ANNEX C

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSION OF THE THIRD PARTIES

ANNEX C - 1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

(18 May 2007)

1. Introduction

1. In this submission, Brazil sets out its views on the reasons why the special bonding requirement applied by the United States against imports of certain frozen warm-water shrimp subject to anti-dumping duties, originating in Brazil, China, Ecuador, India, Thailand and Vietnam ("Enhanced Bond Requirement" or "EBR")[1] violates Articles 18.1 and 1 of the Agreement on Implementation of Article VI of the GATT 1994 (the "AD Agreement") and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative Articles 9 and 1 of the AD Agreement. Further, the EBR is not "reasonable security" under Note 1 Ad Article VI:2-3 and cannot be justified pursuant to Article XX(d) of the GATT 1994.

2. The Measures At Issue

2. Responding to a report by US Customs and Border Protection ("CBP")[2] on fiscal year 2003 uncollected anti-dumping and countervailing duties, on 9 July 2004 CBP amended its the existing Bond Directive governing Customs bonding requirements, and set new formulas for calculating minimum continuous bond amounts for importers of agriculture/aquaculture products subject to anti-dumping or countervailing duty (CVD) orders.[3] This EBR requires a bond for 10 per cent of duties, taxes and fees paid by the importer in the prior 12 months (i.e., the normal continuous bond amount), plus 100 per cent of the cash deposit rate established in the anti-dumping order (or most recent administrative review), multiplied by the value of the importer's entries of that product over the previous 12 months.[4] Pursuant to a clarification issued by CBP on 10 August 2005, the EBR applies to "shrimp covered by anti-dumping or countervailing duty cases", the only designated "Covered Cases" within the only designated "Special Category", agriculture/aquaculture merchandise.

3. In October 2006, an in-depth examination of the EBR by the US Government Accountability Office ("GAO") concluded that this bonding requirement "represented a significant change from CBP's traditional method of setting bond amounts," and was "inconsistently implemented" as between shrimp importers, due to a lack of "clear and transparent guidance".[5] Days before the US Court of International Trade ("USCIT") issued a stinging judgment against CBP in domestic litigation on the EBR,[6] CBP issued a 24 October 2006 Federal Register notice further modifying the EBR by identifying the factors it would consider in determining, prospectively for individual importers, whether to reduce a bond amount.[7]

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[1] Frozen warmwater shrimp from Brazil, Thailand, India and these other countries subject to anti-dumping duties is referred to herein as "subject shrimp."

[2] Continued Dumping and Subsidy Offset Act (CDSOA) annual report for fiscal year 2003, Exhibit THA-11 (WT/DS343).

[3] Exhibit IND-8 (internal exhibit 17).

[4] Exhibit IND-6. The EBR is specific to subject shrimp, but if any other goods were subject to the EBR but not to AD/CV duties, they would have no cash deposit rate, and the bond amount would be the same as under a normal continuous bond.

[5] Exhibit THA-10 (WT/DS343) at 7.

[6] Exhibit IND-16.

[7] Exhibit IND-6.

3. The Enhanced Bond Requirement Is Inconsistent "As Such" With Articles 18.1 and 1 of the Anti-Dumping Agreement

4. The EBR should be analyzed as a separate measure, and as constituting "specific action" imposed "against" dumping inconsistent with Articles 18.1 and 1 of the AD Agreement.

(b) The Enhanced Bond Requirement Is "Specific Action" and Is Imposed "Against Dumping"

5. As the Appellate Body stated in *US – Offset Act (Byrd Amendment)*, if a measure "may be taken only when the constituent elements of dumping ... are present", it is a "specific action" within the meaning of Article 18.1.[8] The CBP notices imposing or clarifying the EBR state that it applies *only* to goods subject to a US anti-dumping or CVD order. Since US law only permits such orders to be imposed where the US authorities have determined that the constituent elements of dumping or subsidization are present, the EBR is a "specific action against dumping."

6. The EBR corresponds to the fines on importers provided by Article 93V of Mexico's Foreign Trade Act, which the panel in *Mexico – Anti-Dumping Measures on Rice* condemned under Article 18.1. That panel also found that by *threatening* to impose fines on importers of a product subject to an anti-dumping or CVD investigation, Article 93V provided for a "specific action" not permitted by the AD or SCM Agreements.[9]

7. The United States asserts that the EBR responds to "noncollection risk.[10] Yet Customs is not acting against all importers whose circumstances indicate high noncollection risk - it is only acting against those who import subject shrimp.

8. The EBR is specific action "against" dumping because, in effect, it punishes importers for importing subject shrimp. The EBR indisputably meets the test explained by the Appellate Body in *US – Offset Act (Byrd Amendment)*.[11] It imposes a much larger bond requirement, and thus a significantly greater financial burden[12], on certain importers simply because they import shrimp subject to anti-dumping measures. Furthermore, the 10 August 2005 notice makes it clear that the bond requirement may be altered if the importer can show that it has ceased importing subject shrimp, as also acknowledged by the USCIT.[13]

(c) The Enhanced Bond Requirement Is Not a Permissible Response to Dumping

9. The EBR is also not taken "in accordance with the provisions of GATT 1994, as interpreted by [the AD] Agreement". The only permissible responses to dumping are definitive anti-dumping duties, provisional measures and price undertakings - and the EBR is none of these. It is therefore inconsistent with Article 18.1 of the AD Agreement.

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[8] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

[9] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.276, 7.278.

[10] United States' first written submission (Thailand, WT/DS343), para. 35.

[11] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 250.

[12] The United States contends that the prohibitive cost of an enhanced bond, including the requirement of collateral, is a matter between the surety and the importer and not the responsibility of the United States. However, because surety companies must have sureties for customs bonds authorized and certified by the US Government in order to be permitted to write such bonds, and CBP may collect duties from the surety if the principal defaults, the United States has a direct interest in the amount of security required by sureties.

[13] Exhibit THA-1 to Thailand's third party submission, para. 183.

10. The EBR on subject shrimp is inconsistent with Article 18.1 of the AD Agreement "as such". It is a "rule or norm" attributable to a WTO Member, which mandates enhanced bonding requirements on subject shrimp and which has general and prospective application on imports of subject shrimp.[14]

4. The Enhanced Bond Requirement Does Not Constitute "Reasonable Security" Permitted by Note 1 Ad Article VI:2-3

11. The United States places the weight of its defence in this dispute on the assertion that the EBR is a "reasonable" surety system permitted under Note 1 Ad paragraphs 2 and 3 of GATT Article VI. However, the EBR falls outside the scope of the Ad Note. The text of the Note refers to security for payment of anti-dumping or countervailing duties "pending final determination of the facts in any case of suspected dumping or subsidization", i.e. the Note only applies during an anti-dumping investigation, and does not apply beyond the date of the final anti-dumping determination and order. The US argument that the "final determination of the facts" does not arrive until the final duty assessment[15] is misplaced. The Note refers to security in cases of "suspected dumping", but dumping is only "suspected dumping" *before* the anti-dumping investigation has concluded. The US imposed the EBR on importers of subject shrimp only after final anti-dumping measures were imposed on 1 February 2005, and over two years later the EBR continues in effect.

