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

(WT/DS345)

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I. 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.

II. PROCEDURAL BACKGROUND

6. On June 6, 2006, India requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXII:1 of GATT 1994, Article 17 of the Antidumping Agreement and Article 30 of the Subsidies Agreement.[1] The United States and India held consultations in Geneva on July 31, 2006 and in Washington, D.C. on September 18, 2006. On October 13, 2006, India requested the establishment of a panel.[2] At its meeting on November 21, 2006, the Dispute Settlement Body established a panel in accordance with Article 6 of the DSU. On January 26, 2007, the Director-General composed this Panel. Brazil, China, the European Communities, Japan, and Thailand have reserved their rights to participate in the panel proceedings as third parties.

III. FACTUAL BACKGROUND

7. 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,[3] 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.[4]

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[1] WT/DS345/1 (June 6, 2006).

[2] WT/DS345/4 (October 13, 2006).

[3] 19 Code of Federal Regulations § 113.13 (Exh. US-1).

[4] CBP's authority for requiring security dates to as early as 1789. *See* An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States", ch. 5, 1 Stat. 29, 42 (July 31, 1789), sec. 19.

8. 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.

9. 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."[5] Security requirements such as these ensure that customs authorities are able to collect duties lawfully owed upon final assessment.

10. 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.[6] 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.[7] 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.[8]

11. 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

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[5] India Customs Act, 1962, section 18 (Exh. US-2).

[6] Kyoto Convention on the Simplification and Harmonization of Customs Procedures, (done at Kyoto on 18 May 1973 and entered into force on 25 September 1974) (as amended June 1999), Ch. 3.40-43 (on the release of goods) (Kyoto Convention) (Exh. US-3).

[7] Kyoto Convention, Ch. 3.40-43.

[8] Similarly, the International Chamber of Commerce International Customs Guidelines provide in Guideline 19 that a modern, efficient and effective customs administration: "19. operates a corporate surety bonding system, or other appropriate means, such as a duty- and tax-deferral system, to protect the revenue and ensure compliance with customs laws without unnecessarily delaying the release of goods." ICC International Customs Guidelines, www.iccwbo.org/home/statements_rules/rules/1997/customsdoc.asp (10 July 1997) (Exh. US-4).

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.

12. With respect to merchandise subject to an antidumping or countervailing duty order, the AD 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.[9] 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.

13. 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.[10] 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.[11] As of the end of fiscal year 2006, total uncollected antidumping duties amounted to $629 million.

14. 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

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[9] Monetary Guidelines for Setting Bond Amounts (July 23, 1991) ("1991 Bond Guidelines") (Exh. IND-2).

[10] Supplemental bills are bills issued when duties are finally assessed and it is determined that the amount of duties actually owed exceeds the amount paid. See e.g., CBP, Revenue Priority Trade Issue: Summary of Findings, at 37-39 (Exh. IND-8).

[11] Considered in relative terms, historically, uncollected duties from importers were less than 0.01% of total duties collected. In FY2003, antidumping duty bills comprised 91% of all unpaid duty bills that were delinquent and which CBP classified as "probable" to be written off. Periodic Risk Assessment of Material Risks in the Revenue Process, at 5 (Exh. IND-8).

duties finally determined to be due on certain merchandise subject to antidumping or countervailing duties (July 2004 Amendment).[12] 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.[13] 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.[14] The additional bond directive does not apply to single entry bonds.

15. 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.[15] 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.[16] 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.

16. 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.[17] 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.[18] Given the

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[12] Amendment to Bond Directive 99–3510–004 for Certain Merchandise Subject to Antidumping Countervailing Duty Cases (July 9, 2004) ("July 2004 Amendment") (Exh. IND-3).

[13] *Id.*, at 2.

[14] In January 2005, CBP again posted the formulas on its website in a separate document ("January 2005 Formulas") (Exh. IND-4).

[15] *See e.g.*, CBP, Proactive Approach to Revenue Protection for Antidumping Duty (June 23, 2004), at 68 (Exh. IND-8).

[16] *Id.*

[17] E.g., Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India, 70 Fed. Reg. 5147 (Exh. IND-13).

[18] Bond Sufficiency Review: Update for the CBP Modernization Board (Feb. 18, 2004), at 49 (Exh. IND-8).

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.[19]

17. 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.[20]

18. 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.[21] 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.[22] 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.[23] This procedure allows importers to obtain an individualized determination, rather than a determination based upon the formulas.

19. 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.

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[19] Bond Sufficiency Review: Update for the CBP Modernization Board (Feb. 18, 2004), at 48 (Exh. IND-8) (discussing shrimp prototype); Bonding for Antidumping (May 27, 2004), at 58 (noting that CBP intends to "try out the process on Shrimp" and that collection problems had occurred previously for similar products) (Exh. IND-8).

[20] Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases (August 10, 2005) ("August 2005 Clarification") (Exh. IND-5).

[21] Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements, 71 Fed. Reg. 62,276 (Oct. 24, 2006) ("October 2006 Notice") (Exh. IND-6). India states that the Notice "also forms part of the Amended Bond Directive." India First Submission, para. 18.

[22] October 2006 Notice at 62,277.

[23] *Id.* at 62,277.

IV. LEGAL ARGUMENT: THE ADDITIONAL BOND AMOUNT

20. India identifies the measures at issue in this proceeding as (1) "the laws and regulations that authorize U.S. Customs to impose the Enhanced Bond Requirement"; and (2) "the instruments that impose it and describe its operation."[24] India further asserts that these measures "both as such and as applied to imports of shrimp" are not consistent with U.S. obligations under the GATT, the Antidumping Agreement and the SCM Agreement.[25] As will be demonstrated below, India fails to demonstrate that these measures are inconsistent with the WTO obligations it identifies.

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

21. The Ad Note to paragraphs 2 and 3 of GATT Article VI states:

> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

22. Under the Ad Note, a Member may require that an importer provide "reasonable security" for the payment of antidumping or countervailing duties.

23. 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."[26]

24. 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." This is in contrast to, for example, the requirements established for provisional measures governed by Article 7 of the Antidumping Agreement (*i.e.*, measures applied after a preliminary determination of dumping but prior to a final determination of dumping), which specifies that such measures "may take the form

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[24] India First Submission, para. 6.

[25] India First Submission, para. 6.

[26] Antidumping Agreement, Article 9.3.1 ("When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.").

of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated."[27]

25. India claims, however, that the additional bond directive is "per se unreasonable" because "[t]he United States already collects cash deposits to the full extent of the dumping margin" determined in the investigation.[28] 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 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."

