

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.