Agreement*, which are presented in Section VII.B.3 above. India explains that it considers it necessary to evaluate the consistency *as such* of the Amended CBD also with the provisions of Article 7 of the *Anti-Dumping Agreement* and of Article 17 of the *SCM Agreement* based on the following premise: the Amended CBD does not make provision for the termination of the EBR after the issuance of an anti-dumping or countervailing duty order and thus provides for the imposition of the EBR as a provisional measure to importers of covered merchandise after a preliminary affirmative determination in an investigation but prior to the issuing of an order in

[256] (*footnote original*) This paragraph is not intended to preclude action under other relevant provisions of the *GATT 1994*, where appropriate.

an anti-dumping or countervailing duty case.[257] According to India, the application of the EBR following issuance of an order violates the express limitations governing provisional measures and is thus *as such* inconsistent with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement.*

7.240 Based on its argument that the Amended CBD provides for the imposition of a provisional measure, India also claims that the Amended CBD *as such* violates Articles 7.1(iii) of the *Anti-Dumping* Agreement and Article 17.1(c) of the *SCM Agreement* because it is not designed as a measure necessary to prevent injury being caused during an investigation.[258] India asserts that, under Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*, it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". However, according to India, the stated reasons for introducing the EBR do not mention injury being caused during the investigation at all and focus rather on protecting revenue against any failure on the part of importers to pay the duties finally assessed and ensuring that payments are made to domestic industry pursuant to the CDSOA that was held to be inconsistent with the obligations of the United States in *US – Offset Act (Byrd Amendment)*. India therefore submits that, if the EBR is a provisional measure, it is inconsistent *as such* with Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*.

7.241 India asserts that the Amended CBD *as such* is also inconsistent with Article 7.2 of the *Anti-Dumping Agreement* and with Article 17.2 of the *SCM Agreement*, since provisional measures, whether in the form of a cash deposit or a bond, may not be for an amount in excess of the "provisionally estimated margin of dumping" or the "provisionally calculated amount of subsidization", as the case may be. India argues that the requirement to provide cash deposits in addition to the EBR clearly exceeds the provisionally estimated margin of dumping.

7.242 Finally, India argues that the Amended CBD *as such* is inconsistent under Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement* to the extent that the EBR is introduced or remains in place on any date after six months have elapsed in the case of an anti-dumping case or after four months have elapsed in the case of a countervailing duty case from the date on which provisional measures are first imposed. If security required under the Amended CBD would not be released until liquidation at least one year following imposition of an anti-dumping order, then any application of the EBR prior to a final determination of dumping in an original investigation would fail to satisfy the limitations imposed by Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement*.

7.243 India thus submits that the Amended CBD *as such* is inconsistent with Article 7 of the *Anti-Dumping Agreement* and with Article 17 of the *SCM Agreement*.

(b) Main arguments of the United States

7.244 As with India's *as applied* claims related to Article 7 of the *Anti-Dumping Agreement*, the United States submits that Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* does not apply to the EBR. The United States argues that India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* regarding provisional measures (*i.e.*, measures taken

[257] Thus, the Notice states that the Enhanced Bond Requirement may be imposed on importers where US Customs "… detects sudden changes in declared values, claimed country of origin or declared classification, etc. …"

[258] India's first written submission, para. 86.

prior to a final determination of dumping or subsidization).[259] The United States asserts that the bond directive, however, is a security requirement imposed *after* the final determination of dumping or subsidization, pending "determination of the final liability for payment of anti-dumping duties," and is therefore not a "provisional measure" within the meaning of Article 7 of the *Anti-Dumping Agreement* or Article 17 of the *SCM Agreement*.

7.245 With respect to India's argument that the Amended CBD applies in the period prior to the issuance of the order and therefore constitutes a "provisional measure" inconsistent, *as such* with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*,[260] the United States asserts that the October 2006 Notice makes clear that the directive no longer covers additional bond amounts requested prior to issuance of an order.[261]

(c) Evaluation by the Panel

7.246 We first note the relevant provisions as discussed by India in its claims under Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*.

7.247 The text of the relevant provisions under Article 7 of the *Anti-Dumping Agreement* appears in Section VII.B.3 above.

7.248 In addition, Article 17.1(c) of the *SCM Agreement* provides:

> "Provisional measures may be applied only if:
>
> (c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation."

7.249 Article 17.2 of the *SCM Agreement* provides:

> "Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization."

7.250 Article 17.4 of the *SCM Agreement* provides:

> "The application of provisional measures shall be limited to as short a period as possible, not exceeding four months."

7.251 The Panel will begin its analysis by considering the text of the Amended CBD. We note that the United States' most recent instrument on record discussing the Amended CBD is the October 2006 Notice. This Notice does not explicitly address the question of whether or not the EBR could be applied before the imposition of an anti-dumping or countervailing duty order. Nevertheless, we consider that certain parts of the Notice clearly indicate that the EBR could not be applied as a provisional measure. For instance, the 2006 Notice provides that the "amount of additional [bond] coverage" will be calculated using a formula incorporating the "AD/CVD rate established in DOC Order (or the rate established in the most recently completed administrative review)."[262] To the extent that the October 2006 Notice provides that the formula for calculating the amount of the EBR refers to

[259] India's first written submission, para. 92 (asserting that "[i]t is clear that the 'reasonable security (bond or cash deposit)' referred to in the Ad Note is the same as the provisional measures referred to in Article 7 of the *Anti-Dumping Agreement*.").

[260] India's first written submission, para. 85.

[261] Exhibit IND-6, p. 62,277 (cf. Exhibit IND-3, pp. 2-3).

[262] Exhibit IND-6, p. 62,277.

the rate of dumping set forth in the anti-dumping or countervailing duty order (or most recent assessment review), the October 2006 Notice does not on its face permit the imposition of the EBR prior to the completion of a final determination in the US retrospective duty assessment system, which precedes publication of an anti-dumping or countervailing duty order. For this reason, in our view, the language of the October 2006 Notice does not provide for the imposition of provisional measures. Provisional duties would only apply prior to the completion of the original anti-dumping or countervailing duty investigation. Therefore, Article 7 of the *Anti-dumping Agreement* or Article 17 of the *SCM Agreement* are not applicable to the Amended CBD.

7.252 To complete our analysis for India's claims under Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*, we also consider the July 2004 Amendment, August 2005 Clarification, and the Current Bond Formulas document. Unlike the October 2006 Notice, we note that each of these documents presents a formula to calculate an EBR amount with respect to importers of "special category" or "covered case" merchandise subject to a preliminary affirmative determination of dumping or subsidisation. The inclusion of this formula in the July 2004 Amendment, August 2005 Clarification, and the Current Bond Formulas document suggests that the Amended CBD did or still does govern applications prior to a final affirmative determination of dumping or subsidisation. In our view, however, we consider the October 2006 Notice to have amended the measure at issue. We noted in the preceding paragraph that the October 2006 Notice does not explicitly address the question of whether or not the EBR could be applied before the imposition of an anti-dumping or countervailing duty order. Specifically, the October 2006 Notice does not include a formula to calculate an EBR amount with respect to importers of "special category" or "covered case" merchandise subject to a preliminary affirmative determination of dumping or subsidisation. We consider this to be an intentional omission in light of language elsewhere in the Notice (i.e., that the "amount of additional [bond] coverage" will be calculated using a formula incorporating the "AD/CVD rate established in DOC Order (or the rate established in the most recently completed administrative review)"). Due to the absence of such a formula in the October 2006 Notice, and in light of our view that the October 2006 Notice serves to amend the measure at issue with respect to the EBR's application prior to the imposition of an anti-dumping or countervailing duty order, we conclude that the Amended CBD does not provide for the application of the EBR as a provisional measure. Our conclusion also accords with the United States' position that the Amended CBD no longer covers additional bond amounts requested prior to issuance of an order.

7.253 We therefore conclude that the Amended CBD *as such* is not inconsistent with Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement* or Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement*.

7. Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*, Articles 19.2, 19.3 and 19.4 of the *SCM Agreement*, and Article VI:3 of the *GATT 1994*

(a) Main arguments of India

7.254 We note that India has presented identical arguments for its *as such* claims under Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3 and 19.4 of the *SCM Agreement*, as for its *as applied* claims under Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*. These arguments are presented in Section VII.B.4 above.

(b) Main arguments of the United States

7.255 The United States arguments in relation to India's applied claims under Article 9 of the *Anti-Dumping Agreement* presented in Section VII.B.4 above, also remain relevant for India's claims under Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*.

(c) Evaluation by the Panel

7.256 We first note the relevant provisions as discussed by India in its claims under Article 9 of the *Anti-Dumping Agreement*, Article 19 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

7.257 The text of the relevant provisions under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* appear in Section VII.B.4 above.

7.258 In addition, Article 19.2 of the *SCM Agreement* provides:

> "The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties(footnote omitted) whose interests might be adversely affected by the imposition of a countervailing duty."

7.259 Finally, Article 19.3 of the *SCM Agreement* provides:

> "When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter."

7.260 Article 19.4 of the *SCM Agreement* provides:

> "No countervailing duty shall be levied[263] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."

7.261 Article VI:3 of the *GATT 1994* provides the following:

> "No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed,

[263] (*footnote original*) As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

> directly, or indirectly, upon the manufacture, production or export of any merchandise."

7.262 We refer to our findings in section VII.B.4 above in relation to India's *as applied* claim under Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*. We noted, as its title indicates, that Article 9 of the *Anti-Dumping Agreement* is concerned with the "imposition and collection of anti-dumping *duties*" (emphasis added). Consistent with this title, we also observed that the disciplines set forth in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* concern the imposition and collection of anti-dumping *duties*. For that reason, we concluded that measures other than anti-dumping duties fall outside the scope of those provisions. Accordingly, we turned to the context of our review of India's claim under Article 18.1 of the *Anti-Dumping Agreement*, and directly considered India's argument[264] that the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods …".[265] We found that India's definition of the term "duty" was not broad enough to encompass the enhanced bond requirements imposed in respect of subject shrimp because bonds do not yield public revenue and have no intrinsic value in and of themselves. We recalled our findings that a bond is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. Indeed, we recalled that India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security", there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."[266]

7.263 Therefore, for the same reasons we concluded that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994;* we also conclude that India's *as such* claims under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 fail.

7.264 We note that the provisions in Articles 19.2, 19.3, and 19.4 of the *SCM Agreement* governing countervailing duty investigations are substantively similar to those in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*. Accordingly, based on our reasoning that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*; we also conclude that the enhanced bond is not a countervailing duty, with the result that the application of the EBR falls outside the scope of Article 19 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

8. Article 18.4 of the *Anti-Dumping Agreement,* Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement*

(a) Main arguments of India

7.265 India claims that the Amended CBD is inconsistent with obligations under Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*. India considers that the Amended CBD and the identified US statutory and regulatory provisions authorize impermissible specific action against dumping, and also violates Articles 7 and 9 of the *Anti-Dumping Agreement*, as well as Articles 17 and 19 of the *SCM Agreement*. India recognizes that its claims under Article 18.4 of the *Anti-Dumping* Agreement and 32.5 of the *SCM*

[264] See India's responses to Second Set of Questions, para. 29.
[265] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.
[266] See India's responses to Second Set of Panel Questions, para. 33.

Agreement are consequential to its claims that the cited provisions are inconsistent *as such* with other provisions of the *GATT 1994*, the *Anti-Dumping Agreement*, or the *SCM Agreement*.[267]

(b) Main arguments of the United States

7.266 Due to the continuing relevance of the "mandatory/discretionary" distinction, the United States argues that the Amended CBD and cited laws and regulations are not *as such* inconsistent with any separate obligations of the covered *WTO Agreement*s, and are therefore consistent with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.

(c) Evaluation by the Panel

7.267 We consider India's claims that the Amended CBD is inconsistent with obligations under Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.

7.268 Article 18.4 of the *Anti-Dumping Agreement* provides that:

> "Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the *WTO Agreement* for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

7.269 Similarly, Article 32.5 of the *SCM Agreement* provides that:

> "Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the *WTO Agreement* for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

7.270 Article XVI:4 of the *WTO Agreement* provides that:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

7.271 We do not make findings on the claims of India that the Amended CBD violates Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement*. The Appellate Body has previously considered it unnecessary to make findings with respect to claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* when a Panel finds that a complainant fails to establish that an *as such* violation has occurred under any specific obligation of the covered agreements.[268] In our opinion, the Appellate Body's rationale is equally applicable to India's claim under Article 32.5 of the *SCM Agreement*. We therefore, also do not make any findings on the claims of India that the Amended CBD violates Article 32.5 of the *SCM Agreement*.

9. Other *as such* claims by India under the *GATT 1994*

7.272 The Panel notes that India has made a number of additional *as such* claims under the *GATT 1994*. In particular, India has requested the Panel to find that the Amended CBD *as such* is

[267] India's second written submission, para. 58.
[268] See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 210-211.

inconsistent with Articles I:1, II:1(a) and (b) of the *GATT 1994* or, alternatively, with Article XI:1 of the *GATT 1994*.

7.273 The Panel recalls its view in Section VII.B.5 above that, even if it were to find that the EBR *as applied* was not an impermissible specific action against dumping, it would not be appropriate to proceed and rule on India's additional *GATT 1994* claims in light of its findings under Articles VI of the *GATT 1994* and its Ad Note, and Articles 1 and 18.1 of the *Anti-Dumping Agreement*. This view also stands as regards India's claims concerning the Amended CBD *as such*. We have found that the Amended CBD *as such* constitutes "specific action against dumping or subsidisation" which is not inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. In particular, we found that the Amended CBD allows for the imposition of reasonable security as permitted under the Ad Note and thus in accordance with the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping* and *SCM Agreements*. As explained before, the Panel is unable to accept that a measure which constitutes specific action against dumping (or subsidisation) in accordance with the provisions of the Ad Note, could nevertheless be found inconsistent with other provisions of the *GATT 1994*. In light of the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, we concluded that our findings under of the Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note must prevail over any potential finding of violation under Articles I, II:1(a) and (b) and XI of the *GATT 1994*. This also applies to our findings under Articles 10 and 32.1 of the *SCM Agreement.*

7.274 We also found support for our view in the principle of international law *lex specialis derogat legi generali*. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping duties, and those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by India, we concluded that Article VI and the Ad Note thus constitute *lex specialis* and should prevail over the more general *GATT 1994* provisions cited by India. This also applies in the context of collecting security for countervailing duties.

7.275 In light of the above, we conclude that it would not be appropriate for us to proceed and rule on India's *as such* claims under Articles I, II:1(a) and (b) and XI of the *GATT 1994*, and we decline to do so.

D. NOTIFICATION REQUIREMENT UNDER ARTICLE 18.5 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE 32.6 OF THE *SCM AGREEMENT*

1. Main arguments of India

7.276 India claims that the United States has violated Articles 18.5 of the *Anti-Dumping Agreement* and 32.6 of the *SCM Agreement* by not informing the Committee on Anti-dumping Practices or the Committee on Subsidies and Countervailing Measures (the "Anti-Dumping and SCM Committees") about the Amended CBD. According to India, the EBR unquestionably constitutes a fundamental change in the United States' administration of its laws and regulations relevant to the *Anti-Dumping* and *SCM Agreements*. India argues that the formal designation of the Amended CBD as a "customs law" is irrelevant.[269] Finally, India submits that Members are obligated to notify changes within a reasonable period of time in order to make notification requirements meaningful.

2. Main arguments of the United States

7.277 The United States argues that it did not act inconsistently with Article 18.5 of the *Anti-Dumping Agreement* or Article 32.6 of the *SCM Agreement* because the Amended CBD is a "law or

[269] India's second written submission, para. 91.

regulation" that relates to the administration of United States customs regulations and continuous bonds, and is not related to the administration of anti-dumping or countervailing duty laws and regulations.[270] The United States submits that a Member is not obligated to notify the Anti-Dumping and SCM Committees about any modification to a customs administrative procedure that incidentally affects merchandise subject to anti-dumping or countervailing duties.[271] Furthermore, according to the United States, neither Article 18.5 nor Article 32.6 specify when a Member must notify the measures specified, thus eliminating the possibility of a violation these provisions.[272]

3. Evaluation by the Panel

7.278 India requests the Panel to find that the United States has violated Articles 18.5 of the *Anti-Dumping Agreement* and 32.6 of the *SCM Agreement* by failing to notify the Amended CBD to the Anti-Dumping and SCM Committees. The United States, however, is of the view that it was under no obligation to notify the Amended CBD to either of the Committees.

7.279 Article 18.5 of the *Anti-Dumping Agreement* provides:

> "Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations."

7.280 Article 32.6 of the *SCM Agreement* identically provides:

> "Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations."

7.281 We note that the United States has stated that the Amended CBD "is not a 'law or regulation' relevant to the *Anti-Dumping* or *SCM Agreements*, and does not relate to the administration of those laws or regulations."[273] Moreover, the United States has described the Amended CBD as containing "administrative procedures applicable to continuous bonds."[274]

7.282 Notwithstanding the United States' views, even if the Amended CBD, as a directive, would not constitute a "law or regulation", and regardless of whether it addresses US Customs regulations and continuous bonds, it amends the procedure for collecting security from importers who may be liable for anti-dumping or countervailing duties. The EBR has been designed as a security for the collection of potential increased anti-dumping or countervailing duties and this security may only be imposed where a given product is subject to an anti-dumping or countervailing order. We also recall our findings that the Amended CBD constitutes specific action against dumping or subsidisation within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. We arrived at this conclusion by finding, *inter alia*, that the constituent elements of dumping and/or subsidisation were present in the Amended CBD. For all of these reasons, we consider that the Amended CBD "changes ... the administration" of anti-dumping or countervailing duty laws and/or regulations and thus falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*.

7.283 In light of our finding that the Amended CBD falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* , we must last address whether the United States has violated its obligations by failing to notify the Amended CBD to the Anti-Dumping

[270] United States' first written submission, para. 81.
[271] United States' first written submission, para. 81.
[272] United States' first written submission, paras. 79-82.
[273] United States' first written submission, para. 81.
[274] United States' first written submission, para. 81.

and SCM Committees within a specific timeframe. India has argued that a Member must make such notifications within a "reasonable" time period. We note that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* do not specify an exact time limit for a WTO Member to notify its relevant law or regulation. Despite the absence of a specific deadline, in our view, in order for any notification to be effective, it must be made within a reasonable time. It is also our view that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* were originally formulated to address transparency concerns surrounding the administration of anti-dumping and countervailing duty investigations and measures. A failure to properly notify changes in the anti-dumping laws or regulations, or the administration of such laws to the Anti-Dumping and SCM Committees within a reasonable time fails to address that objective.

7.284 In the matter before us, we are unaware that the United States has yet attempted to notify the Amended CBD to the Anti-Dumping and SCM Committees . The United States has failed to do so despite the fact that the Amended CBD became effective more than three years ago with publication of the July 2004 Amendment. We consider this delay to be unreasonable.

7.285 We accordingly find that the United States has failed to meet its obligation to notify the Amended CBD to the Anti-Dumping and SCM Committees.

E. UNITED STATES' DEFENCE UNDER ARTICLE XX(D) OF THE *GATT 1994*

7.286 Having found that the EBR constitutes "specific action against dumping" and that it is not a "reasonable security" under the Ad Note to Article VI of the *GATT 1994*, and thus it is not "in accordance with the provisions of the *GATT 1994*, as interpreted by the [*Anti-Dumping] Agreement*", the Panel will proceed to examine the United States' defence under Article XX(d) of the *GATT 1994*.

1. Main arguments of the United States

7.287 The United States argues that the Amended CBD is justified under Article XX(d) of the *GATT 1994* as a measure necessary to secure compliance with United States anti-dumping and countervailing duty assessment laws. According to the United States, the Amended CBD is necessary to secure compliance with 19 U.S.C. 1673e(1), which governs the assessment of anti-dumping duties, as well as general customs regulations related to the payment of duties. Specifically, according to the United States' argument, the Amended CBD is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. The United States has stated that it considers that problems of "significant potential unsecured liability" and "significant risk of default" exist with respect to subject shrimp entries.[275] The United States submits that 19 U.S.C. 1673e(1) and the other relevant laws and regulations that authorize the Amended CBD are not themselves WTO-inconsistent. The United States also argues that no reasonable alternative is available to ensure revenue collection.[276]

7.288 The United States further argues that the Amended CBD is consistent with the chapeau to Article XX. In this regard, the United States submits that the Amended CBD does *not* constitute a disguised restriction on international trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In support of this position, the United States submits that the measure applies to designated merchandise subject to anti-dumping or countervailing duties regardless of origin, and applies to all countries subject to the anti-dumping order on subject shrimp. In addition, the United States submits that bond amounts may be determined based on individualised risk assessments which are available to all importers/principals. Finally, the United

[275] United States' first written submission, para. 90.
[276] United States' first written submission, para. 92.

States emphasizes that the Amended CBD was published on US Customs' web site when initially introduced. The October 2006 Notice, which was later published in the Federal Register, is described by the United States as a complete statement of the measure's contents and how it would be applied, which allows importers to comment formally on the EBR and its administration, and presents the directive's objective as addressing revenue collection problems.[277]

2. Main arguments of India

7.289 India disagrees with the United States and considers that the EBR as authorized by the Amended CBD, is not justified under Article XX(d) of the *GATT 1994* because it is not necessary to secure compliance with US laws. As a general matter, India argues that the measure cannot be considered as necessary or indispensable since the United States has maintained and operated a retrospective system since at least 1979 without previously encountering a need for the type of security provided by the EBR. Also, as specific to subject shrimp, India submits that the US does not have a basis on record or even expertise for determining a higher likelihood of increase in future margins or defaults. India further argues that the United States' assertion is flawed that a high risk of default in payments by subject shrimp importers/principals exists and that such a risk of default should justify imposition of the EBR to subject shrimp imports. In this regard, India submits that the United States improperly established a higher incidence of default in payments by agriculture/aquaculture importers by factoring in margins for crawfish and garlic importers based on adverse facts available, defaults by new shippers not subject to bond requirements, and surety bankruptcies.[278] Additionally, India argues that the application of the EBR should not be considered necessary since less restrictive remedies exist to ensure the collection of anti-dumping or countervailing duties. India has proposed as alternatives, civil remedies, an across-the-board determination of the financial soundness of all importers prior to application of the EBR, or reductions in the duration of assessment review periods.[279] Regardless of whether the measure is considered necessary, and regardless of the existence of less restrictive alternative remedies, India submits that the EBR does not meet the requirements of the chapeau to Article XX(d). According to India, the designation of shrimp subject to an anti-dumping order as a covered case was arbitrary and capricious, and constitutes a disguised restriction on trade. In particular, India considers the EBR's application to discriminate between the six subject countries and other countries where the same conditions prevail.

3. Evaluation by the Panel

7.290 Before examining whether the EBR is justified by Article XX(d) of the *GATT 1994*, we recall that the United States has the burden to prove to the Panel that this is the case.[280]

7.291 We will now look at the text of Article XX(d) and the chapeau of Article XX which provide:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[277] See United States' first written submission, para. 77.
[278] India's second written submission, para. 110.
[279] India's second oral statement, paras. 56-57; see also India's second written submission, para. 112.
[280] In *US – Wool Shirts and Blouses*, the Appellate Body held that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]"

7.292 We note that, in *US – Gasoline*, the Appellate Body concluded that the analysis of a measure under one of the paragraphs of Article XX is a "two-tiered" approach:

> "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under [in that case] XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX ..."[281]

7.293 We agree and adopt as our own the Appellate Body's reasoning. Therefore, the Panel shall first look at whether the EBR is necessary to secure compliance with the relevant provisions of US law that direct US Customs to assess and collect anti-dumping duties. We will only proceed to analyse whether the EBR meets the requirements of the *chapeau* to Article XX, i.e whether the EBR allows for "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or constitutes a "disguised restriction on international trade", if we have first determined that the EBR has met the requirements under paragraph (d).

(a) Whether the EBR is necessary to secure compliance with US laws and regulations as provided in Article XX(d) of the *GATT 1994*

7.294 The Appellate Body has indicated that two elements should be satisfied in order for a measure to be provisionally justified under paragraph (d) of Article XX:

> "For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the *GATT 1994*. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."[282]

(i) First element: Whether the EBR has been "designed" to secure compliance with US laws and regulations that are not in themselves WTO-inconsistent

7.295 We shall therefore commence our analysis by examining whether the EBR has been "designed" to secure compliance with US laws and regulations that are not themselves inconsistent with the *GATT 1994*. A necessary step in this analysis is thus to identify which are those US laws or regulations the compliance with which the EBR is aimed at securing, whether they are not themselves WTO-inconsistent, and whether the EBR is itself designed to secure compliance with the aim expressed in the relevant US laws or regulations.

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[281] Appellate Body Report, *US – Gasoline*, p. 22.
[282] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

7.296 The United States claims that the Amended CBD secures compliance with 19 U.S.C. § 1673e(a)(1), which governs assessment of anti-dumping duties and reads as follows:

> "Within 7 days after being notified by the Commission of an affirmative determination under section 1673d (b) of this title, the administering authority shall publish an anti-dumping duty order which—
>
> > (1) directs customs officers to assess an anti-dumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—
> >
> > (A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or
> >
> > (B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of that merchandise."