12. Even assuming that the EBR falls within the scope of the Ad Note, the EBR does not constitute "reasonable security" under that provision. The use of "or" in "bond *or* cash deposit" in the Ad Note gives the importing Member a choice between either bond *or* cash deposit as a "reasonable security" – not both at once. Furthermore, the reasonableness of any "security for the payment of anti-dumping or countervailing duties" must relate to a risk-based standard for the need for security against non-payment. The decision to apply the EBR to shrimp was not based on any evidence of actual default; moreover, to date, CBP continues *not* to apply the EBR to imports with proven high default rates without providing any explanation, continues to apply the EBR to importers without any default history and refuses to reduce the amounts of enhanced bonds already provided.[16] Remarkably, the USCIT itself has issued a preliminary injunction (although only for eight importers) on the basis that the EBR is likely to be found "arbitrary and capricious" – confirming that the EBR is *un*reasonable.[17]

13. Brazil concurs with the policy concerns expressed by India in respect of the limitless arguments made by the United States in support of the EBR.[18]

5. The Enhanced Bonding Requirement is Also Inconsistent with Articles VI:2 and II:1(b) of the GATT and Article 1 of the Anti-Dumping Agreement

14. The fees and interest costs associated with the duplicative requirements to pay a cash deposit *and* provide an enhanced bond also have the result that the total duty burden on the importer will exceed the amount of the dumping margin in violation of Article VI:2 of the GATT. Panels have recognized that the fees and interest costs associated with a bonding requirement are a real cost to importers.[19] Because the EBR is applied other than under the circumstances provided for in

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[14] Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also Appellate Body Report, *US – Zeroing (EC)*, para. 188, and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[15] United States' first written submission,, paras. 22-27. Brazil also notes the striking difference between the texts of Ad Note 1 (*final determination of facts*) and Article 9.3.1 of the *AD Agreement*, cited by the United States in support of its argument (*determination of the final liability for payment of anti-dumping duties*).

[16] India's first written submission, para. 100.

[17] Exhibit IND-16, p. 46-47, 53, 57-61.

[18] India first written submission, para. 83.

[19] *See*, e.g., *EEC – Minimum Import Prices*, para. 4.6 (accepting that interest charges and costs in connection with the lodging of a security associated with an import certificate were in excess of bound duties).

Article VI, it constitutes a breach by the United States of its obligations under Article 1 of the AD Agreement and Article VI of the GATT. As a consequence, the EBR and the anti-dumping measures on subject shrimp are not an "anti-dumping or countervailing duty applied consistently with the provisions of Article VI," within the meaning of GATT Article II:2(b), and these measures therefore impose an "other duty or charge" in breach of US obligations under GATT Article II:1(b).

6. In the Alternative, the Enhanced Bond Requirement is Inconsistent as such with Articles 9 and 1 of the Anti-Dumping Agreement

15. In the alternative, even if the EBR is to be analyzed together with the anti-dumping measures it enforces, it is inconsistent with Article 9 of the AD Agreement, because the United States is collecting duties in excess of the amounts permitted thereunder. The EBR is inconsistent with Article 9.1, because the charges imposed by the US are not the "full margin of dumping or less"; with Article 9.2, because the anti-dumping duty collected by the United States is not collected in the "appropriate amounts"; and Article 9.3, because the amount of the anti-dumping duty exceeds the margin of dumping.

16. In consequence, the US anti-dumping measures on subject shrimp are imposed inconsistently with the United States' obligations under Article 1 of the AD Agreement. As a further consequence, the EBR and the anti-dumping measures on subject shrimp fall outside GATT Article II:2(b) and are in breach of GATT Article II:1(b) for the reasons set forth in the preceding paragraph.

17. While the United States may have a right to collect cash deposits, it has no right to require *both* a cash deposit equivalent to the full amount of the dumping margin *and* a bonding requirement as an anti-dumping enforcement measure.

7. The Enhanced Bond Requirement Cannot be Justified under Article XX(d) of the GATT 1994

(a) The Enhanced Bond Requirement Is Not "Necessary to Secure Compliance" Within the Meaning of Article XX(d) of the GATT 1994

18. The United States has not demonstrated that the EBR satisfies the requirements of Article XX(d).[20] The United States has done no more than make unsubstantiated assertions that agriculture/aquaculture products in general, or shrimp in particular, create *per se* a critical risk of default in AD/CV duty collection. General, abstract allegations such as these are insufficient to satisfy the burden of proof under Article XX.

19. Moreover, the GAO's finding that when the CBP examined AD and CVD cases to evaluate the risk of uncollected duties, 67 per cent of the time, duty rates *decreased* or stayed the same between the time of entry and final liquidation[21] contradicts the United States' general assertion that there is a need to impose untargeted surety requirements to guarantee increased future duty payments.

20. The United States suggests that its decision to designate the shrimp anti-dumping orders as "Covered Cases" is "due in part to low capitalization and high turnover rates in the industry as a whole"[22], and a belief "that importers of agriculture/aquaculture merchandise tended to be

[20] United States' first submission, paras. 83-97. The United States bears the burden of proof to demonstrate that the conditions of Article XX(d) are fulfilled.

[21] Exhibit THA-10 (WT/DS343), at 16. Where no administrative review of an order is requested on the anniversary of the order or no administrative review is conducted, liquidation is set at the rates set by the final determination and order. It is only when an administrative review is conducted that a rate may change.

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

undercapitalized.[23] Yet importers of agriculture and aquaculture products do not necessarily have low capitalization. Conversely, any consumer goods industry where the importer is a middleman rather than a user of the product imported is likely to be characterized as thinly capitalized and subject to high turnover rates. Thus, the US concerns do not apply to all agriculture and aquaculture importers, and can apply to importers in many other sectors.

21. Even assuming that the United States can demonstrate that particular features of aquaculture and agriculture imports warrant particular surety measures, the United States had at its disposal less trade restrictive measure that it could reasonably employ (e.g. more frequent investigation, raising the cash deposit rate immediately upon making a preliminary finding in an anti-dumping administrative review, etc.).[24]

22. Finally, Brazil recalls that, as the GAO Report states, the adoption of the EBR – by transferring the burden of higher bond to foreign-based supplier – is already giving rise to results that *defeat*, rather than make a contribution to, the purpose allegedly pursued by the US Customs authorities.[25]

(b) The Enhanced Bond Requirement Does Not Secure Compliance with Measures That Are "Not Inconsistent" With the WTO Agreement

23. Furthermore, the adoption of the EBR was directly related to enforcement of the *Byrd Amendment*[26] in defiance of the adopted Panel and Appellate Body reports condemning that illegal measure and in disagreement with the US's stated intentions to comply with the DSB's rulings and recommendations.[27] The explicit nexus traced by the US authorities between the EBR and the *Byrd Amendment* constitutes undeniable evidence of a bias that no legitimate reading of Article XX can support.

8. Conclusions

24. Brazil respectfully requests that the Panel find that the EBR is inconsistent as such with Articles 18.1 and 1 of the AD Agreement, and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative with Articles 9 and 1 of the AD Agreement. Brazil further requests that the Panel find that the EBR does not constitute "reasonable security" under Note 1 Ad Article VI:2-3 of the GATT 1994, and that the EBR cannot be justified under Article XX(d) of the GATT 1994. Brazil supports the request of India that the Panel, pursuant to its authority under Article 19.1 of the DSU, recommend that the United States bring its measure into conformity with its WTO obligations.

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[23] United States' first written submission, para. 14.

[24] Thailand's first written submission (WT/DS343), para. 84-89.

[25] Exhibit THA-10 (WT/DS343), at p. 6. *See also* Exhibit THA-1 to Thailand's third party submission, at p. 35, 43-44; India's first written submission at p. 41.

[26] Exhibit THA-1 to Thailand's third party submission, paras. 94-97.

[27] Dispute Settlement Body, Minutes of the Meeting of 27 January 2003 (WT/DSB/M/142, 6 March 2003), para. 60. At the time the "9 July 2004 Amendment" was adopted by the US Customs authorities, almost 18 months had passed from the date on which the United States announced its intention to implement the DSB's rulings and recommendations in the Byrd Amendment dispute.

