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

(WT/DS345)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

May 11, 2007

Introduction

1. This dispute centers on certain action taken by U.S. Customs and Border Protection (CBP) to address a serious and growing revenue collection problem. In 2003 and 2004, CBP determined that importers were defaulting on hundreds of millions of dollars of antidumping and countervailing duties lawfully owed to the United States. The duties in question were unsecured by cash deposits, sufficient bonds, or other guarantees: thus, when an importer defaulted, CBP could not recover the duties owed from the sureties that ordinarily protect CBP from default risk. To address the problem, CBP began to develop a new directive for increasing security requirements on merchandise with higher risk of default. Its own analysis indicated that importers of agriculture/aquaculture merchandise in particular were the source of the bulk of the defaults.

2. During the same period, the U.S. Department of Commerce (USDOC) and the U.S. International Trade Commission (USITC) were considering a petition to impose antidumping duties on another agriculture/aquaculture product: certain shrimp from China, Thailand, India, Vietnam, Brazil, and Ecuador. Imports of the merchandise subject to the petition were in 2003 valued at in excess of $2.5 billion – itself an unprecedented figure for agriculture/aquaculture merchandise subject to an antidumping order.

3. If the defaults it experienced with respect to other agriculture/aquaculture importers occurred for shrimp, CBP realized that its revenue collection problem could rapidly grow into a crisis. Therefore, after considerable analysis and consideration, it decided to apply the new directive to shrimp. The directive provides for an importer-specific risk assessment as the basis for additional bond amounts. Importantly, this means that CBP has tailored the process to ensure that, if a company subject to the directive does not itself pose a collection risk, it need not provide additional bond amounts. Even with this mechanism in place, India asserts that the directive is impermissible under various provisions of the WTO Agreements. In effect, India ask this Panel to find that the United States may not collect duties lawfully owed to it.

4. India's complaint focuses on the question of what the WTO Agreements permit a revenue collection authority to do when faced with a collection problem involving antidumping and countervailing duties. As discussed below, in its effort to apply the disciplines contained in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Antidumping Agreement) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) to the action in question, India mischaracterizes both the obligations that Agreement contains and key facts about the directive, its content and how it operates. If accepted, India's arguments would suggest that ordinary revenue collection strategies may not be applied to importers subject to antidumping and countervailing duties, and in so doing would seriously compromise the ability of Members' customs authorities to collect duties lawfully owed the Member. These arguments do not accord with the text of the Agreements, which expressly permit authorities to require "reasonable security" to collect antidumping and countervailing duties.

5. India additionally makes the extraordinary claim that ordinary customs laws and regulations are themselves inconsistent with the WTO Agreements simply because they give

CBP the "authority" to require additional security. India's arguments in this regard are unsupported by the text of the Agreements, at odds with the reasoning contained in a long line of panel and Appellate Body reports, and, if accepted, would have profound implications for the WTO Membership as a whole.

Factual Background

6. CBP is the U.S. agency responsible for collection of customs duties. Under the U.S. system, goods are permitted to enter the customs territory of the United States without having paid duties or other liabilities imposed by law. In this manner, the United States expedites the entry of goods and does not make the importer wait on the final determination of duties owed or other liabilities under the law. However, since the goods will have been long since released from CBP's custody and not available for return to satisfy any obligations of the importer when they are legally determined to be due, it is necessary for CBP to have some security against payment of amounts lawfully owed. Consequently, CBP requires single transaction bonds or continuous bonds for entries of merchandise as a matter of course. As a rule, all entries must be accompanied by evidence that a bond is posted with CBP to cover any potential duties, taxes, and charges that may accrue. Pursuant to CBP's regulatory authority, a port director may require additional bond amounts or other additional security in order to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law.

7. CBP establishes the minimum amount of the bond that the importer must obtain from a surety. The United States is the third party beneficiary to the contract between the surety and the bond principal, but is not itself a party to the contract. CBP does not set the fees charged by the sureties for the bonds they provide.