7.297 The United States further submits that the Amended CBD is necessary to ensure compliance with 19 C.F.R. § 113.13(c), which requires port directors to obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."[283]

7.298 India submits that 19 U.S.C. § 1673e(a)(1) or 19 C.F.R. § 113.13(c) exclusively do not govern the obligation to require payment of duties owed to the US Treasury. India submits that 19 U.S.C. § 1673e(a)(1) "... directs US Customs to assess anti-dumping duties ... ", and 19 U.S.C. § 1673e(a)(3) "... requires the deposit of estimated anti-dumping duties pending liquidation ... ". India considers that 19 U.S.C. § 1673e(b) titled "Imposition of duty", which governs imposition of anti-dumping duties, read together with provisions of 19 U.S.C. § 1673f titled "Treatment of difference between deposit of estimated anti-dumping duty and final assessed duty under anti-dumping duty order" actually identifies US Customs' obligation to collect anti-dumping duties.[284] Regardless of the inclusion of these additional provisions, India has stated that all of the provisions read together identify the obligation of the US Treasury and/or US Customs to collect anti-dumping duties.[285]

7.299 Taking the parties' views into consideration, in our view, 19 U.S.C. § 1673e(a)(1) in combination with certain additional provisions encompass the United States' obligation to collect anti-dumping duties. Whereas 19 U.S.C. § 1673e(a)(1) directs customs officers to "assess" an anti-dumping duty, the obligation under 19 U.S.C. § 1673e(b)(1) requires that entries of merchandise subject to an anti-dumping order "be subject to the imposition of anti-dumping duties". Although neither the United States or India did not refer to the following, we also note that 19 U.S.C. § 1673 provides that USDOC shall "impose[] upon such merchandise an anti-dumping duty, in addition to any other duty imposed in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." Additionally, we note that 19

[283] United States' responses to Second Set of Panel Questions, para. 54.
[284] In the case of countervailing duties, India submits that 19 U.S.C. § 1671e(b) read together with 19 U.S.C. § 1671f(b) govern US Customs' obligation to collect countervailing duties.
[285] India's responses to Second Set of Panel Questions, paras. 98-101.

C.F.R. § 351.212(b)(1) requires that "the Secretary will instruct the Customs Service to assess anti-dumping duties by applying the assessment rate to the entered value of the merchandise". Alternately, 19 C.F.R. § 351.211(c)(1) provides that the cash deposit rate will be assessed as the rate of final liability if an administrative review is not requested. We consider each of these provisions govern the final collection of anti-dumping or countervailing duties. Therefore, in our view, 19 U.S.C. § 1673e(a)(1) in combination with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) represents the United States' obligation to collect anti-dumping duties. We note that 19 U.S.C. § 1673e(a)(3) strictly requires the deposit of " ... *estimated* anti-dumping duties pending liquidation ... ".

7.300 Accordingly, the Panel provisionally concludes that for the purpose of considering the United States' defence under Article XX(d), the law or regulation at issue is 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1), all of which together govern the final collection of anti-dumping or countervailing duties. We do not consider it necessary to expand our discussion to include analysis of 19 U.S.C. § 1673e(a)(3), governing the deposit of estimated anti-dumping duties pending liquidation, or 19 U.S.C. § 1673f, governing treatment of difference between deposit of estimated anti-dumping duty and final assessed duty under anti-dumping duty order.

7.301 The Panel must next consider for the purpose of examining the United States' arguments under Article XX(d) whether 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are in themselves not inconsistent with any provision of the *GATT 1994*. When considering the relevant provisions of the *GATT 1994* governing anti-dumping duties, the Panel recognizes that Article VI:2 expressly recognizes Members' ability to levy anti-dumping duties where lawfully owed. As we have established in Section VII.B.2(b) above, the Ad Note permits Members to require reasonable security in a case of suspected dumping until a final determination of dumping is made in the assessment review. The Panel further notes that India has not expressly challenged any of these laws as inconsistent with any provision of the *GATT 1994*. Moreover, regardless of India's expansion of what constitutes the relevant law enforced by the Amended CBD, the Panel does not interpret India's commentary as a challenge to the right of the United States to collect anti-dumping or countervailing duties. Accordingly, the Panel concludes that, for the purpose of its analysis of the US defence under Article XX(d) of *GATT 1994*, 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are not in themselves inconsistent with any provision of the *GATT 1994*.

7.302 As a final preliminary matter, the Panel will next consider whether the Amended CBD, which authorizes application of the EBR, has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1). We note that the August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".[286] The August 2005 Clarification states that the continuous bond guidelines were modified as "necessary in order to ensure the revenue is adequately protected".[287] The October 2006 Notice explains:

> "Congress has provided [US Customs] authority to require security in order to ensure the payment of all duties determined to be due to the United States, including revenue

[286] Exhibit IND-3, p. 2.
[287] Exhibit IND-4, p. 1.

collection gaps between estimated duty deposits and final assessed duties that the importer fails to satisfy."[288]

7.303 We note that the stated goal of collecting "anti-dumping and countervailing duties at liquidation" or "final assessed duties" potentially includes both the collection of the amount of duties established during the final determination in the original investigation as well as any increases in anti-dumping duties that may arise in the period following a final determination but prior to assessment of final liability.

7.304 In our view, the text of the instruments comprising the Amended CBD clearly indicates that the stated goals of the measure at issue align with the objectives that 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are designed to secure: the final collection of anti-dumping or countervailing duties equal to the amount by which normal value of subject merchandise exceeds to export price of that merchandise. Thus, for the purpose of examining the United States' arguments under Article XX(d), it is sufficient for the Panel to conclude that the Amended CBD which authorizes the imposition of the EBR has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1).

(ii) Second element: Whether the EBR is "necessary to secure compliance with" 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1)

7.305 Once we have established that the EBR has been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1), the WTO-compatibility of which is not being contested, we will next examine whether the EBR is "necessary" to ensure such compliance.

7.306 In this regard, the United States argues that the Amended CBD, which authorizes the imposition of the EBR, is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. In particular, the United States is arguing that the application of the measure to subject shrimp importers was and remains necessary to secure against "significant potential unsecured liability" and "significant risk of default" associated with merchandise entries.[289] According to the United States, the Amended CBD was issued in a year following defaults of more than $225 million on payment of anti-dumping duties, which reached $629 million as of end of fiscal year 2006.[290] The United States has estimated that the value of subject shrimp imports exceeds $2.5 billion[291] and thus poses a significant additional risk for uncollected revenue in the event that importer/principals were to default. The United States claims that the likelihood of default by subject shrimp importers, and importers/principals of agriculture/aquaculture merchandise more broadly, is significant due to the fact that such entities tend to be undercapitalised and discontinue operations before payment of final anti-dumping duty liability.[292] With respect to agriculture/aquaculture anti-dumping cases not including subject shrimp, US Customs concluded that anti-dumping duties increased 33 per cent of the time, did not change 11 per cent of the time, and declined 56 per cent of

[288] Exhibit IND-6, p. 62,278.
[289] United States' first written submission, para. 90.
[290] United States' first written submission, para. 13.
[291] United States' first written submission, para. 2.
[292] United States' first written submission, para. 15.

the time.[293] In cases where anti-dumping duties increased, the United States claims that final liability for anti-dumping duties often exceeded the amount secured by cash deposit and ordinary basic bond.

7.307 India disputes as unreasonable the US' determination that subject shrimp importers' dumping margins are likely to increase and that subject shrimp importers present a heightened risk of default in comparison to other importers of other products subject to anti-dumping orders. Foremost, India emphasizes that the US' own analysis of anti-dumping duties in the case of other agriculture/aquaculture products indicated that rates do not increase 67 per cent of the time.[294] India also notes that the United States' analysis of the likelihood of margin increases and the likelihood of default was based on crawfish and honey imports, and not subject shrimp. India calls into question the accuracy of the US' analysis, since India claims no basis for comparison exists that shrimp and other agriculture/aquaculture merchandise share similar characteristics related to capitalization rates, low entry/exit barriers, history of customs duties payments, reliance on asset-based financing, and levels of cash flow.[295] India also claims that determination of margins for crawfish and garlic importers are inaccurate predictors for subject shrimp since the dumping margin determinations were based on the application of adverse facts available, defaults by new shippers not subject to bond requirements, and surety bankruptcies that led to a higher incidence of default in payments, which in turn, led to defaults on anti-dumping duties in the years between 2004 and 2006.[296] For these reasons, India submits that the US also does not have a basis on record or even expertise for determining a higher likelihood of increase in future margins or even a likelihood defaults by importers of subject shrimp.[297] India also cites a determination by the USCIT that no basis existed in US Customs' administrative record to establish that shrimp exporters were likely to default on payment of increased duties.[298]

7.308 We first look at the ordinary meaning of the word "necessary":

> "[t]hat which is indispensable; an essential...;...[that] which is required for a given situation; ...[t]hat cannot be dispensed with or done without; requisite, essential, needful...; [d]etermined by predestination or natural processes, and not by free will;...resulting inevitably from the nature of things or of the mind itself...; [i]nevitably determined or produced by a previous state of things...".[299]

7.309 The Appellate Body has already examined the concept of "necessary" in the context of Article XX(d) of the *GATT 1994* in *Korea – Various Measures on Beef*. In this case, the Appellate Body concluded that, in order to be considered "necessary" to secure compliance, a measure does not need to be "indispensable", but should constitute something more than strictly "making a contribution to":

> "We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. as used in Article XX(d), the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We

[293] United States' first written submission, footnote 29.
[294] See United States' first written submission, footnote 29.
[295] India's responses to Second Set of Panel Questions, para. 72.
[296] India's second written submission, para. 110.
[297] India's second written submission, para. 111.
[298] Exhibit-IND – 16, p. 54.
[299] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3118.

> consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[300]

7.310 The Appellate Body weighed additional factors in evaluating the necessity of a measure, such as: (i) the relative importance of the common interests or values that the law or regulation to be enforced 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 on imported goods. In *Korea – Various Measures on Beef* the stated:

> "It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument... There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is 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. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce,[footnote omitted] that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects ..."[301]

7.311 As pertains to this importance of the interest which the EBR allegedly intends to protect, we consider that the assessment and collection of anti-dumping or countervailing duties carries significant importance, specifically in the context of US efforts to enforce trade remedies permissible under the *WTO Agreement*s, and generally, for the purpose of securing collection of US Treasury revenue within the context of its retrospective duty assessment system. It is in this regard that Article VI:1 of the *GATT 1994* expressly recognizes WTO Members' ability to collect anti-dumping duties where lawfully owed. It also stands to reason that taking security logically serves the purpose of collecting the full amount of anti-dumping or countervailing duties owed. The United States argues that the Amended CBD which allows for the imposition of the EBR, secures an otherwise unsecured liability – any additional anti-dumping duties owed upon assessment that exceed cash deposits.[302] We agree that this would logically aid in the collection of revenue. India does not seem to dispute that this is the case.[303]

7.312 As the EBR makes clear on its face, however, we are not dealing with a measure that is designed to secure the collection of anti-dumping duties generally. Instead, we are considering a measure designed to protect against the likelihood of anti-dumping duties exceeding cash deposit rates. We have explained earlier that there could only be an appropriate basis for taking such increased security under the Ad Note if a WTO 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). Notwithstanding that, we found that the United States had failed to properly

[300] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161.
[301] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-163.
[302] United States' first written submission, para. 90.
[303] Exhibit IND-8, Exhibit 5, p. 6.

establish that rates of dumping provided for in the anti-dumping order were likely to increase would increase and therefore concluded that the United States had failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order. Accordingly, we found that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note. In our view, without adequately establishing that anti-dumping duties are likely to increase above the cash deposit rates, it does not logically follow that a security is necessary within the meaning of Article XX(d) of the *GATT 1994*. Given that the likelihood of increased anti-dumping duties has not been properly established by the United States, we do not see the *need* to impose the EBR to secure against such an outcome.

(b) Conclusion

7.313 Therefore, in light of our findings that that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order, we cannot determine that the EBR *as applied* to shrimp is in fact necessary within the meaning of Article XX(d) of the *GATT 1994*. Accordingly, we consider that the United States has failed to establish that the EBR *as applied* to shrimp is justified as being necessary to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) or any other relevant laws.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, we *reject* India's claims that the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 9.1, 9.2, 9.3 (including 9.3.1), 18.1 and 18.4 of the *Anti-Dumping Agreement*; Articles 10, 17.1(c), 17.2, 17.4, 19.2, 19.3, 19.4 and 32.1 of the *SCM Agreement*; Articles VI:2 and VI:3 of the GATT 1994; and the Ad Note thereto.

8.2 In light of the above findings, we *uphold* India's claims that:

(i) the application of the EBR to subject shrimp from India is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*, and the Ad Note; that

(ii) the application of the EBR to subject shrimp from India prior to the imposition of the anti-dumping order is inconsistent with Article 7.2 of the *Anti-Dumping Agreement*; and that

(iii) the United States violated Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* because it failed to notify the Amended CBD to the Anti-Dumping and SCM Committees;

8.3 We *reject* the United States' argument that the application of the EBR is justified under Article XX(d) of the *GATT 1994*.

8.4 In light of the above findings, we *decline to rule* separately on India's claims that:

(i) the application of the EBR to subject shrimp from India *prior* to the imposition of the anti-dumping order is inconsistent with Articles 7.1(iii), 7.4 and 7.5 of the *Anti-Dumping Agreement*; that

(ii) the application of the EBR to subject shrimp from India is inconsistent with Articles I:1, Article II:1(a) and (b), X(3)(a), XI:1 and XIII of the *GATT 1994*; and that

(iii) the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with Articles I:1, Article II:1(a) and (b), X(3)(a), XI:1 and XIII of the *GATT 1994*

8.5 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the *GATT 1994*, it has nullified or impaired benefits accruing to India thereunder.

8.6 Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

> [i]t shall recommend that the Member concerned bring the measure into conformity with that agreement. (*footnotes omitted*)

8.7 We therefore recommend that the United States bring its measure into conformity with its obligations under the *Anti-Dumping Agreement* and the *GATT 1994*.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSION OF THE PARTIES

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ANNEX A - 1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(11 May 2007)

1. Introduction

1. This dispute centers on certain action taken by US Customs and Border Protection (CBP) to address a serious and growing revenue collection problem. In 2003 and 2004, CBP determined that importers were defaulting on hundreds of millions of dollars of antidumping and countervailing duties lawfully owed to the United States. The duties in question were unsecured by cash deposits, sufficient bonds, or other guarantees: thus, when an importer defaulted, CBP could not recover the duties owed from the sureties that ordinarily protect CBP from default risk. To address the problem, CBP began to develop a new directive for increasing security requirements on merchandise with higher risk of default. Its own analysis indicated that importers of agriculture/aquaculture merchandise in particular were the source of the bulk of the defaults.

2. During the same period, the US Department of Commerce (USDOC) and the US International Trade Commission (USITC) were considering a petition to impose antidumping duties on another agriculture/aquaculture product: certain shrimp from China, Thailand, India, Vietnam, Brazil, and Ecuador. Imports of the merchandise subject to the petition were in 2003 valued at in excess of $2.5 billion – itself an unprecedented figure for agriculture/aquaculture merchandise subject to an antidumping order.

3. If the defaults it experienced with respect to other agriculture/aquaculture importers occurred for shrimp, CBP realized that its revenue collection problem could rapidly grow into a crisis. Therefore, after considerable analysis and consideration, it decided to apply the new directive to shrimp. The directive provides for an importer-specific risk assessment as the basis for additional bond amounts. Importantly, this means that CBP has tailored the process to ensure that, if a company subject to the directive does not itself pose a collection risk, it need not provide additional bond amounts. Even with this mechanism in place, India asserts that the directive is impermissible under various provisions of the WTO Agreements. In effect, India ask this Panel to find that the United States may not collect duties lawfully owed to it.

4. India's complaint focuses on the question of what the WTO Agreements permit a revenue collection authority to do when faced with a collection problem involving antidumping and countervailing duties. As discussed below, in its effort to apply the disciplines contained in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) to the action in question, India mischaracterizes both the obligations that Agreement contains and key facts about the directive, its content and how it operates. If accepted, India' s arguments would suggest that ordinary revenue collection strategies may not be applied to importers subject to antidumping and countervailing duties, and in so doing would seriously compromise the ability of Members' customs authorities to collect duties lawfully owed the Member. These arguments do not accord with the text of the Agreements, which expressly permit authorities to require "reasonable security" to collect antidumping and countervailing duties.

5. India additionally makes the extraordinary claim that ordinary customs laws and regulations are themselves inconsistent with the WTO Agreements simply because they give CBP the "authority" to require additional security. India' s arguments in this regard are unsupported by the text of the Agreements, at odds with the reasoning contained in a long line of panel and Appellate Body reports, and, if accepted, would have profound implications for the WTO Membership as a whole.

2. Factual Background

6. CBP is the US agency responsible for collection of customs duties. Under the US system, goods are permitted to enter the customs territory of the United States without having paid duties or other liabilities imposed by law. In this manner, the United States expedites the entry of goods and does not make the importer wait on the final determination of duties owed or other liabilities under the law. However, since the goods will have been long since released from CBP' s custody and not available for return to satisfy any obligations of the importer when they are legally determined to be due, it is necessary for CBP to have some security against payment of amounts lawfully owed. Consequently, CBP requires single transaction bonds or continuous bonds for entries of merchandise as a matter of course. As a rule, all entries must be accompanied by evidence that a bond is posted with CBP to cover any potential duties, taxes, and charges that may accrue. Pursuant to CBP' s regulatory authority, a port director may require additional bond amounts or other additional security in order to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law.

7. CBP establishes the minimum amount of the bond that the importer must obtain from a surety. The United States is the third party beneficiary to the contract between the surety and the bond principal, but is not itself a party to the contract. CBP does not set the fees charged by the sureties for the bonds they provide.

8. It is not uncommon for Members to require security in this manner, pending final assessment of customs liability. Under India' s customs law, for example, when final duty liability cannot be determined upon entry, customs officers may assess provisional duties if the importer "furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed." Security requirements such as these ensure that customs authorities are able to collect duties lawfully owed upon final assessment.

9. Surety systems are contemplated by, among other provisions, Article 13 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), which provides that Members shall allow importers to withdraw goods from customs pending final determination of customs value if the importer "provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable." In addition to Article 13 of the Customs Valuation Agreement, surety systems are explicitly provided for in the Kyoto Convention on the Simplification and Harmonization of Customs Procedures. The Convention, like the Customs Valuation Agreement, encourages the early release of merchandise, and permits the adoption of surety systems to ensure compliance with regulatory undertakings, as well as to ensure collection of any *additional* import duties and taxes that might become chargeable. Thus, the Convention explicitly contemplates that, as a necessary consequence of the early release of merchandise, it might become necessary to impose bond requirements to ensure the collection of assessed duties beyond the estimated duties for which an importer might be liable based on information at the time of entry.

10. The bond requirements imposed by the United States do not entail any payments to the United States Government. Rather, importers must provide evidence that they have obtained either single transaction bonds or continuous entry bonds (or cash or an authorized obligation of the United States in lieu of surety on a bond) for the entry or entries in question. These bonds are obtained from private surety companies, which charge the importers based on the risk involved with the transaction.

11. With respect to merchandise subject to an antidumping or countervailing duty order, the Anti-Dumping Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment of antidumping duties. The United States has adopted a retrospective system of duty assessment. In the US system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Once a year (during the anniversary month of the order) interested

parties may request a review to determine the amount of duties owed on each entry made during the previous year. Between the time that the good is entered and the time that duties are finally assessed following this review, importers of merchandise subject to antidumping or countervailing duties are required to provide (1) a cash deposit in the amount of the antidumping or countervailing duty rate determined in the investigation; and (2) like importers of all goods, a bond to secure against duties, taxes or charges that may accrue. Under its 1991 Bond Guidelines, CBP provides that the amount of this bond should be equal to 10 per cent of the duties, taxes, and fees paid by the importer in the previous 12 months, or a minimum of $50,000. In general, an importer may obtain either a bond covering a single entry (a single entry bond) or a continuous bond (a bond that provide security for all entries filed by the bond principal during the period of time covered by the bond, usually one year) to satisfy this requirement.

12. In 2003, CBP undertook a review of its overall duty collection program to identify areas in which it was experiencing collection difficulties, so as to address significant problems. As part of that process, CBP determined that, over the past few years, defaults on antidumping duty supplemental bills had increased substantially from previous years. While historically, annual uncollected duties from importers have been relatively low (rarely exceeding $10 million a year), outstanding antidumping liability for 2004 alone reached an unprecedented $225 million. As of the end of fiscal year 2006, total uncollected antidumping duties amounted to $629 million.

13. Facing a serious and growing noncollection problem, CBP reconsidered its general continuous bond formula, which provides that the minimum continuous bond may be in an amount equal to the greater of $50,000 or ten per cent of the amount of the previous year's duties, taxes and fees. On 9 July 2004, CBP published on its website a Memorandum announcing an enhanced customs bond amount for those continuous bonds that secure the promise to pay all duties finally determined to be due on certain merchandise subject to antidumping or countervailing duties (July 2004 Amendment). The formula set forth in the July 2004 Amendment is the USDOC rate in the antidumping or countervailing duty order, or the cash deposit rate at the time of entry, multiplied by the value of subject merchandise that the importer entered during the previous year. The formula in effect ensured that, should the antidumping duty rate actually assessed for an importer increase from that determined during the investigation, CBP would be at least partially secured for the difference. The additional bond directive does not apply to single entry bonds.

14. CBP also determined that the principal entities responsible for uncollected duties were importers of agriculture/aquaculture merchandise subject to antidumping duties, and in particular importers using continuous entry bonds. Based on CBP's analysis, the noncollection problem with respect to this merchandise appeared to be attributable to the fact that importers of agriculture/aquaculture merchandise tended to be undercapitalized, and that by the time final liability was assessed (typically one or more years after the goods had entered), the companies were no longer in operation. This was coupled with the fact that the AD/CVD duties finally assessed on the merchandise often significantly exceeded both the cash deposit rate and the ordinary bond amount typically required for all merchandise under the 1991 Bond Guidelines. CBP was thus unable to collect the unsecured portion of the duties assessed, resulting in a shortfall in CBP collections amounting to hundreds of millions of dollars.

15. On 1 February 2005, following a determination that certain shrimp from Thailand, India, and four other countries were being dumped in the United States, and a finding by the USITC that the US domestic industry was materially injured by imports of frozen warmwater shrimp, USDOC issued its final determination imposing definitive duties on frozen warmwater shrimp. The shrimp order was the first order imposed on agriculture/aquaculture merchandise after issuance of the July 2004 Amendment. Significantly, compared to previous agriculture/aquaculture cases, the overall value of shrimp imports subject to the order was enormous - in calendar year 2003, imports of subject shrimp reached $2.5 billion. Given the volumes involved, even a modest increase in the antidumping rate upon assessment could

result in substantial revenue losses if unsecured. Thus, viewing the shrimp order as an appropriate case for application of the additional bond directive, CBP began applying the directive to shrimp importers.

16. On 10 August 2005, CBP published a clarification to the July 2004 Amendment (the "Clarification"), in an effort to improve both importers' and customs officers' understanding of how the additional bond directive would be applied and to improve transparency in the process by which CBP identified covered cases and special categories of merchandise.

17. In a further effort to minimize burdens on importers resulting from the additional bond amount, on 24 October 2006, CBP published a Notice in the Federal Register amending its procedure for determining bond amounts for covered categories of merchandise. The October 2006 Notice "represents the comprehensive and exclusive statement of the policy and processes expressed in" the July 2004 Amendment, the 2005 Bond Formulas, and the August 2005 Clarification. As described in the October 2006 Notice, importers are offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and CBP determines bond amounts based on that information, the importer's compliance history and other relevant information available to CBP. CBP will evaluate this information promptly and provide an importer-specific bond sufficiency assessment for the importer concerned. In the absence of this information, CBP calculates the bond amount using the formulas. This procedure allows importers to obtain an individualized determination, rather than a determination based upon the formulas.

18. Since CBP issued the October 2006 Notice, by using the process outlined therein, several importers currently subject to the additional bond formulas have requested and received individualized bond amounts substantially lower than those CBP initially required under the additional bond formulas.

3. The Bond Directive Constitutes "Reasonable Security" Permitted by the Ad Note to GATT Article VI:2 and 3

19. Under the Ad Note, a Member may require that an importer provide "reasonable security" for the payment of antidumping or countervailing duties. As is evident from the clause that precedes it, the "final determination of the facts" in the Ad Note refers to the determination of the facts with respect to the "payment of anti-dumping or countervailing duty." In the context of a retrospective duty assessment system, the "determination of the facts" referenced in the Ad Note is the determination that in Article 9.3.1 of the Anti-Dumping Agreement is referred to as the "determination of the final liability for payment of anti-dumping duties."

20. Importantly, the Ad Note does not specify a particular amount of security that a Member may require pending determination of the final liability for payment of anti-dumping duties, but rather provides that the amount required must be "reasonable". Under India's line of reasoning, no amount of bond that exceeds the margin of dumping established in the investigation phase of a proceeding can be "reasonable" security. This interpretation of the term "reasonable" lacks a basis in the text, which, as noted, does not specify a particular ceiling for the bond amount other than the requirement that it be "reasonable".

21. This interpretation also does not accord with ordinary customs practice, which provides context through the Ad Note's prefatory reference to "many other cases in customs administration." A bond is security against the prospect of a future liability. The additional bond amount is intended to secure against additional liability that may accrue upon assessment. As with any insurance policy, to establish the amount of security required, one must consider both the amount of potential liability in the event of default and the likelihood of default. With respect to the amount of potential liability, in excess of $2.5 billion worth of shrimp imports had entered the United States from countries subject to the antidumping order during calendar year 2003. With respect to the risk of default, after facing hundreds of millions of dollars in uncollected antidumping and countervailing duties, CBP determined that importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty liability faced an

elevated risk of default, due in part to low capitalization and high turnover rates in the industry as a whole. Since issuing the directive, CBP published additional mechanisms so that any additional bond amount required is tailored to individual importers' risk of default, mechanisms that even India concedes introduce an "indicia of apparent reasonableness" to the directive.

22. India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the Anti-Dumping Agreement regarding provisional measures (i.e., measures taken prior to a final determination of dumping or subsidization). The bond directive, however, is a security requirement imposed *after* the final determination of dumping or subsidization, pending "determination of the final liability for payment of anti-dumping duties." It is not a "provisional measure" within the meaning of Article 7. India offers absolutely no legal theory as to how the directive "as such" is inconsistent with the Ad Note, and the only evidence it offers in support of either claim relates to the single instance in which the directive has been applied – frozen warmwater shrimp subject to the antidumping orders issued by USDOC in February 2005.