ANNEX C -2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

(21 May 2007)

1. Introduction

1. The People's Republic of China appreciates the opportunity to provide its third party submission regarding the present disputes. In this submission, China focuses on the Enhance Bond Requirement imposed and enforced by the US Customs[1], and is of the view that the Enhance Bond Requirement is, as such, inconsistent with Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement. Additionally, China is of the view that the United States wrongly interprets Ad Note to GATT Article VI: 2 and 3, and its argument that the Enhanced Bond Requirement constitutes "reasonable security" permitted by Ad Note to GATT Article VI: 2 and 3 is groundless.

2. The Enhanced Bond Requirement is as such inconsistent with Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement.

(a) The US Enhanced Bond Requirement constitutes a non–permissible specific action against dumping/ a subsidy.

2. China is of the opinion that the Enhanced Bond Requirement cannot get through the three-step analysis established by the Appellate Body in *Byrd Amendment* with regard to Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement [2] and therefore is inconsistent with both Articles.

(i) The Enhanced Bond Requirement is a "specific action" against dumping/a subsidy

3. It is clear from its texts that the Enhanced Bond Requirement is inextricably linked to, and strongly correlated with, the constituent elements of dumping or of a subsidy in that the Enhanced Bond Requirement only applies to the imports subject to antidumping or countervailing duty orders. The texts indicate that the Enhanced Bond Requirement is established for determination of continuous bond for importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty orders. It is also clear that only with the determination that the constituent elements of dumping or subsidization are present, could the Enhanced Bond Requirement be imposed. Therefore, the Enhanced Bond Requirement is a "specific action" against dumping/a subsidy.

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[1]The Enhanced Bond Requirement in this submission refers to the four instruments relied upon by the US Customs in imposition and enforcement of the Enhanced Bond Requirement, i.e., the "July 9 2004 Amendment", the "January 25 2005 Formulas", the "August 10 2005 Clarification" and the "October 24 2006 Notice"

[2] Appellate Body Report, *US-Offset Act ("Byrd Amendment")*, para.236.The Appellate Body, in examining Article 18.1 of the Antidumping Agreement and 32.1 of the SCM Agreement, stated that there were "two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be 'specific' to dumping or subsidization. The second is that a measure must be 'against' dumping or subsidization." If both of these conditions are met, the Appellate Body stated that, "it would then be necessary to move to a further step in the analysis and to determine whether the measure has been 'taken in accordance with the provision of GATT 1994', as interpreted by the Anti-Dumping Agreement or the SCM Agreement. If it is determined that it is not the case, the measure would be inconsistent with Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement."

4. The United States alleges in its first submission that the Enhanced Bond Requirement is not a "specific" action against dumping or a subsidy. China thinks the United States' arguments are without any merit. Firstly, the United States confused "actions in response to dumping or subsidization" with "the intent of such actions". China recalls the Appellate Body's statement that **"**the intent with which action against dumping is taken is not relevant to the determination of whether such action is 'specific action against dumping' of exports within the meaning of Article 18.1 of the Anti-Dumping Agreement."[3] Secondly, the argument of the United States is also meaningless with regard to the constituent elements of 'dumping' being not 'built into the essential elements' of the Enhanced Bond Requirement. China notes that the Byrd Amendment itself does not determine or calculate antidumping or countervailing duty margins, just as the Enhanced Bond Requirement does not do so. Nevertheless, the Appellate Body has ruled that the Byrd Amendment is a specific action against dumping and subsidization. Furthermore, since the Enhanced Bond Requirement is imposed upon the imported products subject to antidumping or countervailing duty orders following the determination of constituent elements of dumping or of a subsidy, the constituent elements of dumping or of a subsidy is "implicit in the express conditions for taking such action".[4]

(ii) The Enhanced Bond Requirement is a specific action "against" dumping/a subsidy

5. It is clear from the text of the Enhanced Bond Requirement that, the Enhanced Bond Requirement is designed and structured in opposition to, has an adverse bearing on and, more specifically, has the effect of dissuading the practice of dumping or subsidization, or creates an incentive to terminate such practice. Therefore, the Enhanced Bond Requirement is in nature a specific action "against" dumping/a subsidy. Although the United States attempts to argue that CBP neither requested nor encouraged sureties to require collateral with respect to the bonds at issue, and that CBP is only a third party beneficiary to the bond contracts, yet the importers, to satisfy the enhanced bond requirement, have to pay for it regardless of who acts as the beneficiary and who charges them for the enhanced bond. Compared with the Byrd Amendment, which has been ruled by the Appellate Body as an action "against" dumping or subsidization, the Enhanced Bond Requirement at issue, which has direct adverse effect in nature, cannot get through the "against" test either.

(iii) The Enhanced Bond Requirement is a non-permissible response to dumping/subsidization.

6. China recalls that, in both US – 1916 Act and US – Offset Act (Byrd Amendment), the Appellate Body found that the GATT 1994 and the Antidumping Agreement "limit the permissible responses to dumping to provisional measures, price undertaking, and definitive antidumping duties".[5] In its First Written Submission, India has made extensive legal arguments in proving that the U.S. Enhanced Bond Requirement is not definitive anti-dumping/countervailing duties, provisional measures or price undertakings, to which China fully agrees. Moreover, the United States itself, in its First Submission, has confessed that "The bond directive……is not a 'provisional measure' within the meaning of Article 7 [of the Antidumping Agreement]."[6]

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[3] Appellate Body Report, *US-1916 Act*, para.122. In US – 1916 Act. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para.259, the Appellate Body stated that "the intent, stated or otherwise, of the legislators is not conclusive as to whether a measure is against dumping or subsidies under Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement".

[4] Appellate Body Report, *US-Offset Act ("Byrd Amendment")*, paras.244. The Appellate Body also stated that the "test" established in *US – 1916 Act* "is met not only when the constituent elements of dumping are 'explicitly built into' the action at issue, but also where… they are implicit in the express conditions for taking such action."

[5] Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (ByrdAmendment)*, para. 265.

[6] DS 345 United States' first submission, para 30.

(b) The US Enhanced Bond Requirement can be challenged, as such, in WTO dispute settlement proceedings.

7. As indicated in the texts of the Enhanced Bond Requirement, it is not vague that the precise content of the Enhanced Bond Requirement has been identified; that the Enhanced Bond Requirement is attributable to the United States; and that it does have general and prospective application. Just as the Appellate Body ruled in the past [7], China takes the view that the Panel is in a position to find that the U.S. Enhanced Bond Requirement may be challenged, as such.

(c) India has met its burden of proof with regard to the as such claim based on Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement.

8. In the present case, China is of the view that India has provided the evidence and put forward the arguments underlying a prima facie case. Furthermore, nothing in the jurisprudence by the Appellate Body requires the complaining party to articulate a so called "legal theory" as the United States alleged in its First Submission.[8] Therefore, the United States failed to make a meaningful rebuttal against India's as such claim in this respect.

(d) The merit of the Mandatory and Discretionary Doctrine in the present dispute

9. In the present case, India has met its burden of proof to provide a prima facie case concerning its as such claim based on Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement. In rebutting this, the United States seems to put forward legal analysis on the Mandatory and Discretionary Doctrine[9]. In China's view, if this panel chooses to go further and apply the Mandatory and Discretionary Doctrine as an analytical tool, the following aspects should be taken into consideration.