8. It is not uncommon for Members to require security in this manner, pending final assessment of customs liability. Under India's customs law, for example, when final duty liability cannot be determined upon entry, customs officers may assess provisional duties if the importer "furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed." Security requirements such as these ensure that customs authorities are able to collect duties lawfully owed upon final assessment.

9. Surety systems are contemplated by, among other provisions, Article 13 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (Customs Valuation Agreement), which provides that Members shall allow importers to withdraw goods from customs pending final determination of customs value if the importer "provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable." In addition to Article 13 of the Customs Valuation Agreement, surety systems are explicitly provided for in the Kyoto Convention on the Simplification and Harmonization of Customs Procedures. The Convention, like the Customs Valuation Agreement, encourages the early release of merchandise, and permits the adoption of surety systems to ensure compliance with

regulatory undertakings, as well as to ensure collection of any *additional* import duties and taxes that might become chargeable. Thus, the Convention explicitly contemplates that, as a necessary consequence of the early release of merchandise, it might become necessary to impose bond requirements to ensure the collection of assessed duties beyond the estimated duties for which an importer might be liable based on information at the time of entry.

10. The bond requirements imposed by the United States do not entail any payments to the United States Government. Rather, importers must provide evidence that they have obtained either single transaction bonds or continuous entry bonds (or cash or an authorized obligation of the United States in lieu of surety on a bond) for the entry or entries in question. These bonds are obtained from private surety companies, which charge the importers based on the risk involved with the transaction.

11. With respect to merchandise subject to an antidumping or countervailing duty order, the Antidumping Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment of antidumping duties. The United States has adopted a retrospective system of duty assessment. In the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Once a year (during the anniversary month of the order) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year. Between the time that the good is entered and the time that duties are finally assessed following this review, importers of merchandise subject to antidumping or countervailing duties are required to provide (1) a cash deposit in the amount of the antidumping or countervailing duty rate determined in the investigation; and (2) like importers of all goods, a bond to secure against duties, taxes or charges that may accrue. Under its 1991 Bond Guidelines, CBP provides that the amount of this bond should be equal to 10% of the duties, taxes, and fees paid by the importer in the previous 12 months, or a minimum of $50,000. In general, an importer may obtain either a bond covering a single entry (a single entry bond) or a continuous bond (a bond that provide security for all entries filed by the bond principal during the period of time covered by the bond, usually one year) to satisfy this requirement.

12. In 2003, CBP undertook a review of its overall duty collection program to identify areas in which it was experiencing collection difficulties, so as to address significant problems. As part of that process, CBP determined that, over the past few years, defaults on antidumping duty supplemental bills had increased substantially from previous years. While historically, annual uncollected duties from importers have been relatively low (rarely exceeding $10 million a year), outstanding antidumping liability for 2004 alone reached an unprecedented $225 million. As of the end of fiscal year 2006, total uncollected antidumping duties amounted to $629 million.

13. Facing a serious and growing noncollection problem, CBP reconsidered its general continuous bond formula, which provides that the minimum continuous bond may be in an amount equal to the greater of $50,000 or ten percent of the amount of the previous year's duties, taxes and fees. On July 9, 2004, CBP published on its website a Memorandum announcing an enhanced customs bond amount for those continuous bonds that secure the promise to pay all

duties finally determined to be due on certain merchandise subject to antidumping or countervailing duties (July 2004 Amendment). The formula set forth in the July 2004 Amendment is the USDOC rate in the antidumping or countervailing duty order, or the cash deposit rate at the time of entry, multiplied by the value of subject merchandise that the importer entered during the previous year. The formula in effect ensured that, should the antidumping duty rate actually assessed for an importer increase from that determined during the investigation, CBP would be at least partially secured for the difference. The additional bond directive does not apply to single entry bonds.

