

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

*Report of the Panel*



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## I. INTRODUCTION

### A. COMPLAINT OF INDIA

1.1 On 6 June 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 the General Agreement on Tariffs and Trade 1994 (the "*GATT 1994*"), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") and Article 30 of the Agreement on Subsidies and Countervailing Measures (the "*SCM Agreement*") with respect to certain measures imposed by the United States on imports of certain frozen warmwater shrimp from India<sup>1</sup>. India and the United States held consultations, which failed to resolve the dispute.

1.2 On 13 October 2006, India requested the establishment of a panel pursuant to Article XXIII of the *GATT 1994*, Articles 4 and 6 of the *DSU*, Article 17 of the *Anti-Dumping Agreement* and Article 30 of the *SCM Agreement*.<sup>2</sup>

1.3 At its meeting on 21 November 2006, the Dispute Settlement Body (the "*DSB*") established a Panel pursuant to the request of India in document WT/DS345/6, in accordance with Article 6 of the *DSU*.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS345/6, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."<sup>3</sup>

1.5 At its meeting on 26 October 2006, the DSB also established a Panel pursuant to the request of Thailand in document WT/DS343/7, which dealt substantially with the same matter.

1.6 On 19 January 2007, India requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the *DSU*. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 India also requested the Director General to select the same persons to serve as panelists for both DS343 and DS345, in accordance with Article 9.3 of the *DSU*, which provides:

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<sup>1</sup> WT/DS345/1.

<sup>2</sup> WT/DS345/6.

<sup>3</sup> WT/DS345/7.

"If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

1.8 On 26 January 2007, the Director-General composed the Panel as follows:

Chairperson: Mr. Michael Cartland

Members: Mrs. Enie Neri de Ross  
Mr. Graham Sampson

1.9 Brazil, China, the European Communities, Japan, and Thailand reserved their rights to participate in the Panel proceedings as third parties.<sup>4</sup>

1.10 The Panel held the first substantive meeting with the parties on 6 and 7 June 2007. The session with the third parties took place on 7 June 2007. The Panel's second substantive meeting with the parties was held on 24 and 25 July 2007.

1.11 On 4 September 2007, the Panel issued the Descriptive Part of its Panel Report. The Interim Report was issued to the parties on 9 October 2007 and the Final Report was issued to the parties on 13 November 2007.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the implementation of the enhanced continuous bond requirement (hereafter the "EBR")<sup>5</sup> by the United States and its application to certain frozen warmwater shrimp imported from India. India presents claims both *as such* and regarding its application.

### A. THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR")

2.2 On 9 July 2004, US Customs and Border Protection (hereafter "US Customs") amended its existing bond requirements to include new guidelines specific for "covered cases" within "special categories" of merchandise. The EBR has been imposed pursuant to the Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991 (the "1991 Customs Bond Directive"), as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases (hereafter the "July 2004 Amendment")<sup>6</sup>, the document entitled "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" (hereafter the "August 2005 Clarification")<sup>7</sup>, the document entitled "Current Bond Formulas" posted by US Customs on its website on 24 January 2005 (hereafter "Current Bond Formulas")<sup>8</sup>, and the Notice published in the United States Federal Register entitled Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements (hereafter the "October 2006 Notice").<sup>9</sup> The July 2004 Amendment, the August 2005 Clarification, the document Current Bond Formulas and the October 2006 Notice is referred to collectively as the "Amended CBD". US Customs has identified as a primary objective of the

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<sup>4</sup> WT/DS345/7.

<sup>5</sup> In its Request for Establishment of the Panel, India uses the term "Continuous Bond Requirement", instead of EBR to refer to the measure at issue.

<sup>6</sup> Exhibit IND-3.

<sup>7</sup> Exhibit IND-4.

<sup>8</sup> Exhibit IND-5.

<sup>9</sup> Exhibit IND-6.

directive, "continued vigilance ... to ensure collection of all appropriate anti-dumping and countervailing duties."<sup>10</sup> On 1 February 2005, US Customs implemented the EBR with respect to all imports of certain frozen warmwater shrimp subject to anti-dumping duties (hereafter "subject shrimp").<sup>11</sup> Prior to 1 February 2005, the United States had also sent notices to 33 importers beginning on 6 August 2004, of which 12 importers furnished enhanced bonds.<sup>12</sup> To date, "agriculture/aquaculture merchandise" is the only merchandise designated as a "special category" and "shrimp covered by anti-dumping or countervailing duty cases" is currently the only "covered case" designated within the agriculture/aquaculture category.

**B. IMPOSITION OF CONTINUOUS BONDS AND OTHER SECURITY REQUIREMENTS IN THE CONTEXT OF THE US RETROSPECTIVE ANTI-DUMPING AND COUNTERVAILING DUTY ASSESSMENT SYSTEM**

2.3 According to the United States, the EBR in combination with cash deposits is imposed to ensure payment of anti-dumping or countervailing duties under its retrospective duty assessment system. Unlike the systems employed in many other countries, the US retrospective system determines final liability for anti-dumping and countervailing duties 12 months following the anniversary month of the relevant anti-dumping duty order after merchandise is imported into the country at the end of assessment or "administrative" reviews.<sup>13</sup> Certain of the following aspects of the US system discussed below, may prove relevant to an objective assessment of India's claim.

**1. Overview of anti-dumping and countervailing duty procedures**

2.4 Under the US retrospective duty assessment system, the United States determines, through an investigation, whether margins of dumping or countervailable subsidisation exist, and whether dumped imports or countervailable subsidisation cause or threaten to cause material injury to a domestic industry. During the preliminary phase of the investigation, the US International Trade Commission (hereafter "USITC") determines whether a reasonable indication exists that an industry in the United States is materially injured, whether a reasonable indication exists that an industry in the United States is threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of subject merchandise investigated. USDOC also preliminarily determines whether a reasonable basis exists to believe that dumping or countervailable subsidisation is occurring. If USDOC makes an affirmative determination, it will issue a preliminary determination, which permits the imposition of provisional measures, historically in the form of a cash deposit, bond, or other security requirement, to ensure payment if anti-dumping or countervailing duties are ultimately imposed. The preliminary determination sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Subsequently, USDOC makes a final determination as to whether dumping or countervailable subsidisation is occurring. If this determination is affirmative and USITC also issues a final determination that imports of subject merchandise in the investigation were causing material injury to the US domestic industry or threatening with material injury, or that the establishment of an industry in the United States is materially retarded by reason of subject merchandise in the investigation, thereafter USDOC issues a public notice, denominated under US law as an anti-dumping or countervailing duty order. In the anti-dumping or countervailing duty order, the US

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<sup>10</sup> Exhibit IND-3.

<sup>11</sup> US Customs applied the EBR to all importers of subject shrimp under an anti-dumping order from Brazil, China, Ecuador, India, Thailand, and Viet Nam on 1 February 2005. See 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 (1 February 2005), Exhibit IND-13.

<sup>12</sup> See United States' responses to First Set of Panel Questions, paras. 34-35.

