UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND
(WT/DS343)

UNITED STATES – CUSTOMS BOND DIRECTIVE FOR MERCHANDISE SUBJECT TO ANTIDUMPING/COUNTERVAILING DUTIES **(WT/DS345)**

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

JUNE 18, 2007

1. The actions challenged in this dispute were taken in the context of, as Thailand put it, "exceptional increases" in unpaid antidumping duties in the United States. Since 2003, importers have defaulted on hundreds of millions of dollars of duties lawfully owed to the United States. The duties in question were unsecured by cash deposits, sufficient bonds, or other guarantees: when an importer defaulted, Customs and Border Protection (CBP) could not recover the duties owed from the sureties that ordinarily protect CBP from default risk.

2. CBP's analysis indicated that importers of agriculture/aquaculture merchandise in particular were the source of the bulk of the defaults. At the same time, a new AD petition on agriculture/aquaculture merchandise was under consideration: 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. Thailand in its statement misconstrues this point. When the value of imports is large, this suggests that, all other factors being equal, the *risk* of a large, unsecured liability is higher. Based on its analysis of default risk and given the significant potential unsecured liability, CBP decided to apply a new bonding directive to shrimp importers subject to the antidumping order. The directive sets out criteria for requiring additional bond amounts from those importers that opt to use a continuous bond as security for their entries. The directive provides for an importer-specific risk assessment as the basis for additional bond amounts, and importers of Indian and Thai shrimp have requested and obtained individualized bond amounts through that process.

3. ***The Ad Note to Article VI Permits Reasonable Security Requirements*:** India and Thailand offer a range of theories on how the GATT 1994, the Antidumping Agreement, and (in the case of India) the SCM Agreement should be applied to analyze a security requirement for antidumping and countervailing duties. If accepted, India and Thailand's various theories would mean that security pending final assessment of antidumping and countervailing duties is *nowhere* permitted by the Antidumping Agreement, SCM Agreement, or the GATT. Such a conclusion would compromise Members' ability to maintain retrospective duty assessment systems, despite the fact that these systems are specifically contemplated by the text of the Agreement. Moreover, they fail to properly analyze the one provision that most clearly addresses these requirements: the Ad Note to GATT Article VI.

4. The additional bond amounts required pursuant to the directive are security for antidumping duties lawfully owed. The Ad Note to Article VI, which specifically addresses security requirements for antidumping and countervailing duties, provides that, "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." Thus, a Member may require that an importer provide "reasonable security" for the payment of antidumping or countervailing duties.

5. India and Thailand, however, conflate the Ad Note to Article VI with Article 7 of the Antidumping Agreement, and, through a series of unsupported assertions, read into the text of the Ad Note obligations that do not exist. Today, Thailand claims that the Ad Note has been "superseded" by Article 7. India, likewise, asserts that "the United States cannot rely upon the Ad Note independently of Article 7 of the Antidumping Agreement or Article 17 of the Subsidies Agreement to justify the Enhanced Bond Requirement." Both cite to a Committee

Report suggesting the precise opposite. That Committee Report notes that GATT "Article VI made no mention" of the provisional measures referenced in Article 7 of the AD Agreement, and thus if anything suggests that the measures referred to in the Ad Note to Article VI are *not* the same as those contained in Article 7.

6. Nor does the text support Thailand and India's claim that security that exceeds the amount permitted under Article 7 of the AD Agreement cannot be "reasonable." Unlike Article 7, 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." Thailand and India's interpretation also does not accord with ordinary customs practice, which provides context through the reference in the Ad Note 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. The actual amount of liability cannot be known at the time of entry: indeed, this is the reason why customs authorities require bonds instead of assessing duties. As with any insurance policy, to establish the amount of security required, a customs authority must consider both the amount of potential liability in the event of default and the likelihood of default.