14. CBP also determined that the principal entities responsible for uncollected duties were importers of agriculture/aquaculture merchandise subject to antidumping duties, and in particular importers using continuous entry bonds. Based on CBP's analysis, the noncollection problem with respect to this merchandise appeared to be attributable to the fact that importers of agriculture/aquaculture merchandise tended to be undercapitalized, and that by the time final liability was assessed (typically one or more years after the goods had entered), the companies were no longer in operation. This was coupled with the fact that the AD/CVD duties finally assessed on the merchandise often significantly exceeded both the cash deposit rate and the ordinary bond amount typically required for all merchandise under the 1991 Bond Guidelines. CBP was thus unable to collect the unsecured portion of the duties assessed, resulting in a shortfall in CBP collections amounting to hundreds of millions of dollars.

15. On February 1, 2005, following a determination that certain shrimp from Thailand, India, and four other countries were being dumped in the United States, and a finding by the USITC that the U.S. domestic industry was materially injured by imports of frozen warmwater shrimp, USDOC issued its final determination imposing definitive duties on frozen warmwater shrimp. The shrimp order was the first order imposed on agriculture/aquaculture merchandise after issuance of the July 2004 Amendment. Significantly, compared to previous agriculture/aquaculture cases, the overall value of shrimp imports subject to the order was enormous – in calendar year 2003, imports of subject shrimp reached $2.5 billion. Given the volumes involved, even a modest increase in the antidumping rate upon assessment could result in substantial revenue losses if unsecured. Thus, viewing the shrimp order as an appropriate case for application of the additional bond directive, CBP began applying the directive to shrimp importers.

16. On August 10, 2005, CBP published a clarification to the July 2004 Amendment (the "Clarification"), in an effort to improve both importers' and customs officers' understanding of how the additional bond directive would be applied and to improve transparency in the process by which CBP identified covered cases and special categories of merchandise.

17. In a further effort to minimize burdens on importers resulting from the additional bond amount, on October 24, 2006, CBP published a Notice in the Federal Register amending its procedure for determining bond amounts for covered categories of merchandise. The October 2006 Notice "represents the comprehensive and exclusive statement of the policy and processes expressed in" the July 2004 Amendment, the 2005 Bond Formulas, and the August 2005

Clarification. As described in the October 2006 Notice, importers are offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and CBP determines bond amounts based on that information, the importer's compliance history and other relevant information available to CBP. CBP will evaluate this information promptly and provide an importer-specific bond sufficiency assessment for the importer concerned. In the absence of this information, CBP calculates the bond amount using the formulas. This procedure allows importers to obtain an individualized determination, rather than a determination based upon the formulas.

18. Since CBP issued the October 2006 Notice, by using the process outlined therein, several importers currently subject to the additional bond formulas have requested and received individualized bond amounts substantially lower than those CBP initially required under the additional bond formulas.

The Bond Directive Constitutes "Reasonable Security" Permitted by the Ad Note to GATT Article VI:2 and 3

19. Under the Ad Note, a Member may require that an importer provide "reasonable security" for the payment of antidumping or countervailing duties. As is evident from the clause that precedes it, the "final determination of the facts" in the Ad Note refers to the determination of the facts with respect to the "payment of anti-dumping or countervailing duty." In the context of a retrospective duty assessment system, the "determination of the facts" referenced in the Ad Note is the determination that in Article 9.3.1 of the Antidumping Agreement is referred to as the "determination of the final liability for payment of anti-dumping duties."

20. Importantly, the Ad Note does not specify a particular amount of security that a Member may require pending determination of the final liability for payment of anti-dumping duties, but rather provides that the amount required must be "reasonable." Under India's line of reasoning, no amount of bond that exceeds the margin of dumping established in the investigation phase of a proceeding can be "reasonable" security. This interpretation of the term "reasonable" lacks a basis in the text, which, as noted, does not specify a particular ceiling for the bond amount other than the requirement that it be "reasonable."