26. 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. In the case of shrimp, the amount of potential additional liability was significant, as was the risk of default.

27. First, with respect to the amount of potential liability, as noted previously, at the time of entry, under the U.S. retrospective duty assessment system, a determination of the final liability for payment of anti-dumping duties has not been made. While it is sometimes the case that the antidumping duties ultimately assessed are equal to or lower than the cash deposits made upon entry, it is not uncommon for assessed duties to exceed cash deposits.[29] With respect to shrimp, as noted above, 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.[30] Based on that figure, a 1% increase in the antidumping margin between the investigation rate and the assessment rate would translate into $25 million in unsecured antidumping liability. Indeed, USDOC's preliminary results from the first administrative review of the antidumping order with respect to shrimp indicate that several Thai companies that had been making cash deposits at the 6% rate established in the investigation may be subject to an assessment rate in excess of 57%.[31] Likewise, USDOC's preliminary results suggest higher assessment rates for 63 of 70 Indian companies subject to the original order – 17 of these companies, which had been making cash

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[27] Antidumping Agreement, Article 7.2.

[28] India First Submission, para. 95.

[29] CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 percent of time, did not change 11 percent of the time, and decreased 56 percent of the time. The median increase in these cases was found to be approximately 100%. The mean rate increase was 285%.

[30] See paragraph 16, supra.

[31] Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,669, 10,680 (Mar. 9, 2007) (Exh. US-5).

deposits at the 10.17% rate established in the investigation, may be subject to an assessment rate in excess of 82%.[32] Increases such as these result in unsecured liability, often in excess even of the additional bond amount.

28. 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.[33] 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.[34] In particular, as described in the October 2006 Notice, CBP will base its determination on information regarding the importer's ability to pay and history of compliance with customs laws and regulations.[35] Only if the importer has a history of noncompliance or does not request an individual bond determination will CBP use a bond amount established pursuant to the formulas.[36]

29. Both of these factors support the conclusion that the bond amounts required of importers under CBP's additional bond directive constitute "reasonable" security. With over $2.5 billion in shipments of shrimp in calendar year 2003, CBP's regular bond amounts would have resulted in substantially higher unsecured liability than in other cases involving merchandise subject to antidumping duty orders, even other agriculture and aquaculture merchandise.[37] Furthermore, having experienced significant defaults involving similar merchandise, it was not unreasonable for CBP to expect a higher risk of default for subject merchandise – and CBP's current process for determining default risk allows for an even more accurate assessment of individual risk going forward. Even under the formulas, CBP has not fully secured itself against potential defaults. For example, with respect to the Thai companies mentioned previously, under the additional bond formula, CBP is secured up to a 12% antidumping duty assessment rate (6% secured by cash deposits and the remainder secured by the additional bond amounts). If USDOC calculates an assessment rate on par with that established in its preliminary results, CBP will face an unsecured liability in excess of 45% of the total value of shipments for those importers alone, even with the

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

[33] *See e.g.*, CBP, Proactive Approach to Revenue Protection for Antidumping Duty (June 23, 2004), at 68 (Exh. IND-8).

[34] India First Submission, para. 100.

[35] October 2006 Notice at 62,277.

[36] October 2006 Notice at 62,277.

[37] By comparison, in calendar year 2006, shipments of merchandise subject to U.S. antidumping duty orders on crawfish totaled approximately $16 million; shipments of merchandise subject to U.S. antidumping duty orders on garlic totaled approximately $69 million; and shipments of merchandise subject to U.S. antidumping duty orders on mushrooms totaled $62.1 million.

additional bond amounts. Given the risk of default and the amount of potential liability incurred, the additional bond amounts required of importers based on the directive are "reasonable".[38]

1. Article 7 of the Antidumping Agreement Does Not Apply to the Bond Directive

30. In its submission, 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).[39] 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.

31. Citing to a 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties, India argues that the "reasonable security (bond or cash deposit)" referred to in the Ad Note "is the same as the provisional measures referred to in Article 7 of the Antidumping Agreement."[40] However, the document cited by India if anything suggests the opposite. In its report, the Committee notes that "Article VI made no mention of them [provisional measures]"[41] and the only reference the Committee makes to the Ad Note is that the provisional measures under discussion "should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI."[42] Nowhere in its discussion does the Committee suggest that the measures described in the Ad Note are themselves "provisional measures" within the meaning of Article 7 or that criteria under consideration for provisional measures under Article 7 should apply to the types of measures described in the Ad Note. Indeed, the Ad Note has not been amended to incorporate those criteria.

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[38] With regard to the decision of the United States Court of International Trade that India cites in support of its position that the directive does not constitute "reasonable" security, India First Submission, para. 98-100, the United States notes that the litigation relates to certain claims under U.S. law (rather than the WTO Agreements) and is ongoing. Moreover, the October 2006 Notice was issued just prior to the release of the decision referenced by India, and the court did not squarely address the Notice in its findings. See *NFI v. U.S.*, U.S. Ct. of Int'l Trade, Slip. Op. 06-166 (Exh. IND-16).

[39] India First Submission, para. 92 (asserting that "[i]t is clear that the 'reasonable security (bond or cash deposit)' referred to in the Ad Note is the same as the provisional measures referred to in Article 7 of the Antidumping Agreement.").

[40] India First Submission, para. 92.

[41] The Ad Note to Article VI was included in Article 34 of the Havana Charter and was incorporated into the GATT in conjunction with the rest of Article 34 in 1948. See Report of Working Party No. 3 on Modifications to the General Agreement, GATT/CP.2/22/Rev.1 (Aug. 30, 1948). The original language was unanimously agreed to at a meeting of the Working Party to Subcommittee C of the Commercial Policy Committee in January 1948. E/CONF.2/C.3/C/18 (Jan. 22, 1948). It has not been amended since that time.

[42] Guide to GATT 1994 Law and Practice, Analytic Index (1995), at p. 236 (Reports of Committees and Principal Sub-Commitees: ICITO I/8, Geneva, September 1948).

32. With respect to India's argument that the additional bond directive was applied in a handful of cases prior to the issuance of the order and therefore constitutes a "provisional measure" inconsistent, as such and as applied, with Article 7,[43] the October 2006 Notice makes clear that the directive no longer covers additional bond amounts requested prior to issuance of an order.[44]

2. India Fails to Provide Any Support for its "As Such" Challenge to Additional Bond Directive Under Ad Note to Article VI

33. In addition to arguing that the bond directive as applied to shrimp does not constitute "reasonable" security within the meaning of the Ad Note, India further asserts that the bond directive "as such" is inconsistent with the Ad Note to Article VI. However, India offers absolutely no legal theory as to how the directive "as such" is inconsistent with the Ad Note, and the only evidence it offers in support of 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.[45] India fails to identify any reason why the *directive*, *as such,* is inconsistent with the Ad Note.