<sup>13</sup> See generally Title VII of the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq.*; see also 19 C.F.R. § 351.101 *et seq.*

Department of Commerce sets forth ad valorem cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other producers/exporters. Pursuant to the order, importers must post a cash deposit of estimated anti-dumping or countervailing duties for each import transaction. This cash deposit is based on the overall margin of dumping or countervailable subsidisation found for the exporter or producer during the investigation phase.

2.5 During the anniversary month following a final determination in the investigations phase, importers, exporters, producers, and domestic interested parties may request that USDOC conduct an assessment review, often referred to as an "administrative review" of the import transactions that occurred in the prior year. During this review, USDOC analyses all of the import transactions for the period of review (i.e., the prior 12 months) to determine the final amount of the anti-dumping or countervailing duty payable on imports from each producer or exporter for which USDOC received a request for review.

2.6 Upon USDOC's completion of an administrative review, US Customs applies the assessment rate provided by USDOC to the customs value of each entry to determine the amount of final liability. If the amount of the cash deposit is greater than the amount of final liability, US Customs refunds the amount collected in excess of the final liability, together with interest on the excess amount. Alternatively, if the amount of final liability exceeds the amount of the cash deposit, US Customs issues a bill to the importer for payment of the difference in the amounts together with interest on the difference in the amounts. During the administrative review, USDOC may establish a new cash deposit rate for each producer or exporter, on the basis of that producer or exporter's transactions over the period of review. This new ad valorem cash deposit rate will be applied to future imports from the producer or exporter. USDOC analyses the import transactions of each producer or exporter subject to the review to calculate a new cash deposit rate going forward. For those entries not covered by a request for an administrative review, USDOC instructs US Customs to assess anti-dumping or countervailing duties at the cash deposit rate required upon entry.

2.7 Due to the design of the US retrospective system, the dumping or subsidisation calculations in the administrative review are based on different transactions than those evaluated during the investigation. The investigation evaluates the pricing behaviour of producers and exporters based on transactions completed during a period of time prior to the initiation of the anti-dumping or countervailing duty investigation. In contrast, an administrative review evaluates pricing behaviour during later time periods.<sup>14</sup> As a result of this, the dumping or subsidisation margins calculated in the administrative review may be either higher or lower than the margins calculated in the investigation. According to the United States, the EBR attempts to ensure full collection of anti-dumping or countervailing duties by securing against the possibility that the margin will increase from the time of the investigation until calculation of the final duty liability during the administrative review, and that importers will default on payment of increased duties.<sup>15</sup>

## **2. Timeline for anti-dumping and countervailing duty procedures**

2.8 Under US law, USDOC has a finite period to complete its anti-dumping or countervailing duty investigation and issue an anti anti-dumping or countervailing duty order, if any. USDOC may extend the deadlines for the preliminary and final determinations, but cannot extend the investigation beyond 407 days. US law provides that USDOC ordinarily must complete an administrative review within 365 days. USDOC may extend the deadlines for issuing preliminary and final results of the

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<sup>14</sup> The first administrative review evaluates transactions occurring from the date of imposition of provisional measures (if any) in the preliminary determination through the end of the twelve-month period following imposition of the anti-dumping duty order, generally a period of 18 months. All subsequent administrative reviews generally evaluate transactions occurring during the preceding 12 months.

<sup>15</sup> United States' Responses to First Set of Panel Questions, para. 58.

assessment review, but the review may not exceed 545 days. Specifically, the following is an overview of applicable time limits:

- In the petition phase of an anti-dumping or countervailing duty investigation, USDOC has 20 days (which may be extended to 40 days, only in the case of an anti-dumping investigation) to determine whether to initiate an investigation after it receives a petition to investigate dumping or countervailable subsidisation.
- In the preliminary phase of an anti-dumping or countervailing duty investigation, after USDOC initiates the investigation, USITC has 45 days (which may be extended to 65 days) from the date the petition is filed to make a preliminary injury determination. If USITC makes a preliminary affirmative injury determination, then USDOC has 140 days (which may be extended to 190 days) in the case of a dumping investigation, or 65 days (which may be extended to 130 days) in the case of a countervailable subsidisation investigation, from the date it initiated the investigation to make its preliminary determination of the existence of dumping or countervailable subsidisation.
- In the final phase of an anti-dumping or countervailing duty investigation, USDOC has 75 days (which may be extended to 135 days, only in the case of an anti-dumping investigation) from its preliminary determination to make a final determination of the dumping or subsidisation margins of investigated producers and exporters. If USDOC makes an affirmative final determination, USITC has until 45 days (which may be extended to 75 days) after USDOC's final determination to make its final injury determination. If the USITC makes an affirmative final injury determination, USDOC issues an anti-dumping or countervailing duty order.
- One year after the date the anti-dumping or countervailing duty order is issued, and during the anniversary month of the order every year thereafter, interested parties may request that USDOC conduct an administrative review of individual producers or exporters. After initiating this review, USDOC is required to issue preliminary results of the actual margin of dumping or subsidisation for the entries of the reviewed producer or exporter during the period of review within 245 days (which may be extended to 365 days) after the last day of the anniversary month. USDOC then must issue the final results within 120 days (which may be extended to 180 days) after the preliminary results are published.

#### C. IMPLEMENTATION OF THE AMENDED CONTINUOUS BOND DIRECTIVE (THE "AMENDED CBD")

2.9 Following issuance of the anti-dumping duty order on imports of certain frozen warmwater shrimp on 1 February 2005, US Customs began requiring subject shrimp importers to maintain enhanced bond coverage additional to the cash security required on each entry, in compliance with the Amended CBD.<sup>16</sup>

2.10 Generally, to satisfy US Customs bond requirements, any importer of goods subject to an anti-dumping or countervailing duty order may obtain either a single entry bond, covering a single entry, or a continuous bond, which provides security for all entries filed by the bond principal during the period of time covered by the bond, typically one year. US Customs may also require additional security if US Customs believes that acceptance of an entry secured by a continuous bond would

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<sup>16</sup> As indicated in para.2.2, the United States sent notices to 33 importers prior to publication of the anti-dumping order on 1 February 2005 beginning on 6 August 2004, of which 12 importers furnished enhanced bonds prior to 1 February 2005.

impair US Treasury revenue collection.<sup>17</sup> Previously, under the 1991 Customs Bond Directive, importers subject to an anti-dumping or countervailing duty order that selected the continuous bond option only needed to post a customs bond equal to the greater of \$50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded to the nearest multiple of \$10,000. After publication of the Amended CBD, however, US Customs implemented the EBR and required select importers of merchandise designated as "covered cases" to provide continuous customs bonds in excess of amounts established under the 1991 Customs Bond Directive *and* in addition to cash deposits of estimated anti-dumping duties per entry. Thus, under the Amended CBD, in addition to a minimum of \$50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, US Customs requires importers subject to the EBR to secure a bond for an amount equal to the USDOC cash deposit rate in effect on the date of entry of the merchandise multiplied by the importer's value of imports from the previous year, as well as pay cash deposits equal to the amount of anti-dumping duties per entry. The Amended CBD does not apply to single entry bonds.