21. This interpretation also does not accord with ordinary customs practice, which provides context through the Ad Note's prefatory reference to "many other cases in customs administration." A bond is security against the prospect of a future liability. The additional bond amount is intended to secure against additional liability that may accrue upon assessment. As with any insurance policy, to establish the amount of security required, one must consider both the amount of potential liability in the event of default and the likelihood of default. With respect to the amount of potential liability, in excess of $2.5 billion worth of shrimp imports had entered the United States from countries subject to the antidumping order during calendar year 2003. With respect to the risk of default, after facing hundreds of millions of dollars in uncollected antidumping and countervailing duties, CBP determined that importers of agriculture/aquaculture merchandise subject to antidumping or countervailing duty liability faced

an elevated risk of default, due in part to low capitalization and high turnover rates in the industry as a whole. Since issuing the directive, CBP published additional mechanisms so that any additional bond amount required is tailored to individual importers' risk of default, mechanisms that even India concedes introduce an "indicia of apparent reasonableness" to the directive.

22. India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the Antidumping Agreement regarding provisional measures (*i.e.*, measures taken prior to a final determination of dumping or subsidization). The bond directive, however, is a security requirement imposed *after* the final determination of dumping or subsidization, pending "determination of the final liability for payment of anti-dumping duties." It is not a "provisional measure" within the meaning of Article 7. India offers absolutely no legal theory as to how the directive "as such" is inconsistent with the Ad Note, and the only evidence it offers in support of either claim relates to the single instance in which the directive has been applied – frozen warmwater shrimp subject to the antidumping orders issued by USDOC in February 2005.

Additional Bond Directive Is Not a "Specific Action Against Dumping" or "Subsidy"

23. As explained above, the additional bond directive serves to secure an otherwise unsecured debt owed to the U.S. government in the form of assessed antidumping duties that exceed cash deposits. It was issued after CBP identified a serious noncollection problem with respect to these duties. As it would in any case in which there exists an unsecured liability that presents a risk to the revenue, CBP issued the additional directive to provide for an increase in the amount of security on certain transactions and thereby address the noncollection concern. The sole reason the directive is designed to secure antidumping liability is because *the vast majority of unsecured liability that has resulted in noncollection happens to be antidumping duty liability.* Of the $589 million in uncollected duties outstanding since fiscal year 2003, $513 million (87 percent) have been antidumping duties. The fact that the additional bond directive is based on noncollection risk, rather than the constituent elements of dumping or subsidization, is evident in the text of the directive itself and associated materials.

24. The sole evidence that India cites in support of its argument that the directive operates "against" dumping is either inaccurate or irrelevant. The additional bond directive does not meet the second prong of the test set forth by the Appellate Body under Article 18.1: it is not an action taken "against" dumping or subsidization. First, India claims that the directive reduced shipments from countries subject to it. However, the record simply does not support this assertion. According to a study prepared by the Government Accountability Office (GAO), after the petition was filed in late 2003, *but before the bond directive was announced*, the share of imports from Thailand decreased from 30% of total U.S. shrimp imports to 15%. *After* the bond directive was announced in July 2004, Thailand's share of shrimp imports actually increased significantly, returning to approximately 30%. Based on GAO's analysis, there is no evidence that the bond directive in fact adversely affected imports of merchandise subject to the antidumping order. Second, India cites a number of actions by sureties and other private parties

as evidence that the directive itself is an action "against" dumping or subsidization, including sureties' fees and collateral requirements associated with these imports. As noted previously, CBP does not set surety fees, nor does it require importers to post collateral in support of bonds. CBP is a third party beneficiary to bond contracts, which are private contracts negotiated between the surety and the importer.

25. In order for India to prevail on its claim that the directive is "action against dumping", it also must demonstrate that the directive is not "in accordance with the provisions of GATT 1994." It has failed to do so. As explained above, the additional bond amounts required under the directive constitute "reasonable security" within the meaning of the Ad Note to GATT Article VI and therefore the directive is "in accordance with the provisions of GATT 1994."