4. Additional Bond Directive Is Not a "Specific Action Against Dumping" or "Subsidy"

23. As explained above, the additional bond directive serves to secure an otherwise unsecured debt owed to the US government in the form of assessed antidumping duties that exceed cash deposits. It was issued after CBP identified a serious noncollection problem with respect to these duties. As it would in any case in which there exists an unsecured liability that presents a risk to the revenue, CBP issued the additional directive to provide for an increase in the amount of security on certain transactions and thereby address the noncollection concern. The sole reason the directive is designed to secure antidumping liability is because *the vast majority of unsecured liability that has resulted in noncollection happens to be antidumping duty liability.* Of the $589 million in uncollected duties outstanding since fiscal year 2003, $513 million (87 per cent) have been antidumping duties. The fact that the additional bond directive is based on noncollection risk, rather than the constituent elements of dumping or subsidization, is evident in the text of the directive itself and associated materials.

24. The sole evidence that India cites in support of its argument that the directive operates "against" dumping is either inaccurate or irrelevant. The additional bond directive does not meet the second prong of the test set forth by the Appellate Body under Article 18.1: it is not an action taken "against" dumping or subsidization. First, India claims that the directive reduced shipments from countries subject to it. However, the record simply does not support this assertion. According to a study prepared by the Government Accountability Office (GAO), after the petition was filed in late 2003, *but before the bond directive was announced*, the share of imports from Thailand decreased from 30 per cent of total US shrimp imports to 15 per cent. *After* the bond directive was announced in July 2004, Thailand' s share of shrimp imports actually increased significantly, returning to approximately 30 per cent. Based on GAO' s analysis, there is no evidence that the bond directive in fact adversely affected imports of merchandise subject to the antidumping order. Second, India cites a number of actions by sureties and other private parties as evidence that the directive itself is an action "against" dumping or subsidization, including sureties' fees and collateral requirements associated with these imports. As noted previously, CBP does not set surety fees, nor does it require importers to post collateral in support of bonds. CBP is a third party beneficiary to bond contracts, which are private contracts negotiated between the surety and the importer.

25. In order for India to prevail on its claim that the directive is "action against dumping", it also must demonstrate that the directive is not "in accordance with the provisions of GATT 1994." It has failed to do so. As explained above, the additional bond amounts required under the directive constitute "reasonable security" within the meaning of the Ad Note to GATT Article VI and therefore the directive is "in accordance with the provisions of GATT 1994."

26. With respect to India's claim that the directive "as such" is an action against dumping or subsidization, India again fails to so much as articulate a legal theory as to why the directive "as such" breaches US obligations under Article 1 and 18.1 of the Anti-Dumping Agreement, and Article 10 and 32.1 of the SCM Agreement. Furthermore, India misstates the facts, asserting incorrectly that the directive "requires" importers of merchandise subject to an antidumping or countervailing duty order to furnish an enhanced continuous bond. In fact, the directive does not so require.

5. India Fails to Demonstrate that Customs Laws and Regulations Are Inconsistent "As Such" with Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement or Article XVI:4 of the WTO Agreement

27. Arguing that "[t]he old distinction between 'mandatory' and 'discretionary' under the GATT 1947 does not survive any longer," India identifies nine laws and regulations in particular as measures "inconsistent as such" with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement, and Article 32.5 of the SCM Agreement. India argues that these laws and regulations create "the very existence of discretion" to act in a WTO-inconsistent manner, and therefore are impermissible. India's argument, however, does not accord with the text of the Agreement, is at odds with a long line of panel and Appellate Body reports, and if accepted, would mean that a single WTO-inconsistent administrative act could serve as the basis for finding a Member's entire legal system to be WTO-inconsistent.

28. As the complaining party to this proceeding, India bears the burden of presenting evidence and arguments sufficient to establish that the customs laws and regulations it cites are inconsistent with the provisions of the WTO Agreements that it invokes. India, however, provides no support for its claims in this regard. Under India's logic, any law granting "authority" to collect revenue – ranging from Article 8 of the United States Constitution to the 1789 Act of Congress establishing the US Treasury Department – would be implicated in this dispute, as they also "authorize" CBP to secure the revenue, including through bonds.

29. Article XVI:4 means that, if a Member's law, regulation, or administrative procedure does not conform with its obligations as provided in the annexed Agreements, that Member has an affirmative obligation to bring it into conformity. Conversely, however, if those laws, regulations and administrative procedures conform with its obligations, it need undertake no further action. Thus, the ordinary meaning of Article XVI:4 is that a law, regulation or administrative procedure is not inconsistent with Article XVI:4 unless it is also inconsistent with a separate obligation of a covered agreement. The laws and regulations of the United States are not inconsistent with any such provision – nor does India so assert – and are therefore consistent with Article XVI:4.

30. India further argues that it should be permitted to challenge the measures at issue "as such" because if it is unable to do so "it will only lead to 'multiplicity of litigation' in future." The prospect of having to present an argument in the future does not, however, excuse India from proving its case in the instant proceeding. A measure that is not itself inconsistent with a WTO provision may not be found in breach simply because at some date in the future it may be relied up as "authority" for a WTO-inconsistent act. The distinction between mandatory and discretionary action in GATT/WTO jurisprudence was a basic element of the practice of the GATT 1947 Contracting Parties in interpreting the GATT 1947, and remains a basic element of the practice of WTO Members in interpreting the WTO Agreement.

6. The Additional Bond Directive Is Not Inconsistent with GATT Article X:3(a)

31. India has failed to establish a breach of Article X. Even under India's theory that GATT Article X applies, the evidence demonstrates that CBP administers the bond directive in a "uniform, impartial and reasonable" manner. The directive contains various criteria for identifying importers of merchandise

with elevated default risk, and CBP applies these criteria uniformly. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair." Treatment in an unbiased and fair manner is distinguishable from identical treatment. Using the criteria described above, CBP determined that importers of shrimp were particularly risky – the potential losses were significant, as was the likelihood of default. Insofar as CBP treated shrimp importers differently from others, it did so based on neutral, "impartial" criteria. "Reasonable" means "[i]n accordance with reason; not irrational or absurd." Here, CBP's reason for applying the additional bond directive to shrimp subject to the February 2005 orders is clear: it faced $2 billion in imports of shrimp newly subject to an antidumping order, had experienced $225 million in defaults on similar merchandise when antidumping orders were imposed in the past, and believed that, due to low capitalization rates in the industry and other factors, these imports posed a serious risk to the revenue. Thus, India fails to demonstrate that the additional bond directive represents unreasonable, partial, or nonuniform administration of US customs laws, within the meaning of GATT Article X.

7. The Additional Bond Directive Does not Breach GATT Article XI

32. With respect to GATT Article XI, as was the case with the bond measure at issue in *Dominican Republic – Cigarettes*, the bond directive does not prevent importers from importing shrimp into the United States. The directive does not mandate an increased bond amount – as noted previously, importers can obtain individual bond determinations and, depending on their ability to pay and history of compliance with US customs laws and regulations, may not be required to obtain a higher bond. Furthermore, even those importers that have not demonstrated an ability to pay or have not complied with US customs laws in the past are able to import even without participating in the process outlined in the directive or providing additional bond amounts.

8. The Directive Is Not Inconsistent with GATT Article II

33. The additional bond directive itself does not constitute a "duty" (antidumping or otherwise). Likewise, the additional bond directive does not constitute an "other charge." First, CBP does not charge for the bonds, nor does it even require that security take the form of the additional bond. Second, India's argument that such bonds are "other charges" would mean that Members may not maintain bonds as a means to secure importers' obligations unless the bonds are specifically included in a Member' s schedule. However, as noted above, customs bonds are specifically contemplated in various WTO provisions, including the Ad Note to Article VI and Article 13 of the Customs Valuation Agreement. This context supports the conclusion that bonds are a tool that is generally available to the Members, and not simply to those Members which have scheduled them. For this reason as well, bonding requirements are not an "other charge."

9. The Directive Is Not Inconsistent with GATT Article XIII

34. The directive does not restrict the quantity of shrimp that may be imported into the United States, and thus does not constitute a "quantitative restriction" within the meaning of GATT Article XIII. India provides no support for its assertion that the United States has breached Article XIII, other than its argument that the directive "severely restricts imports" into the United States of subject merchandise. This statement is not a sufficient basis to conclude that the directive is a "quantitative restriction", and, as noted previously, is simply incorrect.

10. The Directive Is Not "As Such" Inconsistent with GATT Articles I, II or XI

35. Even more dramatically than with respect to its other "as such" claims, with respect to GATT Articles I, II, and XI, India offers absolutely no legal theory, evidence, or even argumentation to explain how the directive "as such" is inconsistent with these provisions. India has not even attempted to meet, let alone met, its burden with respect to its "as such" claims under GATT Articles I, II, and XI.

11. The United States Did Not Act Inconsistently with Article 18.5 of the Anti-Dumping Agreement or Article 32.6 of the SCM Agreement by Not Notifying the Amended Bond Directive

36. The bond directive modified CBP's 1991 Bond Guidelines regarding bond amounts for all merchandise. That directive is not a "law or regulation" relevant to the *Anti-Dumping* or SCM Agreements, nor does it relate to the administration of those laws and regulations.

12. The Additional Bond Directive Is Justified by GATT Article XX(d)

37. As the United States has demonstrated, the additional bond directive is not inconsistent with US WTO obligations. Article XX of the GATT 1994 makes this even clearer.

38. The additional bond directive is "necessary to secure compliance" with US antidumping and countervailing duty assessment laws, in particular 19 USC. 1673e(a)(1) governing the assessment of antidumping duties and general customs and regulations requiring the payment of duties owed to the US Treasury. The fact that the directive and its application to shrimp secures compliance with this obligation and general customs laws and regulations requiring payment of duties owed to the US Treasury is evident on its face. The directive is "necessary" to secure compliance with US laws and regulations. Revenue collection is among the most fundamental responsibilities of governments. As explained above, the directive secures an otherwise unsecured liability in the form of additional antidumping duties owed upon assessment that exceed cash deposits, and thus permits collection of revenue that in the past has been subject to unprecedented default.

39. The additional bond directive also meets the requirements of the chapeau to Article XX, as it has not been applied in a manner that would constitute a "disguised restriction on international trade" or "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."

ANNEX A - 2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

(30 March 2007)

1. Introduction

1. In this dispute, India is challenging the requirement imposed by the United States on importers of certain designated merchandise subject to antidumping or countervailing measures that they must post, in addition to the bonds or cash deposits required under such measures, a bond for an amount calculated at 100 per cent of the antidumping or countervailing duties payable on their total imports during the previous one year (the "Enhanced Bond Requirement").

2. The measure at issue in this dispute includes the instruments issued by the United States Customs and Border Protection Service ("US Customs") that provide for the imposition of the Enhanced Bond Requirement and describe its operation (the "Amended Bond Directive") and the laws and regulations that authorize US Customs to impose the Enhanced Bond Requirement.

2. Legal Argument

3. India considers that the Amended Bond Directive and the laws and regulations that authorize it are not consistent, both as such and as applied to imports of shrimp subject to antidumping duties, with the obligations of the United States under the provisions of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"), of the WTO Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement") and of the General Agreement on Tariffs and Trade, 1994 (the "GATT 1994").

(a) The Amended Bond Directive provides for specific action against dumping and subsidization that is inconsistent as such with the provisions of the GATT 1994 as interpreted by the Anti-Dumping Agreement and the Subsidies Agreement, respectively.

4. The Enhanced Bond Requirement constitutes an impermissible "specific action" against dumping and subsidization that is inconsistent with the obligations of the United States under Articles 1 and 18.1 of the Anti-Dumping Agreement and Articles 10 and 32.1 of the Subsidies Agreement. According to the Appellate Body ruling in *US – CDSOA*, a three-step analysis is necessary to determine whether a measure constitutes impermissible specific action against dumping or subsidization. The two basic conditions precedent are that the measure must be (a) "specific" to dumping or subsidization, and (b) "against" dumping or subsidization. If these two conditions are met, it is necessary to determine whether the measure has been taken in accordance with the provisions of Article VI of the GATT 1994 as interpreted by the provisions of the Anti-Dumping Agreement and the Subsidies Agreement.

5. The Enhanced Bond Requirement is "specific" to dumping or subsidization because the Amended Bond Directive expressly states that it applies only to importers of designated merchandise that is subject to antidumping or countervailing duties, i.e., when all the conditions for imposition of antidumping or countervailing duties have been fulfilled. As the United States itself has admitted in *US- CDSOA*, a measure such as the Enhanced Bond Requirement that " … imposes … liability on importers/producers/ exporters when dumping or subsidization is found … " will constitute "specific action" with respect to dumping and subsidization. In addition, one important element of the formula for calculating the bond liability amount is the amount of antidumping or countervailing duties owed based on the dumping margin or the individual net subsidy rate. Therefore, there is clearly an inextricable link between the Enhanced Bond Requirement and the constituent elements of dumping or of a subsidy.

6. Moreover, one of the stated purposes of the Enhanced Bond Requirement is to ensure that antidumping and countervailing duties are collected for payment to domestic industry under the US Continued Dumping and Subsidy Offset Act (the "CDSOA"), which the Appellate Body has found to be a "specific action" against dumping or subsidization. Regulations or administrative procedures by US Customs to implement the CDSOA such as the Amended Bond Directive also, therefore, constitute specific action against dumping or subsidization.

7. Further, the Enhanced Bond Requirement also clearly acts "against" dumping and subsidization. It has a serious, adverse impact on importers and, therefore, on dumping or subsidization. The demand of 100 per cent collateral by sureties acceptable to US Customs to issue enhanced bonds and high bond premiums and other charges associated with providing the collateral impose a heavy burden on importers. The bonds initially posted by importers inevitably get exhausted or saturated well before the first administrative review and liquidation of entries are completed. As a result, importers are forced to post additional, enhanced bonds. Sureties again subject them to additional demands for collateral and high bond premiums, which results in further charges and further depletion of their capital and credit. Thus, as found by the US Court of International Trade, importers are forced to incur serious losses in profits and business opportunities. This in turn has a serious deterrent effect on exports of the merchandise subject to the Enhanced Bond Requirement as is evident from the sharp drop between 2005 and 2006 in the quantity and value of shrimp exported from India as well as in the total number of exporters from India.

8. There are further disincentives that distort the structure of the Anti-Dumping Agreement and the Subsidies Agreement as is evident from the agreements between exporters of shrimp subject to antidumping duties and a group of US domestic shrimp producers known as the "Southern Shrimp Alliance". Exporters are forced to forgo their right under US law to have their dumping margins determined in an administrative review because liquidation is ordered immediately upon termination of administrative review at the rate set out in the Order. In addition, the linkage between agreeing not to import the subject shrimp and being exempted from the Enhanced Bond Requirement in the agreements entered into by US Customs and importers of shrimp confirms that it has the effect of dissuading imports of dumped products into the United States. It cannot be disputed, therefore, that the Enhanced Bond Requirement has a serious adverse bearing on dumping and subsidization.

9. The last step in the analysis is to determine whether the Enhanced Bond Requirement accords with the requirements of Article VI of the GATT 1994 as interpreted by the provisions of the Anti-Dumping Agreement and the Subsidies Agreement. In *US – AD Act of 1916*, the Appellate Body found that the Anti-Dumping Agreement limits the permissible responses to dumping to (a) definitive anti-dumping duties, (b) provisional measures and (c) price undertakings. Similarly, in *US – CDSOA*, the Appellate Body found that there are only four permissible responses to subsidization: (i) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally sanctioned countermeasures under the dispute settlement system.

10. In this case, by definition, the Enhanced Bond Requirement does not involve the collection of a definitive (antidumping or countervailing) duty or a price undertaking by exporters. It is also not a provisional measure to the extent that it is applied (a) in addition to, and on top of, the provisional measures contemplated by Article 7 of the Anti-Dumping Agreement and by Article 17 of the Subsidies Agreement, and (b) even after the provisional measures contemplated by these provisions have run their course and the decision to impose definitive duties has been taken under Article 9.1 of the Anti-Dumping Agreement or Article 19.2 of the Subsidies Agreement, as the case may be. Even otherwise, the Enhanced Bond Requirement is clearly inconsistent with the requirements of Articles 7 and 9 of the Anti-Dumping Agreement and of Articles 17 and 19 of the Subsidies Agreement.

11. Accordingly, it is clear that the Enhanced Bond Requirement is inconsistent as such with the obligations of the United States (a) under Article VI:2 of the GATT 1994 and Articles 1 and 18.1 of the

Anti-Dumping Agreement; and (b) under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the Subsidies Agreement.

12. Further, the United States cannot rely on footnote 24 to the Anti-Dumping Agreement or on footnote 56 to the Subsidies Agreement to justify the Enhanced Bond Requirement under other provisions of the GATT 1994. Footnote 24 qualifies Article 18.1 of the Anti-Dumping Agreement just as footnote 56 qualifies Article 32.1 of the Subsidies Agreement by stating that neither provision is " … intended to preclude action under other relevant provisions of GATT 1994, as appropriate." In *US – CDSOA*, the Appellate Body clarified that these provisions only "… confirm what is implicit in Article 18.1 of the Anti-Dumping Agreement and in Article 32.1 of the *SCM Agreement*, namely, that an action that is not 'specific' within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the *SCM Agreement*". Therefore, it is clear that a measure that constitutes specific action against dumping or subsidization cannot be justified under either footnote 24 to the Anti-Dumping Agreement or footnote 56 to the Subsidies Agreement. The Enhanced Bond Requirement clearly constitutes specific action against dumping and subsidization. Accordingly, the United States cannot justify it as being permissible under any other provision of the GATT 1994.

(b) The Enhanced Bond Requirement is also inconsistent with the provisions of Article VI:2 of the GATT 1994 and Articles 1 and 18 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

13. The application of the Enhanced Bond Requirement has had a serious adverse impact on importers of shrimp from India. After many US importers ceased to import shrimp from India, Indian exporters were forced to export shrimp either on a duty-paid basis or were forced to register themselves as importers of record with US Customs. In the month of February 2005, the US Customs issued notices to several importers that their existing continuous bonds were insufficient and directed them to post enhanced continuous bonds ranging from $1 million to $5 million. US Customs made it clear that the provisions in the Clarification and the Notice relating to modification of the bonds to account for the circumstances of individual importers will not result in discharging enhanced bonds already previously furnished to US Customs. Further, the bonds were required to be given only by surety companies approved by the US Treasury in the United States, which demanded 100 per cent collateral from their banks in India. US Customs have also detained shipments of imported shrimp from India for not complying with the Enhanced Bond Requirement. For these reasons and those set out above in the context of India's "as such" claim under Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Subsidies Agreement, the Enhanced Bond Requirement is also inconsistent with the provisions of Article VI:2 of the GATT 1994 and Articles 1 and 18.1 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

(c) The Amended Bond Directive and the laws and regulations of the United States that authorize it are inconsistent with the obligations of the United States under Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement.

14. US Customs is authorized to impose the Enhanced Bond Requirement under, among other provisions, 19 USC. § 1623(a), 19 C.F.R. § 113.1 and 19 C.F.R. § 113.13. India considers that these laws and regulations together with the Amended Bond Directive are inconsistent as such with the obligations of the United States under Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement because the Enhanced Bond Requirement constitutes "specific action" against dumping and subsidization that does not fall within any of the permitted responses to dumping under the Anti-Dumping Agreement or to subsidization under the Subsidies Agreement. The imposition of the Enhanced Bond Requirement is also inconsistent with various other provisions of the Anti-Dumping Agreement and of the Subsidies Agreement.

15. Moreover, in the application of the Enhanced Bond Requirement to imports of shrimp from India, US Customs has acted in an inflexible manner, requiring every importer of shrimp to furnish a bond calculated at exactly 100 per cent of the antidumping duties payable on imports of shrimp during the previous 12-month period. Even assuming that bond amounts are lowered in future pursuant to the notice published by US Customs on 24 October 2006 in the Federal Register entitled "Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements" (the "Notice"), it still contains norms or rules that Port Directors of US Customs are required to apply while determining bond liability amounts for importers subject to the Enhanced Bond Requirement. To the extent that this liability is in addition to the provisional measures permissible under Article 7 of the Anti-Dumping Agreement and Article 17 of the Subsidies Agreement or definitive duties (in the form of cash deposits) permissible under Article 9 of the Anti-Dumping Agreement and Article 19 of the Subsidies Agreement, it is clearly inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Subsidies Agreement. Therefore, the Amended Bond Directive contains normative rules of conduct enforced by US Customs that are inconsistent with the requirements of Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement.

16. The old distinction between "mandatory" and "discretionary" under the GATT 1947 does not survive any longer. The very existence of discretion to impose measures that represent impermissible responses to dumping or subsidization renders such provisions in the laws, regulations and administrative procedures of Members inconsistent with their obligations under Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement. This is also a salutary approach in light of the obligation to perform treaty obligations "in good faith".

17. In *US – Sunset Policy Bulletin*, the Appellate Body noted that "… allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated." In the circumstances, India submits that the Panel should find that the Amended Bond Directive and the underlying statutory provisions and regulations of the United States that authorize it are inconsistent as such with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement.

(d) The Enhanced Bond Requirement is inconsistent as such with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement and with Articles 19.2, 19.3 and 19.4 of the Subsidies Agreement. It is also inconsistent with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

18. To the extent that the US seeks to justify the Enhanced Bond Requirement as a measure consistent with Article 9 of the Anti-Dumping Agreement or Article 19 of the Subsidies Agreement, it is necessary to evaluate its consistency with these provisions for purposes of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the Subsidies Agreement.

19. Under Article 9.2 of the Anti-Dumping Agreement (or under Article 19.3 of the Subsidies Agreement), the only possible measure that may be taken as a result of the decision to impose definitive duties under Article 9.1 of the Anti-Dumping Agreement (or under Article 19.2 of the Subsidies Agreement) is that duties shall be collected in the "appropriate amounts". Further, under Article 9.3 of the Anti-Dumping Agreement (or under Article 19.4 of the Subsidies Agreement), the amount of the duty shall not exceed the "margin of dumping" (or the "amount of the subsidy found to exist"). Therefore, it is clearly impermissible to demand an enhanced, continuous bond in addition to the duties collected in an amount equal to the dumping margin or the amount of the subsidy found to exist.

20. The United States cannot justify the Enhanced Bond Requirement on the basis that it follows the retrospective system of assessment referred to in Article 9.3.1 of the Anti-Dumping Agreement. Article 9.3.1 clarifies that the "final liability" for antidumping duties will be fixed at the stage of administrative review and that any refund must be made normally within a period of 90 days from the

determination of the final liability. The terms "final liability" and "refund" in Article 9.3.1 of the Anti-Dumping Agreement have the following implications:

First: There must be a prior liability that is not "final", which can only refer to the liability fixed at the time of the decision to impose definitive duties in Article 9.1. That some liability is fixed at the time of the Article 9.1 imposition decision is corroborated by the requirement in Article 12.2.2 that a public notice of the final determination must include the dumping margins established under Article 2.

Second: It is permissible under Article 9.3.1 for the United States to collect higher antidumping duties after the administrative review under Article 9.3.1 than were collected under Article 9.2 consequent upon the imposition decision taken under Article 9.1.

Third: Article 9.3.1 could not have contemplated a refund unless some amounts have already been collected prior to the determination of the final liability. However, the duties may be collected only "in the appropriate amounts" consequent upon the imposition decision in Article 9.1.

Fourth: The absence of any reference to a discharge of bonds in Article 9.3.1 (unlike in Articles 10.4 and 10.5 of the Anti-Dumping Agreement), at least suggests, if not confirms, that no measure other than the collection of definitive antidumping duties (or cash deposits) in "appropriate amounts" is contemplated after the imposition decision in Article 9.1 and prior to the determination of final liability in Article 9.3.1.

Even by implication, however, Article 9.3.1 of the Anti-Dumping Agreement does not confer any special right, either expressly or impliedly, on Members that choose to follow the retrospective assessment system to take any measure after the imposition decision in Article 9.1 of the Anti-Dumping Agreement other than to collect antidumping duties.

21. Similarly, based on the provisions of Articles 19.2, 19.3 and 19.4 of the Subsidies Agreement, it is clear that, after the decision to impose countervailing duties referred to in Article 19.2, it is not permissible to take any measure other than to collect countervailing duties not in excess of the amount of the subsidy found to exist. Thus, the Enhanced Bond Requirement is clearly inconsistent with Articles 19.2, 19.3 and 19.4 of the Subsidies Agreement.

22. The ordering of the paragraphs of Article 9 of the Anti-Dumping Agreement makes it clear that Articles 9.1 and 9.2 also govern the retrospective assessment system. The imposition decision in Article 9.1 must follow the final determination. The only permissible measure thereafter is the collection of antidumping duties under Article 9.2 "in the appropriate amounts". That Article 9.3 and Article 9.3.1 follow after Article 9.2 does not mean that some additional right to take security exists in the case of retrospective assessment systems. In fact, the first sentence of Article 9.3 prohibiting the collection of antidumping duties in excess of the dumping margin clearly qualifies the "appropriate amounts" in which antidumping duties may be collected under Article 9.2.

23. Moreover, it is important to keep in mind the policy consequences of conceding any right to take enhanced, continuous bonds in addition to provisional measures or definitive measures that are not governed by the strict disciplines contained in the Anti-Dumping Agreement or the Subsidies Agreement. Members may well demand a continuous bond amounting to 200 per cent or 300 per cent of antidumping or countervailing duties payable on imports at the rate specified in the final affirmative determination for the immediately preceding one-year period.

24. For the reasons stated above, the Enhanced Bond Requirement is also clearly inconsistent with the provisions of Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

(e) The Enhanced Bond Requirement is inconsistent as such with the requirements of Article 7 of the Anti-Dumping Agreement and of Article 17 of the Subsidies Agreement. It is also inconsistent with Article 7 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

25. India submits that the Enhanced Bond Requirement is inconsistent as such with Article 7 of the Anti-Dumping Agreement and with Article 17 of the Subsidies Agreement.