B. Additional Bond Directive is Not a "Specific Action Against Dumping" or "Subsidy"

34. Article 18.1 of the Antidumping Agreement provides that "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Footnote 24 to Article 18.1 further provides that "This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate."

35. Article 32.1 of the SCM Agreement similarly provides that "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Footnote 56 states "This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

36. To establish that a measure is a "specific action against dumping or a subsidy" that is not "in accordance with the provisions of GATT 1994," India must demonstrate that (1) the action is taken only when the constituent elements of dumping are present (i.e., it is "specific" to dumping or a subsidy);(2) the action is taken "against dumping," *i.e.*, to counteract dumping or a subsidy;

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[43] India First Submission, para. 85.

[44] October 2006 Notice at 62,277 (cf. July 2004 Directive at 2-3).

[45] India First Submission, para. 97, 99-100 (discussing default history of shrimp importers in support of claim that directive "as such" is not "reasonable" security as provided in the Ad Note to Article VI).

and (3) it is inconsistent with the provisions of GATT 1994.[46] The additional bond directive meets none of these criteria. 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.

1. Additional Bond Directive is not "Specific" to Dumping or Subsidy

37. India identifies several aspects of the additional bond directive that in its view make it "specific" to dumping and subsidization. An examination of each reveals this not to be the case.[47]

38. For example, India argues that the directive may be and has been applied only to importers of goods subject to a U.S. antidumping order[48] and the formula it contains uses the antidumping rate as one variable in determining the amount of additional security that may be prescribed.[49] These features, however, merely reflect the fact that the directive, like various measures referred to by the Appellate Body in *US – Offset Act*, "related to" dumping or subsidies insofar as the unsecured liability it is designed to secure is antidumping and countervailing duty liability. As the Appellate Body explained it, under Article 18.1, "an action that is not 'specific' within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the SCM Agreement, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement."[50]

39. As explained above, 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. There have been no major collection problems with other duties during this period. Had another type of duty

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[46] *US – Offset Act (Byrd Amendment) (AB)*, paras. 224-236.

[47] *US – 1916 Act (AB)*, para. 122 *(*Article VI and the Antidumping Agreement apply to "action that is taken in response to the constituent elements of dumping."); *US – Offset Act (Byrd Amendment) (AB)*, para. 242 (explaining that, in order for a measure to be a "specific" action in response to dumping, "the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. Such link or correlation may ... be derived from the text of the measure itself.").

[48] India First Submission, para. 60.

[49] India First Submission, para. 60.

[50] *US – Offset Act (Byrd Amendment) (AB)*, para. 262.

resulted in noncollection, CBP would likewise have taken steps to address that particular noncollection problem.[51]

40. The fact that the additional bond directive is based on noncollection risk, rather than the constituent elements of dumping or subsidization, is evident in the text of the directive itself and associated materials. The October 2006 Notice describes CBP's current approach to applying the additional bond directive, and describes the process by which CBP will determine the amount of bond required based on individual risk factors.[52] None of the information CBP uses to determine that merchandise should be identified as Special Category Merchandise subject to the amended directive – previous collection problems, payment history, indications that the liquidated duty rates may exceed existing security – has any relation to the constituent elements of dumping or subsidization.[53] Likewise, none of the information CBP requests for purposes of establishing individual bond amounts – prior history of paying import duties, the value of the merchandise to be secured, the degree of supervision CBP exercises over the transaction, the prior record of the importer in honoring bond commitments, and evidence of the importer's ability to pay duties assessed – has any bearing on the constituent elements of dumping or subsidization.[54] All of these factors are, however, relevant to establishing noncollection risk.

41. Furthermore, in the October 2006 Notice, CBP has clearly indicated that it will consider each individual importer's financial condition or ability to pay in determining risk, and describes a process for doing so.[55] Since the October 2006 Notice was issued, CBP has received submissions in support of individual bond determinations from importers currently subject to additional bond amounts pursuant to the directive. In several cases, as a result of this analysis, CBP has requested a bond amount significantly lower than that otherwise provided by the formula.

42. If an importer does not provide any information that would enable it to determine a bond amount reflecting the importer's individual risk, CBP relies on the information available to it as well as formulas that reflect its best estimate of the unsecured liability against which it requires additional security.[56] These formulas do incorporate the antidumping rate, but do not constitute an antidumping duty calculation – rather, they include the rate simply because from CBP's

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[51] Indeed, the materials prepared by CBP in connection with its overall program review in 2003 suggest a broader effort to improve collections and prevent revenue loss, with steps taken in various areas to address risk (though no actual losses as significant as those involving antidumping and countervailing duties). Revenue Priority Trade Issue, at 24-32 (Exh. IND-8).

[52] October 2006 Notice at 62,277-78. CBP's current approach with respect to bond reduction is clear, and does not, as India argues of CBP's initial approach, encourage shifting sources to non-subject countries.

[53] *Id.* at 62,277.

[54] *Id.*

[55] See October 2006 Notice at 62,277.

[56] October 2006 Notice at 62,277.

standpoint it is the best and only available baseline proxy of duties that ultimately may be assessed. The inclusion of the antidumping rate in the formulas thus does not support the conclusion that the directive itself relies on the constituent elements of dumping or subsidization. The formulas do not calculate dumping margins, but rather calculate CBP's best estimate of the amount of unsecured liability for which CBP requires additional security.

43. With respect to India's assertions regarding the relevance of the CDSOA,[57] the handful of references to the CDSOA in the July 2004 Amendment and some internal CBP documents also do not support the conclusion that the directive constitutes specific action against dumping or subsidization. The October 2006 Notice, which "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,[58] does not refer to the CDSOA. Furthermore, merely acknowledging the existence of a measure that has been found to constitute specific action against dumping does not itself constitute "specific action against dumping." The CDSOA was indeed in effect at the time that the additional bond directive was being developed, and CBP did note that the problem with noncollection had affected CDSOA disbursements.[59] However, these two facts do nothing to detract from the fact that, as explained above, the fundamental problem CBP was trying to address was not dumping and subsidization, but rather a shortfall in excess of $500 million in collections of antidumping duties lawfully owed, attributable to the existence of significant unsecured liability on antidumping duties that importers have failed to pay.[60] As is apparent from the structure of the directive itself, the criteria it references, and the CBP materials describing its development, CBP's "intent" in issuing the directive, to the extent it is at all relevant, was to address the noncollection problem, not to counteract dumping or subsidization.