7. In this regard, it is important to note that the United States is not, as Thailand implies in its submission, suggesting that Members have "carte blanche" to impose bond requirements – rather, as made clear by the Ad Note, a Member may require bonds as security for antidumping and countervailing duties provided the security is "reasonable." In the case of shrimp, the bond amounts required are "reasonable." With respect to the amount of potential liability, in excess of $2.5 billion worth of shrimp imports had entered the United States from countries subject to the antidumping order during calendar year 2003. No other U.S. antidumping case relating to agriculture or aquaculture merchandise has involved imports of this magnitude.

8. With respect to the risk of default, after facing hundreds of millions of dollars in uncollected antidumping and countervailing duties on agriculture/aquaculture merchandise, 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 high turnover rates in the industry as a whole and the fact that many companies are highly leveraged or have little capital. Combined, these factors supported an increase in the bond amount ordinarily required of importers. The preliminary results of the first administrative review appear to have borne out CBP's assessment of potential unsecured liability: preliminary assessment rates have exceeded the cash deposit rate for several importers, often by a significant margin. If similar rates are issued in the final results, CBP will have secured itself, at least in part, against defaults on these increases by requiring additional bond amounts beyond the cash deposit.

9. Furthermore, CBP has published a process to tailor bond amounts to individual importers' risk of default, a process that even India conceded in its first written submission introduces an "indicia of apparent reasonableness" to the directive. With this process, CBP relies on importer-specific information regarding the company's history of compliance with customs laws and regulations and its ability to pay in order to establish the bond amount

necessary to secure CBP against default.

10. ***Additional Bond Directive Is Not a "Specific Action Against Dumping" or "Subsidy"*** **:** Furthermore, even aside from the fact that the directive is permitted in order to secure amounts legally owed to the United States, the directive is not a "specific action against dumping" or "subsidy", despite India and Thailand's claims. The directive is not "specific" to dumping or subsidy – it is not based on the constituent elements of dumping or subsidy, but rather is based on default risk. It is not an action taken "against" dumping or subsidization, but rather is taken to secure an unsecured liability. And the record simply does not support India and Thailand's assertions regarding the impact of the directive on imports. Data on Thailand's imports offer a case in point: after the petition was filed in late 2003, but before the bond directive was announced, Thailand's import share decreased from 30% of total U.S. shrimp imports to 15%. After the bond directive was announced in July 2004, Thailand's share actually increased significantly, returning to approximately 30%. India's data fails to rebut this analysis. Based on this analysis, there is no evidence that the bond directive in fact adversely affected imports of merchandise subject to the antidumping order.

11. As for Thailand and India's assertions that various actions by sureties and other private parties support their claim that the directive itself is an action "against" dumping or subsidization, these assertions are without merit. 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.

12. Finally, it must be emphasized that the additional bond amounts required under the directive constitute "reasonable security" within the meaning of the Ad Note to GATT Article VI. Therefore, the directive is "in accordance with the provisions of GATT 1994," as Article 18.1 requires.

13. ***GATT Article X:3(a)*****:** With regard to GATT Article X, India and Thailand have failed to establish a breach. Even under their theory that GATT Article X applies, the evidence demonstrates that CBP administers the bond directive in a "uniform, impartial and reasonable" manner. The directive contains various criteria for identifying importers of merchandise with elevated default risk, and CBP applies these criteria uniformly. Shrimp was the first AD order imposed on agriculture/aquaculture merchandise after the directive was issued. Using the criteria in the directive, 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. CBP's actions were also "reasonable" – it faced in excess of $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 and Thailand fail 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.

14. ***GATT Article XI*****:** With respect to GATT Article XI, as was the case with the bond measure at issue in *Dominican Republic – Cigarettes*, the bond directive does not prevent

importers from importing shrimp into the United States. The directive does not mandate an increased bond amount – as noted previously, importers can obtain individual bond determinations and, depending on their ability to pay and history of compliance with U.S. customs laws and regulations, may not be required to obtain a higher bond. Furthermore, even for those importers that have not demonstrated an ability to pay or have not complied with U.S. customs laws in the past, CBP allows them to import even without participating in the process outlined in the directive or providing additional bond amounts. Importers have a range of mechanisms available to them to import into the United States without being subject to the additional bond directive, including single entry bonds, cash deposits or security other than a continuous entry bond.