26. Under Article 7.1(iii) of the Anti-Dumping Agreement and Article 17.1(c) of the Subsidies Agreement, it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". The stated reasons for introducing the Enhanced Bond Requirement, however, do not mention injury being caused during the investigation at all and focus rather on protecting revenue and ensuring that payments are made to domestic industry pursuant to the CDSOA. Therefore, if the Enhanced Bond Requirement is a provisional measure, it is clearly inconsistent as such with Article 7.1(iii) of the Anti-Dumping Agreement and Article 17.1(c) of the Subsidies Agreement.

27. The Enhanced Bond Requirement is also inconsistent with Article 7.2 of the Anti-Dumping Agreement and with Article 17.2 of the Subsidies Agreement. A provisional measure, whether in the form of a cash deposit or a bond, may not be for an amount in excess of the "provisionally estimated margin of dumping" or the "provisionally calculated amount of subsidization", as the case may be. However, under the Enhanced Bond Requirement, importers are required to provide an enhanced, continuous bond in an amount equal to the antidumping duties or countervailing duties payable on total imports for the previous year at the applicable rate specified in the preliminary affirmative determination rather than a single-entry bond for the amount of antidumping or countervailing duty owed on each shipment. Combined with the fact that provisional measures are never permissible for a period in excess of six months, the value of the enhanced bond for a year's worth of imports considerably exceeds the amount of the provisionally estimated dumping margin or the provisionally calculated amount of subsidization. Thus, if the Enhanced Bond Requirement is a provisional measure, it is also clearly inconsistent as such with the requirements of Article 7.2 of the Anti-Dumping Agreement and Article 17.2 of the Subsidies Agreement.

28. Moreover, Article 7.4 of the Anti-Dumping Agreement provides for limiting a provisional measure to a period "not exceeding four months or, on the decision of the authorities concerned, upon request by exporters … to a period not exceeding six months" just as Article 17.4 of the Subsidies Agreement provides for limiting it to "a period not exceeding four months". Accordingly, to the extent that the Enhanced Bond Requirement on importers is introduced or remains in place on any date after six months from the date on which provisional measures are first imposed in an antidumping case or after four months in the case of a countervailing duty case, the Enhanced Bond Requirement constitutes a clear inconsistency as such with the provisions of Article 7.4 of the Anti-Dumping Agreement and of Article 17.4 of the Subsidies Agreement.

29. For the same reasons, the Enhanced Bond Requirement is also inconsistent with the provisions of Articles 7.1, 7.2 and 7.4 of the Anti-Dumping Agreement as applied to importers of shrimp from India.

(f) The Enhanced Bond Requirement is inconsistent with the Ad Note both as such and as applied to imports of shrimp from India.

30. India considers that the United States cannot rely upon the Note *Ad* Paragraphs 1 and 2 of Article VI of the GATT 1994 (the "Ad Note") to justify the Enhanced Bond Requirement independently of Article 7 of the Anti-Dumping Agreement or Article 17 of the Subsidies Agreement to justify the

Enhanced Bond Requirement. In fact, it is clear that the "reasonable security (bond or cash deposit)" referred to in the Ad Note is the same as the provisional measures referred to in Article 7 of the Anti-Dumping Agreement and in Article 17 of the Subsidies Agreement and that these provisions merely elaborate upon the provisions of the Ad Note and impose further disciplines in this regard. The final determination of the facts referred to in the Ad Note can only be at the stage of the decision to impose definitive antidumping duties under Article 9.1 of the Anti-Dumping Agreement and under Article 19.2 of the Subsidies Agreement. Thus, the Ad Note clearly does not constitute a "general exception" in Article VI of the GATT 1994 that operates independently of the disciplines in Articles 7 and 9 of the Anti-Dumping Agreement and in Articles 17 and 19 of the Subsidies Agreement.

31. Further, the requirement in the Ad Note that any security taken must be "reasonable" is clearly not satisfied in the case of the Enhanced Bond Requirement because the enhanced, continuous bond must be furnished in addition to making cash deposits at the duty rates specified in the Order. Therefore, the Enhanced Bond Requirement imposed by the United States is *per se* unreasonable.

32. In addition, the Enhanced Bond Requirement is clearly not reasonable because it was motivated by political considerations. Further, the designation of products by US Customs is also arbitrary and capricious. The Amended Bond Directive does not cite a single reason why there is a likelihood of a higher rate of default in collection of antidumping duties on imports of shrimp as opposed to imports of other agricultural or aquacultural merchandise. As imports of shrimp subject to antidumping duties were not liquidated, there was no evidence of default by shrimp importers at the relevant time. Further, US Customs at no time has offered any explanation of why importers of crawfish or garlic from China were not subject to the Enhanced Bond Requirement.

33. It is clear also that US Customs does not engage in any analysis of the likelihood of an increase in dumping margins which is the ostensible justification for applying the Enhanced Bond Requirement to merchandise subject to antidumping or countervailing duties.

34. Moreover, the extent of the security demanded under the Enhanced Bond Requirement is clearly excessive. As the US Court of International Trade found, the effects of imposition of the Enhanced Bond Requirement include (a) a serious depletion of the credit of importers caused by the need to provide collateral for the initial bond amount as well as subsequent increases in the bond amount to account for delays in liquidation, (b) dropping or scaling back on product lines imported into the United States, (c) preventing the addition of new product lines, (d) causing the loss of spot sales, (e) preventing participation in bids from major supermarket chains, (g) forcing imports of shrimp on a delivered, duty-paid basis, thus reducing profit margins, (h) adversely affecting customer and supplier relationships, (i) inability to fulfil contractual orders because there are no substitutes for the merchandise subject to the antidumping or countervailing duty orders. The extent of the harm suffered by shrimp importers as a result of the Enhanced Bond Requirement is clear evidence of its unreasonableness.

35. In fact, in the case of shrimp, until the publication of the Notice in the Federal Register, US Customs certainly did not take account of the financial soundness of individual importers at all, which presumably should have been its primary concern in imposing the Enhanced Bond Requirement. This is an obvious indicator of the extreme unreasonableness both in conception and in administration of the Enhanced Bond Requirement. Although US Customs now claims that it will take into account the financial soundness of individual importers in fixing the amount of the enhanced bond, they have also clarified that they will not apply this analysis pending liquidation to importers of shrimp to reduce the value of enhanced, continuous bonds already furnished.

36. Accordingly, India considers that the Enhanced Bond Requirement is inconsistent with the provisions of the Ad Note both as such and as applied to shrimp.

(g) The United States has acted inconsistently with Article 18.5 of the Anti-Dumping Agreement and with Article 32.6 of the Subsidies Agreement by not notifying the Amended Bond Directive.

37. The Enhanced Bond Requirement clearly represents a fundamental change in the administration by the United States of its laws and regulations relevant to the Anti-Dumping Agreement and to the Subsidies Agreement. Nevertheless, the United States has not informed the Committee on Anti-Dumping Practices or the Committee on Subsidies and Countervailing Measures about the Amended Bond Directive. India considers, therefore, that the United States has acted inconsistently with its obligations under Article 18.5 of the Anti-Dumping Agreement and under Article 32.6 of the Subsidies Agreement.

(h) The Enhanced Bond Requirement is inconsistent with Article X:3(a) of the GATT 1994 as applied to imports of shrimp from India.

38. India submits that the Enhanced Bond Requirement is inconsistent with Article X:3(a) as applied to shrimp because it has not been administered in a uniform, impartial and reasonable manner as discussed above. It has been applied only to importers of shrimp from the six countries subject to the Antidumping Order in the shrimp case and not to other importers. Therefore, the Enhanced Bond Requirement is clearly inconsistent with the requirements of Article X:3(a) as applied to shrimp.

(i) The Enhanced Bond Requirement is inconsistent with Articles I and II:1(a) and II:1(b) of the GATT 1994 as such and as applied to imports of shrimp from India.

39. To the extent that the Enhanced Bond Requirement can be characterized legally as involving duties, taxes or other charges, India submits that it is inconsistent with the obligations of the United States under Articles I:1 and II:1(a) and II:1(b) of the GATT 1994. The Enhanced Bond Requirement certainly involves charges by US surety companies, is "a method of levying … duties", and represents a "rule" and "formality" in connection with importation. Therefore, it is clearly subject to the most-favoured nation obligation in Article I:1 of the GATT 1994. To the extent that the Enhanced Bond Requirement is applied in a discriminatory manner, therefore, to only those Members that are subject to antidumping or countervailing duties in respect of certain designated merchandise, it is clearly inconsistent with the obligations of the United States under Article I:1 of the GATT 1994.

40. Again, to the extent that the Enhanced Bond Requirement necessarily involves payment of (high) charges to US surety companies, it constitutes an inconsistency with the second sentence of Article II:1(b), which provides that the "… products [described in Part I of the Schedule] relating to any [Member] shall also be exempt from all other … charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

41. For the reasons stated above, the Enhanced Bond Requirement as applied to shrimp is inconsistent with the provisions of Article I:1 and the second sentence of Article II:1(b) of the GATT 1994.

42. The duties associated with the Enhanced Bond Requirement are not antidumping or countervailing duties authorized under the provisions of Article VI of the GATT 1994, of the Anti-Dumping Agreement or of the Subsidies Agreement. To the extent that the Enhanced Bond Requirement results in an increase in "contingent tariff liability" above bound levels for Members subject to antidumping or countervailing duties, therefore, the Enhanced Bond Requirement is inconsistent with the obligations of the United States under Article II:1(a) and the first sentence of Article II:1(b) of the GATT 1994. Moreover, the increase in contingent tariff liability is only in respect of certain Members whose merchandise is subject to the Enhanced Bond Requirement. Therefore, it is also inconsistent with the "most-favoured nation" treatment obligation of the United States under Article I:1 of the GATT 1994.

43. It is important to note that the bound rate for shrimp falling under tariff headings 0306.13.00 and 1605.20.10 in the Schedule of Concessions of the United States is "0.0%". Therefore, the Enhanced Bond Requirement is inconsistent with Articles I, II:1(a) and II:1(b) as applied to shrimp as well.

(j) In the alternative, the Enhanced Bond Requirement is inconsistent as such and as applied to imports of shrimp from India with Articles XI and as applied to imports of shrimp from India with Article XIII of the GATT 1994.

44. Alternatively, to the extent that the Enhanced Bond Requirement may be legally characterized as an import restriction and not as a "duty, tax or other charge," it is clearly inconsistent with Article XI:1 of the GATT 1994 and is not saved by any of the exceptions contained therein. The Enhanced Bond Requirement operates in a manner that severely restricts imports into the United States of merchandise subject to antidumping or countervailing duties. Accordingly, to this extent, the Enhanced Bond Requirement is inconsistent with Article XI:1 of the GATT 1994.

45. Further, the Enhanced Bond Requirement inherently discriminates against imports from some Members because antidumping investigations almost always will only be against imports from some Members that are found to have been dumped and to have caused injury and not imports from all Members. In the case of shrimp, US Customs has applied the Enhanced Bond Requirement to imports of shrimp only from the six countries subject to investigation: Brazil, China, Ecuador, India, Thailand and Vietnam. Accordingly, India considers that the United States has acted inconsistently with its obligations under Article XIII of the GATT 1994 by applying the Enhanced Bond Requirement to imports of shrimp from India in a discriminatory manner.

3. Conclusion

46. For the reasons stated above, India respectfully requests the Panel to find that the laws, rules and regulations of the United States that authorize the imposition of the Enhanced Bond Requirement and the instruments comprising the Amended Bond Directive are inconsistent as such with the provisions of Article VI of the GATT 1994 including the Ad Note, Articles 1, 7.1, 7.2, 7.4, 9.1, 9.2, 9.3, 9.3.1, 18.1, 18.4 and 18.5 of the Anti-Dumping Agreement, Articles 10, 17.1, 17.2, 17.4, 19.2, 19.3, 19.4, 32.1, 32.5 and 32.6 of the Subsidies Agreement, Article XVI:4 of the WTO Agreement and of Articles I:1, II:1(a) and (b) or, alternatively, of XI:1 of the GATT 1994.

47. For the same reasons, India also respectfully requests the Panel to find that the Enhanced Bond Requirement as applied to imports of shrimp from India is inconsistent with the provisions of Articles 1, 7.1, 7.2, 7.4, 7.5, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the Anti-Dumping Agreement, of Article X:3(a) and of Articles I:1, II:1(a) and (b) or, alternatively, of XI:1 and XIII of the GATT 1994.

48. Accordingly, India respectfully requests that the Panel recommend to the DSB in accordance with Article 19.1 of the DSU that the United States bring its measures into conformity with the provisions of the Anti-Dumping Agreement, the Subsidies Agreement and the GATT 1994 within a reasonable period of time.

ANNEX B

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSION OF THE PARTIES

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ANNEX B - 1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(9 July 2007)

1. The Additional Bond Amount Constitutes "Reasonable Security" Within the Meaning of the Ad Note to GATT 1994 Articles VI:2 and VI:3.

1. A central question before this Panel is whether any provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), SCM Agreement, or the GATT 1994 govern a security requirement for the payment of an antidumping or countervailing duty assessed after an order has been imposed, such as that contemplated by the enhanced bond directive. As the United States has demonstrated in its previous submissions, the Ad Note to Article VI is the sole provision that specifically limits security requirements of this type.

2. As the United States has explained in previous submissions, the "final determination of the facts" in the Ad Note refers to the determination of the facts with respect to the "*payment* of ant-dumping or countervailing duty." In the context of a retrospective duty assessment system, the "determination of the final liability for payment of anti-dumping duties," referenced in Article 9.3.1, must be made in order for the facts with respect to payment to be determined. Thus, the "final determination of the facts" in the Ad Note follows an assessment review as described in Article 9.3.1. This interpretation is consistent with the immediate context in which the phrase appears. The Ad Note refers to "security for payment" and "other cases in customs administration" – in other cases in customs administration, security for payment of duties is required upon entry when the actual amount of liability is not known, and this security is required until the duties are finally assessed and paid. It is also consistent with GATT 1994 Article VI:2 and 3, the provisions to which the Ad Note is appended, and the AD Agreement. GATT 1994 Article VI:2 and 3 address "levy[ing]" antidumping and countervailing duties. In the AD Agreement and SCM Agreement, the term "levy" refers to "the definitive or final legal assessment or collection of a duty or tax." The "final determination" referenced in the Ad Note thus pertains to security pending final legal assessment of duties – an event that in a retrospective duty assessment system does not normally occur until after the completion of the assessment review.

3. The context provided by the AD Agreement also supports this interpretation of the Ad Note. AD Agreement Article 9.2 allows Members to collect antidumping duties "in the appropriate amounts in each case." Article 9.3 states that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." The "margin of dumping" established following the assessment review described in Article 9.3.1 is a margin of dumping "as established under Article 2" – meaning, a margin of dumping calculated in accordance with the general requirements of Article 2. India is thus incorrect in asserting that this means a "margin of dumping" from the investigation proceeding. The cash deposit and bond secure payment of this amount of duty and ensure that the United States is able to collect duties in that amount, in accordance with Article 9.2. Article 9.3.1 makes clear that "final" liability for payment of antidumping duties occurs at the end of an assessment period – the terminology used coincides with the reference to the "final" determination of the facts with respect to "payment" in the Ad Note, further supporting the view that the Ad Note addresses security pending completion of assessment.

4. Finally, as explained in the US Responses to Panel Questions, this interpretation is consistent with the manner in which the United States administered its antidumping law at the time the Ad Note was negotiated. The Antidumping Act, 1921, established a retrospective duty assessment system,

whereby assessment or appraisement of antidumping duties was withheld pending the determination of whether and to what extent dumping had occurred on individual transactions subject to an antidumping "finding". The 1921 Act, also included provisions for security pending final assessment, which prior to enactment of the Trade Agreements Act of 1979 was usually required in the form of "a bond equal to the estimated value of the merchandise."

5. India offers a reading of both the Ad Note and the AD and SCM Agreements that is at odds with their plain language and irreconcilable with the context in which the relevant language appears. First, with respect to the Ad Note, India argues that dumping cannot be "suspected" after an antidumping duty order is imposed following the completion of the investigation, and thus no case of suspected dumping can exist at that time. This interpretation does not, however, conform to the ordinary meaning of the term "suspected" or the context in which the term appears. In the Ad Note, "suspected" dumping refers to dumping that is "imagined to be possible or likely." The immediate context provides that security in such a case may be required for "payment" "pending final determination of the facts." In a retrospective system of duty assessment, whether and in what amount duties are owed on a given entry is not known until completion of assessment, and thus dumping – in the context of payment – is "suspected" during the intervening time. Dumping (if any) with respect to a given set of entries is not "known" until assessment of those entries is completed.

6. India attempts to rely on the phrase "existence of dumping," which is nowhere used in the Ad Note, to support its assertion that the Ad Note does not govern security after issuance of an antidumping duty order in an investigation. However, as the United States has explained, while the "existence of dumping" is confirmed at the conclusion of the investigation, whether a given entry has been dumped, and thus whether duties are owed, is not determined until completion of the assessment review. The "final determination of the facts" is used in the Ad Note in connection with the "payment of anti-dumping or countervailing duty," which in a retrospective system is not established at the conclusion of the investigation.

7. To read the Ad Note and the AD Agreement as India suggests would lead to an absurd result: it would mean that "security for payment of antidumping and countervailing duty" must be released after completion of an investigation (the moment when it has been established that it is likely that some duties will be owed) – and before the amount of duties owed is finally established and those duties have in fact been paid. The United States is not aware of any customs authority that administers security requirements in this manner.

8. Furthermore, India offers an interpretation of the Ad Note in relation to the AD Agreement and SCM Agreement that is inconsistent with the terms of those agreements and fails to give the Ad Note any meaning or legal effect, contrary to the relationship between the GATT 1994 and other WTO agreements contemplated by the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). As a threshold matter, the GATT 1994, including the Ad Note to Article VI, is an "integral part" of the WTO Agreement. As past panels and the Appellate Body have noted, Article VI is "part of the same treaty" as the AD Agreement, and "should not be interpreted in a way that would deprive it or the Antidumping Agreement of meaning." A panel "should give meaning and legal effect to all the relevant provisions," including the Ad Note to Article VI. Instead of "reading Article VI in conjunction with the Antidumping Agreement," as the Appellate Body in *US – 1916 Act* suggested, India, through a misreading of Articles 7 and 9 of the AD Agreement, attempts to read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning.

9. India's analysis of AD Agreement Article 9 in connection with the US cash deposit requirement illustrates the basic flaws in its approach. First, to argue that Article 9, and not the Ad Note, is the relevant provision applicable to cash deposit requirements, it asserts that the term "cash deposit" is the same as the term "duty" – a position that cannot be reconciled with the text of the AD

Agreement or the Ad Note, or the ordinary meaning of either of the terms in question. A "cash deposit" is security for a duty owed, but is not itself a duty. In both the GATT 1994 and the AD Agreement, the term "cash deposit" is used throughout to refer to a form of "security," not a "duty". The Ad Note, for example, provides for "reasonable security (cash deposit or bond)" – it does not characterize cash deposits as "duties". Article 7.2 of the AD Agreement likewise distinguishes a "cash deposit" as a form of "security" from "duties" in stating that "provisional measures may take the form of a provisional duty *or, preferably, a security – by cash deposit* or bond ... ." Insofar as it indicates a preference for requiring payment of cash deposits rather than duties, Article 7.2 suggests that there is in fact a "substantive difference" between a cash deposit requirement and a duty.

10. The sole support India offers for its reading of the GATT 1994 and the AD Agreement in this regard is a single reference by the Appellate Body in *US – Zeroing (Japan)* to cash deposits in its description of an administering authority's right to "collect duties, in the form of a cash deposit." India concedes that this statement was not made in the context of any finding with respect to cash deposit requirements – and indeed, the Appellate Body report contains no analysis of the question of whether cash deposits are in fact duties. A single clause in one sentence in an Appellate Body report, in a different context and unsupported by any relevant analysis, cannot justify a conclusion that plainly contradicts the text of the GATT 1994 and the AD Agreement.

11. Moreover, India misinterprets the term "margin of dumping" in Article 9.3 to refer, alternately, to the margin of dumping established in the investigation or to the margin established for a previous set of entries in a prior administrative review. This reading of Article 9.3, however, is both illogical and inconsistent with the text of that provision and previous reports of the Appellate Body examining that text. Inexplicably, India ignores the one margin of dumping that is based on actual analysis of the particular entries in question and which is used to establish the "final liability" for payment of antidumping duties, referenced in Article 9.3.1: the margin of dumping established in the assessment review. It is this margin (which, contrary to what India asserts, is a margin "as established under Article 2") that is the "margin of dumping" referenced in Article 9.3, and it is payment of duties resulting from this margin that the cash deposit and bond are intended to secure.

12. Contrary to India's claim, the Appellate Body's findings in *US – Zeroing (EC)* are fully consistent with this reading of AD Agreement Article 9. The "margin of dumping established for an exporter or producer" referenced in that section of the Appellate Body's report is the margin of dumping established in an *assessment* proceeding, not the margin of dumping established in an investigation. Article 9.3 specifies the amount of "assessed" antidumping duties – an amount determined through the administrative review. The margin of dumping it describes is thus the margin of dumping established in that review. Article 9.3 does not prescribe the specific methodology by which duties should be assessed, nor the amount of security that a Member may require pending final assessment.

13. Finally, India attempts to rely on Article 7 of the AD Agreement as a basis to read the Ad Note out of the GATT 1994 entirely, asserting that the Ad Note is confined to "provisional measures" and superseded by Article 7. However, nothing in the text of the Ad Note suggests that it is limited to "provisional measures" and nothing in the text of Article 7 supports the conclusion that it is intended to address security requirements after the imposition of an order. Neither Article 7 nor the concept of "provisional measures" existed at the time the Ad Note was negotiated. Article 7 contains rules with respect to provisional measures – measures (including security) taken prior to a final determination in an investigation. Article 7 does not, however, address security requirements imposed after a final determination has been made, and there is no basis to conclude that it places limitations on those requirements beyond the limitations established in the Ad Note.

14. If India's arguments were accepted, Members would not be permitted to maintain security requirements pending final determination of liability. To preclude a Member with a retrospective

system from requiring the posting of security prior to the determination of final liability would create a disparity between retrospective and prospective systems. The nature of prospective systems is that the duties billed at importation are treated as final. Thus, no security need be required. If an importer refuses to pay the antidumping duties owed, the Member maintaining a prospective system may deny entry to the merchandise in question. Members with prospective systems therefore are not required to bear the risk of unsecured liability in the way that Members with retrospective systems would if India's interpretation were accepted. Nothing in the GATT 1994 or AD Agreement suggests that one system is favored over another, and the Appellate Body has confirmed that this is the case. Members with retrospective systems should not be penalized for deferring determination of final liability to the end of the review period.

15. The evidence demonstrates that the additional bond amount satisfies the requirements of the Ad Note: it constitutes "reasonable security" for the payment of antidumping or countervailing duty. The United States imposed the additional bond requirement after it identified a serious and growing problem: when the assessment rate resulting from the administrative review exceeded the cash deposit rate at the time of entry, many importers were not paying the duties lawfully owed. This liability was unsecured by cash deposit, bond, or other security. As a result, the United States has been unable to collect over $600 million in antidumping duties lawfully owed to it. The additional security reflects an assessment of the multiple factors typically considered in establishing security requirements, including the amount of potential liability in the event of default and the likelihood of default. For shrimp, the amount of potential additional liability was significant, as was the risk of default. In excess of $2.5 billion worth of shrimp imports had entered the United States from countries subject to antidumping duty orders during calendar year 2003. This quantity of shrimp far exceeded that of imports subject to previous antidumping duty orders that had resulted in significant unpaid duties. Because antidumping duties are assessed on an *ad valorem* basis, the sheer quantity of shrimp imports alone increased the likelihood that, all other things being equal, the potential unsecured liability for shrimp would be substantial. No party to this proceeding disputes the fact that rates do increase. Even if the likelihood that rates for shrimp would increase was no greater than the historical norm, the fact that shrimp imports were so substantial in value supported CBP's decision to require greater security for shrimp, as it suggested significantly greater unsecured liability in the event of an increase.

16. As for the risk of default, CBP determined that importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty liability faced an elevated risk of default, due in part to low capitalization and high turnover rates in the industry as a whole. CBP provides importers subject to the enhanced bond directive with individualized risk assessments, if they so request. In that event, the bond amount reflects an individualized assessment of risk of default. Importers have requested and received individual bond amounts – often substantially lower than those prescribed by the formula – through this process.

2. The Additional Bond Directive Is Not Inconsistent with AD Agreement Article 18.1 or SCM Agreement Article 32.1.

17. India has failed to demonstrate that the additional bond directive is "specific action against dumping" or a "subsidy" – it is neither "specific" to dumping or a subsidy nor "against" dumping or a subsidy. As the United States explained in its submissions, the directive is a reasonable means of ensuring payment of duties ultimately assessed. Having identified a serious collection problem, CBP took action to secure unsecured liability, as it would in any case in which such liability exists that presents a risk to the revenue, whether or not the "constituent elements of dumping or a subsidy are present." The design of the directive, including the criteria for applying it to particular orders and establishing a bond amount based on individual risk, all pertain to securing against risk of uncollected duties, not the "constituent elements of dumping". Thus, while the directive may be "related to"

dumping – as the Appellate Body in *US – Offset Act (Byrd Amendment)* described various measures not inconsistent with Article 18.1 – it is not "specific" to it.

18. With regard to India's claim that the directive is action "against" dumping, neither previous Appellate Body reports examining that term nor the evidence in this proceeding supports this conclusion. The bond is security for the final assessed duty, which itself may be an action against dumping, but the security as such simply allows the United States to obtain payment of duties lawfully owed to it. As the Appellate Body noted in *US – Offset Act (Byrd Amendment)*, "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent." The GATT 1994 and the AD Agreement do not prohibit the United States from obtaining payment for the antidumping duties in question, and the bond requirement facilitates its ability to do so.