2.11 As noted, subject shrimp is currently the only category of merchandise subject to the EBR.

2.12 The following hypothetical example illustrates the combined total security obligations imposed on Indian shrimp importers subject to the EBR, including bond and cash deposit requirements:

- (a) An importer of Certain Frozen Warmwater Shrimp from India subject to the "all others" anti-dumping duty rate imports US\$1 million of subject shrimp during the previous 12 months.
- (b) The value of subject shrimp entered in the present transaction amounts to US\$ 10,000.
- (c) The Bound rate under Harmonized Tariff Schedule (HTS) headings 0303.13.00 and 1605.20.10 is 0 per cent.
- (d) The USDOC anti-dumping duty "all-others" rate (pursuant to anti-dumping order) is 10.17 per cent.
- (e) US Customs applies the Amended EBR formula to the existing importer without making adjustments based on an individualized determination.

	Obligation	Description	Amount
1.	<b>Normal Duties:</b>	As per a 0 per cent bound rate under HTS headings	<b>\$0</b>
2.	<b>Cash Deposit for Anti-dumping Duties:</b>	Upon issuance of an anti-dumping order but prior to an administrative review, US Customs orders the posting of a cash deposit based on the "all-others" rate. <sup>18</sup>	<b>\$1,017</b>

<sup>17</sup> See 19 C.F.R. § 113.13(d). US Customs administers the powers under section 113.13(d) in accordance with 1991 Customs Bond Directive, which provides that "a bond may be demanded with a limit of liability amount greater than that computed using this formula, provided sufficient evidence of high risk is on hand to support the higher amount".

<sup>18</sup> See 19 C.F.R. § 351.211(a). If no administrative review is requested, anti-dumping duties will be assessed at the cash deposits rate for estimated anti-dumping duties as established in the anti-dumping Order and required on that merchandise at the time of entry. (See 19 C.F.R. § 351.212(c)).

	Obligation	Description	Amount
3.	<b>Continuous Bond Amount:</b> <sup>19</sup>	Basic Bond + EBR amounts ( <i>see 3(a) + (b) below</i> ), <u>rounded up</u> by increments of \$10,000 up to \$100,000, and then by increments of \$100,000.	<b>\$200,000</b>
	<i>3(a). Basic Bond Amount:</i>	<i>The greater of either \$50,000 or 10 per cent of the duties, taxes, and fees paid during the preceding year, rounded.</i> <sup>20</sup>	<b>\$50,000</b>
	<i>3(b). EBR Amount:</i>	<i>100 per cent of anti-dumping duty rate established in final Order or most recent administrative review * value of imports in previous 12 months.</i>	<b>\$101,700</b>
4.	<b>Total Obligations:</b>	<b>= 1. + 2. + 3.</b>	<b>\$200,000 continuous bond (covering all shipments in one year period) + \$1017 cash deposit per shipment of \$10,000</b>

2.13 The Amended CBD authorizes US Customs to use the standard formula or instead make individualised bond determinations for subject Indian importers to determine bond amounts. The Amended CBD (specifically the August 2005 Clarification and the October 2006 Notice), provides that US Customs may reconsider bond amounts for individual importers on a case-by-case basis to ensure that duties are collected. However, in order to receive a reduction in the overall bond coverage via an individualized bond determination, an importer must so request, and may submit information on its financial condition related to the risk of non-collection for that importer. US Customs will then determine bond amounts based on the financial information supplied by the importer, US Customs records on compliance history of the importer, the importer's or principal's ability to pay, and other relevant information available to US Customs. Thus, the October 2006 Notice provides that, "[a]bsent exceptional circumstances, the above formulas will determine the bond amounts where a submission has not been made by the principal".<sup>21</sup> To date, the US has indicated that it received 27 requests for individualized bond determinations, of which it has reviewed 22 requests and has granted no reductions to three importers, reductions of 25 per cent to eleven importers, 45 per cent to one importer, 75 per cent to two importers, 80 per cent to one importer and 85 per cent to two importers.<sup>22</sup>

<sup>19</sup> A continuous bond amount secures multiple transactions during its validity. In place of a continuous bond, an importer may elect to post a single-transaction bond, which is equal to the total entry value of merchandise plus all applicable duties, taxes, and fees.

<sup>20</sup> See the 1991 Customs Bond Directive, which fixes a minimum continuous bond amount of \$50,000 and establishes the following formula: (1) In the case of 0 to \$1 million duties/taxes, the bond limit of liability is fixed in multiples of \$10,000 nearest to 10 per cent of duties, taxes and fees paid during the preceding calendar year; or (2) in the case of duties/taxes over \$1 million, the bond liability is fixed in multiples of \$100,000 nearest to 10 per cent of duties, taxes and fees paid during the preceding year.

<sup>21</sup> See Exhibit IND-6.

<sup>22</sup> See United States' responses to First Set of Panel Questions, para. 38; Exhibit US-12. The GAO Report, Exhibit IND-26, p. 42 indicates that the number of shrimp importers totalled 550 through June 2006. Exhibit US-17 refers to 530 shrimp importers in 2004.

2.14 The enhanced continuous bonds provided pursuant to the Amended CBD are released when final liability for anti-dumping duties on goods covered by the bond is assessed, and upon liquidation of the import entries made in account of the goods.<sup>23</sup> As explained in section II.B above, if an administrative review is requested, final liability for anti-dumping or countervailing duties will be determined through such a review. If an administrative review is not requested, final liability will equal the margin of dumping or subsidy published in the final determination; however, this liability will not be assessed until the conclusion of the time period for requesting an administrative review.

D. THE IMPACT OF THE ENHANCED CONTINUOUS BOND REQUIREMENT (THE "EBR") ON SUBJECT SHRIMP IMPORTERS

2.15 Following the application of the EBR, subject shrimp importers have faced significantly higher security obligations than previously to enter merchandise. Specifically, as explained above, subject shrimp importers must satisfy both the Basic Bond and the EBR as well as provide cash deposits equal to the anti-dumping duty rate established in the final determination. Additionally, India submits that sureties have also "typically" required subject shrimp importers to post collateral equal to 100 per cent of the EBR to secure the increased bond amounts.<sup>24</sup> The United States contends that evidence presented to this Panel does not support the conclusion that a majority of companies eligible to act as sureties on bonds securing obligations to US Customs has required certain importers of subject shrimp to post collateral equal to 100 per cent of the EBR.<sup>25</sup> India further submits that subject shrimp importers/exporters have also been required to pay associated fees to secure the increased bond amounts.<sup>26</sup> Due to the fact that enhanced bonds are deemed valid for 12-month periods of liability, but are not released until final liability has been assessed for anti-dumping duties on the goods covered by the bond, shrimp importers/exporters subject to the EBR have also had to furnish concurrent enhanced bonds and concurrent rounds of collateral for bonds covering distinct 12-month periods of liability. In the context of the additional security, collateral and fee obligations, the Government Accountability Office (hereafter "USGAO") in a report (the "USGAO Report")<sup>27</sup> concluded that subject importers/exporters have likely had to forgo other commercial opportunities, although the effects of the EBR could not be fully isolated from other changes occurring at the same time.<sup>28</sup> The USGAO Report also indicated that some importers have required exporters to export on a Delivery Duty Paid ("DDP") basis, thereby making the exporter, as the importer of record, responsible for customs bond requirements.<sup>29</sup> The parties disagree on the impact of the increased security

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<sup>23</sup> Under 19 USC § 1675(b), once the administering authority orders liquidation of entries pursuant to a review, goods are liquidated within 90 days after the instructions to Customs are issued, in most cases.