10. **Firstly**, up to now, the following conclusions can be drawn from WTO case law regarding the the Mandatory and Discretionary Doctrine :

i. The mandatory and discretionary doctrine is now not relevant when determining a measure challengeable or not, as such, under the WTO Agreement[10], which is quite different from the GATT panel practice[11].
ii. The mandatory and discretionary doctrine may be relevant "only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[12]
iii. The mandatory and discretionary doctrine, as with any such analytical tool, the import of it may vary from case to case. The application of this distinction in a mechanical fashion should be cautioned against.[13]
iv. The measure mandating particular action inconsistent with a WTO obligation is of WTO inconsistency, while whether discretionary legislation could be found inconsistent with

[7] Appellate Body Report, *US –Laws, Regulations and Methodology for Calculating Dumping Margin ("Zeroing")*, para.198.Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para.81. The Appellate Body indicated that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."

[8] DS 345 United States first submission, para.49.

[9] DS345 United .States' first submission, para.50.

[10] Appellate Body Report: *US - Corrosion-Resistant Steel Sunset Review*, para. 89

[11] Panel Report, *Canada – Aircraft*, para 9.124, citing GATT Panel Report, *US – Tobacco*, para 118.

[12] Appellate Body Report: *US. - Corrosion-Resistant Steel Sunset Review*, para. 89.

[13] Appellate Body Report: *US - Corrosion-Resistant Steel Sunset Review*, para. 93 (footnote omitted).

> WTO provisions or not may vary from case to case.[14] Discretionary legislation may also be found inconsistent with WTO provisions in some certain special cases depending on whether it is enough to create a "chilling effect" on trade, regardless of its discretionary nature.[15]

11. **Secondly**, China believes that the Enhanced Bond Requirement is mandatory in nature and is therefore of WTO inconsistency. First, CBP is mandated in imposing and enforcing the Enhanced Bond Requirement only with regard to agriculture/aquaculture merchandise subject to antidumping/countervailing duty orders, and merchandise or products outside the scope of agriculture /aquaculture sector will not be subject to the Enhanced Bond Requirement.. Second, the Port Directors will be required to review continuous bonds for importers involved. The term "be required to review" indicates that the Enhanced Bond Requirement, in this respect, is mandatory. Third, any increase in bond liability will become effective when the USDOC issues its Order on the case; the alteration of the bond amount could take place only after the imposition of the enhanced continuous bond subject to many conditions. Fourth, China notes that the United States, by introducing the "October 24 2006 Notice", seems to argue that the Enhanced Bond Requirement is not mandatory because the directive of CBP has offered importers a customized alternative to the application of the formulas in the directive by providing importers with the ability to obtain bonds based on individualized assessments of risk.[16] China does not agree in this regard. In the case that the importers fail to submit information on their financial condition related to the risk of non-collection for that importer, or fail to submit the information correctly as required, CBP will be ***required*** to apply enhanced bond in accordance with the Enhanced Bond Requirement. (emphasis added)

12. **Thirdly**, even if the panel finds that the Enhanced Bond Requirement is discretionary in nature, the panel should continue to make further study on the effect of the challenged measure. China is of the view that, even if the Enhanced Bond Requirement is discretionary, it still poses a threat to, or has a "chilling effect"[17] on, the trade of products subject to antidumping/countervailing duty, and is therefore as such inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.

3. The U.S. Argument that its Enhanced Bond Requirement constitutes "Reasonable Security" permitted by Ad Note to GATT Article VI: 2 and 3 is groundless under WTO rules.

13. China believes that, the phrase "reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending ***final determination of the facts in any case of suspected dumping or subsidization***" of the Ad Note, is not equal or similar to "reasonable security

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[14] Appellate Body Report, *US-1916 Act*. In para.99, the Appellate Body specifically stated that it did not need to consider whether Article 18.4 of the Anti-Dumping Agreement had 'supplanted or modified' the mandatory-discretionary distinction because the 1916 Act was clearly not discretionary.

In *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated in the footnote 334 that: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation".

China is of the view that these findings provide to some extent possibility for the discretionary legislation to be found inconsistent with WTO provisions.

[15] Panel Report, *US- Section 301 Trade Act*. The Panel considered that a law permitting a government to take unilateral measures contrary to the DSU would "constitute an ongoing threat and produce a 'chilling effect' causing serious damage" to other Members with less power in the WTO regime and to the market-place itself, by possibly stunting investment or trade. Paras. 7.86-91.

[16] DS345 United States' first submission, para.51

[17] In *US- Section 301 Trade Act*, the panel established the so called "chilling effect test" in determining whether or not a discretionary legislation is inconsistent with WTO provisions.

(bond or cash deposit) for the payment of anti-dumping duty pending ***determination of final liability for payment of anti-dumping duties***" in the context of a retrospective duty assessment system. The United States' rebuttal[18] in this regard is groundless. The "reasonable security" provided in the Ad Note could only refer to the phase of antidumping (or countervailing) investigation after the preliminary determination is made and prior to the final determination. Therefore, what Ad Note to Article VI: 2 and 3 means is the illustration of the forms of provisional measures a Member may usually take after the preliminary determination and prior to the final determination of any antidumping or countervailing investigation.[19] Therefore, China does not agree with the United States that the Enhanced Bond Requirement constitutes "reasonable security" permitted by Ad Note to Articles VI:2 and 3 of GATT 1994. (Emphasis added)

4. Conclusion

14. China thanks the Panel to provide this opportunity to comment on the issues involved in this proceeding, and hopes the above comments will prove to be helpful.

[18] DS345 United States' first submission, para.23.

[19] In the stage demonstrated by the Ad Note , no final affirmative determination has been made of dumping/subsidy and consequent injury to a domestic industry since there are only facts of suspected dumping or subsidization which await further investigation in the following final determination. In the final phase of any antidumping/countervailing investigation, the suspicion of any facts of dumping or subsidization must be removed and the positive evidence must be discovered before a final affirmative determination is made.

ANNEX C -3

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(16 May 2007)

1. Enhanced Bond Requirement

(a) Principal factual features of the EBR which affect the EC legal analysis

1. As explained by India (and not disputed by the US) the Enhanced Bond Requirement ("EBR")[1] applies *in addition* to the cash deposit rate.[2] Hence, the EBR is not supposed to ensure the collection of dumping duties assessed at the rate initially determined by the US investigating authorities (as the collection of these duties is ensured by the cash deposit rate). The EBR is designed to ensure collection of final anti-dumping duties that would be due in case dumping would increase dramatically from one year to another.[3] The EBR is therefore a measure designed to address a *hypothetical* problem in the collection of a *hypothetical* dumping duty reflecting a *hypothetical* dramatic increase in dumping (up to 100 per cent) from the level of dumping that has been initially determined by the investigating authorities.

(b) Measure designed to ensure collection of an anti-dumping duty cannot be more onerous that the anti-dumping duty itself

2. In the European Communities' view, one of the main reasons behind the existence of Article VI GATT and the Anti-Dumping Agreement was a desire to create a set of anti-dumping disciplines acceptable to all Members and capable of curbing the possibilities of a misuse – deliberate or not – of anti-dumping policies by Members. Yet, what would be the purpose of creating these rather detailed and carefully balanced rules, such as those on the calculation of dumping margin and the amount of anti-dumping duty, if the effect on trade of the duties determined pursuant those rules could be in practice much less important that the impact of measures ensuring the collection of those duties?

3. By definition, measures designed to ensure the collection of anti-dumping duties are merely *ancillary* to the duties themselves. If no dumping is determined which would give a rise to an anti-dumping duty, there cannot be an ancillary measure that is supposed to ensure the collection of such duty. Moreover, even if a margin of dumping is determined and a corresponding anti-dumping duty is assessed, the mechanism for securing the collection of that anti-dumping duty cannot impose a burden which would be greater than the duty itself – otherwise the Anti-Dumping Agreement would contain detailed rules only on the determination of a collection mechanism and not on the determination of dumping.