19. As for India's claim that the directive was "against" dumping because it adversely affected imports from countries subject to the antidumping order, the evidence demonstrates otherwise. Aside from seasonal fluctuations, imports from most countries subject to the AD order appear to have remained steady or increased. India asserts that "the impact of the bond directive was magnified in the case of" Brazil, China, and India "because they suffered higher antidumping duty rates than the other three countries subject to antidumping duties." Even if the evidence supported this claim – and a review of the data for these three countries shows no consistent trend – India fails to explain how the effects of the bond directive can, as the US Government Accountability Office ("GAO") put it, "readily be isolated from other changes occurring at the same time, such as the imposition of AD duties." In theory, higher duties themselves may also result in a greater impact on trade, yet India fails to show how the directive itself adversely affected imports.

20. With regard to costs to importers, the mere fact that additional security is required and results in additional costs does not support the conclusion that the security requirement itself is designed to "counteract" dumping. All security requirements, including cash deposits and other reasonable security for the payment of antidumping and countervailing duties, may result in some added cost. If accepted, India's argument would mean that any measure that increases the cost of importing for importers subject to antidumping and countervailing duties is an action "against" dumping. This interpretation is not supported by the analysis of the Appellate Body in *US – Offset Act*. Increasing the cost of importing alone does not necessarily create, as the Appellate Body put it in *US – Offset Act*, an "incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices" – indeed, import data for shrimp suggest that no such incentive exists.

21. Even if considered "specific" action "against" dumping or subsidy, the security requirements in question are permitted by the Ad Note and thus are "in accordance with the provisions of GATT 1994, as interpreted by the Anti-dumping Agreement." Again without any textual support or analysis, India refers to a single sentence in the Appellate Body report in *US – 1916 Act* to assert that security requirements contemplated by the Ad Note are "not permitted" responses to dumping or subsidy. The statement quoted by India does not, however, support the proposition for which it is cited. The Appellate Body report in question contains no analysis of the Ad Note, or security requirements generally, and to the extent it discusses Article VI and the AD Agreement, it is fully consistent with the US reading of Article 18.1 and SCM Agreement Article 32.1. For example, the Appellate Body stated that "'the provisions of GATT 1994' referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping," and then proceeded to analyze whether the measure in question "falls within the scope of application of Article VI of the GATT 1994." The Ad Note to Article VI is a provision of Article VI "concerning dumping," and the security requirements at issue fall within its scope. As explained above, the AD Agreement does not contain additional limits on security requirements such as those contemplated by the Ad Note. Thus, if a security requirement is consistent with the Ad Note, it is "in accordance with the provisions of GATT 1994, as interpreted by" the AD Agreement.

22. To suggest, as India does, that Article 18.1 and SCM Article 32.1 mean that measures permitted by Article VI are no longer permitted unless specifically provided for in the AD Agreement or SCM Agreement, is at odds with the text of both provisions and, as noted previously, the relationship between the covered agreements set forth in the WTO Agreement. Were India's reading correct, there would be no need for Article 18.1 or SCM Article 32.1 to refer to the GATT 1994 at all – yet both provisions do refer to GATT 1994. India's assertion that, even if the security requirement is "reasonable security" within the meaning of the Ad Note, it "would remain inconsistent with Article 18.1," in effect reads the qualifying phrase out of the text entirely. This reading of the text is not consistent with its terms, and contradicts the principle contained in the WTO Agreement that each of the texts, including GATT 1994, shall be integral to it. Moreover, India's interpretation incorrectly presumes that, unless a measure is specifically permitted by the AD Agreement, it is prohibited. The AD Agreement, however, contains rules regarding certain aspects of antidumping and countervailing duty measures. As the Appellate Body has observed, the covered agreements are not exhaustive, and if an action is not expressly prohibited, taking that action does not breach the WTO agreement in question. To read Article 18.1 and SCM Agreement Article 32.1 as broadly as India suggests would impermissibly extend the disciplines of the AD Agreement and SCM Agreement beyond their terms.

3. The Additional Bond Directive Does not Breach GATT Article I, GATT Article II, GATT Article XI, or GATT Article XIII.

23. *GATT Article I*. Contrary to India's assertions, the additional bond directive does not improperly discriminate between products originating in India and products originating in other countries. The directive has been applied to all importers of shrimp subject to the AD orders, and the US action of increasing bond amounts merely addressed the particular risks associated with these imports.

24. *GATT Article II*. As explained above, the additional bond directive does not constitute a "duty" (antidumping or otherwise) or an "other charge." CBP does not charge for the bonds, nor does it even require that security take the form of the additional bond. The implication of India's argument that such bonds are "other charges" is that Members may not require bonds as a means to secure importers' obligations unless the bonds are specifically included in a Member's Schedule. Yet many Members do maintain such requirements, and several provisions of the WTO agreements contemplate the use of bonds, suggesting that they are intended to be a device generally available to Members to secure their obligations. Finally, India's assertion that the bond results in a "contingent tariff liability" is incorrect. The bond is security for liability resulting from the antidumping duty order; it does not itself result in tariff liability, "contingent" or otherwise.

25. *GATT Article XI*. As was the case with the bond measure at issue in *Dominican Republic – Cigarettes*, the bond directive does not prevent importers from importing shrimp into the United States. Indeed, import data demonstrates that significant quantities of shrimp subject to the AD orders continue to be imported into the United States, and there is no evidence that the bond directive has had any appreciable impact on imports. India's argument that a "limiting effect" of the type referenced in *India – Autos* exists simply when a measure may result in costs to importers proves too much: it would render any bond requirement inconsistent with Article XI. The directive does not mandate an increased bond amount – as noted previously, importers can obtain individual bond determinations and, depending on their ability to pay and history of compliance with US customs laws and regulations, may not be required to obtain a higher bond. Virtually all importers that have made a request have received individualized bond amounts pursuant to this process that are lower than those contemplated by the formula. Importers have a range of mechanisms available to them to import into the United States without being subject to the additional bond directive, including single entry bonds, cash deposits or security other than a continuous entry bond.

26. *GATT Article XIII*. Contrary to India's assertion, the title of Article XIII is "Non-discriminatory Administration of Quantitative Restrictions." Thus by its terms Article XIII governs "quantitative restrictions." Article XIII has in the past been applied to analyze tariff-rate quotas, safeguards, and other measures that contain *quantitative* restrictions on trade; measures that do not restrict trade in this manner are not covered by it. The enhanced bond directive is not a "quantitative restriction." Furthermore, India's interpretation of "restriction" in the context of Article XIII fails for the same reason as it does with respect to Article XI: it suggests that any bond requirement is a "restriction" and thus implicated under Articles XI and XIII.

4. The Additional Bond Directive Is Not Inconsistent with GATT 1994 Article X:3(a).

27. With regard to GATT 1994 Article X, India has failed to establish a breach. Article X does not govern the substance of a measure, yet India continues to cite aspects of the measure's substance – including the formula used to establish bond amounts absent an individual risk analysis – in support of its claim that Article X was breached. With respect to the application of the directive, CBP did not apply the directive in a nonuniform, partial, or unreasonable fashion. It required the bond of shrimp importers because, using the criteria in the directive, CBP determined that the risk of substantial unsecured liability was high in the case of shrimp. The fact that CBP opted to apply the directive to importers of covered merchandise subject to new orders, rather than preexisting orders, does not render its application "nonuniform, partial or unreasonable," as India claims. CBP considered that applying the new directive to a new order would facilitate its ability to monitor and administer the new bond requirement at its inception. Article X does not prohibit a Member from implementing a new measure in this fashion.

28. Even under India's theory that Article X applies, the evidence demonstrates that CBP administers the bond directive in a "uniform, impartial and reasonable" manner. The directive contains various criteria for identifying importers of merchandise with elevated default risk, and CBP applies these criteria uniformly. CBP faced in excess of $2 billion in imports of shrimp newly subject to an antidumping order. It had experienced $225 million in defaults on importers in industries that, like shrimp, were characterized by low capitalization rates and relatively low barriers to entry and exit, had very little history of paying customs duties prior to imposition of the order, and were highly leveraged. All of these factors suggested that, as with other agriculture/aquaculture merchandise, there was a significant risk of default associated with importers of shrimp. Finally, contrary to India's suggestion, the October 2006 Notice makes the procedures for requesting an individual bond amount clear, and does not impose significant costs on importers to do so. The procedures for requesting an individual bond amount are set forth in the Notice, which itself was published in the *Federal Register*.

5. India's "As Such" Claims

29. As the United States has demonstrated, India's claims with respect to certain customs laws and regulations are not within the Panel's terms of reference, nor are they consistent with any reasonable reading of the provisions of the agreements in question. Contrary to India's assertion that "it is a Member's panel request (and not its request for consultations) that governs a panel's terms of reference," it is well established that a Member cannot advance claims with respect to a measure included in its panel request, if it failed to include that measure in its request for consultations. In determining whether the consultation requirement has been met, panels are limited to evaluating the request for consultations, not what may or may not have taken place during consultations. Where a Member has provided no indication in its consultation request of the measures at issue, it is well established that the Member may not advance claims with respect to that measure, having failed to request consultations. Nowhere in India's consultation request is there a single reference to the statute and regulations it now seeks to challenge. India is not "focusing the scope of the matter," as it now asserts, but rather is impermissibly *expanding* the matter before the Panel to include measures that were not included in its request for consultations.

30. With respect to the substance of India's claims, in its answers to Panel questions, India contradicts itself when it describes how the laws and regulations purport to breach US obligations under WTO Agreement Article XVI, AD Agreement Article 18.4 and SCM Agreement Article 32.5. In one portion of its submission, India argues that the laws and regulations are "rules and norms of general and prospective application that *require* US Customs to undertake impermissible specific actions against dumping," but elsewhere it proceeds to argue that its claims are based on "the *discretion* conferred by the Amended Bond Directive and 19 U.S.C. 1623 and 19 C.F.R. 113.13 to take impermissible specific actions against dumping."

31. To the extent that India's claims are based on a "requirement" to act in a WTO-inconsistent manner, these claims do not accord with the facts: nothing in the laws and regulations identified by India requires the United States to act inconsistently with its obligations, and India has failed to provide any explanation of how the text of these provisions operate to do so. To the extent India's claims are based on the existence of "discretion" to act in a WTO-inconsistent manner, the proposition India advances – that a Member breaches Article XVI:4 merely by maintaining a law that provides it with the *discretion* to act in a WTO-inconsistent manner – is contrary to the text of the WTO Agreement and the conclusion drawn in numerous prior panel and Appellate Body reports, and would substantially undermine the rights of Members.

32. Furthermore, setting aside the fact that nothing in the cited agreements suggests such an analysis is relevant to demonstrating WTO-inconsistency, India fails to explain which aspects of the text of 19 U.S.C. 1623 and 19 C.F.R. 113.13 it refers to when it describes the purported "statutory purpose and standards" that allegedly "guide the discretion of US Customs" and render these provisions WTO-inconsistent. Instead, it cites to a CBP press release discussing the fact that CBP "must collect the duties of whatever nature owed" – India's suggestion that CBP's obligation to collect duties lawfully owed is somehow inconsistent with the WTO Agreement simply underlines the incongruity of its claim. In addition to arguing that the bond directive as applied to shrimp does not constitute "reasonable" security within the meaning of the Ad Note, India further asserts that the bond directive "as such" is inconsistent with the Ad Note to Article VI and various other provisions of the AD and SCM Agreements and the GATT 1994. However, India offers absolutely no legal theory as to how the directive "as such" is inconsistent with the Ad Note, and the only evidence it offers in support of its claim relates to the single instance in which the directive has been applied – frozen warmwater shrimp subject to the antidumping orders issued by USDOC in February 2005.

33. With respect to India's "as such" claims under AD Agreement Articles 1 and 18.1 and SCM Agreement Articles 10 and 32.1, India's argument likewise falls short. India does not explain how the directive "as such" is an action against dumping or subsidization. It claims that the directive "requires" importers of merchandise subject to an antidumping order to furnish an enhanced continuous bond, but again, the facts demonstrate that the only instance in which such a bond has been required is with respect to frozen warmwater shrimp subject to the antidumping orders issued by USDOC in February 2005. India has offered no argument regarding how the directive "as such" breaches SCM Agreement Articles 17, 19.2, 19.3, and 19.4 or AD Agreement Articles 7, 9.1, 9.2, and 9.3. Finally, India provides no legal theory, evidence, or even argumentation in support of its "as such" claims under GATT 1994 Articles I, II, and XI.

6. The Additional Bond Directive Would Be Justified by GATT Article XX(d).

34. The directive is "necessary to secure compliance" with US antidumping and countervailing duty assessment laws, in particular 19 U.S.C. 1673e(a)(1) governing the assessment of antidumping duties, and general customs laws and regulations requiring the payment of duties owed to the US Treasury. As evidenced by, among other things, the criteria the directive uses to determine bond amounts, the directive and its application to shrimp secures compliance with this obligation and general customs laws and regulations requiring payment of duties owed to the US Treasury.

35. As possible WTO-consistent alternatives, India cites US civil remedies or alternately proposes requiring "commercial importers across the board to demonstrate higher levels of financial soundness before being permitted to undertake imports." Civil recovery proceedings are not a reasonable alternative to address the problem faced by CBP: like cash deposits, CBP has used civil recovery to try to recover duties when an importer defaults, yet notwithstanding these efforts, uncollected duties have continued to accrue. Civil recovery produces no remedy if the importer cannot be reached or has no attachable assets by the time the proceeding has concluded. Thus, these measures do not constitute reasonably available alternatives that "would preserve for" the United States "its right to achieve ... the objective pursued." Finally, India's suggestion – that CBP require all importers to demonstrate higher levels of financial soundness – would imply that CBP can require greater security in all cases, but cannot target particular areas – such as collection of antidumping duties – with respect to which a specific problem has been found to exist.

36. The additional bond directive meets the requirements of the chapeau to Article XX. It has not been applied in a manner that would constitute a "disguised restriction on international trade" or "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." It has been administered uniformly, and does not discriminate.

ANNEX B - 2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

(9 July 2007)

1. Scope of the Measure at Issue

1. With respect to the United States' assertion that the statutory and regulatory provisions included in India's Panel Request were not subject to consultations, India notes that it is the panel request and not the request for consultations that defines the scope of the Panel's terms of reference. There is no requirement of a precise and exact identity between the measures subject to consultations and the measures identified in the Panel Request. In any case, India requests that the Panel make findings and recommendations on India's "as such" claims with respect to the legal instruments that comprise the Amended Bond Directive if not the statutory and regulatory provisions.

2. India acknowledges further that the scope of the measures with respect to which it has sought findings of inconsistency under Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement is the same as the scope of the measures with respect to which it has sought findings under Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Subsidies Agreement. India also has limited the scope of the measure at issue to the statutory and regulatory provisions in 19 U.S.C. 1623 and 19 C.F.R. 113.13 and to the Amended Bond Directive.

3. Moreover, India agrees that its claims under Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement are necessarily consequential to findings that 19 U.S.C. 1623, 19 C.F.R. 113.13 and the Amended Bond Directive are inconsistent as such with other provisions of the covered agreements.

2. Specific Action against Dumping and Subsidization

(a) 19 U.S.C. 1623 and 19 C.F.R. 113.13 are inconsistent "as such" with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Subsidies Agreement

4. In US – *Sunset Policy Bulletin*, the Appellate Body clarified that, under Article 3.3 of the DSU, measures subject to dispute settlement include "acts setting forth rules or norms that are intended to have general or prospective application" and that "… the phrase 'laws, regulations and administrative procedures' [encompasses] the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of antidumping proceedings. If some of these measures could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of conformity set forth in Article 18.4." In this case, it cannot be disputed that the measures at issue contain rules or norms of general application. Moreover, the United States has not disputed either their existence or their content.

5. Further, the United States has objected to India's "as such" challenge to 19 U.S.C. 1623 and 19 C.F.R. 113.13 on the ground that these are mere authorizing provisions and that even India has similar, general statutory provisions authorizing the taking of bonds as security. However, India's statutory and regulatory requirements for antidumping and countervailing duties do not permit India's customs agencies to take bonds for amounts in excess of the dumping margin or the amount of the subsidy found to exist.

6. 19 U.S.C. 1623 provides, in relevant part, that "… the Secretary of the Treasury may *by regulation … require … customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue …*". 19 C.F.R. 113.1 delegates this authority to the Commissioner of Customs. The United States has consistently stated both in the Amended Bond Directive and in its first written submission that 19 U.S.C. 1623 and 19 C.F.R. 113.13 extend to the taking of bonds to ensure collection of duties finally assessed in an administrative review. Further, the United States has justified the Amended Bond Directive under Article XX(d) of the GATT 1994 as being *necessary* to ensure compliance with the mandate of 19 U.S.C. 1673e(a)(1) which requires the collection of the final liability for duties assessed in an administrative review. The effect of this interpretation of 19 U.S.C. 1623 and 19 C.F.R. 113.13 is exactly the same as amending 19 U.S.C. 1673e(a)(1) to confer the discretion to take security for payment of antidumping or countervailing duties finally assessed under the retrospective assessment system. Arguably, such an amendment provides for an impermissible specific action against dumping and subsidization.

7. India has argued that the imposition of liability on importers in the form of a bond to secure against a potential increase in duties amounts to a specific action against dumping or subsidization. If the Panel accepts India's arguments, by the United States' own admission, 19 U.S.C. 1623 and 19 C.F.R. 113.13 provide for precisely this type of specific action against dumping and subsidization. In fact, in *Mexico – Rice*, the United States argued that a statutory provision conferring discretion on the Government of Mexico to impose a fine on importers subject to antidumping or countervailing duties provided for impermissible specific action against dumping and subsidization. The Panel rejected Mexico's plea that the provision was not mandatory, finding that, when the statutory conditions are met, " … it is up to the Ministry responsible for the conduct of … investigations to impose such fines."

8. Without prejudice to the foregoing, based on the report of the Panel in US – *Section 301*, India notes that the provisions of 19 U.S.C. 1623, 19 C.F.R. 113.13 and of the Amended Bond Directive must also be assessed together as a single, multi-layered measure providing for impermissible specific action against dumping and subsidization. 19 U.S.C. 1623 clearly contains a rule or norm that in every case in which a bond or security is not specifically required by law, the Secretary of the Treasury may require customs officers to require bonds or security deemed necessary for protecting revenue. Similarly, 19 C.F.R. 113.13 contains norms of general application that must be applied in determining the sufficiency of a bond. The Amended Bond Directive in turn sets out norms or rules of general application for designating merchandise subject to antidumping or countervailing duties in respect of which enhanced, continuous bonds must be taken.

9. In any case, the United States has stated in its first written submission that "[t]he [Amended Bond Directive] refers throughout to 19 C.F.R. 113.13, which … provides that the amount to be established must be 'adequate to protect the revenue and insure compliance with the law and regulations.' … Likewise, [U.S. Customs] established the bond directive pursuant to its authority under 19 U.S.C. 1623, which permits it to require that an importer provide "such bonds or other security as … may [be deemed] necessary for the protection of the revenue …". Moreover, the Notice states that "[a] key [U.S. Customs'] mission is to collect all import duties determined to be owed to the United States …" and that US Customs "must collect the duties owed of whatever nature." The Notice expressly states also that "Congress has provided [U.S. Customs] authority to require security in order to ensure the payment of all duties …, including any revenue collection gaps between estimated duty deposits and final assessed duties …". Therefore, there is no force in the objection of the United States that the Amended Bond Directive is discretionary and has been applied only once to antidumping duties on shrimp. Moreover, in US – *Sunset Policy Bulletin*, the Appellate Body found that the objective of protecting the security and predictability needed to conduct future trade "… would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a Panel … *irrespective of any particular instance of application* …".

(b) The Amended Bond Directive is "specific" to dumping and subsidization

10. In US – *CDSOA*, the Appellate Body further refined the test of "specificity" in *US – Antidumping Act of 1916* by clarifying that the key consideration is "… the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy" and it is sufficient if "… the constituent elements of dumping or of a subsidy are implicit in the measure". The Appellate Body agreed with the Panel also that the real issue is whether there is "a clear, direct and unavoidable connection" between the determination of dumping or subsidization and the measure at issue. In fact, in *US – CDSOA*, the United States argued that the CDSOA was not specific because it does not "… impose any form of liability on importers/foreign producers when dumping or subsidization is found …." In this case, however, the United States does not dispute that the Amended Bond Directive imposes the liability of obtaining an enhanced bond on importers of designated merchandise subject to antidumping or countervailing duties.

11. India considers the following elements of the instruments that comprise the Amended Bond Directive important to establish that the constituent elements of dumping and of subsidization are inherent in these instruments: (a) the Amendment, the Clarification and the Notice state that the purpose of the Enhanced Bond Requirement is to ensure collection of additional AD/CVD duties determined to be due at liquidation; (b) each instrument states expressly that it applies to merchandise subject to antidumping and countervailing duties, more specifically "agriculture and aquaculture merchandise subject to antidumping or countervailing duty cases", whether designated as Special Category merchandise or Covered Cases; (c) each instrument (and the Bond Formulas Document) states that it is the importers of merchandise subject to antidumping or countervailing duties who are required to comply with the Enhanced Bond Requirement; (d) each tailors the application of the Enhanced Bond Requirement to importers in different situations that arise only in an antidumping or countervailing duty case, i.e., regular importers after a preliminary affirmative determination or the issuing of an Order and new importers subject to antidumping or countervailing duties (only the Notice does not mention the possibility of applying the Enhanced Bond Requirement after the preliminary determination); (e) each instrument (except the Notice) provides for applying the Enhanced Bond Requirement following either a preliminary affirmative determination of dumping or subsidization and injury or an Antidumping Order or a Countervailing Duty Order; (f) the basic formula for determining the amount of the bond is based on the applicable rate of duty under the preliminary determination, the Antidumping Duty Order or the Countervailing Duty Order; and (g) the Clarification states that in modifying bond requirements for importers who respond to a notice, "any other relevant factors" will include "… whether the importer can show that it has switched to a new source of imports or a shift in the pattern of imports that [could lead] to a lower duty liability".

12. As a measure intended to ensure availability of collections for distribution of offset payments under the CDSOA which the Appellate Body has found to be specific to dumping and subsidization, the Enhanced Bond Requirement is also necessarily specific to dumping and subsidization. The Administrative Record confirms that this was the objective of the Amendment. That the Notice does not refer to the CDSOA or that the United States intends to continue applying the Enhanced Bond Requirement after the CDSOA is terminated cannot undermine the inferences to be drawn from the stated purpose of the Amendment. Moreover, the Appellate Body found in US – *CDSOA* that it is permissible to rely on the stated purpose of a measure as a consideration confirming the conclusion that it is a specific action against dumping.

13. Accordingly, there is a "strong correlation" and a "clear, direct and unavoidable" connection between the Amended Bond Directive and dumping and subsidization.

(c) The Amended Bond Directive operates "against" dumping and subsidization

14. In *US– CDSOA*, the United States argued that the CDSOA could be characterized as operating "against" dumping or subsidization "… only if it applies directly to the dumped or subsidized imported good or an entity responsible for the dumped or subsidized imported goods, and if it burdens the dumped or subsidized imported good, or an entity responsible for the dumped or subsidized imported good". In this case also, the Amended Bond Directive singles out certain designated merchandise that is dumped or subsidized and imposes the liability specifically on importers to provide enhanced, continuous bonds.

15. The burden imposed on importers under the Amended Bond Directive is significant. Further, as stated in the Notice, the maximum time between the initiation of an administrative review and liquidation is not limited to 545 days, because "…the *administrative and judicial* process for determining the appropriate rate of duty for AD/CVD merchandise may significantly delay … liquidation …". Therefore, the bond initially given immediately following the Antidumping or Countervailing Duty Order will be exhausted and fresh bonds will be required prior to liquidation. This "stacking" of bonds further compounds the problem faced by importers and magnifies the effect of the dumping margin or amount of subsidy. The US Court of International Trade has catalogued the serious adverse effects suffered by importers of shrimp subject to antidumping duties as a result of the Enhanced Bond Requirement. By making the dumping margin the basis of the amount of the enhanced, continuous bond that an importer must furnish, US Customs also punishes and dissuades dumping because the higher the dumping margin, the higher the amount of the bond. Because of the "stacking" of bonds, even Indian exporters committed to the US market are forced to abandon it over time. This is demonstrated by the steep decline in India's exports by quantity and value and the total number of Indian exporters between 2004 and 2006.

16. The United States has relied on the GAO Report, which concludes that imports declined because of imposition of antidumping duties and not because of the Enhanced Bond Requirement. However, the GAO Report did not take into account data on imports from all countries subject to antidumping duties and included imports from Indonesia, which did not suffer antidumping duties. Further, the monthly data on imports of shrimp into the United States provided by India establishes that the higher the dumping margins, the more exports suffered. Imports from Brazil, China and India, with the highest margins, suffered the most, while exports from Ecuador, Thailand and Vietnam did not.

17. Further, US Customs dispensed with the Enhanced Bond Requirement where the importer agreed to shift its source of imports to countries not subject to antidumping duties. That this has not ceased after the Notice is clear from a bond waiver letter submitted by India as evidence to the Panel.

18. In *US – CDSOA*, the Appellate Body found relevant the fact that the CDSOA effects a transfer of financial resources from producers/exporters of dumped or subsidized goods to their domestic competitors. India's evidence demonstrates that one association of domestic shrimp producers in the United States, the SSA, entered into agreements with exporters to withdraw its request for administrative review if the exporter paid a percentage of the value of its total exports during the period of review to the SSA. Exporters have never made such payments in the past. Brazil has placed before the Panel a document published on the website of the LSA, another association of domestic shrimp producers, establishing the basis on which exporters were forced to make payments to the SSA in the present case on account of the Enhanced Bond Requirement.