<sup>24</sup> In its Request for Review of the Interim Report, paragraph 4, India refers to the following statement by the US Court of International Trade (hereafter "USCIT") in *NFI v. US* (Exhibit IND-16, p. 38.): "the testimony of witnesses for two plaintiffs relating to the requirements imposed on plaintiffs seeking new term bonds corroborates the finding that sureties typically require 100 percent collateral in the situations occasioned by the new bonding requirements." See also Exhibit IND-15, which contains, among other documents, a request for collateral from an Indian shrimp importer.

<sup>25</sup> See United States' Request for Review of the Interim Report, para. 4. See also Exhibit US-13, which lists companies to act as sureties on bonds securing obligations to US Customs.

<sup>26</sup> The United States has emphasized that, as a third party beneficiary to the contract between the surety and the bond principal, it is not itself a party to the contract, and thus does not set market-based fees charged by sureties or receive payments: see also United States' first written submission, paras. 8 and 11.

<sup>27</sup> Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain* (hereafter, "USGAO Report"), GAO-07-50 (Washington D.C.: October 2006), Exhibit IND-26.

<sup>28</sup> See USGAO Report, pp. 6, 24 and 35, Exhibit IND-26; see also *NFI v. US*, Exhibit IND-16, p. 31.

<sup>29</sup> See USGAO Report, p. 6, Exhibit IND-26. See also United States' second written submission, para. 30, wherein the United States contends that the use of a DDP basis rather than Cost, Insurance and Freight (CIF) one does not affect the costs borne by the importer of record.

requirements and related collateral requirements and fees on the year-on-year volume of shrimp imports into the United States.<sup>30</sup>

2.16 In October 2006, USGAO concluded in the USGAO Report that the Amended CBD criteria were not transparent or consistently applied.<sup>31</sup> On 13 November 2006, the US Court of International Trade (hereafter "USCIT") ruled that US Customs appeared to have discretion under US law to consider potential anti-dumping or countervailing duty in setting continuous bond amounts<sup>32</sup>; however, it concluded that the administrative record supported the conclusion that the plaintiffs are likely to demonstrate that US Customs arbitrarily and capriciously selected the anti-dumping orders on shrimp as the only "covered case" of merchandise<sup>33</sup>, and that the application of the Amended CBD to the eight complaining importers was arbitrary and capricious.<sup>34</sup> For this reason, the USCIT issued a preliminary injunction *status quo* in favour of eight of the 20 complaining importers, prohibiting the enforcement of any side agreements that limited importation<sup>35</sup>, and ordered US Customs to review the sufficiency of certain EBR bonds amounts in excess of \$1,500,000 posted by the eight complaining importers in the case.<sup>36</sup> The USCIT's final decision on the merits of the complainants' legal claims is pending. After the GAO Report was issued but prior to publication of the USCIT's ruling, US Customs published the Amended CBD criteria in the October 2006 Notice, which further described the process for obtaining individualized bond amounts.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### 3.1 India requests the Panel:

- (a) to find that the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with the provisions of:<sup>37</sup>
  - (i) Article 18.1 of the *Anti-Dumping Agreement* together with Article VI:2 of the GATT and Article 1 of the *Anti-Dumping Agreement* because the EBR is a specific action against dumping not in accordance with the provisions of the *Anti-Dumping Agreement*;
  - (ii) Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement* because the United States has not complied with its obligation to ensure conformity of its laws, regulations and administrative procedures with the provisions of each of these agreements;
  - (iii) Article 32.1 of the *SCM Agreement* together with Article VI:3 of the *GATT 1994* and Article 10 of the *SCM Agreement* because it is a specific action against subsidization not in accordance with the *SCM Agreement*;

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<sup>30</sup> See e.g. India's first written submission, para. 53; India's first oral statement, para. 4; United States' first written submission, para. 46.

<sup>31</sup> See generally, USGAO Report, Exhibit IND-26.

<sup>32</sup> See Exhibit IND-16, p. 42.

<sup>33</sup> See Exhibit IND-16, p. 54.

<sup>34</sup> See Exhibit IND-16, p. 58.

<sup>35</sup> See Exhibit IND-16, p. 73.

<sup>36</sup> See Exhibit IND-16, p. 72.

<sup>37</sup> India's first written submission, para. 115.

- (iv) Articles VI:2 and VI:3 of the *GATT 1994* because it secures duties, and results in charges, in excess of the margin of dumping or in excess of the amount of the subsidy determined to have been granted, as the case may be;
- (v) Articles 9.1, 9.2 and 9.3 (including Article 9.3.1) of the *Anti-Dumping Agreement* and Articles 19.2, 19.3 and 19.4 of the *SCM Agreement* because the EBR is imposed on top of, and in addition to, the collection of cash deposits calculated on the basis of the rate of antidumping or countervailing duties specified in the final determination which alone is permissible under these provisions;
- (vi) Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* because the EBR is applied:
  - on the basis of a risk of default in collections and not because it is judged necessary to prevent injury during the investigation as required by Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*;
  - without regard to, and in excess of, the provisionally estimated amount of duty:
    - equal to the provisionally estimated dumping margin as required by Article 7.2 of the *Anti-Dumping Agreement*; or
    - equal to the provisionally calculated amount of subsidization in Article 17.2 of the *SCM Agreement*;
  - for a duration that is not limited to as short a period as possible as required by Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement*;
- (vii) The Ad Note to Article VI:2 and 3 of the *GATT 1994* (the "Ad Note") because the imposition of the EBR on top of the obligation to provide bonds or make cash deposits for the payment of antidumping or countervailing duties is not reasonable security for the payment of antidumping or countervailing duties and because it is not imposed pending final determination of the facts in any case of suspected dumping or subsidization;
- (viii) Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* because the Amended CBD has made changes in the laws and regulations and/or in the administration of the laws and regulations of the United States that are relevant to these agreements and that were required to be notified by the United States to the relevant Committees; and
- (ix) Article I:1 and Article II:1(a) and (b) of the *GATT 1994* to the extent that the EBR results in a duty or charge imposed on or in connection with importation or is a method of levying duties and charges or is a rule or formality in connection with importation that is inconsistent with these provisions; or
- (x) Alternatively, Article XI of the *GATT 1994* to the extent that the EBR constitutes a restriction on imports other than "a duty, tax or other charge".