4. The temporary nature of EBR (the fact that, once the margin of dumping for the period covered by EBR is definitely determined and the anti-dumping duties finally collected, the remaining

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[1] In its first written submission, India refers to the US measures challenged in the present dispute as "Enhanced Bond Requirement" and "Amended Bond Directive". The US uses, in its first written submission, another set of abbreviations to refer to these measures, or some of those measures (as the reference does not seem to be always consistent). For ease of reference and to prevent confusion, the European Communities refers in this submission to all the measures at issue, identified by India, as the "Enhanced Bond Requirement" or "EBR".

[2] India's first written submission, paras 29 – 30 and Exhibit IND-3. US first written submission, paras 12-14.

[3] This also is confirmed by statements made by the US authorities. See Exhibit IND-8 (Exhibit-12).

funds previously "frozen" in the enhanced bonds can be used for other purposes) does not affect this assessment. To the contrary, it actually underlines it. What sort of a temporary measure of an ancillary nature can be given such an effect which actually removes the very reason for the existence of and imposition the anti-dumping duties – namely the exports by dumping companies – by eliminating in practice these companies themselves (or their ability to export to the US)?[4]

(c) EBR is inconsistent with the provisions of Article 9 Anti-Dumping Agreement

5. The European Communities recalls the far-reaching nature of the EBR: the EBR is not merely a "collection-ensuring mechanism", it is a measure against potential *future* dumping which is put in place without any evidence and actual determination of dumping. This contradicts a number of distinct provisions of Article 9 Anti-Dumping Agreement . Article 9, as indicated in its title, sets forth – for the purposes of the Anti-Dumping Agreement – rules governing the imposition and collection of anti-dumping duties. The first three paragraphs of Article 9 set out rules governing this issue.

6. First, following on the preceding provisions of the Anti-Dumping Agreement , Article 9.1 makes clear that that the determination of a margin of dumping is an inherent pre-condition for the imposition of any anti-dumping duty. At any stage, an anti-dumping duty has to be calculated and imposed *on the basis of* and *in correspondence to* positive evidence of dumping. The latter element – the existence of a *corresponding* relationship between the evidenced margin of dumping and the amount of duty – is also reflected in the second sentence of Article 9.1 of the Anti-Dumping Agreement : Members are encouraged to impose a lesser duty than the margin of dumping if such lesser duty would be adequate to remove the injury to domestic industry. However, Members certainly cannot, under this provision, impose a duty which would be *more* than the margin of dumping.

7. Article 9.2 of the Anti-Dumping Agreement confirms the above understanding. The reference to "appropriate amounts" in Article 9.2 follows on the principle set out in Article 9.1: an anti anti-dumping duty *imposed* (in accordance with Article 9.1) shall also be collected in *appropriate amounts*.

8. In other words, the rule resulting from Articles 9.1 and 9.2 is that the "appropriate amounts" have to *correspond* to the imposed duty and the duty itself has to *correspond* to the margin of dumping (or less than the margin of dumping, if deemed sufficient to remove injury). This principle is further elaborated in Article 9.3 of the Anti-Dumping Agreement . This provision states, in its *chapeau*, the fundamental principle that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." To ensure that this principle is respected, Articles 9.3.1 and 9.3.2 of the Anti-Dumping Agreement set forth refund rules for both the retrospective and prospective systems. The existence of these rules makes it clear that the collected anti-dumping duties may *temporarily* exceed the actual contemporaneous margin of dumping (as opposed to the margin of dumping calculated during the original investigation) – for example if dumping decreases. This is a natural implication of the technical mechanics of the dumping determination, nothing more. An attempt to read into these refund rules a new rule, namely one allowing a temporary increase of collected anti-dumping duty bearing no relation to the margin of dumping actually ascertained would not be based on the text of these provisions.[5] Both the text and context make clear that the purpose of Article 9.3.1 and 9.3.2 is to set forth refund rules and not to provide a ground for a departure from the principles established in Articles 9.1 and 9.2 of the Anti-Dumping Agreement .

[4] See, for instance, India's first written submission, para 53.

[5] Although the US has not made any explicit rebuttals of India's arguments on the provisions of Article 9 (especially Article 9.3.1), it seems that the US might actually be taking this position (cf. United States' first submission, para 23).

9. To summarize: the EBR attempts to ensure the collection of an anti-dumping duty for which a margin of dumping has not at all been established. In that respect, the measure directly violates Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement .

(d) Ad Note to paragraphs 2 and 3 of Article VI GATT confirms that EBR violates Article VI:2 GATT and the Anti-Dumping Agreement

10. The European Communities is of the view that EBR is prohibited by Article VI:2 GATT for the same reasons as discussed above: the EBR requires a surety with respect to anti-dumping duties based on dumping which had not yet been determined and, in fact, had not occurred. The Ad Note to paragraphs 2 and 3 of Article VI GATT confirms this conclusion, as it allows a Member to "require a reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty *pending final* determination of the facts in any case of suspected dumping or subsidization".[6] In many respects, this provision addresses the very matter at issue. The EBR is not a "security … *pending final* determination of the facts". As the European Communities mentioned at the outset, the EBR is targeted at a potential future dramatic increase (up to 100 per cent) in dumping *beyond* the level of the dumping incurred in the past assessment period. Hence, in contrast to a cash deposit applied by the US, the EBR is not a security required *pending* the *final* determination of the facts in a case of suspected dumping. A "final determination" implies that there already has been a preliminary or initial determination of dumping which is then verified – and, if necessary, adapted – and becomes final. Yet, when EBR is applied, there is no preliminary or initial determination of the facts of dumping with respect to the dramatically increased dumping that is addressed by EBR.

(e) Article 7.2 Anti-Dumping Agreement confirms that security cannot exceed the margin of dumping

11. In the preceding section, the European Communities explained that EBR violates Article 9 as it attempts to ensure the collection of duties designed to offset dumping which has not yet occurred and has not been established. This view is further confirmed by Article 7.2 Anti-Dumping Agreement. While this provision relates to provisional measures, the principle holds equally well with respect to the issue at hand: if there is a margin of dumping determined, and if there is a duty assessed on the grounds of that margin, then a security can be requested that, however, has to *correspond to the amount of that duty*. In other words, the security cannot be determined in the absence of a margin of dumping and duty determination. If this rule were not applicable beyond the stage of preliminary measures, then one would end up with a rather absurd result: namely that the Anti-Dumping Agreement for some reason only protects the preliminary phase against a misuse and that the main and principle part of the anti-dumping regime, which can and does last for years, is fully open to all kinds of measures which can bypass the anti-dumping duty and be, as far as their effect is concerned, much more onerous.