26. With respect to India's claim that the directive "as such" is an action against dumping or subsidization, India again fails to so much as articulate a legal theory as to why the directive "as such" breaches U.S. obligations under Article 1 and 18.1 of the Antidumping Agreement, and Article 10 and 32.1 of the SCM Agreement. Furthermore, India misstates the facts, asserting incorrectly that the directive "requires" importers of merchandise subject to an antidumping or countervailing duty order to furnish an enhanced continuous bond. In fact, the directive does not so require.

India Fails to Demonstrate that Customs Laws and Regulations Are Inconsistent "As Such" with Article 18.4 of the Antidumping Agreement, Article 32.5 of the SCM Agreement or Article XVI:4 of the WTO Agreement

27. Arguing that "[t]he old distinction between 'mandatory' and 'discretionary' under the GATT 1947 does not survive any longer," India identifies nine laws and regulations in particular as measures "inconsistent as such" with Article XVI:4 of the WTO Agreement, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement. India argues that these laws and regulations create "the very existence of discretion" to act in a WTO-inconsistent manner, and therefore are impermissible. India's argument, however, does not accord with the text of the Agreement, is at odds with a long line of panel and Appellate Body reports, and if accepted, would mean that a single WTO-inconsistent administrative act could serve as the basis for finding a Member's entire legal system to be WTO-inconsistent.

28. As the complaining party to this proceeding, India bears the burden of presenting evidence and arguments sufficient to establish that the customs laws and regulations it cites are inconsistent with the provisions of the WTO Agreements that it invokes. India, however, provides no support for its claims in this regard. Under India's logic, any law granting "authority" to collect revenue – ranging from Article 8 of the United States Constitution to the 1789 Act of Congress establishing the U.S. Treasury Department – would be implicated in this dispute, as they also "authorize" CBP to secure the revenue, including through bonds.

29. Article XVI:4 means that, if a Member's law, regulation, or administrative procedure does not conform with its obligations as provided in the annexed Agreements, that Member has

an affirmative obligation to bring it into conformity. Conversely, however, if those laws, regulations and administrative procedures conform with its obligations, it need undertake no further action. Thus, the ordinary meaning of Article XVI:4 is that a law, regulation or administrative procedure is not inconsistent with Article XVI:4 unless it is also inconsistent with a separate obligation of a covered agreement. The laws and regulations of the United States are not inconsistent with any such provision – nor does India so assert – and are therefore consistent with Article XVI:4.

30. India further argues that it should be permitted to challenge the measures at issue "as such" because if it is unable to do so "it will only lead to 'multiplicity of litigation' in future." The prospect of having to present an argument in the future does not, however, excuse India from proving its case in the instant proceeding. A measure that is not itself inconsistent with a WTO provision may not be found in breach simply because at some date in the future it may be relied up as "authority" for a WTO-inconsistent act. The distinction between mandatory and discretionary action in GATT/WTO jurisprudence was a basic element of the practice of the GATT 1947 Contracting Parties in interpreting the GATT 1947, and remains a basic element of the practice of WTO Members in interpreting the WTO Agreement.

The Additional Bond Directive Is Not Inconsistent with GATT Article X:3(a)

31. India has failed to establish a breach of Article X. Even under India's theory that GATT Article X applies, the evidence demonstrates that CBP administers the bond directive in a "uniform, impartial and reasonable" manner. The directive contains various criteria for identifying importers of merchandise with elevated default risk, and CBP applies these criteria uniformly. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair." Treatment in an unbiased and fair manner is distinguishable from identical treatment. Using the criteria described above, CBP determined that importers of shrimp were particularly risky – the potential losses were significant, as was the likelihood of default. Insofar as CBP treated shrimp importers differently from others, it did so based on neutral, "impartial" criteria. "Reasonable" means "[i]n accordance with reason; not irrational or absurd." Here, CBP's reason for applying the additional bond directive to shrimp subject to the February 2005 orders is clear: it faced $2 billion in imports of shrimp newly subject to an antidumping order, had experienced $225 million in defaults on similar merchandise when antidumping orders were imposed in the past, and believed that, due to low capitalization rates in the industry and other factors, these imports posed a serious risk to the revenue. Thus, India fails to demonstrate that the additional bond directive represents unreasonable, partial, or nonuniform administration of U.S. customs laws, within the meaning of GATT Article X.

