

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 anti-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 appraisal 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.