19. Even if the amount of the bond is reduced by US Customs based on individualized consideration of the risk posed by an importer after the Notice, the fact remains that any liability imposed on an importer operates against dumping and subsidization. In this respect, there is no

difference between the Enhanced Bond Requirement as implemented under the Amendment and the Clarification, on the one hand, and the Notice, on the other.

20. Moreover, the assertion of the United States that surety fees and collateral demanded by sureties cannot be attributed to it runs directly contrary to the finding of the Panel in US – *Import Measures* that an enhanced bonding requirement remains a governmental measure even if the charges are paid to an independent private entity.

(d) The Amended Bond Directive is inconsistent with the provisions of Article VI of the GATT 1994 "as interpreted by this Agreement"

21. The logic of the United States' argument that it is sufficient if the Amended Bond Directive complies with the requirements of the Ad Note is similar to that advanced by the United States in *US - CDSOA* that the CDSOA is in accordance with Article VI:3 of the GATT 1994 and the provisions of Part V of the Subsidies Agreement because these provisions do not encompass all measures taken against subsidization. The Appellate Body rejected this argument by finding that the argument would render Article 32.1 of the Subsidies Agreement "redundant or inutile" because it then would not provide any "additional discipline". In this case too, accepting the United States' arguments based on the Ad Note would have the same consequence.

(e) The Amended Bond Directive is inconsistent with Article VI:2 of GATT 1994 and Articles 1 and 18 of the Anti-Dumping Agreement as applied to importers of shrimp from India

22. Based on India's arguments above and those in its first submission and first oral statement, it is clear that the Enhanced Bond Requirement as applied to shrimp constitutes impermissible specific action against dumping.

3. Conformity of Laws, Regulations and Administrative Procedures with WTO Obligations

23. India's claims under Article XVI:4 of the WTO Agreement with respect to the laws, regulations and administrative procedures of the United States are broader than its claims under Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement because India has also made claims under various provisions of the GATT 1994.

24. India agrees that findings of inconsistency of a Member's laws, regulations and administrative procedures with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement or Article 32.5 of the Subsidies Agreement always will be consequential to findings of inconsistency as such with other provisions of these Agreements or of the GATT. Nevertheless, the Panel should not refuse to render findings under these provisions because it would render these provisions "redundant or inutile" despite being framed in terms of binding, enforceable obligations. The United States has stated in its first written submission that "[u]nder the directive, goods that carry similar collection risk as shrimp are 'similarly prohibited or restricted' insofar as the directive provides for CBP to … establish … additional bond amounts for other merchandise…". India should not be forced to resort again to the WTO dispute settlement system merely to confirm again that the United States breaches its obligations. Further, both in *US – Antidumping Act of 1916* and in *US – CDSOA*, the panels and the Appellate Body found that the legislation at issue in those disputes was inconsistent as such with Article XVI:4 of the WTO Agreement, and Article 18.4 of the AD Agreement (and Article 32.5 of the Subsidies Agreement in the case of the CDSOA). India considers that they did so because these disputes involved the inconsistency of legislation with the obligation to refrain from impermissible specific actions against dumping and subsidization.

25. Judicial economy is premised upon the inherent discretion of a panel not to render findings on issues that do not contribute to a positive solution. India respectfully submits that the Panel would contribute to a positive solution in this dispute by rendering a finding of inconsistency with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Subsidies Agreement. This would provide the necessary guidance to the United States on how to "protect the security and predictability needed [by its trading partners] to conduct future trade".

4. Article 9 of Anti-Dumping Agreement and Article 19 of Subsidies Agreement

26. Based on the Appellate Body's findings in *US – Antidumping Act of 1916* that Article 9.1 of the Anti-Dumping Agreement gives Members a choice between imposing or not imposing duties and between imposing an anti-dumping duty equal to the dumping margin or a lower duty, India submits that the Amended Bond Directive is inconsistent with Article 9.1 of the Anti-Dumping Agreement in two ways: first, it provides for taking a bond instead of the collection of definitive duties; second, the bond secures an amount in addition to the amounts collected by the United States to the extent of the dumping margin determined in the final affirmative determination.

27. The Amended Bond Directive is also inconsistent with Article VI:2 of the GATT 1994 read in conjunction with Articles 1, 18.1 and 9.2 of the Anti-Dumping Agreement and Article VI:3 of the GATT 1994 read in conjunction with Articles 10, 32.1 and 19.3 of the Subsidies Agreement.

28. In response to a specific request from India to identify the specific provision in the Anti-Dumping Agreement and in the Subsidies Agreement that confers the right on the United States *to collect duties* after the final assessment of duties under the retrospective system of assessment, the United States responds only that "… as with all WTO Agreements, Members maintain the 'right' to take a particular action provided it is not prohibited by the Agreement in question". In its answers to the Panel's questions, however, the United States appears to concede that the right to collect duties finally assessed under the retrospective system of assessment is governed by Articles 9.2 and 9.3 of the Anti-Dumping Agreement (and presumably by Articles 19.3 and 19.4 of the Subsidies Agreement).

29. The further argument of the United States that it is permitted to take security because Article 9 of the Anti-Dumping Agreement and Article 19 of the Subsidies Agreement are silent on the taking of security misses the point that the taking of security as a provisional measure is certainly a specific action against dumping and subsidization under Article 7 of the Anti-Dumping Agreement and Article 17 of the Subsidies Agreement. Moreover, both Article 1 of the Anti-Dumping Agreement and Article 10 of the Subsidies Agreement (albeit with some differences in language) basically provide that the provisions of the respective Agreements govern the application of Article VI of the GATT 1994. Therefore, silence of the relevant provision in either of these Agreements is no basis to infer a right to take a specific action against dumping or subsidization not contemplated by these Agreements. The plain meaning of Articles 1 and 18.1 of the Anti-Dumping Agreement and of Articles 10 and 32.1 of the Subsidies Agreement is that the taking of specific action against dumping or subsidization must be in accordance with the provisions of these Agreements.

30. Even under the retrospective system of assessment, therefore, the only provision in the Anti-Dumping Agreement that confers a right on a Member to collect definitive duties is Article 9.2. Under Article 9.2 of the Antidumping Agreement, the only option available to a Member even under the retrospective system of assessment is to collect antidumping duties to the extent of the dumping margin determined in the final determination that precedes the imposition decision under Article 9.1 of the Antidumping Agreement. The corresponding provisions in the Subsidies Agreement that recognize the retrospective system of assessment and provide for countervailing duties to be "levied" to the extent of the dumping margin are footnote 52 and Article 19.3, respectively. In *US – Zeroing (Japan)*, the Appellate Body found that:

> …The *Anti – Dumping Agreement* is neutral as between different systems for levy and collection of antidumping duties. The Agreement lays down the "margin of dumping" as the ceiling for the collection of duties regardless of the duty assessment system adopted by a WTO Member, and provides for a refund if the ceiling is exceeded. It is therefore incorrect to say that the *Anti – Dumping Agreement* favours one system, or places another system at a disadvantage.

It is clear, therefore, that the Anti-Dumping Agreement (and, by extension, the Subsidies Agreement) provides a ceiling for the collection of duties including after the final determination and prior to the determination of the final liability under the retrospective assessment system. Therefore, it is not permissible for the United States to take security for the potential liability under the retrospective system of assessment.

31. Finally, pursuant to Article 9.3 of the Antidumping Agreement, it is clear that antidumping duties collected under Article 9.2 could never exceed the margin of dumping. Similarly, pursuant to Article 19.4 of the Subsidies Agreement, countervailing duties could never exceed the amount of the subsidy found to exist.

32. The United States has applied the Enhanced Bond Requirement to importers from India of shrimp subject to antidumping duties in addition to requiring cash deposits to the full extent of the margin of dumping found in the final affirmative determination of dumping and injury and set out as a deposit rate in the Antidumping Order dated 1 February 2005. Therefore, the application of the Enhanced Bond Requirement to importers of shrimp is inconsistent with the provisions of Articles 9.1, 9.2 and 9.3 of the Antidumping Agreement.

5. Article 7 of Anti-Dumping Agreement and Art. 17 of Subsidies Agreement

33. The United States has now admitted in response to a question from the Panel that US Customs requested 28 importers of shrimp to provide enhanced, continuous bonds prior to the final affirmative determination on 1 February 2005 and that 15 importers, in fact, furnished such bonds. None of these bonds have been discharged or cancelled to date. Accordingly, India requests the Panel to find that the Amendment, the Current Bond Formulas Document and the Clarification are inconsistent as such with the provisions of Articles 7.1, 7.2 and 7.4 of the Anti-Dumping Agreement and with Articles 17.1, 17.2 and 17.4 of the Subsidies Agreement. India also requests the Panel to find that the application of the Enhanced Bond Requirement to importers of shrimp is inconsistent with the provisions of Articles 7.1, 7.2 and 7.4 of the Antidumping Agreement.

6. The Ad Note

34. On the United States' interpretation of the phrase "final determination of the facts in a case of suspected dumping or subsidization" in the Ad Note, there would be as many final determinations as there are import shipments by each exporter. However, whether a particular shipment is dumped or subsidized is premised on an analysis of all the shipments by that exporter during the period of review and not on each individual import shipment. Further, if no request for administrative review is made or if it is withdrawn, duties are finally assessed on the basis of the final determination and not the administrative review. Finally, under footnote 22 to the Antidumping Agreement, "a finding in the most recent assessment proceeding under subparagraph 3 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty".

35. Article 1 of the Anti-Dumping Agreement provides that "the provisions of the Anti-Dumping Agreement govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations". Because the Ad Note is an interpretative note to paragraphs 2 and 3 of Article VI and supplements these provisions, any action taken under the Ad Note is

necessarily also a "specific action against dumping" for purposes of Article 18.1 of the Antidumping Agreement. The same conclusion must follow in the case of countervailing duties from the provisions of Article 10 and 32.1 of the Subsidies Agreement.

36. The United States concedes that the Ad Note would have been available to take security prior to the final determination but for the disciplines contained in Article 7 of the Antidumping Agreement. Provisional measures under these provisions are one of the specific actions against dumping and subsidization. Therefore, security taken under the Ad Note for payment of duties, whether before or after the final determination, is necessarily also a specific action against dumping or subsidization. As neither the Anti-Dumping Agreement nor the Subsidies Agreement contemplates the taking of security after the final determination, it follows that security for ensuring payment of antidumping or countervailing duties under the retrospective assessment system is also an impermissible specific action against dumping and subsidization.

37. In fact, the thesis of the United States – that the Ad Note is intended to permit the United States to safeguard itself against "non-collection risk" – suffers from a fundamental contradiction. To the extent that it is premised on the use of the term "security" in the Ad Note, Article 7 of the Anti-Dumping Agreement and Article 17 of the Subsidies Agreement already provide for safeguarding Members against one form of "non-collection" risk by permitting the taking of security after a preliminary determination and prior to the final affirmative determination. If provisional measures constitute one of the permitted specific responses, the United States cannot now argue that the Enhanced Bond Requirement is not a specific response to dumping and subsidization.

38. India has set out in its first oral statement the reasons why the Panel should reject the United States' argument that the preliminary results of the administrative review in the case of shrimp establish the necessity for the Amended Bond Directive. Based on India's analysis of the preliminary results, the 17 exporters who were assigned an antidumping duty rate of 82 per cent based on "adverse facts available" in the preliminary results are responsible for exports of shrimp valued at only about $2,000,000, which represents only 0.5 per cent of the total value of shrimp exported from India during the period of review. In the case of the three largest exporters, assuming that the preliminary results are confirmed in the final results, one company will be entitled to a refund of $2,900,000 approximately and the other two companies will have to pay about $1,000,000 and $325,000 approximately. India notes further that the total unsecured liability based on the preliminary results would be only about $2,000,000 as against the huge amount of the bonds (about $30,000,000) demanded from all Indian exporters up to the end of the period of review. India notes also that the "all others" industry rate is expected to come down for exporters from India in the final results based on corrections in the calculations of dumping margins of some of the larger exporters selected for review.

7. Notification Requirements

39. With respect to the notification requirements in Article 18.5 of the Anti-Dumping Agreement or Article 32.6 of the Subsidies Agreement, India notes that the real issue is the substance and effect of the law or regulation and not whether it is formally called a customs law or regulation or an antidumping or countervailing duty law or regulation. If the taking of security in the form of cash deposits or bonds as a provisional measure is a fundamental part of the antidumping and countervailing duty regulations of the United States, taking security to ensure collection of antidumping and countervailing duties finally assessed in an administrative review also involves administration of the antidumping and countervailing duty laws and regulations of the United States. The United States itself attempts to justify the Amended Bond Directive as being necessary to secure compliance with 19 U.S.C. 1673e(a)1, which is part of its antidumping and countervailing duty statute. Therefore, the United States should have notified the Amended Bond Directive to the Committee on Antidumping Practices and to the Committee on Subsidies and Countervailing Measures. The

argument of the United States – that Article 18.5 of the Anti-Dumping Agreement and Article 32.6 of the Subsidies Agreement do not specify when changes must be notified – also cannot be accepted because it would render these provisions redundant and inutile. Changes obviously have to be notified within a reasonable period of time. In this case, more than three years have elapsed since the United States instituted the Enhanced Bond Requirement. This is not a reasonable period of time.

8. Article X:3(a) of the GATT 1994

40. With respect to the objection of the United States that India's claim under Article X:3(a) of the GATT 1994 concerns the substantive content of the Amended Bond Directive and not its administration, India notes that the scope of the measures at issue as defined in India's Panel Request includes not only the Amended Bond Directive but also 19 U.S.C. 1623 and 19 C.F.R. 113.13. The Amended Bond Directive represents the discriminatory application of 19 U.S.C. 1623 and 19 C.F.R. 113.13 to imports of shrimp subject to antidumping duties from India. The Amended Bond Directive clearly is not a law or regulation. Moreover, in *E.C. – Selected Customs Matters*, the Appellate Body clarified that there is "… no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial or reasonable administration of that legal instrument". The Panel in *Argentina – Bovine Hides*, reached similar conclusions regarding the scope of Article X:3(a).

41. Further, apart from the fact that the enhanced bonds taken prior to the Notice have not been discharged, even after the Notice dated 24 October 2006, US Customs has not issued notices informing any importer of Indian origin that it may apply for reduction in its bond amounts. India has also supplied to the Panel copies of bond waiver letters issued to certain importers, which establish that US Customs did not provide any reasons for determining a particular bond amount.

9. Articles I:1, II:1(a) and II:1(b) of the GATT 1994

42. At the outset, India notes that its claims under Articles I:1, II:1(a) and II:1(b) of the GATT 1994 will not arise unless the United States successfully demonstrates that the Amended Bond Directive does not provide for specific action against dumping and subsidization and is covered by footnote 24 of the Anti-Dumping Agreement and footnote 56 of the Subsidies Agreement.

43. To the extent that the Enhanced Bond Requirement seeks to secure a contingent liability for payment of antidumping or countervailing duties, it may be characterized as an "other duty" or "charge" for purposes of Articles I and II of the GATT. There is considerable GATT and WTO jurisprudence that establishes the necessity of evaluating a bond requirement together with the obligation that it purports to secure. In this case, the United States has no right to collect duties in excess of the dumping margin or the subsidy found to exist until the final liability is established in an administrative review under its retrospective assessment system. Further, Article II:2(b) makes an exception to the requirement of Article II:1(b) in respect of "all other duties" only for "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI". To the extent that the Enhanced Bond Requirement purports to secure the liability for duties that have not yet been finally assessed under its retrospective assessment system, therefore, it is a contingent liability for an "other duty" that is not covered by Article II:2(b).

10. Articles XI:1 and XIII of the GATT 1994

44. With respect to the United States' argument that the Enhanced Bond Requirement does not limit imports, India notes that the Panel in *EEC – Minimum Import Price* rejected the argument of the European Communities that its minimum import price system, "… as enforced by the additional security, for imports of tomato concentrates into the Community were allowed, but not below the minimum price level" and found that it was "… a restriction 'other than duties taxes or other charges'

within the meaning of Article XI:1". Arguably, therefore, the Enhanced Bond Requirement also constitutes a restriction on imports of the merchandise to which it applies. Based on Article 3.8 of the DSU, India submits also that there is no legal requirement that India must establish, as a matter of fact, that the Amended Bond Requirement restricts imports of shrimp. India refers also to the inadequacies in the GAO Report relied upon by the United States for concluding that the Enhanced Bond Requirement, in fact, does not restrict imports of shrimp.

11. Article XX:(d) of the GATT 1994

45. India notes that Article XX:(d) of the GATT 1994 is an affirmative defense and the United States bears the burden of demonstrating that the Amended Bond Directive is justified under it. The Appellate Body noted in *Korea – Beef* that a measure that is "necessary" for purposes of Article XX(d) must be one that is closer to "indispensable" than simply "making a contribution to". In order to establish that the Amended Bond Directive is "necessary," therefore, the United States must establish both that its existing system of collection does not work and that the Enhanced Bond Requirement is close to indispensable. However, the United States, which has operated its retrospective system at least since 1979 and claims to have done so since 1921, did not find it necessary to impose the Enhanced Bond Requirement until 2004.

46. To establish the necessity of the Enhanced Bond Requirement, the United States points only to the incidence of default for a few years immediately preceding the Amendment in 2004. However, defaults could also be attributed to the fact that they involved non-market economies and the determination of margins based on adverse facts available, to surety bankruptcies and to defaults by new shippers from whom no security at all was taken. Further, it is important to note that the Enhanced Bond Requirement is premised on both a risk of increases in dumping margins at liquidation and default in payments by importers. US Customs has absolutely no expertise or any basis to determine when dumping margins are likely to increase. The analysis of past history of increases in duty rates, on which US Customs relies, shows that 67 per cent of the time, duties did not increase at all. The United States also appears to concede that there was no basis for forecasting a high likelihood of non-collection risk in the case of agricultural and aquaculture merchandise subject to countervailing duties. Further, the US Court of International Trade found that there was no basis in the record for designating shrimp as a likely non-collection risk.

47. Moreover, the Amended Bond Directive also does not satisfy the requirements of the *chapeau* to Article XX. In *US – Shrimp*, the Appellate Body has interpreted the meaning of the phrase "arbitrary or unjustifiable discrimination" in the *chapeau* to Article XX as including "… not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner". In this case, the Amended Bond Directive clearly involves arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

ANNEX C

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSION OF THE THIRD PARTIES

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ANNEX C - 1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

(18 May 2007)

1. Introduction

1. In this submission, Brazil sets out its views on the reasons why the special bonding requirement applied by the United States against imports of certain frozen warm-water shrimp subject to anti-dumping duties, originating in Brazil, China, Ecuador, India, Thailand and Vietnam ("Enhanced Bond Requirement" or "EBR")[1] violates Articles 18.1 and 1 of the Agreement on Implementation of Article VI of the GATT 1994 (the "AD Agreement") and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative Articles 9 and 1 of the AD Agreement. Further, the EBR is not "reasonable security" under Note 1 Ad Article VI:2-3 and cannot be justified pursuant to Article XX(d) of the GATT 1994.

2. The Measures At Issue

2. Responding to a report by US Customs and Border Protection ("CBP")[2] on fiscal year 2003 uncollected anti-dumping and countervailing duties, on 9 July 2004 CBP amended its the existing Bond Directive governing Customs bonding requirements, and set new formulas for calculating minimum continuous bond amounts for importers of agriculture/aquaculture products subject to anti-dumping or countervailing duty (CVD) orders.[3] This EBR requires a bond for 10 per cent of duties, taxes and fees paid by the importer in the prior 12 months (i.e., the normal continuous bond amount), plus 100 per cent of the cash deposit rate established in the anti-dumping order (or most recent administrative review), multiplied by the value of the importer's entries of that product over the previous 12 months.[4] Pursuant to a clarification issued by CBP on 10 August 2005, the EBR applies to "shrimp covered by anti-dumping or countervailing duty cases", the only designated "Covered Cases" within the only designated "Special Category", agriculture/aquaculture merchandise.

3. In October 2006, an in-depth examination of the EBR by the US Government Accountability Office ("GAO") concluded that this bonding requirement "represented a significant change from CBP's traditional method of setting bond amounts," and was "inconsistently implemented" as between shrimp importers, due to a lack of "clear and transparent guidance".[5] Days before the US Court of International Trade ("USCIT") issued a stinging judgment against CBP in domestic litigation on the EBR,[6] CBP issued a 24 October 2006 Federal Register notice further modifying the EBR by identifying the factors it would consider in determining, prospectively for individual importers, whether to reduce a bond amount.[7]

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[1] Frozen warmwater shrimp from Brazil, Thailand, India and these other countries subject to anti-dumping duties is referred to herein as "subject shrimp."

[2] Continued Dumping and Subsidy Offset Act (CDSOA) annual report for fiscal year 2003, Exhibit THA-11 (WT/DS343).

[3] Exhibit IND-8 (internal exhibit 17).

[4] Exhibit IND-6. The EBR is specific to subject shrimp, but if any other goods were subject to the EBR but not to AD/CV duties, they would have no cash deposit rate, and the bond amount would be the same as under a normal continuous bond.

[5] Exhibit THA-10 (WT/DS343) at 7.

[6] Exhibit IND-16.

[7] Exhibit IND-6.

3. The Enhanced Bond Requirement Is Inconsistent "As Such" With Articles 18.1 and 1 of the Anti-Dumping Agreement

4. The EBR should be analyzed as a separate measure, and as constituting "specific action" imposed "against" dumping inconsistent with Articles 18.1 and 1 of the AD Agreement.

(b) The Enhanced Bond Requirement Is "Specific Action" and Is Imposed "Against Dumping"

5. As the Appellate Body stated in *US – Offset Act (Byrd Amendment)*, if a measure "may be taken only when the constituent elements of dumping ... are present", it is a "specific action" within the meaning of Article 18.1.[8] The CBP notices imposing or clarifying the EBR state that it applies *only* to goods subject to a US anti-dumping or CVD order. Since US law only permits such orders to be imposed where the US authorities have determined that the constituent elements of dumping or subsidization are present, the EBR is a "specific action against dumping."

6. The EBR corresponds to the fines on importers provided by Article 93V of Mexico's Foreign Trade Act, which the panel in *Mexico – Anti-Dumping Measures on Rice* condemned under Article 18.1. That panel also found that by *threatening* to impose fines on importers of a product subject to an anti-dumping or CVD investigation, Article 93V provided for a "specific action" not permitted by the AD or SCM Agreements.[9]

7. The United States asserts that the EBR responds to "noncollection risk.[10] Yet Customs is not acting against all importers whose circumstances indicate high noncollection risk - it is only acting against those who import subject shrimp.

8. The EBR is specific action "against" dumping because, in effect, it punishes importers for importing subject shrimp. The EBR indisputably meets the test explained by the Appellate Body in *US – Offset Act (Byrd Amendment)*.[11] It imposes a much larger bond requirement, and thus a significantly greater financial burden[12], on certain importers simply because they import shrimp subject to anti-dumping measures. Furthermore, the 10 August 2005 notice makes it clear that the bond requirement may be altered if the importer can show that it has ceased importing subject shrimp, as also acknowledged by the USCIT.[13]

(c) The Enhanced Bond Requirement Is Not a Permissible Response to Dumping

9. The EBR is also not taken "in accordance with the provisions of GATT 1994, as interpreted by [the AD] Agreement". The only permissible responses to dumping are definitive anti-dumping duties, provisional measures and price undertakings - and the EBR is none of these. It is therefore inconsistent with Article 18.1 of the AD Agreement.

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[8] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

[9] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.276, 7.278.

[10] United States' first written submission (Thailand, WT/DS343), para. 35.

[11] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 250.

[12] The United States contends that the prohibitive cost of an enhanced bond, including the requirement of collateral, is a matter between the surety and the importer and not the responsibility of the United States. However, because surety companies must have sureties for customs bonds authorized and certified by the US Government in order to be permitted to write such bonds, and CBP may collect duties from the surety if the principal defaults, the United States has a direct interest in the amount of security required by sureties.

[13] Exhibit THA-1 to Thailand's third party submission, para. 183.

10. The EBR on subject shrimp is inconsistent with Article 18.1 of the AD Agreement "as such". It is a "rule or norm" attributable to a WTO Member, which mandates enhanced bonding requirements on subject shrimp and which has general and prospective application on imports of subject shrimp.[14]

4. The Enhanced Bond Requirement Does Not Constitute "Reasonable Security" Permitted by Note 1 Ad Article VI:2-3

11. The United States places the weight of its defence in this dispute on the assertion that the EBR is a "reasonable" surety system permitted under Note 1 Ad paragraphs 2 and 3 of GATT Article VI. However, the EBR falls outside the scope of the Ad Note. The text of the Note refers to security for payment of anti-dumping or countervailing duties "pending final determination of the facts in any case of suspected dumping or subsidization", i.e. the Note only applies during an anti-dumping investigation, and does not apply beyond the date of the final anti-dumping determination and order. The US argument that the "final determination of the facts" does not arrive until the final duty assessment[15] is misplaced. The Note refers to security in cases of "suspected dumping", but dumping is only "suspected dumping" *before* the anti-dumping investigation has concluded. The US imposed the EBR on importers of subject shrimp only after final anti-dumping measures were imposed on 1 February 2005, and over two years later the EBR continues in effect.