- (xi) India also claims a violation of Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement*<sup>38</sup>; Articles 1 and 14 of the *SCM Agreement*<sup>39</sup>; Article 7.5 of the *Anti-Dumping Agreement* and 17.5 of the *SCM Agreement*<sup>40</sup>; Articles X:1 and X:2 of the *GATT 1994*<sup>41</sup>;
- (b) For the same reasons, India also requests the Panel to find that the EBR *as applied* to imports of shrimp from India is inconsistent with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 7.5, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the *Anti-Dumping Agreement*, of Article X:3(a) and of Articles I:1, II:1(a) and (b) or, alternatively, of XI:1 and XIII of the *GATT 1994*.<sup>42</sup> India also claims a violation of Article VI:2 of the *GATT 1994* (including the Ad Note); and Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement*.<sup>43</sup>
- (c) Accordingly, India requests that the Panel recommend to the DSB in accordance with Article 19.1 of the *DSU* that the United States brings its measures into conformity with the provisions of the *Anti-Dumping Agreement*, *SCM Agreement* and the *GATT 1994* within a reasonable period of time.<sup>44</sup>

3.2 The United States requests that the Panel reject India's claims for the reasons provided in its first written submission.<sup>45</sup>

#### IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as set forth in their executive summaries submitted to the Panel, are attached to this Report as Annexes (see List of Annexes, page (vii)).

#### V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties as set forth in their executive summaries submitted to the Panel, i.e. Brazil, China, the European Communities, Thailand and Japan are attached to this Report as Annexes (see List of Annexes, page (vii)).

#### VI. INTERIM REVIEW

6.1 On 9 October 2007, the Panel issued its Interim Report to the parties. On 23 October 2007, both parties submitted written requests for the review of precise aspects of the Interim Report. The parties also submitted written comments on the other party's comments on 2 November 2007. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.4 of the *DSU*, this section of the Panel's Report sets out the Panel's response to the arguments made at the interim review stage, wherever the Panel felt that explanation was necessary. The Panel has also modified certain aspects of its Report in light of the parties' comments wherever the Panel considered it necessary. Due to the factual similarities in the disputes DS343 and DS345, the Panel wherever possible has modified the respective reports of these two disputes in parallel. The Panel has also made a limited number of editorial corrections to the

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<sup>38</sup> Request for Establishment of the Panel, WT/DS345/6, para. (c).

<sup>39</sup> Request for Establishment of the Panel, WT/DS345/6, para. (d).

<sup>40</sup> Request for Establishment of the Panel, WT/DS345/6, para. (g).

<sup>41</sup> Request for Establishment of the Panel, WT/DS345/6, para. (j).

<sup>42</sup> India's first written submission, para. 116.

<sup>43</sup> Request for Establishment of the Panel, WT/DS345/6.

<sup>44</sup> India's first written submission, para. 117.

<sup>45</sup> United States' first written submission, para. 98.

Interim Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

A. INDIA'S COMMENTS ON THE INTERIM REPORT

**1. Sequence of events surrounding implementation of the EBR**

6.3 Regarding paragraph 2.2 and footnote 11, India submits that US Customs began "official" implementation of the EBR immediately after the introduction of the July 2004 Amendment and prior to imposition of the anti-dumping order on certain frozen warmwater shrimp from India on 1 February 2005. India therefore requests that the Panel move text located in Footnote 11 into the main body text in paragraph 2.2 to emphasize that the EBR was implemented for certain importers prior to 1 February 2005. The United States requests the Panel to reject India's suggestions. Although acknowledging that 35 importers did receive notices prior to publication of the anti-dumping order, the United States considers the notion that the receipt of these notices constitutes "immediate implementation" to be misleading. Taking both parties' comments into consideration, the Panel has moved information contained in footnote 11 into the main body text, but has declined to designate these notices as constituting "immediate" or "official" implementation.

**2. One hundred per cent surety collateral requirements**

6.4 Regarding paragraph 2.15, India submits that the following statement is inaccurate: "at least one or more of 250 companies eligible to act as sureties on bonds securing obligations to US Customs has also required certain importers of subject shrimp to post collateral equal to 100 per cent of the EBR plus associated fees to secure the increased bond amounts". In reference to *NFI v. US* (Exhibit IND-16, p. 38), India notes the USCIT's statement that facts (in that case) support the inference that sureties require up to 100 per cent security for the EBR. In particular, as India notes, the USCIT indicated that testimony of witnesses for two plaintiffs in that case corroborated the finding that sureties typically require 100 per cent collateral to satisfy the EBR. In light of this statement, India requests the Panel to modify the factual aspects of the report to reflect the USCIT's conclusion. The United States requests the Panel to decline India's suggestions due to the fact that the proceedings in *NFI v. US* are ongoing, contain a different factual record and involve questions of US law (and not WTO law). In particular, the United States notes that the findings in *NFI v. US* pertain to 8 importers and should not be extrapolated. However, the United States requests the Panel to include evidence submitted by India and the United States on the issue of collateral requirements into the relevant footnotes. Taking both parties' comments into consideration, the Panel has modified paragraph 2.15 in order to reflect the parties' views with respect to the overall effect of the EBR on *all* subject shrimp importers/exporters from India, including additional references to Exhibit IND-15.

**3. India's Article X:3(a) as such claim**

6.5 Regarding paragraph 6.6, India requests that the Panel include a reference to India's *as such* claim relating to Article X:3(a) of the *GATT 1994*. The United States requests the Panel to reject this suggestion. The Panel notes that, in its Request for Establishment, India only claimed that the EBR *as applied* to subject shrimp is inconsistent with Article X:3(a), and did not refer to this provision in relation to its *as such* claims. Therefore, the Panel considers India's suggested modification without basis and rejects it.

**4. The relationship of the Ad Note and the Anti-Dumping Agreement**

6.6 Regarding paragraphs 6.65 – 6.90, India requests that the Panel modify its discussion of the relationship between the Ad Note and the *Anti-Dumping Agreement* to reflect India's arguments in its

second oral statement (see India's second oral statement, paras. 40-45). India argues that, based on Article 31(3) of the Vienna Convention, the Ad Note must be interpreted in light of the context provided by the *Anti-Dumping* and *SCM Agreements*. Specifically, India requests the Panel to modify the statement in the third sentence of footnote 107 that "India notes that the Ad Note is not expressly implemented through the *Anti-Dumping Agreement*". India would prefer, as provided in paragraph 6.80 of the Interim Report, that footnote 107 reflect India's argument that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*. The United States considers India's arguments to be fully addressed in paragraphs 6.91 – 6.107 in the section entitled "contextual considerations". The United States does not object to India's proposed changes to footnote 107, although it considers that the Panel addressed India's argument in paragraphs 6.91 – 6.95 of the Interim Report.