(f) EBR violates Article 18.1 Anti-Dumping Agreement

12. Like India, the European Communities is also of the view that EBR is a "specific action against dumping" which is not permitted by Article 18.1 of the Anti-Dumping Agreement . Instead of repeating the arguments made by India, however, the European Communities would limit itself to pointing out a few factual and legal aspects of the EBR which it considers particularly relevant. First, there can be no doubt that the EBR is a "specific" action against dumping. As the European Communities mentioned above, the EBR is a measure ancillary to the anti-dumping duties, not the other way round. Second, the EBR is a specific action "against" dumping. Under the Appellate Body case law, the legal test in this respect should focus on dumping (or subsidization) as "practices"[7] and,

[6] Emphasis added.
[7] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 253.

particularly, on the assessment of "whether the design and structure of a measure is such that the measure … has an adverse bearing on … or, more specifically, has the effect of dissuading the practice of dumping … or creates an incentive to terminate such practices".[8] The effect of the measure in question on the competitive position of the domestic industry vis-à-vis their foreign competitors subject to anti-dumping duties is at least one of the elements in the above test.[9] The harmful effects of EBR on the competitors of the US domestic industry have been well documented in the submission of India.[10]

(g) The EBR is inconsistent "as such" with the Anti-Dumping Agreement and Article VI:2 GATT

13. Based on the above discussion, the European Communities is of the view that the operative elements of EBR (in particular those which constitute the principal factual aspects of the EBR as discussed above, such as the Amendment to Bond Directive 99-3510-004 of 9 July 2004[11]) are inconsistent, *as such* and *as applied*, with Article VI:2 GATT and the Anti-Dumping Agreement (in particular with Articles 9.1, 9.2, 9.3, 9.3.1 and 18.1 thereof). Consequently, the EBR is also inconsistent with Article 18.4 of the Anti-Dumping Agreement and XVI:4 of the WTO Agreement. In this particular case, the distinction that the US makes between mandatory and discretionary legislation does not even play a role, since the application of EBR would always lead an inconsistency with WTO law.

(h) Other claims raised by India and alternative measure ensuring collection of anti-dumping duties

14. The European Communities does not address other and alternative claims raised by India in detail as it believes that a Panel finding made under the legal provisions discussed in the preceding section of this submission (i.e., provisions which pertain specifically to dumping) would correspond to and address more pertinently the problem at issue. The European Communities notes, however, that it disagrees with the US view that the EBR can be justified under Article XX(d) GATT.[12] In particular, contrary to what the US argues, the EBR is not "necessary to secure compliance" with US anti-dumping duty laws. Alternative measures, such as variable duties, are reasonably available[13] and, if adopted, would lead to a considerably less onerous and restrictive impact upon trade.

2. Conclusion

15. The European Communities is of the view that the EBR is inconsistent, as such and as applied, with Articles 9.1, 9.2, 9.3, 9.3.1, 18.1 and 18.4 of the Anti-Dumping Agreement , with Article VI:2 GATT including the Ad Note to Paragraphs 2 and 3 of Article VI GATT and Article XVI:4 WTO Agreement.

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[8] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 254.
[9] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 256.
[10] See, for instance, India's first written submission, para 53.
[11] Exhibit IND-3.
[12] United States' first written submission, paras 83 *et seq*.
[13] United States' first written submission, para 92.

ANNEX C - 4
EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

(18 May 2007)

1. Introduction

1. This dispute brought by India is about the Enhanced Bond Requirement (the "EBR") on certain products subject to antidumping or countervailing duties introduced by the United States. India questions the WTO consistency of this measure in light of various provisions under the AD Agreement, the SCM Agreement, and the GATT 1994. In this submission, Japan, as a third party, would like to focus on the following two issues based on its systemic interest in the interpretation of these agreements ensuring fair and objective application of them:

- whether the EBR constitutes specific action against dumping and subsidization that is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement, respectively; and

- whether the EBR is inconsistent with the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994.

2. Arguments

(a) Consistency of the EBR with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement prohibiting *specific actions against dumping and subsidization* other than those permitted under those Agreements

2. India submits that the EBR constitutes an impermissible specific action against dumping or a subsidy under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

3. The Appellate Body stated that a Member's measure constitutes a specific action against dumping or subsidization, where: (1) the measure is "specific" to dumping or subsidization; (2) the action is taken "against" dumping or subsidization, i.e., to counteract dumping or a subsidy; and (3) it is inconsistent with the provisions of GATT 1994, as interpreted by AD Agreement or SCM Agreement.[1] An action is "specific" where it is "inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy."[2] An action is taken "against" dumping or subsidization if the action has the effect of dissuading the practice of dumping or subsidization.[3]

4. Regarding the "specific" requirement, Japan considers that the Panel should examine under what situations the EBR is imposed to see whether and how the measure is linked to the "constituent elements" of dumping or subsidy. In Japan's view, to meet this requirement, it would be necessary that the EBR is imposed only where dumping or subsidy is found to exist. In this connection, it appears that the bond requirement in question is required only where the United States found the existence of dumping or subsidy, i.e., constituent elements of dumping or subsidization. Any additional requirements, such as the risk of non-collection for individual importers, would not change such basic characteristics of the EBR.

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[1] See Appellate Body Report, *US – Continued Dumping and Subsidy Offset Act of 2000 ("US-CDSOA (AB)")*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 236.
[2] Ibid., para.239.
[3] Ibid., para.254.

5. Regarding the "against" requirement, the Panel should examine at least the purpose as well as the design and structure of the EBR, and its effect, that is, how the bond requirement would reduce shipments from subject countries. In particular, the United States admits that the EBR is to secure future duty collection in case that the antidumping duty rate actually assessed increase from that determined during the investigation.[4] By definition, the antidumping or countervailing duty is a measure "against" dumping or a subsidy. As the bond requirement in question is a measure to complement the imposition of antidumping or countervailing duty, it must be a measure "against" dumping or a subsidy.

6. The United States argues that the EBR is not an action "against" dumping or subsidization, but "is designed to secure antidumping liability" only because "the vast majority of unsecured liability that has resulted in noncollection happens to be antidumping duty liability."[5] The United States also argues that it is just a third party beneficiary and "is not itself a party to the contract" with a surety.[6] There is no dispute, however, that the EBR is an action taken by the United States to collect anti-dumping or countervailing duties only with respect to imports for which dumping or subsidization was found. As discussed above, the bond requirement at issue must be a "specific action against dumping or a subsidy".

7. In such case, the Appellate Body clarifies that the permissible action under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement is limited to the imposition of (i) definitive anti-dumping or countervailing duties, (ii) provisional measures, (iii) undertakings, or, under the SCM Agreement, (iv) multilaterally-sanctioned countermeasures under the dispute settlement system.[7] The EBR is not either one of these four measures, and therefore impermissible under these provisions.

8. The United States argues that the EBR is merely "related to" dumping or subsidies[8], and therefore permissible. The United States then relied on the statement of the Appellate Body that footnote 24 of the AD Agreement and footnote 54 of the SCM Agreement is to confirm that "an action that is *not* 'specific' within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the SCM Agreement, but is nevertheless related to dumping or subsidization, is not prohibited" by those Articles.[9] As the bond requirement in question is "specific" action against dumping or a subsidy as discussed above, the requirement would not be justified by any other provisions of GATT 1994.

(b) Permissibility of the Enhanced Bond Requirement under the Ad Note

9. The United States argues that the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994 justifies the EBR,[10] arguing that the EBR is "security against the prospect of a future liability."[11] India denies that the United States can rely on the Ad Note, arguing that the Ad Note cannot be applied independently from Article 7 of the Anti-Dumping Agreement or Article 17 of the SCM Agreement, which provide for provisional measures.[12] The United States rebuts that the bond requirement at issue is imposed pending determination of the *final liability for payment of duties*. According to the United States, in the context of its retrospective duty assessment system, the language "final determination of the facts" in the Ad Note means "determination of the *final liability*

[4] United States' first written submission , para.14.
[5] Ibid., para. 39.
[6] Ibid., para. 8.
[7] Appellate Body Report, *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para.137., *US – CDSOA (AB)*, para. 269.
[8] United States' first written submission, para. 38.
[9] *US – CDSOA (AB)*, para. 262. (emphasis in original)
[10] United States' first written submission, paras. 21-29.
[11] Ibid., para. 26.
[12] India's first written submission, paras.92-94

for payment of anti-dumping duties"[13]. Based on the following consideration, Japan is of the view that the "reasonable security" permitted under the Ad Note purports the provisional measures.