44. Finally,"the constituent elements of 'dumping'" are not "built into the essential elements" of the additional bond directive.[61] CBP does not determine antidumping or countervailing duty margins, and the directive does not purport to establish margins of dumping or subsidization. Nor does the additional bond directive apply to all entries subject to antidumping or countervailing duties – rather it only applies to those for which a specific noncollection risk has been identified. The directive is applied in response to noncollection risk – the mere fact that the particular noncollection risk at issue relates to antidumping duties is not a sufficient basis to conclude that the directive itself is "taken in response to the constituent elements of dumping or a subsidy." Noncollection risk is not a constituent element of dumping or subsidization.

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[57] India First Submission, paras. 60-61.

[58] October 2006 Notice at 62,277.

[59] July 2004 Directive at 1.

[60] It should also be noted in this regard that the changed status of CDSOA in 2006 has not affected CBP's efforts to secure duties lawfully owed, pursuant to the directive.

[61] *US – 1916 Act (AB)*, para. 130.

2. The Additional Bond Directive Is Not Action "Against" Dumping or Subsidization

45. 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.

46. First, India claims that the directive reduced shipments from countries subject to it.[62] However, the record simply does not support this assertion. According to a study prepared by the Government Accountability Office (GAO), the effects of the bond directive "cannot readily be isolated from other changes occurring at the same time, such as the imposition of AD duties."[63] For example, 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%.[64] *After* the bond directive was announced in July 2004, Thailand's share of shrimp imports actually increased significantly, returning to approximately 30%. After CBP began requiring bonds in February 2005, Thailand's share of imports even increased further, before stabilizing around 30% as of 2006.[65] 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.[66]

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[62] India First Submission, para. 62.

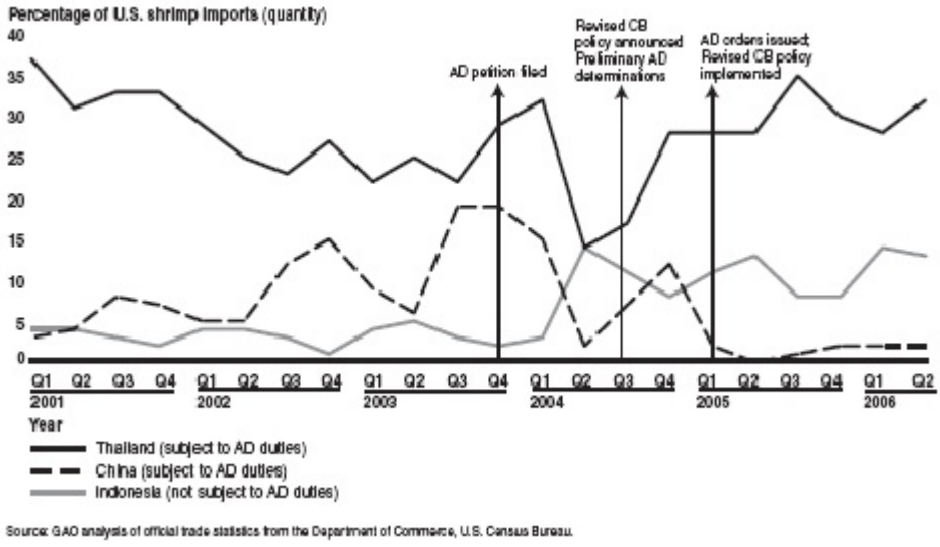
[63] GAO Study at 24.

[64] *Id.*

[65] *Id.*

[66] The data submitted by India in support of its assertion that the additional bond directive resulted in a "sharp drop between 2005 and 2006 in the quantity and value of shrimp exported from India as well as in the total number of exporters from India" does not distinguish between the effects from the order and effects from the bond directive. India First Submission, paras. 53 and 62,

Shrimp Import Patterns, 2001-2006



Source: GAO analysis of official trade statistics from the Department of Commerce, U.S. Census Bureau.

47. 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.[67] 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. CBP neither requested nor encouraged sureties to require collateral with respect to the bonds at issue. [68]

3. Additional Bond Directive Not Inconsistent with the Provisions of GATT 1994

48. 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."[69] 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."

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[67] India First Submission, para. 62.

[68] Likewise, the United States had no role in the private agreements described by India in paragraphs 46-48 of its submission.

[69] *US – Offset Act (Byrd Amendment) (AB)*, paras. 224-236.

4. Additional Bond Directive, "As Such", is not Action Against Dumping or Subsidization

49. 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.

50. 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.[70] In fact, the directive does not so require. CBP has ample discretion in applying the directive, as evidenced by the fact that thus far *it has only done so in a single case* – certain frozen warmwater shrimp subject to the February 2005 antidumping orders. As India elsewhere concedes, CBP has not required additional bond amounts for other merchandise subject to antidumping duties, including other agriculture/aquaculture merchandise.[71] CBP has never applied the directive to merchandise subject to a countervailing duty determination.

51. Moreover, as the October 2006 Notice makes clear, 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.[72] The October 2006 Notice indicates, for example, that Special Categories of merchandise "*may* be designated when additional bond requirements in the form of greater continuous entry bonds or other security *may* be required."[73] As the Notice explains, CBP will determine bond amounts based on information about the financial condition of the particular importer, rather than the formulas, when that information is made available to it. According to the Notice, "If CBP determines that the principal has a record of compliance with customs laws and regulations and that the principal has demonstrated an ability to pay, CBP may decide not to require an increased bond amount even though the principal imports Special Category merchandise."[74] Thus, under the process outlined

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[70] India First Submission, para. 56 (discussing Article 18.1 claim and asserting that "The Amended bond directive requires importers of certain merchandise subject to antidumping or countervailing duties which is designated by U.S. Customs to furnish an enhanced continuous bond"). Elsewhere India describes the directive as containing "norms or rules" that customs officers are "required" to apply. India appears to be referencing the Appellate Body's observation in *US – Corrosion-Resistant Steel Sunset Review* that "the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings," and that therefore such actions are capable of being challenged "as such." *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 87; 208-211. However, the issue of whether the bond directive contains rules or norms is only relevant to the question of whether there is a measure, and not whether that measure breaches an obligation. The Appellate Body has been clear that the issues are distinct. See *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

[71] See India First Submission, para. 51.