6.7 The Panel has made the change requested by India in footnote 107 (113 of its Final Report).

**5. Classification of Appellate Body reasoning as *dicta* in *US – Zeroing (EC)* and *US – Zeroing (Japan)***

6.8 Regarding paragraph 6.101, India contends that the Appellate Body's statements in *US – Zeroing (EC)*, footnote 184, regarding its comments on the US retrospective duty assessment system found in footnote 109, are themselves based on the description contained in paragraph's 2.4-2.5 of the *US – Zeroing (EC)* Panel Report and thus do not constitute *dicta* of the Appellate Body. Instead, India contends that the Appellate Body is restating the Panel's analysis. India thus requests the Panel to modify paragraph 6.101 of the Interim Report to reflect this. The United States disputes India's assertion regarding footnote 184. The United States notes that *obiter dictum* is defined in Ballentine's Law Dictionary (West Publishing, 3d. ed.) as "expressions in an opinion of the court which are not necessary to support the decision". The United States submits that, the mere fact that the Appellate Body based its comments on paragraphs in the Panel report has no bearing on whether the Appellate Body's comments were necessary to support its actual findings.

6.9 The Panel sees no need to make the change requested by India. Given that panels themselves may state *dicta*, and that the scope of an appeal may be narrower than the scope of panel proceedings, the mere fact that the Appellate Body was restating the panel's analysis does not mean *ipso facto* that the Appellate Body's statement does not constitute *obiter dictum*.

**6. Text of footnote 203**

6.10 Regarding footnote 203, India requests that the text be amended to read "In its first oral submission, India notes that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion". The United States considers this proposed change unnecessary. Nevertheless, the United States requests the Panel to use the term "contends" instead of "notes" if it follows India's suggestion, since the verb "notes" could imply that the statement is one of fact. The Panel has modified the text of footnote 203 (of the Final Report) to read as follows: "In its first oral submission, India contends that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion".

**7. India's claims under the *GATT 1994* and the United States' defence under Article XX(d) of the *GATT 1994***

6.11 Regarding paragraphs 6.286 – 6.313, India requests that the Panel address whether the United States should be permitted to defend the EBR simultaneously under the Ad Note and under Article XX(d) of the *GATT 1994*, and in any case, whether it should be permitted to defend the EBR under

Article XX(d) since, India submits, the Panel found that Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* read together constitute *lex specialis*. Finally, India requests the Panel to clarify whether the United States should be permitted to defend the EBR under Article XX(d) without having invoked footnote 24 of the *Anti-Dumping Agreement*. India requests the Panel to address these issues as threshold considerations, and in the case that the Panel considers it appropriate to evaluate the United States' defence under Article XX(d), the Panel also evaluate India's *as applied* claims under the *GATT 1994*.

6.12 The United States requests the Panel to reject India's proposal to conduct a threshold analysis regarding the appropriateness of its Article XX(d) defence. The United States contends that no basis exists in the *WTO Agreements* to conclude that a Member may not defend a measure under Article XX(d) simply because it also responds to a claim under the Ad Note. According to the United States, the analysis under Article XX(d) is independent from that of the Ad Note. Furthermore, the United States disagrees with India's assertion that the Panel should not consider Article XX(d) in view of its findings regarding *lex specialis*. The United States notes that the Panel found that "Article VI of the *GATT 1994* and the Ad Note" constitute *lex specialis*, and not the *Anti-Dumping Agreement*. Finally, the United States submits that it was not required to invoke footnote 24 of the *Anti-Dumping Agreement* since the Panel has found the United States in breach of the Ad Note.

6.13 The Panel is of the view that a respondent in a WTO dispute may simultaneously respond to claims presented by the claimant while also raising an affirmative defence under a relevant provision in Article XX of the *GATT 1994*. The Panel notes that the text of the chapeau to Article XX of the *GATT 1994* reads: " ... nothing in *this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures ... " (emphasis added). This text does not on its face limit a panel from considering an affirmative defence under Article XX where it has found a violation under a provision of the *GATT*, including Article VI and/or the Ad Note. In this regard, the Panel recalls its findings that the application of the EBR constitutes specific action against dumping which is not in accordance with the provisions of the *GATT 1994* since it is inconsistent with the Ad Note. The Panel also considers it proper to analyse the United States' defence under Article XX notwithstanding the finding presented in paragraph 6.171 that Article VI of the *GATT 1994* and the Ad Note to Article VI constitute *lex specialis*. In the findings, the Panel refers to Article VI and its Ad Note as *lex specialis* with respect to the other more general provisions of the *GATT 1994* cited by India. The Panel's findings with respect to the applicability of the principle of *lex specialis* do not refer to a defence under Article XX(d) in order to justify a potential violation of Article VI and its Ad Note. Accordingly, the Panel considers additional analysis of the United States' Article XX(d) defence unnecessary and rejects India's request for review of our findings on this issue. For the foregoing reasons, the Panel considers it unnecessary to evaluate whether a Member must invoke footnote 24 of the *Anti-Dumping Agreement* in order to assert an affirmative defence under Article XX.

## B. THE UNITED STATES' COMMENTS ON THE INTERIM REPORT

### 1. Typographical errors

6.14 Regarding paragraph 1.10, the United States requests replacing the phrase "24 and 25 July 200" with "24 and 25 July 2007". The Panel has corrected this typographical error.

6.15 Regarding paragraph 1.11, the United States requests replacing the phrase "9 September 2007" with "9 October 2007". The Panel has corrected this typographical error.

6.16 Regarding paragraph 2.10, the United States submits that US Customs designates importers of certain merchandise, not importers, as "covered cases", and thus requests the Panel to modify the text

to read: "US Customs implemented the EBR and required select importers of merchandise designated as 'covered cases' ...". The Panel has corrected this error.

6.17 Regarding paragraph 6.20 (7.20 of the Final Report), the United States requests replacing the phrase "the amendment as issue" with "the amendment at issue". The Panel has corrected this typographical error.

## **2. Treatment of amendments as part of the measure at issue**

6.18 Regarding paragraph 6.22, the United States construes the Panel's reference to the findings of the Appellate Body in *Chile – Price Band System* as suggesting that, by merely including certain language in a panel request regarding amendments to measures, a basis would exist to treat a measure as part of the measure at issue and within the panel's terms of reference. The United States requests the Panel to remove the third and final sentences from the paragraph and base the analysis on the nature of the measure in question. India considers that the third and final sentences are consistent with the rationale in *Chile – Price Band System*. The Panel has made minor modifications to the text in paragraph 6.22 (7.22 of the Final Report) in order to reflect the rationale presented in *Chile – Price Band System* that an amendment should not change the *essence* of the original measure into something different than what was in force before its issuance.

## **3. Description of the United States' argument regarding Article 18.1 of the *Anti-Dumping Agreement***

6.19 Regarding paragraph 6.37, the United States considers the Panel's description of the US argument regarding Article 18.1 of the *Anti-Dumping Agreement* to be redundant with paragraph 6.34. Thus, the United States requests the Panel to delete the paragraph in its entirety. The Panel has deleted para. 6.37 of the Interim Report.