10. First, the language "pending final determination of the facts" in the Ad Note must be read in the context of the subsequent language "in any case of *suspected* dumping or subsidization" (emphasis added). The word "suspected" suggests that the facts concerning "dumping" or "subsidization" are still at an unproven stage. Therefore, Japan understands that Ad Note contemplates a situation before the final determination of dumping or subsidization in the original investigation. The language of the Ad Note "determination of *facts* in any case of suspected dumping or subsidization" does not support the United States contention that this "determination" concerns with the final liability for payment of duties in a review. The review, however, does not concern with the determination of the *fact*, or the existence, of dumping or a subsidy. It merely reassesses the amount of dumping or subsidization. The determination in a review, thus, is not related to the "final determination of the facts of dumping or subsidization" as set forth in the Ad Note.

11. Japan considers that the "final determination" in the Ad Note means that of dumping or subsidization as a prerequisite of deciding to impose antidumping or countervailing duties. Therefore, the measure permitted under the Ad Note should be the provisional measures to be taken before the final determination of dumping or subsidization, as provided in Article 7 of the AD Agreement or Article 17 of the SCM Agreement.

12. Even in the retroactive system of duty assessment in the antidumping regime, the United States issues the antidumping order, which embodies the administrative decision to impose antidumping duties on certain products upon affirmative final determination on the facts of dumping. The determination of the assessment of the final duty liability may take place after the review process, if a request for a review is made. The measure purported in the Ad Note, however, is only related to the provisional measure to be taken before the issuance of this order, not after the affirmative final determination on dumping in the original investigation, and not even before the completion of the final liability assessment in a subsequent review. This interpretation equally applies to the imposition of countervailing duties.

13. The United States also quotes the reference to "many other cases in customs administration" to contend that the Ad Note permits the security requirement for the payment of antidumping or countervailing duties apart from provisional measures.[14] However, the mere reference to customs administration does not give support for an interpretation that the Ad Note would broadly permit security requirement, including those imposed even *after* the final determination of dumping or subsidization.

14. For the above reasons, Japan submits that it considers that the Ad Note gives no legal basis for the imposition of the EBR.

3. Conclusion

15. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure fair and objective application of the AD Agreement, the SCM Agreement and the GATT 1994.

[13] United States' first written submission, para.23 (emphasis added)
[14] United States' first written submission, para.26.

ANNEX C -5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THAILAND

(21 May 2007)

1. Introduction

1. India's complaint is largely related to the same matter as Thailand's complaint in *United States – Measures Relating to Shrimp from Thailand* (DS343). The main measure at issue in both disputes – the imposition of enhanced bonding requirements by the United States on importers of subject shrimp products from Thailand and India – is substantively the same. Many of the legal claims made by Thailand in *United States – Measures Relating to Shrimp from Thailand* (DS343) overlap with the legal claims made by India in these proceedings.

2. Thailand considers that the imposition of the enhanced bonding requirement to imports of subject shrimp from Thailand is inconsistent with WTO law. The grounds for its view are contained in Thailand's First Written Submission to the Panel in *United States – Measures Relating to Shrimp from Thailand* (DS343) attached as Exhibit THA-1 to Thailand's third-party submission. To the extent that the legal arguments of Thailand in Exhibit THA-1 relate to claims also made by India, they are equally relevant to an analysis of the imposition of the enhanced bonding requirement on importers of certain shrimp from India. A summary of those legal arguments is provided below.[1]

2. Legal Argument

(a) The application of the Enhanced Bond Requirement to subject shrimp is inconsistent with Article 18.1 of the Anti-Dumping Agreement

(i) The Enhanced Bond Requirement is specific action against dumping

The Enhanced Bond Requirement is "specific action" against dumping

3. The Enhanced Bond Requirement is "specific action" against dumping within the meaning of Article 18.1 of the Anti-Dumping Agreement as it is "action that may be taken *only* when the constituent elements of 'dumping' are present".[2] The application of the Enhanced Bond Requirement is limited to merchandise upon which US Department of Commerce ("USDOC") has issued an anti-dumping order. The United States Bureau of Customs and Border Protection ("CBP") has stated that "[a]ny increase in bond liability will become effective when the Department of Commerce (DOC) issues its Order on the case".[3] The Enhanced Bond Requirement is based on "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*",[4] and applies only to "covered cases" within "special categories" of merchandise. The 24 October 2006 Notice confirms that relevant "Special Category merchandise … is merchandise *subject to AD/CVD*".[5] In

[1] Thailand's third-party written submission does not address legal claims made by India that do not overlap with the claims made by Thailand in *US – Measures Relating to Shrimp from Thailand* (DS343). Thailand nonetheless reserves the right to do so at the meeting of the Panel with the third parties.

[2] Appellate Body Report, *US – 1916 Act*, para. 122.

[3] 9 July 2004 Amendment. Exhibit THA-2.

[4] 10 August 2005 Clarification. Exhibit THA-4, p. 2.

[5] 24 October 2006 Notice, Exhibit THA-5, p. 62276.

fact, the formulae for calculating the amount of the Enhanced Bond Requirement all require the use of a USDOC-determined anti-dumping duty rate as the multiplier.[6]

4. A recent decision of the US Court of International Trade ("USCIT") found that "the administrative record indicates that the plaintiffs are likely to succeed in showing that the bond formulas were applied to these plaintiffs for the sole reason that these plaintiffs were importers of shrimp subject to antidumping duty orders",[7] and that "Customs did not consider each individual importer's financial condition or ability to pay prospective antidumping duties, but rather appeared to base the application of the formulas on one critical factor – that the importer engages in the importation of subject shrimp."[8]

5. In addition, the CBP's stated policy reasons for introducing the Enhanced Bond Requirement confirm the clear connection to dumping. These include "[d]ifficulties in collecting the antidumping duties" and "the impact of these collections on the amount of disbursements pursuant to the Continued Dumping and Subsidy Offset Act",[9] (i.e. disbursements previously found to be inconsistent with Article 18.1 of the Anti-Dumping Agreement).[10] This is confirmed by the CBP's stated policy that it would alter the enhanced bond amount if importers stopped or limited imports of subject shrimp.[11]

6. Finally, the Enhanced Bond Requirement does not address circumstances other than dumping such as: (i) problems of default (because it has not been applied in situations where there is a history of default, such as crawfish); (ii) problems of surety bankruptcies; or (iii) problems that arise in new shipper situations (which have been addressed separately through legislative action).

The Enhanced Bond Requirement is specific action "against" dumping

7. The application of the Enhanced Bond Requirement to subject shrimp acts "against dumping" as it has an adverse bearing on, and has the effect of dissuading, the practice of dumping. Thus, the 10 August 2005 Clarification lists as a factor that may result in altering the amount of the enhanced bond "whether the importer can show that it has switched to a new source of imports or a shift in the pattern of imports".[12] The USCIT found that "only those eight importers who promised not to import subject shrimp, or to limit such imports, were able to negotiate a lower minimum bond amount than the bond formulas required".[13]

8. The GAO Report found that the Enhanced Bond Requirement would tend to "cause importers to change business practices" and to "reduce imports from countries subject to AD/CV duties".[14] The CBP itself confirmed that "NFI importers have increased their sourcing from countries not affected by the antidumping order, from 21 per cent to 32 per cent".[15]

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[6] This rate is either the final determination dumping rate, the most recent administrative review dumping rate, the preliminary determination dumping rate, or the applicable deposit rate.

[7] *National Fisheries Institute, Inc., et al., v. United States Bureau of Customs and Border Protection*, Court No. 05-00683, Slip Op. 06-166, 13 November 2006, (Stanceu J.) ("*NFI v. US*"). Exhibit THA-9, p 58.