[72] October 2006 Notice at 62,277.

[73] *Id.* (emphasis added).

[74] *Id*. at 62,278.

in the October 2006 Notice, the actual bond amount required may vary significantly within the single case to which the bond directive has thus far been applied and no additional bond may be required at all. India fails to explain how, by introducing the mere possibility that an importer would have to obtain a higher bond upon a finding that it is a higher risk, the directive, as such, constitutes an "action against dumping and subsidization."

C. 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

52. 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: 19 U.S.C. 1623(a), 19 U.S.C. 1484, 19 U.S.C. 1502, 19 U.S.C. 1505, 19 U.S.C. 1673g, 19 C.F.R. 113.13(b), 19 C.F.R. 113.40, 19 C.F.R. 113.62, and 19 C.F.R. 142.2. India argues that these laws and regulations create "the very existence of discretion" to act in a WTO-inconsistent manner, and therefore are impermissible.[75] 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.

53. 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.[76] To do so, it must provide evidence, in the form of specific language from the laws and regulations at issue, demonstrating that these laws and regulations preclude the United States from acting consistently with its obligations.[77] India, however, provides no support for its claims in this regard. It quotes at length from 19 C.F.R. 113.1 and 113.13, as well as 19 U.S.C. § 1623(a), but fails to provide any analysis indicating how the language it identifies *requires* the United States to act inconsistently with its WTO obligations. Rather, it argues that simply because these legal instruments may be relied upon as "authority" for imposing the additional bond amounts, they must be found inconsistent along with the additional bond directive itself.[78] Under India's logic, any law granting "authority" to collect revenue – ranging from Article 8 of the United States Constitution to the

[75] India First Submission, para. 73.

[76] *US – Wool Shirts (AB)* at 14.

[77] *India – Patent Protection (US) (AB)*, para. 65.

[78] India First Submission, para. 70.

1789 Act of Congress establishing the U.S. Treasury Department[79] – would be implicated in this dispute, as they also "authorize" CBP to secure the revenue, including through bonds.

54. India's logic also means any "authority" to undertake the action at issue in a particular WTO dispute would be equally subject to a finding of breach. For example, in *India – Autos,* India imposed on auto manufacturers a local content requirement and trade balancing condition, contained in Public Notice No. 60, which was found inconsistent with GATT Article III:4 and XI. That Notice was "adopted under the authority of" India's Export Import Policy of 1997-2002,[80] which itself was issued pursuant to, among other things, Section 5 of the Foreign Trade (Development and Regulation Act), 1992. Presumably, under India's theory, all of these "authorities" for the WTO-inconsistent actions at issue were in breach of Article XVI:4 because of their role in the particular measures found to be inconsistent with the WTO provisions at issue in that dispute. There is simply nothing in the text of Article XVI:4 which suggests this outcome, and it is inconceivable that Members could have intended such an intrusion on their sovereignty.

55. Article XVI:4 of the WTO Agreement provides:

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

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.[81]

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[79] U.S. Const. Art. 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposes and Excises..."); 1789 Act of Congress, Chapter XII, sec. 2 (providing that "it shall be the duty of the Secretary of the Treasury...to superintend the collection of revenue...").

[80] *India – Autos (Panel),* para. 7.188.

[81] In portions of its argument, India appears to consider its challenge to the amended directive under Articles XVI, 18.4, and 32.5 to be derivative of its claim with respect to Antidumping Agreement, Article 18.1. India First Submission, paras. 71-72 ("As discussed above, the Enhanced Bond Requirement clearly does not conform to the provisions of Article 18.1 of the Antidumping Agreement and of Article 32.1 of the Subsidies Agreement"). With respect to the laws and regulations, India does not identify any other provisions allegedly breached. To the extent that India's claims with respect to the amended directive under Articles 18.4, 32.5 and XVI are *not* derivative of its other claims, its argument is flawed for the reasons provided above. To the extent that they are derivative of its other claims, for reasons provided elsewhere in this submission, India has failed to demonstrate a breach of those obligations.

56. Likewise, Article 18.4 of the Antidumping Agreement and Article 32.5 of the SCM Agreement do not prohibit the "very existence of discretion" to impose measures that are not permitted under the Antidumping and SCM Agreements. Article 18.4 requires that Members "take all necessary steps, of a general or particular character, to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of the Agreement ... ." To establish a breach of Article 18.4 or Article 32.5, a Member must demonstrate that the measure complained of is not in conformity with the provisions of the Agreement.[82]

57. Further, there is no support for India's assertion that the mandatory/discretionary distinction is no longer relevant in determining whether a measure, as such, breaches a WTO obligation, as distinct from instances in which the measure has been applied. Numerous panel and Appellate Body reports have applied the distinction, concluding that a measure is not itself inconsistent with a WTO Member's obligations unless that measure *mandates* action which violates those obligations, even if the measure does not preclude such action.[83] A Member may challenge, and a WTO panel may find against, a measure "as such" only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent. In accordance with the normal WTO rules on the allocation of the burden of proof, the complaining party must demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.

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[82] *See US – Offset Act (Byrd Amendment) (AB)*, paras. 300-302 (Article 18.4 as a derivative claim); *US – Hot-Rolled Steel (AB)*, para. 129 (same).

[83] *See e.g.*, *Korea – Commercial Vessels*, paras. 7.57-67; *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 73-101; *US – Offset Act (Byrd Amendment) (Panel)*, paras. 7.67-82, *US – Countervailing Measures (AB)*, paras. 154-160 (reversing panel finding that Section 1677(5)(F), as such, breaches SCM Agreement); *US – Softwood Lumber CVD Prelim*, paras. 7.116-159 (rejecting as such claim); *US – Section 129*, paras. 6.27-134 (same); *US – Export Restraints*, paras. 8.4-9, 8.77-131. *See also Canada – Aircraft (Panel)* (citing *US – Tobacco*):

> We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States -- Tobacco*, the panel "recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge".[citation omitted]

See also, e.g., EEC – Parts and Components, para. 5.25 (finding that "the mere existence" of the anticircumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision, because it "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."); *US – Superfund*, BISD 34S/163 ("From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement."); *Thailand – Cigarettes*, BISD 37S/200 (concluding that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement.").