## **4. The EBR formula**

6.20 Regarding paragraph 6.47 (7.46 of the Final Report), the United States requests the Panel to replace the phrase "the formula would be invalid" in the final sentence of this paragraph with "the formula would not apply" to more accurately characterise the statute of the EBR formula in relation to the directive. India considers the phrase "the formula would be invalid" to be appropriate since the formula in the Amended CBD is based on the anti-dumping rate, which thus signifies that the constituent elements of dumping are built into the formula.

6.21 The Panel has made the change requested by the United States .

## **5. The relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment**

6.22 Regarding paragraphs 6.86, 6.97 and note 114, the United States requests the Panel to modify language to more accurately reflect the relationship between Article 9.3.1 of the *Anti-Dumping Agreement* and retrospective duty assessment. First, the United States suggests that the Panel replace the parenthetical that the system is "specifically authorised by Article 9.3.1" with "which is specifically contemplated in Article 9.3.1)". Second, the United States suggests replacing the parenthetical "(which Members are entitled to apply by virtue of Article 9.3.1 of the *Anti-Dumping Agreement*)" with "(which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*)". India requests the Panel to reject the United States' suggestions since the Panel's rationale should be parallel to the reasoning in paragraph 6.97. India submits that in paragraph 6.97, the Panel concluded that there must be a source of authorisation for taking security. Accordingly, India submits that the Panel should also identify a source of authorisation for the retrospective

assessment system, and if none, consider the consequences of such a finding. By merely contemplating a retrospective assessment system, India submits that it would be equally plausible to presume the drafters had no intention of enabling Members to require security.

6.23 The Panel is not persuaded by India's comments, and therefore sees no reason not to make the changes requested by the United States.

## **6. Characterisation of the "enhanced" bond requirement**

6.24 Regarding paragraph 6.108 (7.108 of the Final Report), the United States suggests replacing the term "extended" with "enhanced" to describe the bonds required under the Amended CBD.

6.25 The Panel has made the change requested by the United States.

## **7. The legal standard for determining whether or not the application of the EBR resulted in "reasonable" security requirements**

6.26 Regarding paragraphs 6.116 – 6.128, the United States proposes a number of changes to language that, in its view, could be construed as inconsistent with the Panel's positions elsewhere in its Report. First, the United States proposes a number of changes to prevent the Panel from incorrectly paraphrasing the reasonableness standard set forth in the Ad Note. In general, the United States proposes to use the formulation "the likelihood of rates increasing", as the United States considers that the term "likely", or "likely amount" (as used by the Panel in the Interim Report), suggests that a Member must demonstrate substantial certainty.

6.27 Second, the United States considers that the Panel's use of the term "likely" in the Interim Report's discussion of increases in margins could be read to contradict its point elsewhere in the report that the information on which security requirements must be evaluated is that available "at the time that the [requirement]" is imposed, and not *ex post* rationalization.<sup>46</sup> The United States recalls the Panel's statement in paragraph 6.82 of its Interim Report that, due to the operation of the U.S. retrospective duty assessment system, "there is no certainty that imports entering the United States following imposition of an anti-dumping order are in fact dumped" and that until assessment "it is not possible to state with certainty whether or not those imports are dumped." Since likelihood would need to be evaluated based on information available to the customs authority at the time the security requirement is imposed, the United States has suggested, for example, changing "determine the amount" to "estimate the amount" in paragraph 6.118.

6.28 Third, the United States asserts that as in "ordinary cases of customs administration", there may be cases in which an importer has a history of defaulting on its obligations such that *additional* security may be the only means available to the United States to ensure that duties are paid, short of prohibiting that importer from entering goods entirely. The United States claims that the Panel failed to address US arguments regarding risks of default. The United States requests that the Panel consider clarifying its findings to confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require, such as cases in which importers have a demonstrated history of non-payment of liability owed.

6.29 The United States also asks the Panel to refer to estimates of the "amount" of final dumping liability rather than estimates of the amount of the final "rate" of dumping. The United States asserts that since security for antidumping duties (whether cash deposit or bond) is a quantity based on the total dumping liability, which depends both on the ad valorem rate and the customs value of imports

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<sup>46</sup> Interim Report, para. 6.125.

entered at a given time, using the term “dumping liability” rather than the “rate of dumping” in discussing the amount of security that may be required.

6.30 Regarding para. 6.122 of the Interim Report, the United States asks the Panel to delete certain language describing an argument made by the United States early in the proceedings.

6.31 India requests the Panel to reject the United States' suggestions. Regarding paragraph 6.117, India considers changes suggested by the United States to be inconsistent with its argument that the final amount of liability is only established following an administrative review, as opposed to through the anti-dumping order. Regarding the changes suggested for paragraphs 6.118, 6.119, 6.122, 6.128, 6.226 and 6.312, India submits that these changes are inconsistent with the level or rigour of analysis that a Member must undertake before taking additional security, as discussed in paragraph 6.118. India considers the proposed changes to be inconsistent with the Panel's conclusion in paragraph 6.118, last sentence, that the rate in the anti-dumping order remains the best estimate of suspected dumping and a rigorous analysis is necessary to exceed this estimate. Regarding the changes suggested for paragraph 6.122, India submits that the Panel should retain the United States' assertion that "it is not uncommon for assessed duties to exceed cash deposits". India considers this statement to be an omission by the United States, and its removal is not justified based on footnote 29, which qualifies this assertion. Further, India considers that reasoning in paragraphs 6.120 – 6.121 provide support to reject the assertion that rates increased 33% of the time.

6.32 The Panel has made only a limited number of the changes requested by the United States regarding this first issue. In particular, the Panel has declined the US suggestion to replace its own language with references to "the likelihood of rates increasing", for the United States has failed to properly explain the advantages of its formulation over that of the Panel. Generally, the Panel is concerned that the changes proposed by the United States might weaken the standard that the Panel applied, consistent with the Ad Note, in the present case. In particular, the Panel is not persuaded that it is inappropriate to expect an investigating authority to make determinations of what is likely to happen in the future. The Panel is not persuaded by the US suggestion that the standard articulated in the Interim Report would require *ex post* rationalization. The Panel considers that an investigating authority is required to comply with the applicable standard by making a prospective determination of the likelihood of rates of dumping increasing on the basis of the information available to it at the relevant time.

6.33 The Panel declines to make any changes in respect of the US comments on the need to consider the risk of default as in “ordinary cases of customs administration”. The Panel considers that it already addressed the principal argument of the United States regarding risk of default in footnote 140 of the Interim Report. The Panel declines to further confirm that it is not finding that a Member is precluded from requiring additional security in cases in which principles of ordinary customs administration would so require. The Panel's findings are based on its interpretation of the Ad Note. The Panel does not have a mandate to consider whether or not additional security may be imposed under principles of ordinary customs administration. Although the Ad Note contains the phrase "[a]s in many other cases in customs administration", the Panel considers that such phrase is used for introductory purposes only. If such phrase had been intended to dictate the substantive circumstances under which "reasonable security" could be imposed under the Ad Note, details of such other cases of customs administration would have been spelled out in the Ad Note in detail.