[8] Ibid., p. 60. See also Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington DC: October 2006), (the "GAO Report"), Exhibit THA-10, p. 5.

[9] 9 July 2004 Amendment, Exhibit THA-2, p. 1.

[10] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 318.

[11] See below, para. 7.

[12] 10 August 2005 Clarification, Exhibit THA-4, para 3(g), p. 6.

[13] *NFI v. US*, Exhibit THA-9, pp. 52-53.

[14] GAO Report, Exhibit THA-10, p. 32.

[15] Declaration of Bruce W. Ingalls to the USCIT in *NFI v. US*, Exhibit THA-7, para. 17.

9. The adverse bearing of the Enhanced Bond Requirement is also demonstrated by the significant shift in trading patterns of Thai shrimp exports: while 100 per cent of exports were made on a CIF basis in 2003, over 50 per cent of exports were made on a DDP basis in 2006.[16] This shift to DDP exports "makes the foreign-based supplier the US importer of record and shifts the burdens of the higher bonds to them".[17]

10. The adverse effects of the Enhanced Bond Requirement include costs associated with the enhanced bonds, such as the fees charged by sureties of 10 per cent of the value of the bonds.[18] These effects are compounded by the demands of sureties for 100 per cent collateral to secure the enhanced bonds[19] and the "stacking" of bonds due to regular three to five year delays before final liquidation, which results in the tying up of assets and cash that forces companies to forego business opportunities.[20]

(ii) The Enhanced Bond Requirement is not a permissible response to dumping

11. The Enhanced Bond Requirement is not a permissible provisional measure, price undertaking, or definitive anti-dumping duty.

12. The application of the Enhanced Bond Requirement to subject shrimp does not take the form of a permitted provisional measure within the meaning of Note 1 to paragraphs 2 and 3, Ad Article VI of GATT 1994 or Article 7.1 of the Anti-Dumping Agreement as it is applied *after* the definitive determination of dumping. It is also not a provisional measure taken in accordance with Articles 7.2 and 7.5 of the Anti-Dumping Agreement or Note 1, Paragraphs 2 and 3 to Ad Article VI of the GATT 1994, because it exceeds the amount of the provisional measures contemplated by those provisions.

13. The Enhanced Bond Requirement is evidently not a voluntary price undertaking in accordance with Article 8 of the Anti-Dumping Agreement and is of a fundamentally different character to an anti-dumping "duty" taken in accordance with Article VI:2 of the GATT 1994 and Article 9 of the Anti-Dumping Agreement.

(b) The Enhanced Bond Requirement is inconsistent with Articles XI:1, II:1(a) and II:1(b), and I of the GATT 1994

14. The Enhanced Bond Requirement constitutes a "restriction" on the importation of subject shrimp within the meaning of Article XI:1 of the GATT 1994, and cannot be characterised as a requirement to pay a duty, tax or charge, as it does not involve a monetary imposition that yields public revenue. By imposing considerable additional financial costs and procedural burdens on importers, the Enhanced Bond Requirement makes the importation of subject shrimp more burdensome than the importation of goods not subject to anti-dumping duties and the importation of goods subject to other US anti-dumping measures.

15. In the alternative, if the Enhanced Bond Requirement is considered to constitute a duty or charge imposed on or in connection with importation, it is inconsistent with Articles II:1(a) and (b) of the GATT 1994.

16. Imports of shrimp from India, Thailand and the four other countries subject to the anti-dumping measure are "like" shrimp products originating in *other countries*. Because the United

[16] Thai Shrimp Industry Survey, Department of Foreign Trade, Exhibit THA-12.
[17] GAO Report, Exhibit THA-10, p. 6.
[18] Exhibit THA-18.
[19] GAO Report, Exhibit THA-10, p. 6. *NFI v. US*, Exhibit THA-9, at p. 38.
[20] GAO Report, Exhibit THA-10, pp. 6 and 35. *NFI v. US*, Exhibit THA-9, p. 31.

States exempts "like" products from these other countries from the application of the enhanced bonding requirement, it fails to treat like products equally. Such treatment cannot be reconciled with the United States' obligations under Article I:1 of the GATT 1994.

(c) The selective application of the Enhanced Bond Requirement is inconsistent with Article X:3(A) of the GATT 1994

17. In applying the Enhanced Bond Requirement only to importers of subject shrimp, the United States has failed to administer its laws and regulations relating to import bonds in a uniform, impartial and reasonable manner and therefore acts inconsistently with Article X:3(a) of the GATT 1994.

18. Importers of subject shrimp are being treated differently from other importers of goods subject to anti-dumping duties. They are (1) subject to unique evidentiary burdens from which importers of all other goods subject to anti-dumping duties are exempt and (2) must post continuous bonds in higher amounts than importers of all other goods subject to anti-dumping duties. This special and adverse treatment constitutes a failure by the United States to administer these laws in a "uniform" manner within the meaning of Article X:3(a) of the *GATT 1994*.

19. The United States fails to administer its customs laws and regulations relating to bonds in a "reasonable" manner. The CBP should ensure that its bond amount assessments are reasonably related to the actual risk represented by imports of subject shrimp. The fact that an importer imports subject shrimp does not, by itself, provide any reliable indication of any elevated risk of non-payment. The problems the United States has experienced in collecting anti-dumping duties have been concentrated almost exclusively in non-market economy cases and, in particular, anti-dumping duties on imports of crawfish and to a lesser extent garlic. They also arise from new shipper reviews and isolated surety bankruptcies. Circumstances that have not arisen or do not apply in the context of imports of subject shrimp from Thailand.

20. The evidence establishes (1) that the CBP has used the Enhanced Bond Requirement to try to limit imports of shrimp subject to anti-dumping duties, (2) that in applying the Enhanced Bond Requirement to subject shrimp the CBP "was motivated, at least in part, by domestic political pressure to take action directed against the shrimp importing industry"[21] and (3) that the CBP applied the Enhanced Bond Requirement only to the measures against subject shrimp even though there was no history of marked defaults or other problems with respect to these imports and in face of considerable problems with respect to other products and other anti-dumping orders. This evidence cannot be reconciled with the requirement of impartiality contained in Article X:3(a).

(d) The Enhanced Bond Requirement cannot be justified under Article XX(d) of the GATT 1994

21. The Enhanced Bond Requirement is not "necessary to secure compliance" within the meaning of Article XX(d) of the GATT 1994.

22. The United States applies the Basic Bond Requirement to 98 per cent of anti-dumping orders currently in place. The USCIT ruled that "[c]ustoms … did not articulate in the Amendment or the Clarification a reason why antidumping duties on shrimp imports are especially susceptible to under-collection, as opposed to duties on imports of other agricultural or aquacultural products subject to antidumping duty orders, or as opposed to all products subject to such orders".[22] It also ruled that "no record exists demonstrating that significant numbers of shrimp exporters are defaulting or have defaulted on any obligation to pay antidumping duties on their imports of shrimp".[23] It remains

[21] *NFI v. US*, p.57.
[22] Ibid., p. 54.
[23] Ibid., p. 54.

unclear why it is "necessary" to impose more stringent bonding requirements on a class of importers who are not susceptible to and have no marked history of default.

23. US problems with collecting anti-dumping duties arise almost exclusively in non-market economy cases such as those involving crawfish and garlic, and were also attributable to isolated surety bankruptcies and exemptions (now removed) from cash deposit requirements for new shippers of products subject to anti-dumping duties.

24. Furthermore, the Enhanced Bond Requirement does not meet the conditions set out in the *chapeau* to Article XX(d) of the GATT 1994 because the manner in which it is applied constitutes "arbitrary" or "unjustifiable" discrimination and a "disguised restriction on international trade".