The Additional Bond Directive Does not Breach GATT Article XI

32. With respect to GATT Article XI, as was the case with the bond measure at issue in *Dominican Republic – Cigarettes*, the bond directive does not prevent importers from importing shrimp into the United States. The directive does not mandate an increased bond amount – as noted previously, importers can obtain individual bond determinations and, depending on their

ability to pay and history of compliance with U.S. customs laws and regulations, may not be required to obtain a higher bond. Furthermore, even those importers that have not demonstrated an ability to pay or have not complied with U.S. customs laws in the past are able to import even without participating in the process outlined in the directive or providing additional bond amounts.

The Directive Is Not Inconsistent with GATT Article II

33. The additional bond directive itself does not constitute a "duty" (antidumping or otherwise). Likewise, the additional bond directive does not constitute an "other charge." First, CBP does not charge for the bonds, nor does it even require that security take the form of the additional bond. Second, India's argument that such bonds are "other charges" would mean that Members may not maintain bonds as a means to secure importers' obligations unless the bonds are specifically included in a Member's schedule. However, as noted above, customs bonds are specifically contemplated in various WTO provisions, including the Ad Note to Article VI and Article 13 of the Customs Valuation Agreement. This context supports the conclusion that bonds are a tool that is generally available to the Members, and not simply to those Members which have scheduled them. For this reason as well, bonding requirements are not an "other charge."

The Directive Is Not Inconsistent with GATT Article XIII

34. The directive does not restrict the quantity of shrimp that may be imported into the United States, and thus does not constitute a "quantitative restriction" within the meaning of GATT Article XIII. India provides no support for its assertion that the United States has breached Article XIII, other than its argument that the directive "severely restricts imports" into the United States of subject merchandise. This statement is not a sufficient basis to conclude that the directive is a "quantitative restriction", and, as noted previously, is simply incorrect.

The Directive Is Not "As Such" Inconsistent with GATT Articles I, II or XI

35. Even more dramatically than with respect to its other "as such" claims, with respect to GATT Articles I, II, and XI, India offers absolutely no legal theory, evidence, or even argumentation to explain how the directive "as such" is inconsistent with these provisions. India has not even attempted to meet, let alone met, its burden with respect to its "as such" claims under GATT Articles I, II, and XI.

The United States Did Not Act Inconsistently with Article 18.5 of the Antidumping Agreement or Article 32.6 of the SCM Agreement by Not Notifying the Amended Bond Directive

36. The bond directive modified CBP's 1991 Bond Guidelines regarding bond amounts for all merchandise. That directive is not a "law or regulation" relevant to the Antidumping or SCM Agreements, nor does it relate to the administration of those laws and regulations.

The Additional Bond Directive Is Justified by GATT Article XX(d)

37. As the United States has demonstrated, the additional bond directive is not inconsistent with U.S. WTO obligations. Article XX of the GATT 1994 makes this even clearer.

38. The additional bond directive is "necessary to secure compliance" with U.S. antidumping and countervailing duty assessment laws, in particular 19 U.S.C. 1673e(a)(1) governing the assessment of antidumping duties and general customs and regulations requiring the payment of duties owed to the U.S. Treasury. The fact that the directive and its application to shrimp secures compliance with this obligation and general customs laws and regulations requiring payment of duties owed to the U.S. Treasury is evident on its face. The directive is "necessary" to secure compliance with U.S. laws and regulations. Revenue collection is among the most fundamental responsibilities of governments. As explained above, the directive secures an otherwise unsecured liability in the form of additional antidumping duties owed upon assessment that exceed cash deposits, and thus permits collection of revenue that in the past has been subject to unprecedented default.

39. The additional bond directive also meets the requirements of the chapeau to Article XX, as it has not been applied in a manner that would constitute a "disguised restriction on international trade" or "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."