58. While the Appellate Body has not "pronounce[d] generally upon the continuing relevance or significance of the mandatory/discretionary distinction,"[84] it has continued to apply it. Most recently, for example, in *US – OCTG from Argentina (Article 21.5) (AB)*, the Appellate Body reversed the panel's finding that Section 751(c)(4)(B) of the Tariff Act, operating in conjunction with Section 751(c)(4)(A) of the Tariff Act and Section 351.218(d)(2) of the Code of Federal Regulations, was inconsistent with Article 11.3 of the Antidumping Agreement, because:

> on the basis of the evidence on the Panel record, we are not persuaded that the amended waiver provisions *preclude* the USDOC from making a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the *Anti-Dumping Agreement*.[85]

The sole report India cites in support of its argument, the panel report in *US – Section 301*, does not stand for the proposition that the mandatory/discretionary distinction "does not survive any longer," as India asserts.[86] Rather, the panel in that dispute stated that its finding "does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions" and concluded that "that is the very test we shall apply in our analysis."[87]

59. Thus, there is no basis for India's suggestion that the mandatory/discretionary distinction "has not survived." As evidenced by its continued application, the distinction continues to be applied, and with good reason: many WTO obligations prohibit Members from taking particular actions or require Members to take a particular action. If a measure does not require a Member to take a prohibited act or preclude a Member from taking a required act, there is no basis for concluding it is WTO-inconsistent. India argues that the measure may nevertheless breach Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, asserting that they require that a Member must ensure the "conformity" of its laws with WTO obligations. But this begs the question of what "conformity" means. If a WTO obligation is to do or not do something, a measure that does not require WTO-prohibited action or preclude WTO-required action is in conformity with that obligation.

60. 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."[88] 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

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[84] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 93.

[85] *US – OCTG from Argentina (Article 21.5) (AB)*, para. 121 (emphasis added).

[86] India First Submission, para. 73 and n.78.

[87] *US – Section 301*, para. 7.54.

[88] India First Submission, para. 74.

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.[89] The alternative to this distinction would be to require Members to write into their domestic laws specific limitations on the exercise of discretion in order to avoid even the *possibility* of WTO-inconsistent action. Furthermore, to preserve their rights with respect to non-Members, this position would require Members to maintain different laws for Members and non-Members, respectively. Neither such obligation now exists.

61. Finally, the laws and regulations India now challenges were nowhere mentioned in India's request for consultations.[90] Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request "including identification of the measures at issue and an indication of the legal basis for the complaint." India has failed to satisfy this obligation and therefore the laws and regulations are outside the terms of reference of this proceeding.

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

62. India argues that, "[i]n the event that the Panel considers that the Enhanced Bond Requirement does not constitute specific action against dumping," it should conclude that the directive "is inconsistent with Article X:3(a) as applied to shrimp because it has not been administered in a uniform, impartial and reasonable manner."[91]

63. Article X:3(a) states:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all of its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

64. Paragraph 1 of Article X, in turn, refers to

> [l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any party, pertaining to the classification or the

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[89] *See Japan – Alcohol (AB)*, p. 14 ("Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*.").

[90] WT/DS345/1 (June 6, 2006).

[91] India First Submission, paras. 104-105.

> valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use.

65. India has failed to establish a breach of Article X. As the Appellate Body observed in *EC – Poultry*, "Article X relates to the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures." Thus, "to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994."[92] India's claims relate to the substantive content of the additional bond directive – including the criteria it uses to identify importers subject to the additional bond amount,[93] and the process it contains for obtaining a bond amount based upon importer-specific risk.[94]

66. 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 ordinary meaning of "uniform," as relevant here, is, "Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[95] The directive contains various criteria for identifying importers of merchandise with elevated default risk, and CBP applies these criteria uniformly. Importers of shrimp met the criteria – shrimp was agriculture/aquaculture merchandise subject to an antidumping order, which for reasons explained above, CBP had determined to have a higher risk of default than other merchandise. No other order issued since the directive was announced has had the attributes identified in the directive – in particular, no other order has since been issued with respect to agriculture/aquaculture merchandise and CBP has not identified other sectors with defaults as significant as those with respect to agriculture/aquaculture.

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[92] *EC – Poultry (AB)*, para. 115; see also *EC – Bananas III (AB)*, para. 200 ("The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.").

[93] India First Submission, para. 105 (citing paras. 96-99).

[94] India First Submission, para. 105 (citing paras. 96-99).

[95] See *Argentina – Bovine Hides*, para. 11.80 (quoting *The New Shorter Oxford English Dictionary*, Vol. II at 3488 (1993)).

67. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."[96] Treatment in an unbiased and fair manner is distinguishable from identical treatment. For example, the panel in *US – Japan Sunset* rejected Japan's contention that requiring foreign producers/exporters to provide more information than domestic produces in USDOC's sunset review resulted in non-impartial administration of U.S. sunset laws.[97] The panel explained that because "foreign exporters will be the main source of information regarding dumping, or likelihood of continuation or recurrence of dumping," the quantity of information required from foreign exporters will necessarily differ.[98] Similarly, as explained above, the risk to the revenue differs between importers, depending on the amount of potential duty liability requiring security and the risk of default. 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.

68. "Reasonable" means "[i]n accordance with reason; not irrational or absurd."[99] In *Argentina – Bovine Hides*, the panel found the administration of Argentine customs law unreasonable because there was "no reason" for allowing Argentinean hide buyers to see documents containing their customers' business confidential information.[100] 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.

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[96] See *US – OCTG from Argentina (AB),* para. 272 *(quoting New Shorter Oxford English Dictionary* 1318 (1993).

[97] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.306.

[98] *Id; see also Argentina – Bovine Hides,* paras 11.99-.101 (finding that in providing private parties access to confidential business information of parties with conflicting commercial interests constituted a partial administration of Argentine customs laws).

[99] See *Dominican Republic – Cigarettes (Panel)*, para. 7.385 (quoting *New Shorter Oxford English Dictionary* 2496 (1993)).

[100] *Argentina – Bovine Hides*, paras. 11.87, 11.91-92.

E. The Additional Bond Directive Does not Breach GATT Article XI, GATT Article II, or GATT Article I

1. The Directive Is Not Inconsistent with GATT Article XI:1

69. Article XI:1 of the GATT states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

70. In the alternative to its claim under GATT Articles I and II, India argues that the bond directive is an "import restriction" prohibited by GATT Article XI:1. As the Panel in *India – Autos* observed,

> On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. ... [T]he Panel considers that the expression 'limiting condition' used by the India-Quantitative restrictions panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself.[101]

71. 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. Importers can enter their merchandise using single entry bonds, cash deposits or security other than a continuous entry bond. Thus, like the bond measure at issue in *Dominican Republic – Cigarettes*, failure to provide an additional bond based on the directive does not prevent imports.[102]

72. Furthermore, as noted earlier, there is no evidence that the bond directive in fact restricted imports of shrimp. To the contrary, the analysis prepared by GAO indicates that the

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[101] *India – Autos*, para. 7.269; see also *Dominican Republic – Cigarettes (Panel)*, para. 7.252.