12. Even assuming that the EBR falls within the scope of the Ad Note, the EBR does not constitute "reasonable security" under that provision. The use of "or" in "bond *or* cash deposit" in the Ad Note gives the importing Member a choice between either bond *or* cash deposit as a "reasonable security" – not both at once. Furthermore, the reasonableness of any "security for the payment of anti-dumping or countervailing duties" must relate to a risk-based standard for the need for security against non-payment. The decision to apply the EBR to shrimp was not based on any evidence of actual default; moreover, to date, CBP continues *not* to apply the EBR to imports with proven high default rates without providing any explanation, continues to apply the EBR to importers without any default history and refuses to reduce the amounts of enhanced bonds already provided.[16] Remarkably, the USCIT itself has issued a preliminary injunction (although only for eight importers) on the basis that the EBR is likely to be found "arbitrary and capricious" – confirming that the EBR is *un*reasonable.[17]

13. Brazil concurs with the policy concerns expressed by India in respect of the limitless arguments made by the United States in support of the EBR.[18]

5. The Enhanced Bonding Requirement is Also Inconsistent with Articles VI:2 and II:1(b) of the GATT and Article 1 of the Anti-Dumping Agreement

14. The fees and interest costs associated with the duplicative requirements to pay a cash deposit *and* provide an enhanced bond also have the result that the total duty burden on the importer will exceed the amount of the dumping margin in violation of Article VI:2 of the GATT. Panels have recognized that the fees and interest costs associated with a bonding requirement are a real cost to importers.[19] Because the EBR is applied other than under the circumstances provided for in

[14] Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also Appellate Body Report, *US – Zeroing (EC)*, para. 188, and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[15] United States' first written submission,, paras. 22-27. Brazil also notes the striking difference between the texts of Ad Note 1 (*final determination of facts*) and Article 9.3.1 of the *AD Agreement*, cited by the United States in support of its argument (*determination of the final liability for payment of anti-dumping duties*).

[16] India's first written submission, para. 100.

[17] Exhibit IND-16, p. 46-47, 53, 57-61.

[18] India first written submission, para. 83.

[19] *See*, e.g., *EEC – Minimum Import Prices*, para. 4.6 (accepting that interest charges and costs in connection with the lodging of a security associated with an import certificate were in excess of bound duties).

Article VI, it constitutes a breach by the United States of its obligations under Article 1 of the AD Agreement and Article VI of the GATT. As a consequence, the EBR and the anti-dumping measures on subject shrimp are not an "anti-dumping or countervailing duty applied consistently with the provisions of Article VI," within the meaning of GATT Article II:2(b), and these measures therefore impose an "other duty or charge" in breach of US obligations under GATT Article II:1(b).

6. In the Alternative, the Enhanced Bond Requirement is Inconsistent as such with Articles 9 and 1 of the Anti-Dumping Agreement

15. In the alternative, even if the EBR is to be analyzed together with the anti-dumping measures it enforces, it is inconsistent with Article 9 of the AD Agreement, because the United States is collecting duties in excess of the amounts permitted thereunder. The EBR is inconsistent with Article 9.1, because the charges imposed by the US are not the "full margin of dumping or less"; with Article 9.2, because the anti-dumping duty collected by the United States is not collected in the "appropriate amounts"; and Article 9.3, because the amount of the anti-dumping duty exceeds the margin of dumping.

16. In consequence, the US anti-dumping measures on subject shrimp are imposed inconsistently with the United States' obligations under Article 1 of the AD Agreement. As a further consequence, the EBR and the anti-dumping measures on subject shrimp fall outside GATT Article II:2(b) and are in breach of GATT Article II:1(b) for the reasons set forth in the preceding paragraph.

17. While the United States may have a right to collect cash deposits, it has no right to require *both* a cash deposit equivalent to the full amount of the dumping margin *and* a bonding requirement as an anti-dumping enforcement measure.

7. The Enhanced Bond Requirement Cannot be Justified under Article XX(d) of the GATT 1994

(a) The Enhanced Bond Requirement Is Not "Necessary to Secure Compliance" Within the Meaning of Article XX(d) of the GATT 1994

18. The United States has not demonstrated that the EBR satisfies the requirements of Article XX(d).[20] The United States has done no more than make unsubstantiated assertions that agriculture/aquaculture products in general, or shrimp in particular, create *per se* a critical risk of default in AD/CV duty collection. General, abstract allegations such as these are insufficient to satisfy the burden of proof under Article XX.

19. Moreover, the GAO's finding that when the CBP examined AD and CVD cases to evaluate the risk of uncollected duties, 67 per cent of the time, duty rates *decreased* or stayed the same between the time of entry and final liquidation[21] contradicts the United States' general assertion that there is a need to impose untargeted surety requirements to guarantee increased future duty payments.

20. The United States suggests that its decision to designate the shrimp anti-dumping orders as "Covered Cases" is "due in part to low capitalization and high turnover rates in the industry as a whole"[22], and a belief "that importers of agriculture/aquaculture merchandise tended to be

[20] United States' first submission, paras. 83-97. The United States bears the burden of proof to demonstrate that the conditions of Article XX(d) are fulfilled.

[21] Exhibit THA-10 (WT/DS343), at 16. Where no administrative review of an order is requested on the anniversary of the order or no administrative review is conducted, liquidation is set at the rates set by the final determination and order. It is only when an administrative review is conducted that a rate may change.

[22] United States' first written submission, para. 27.

undercapitalized.[23] Yet importers of agriculture and aquaculture products do not necessarily have low capitalization. Conversely, any consumer goods industry where the importer is a middleman rather than a user of the product imported is likely to be characterized as thinly capitalized and subject to high turnover rates. Thus, the US concerns do not apply to all agriculture and aquaculture importers, and can apply to importers in many other sectors.

21. Even assuming that the United States can demonstrate that particular features of aquaculture and agriculture imports warrant particular surety measures, the United States had at its disposal less trade restrictive measure that it could reasonably employ (e.g. more frequent investigation, raising the cash deposit rate immediately upon making a preliminary finding in an anti-dumping administrative review, etc.).[24]

22. Finally, Brazil recalls that, as the GAO Report states, the adoption of the EBR – by transferring the burden of higher bond to foreign-based supplier – is already giving rise to results that *defeat*, rather than make a contribution to, the purpose allegedly pursued by the US Customs authorities.[25]

(b) The Enhanced Bond Requirement Does Not Secure Compliance with Measures That Are "Not Inconsistent" With the WTO Agreement

23. Furthermore, the adoption of the EBR was directly related to enforcement of the *Byrd Amendment*[26] in defiance of the adopted Panel and Appellate Body reports condemning that illegal measure and in disagreement with the US's stated intentions to comply with the DSB's rulings and recommendations.[27] The explicit nexus traced by the US authorities between the EBR and the *Byrd Amendment* constitutes undeniable evidence of a bias that no legitimate reading of Article XX can support.

8. Conclusions

24. Brazil respectfully requests that the Panel find that the EBR is inconsistent as such with Articles 18.1 and 1 of the AD Agreement, and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative with Articles 9 and 1 of the AD Agreement. Brazil further requests that the Panel find that the EBR does not constitute "reasonable security" under Note 1 Ad Article VI:2-3 of the GATT 1994, and that the EBR cannot be justified under Article XX(d) of the GATT 1994. Brazil supports the request of India that the Panel, pursuant to its authority under Article 19.1 of the DSU, recommend that the United States bring its measure into conformity with its WTO obligations.

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[23] United States' first written submission, para. 14.

[24] Thailand's first written submission (WT/DS343), para. 84-89.

[25] Exhibit THA-10 (WT/DS343), at p. 6. *See also* Exhibit THA-1 to Thailand's third party submission, at p. 35, 43-44; India's first written submission at p. 41.

[26] Exhibit THA-1 to Thailand's third party submission, paras. 94-97.

[27] Dispute Settlement Body, Minutes of the Meeting of 27 January 2003 (WT/DSB/M/142, 6 March 2003), para. 60. At the time the "9 July 2004 Amendment" was adopted by the US Customs authorities, almost 18 months had passed from the date on which the United States announced its intention to implement the DSB's rulings and recommendations in the Byrd Amendment dispute.

ANNEX C -2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

(21 May 2007)

1. Introduction

1. The People's Republic of China appreciates the opportunity to provide its third party submission regarding the present disputes. In this submission, China focuses on the Enhance Bond Requirement imposed and enforced by the US Customs[1], and is of the view that the Enhance Bond Requirement is, as such, inconsistent with Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement. Additionally, China is of the view that the United States wrongly interprets Ad Note to GATT Article VI: 2 and 3, and its argument that the Enhanced Bond Requirement constitutes "reasonable security" permitted by Ad Note to GATT Article VI: 2 and 3 is groundless.

2. The Enhanced Bond Requirement is as such inconsistent with Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement.

(a) The US Enhanced Bond Requirement constitutes a non–permissible specific action against dumping/ a subsidy.

2. China is of the opinion that the Enhanced Bond Requirement cannot get through the three-step analysis established by the Appellate Body in *Byrd Amendment* with regard to Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement [2] and therefore is inconsistent with both Articles.

(i) The Enhanced Bond Requirement is a "specific action" against dumping/a subsidy

3. It is clear from its texts that the Enhanced Bond Requirement is inextricably linked to, and strongly correlated with, the constituent elements of dumping or of a subsidy in that the Enhanced Bond Requirement only applies to the imports subject to antidumping or countervailing duty orders. The texts indicate that the Enhanced Bond Requirement is established for determination of continuous bond for importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty orders. It is also clear that only with the determination that the constituent elements of dumping or subsidization are present, could the Enhanced Bond Requirement be imposed. Therefore, the Enhanced Bond Requirement is a "specific action" against dumping/a subsidy.

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[1]The Enhanced Bond Requirement in this submission refers to the four instruments relied upon by the US Customs in imposition and enforcement of the Enhanced Bond Requirement, i.e., the "July 9 2004 Amendment", the "January 25 2005 Formulas", the "August 10 2005 Clarification" and the "October 24 2006 Notice"

[2] Appellate Body Report, *US-Offset Act ("Byrd Amendment")*, para.236.The Appellate Body, in examining Article 18.1 of the Antidumping Agreement and 32.1 of the SCM Agreement, stated that there were "two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be 'specific' to dumping or subsidization. The second is that a measure must be 'against' dumping or subsidization." If both of these conditions are met, the Appellate Body stated that, "it would then be necessary to move to a further step in the analysis and to determine whether the measure has been 'taken in accordance with the provision of GATT 1994', as interpreted by the Anti-Dumping Agreement or the SCM Agreement. If it is determined that it is not the case, the measure would be inconsistent with Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement."

4. The United States alleges in its first submission that the Enhanced Bond Requirement is not a "specific" action against dumping or a subsidy. China thinks the United States' arguments are without any merit. Firstly, the United States confused "actions in response to dumping or subsidization" with "the intent of such actions". China recalls the Appellate Body's statement that **"**the intent with which action against dumping is taken is not relevant to the determination of whether such action is 'specific action against dumping' of exports within the meaning of Article 18.1 of the Anti-Dumping Agreement."[3] Secondly, the argument of the United States is also meaningless with regard to the constituent elements of 'dumping' being not 'built into the essential elements' of the Enhanced Bond Requirement. China notes that the Byrd Amendment itself does not determine or calculate antidumping or countervailing duty margins, just as the Enhanced Bond Requirement does not do so. Nevertheless, the Appellate Body has ruled that the Byrd Amendment is a specific action against dumping and subsidization. Furthermore, since the Enhanced Bond Requirement is imposed upon the imported products subject to antidumping or countervailing duty orders following the determination of constituent elements of dumping or of a subsidy, the constituent elements of dumping or of a subsidy is "implicit in the express conditions for taking such action".[4]

(ii) The Enhanced Bond Requirement is a specific action "against" dumping/a subsidy

5. It is clear from the text of the Enhanced Bond Requirement that, the Enhanced Bond Requirement is designed and structured in opposition to, has an adverse bearing on and, more specifically, has the effect of dissuading the practice of dumping or subsidization, or creates an incentive to terminate such practice. Therefore, the Enhanced Bond Requirement is in nature a specific action "against" dumping/a subsidy. Although the United States attempts to argue that CBP neither requested nor encouraged sureties to require collateral with respect to the bonds at issue, and that CBP is only a third party beneficiary to the bond contracts, yet the importers, to satisfy the enhanced bond requirement, have to pay for it regardless of who acts as the beneficiary and who charges them for the enhanced bond. Compared with the Byrd Amendment, which has been ruled by the Appellate Body as an action "against" dumping or subsidization, the Enhanced Bond Requirement at issue, which has direct adverse effect in nature, cannot get through the "against" test either.

(iii) The Enhanced Bond Requirement is a non-permissible response to dumping/subsidization.

6. China recalls that, in both US – 1916 Act and US – Offset Act (Byrd Amendment), the Appellate Body found that the GATT 1994 and the Antidumping Agreement "limit the permissible responses to dumping to provisional measures, price undertaking, and definitive antidumping duties".[5] In its First Written Submission, India has made extensive legal arguments in proving that the U.S. Enhanced Bond Requirement is not definitive anti-dumping/countervailing duties, provisional measures or price undertakings, to which China fully agrees. Moreover, the United States itself, in its First Submission, has confessed that "The bond directive……is not a 'provisional measure' within the meaning of Article 7 [of the Antidumping Agreement]."[6]

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[3] Appellate Body Report, *US-1916 Act*, para.122. In US – 1916 Act. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para.259, the Appellate Body stated that "the intent, stated or otherwise, of the legislators is not conclusive as to whether a measure is against dumping or subsidies under Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement".

[4] Appellate Body Report, *US-Offset Act ("Byrd Amendment")*, paras.244. The Appellate Body also stated that the "test" established in *US – 1916 Act* "is met not only when the constituent elements of dumping are 'explicitly built into' the action at issue, but also where… they are implicit in the express conditions for taking such action."

[5] Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (ByrdAmendment)*, para. 265.

[6] DS 345 United States' first submission, para 30.

(b) The US Enhanced Bond Requirement can be challenged, as such, in WTO dispute settlement proceedings.

7. As indicated in the texts of the Enhanced Bond Requirement, it is not vague that the precise content of the Enhanced Bond Requirement has been identified; that the Enhanced Bond Requirement is attributable to the United States; and that it does have general and prospective application. Just as the Appellate Body ruled in the past [7], China takes the view that the Panel is in a position to find that the U.S. Enhanced Bond Requirement may be challenged, as such.

(c) India has met its burden of proof with regard to the as such claim based on Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement.

8. In the present case, China is of the view that India has provided the evidence and put forward the arguments underlying a prima facie case. Furthermore, nothing in the jurisprudence by the Appellate Body requires the complaining party to articulate a so called "legal theory" as the United States alleged in its First Submission.[8] Therefore, the United States failed to make a meaningful rebuttal against India's as such claim in this respect.

(d) The merit of the Mandatory and Discretionary Doctrine in the present dispute

9. In the present case, India has met its burden of proof to provide a prima facie case concerning its as such claim based on Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement. In rebutting this, the United States seems to put forward legal analysis on the Mandatory and Discretionary Doctrine[9]. In China's view, if this panel chooses to go further and apply the Mandatory and Discretionary Doctrine as an analytical tool, the following aspects should be taken into consideration.

10. **Firstly**, up to now, the following conclusions can be drawn from WTO case law regarding the the Mandatory and Discretionary Doctrine :

i. The mandatory and discretionary doctrine is now not relevant when determining a measure challengeable or not, as such, under the WTO Agreement[10], which is quite different from the GATT panel practice[11].
ii. The mandatory and discretionary doctrine may be relevant "only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[12]
iii. The mandatory and discretionary doctrine, as with any such analytical tool, the import of it may vary from case to case. The application of this distinction in a mechanical fashion should be cautioned against.[13]
iv. The measure mandating particular action inconsistent with a WTO obligation is of WTO inconsistency, while whether discretionary legislation could be found inconsistent with

[7] Appellate Body Report, *US –Laws, Regulations and Methodology for Calculating Dumping Margin ("Zeroing")*, para.198.Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para.81. The Appellate Body indicated that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."

[8] DS 345 United States first submission, para.49.

[9] DS345 United .States' first submission, para.50.

[10] Appellate Body Report: *US - Corrosion-Resistant Steel Sunset Review*, para. 89

[11] Panel Report, *Canada – Aircraft*, para 9.124, citing GATT Panel Report, *US – Tobacco*, para 118.

[12] Appellate Body Report: *US. - Corrosion-Resistant Steel Sunset Review*, para. 89.

[13] Appellate Body Report: *US - Corrosion-Resistant Steel Sunset Review*, para. 93 (footnote omitted).

> WTO provisions or not may vary from case to case.[14] Discretionary legislation may also be found inconsistent with WTO provisions in some certain special cases depending on whether it is enough to create a "chilling effect" on trade, regardless of its discretionary nature.[15]

11. **Secondly**, China believes that the Enhanced Bond Requirement is mandatory in nature and is therefore of WTO inconsistency. First, CBP is mandated in imposing and enforcing the Enhanced Bond Requirement only with regard to agriculture/aquaculture merchandise subject to antidumping/countervailing duty orders, and merchandise or products outside the scope of agriculture /aquaculture sector will not be subject to the Enhanced Bond Requirement.. Second, the Port Directors will be required to review continuous bonds for importers involved. The term "be required to review" indicates that the Enhanced Bond Requirement, in this respect, is mandatory. Third, any increase in bond liability will become effective when the USDOC issues its Order on the case; the alteration of the bond amount could take place only after the imposition of the enhanced continuous bond subject to many conditions. Fourth, China notes that the United States, by introducing the "October 24 2006 Notice", seems to argue that the Enhanced Bond Requirement is not mandatory because the directive of CBP has offered importers a customized alternative to the application of the formulas in the directive by providing importers with the ability to obtain bonds based on individualized assessments of risk.[16] China does not agree in this regard. In the case that the importers fail to submit information on their financial condition related to the risk of non-collection for that importer, or fail to submit the information correctly as required, CBP will be ***required*** to apply enhanced bond in accordance with the Enhanced Bond Requirement. (emphasis added)

12. **Thirdly**, even if the panel finds that the Enhanced Bond Requirement is discretionary in nature, the panel should continue to make further study on the effect of the challenged measure. China is of the view that, even if the Enhanced Bond Requirement is discretionary, it still poses a threat to, or has a "chilling effect"[17] on, the trade of products subject to antidumping/countervailing duty, and is therefore as such inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.

3. The U.S. Argument that its Enhanced Bond Requirement constitutes "Reasonable Security" permitted by Ad Note to GATT Article VI: 2 and 3 is groundless under WTO rules.

13. China believes that, the phrase "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***" of the Ad Note, is not equal or similar to "reasonable security

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[14] Appellate Body Report, *US-1916 Act*. In para.99, the Appellate Body specifically stated that it did not need to consider whether Article 18.4 of the Anti-Dumping Agreement had 'supplanted or modified' the mandatory-discretionary distinction because the 1916 Act was clearly not discretionary.

In *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated in the footnote 334 that: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation".

China is of the view that these findings provide to some extent possibility for the discretionary legislation to be found inconsistent with WTO provisions.

[15] Panel Report, *US- Section 301 Trade Act*. The Panel considered that a law permitting a government to take unilateral measures contrary to the DSU would "constitute an ongoing threat and produce a 'chilling effect' causing serious damage" to other Members with less power in the WTO regime and to the market-place itself, by possibly stunting investment or trade. Paras. 7.86-91.

[16] DS345 United States' first submission, para.51

[17] In *US- Section 301 Trade Act*, the panel established the so called "chilling effect test" in determining whether or not a discretionary legislation is inconsistent with WTO provisions.

(bond or cash deposit) for the payment of anti-dumping duty pending ***determination of final liability for payment of anti-dumping duties***" in the context of a retrospective duty assessment system. The United States' rebuttal[18] in this regard is groundless. The "reasonable security" provided in the Ad Note could only refer to the phase of antidumping (or countervailing) investigation after the preliminary determination is made and prior to the final determination. Therefore, what Ad Note to Article VI: 2 and 3 means is the illustration of the forms of provisional measures a Member may usually take after the preliminary determination and prior to the final determination of any antidumping or countervailing investigation.[19] Therefore, China does not agree with the United States that the Enhanced Bond Requirement constitutes "reasonable security" permitted by Ad Note to Articles VI:2 and 3 of GATT 1994. (Emphasis added)

4. Conclusion

14. China thanks the Panel to provide this opportunity to comment on the issues involved in this proceeding, and hopes the above comments will prove to be helpful.

[18] DS345 United States' first submission, para.23.

[19] In the stage demonstrated by the Ad Note , no final affirmative determination has been made of dumping/subsidy and consequent injury to a domestic industry since there are only facts of suspected dumping or subsidization which await further investigation in the following final determination. In the final phase of any antidumping/countervailing investigation, the suspicion of any facts of dumping or subsidization must be removed and the positive evidence must be discovered before a final affirmative determination is made.

ANNEX C -3

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(16 May 2007)

1. Enhanced Bond Requirement

(a) Principal factual features of the EBR which affect the EC legal analysis

1. As explained by India (and not disputed by the US) the Enhanced Bond Requirement ("EBR")[1] applies *in addition* to the cash deposit rate.[2] Hence, the EBR is not supposed to ensure the collection of dumping duties assessed at the rate initially determined by the US investigating authorities (as the collection of these duties is ensured by the cash deposit rate). The EBR is designed to ensure collection of final anti-dumping duties that would be due in case dumping would increase dramatically from one year to another.[3] The EBR is therefore a measure designed to address a *hypothetical* problem in the collection of a *hypothetical* dumping duty reflecting a *hypothetical* dramatic increase in dumping (up to 100 per cent) from the level of dumping that has been initially determined by the investigating authorities.

(b) Measure designed to ensure collection of an anti-dumping duty cannot be more onerous that the anti-dumping duty itself

2. In the European Communities' view, one of the main reasons behind the existence of Article VI GATT and the Anti-Dumping Agreement was a desire to create a set of anti-dumping disciplines acceptable to all Members and capable of curbing the possibilities of a misuse – deliberate or not – of anti-dumping policies by Members. Yet, what would be the purpose of creating these rather detailed and carefully balanced rules, such as those on the calculation of dumping margin and the amount of anti-dumping duty, if the effect on trade of the duties determined pursuant those rules could be in practice much less important that the impact of measures ensuring the collection of those duties?

3. By definition, measures designed to ensure the collection of anti-dumping duties are merely *ancillary* to the duties themselves. If no dumping is determined which would give a rise to an anti-dumping duty, there cannot be an ancillary measure that is supposed to ensure the collection of such duty. Moreover, even if a margin of dumping is determined and a corresponding anti-dumping duty is assessed, the mechanism for securing the collection of that anti-dumping duty cannot impose a burden which would be greater than the duty itself – otherwise the Anti-Dumping Agreement would contain detailed rules only on the determination of a collection mechanism and not on the determination of dumping.

4. The temporary nature of EBR (the fact that, once the margin of dumping for the period covered by EBR is definitely determined and the anti-dumping duties finally collected, the remaining

[1] In its first written submission, India refers to the US measures challenged in the present dispute as "Enhanced Bond Requirement" and "Amended Bond Directive". The US uses, in its first written submission, another set of abbreviations to refer to these measures, or some of those measures (as the reference does not seem to be always consistent). For ease of reference and to prevent confusion, the European Communities refers in this submission to all the measures at issue, identified by India, as the "Enhanced Bond Requirement" or "EBR".

[2] India's first written submission, paras 29 – 30 and Exhibit IND-3. US first written submission, paras 12-14.

[3] This also is confirmed by statements made by the US authorities. See Exhibit IND-8 (Exhibit-12).

funds previously "frozen" in the enhanced bonds can be used for other purposes) does not affect this assessment. To the contrary, it actually underlines it. What sort of a temporary measure of an ancillary nature can be given such an effect which actually removes the very reason for the existence of and imposition the anti-dumping duties – namely the exports by dumping companies – by eliminating in practice these companies themselves (or their ability to export to the US)?[4]

(c) EBR is inconsistent with the provisions of Article 9 Anti-Dumping Agreement

5. The European Communities recalls the far-reaching nature of the EBR: the EBR is not merely a "collection-ensuring mechanism", it is a measure against potential *future* dumping which is put in place without any evidence and actual determination of dumping. This contradicts a number of distinct provisions of Article 9 Anti-Dumping Agreement . Article 9, as indicated in its title, sets forth – for the purposes of the Anti-Dumping Agreement – rules governing the imposition and collection of anti-dumping duties. The first three paragraphs of Article 9 set out rules governing this issue.

6. First, following on the preceding provisions of the Anti-Dumping Agreement , Article 9.1 makes clear that that the determination of a margin of dumping is an inherent pre-condition for the imposition of any anti-dumping duty. At any stage, an anti-dumping duty has to be calculated and imposed *on the basis of* and *in correspondence to* positive evidence of dumping. The latter element – the existence of a *corresponding* relationship between the evidenced margin of dumping and the amount of duty – is also reflected in the second sentence of Article 9.1 of the Anti-Dumping Agreement : Members are encouraged to impose a lesser duty than the margin of dumping if such lesser duty would be adequate to remove the injury to domestic industry. However, Members certainly cannot, under this provision, impose a duty which would be *more* than the margin of dumping.

7. Article 9.2 of the Anti-Dumping Agreement confirms the above understanding. The reference to "appropriate amounts" in Article 9.2 follows on the principle set out in Article 9.1: an anti anti-dumping duty *imposed* (in accordance with Article 9.1) shall also be collected in *appropriate amounts*.

8. In other words, the rule resulting from Articles 9.1 and 9.2 is that the "appropriate amounts" have to *correspond* to the imposed duty and the duty itself has to *correspond* to the margin of dumping (or less than the margin of dumping, if deemed sufficient to remove injury). This principle is further elaborated in Article 9.3 of the Anti-Dumping Agreement . This provision states, in its *chapeau*, the fundamental principle that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." To ensure that this principle is respected, Articles 9.3.1 and 9.3.2 of the Anti-Dumping Agreement set forth refund rules for both the retrospective and prospective systems. The existence of these rules makes it clear that the collected anti-dumping duties may *temporarily* exceed the actual contemporaneous margin of dumping (as opposed to the margin of dumping calculated during the original investigation) – for example if dumping decreases. This is a natural implication of the technical mechanics of the dumping determination, nothing more. An attempt to read into these refund rules a new rule, namely one allowing a temporary increase of collected anti-dumping duty bearing no relation to the margin of dumping actually ascertained would not be based on the text of these provisions.[5] Both the text and context make clear that the purpose of Article 9.3.1 and 9.3.2 is to set forth refund rules and not to provide a ground for a departure from the principles established in Articles 9.1 and 9.2 of the Anti-Dumping Agreement .