15. ***GATT Articles I and II*:** With respect to Thailand and India's claims under GATT Article I, contrary to their assertions, the bond directive does not improperly discriminate between products originating in Thailand and India and products originating in other countries. The directive has been applied to all shrimp subject to the AD orders, and the U.S. action of increasing bond amounts merely addressed the particular risks associated with these entries.

16. As for Thailand and India's claims under GATT Article II, the additional bond directive itself does not constitute a "duty" (antidumping or otherwise). Likewise, the additional bond directive does not constitute an "other charge."

17. ***GATT Article XX(d)*:** Furthermore, nothing in the GATT 1994 prevents the directive since it 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 laws and regulations requiring the payment of duties owed to the U.S. Treasury. As explained in our first written submission, 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. This is evident on its face, including in the criteria the directive uses to determine bond amounts. The directive is "necessary" to secure compliance with U.S. laws and regulations. It 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.

18. The three mechanisms Thailand cites in support of its view that there are reasonable alternatives to the additional bond directive – the cash deposit requirement and civil recovery proceedings, as well as the basic bond amount that Thailand discussed today – do nothing to address the particular problem CBP faced. Cash deposits do not secure liability resulting from an increase in duties upon assessment above the cash deposit rate, because they are limited to the cash deposit rate. Likewise, civil recovery proceedings are not a reasonable alternative to address the problem faced by CBP. Like cash deposits, CBP has used civil recovery to try to recover duties when an importer defaults, yet notwithstanding these efforts, uncollected duties have continued to accrue. Civil recovery produces no remedy if the importer cannot be reached or has no attachable assets by the time the proceeding has concluded. And, of course, notwithstanding cash deposits and civil recovery, CBP experienced the defaults in question. The same is true of the basic bond requirement that Thailand notes today. It was in effect, but failed

to stop the defaults at issue.

19. 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." It has been administered uniformly, and does not discriminate.

20. ***India's "As Such" Claims*:** As explained in our submission, with respect to India's claims that the directive "as such" breaches various provisions of the WTO Agreements, India either fails to even articulate a legal theory as to why the directive "as such" breaches the particular obligation it identifies, misstates the facts, or both. For example, regarding its claim under Article 18.1, India does not explain why the directive "as such" constitutes specific action against dumping or subsidization inconsistent with the GATT 1994, and asserts incorrectly that the directive "requires" importers of merchandise subject to an antidumping or countervailing duty order to furnish an enhanced continuous bond. 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.

21. Perhaps most troubling from a systemic standpoint, however, is India's claim that nine U.S. customs laws and regulations are "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 simply because they allegedly create "the very existence of discretion" to act in a WTO-inconsistent manner. India's argument does not accord with the text of the Agreement, is at odds with how numerous GATT and WTO panels and the Appellate Body have analyzed whether a measure as such breaches an obligation and, if accepted, would mean that a single WTO-inconsistent administrative act could serve as the basis for finding that a Member's entire legal system is WTO-inconsistent. Thailand does not make this argument, and neither Thailand nor any of the third parties so much as refer to it.

22. Under India's logic, any law granting "authority" to collect revenue – ranging from Article 8 of the United States Constitution to the 1789 Act of Congress establishing the U.S. Treasury Department – would be implicated in this dispute, as they also "authorize" CBP to secure the revenue, including through bonds. India's claims should be rejected: A measure that is not itself inconsistent with a WTO provision may not be found in breach simply because it may provide "authority" for a Member to take a WTO-inconsistent act. The distinction between mandatory and discretionary action in GATT/WTO panel reports 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. India's as-such claims provide a fine illustration of why that is – Members have not committed to remove from their laws and regulations the numerous instances of discretionary authority that might be exercised in a WTO-inconsistent manner. The WTO Agreement did not represent any departure from the GATT 1947 in this regard, and the continued application of the mandatory/discretionary distinction in WTO dispute settlement both follows from this fact and is necessary to avoid the profoundly disturbing implications of India's arguments.