[102] *Dominican Republic – Cigarettes (Panel)*, para. 7.255.

share of imports from countries subject to the additional bond directive *increased* after the directive was announced, and again after CBP began requiring bonds pursuant to it.[103]

2. The Directive Is Not Inconsistent with GATT Article II

73. India makes a conditional claim that, if the directive is considered a "duty, tax, or charge," it is inconsistent with GATT Article II:1(a) and (b).[104] Article II:1(a) and (b) provide:

> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

74. 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."

3. The Directive Is Not Inconsistent with GATT Article XIII

75. GATT Article XIII, which is entitled "Non-discriminatory Administration of Quantitative Restrictions" provides

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[103] GAO Study at 24.

[104] India First Submission, para. 106.

> No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

76. 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.[105] This statement is not a sufficient basis to conclude that the directive is a "quantitative restriction", and, as noted previously, is simply incorrect. As the GAO analysis demonstrates, the directive has had no impact on actual imports of shrimp.[106]

77. Furthermore, even if the panel were to conclude that the directive is a "prohibition or restriction" within the meaning of Article XIII, the facts demonstrate that it is applied in a nondiscriminatory fashion. The directive is designed to address collection risk, and as demonstrated above, CBP had a reasonable basis to believe that the shrimp order carried with it greater collection risk than the orders that followed. Under the directive, goods that carry similar collection risk as shrimp are "similarly prohibited or restricted" insofar as the directive provides for CBP to identify other orders and establish special additional bond amounts for other merchandise deemed similarly risky. For this reason as well, it is not inconsistent with Article XIII.

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

78. 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.[107] 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.

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[105] India First Submission, para. 113.

[106] GAO Study at 24.

[107] India First Submission, paras. 106-114.

F. 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

79. Article 18.5 of the Antidumping Agreement and Article 32.6 of the SCM Agreement provide that "Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations."

80. India claims that the United States "has acted inconsistently with its obligations under Article 18.5 of the Antidumping Agreement and under Article 32.6 of the Subsidies Agreement" because it has not informed the Committee on Antidumping Practices and the Committee on Subsidies and Countervailing Measures of the additional bond directive.[108] However, contrary to India's assertion, the additional bond directive relates to the administration of U.S. customs regulations regarding bond requirements, not the "administration of laws and regulations relevant to" the Antidumping or SCM Agreements.

81. 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. As India elsewhere describes that document, the directive contains "administrative procedures applicable to continuous bonds."[109] India's theory would suggest that any modification to a customs administrative procedure that happens to affect merchandise subject to antidumping or countervailing duties – whether related to transshipment, verification procedures, etc. – must be notified to the ADP and SCM Committees. This argument does not accord with the text of the Agreements, and would result in a substantial expansion of the mandate of the Committees.

82. Furthermore, it should be noted that neither Article 18.5 nor Article 32.6 specify when a Member must notify the measures specified therein. Thus, even if the Panel concludes that the actions in question are changes in the administration of "laws and regulations relevant to" the Antidumping and SCM Agreements, India fails to demonstrate how the fact that the United States has not at this time notified the measures to those Committees constitutes a breach of the Agreements.

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

83. 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. Article XX(d) and the chapeau of Article XX provide:

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[108] India First Submission, paras. 102-103.

[109] India First Submission, para. 22.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

84. To demonstrate that a measure is justified under Article XX(d), a Party must establish that (1) the measures for which justification is claimed secure compliance with other laws or regulations; (2) the other laws or regulations are not inconsistent with the provisions of the GATT 1994; and (3) the measures for which justification is claimed are necessary to secure compliance with those other laws or regulations.[110] If the measure meets these criteria, the measure is provisionally justified and the Panel must then determine whether application of the measure is a "disguised restriction on international trade" or "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Whether the measure is provisionally justified under paragraph (d) should be examined prior to considering whether the application of the measure is consistent with the chapeau.[111]

1. The Directive Is "Necessary to Secure Compliance" with Other Laws or Regulations

85. 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. Under 19 U.S.C. 1673e(a)(1), when an antidumping duty order is published, customs officers are directed to:

> assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the

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[110] *Argentina – Bovine Hides*, para. 11.290.

[111] *US – Shrimp (AB)*, paras. 118-120.

> merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based...

86. As noted previously, USDOC is the agency responsible for determining "the amount by which the normal value of the merchandise exceeds the export price." Under the U.S. retrospective duty assessment system, the "date on which the administering authority receives satisfactory information upon which the assessment may be based" is generally the date of completion of the administrative review applicable to those entries.[112] Thus, upon assessment, importers are required to pay an antidumping duty in the amount determined by USDOC.

87. 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 refers throughout to 19 C.F.R. 113.13, which governs the amount of bond that CBP shall require and itself provides that the amount to be established must be "adequate to protect the revenue and insure compliance with the law and regulations." 19 C.F.R.113.13(c)). Likewise, CBP established the bond directive pursuant to its authority under 19 U.S.C. 1623, which permits it to require that an importer provide "such bonds or other security as [the Secretary of the Treasury or customs officers] may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation or instruction" enforced by CBP. Furthermore, the directive was issued at a time when CBP faced a serious and growing noncollection problem associated with antidumping duties, with defaults in excess of $225 million in the year the directive was issued.[113] It is beyond dispute that securing otherwise unsecured liability tends to result in greater duty collection.

88. None of the aforementioned laws and regulations are themselves WTO-inconsistent.[114] With respect to U.S. law governing the assessment of antidumping duties following an administrative review, retrospective duty assessment is expressly contemplated by Article 9.3.1 of the Antidumping Agreement. Thus, the remaining question for purposes of Article XX(d) is whether the measure is "necessary."

89. The Appellate Body has described the word "necessary" as "normally denot[ing] something 'that cannot be disposed with or done without, requisite, essential, needful.'"[115] The Appellate Body has noted that "necessary…'is not limited to that which is 'indispensible' or 'of absolute necessity' or inevitable'," though a "'necessary measure" is "located significantly

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[112] If no administrative review is requested, duties are assessed at the cash deposit rate upon entry.