[4] See, for instance, India's first written submission, para 53.

[5] Although the US has not made any explicit rebuttals of India's arguments on the provisions of Article 9 (especially Article 9.3.1), it seems that the US might actually be taking this position (cf. United States' first submission, para 23).

9. To summarize: the EBR attempts to ensure the collection of an anti-dumping duty for which a margin of dumping has not at all been established. In that respect, the measure directly violates Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement .

(d) Ad Note to paragraphs 2 and 3 of Article VI GATT confirms that EBR violates Article VI:2 GATT and the Anti-Dumping Agreement

10. The European Communities is of the view that EBR is prohibited by Article VI:2 GATT for the same reasons as discussed above: the EBR requires a surety with respect to anti-dumping duties based on dumping which had not yet been determined and, in fact, had not occurred. The Ad Note to paragraphs 2 and 3 of Article VI GATT confirms this conclusion, as it allows a Member to "require a 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".[6] In many respects, this provision addresses the very matter at issue. The EBR is not a "security … *pending final* determination of the facts". As the European Communities mentioned at the outset, the EBR is targeted at a potential future dramatic increase (up to 100 per cent) in dumping *beyond* the level of the dumping incurred in the past assessment period. Hence, in contrast to a cash deposit applied by the US, the EBR is not a security required *pending* the *final* determination of the facts in a case of suspected dumping. A "final determination" implies that there already has been a preliminary or initial determination of dumping which is then verified – and, if necessary, adapted – and becomes final. Yet, when EBR is applied, there is no preliminary or initial determination of the facts of dumping with respect to the dramatically increased dumping that is addressed by EBR.

(e) Article 7.2 Anti-Dumping Agreement confirms that security cannot exceed the margin of dumping

11. In the preceding section, the European Communities explained that EBR violates Article 9 as it attempts to ensure the collection of duties designed to offset dumping which has not yet occurred and has not been established. This view is further confirmed by Article 7.2 Anti-Dumping Agreement. While this provision relates to provisional measures, the principle holds equally well with respect to the issue at hand: if there is a margin of dumping determined, and if there is a duty assessed on the grounds of that margin, then a security can be requested that, however, has to *correspond to the amount of that duty*. In other words, the security cannot be determined in the absence of a margin of dumping and duty determination. If this rule were not applicable beyond the stage of preliminary measures, then one would end up with a rather absurd result: namely that the Anti-Dumping Agreement for some reason only protects the preliminary phase against a misuse and that the main and principle part of the anti-dumping regime, which can and does last for years, is fully open to all kinds of measures which can bypass the anti-dumping duty and be, as far as their effect is concerned, much more onerous.

(f) EBR violates Article 18.1 Anti-Dumping Agreement

12. Like India, the European Communities is also of the view that EBR is a "specific action against dumping" which is not permitted by Article 18.1 of the Anti-Dumping Agreement . Instead of repeating the arguments made by India, however, the European Communities would limit itself to pointing out a few factual and legal aspects of the EBR which it considers particularly relevant. First, there can be no doubt that the EBR is a "specific" action against dumping. As the European Communities mentioned above, the EBR is a measure ancillary to the anti-dumping duties, not the other way round. Second, the EBR is a specific action "against" dumping. Under the Appellate Body case law, the legal test in this respect should focus on dumping (or subsidization) as "practices"[7] and,

[6] Emphasis added.
[7] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 253.

particularly, on the assessment of "whether the design and structure of a measure is such that the measure … has an adverse bearing on … or, more specifically, has the effect of dissuading the practice of dumping … or creates an incentive to terminate such practices".[8] The effect of the measure in question on the competitive position of the domestic industry vis-à-vis their foreign competitors subject to anti-dumping duties is at least one of the elements in the above test.[9] The harmful effects of EBR on the competitors of the US domestic industry have been well documented in the submission of India.[10]

(g) The EBR is inconsistent "as such" with the Anti-Dumping Agreement and Article VI:2 GATT

13. Based on the above discussion, the European Communities is of the view that the operative elements of EBR (in particular those which constitute the principal factual aspects of the EBR as discussed above, such as the Amendment to Bond Directive 99-3510-004 of 9 July 2004[11]) are inconsistent, *as such* and *as applied*, with Article VI:2 GATT and the Anti-Dumping Agreement (in particular with Articles 9.1, 9.2, 9.3, 9.3.1 and 18.1 thereof). Consequently, the EBR is also inconsistent with Article 18.4 of the Anti-Dumping Agreement and XVI:4 of the WTO Agreement. In this particular case, the distinction that the US makes between mandatory and discretionary legislation does not even play a role, since the application of EBR would always lead an inconsistency with WTO law.

(h) Other claims raised by India and alternative measure ensuring collection of anti-dumping duties

14. The European Communities does not address other and alternative claims raised by India in detail as it believes that a Panel finding made under the legal provisions discussed in the preceding section of this submission (i.e., provisions which pertain specifically to dumping) would correspond to and address more pertinently the problem at issue. The European Communities notes, however, that it disagrees with the US view that the EBR can be justified under Article XX(d) GATT.[12] In particular, contrary to what the US argues, the EBR is not "necessary to secure compliance" with US anti-dumping duty laws. Alternative measures, such as variable duties, are reasonably available[13] and, if adopted, would lead to a considerably less onerous and restrictive impact upon trade.

2. Conclusion

15. The European Communities is of the view that the EBR is inconsistent, as such and as applied, with Articles 9.1, 9.2, 9.3, 9.3.1, 18.1 and 18.4 of the Anti-Dumping Agreement , with Article VI:2 GATT including the Ad Note to Paragraphs 2 and 3 of Article VI GATT and Article XVI:4 WTO Agreement.

[8] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 254.
[9] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 256.
[10] See, for instance, India's first written submission, para 53.
[11] Exhibit IND-3.
[12] United States' first written submission, paras 83 *et seq*.
[13] United States' first written submission, para 92.

ANNEX C - 4
EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

(18 May 2007)

1. Introduction

1. This dispute brought by India is about the Enhanced Bond Requirement (the "EBR") on certain products subject to antidumping or countervailing duties introduced by the United States. India questions the WTO consistency of this measure in light of various provisions under the AD Agreement, the SCM Agreement, and the GATT 1994. In this submission, Japan, as a third party, would like to focus on the following two issues based on its systemic interest in the interpretation of these agreements ensuring fair and objective application of them:

- whether the EBR constitutes specific action against dumping and subsidization that is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement, respectively; and

- whether the EBR is inconsistent with the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994.

2. Arguments

(a) Consistency of the EBR with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement prohibiting *specific actions against dumping and subsidization* other than those permitted under those Agreements

2. India submits that the EBR constitutes an impermissible specific action against dumping or a subsidy under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

3. The Appellate Body stated that a Member's measure constitutes a specific action against dumping or subsidization, where: (1) the measure is "specific" to dumping or subsidization; (2) the action is taken "against" dumping or subsidization, i.e., to counteract dumping or a subsidy; and (3) it is inconsistent with the provisions of GATT 1994, as interpreted by AD Agreement or SCM Agreement.[1] An action is "specific" where it is "inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy."[2] An action is taken "against" dumping or subsidization if the action has the effect of dissuading the practice of dumping or subsidization.[3]

4. Regarding the "specific" requirement, Japan considers that the Panel should examine under what situations the EBR is imposed to see whether and how the measure is linked to the "constituent elements" of dumping or subsidy. In Japan's view, to meet this requirement, it would be necessary that the EBR is imposed only where dumping or subsidy is found to exist. In this connection, it appears that the bond requirement in question is required only where the United States found the existence of dumping or subsidy, i.e., constituent elements of dumping or subsidization. Any additional requirements, such as the risk of non-collection for individual importers, would not change such basic characteristics of the EBR.

[1] See Appellate Body Report, *US – Continued Dumping and Subsidy Offset Act of 2000 ("US-CDSOA (AB)")*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 236.
[2] Ibid., para.239.
[3] Ibid., para.254.

5. Regarding the "against" requirement, the Panel should examine at least the purpose as well as the design and structure of the EBR, and its effect, that is, how the bond requirement would reduce shipments from subject countries. In particular, the United States admits that the EBR is to secure future duty collection in case that the antidumping duty rate actually assessed increase from that determined during the investigation.[4] By definition, the antidumping or countervailing duty is a measure "against" dumping or a subsidy. As the bond requirement in question is a measure to complement the imposition of antidumping or countervailing duty, it must be a measure "against" dumping or a subsidy.

6. The United States argues that the EBR is not an action "against" dumping or subsidization, but "is designed to secure antidumping liability" only because "the vast majority of unsecured liability that has resulted in noncollection happens to be antidumping duty liability."[5] The United States also argues that it is just a third party beneficiary and "is not itself a party to the contract" with a surety.[6] There is no dispute, however, that the EBR is an action taken by the United States to collect anti-dumping or countervailing duties only with respect to imports for which dumping or subsidization was found. As discussed above, the bond requirement at issue must be a "specific action against dumping or a subsidy".

7. In such case, the Appellate Body clarifies that the permissible action under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement is limited to the imposition of (i) definitive anti-dumping or countervailing duties, (ii) provisional measures, (iii) undertakings, or, under the SCM Agreement, (iv) multilaterally-sanctioned countermeasures under the dispute settlement system.[7] The EBR is not either one of these four measures, and therefore impermissible under these provisions.

8. The United States argues that the EBR is merely "related to" dumping or subsidies[8], and therefore permissible. The United States then relied on the statement of the Appellate Body that footnote 24 of the AD Agreement and footnote 54 of the SCM Agreement is to confirm that "an action that is *not* 'specific' within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the SCM Agreement, but is nevertheless related to dumping or subsidization, is not prohibited" by those Articles.[9] As the bond requirement in question is "specific" action against dumping or a subsidy as discussed above, the requirement would not be justified by any other provisions of GATT 1994.

(b) Permissibility of the Enhanced Bond Requirement under the Ad Note

9. The United States argues that the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994 justifies the EBR,[10] arguing that the EBR is "security against the prospect of a future liability."[11] India denies that the United States can rely on the Ad Note, arguing that the Ad Note cannot be applied independently from Article 7 of the Anti-Dumping Agreement or Article 17 of the SCM Agreement, which provide for provisional measures.[12] The United States rebuts that the bond requirement at issue is imposed pending determination of the *final liability for payment of duties*. According to the United States, in the context of its retrospective duty assessment system, the language "final determination of the facts" in the Ad Note means "determination of the *final liability*

[4] United States' first written submission , para.14.
[5] Ibid., para. 39.
[6] Ibid., para. 8.
[7] Appellate Body Report, *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para.137., *US – CDSOA (AB)*, para. 269.
[8] United States' first written submission, para. 38.
[9] *US – CDSOA (AB)*, para. 262. (emphasis in original)
[10] United States' first written submission, paras. 21-29.
[11] Ibid., para. 26.
[12] India's first written submission, paras.92-94

for payment of anti-dumping duties"[13]. Based on the following consideration, Japan is of the view that the "reasonable security" permitted under the Ad Note purports the provisional measures.

10. First, the language "pending final determination of the facts" in the Ad Note must be read in the context of the subsequent language "in any case of *suspected* dumping or subsidization" (emphasis added). The word "suspected" suggests that the facts concerning "dumping" or "subsidization" are still at an unproven stage. Therefore, Japan understands that Ad Note contemplates a situation before the final determination of dumping or subsidization in the original investigation. The language of the Ad Note "determination of *facts* in any case of suspected dumping or subsidization" does not support the United States contention that this "determination" concerns with the final liability for payment of duties in a review. The review, however, does not concern with the determination of the *fact*, or the existence, of dumping or a subsidy. It merely reassesses the amount of dumping or subsidization. The determination in a review, thus, is not related to the "final determination of the facts of dumping or subsidization" as set forth in the Ad Note.

11. Japan considers that the "final determination" in the Ad Note means that of dumping or subsidization as a prerequisite of deciding to impose antidumping or countervailing duties. Therefore, the measure permitted under the Ad Note should be the provisional measures to be taken before the final determination of dumping or subsidization, as provided in Article 7 of the AD Agreement or Article 17 of the SCM Agreement.

12. Even in the retroactive system of duty assessment in the antidumping regime, the United States issues the antidumping order, which embodies the administrative decision to impose antidumping duties on certain products upon affirmative final determination on the facts of dumping. The determination of the assessment of the final duty liability may take place after the review process, if a request for a review is made. The measure purported in the Ad Note, however, is only related to the provisional measure to be taken before the issuance of this order, not after the affirmative final determination on dumping in the original investigation, and not even before the completion of the final liability assessment in a subsequent review. This interpretation equally applies to the imposition of countervailing duties.

13. The United States also quotes the reference to "many other cases in customs administration" to contend that the Ad Note permits the security requirement for the payment of antidumping or countervailing duties apart from provisional measures.[14] However, the mere reference to customs administration does not give support for an interpretation that the Ad Note would broadly permit security requirement, including those imposed even *after* the final determination of dumping or subsidization.

14. For the above reasons, Japan submits that it considers that the Ad Note gives no legal basis for the imposition of the EBR.

3. Conclusion

15. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure fair and objective application of the AD Agreement, the SCM Agreement and the GATT 1994.

[13] United States' first written submission, para.23 (emphasis added)
[14] United States' first written submission, para.26.

ANNEX C -5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THAILAND

(21 May 2007)

1. Introduction

1. India's complaint is largely related to the same matter as Thailand's complaint in *United States – Measures Relating to Shrimp from Thailand* (DS343). The main measure at issue in both disputes – the imposition of enhanced bonding requirements by the United States on importers of subject shrimp products from Thailand and India – is substantively the same. Many of the legal claims made by Thailand in *United States – Measures Relating to Shrimp from Thailand* (DS343) overlap with the legal claims made by India in these proceedings.

2. Thailand considers that the imposition of the enhanced bonding requirement to imports of subject shrimp from Thailand is inconsistent with WTO law. The grounds for its view are contained in Thailand's First Written Submission to the Panel in *United States – Measures Relating to Shrimp from Thailand* (DS343) attached as Exhibit THA-1 to Thailand's third-party submission. To the extent that the legal arguments of Thailand in Exhibit THA-1 relate to claims also made by India, they are equally relevant to an analysis of the imposition of the enhanced bonding requirement on importers of certain shrimp from India. A summary of those legal arguments is provided below.[1]

2. Legal Argument

(a) The application of the Enhanced Bond Requirement to subject shrimp is inconsistent with Article 18.1 of the Anti-Dumping Agreement

(i) The Enhanced Bond Requirement is specific action against dumping

The Enhanced Bond Requirement is "specific action" against dumping

3. The Enhanced Bond Requirement is "specific action" against dumping within the meaning of Article 18.1 of the Anti-Dumping Agreement as it is "action that may be taken *only* when the constituent elements of 'dumping' are present".[2] The application of the Enhanced Bond Requirement is limited to merchandise upon which US Department of Commerce ("USDOC") has issued an anti-dumping order. The United States Bureau of Customs and Border Protection ("CBP") has stated that "[a]ny increase in bond liability will become effective when the Department of Commerce (DOC) issues its Order on the case".[3] The Enhanced Bond Requirement is based on "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*",[4] and applies only to "covered cases" within "special categories" of merchandise. The 24 October 2006 Notice confirms that relevant "Special Category merchandise … is merchandise *subject to AD/CVD*".[5] In

[1] Thailand's third-party written submission does not address legal claims made by India that do not overlap with the claims made by Thailand in *US – Measures Relating to Shrimp from Thailand* (DS343). Thailand nonetheless reserves the right to do so at the meeting of the Panel with the third parties.

[2] Appellate Body Report, *US – 1916 Act*, para. 122.

[3] 9 July 2004 Amendment. Exhibit THA-2.

[4] 10 August 2005 Clarification. Exhibit THA-4, p. 2.

[5] 24 October 2006 Notice, Exhibit THA-5, p. 62276.

fact, the formulae for calculating the amount of the Enhanced Bond Requirement all require the use of a USDOC-determined anti-dumping duty rate as the multiplier.[6]

4. A recent decision of the US Court of International Trade ("USCIT") found that "the administrative record indicates that the plaintiffs are likely to succeed in showing that the bond formulas were applied to these plaintiffs for the sole reason that these plaintiffs were importers of shrimp subject to antidumping duty orders",[7] and that "Customs did not consider each individual importer's financial condition or ability to pay prospective antidumping duties, but rather appeared to base the application of the formulas on one critical factor – that the importer engages in the importation of subject shrimp."[8]

5. In addition, the CBP's stated policy reasons for introducing the Enhanced Bond Requirement confirm the clear connection to dumping. These include "[d]ifficulties in collecting the antidumping duties" and "the impact of these collections on the amount of disbursements pursuant to the Continued Dumping and Subsidy Offset Act",[9] (i.e. disbursements previously found to be inconsistent with Article 18.1 of the Anti-Dumping Agreement).[10] This is confirmed by the CBP's stated policy that it would alter the enhanced bond amount if importers stopped or limited imports of subject shrimp.[11]

6. Finally, the Enhanced Bond Requirement does not address circumstances other than dumping such as: (i) problems of default (because it has not been applied in situations where there is a history of default, such as crawfish); (ii) problems of surety bankruptcies; or (iii) problems that arise in new shipper situations (which have been addressed separately through legislative action).

The Enhanced Bond Requirement is specific action "against" dumping

7. The application of the Enhanced Bond Requirement to subject shrimp acts "against dumping" as it has an adverse bearing on, and has the effect of dissuading, the practice of dumping. Thus, the 10 August 2005 Clarification lists as a factor that may result in altering the amount of the enhanced bond "whether the importer can show that it has switched to a new source of imports or a shift in the pattern of imports".[12] The USCIT found that "only those eight importers who promised not to import subject shrimp, or to limit such imports, were able to negotiate a lower minimum bond amount than the bond formulas required".[13]

8. The GAO Report found that the Enhanced Bond Requirement would tend to "cause importers to change business practices" and to "reduce imports from countries subject to AD/CV duties".[14] The CBP itself confirmed that "NFI importers have increased their sourcing from countries not affected by the antidumping order, from 21 per cent to 32 per cent".[15]

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[6] This rate is either the final determination dumping rate, the most recent administrative review dumping rate, the preliminary determination dumping rate, or the applicable deposit rate.

[7] *National Fisheries Institute, Inc., et al., v. United States Bureau of Customs and Border Protection*, Court No. 05-00683, Slip Op. 06-166, 13 November 2006, (Stanceu J.) ("*NFI v. US*"). Exhibit THA-9, p 58.

[8] Ibid., p. 60. See also Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington DC: October 2006), (the "GAO Report"), Exhibit THA-10, p. 5.

[9] 9 July 2004 Amendment, Exhibit THA-2, p. 1.

[10] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 318.

[11] See below, para. 7.

[12] 10 August 2005 Clarification, Exhibit THA-4, para 3(g), p. 6.

[13] *NFI v. US*, Exhibit THA-9, pp. 52-53.

[14] GAO Report, Exhibit THA-10, p. 32.

[15] Declaration of Bruce W. Ingalls to the USCIT in *NFI v. US*, Exhibit THA-7, para. 17.

9. The adverse bearing of the Enhanced Bond Requirement is also demonstrated by the significant shift in trading patterns of Thai shrimp exports: while 100 per cent of exports were made on a CIF basis in 2003, over 50 per cent of exports were made on a DDP basis in 2006.[16] This shift to DDP exports "makes the foreign-based supplier the US importer of record and shifts the burdens of the higher bonds to them".[17]

10. The adverse effects of the Enhanced Bond Requirement include costs associated with the enhanced bonds, such as the fees charged by sureties of 10 per cent of the value of the bonds.[18] These effects are compounded by the demands of sureties for 100 per cent collateral to secure the enhanced bonds[19] and the "stacking" of bonds due to regular three to five year delays before final liquidation, which results in the tying up of assets and cash that forces companies to forego business opportunities.[20]

(ii) The Enhanced Bond Requirement is not a permissible response to dumping

11. The Enhanced Bond Requirement is not a permissible provisional measure, price undertaking, or definitive anti-dumping duty.

12. The application of the Enhanced Bond Requirement to subject shrimp does not take the form of a permitted provisional measure within the meaning of Note 1 to paragraphs 2 and 3, Ad Article VI of GATT 1994 or Article 7.1 of the Anti-Dumping Agreement as it is applied *after* the definitive determination of dumping. It is also not a provisional measure taken in accordance with Articles 7.2 and 7.5 of the Anti-Dumping Agreement or Note 1, Paragraphs 2 and 3 to Ad Article VI of the GATT 1994, because it exceeds the amount of the provisional measures contemplated by those provisions.

13. The Enhanced Bond Requirement is evidently not a voluntary price undertaking in accordance with Article 8 of the Anti-Dumping Agreement and is of a fundamentally different character to an anti-dumping "duty" taken in accordance with Article VI:2 of the GATT 1994 and Article 9 of the Anti-Dumping Agreement.

(b) The Enhanced Bond Requirement is inconsistent with Articles XI:1, II:1(a) and II:1(b), and I of the GATT 1994

14. The Enhanced Bond Requirement constitutes a "restriction" on the importation of subject shrimp within the meaning of Article XI:1 of the GATT 1994, and cannot be characterised as a requirement to pay a duty, tax or charge, as it does not involve a monetary imposition that yields public revenue. By imposing considerable additional financial costs and procedural burdens on importers, the Enhanced Bond Requirement makes the importation of subject shrimp more burdensome than the importation of goods not subject to anti-dumping duties and the importation of goods subject to other US anti-dumping measures.

15. In the alternative, if the Enhanced Bond Requirement is considered to constitute a duty or charge imposed on or in connection with importation, it is inconsistent with Articles II:1(a) and (b) of the GATT 1994.

16. Imports of shrimp from India, Thailand and the four other countries subject to the anti-dumping measure are "like" shrimp products originating in *other countries*. Because the United

[16] Thai Shrimp Industry Survey, Department of Foreign Trade, Exhibit THA-12.
[17] GAO Report, Exhibit THA-10, p. 6.
[18] Exhibit THA-18.
[19] GAO Report, Exhibit THA-10, p. 6. *NFI v. US*, Exhibit THA-9, at p. 38.
[20] GAO Report, Exhibit THA-10, pp. 6 and 35. *NFI v. US*, Exhibit THA-9, p. 31.

States exempts "like" products from these other countries from the application of the enhanced bonding requirement, it fails to treat like products equally. Such treatment cannot be reconciled with the United States' obligations under Article I:1 of the GATT 1994.

(c) The selective application of the Enhanced Bond Requirement is inconsistent with Article X:3(A) of the GATT 1994

17. In applying the Enhanced Bond Requirement only to importers of subject shrimp, the United States has failed to administer its laws and regulations relating to import bonds in a uniform, impartial and reasonable manner and therefore acts inconsistently with Article X:3(a) of the GATT 1994.

18. Importers of subject shrimp are being treated differently from other importers of goods subject to anti-dumping duties. They are (1) subject to unique evidentiary burdens from which importers of all other goods subject to anti-dumping duties are exempt and (2) must post continuous bonds in higher amounts than importers of all other goods subject to anti-dumping duties. This special and adverse treatment constitutes a failure by the United States to administer these laws in a "uniform" manner within the meaning of Article X:3(a) of the *GATT 1994*.

19. The United States fails to administer its customs laws and regulations relating to bonds in a "reasonable" manner. The CBP should ensure that its bond amount assessments are reasonably related to the actual risk represented by imports of subject shrimp. The fact that an importer imports subject shrimp does not, by itself, provide any reliable indication of any elevated risk of non-payment. The problems the United States has experienced in collecting anti-dumping duties have been concentrated almost exclusively in non-market economy cases and, in particular, anti-dumping duties on imports of crawfish and to a lesser extent garlic. They also arise from new shipper reviews and isolated surety bankruptcies. Circumstances that have not arisen or do not apply in the context of imports of subject shrimp from Thailand.

20. The evidence establishes (1) that the CBP has used the Enhanced Bond Requirement to try to limit imports of shrimp subject to anti-dumping duties, (2) that in applying the Enhanced Bond Requirement to subject shrimp the CBP "was motivated, at least in part, by domestic political pressure to take action directed against the shrimp importing industry"[21] and (3) that the CBP applied the Enhanced Bond Requirement only to the measures against subject shrimp even though there was no history of marked defaults or other problems with respect to these imports and in face of considerable problems with respect to other products and other anti-dumping orders. This evidence cannot be reconciled with the requirement of impartiality contained in Article X:3(a).

(d) The Enhanced Bond Requirement cannot be justified under Article XX(d) of the GATT 1994

21. The Enhanced Bond Requirement is not "necessary to secure compliance" within the meaning of Article XX(d) of the GATT 1994.

22. The United States applies the Basic Bond Requirement to 98 per cent of anti-dumping orders currently in place. The USCIT ruled that "[c]ustoms … did not articulate in the Amendment or the Clarification a reason why antidumping duties on shrimp imports are especially susceptible to under-collection, as opposed to duties on imports of other agricultural or aquacultural products subject to antidumping duty orders, or as opposed to all products subject to such orders".[22] It also ruled that "no record exists demonstrating that significant numbers of shrimp exporters are defaulting or have defaulted on any obligation to pay antidumping duties on their imports of shrimp".[23] It remains

[21] *NFI v. US*, p.57.
[22] Ibid., p. 54.
[23] Ibid., p. 54.

unclear why it is "necessary" to impose more stringent bonding requirements on a class of importers who are not susceptible to and have no marked history of default.

23. US problems with collecting anti-dumping duties arise almost exclusively in non-market economy cases such as those involving crawfish and garlic, and were also attributable to isolated surety bankruptcies and exemptions (now removed) from cash deposit requirements for new shippers of products subject to anti-dumping duties.

24. Furthermore, the Enhanced Bond Requirement does not meet the conditions set out in the *chapeau* to Article XX(d) of the GATT 1994 because the manner in which it is applied constitutes "arbitrary" or "unjustifiable" discrimination and a "disguised restriction on international trade".