[113] *See Korea – Beef (Panel)*, para. 658 (finding that dual retail system was "put in place, at least in part, in order to secure compliance with the Korean legislation against deceptive practices," noting that it was "established at the time when...acts of misrepresentation were widespread in the beef sector" and "the dual retail system does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef.").

[114] With respect to India's challenge to the "laws and regulations authorizing" the bond directive, see Section IV.C, supra.

[115] *Korea – Beef (AB)*, paras. 160-61.

closer to the pole of 'indispensible' than to the opposite pole of simply 'making a contribution to'."[116] To evaluate whether a measure meets this requirement, the Appellate Body has used a weighing and balancing approach, taking into account a number of different factors, including the impact on trade of the measure being challenged, the importance of the interests or values pursued, and whether there exists a reasonably available alternative that is consistent with a Member's WTO obligations.[117] [118]

90. The directive is indeed "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. It was applied to shrimp due to the significant potential unsecured liability in question (attributable to the fact that shipments have been in excess of $2 billion) and the significant risk of default associated with those entries. Requiring additional security pending final determination of duties owed is a standard approach among WTO Members to address the precise problem confronted by the United States: potential duty liability unsecured pending final assessment.

91. With the introduction of the October 2006 Notice, CBP has adopted a process for evaluating risk that provides an even more tailored approach to establishing bond amounts. Under this process, the bond amount required of an importer reflects the particular importer's actual ability to pay duties lawfully owed, and thus the "necessity" of any additional amount. While India complains that even requiring basic information from an importer regarding its ability to pay is somehow inconsistent with U.S. obligations, there is no alternative available to the United States that would allow it to ensure that the revenue is collected.

92. In this regard, it is recognized that Members have the right to determine their own desired level of protection with respect to the objective pursued. As the Appellate Body noted in *US-Gambling*,

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[116] *Korea – Beef (AB)*, paras. 160-61.

[117] *Canada – Wheat Exports (Panel)*, paras. 6.229-239, 6.308-316 (finding that Canada could have adopted an alternative measure of allowing foreign grain to be received into elevators subject to a segregation requirement); *Korea – Beef (Panel)*, paras. 659-674 (finding that alternative measures existed for dealing with misrepresentation of origin); *Korea – Beef (AB)*, paras. 165-172 (upholding *Korea – Beef* panel finding); *EC – Asbestos (Panel)*, paras. 8.204-8.212 (finding that alternative measures of controlled use or reliance on existing international standards were not reasonably available); *EC – Asbestos (AB)*, para. 174 (finding that "controlled use" alternative would not would not allow France to achieve its chosen level of health protection); *US – Section 337*, para 5.26 ("[A] contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.").

[118] The Appellate Body in *Korea – Beef* stated that the "weighing and balancing" process it outlined "is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available ..." *Korea – Beef (AB)*, para. 166.

> An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.[119]

2. The Directive Is Consistent with the Chapeau to Article XX

93. 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."

94. As the Appellate Body explained in *US – Shrimp*,

> There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. ... Third, this discrimination must occur *between countries where the same conditions prevail*.

95. With respect to discrimination, as a threshold matter, if India were to successfully demonstrate that the measure is inconsistent with a provision of the WTO Agreement based on claimed discrimination, the discrimination that would be the basis for that finding "cannot logically" be the basis for a finding of discrimination under the chapeau.[120]

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[119] *US – Gambling (AB)*, para. 308.

[120] *US – Gasoline (AB)*, p. 22 ("the provisions of the chapeau [of Article XX] cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."); *EC – Asbestos (Panel)*, para. 8.227 ("'discrimination' in the introductory clause of Article XX covers both discrimination between products from different supplier countries and discrimination between domestic and imported products.").

96. The Appellate Body observed in *US – Gasoline* that "discrimination in the introductory clause of Article XX covers both discrimination between products from different supplier countries and discrimination between domestic and imported products.[121] The directive as applied results in neither type of discrimination. It provides for additional bond amounts for agriculture/aquaculture merchandise subject antidumping or countervailing duties wherever the merchandise originates, and has been applied to all countries subject to the February 2005 order on shrimp. Nor does it discriminate between domestic and imported products, beyond the simple fact that, like any bond to secure import duties that may later be assessed, it applies to importers. The bond amounts established pursuant to the directive are based on the particular risk associated with the entries in question. Furthermore, under the process described in the October 2006 Notice, importers may obtain a bond amount reflecting the importer's ability to pay and compliance with customs laws and regulations. Thus, even at the level of the individual importer, the Notice provides a neutral, transparent process for CBP to establish bond amounts based on risk.[122]

97. Nor does the directive as applied constitute a "disguised restriction on international trade." The directive was publicized on CBP's web site when initially introduced, and was followed by a clarification similarly publicized. In the interest of greater transparency, in October 2006, CBP published a complete statement of the directive's contents and how it would be applied in the Federal Register, and provided importers with an opportunity to comment formally on the approach CBP had used.[123] Furthermore, the aim of the directive was clear: to address a serious and growing revenue collection problem relating to AD/CVD liability. As applied to shrimp, the terms of the directive, the criteria it uses, and CBP's own analysis prepared prior to its issuance demonstrate that it was designed not to impede imports but to prevent a growing revenue collection problem from becoming insurmountable should assessed antidumping duties on over $2.5 billion in shrimp entries exceed cash deposits.

V. CONCLUSION

98. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

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[121] *EC – Asbestos (Panel)*, para. 8.227 (citing *US – Gasoline (AB)*).

[122] This is in contrast to the "rigid and unbending standard," and the process lacking "transparency and procedural fairness", that the Appellate Body described as resulting in arbitrary and unjustifiable discrimination in *US – Shrimp*. *US – Shrimp (AB)*, para. 177.

[123] October 2006 Notice at 62,277-78.

LIST OF U.S. EXHIBITS

United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties
(WT/DS345)

U.S. Exhibit	Description
1	19 U.S. Code of Federal Regulations, § 113.13
2	India Customs Act, section 18
3	Kyoto Convention on the Simplification and Harmonization of Customs Procedures (done at Kyoto on 18 May 1973 and entered into force on 25 September 1974) (as amended June 1999), Ch. 3
4	International Chamber of Commerce International Customs Guidelines (10 July 1997), www.iccwbo.org/home/statements_rules/rules/1997/customsdoc.asp
5	Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,669 (Mar. 9, 2007)
6	Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,658 (Mar. 9, 2007)