6.34 The Panel accepts the US request to refer to use the term “dumping liability” rather than the “rate of dumping”. This is because the amount of security is not merely a function of the rate of dumping in the anti-dumping order, but also of the customs value of the relevant imports. The Panel is not persuaded by India's concern that such changes would be inconsistent with the US argument that the amount of liability is established finally only in an administrative review and not in the anti-dumping order. As noted at footnote 114 to the Interim Report, the final determination of dumping,

injury and causation is in fact the basis for collecting anti-dumping duties under prospective assessment systems. Regardless of when liability is actually deemed to arise, Article 9.3.1 of the *Anti-Dumping Agreement* stipulates that, under both the prospective and retrospective assessment systems, "[t]he amount of the anti-dumping duty shall not exceed the margin" of dumping. The Panel has modified paras 6.117 and 6.118 of the Interim Report accordingly. The Panel has not modified the reference to "the likely amount of such increase" in para. 6.119 of the Interim Report, in order to maintain consistency with the identical phrase in para. 6.118 of the Interim Report (in respect of which the United States did not ask the Panel to include references to duty liability).

6.35 Regarding paragraph 6.226, the United States requests the Panel to modify the penultimate sentence to incorporate modifications suggested for paragraphs 6.116-6.218. Specifically, the United States requests that the Panel replace phrasing "that anti-dumping liability was likely to increase" with the phrase "that there was a likelihood that anti-dumping liability would increase". For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

6.36 Regarding paragraph 6.312, the United States requests the Panel to modify the fourth and sixth sentences to incorporate modifications suggested for paragraphs 6.116 – 6.128. Specifically, the United States requests that the Panel replace the phrase "that rates of dumping provided for in the anti-dumping order were likely to increase" with the phrase "that there was a likelihood that rates of dumping provided for in the anti-dumping order would increase"; and the phrase "without adequately establishing that anti-dumping duties are likely to increase" with the phrase "without adequately establishing that there was a likelihood that anti-dumping duties would increase". For the same reasons discussed above, India requests the Panel to reject this change. For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

6.37 The Panel has made the deletion requested by the United States in respect of paragraph 6.122 of the Interim Report (7.122 of the Final Report), since such deletion does not impact negatively on the integrity of its findings.

## **8. Challenges to mandatory measures under the "mandatory/discretionary" distinction**

6.38 Regarding paragraph 6.208, the United States requests the Panel to delete the phrase "challenged and" from the last sentence to better reflect the Panel's observations in the subsequent paragraph regarding the import of the "mandatory/discretionary" distinction. The Panel does not find this change appropriate, and thus declines to amend the text.

6.39 Regarding paragraph 6.226, the United States requests the Panel to modify the penultimate sentence to incorporate modifications suggested for paragraphs 6.116-6.218. Specifically, the United States requests that the Panel replace phrasing "that anti-dumping liability was likely to increase" with the phrase "that there was a likelihood that anti-dumping liability would increase". For the reasons set forth above in respect of paras 6.116 – 6.128, the Panel declines to make the changes requested by the United States.

## **9. Consistency between DS343 and DS345**

6.40 The Panel has also made a number of changes to paras 6.98, 6.109, 6.121 and footnote 143 of the Interim Report, to maintain consistency with its findings in *United States – Measures Relating to Shrimp from Thailand* (DS 343). The Panel included paragraph 7.81 in its Final Report for the same reason.

## VII. FINDINGS

### A. PRELIMINARY ISSUES

#### 1. Parallel panel proceedings in DS343 and DS345

7.1 This Panel was established by the DSB at its meeting on 21 November 2006. One month earlier, on 26 October 2006, the DSB had established a separate Panel in the dispute (DS343) *US – Shrimp (Thailand)* the terms of reference of which also included the application of the EBR to imports of subject shrimp. At the DSB meeting where the present Panel was established, Thailand stated that it had expected the establishment of a single Panel for both proceedings in accordance with Article 9.1 of the *DSU*. In the absence of that single Panel, Thailand indicated that, pursuant to Article 9.3 of the *DSU*, it expected that the same persons would be appointed as panelists in the two disputes and that the timetables would be harmonized. The representative of the United States responded that, although the Panel in DS343 had already been established, the same persons could be appointed to serve as panelists in the two proceedings and the timetables of the separate Panels could be harmonized.

7.2 The meetings to appoint the same members for this Panel and that of DS343 were held jointly between the two separate complainants, India and Thailand, and the common defendant, the United States. Since the parties were unable to agree on panelists to serve for these proceedings, on 19 January 2007, Thailand and India requested, in separate letters, that the Director-General determine the composition of the Panel pursuant to Article 8.7 of the *DSU*, and select the same persons to serve as panelists for both proceedings, pursuant to Article 9.3 of the *DSU*. On 26 January 2007, the Director-General composed two separate Panels consisting of the same members.

7.3 On 9 February 2007, India and Thailand sent separate letters to the Chairman of the two Panels requesting enhanced third party rights in each other's proceedings. On 15 February 2007, the Chairman met with the parties in a joint organizational meeting to hear comments on the proposed Timetable and Panel Working Procedures. At that meeting, as well as in a letter dated 16 February 2007, the United States argued that granting enhanced third party rights to Thailand and India was not necessary in the instant cases.

7.4 After having heard the parties' views, the Panel decided not to grant enhanced third party rights to India and Thailand but instead, opted for a practical approach aimed at ensuring that the parties to both disputes enjoyed adequate opportunity to participate in the proceedings where appropriate. On 23 February 2007, the Panel sent to the parties a joint Timetable as well as separate, albeit similarly worded, Working Procedures. In this joint communication, the Panel informed the parties that it had decided the following:

"[The Panel] intends to conduct both proceedings so as to ensure that the parties who are also third parties in each other's proceedings, have adequate opportunity and ability to participate to the fullest extent in a manner which is compatible with the provisions of the *DSU*. To this end, after having heard the parties' views, the Panel intends to take the following steps:

- (i) holding consolidated substantive meetings with the parties (Thailand, India and US);
- (ii) allowing the complainants during the joint meetings to comment on each others' argumentation, provided they limit themselves to those claims they have in common;

(iii) holding separate Third-Party Sessions, starting with DS343 and asking the Members which are not third-parties to DS345 (i.e., Chile, Mexico, Korea and Viet Nam) to leave the meeting room once the Third-Party Session for DS343 is over. Note that since Thailand and India are third parties to each other's cases, and parties in their own, they would be in the room during the entirety of the joint meetings, including third party sessions;

(iv) *not* allowing submissions in one case to be deemed to be submitted in the other case. The parties could however attach to their third party submissions, their submissions made as parties in the case in which they are complaining party;

(v) issuing separate reports;

(vi) allowing all parties to respond to all questions posed by the Panel in writing."

## 2. Overview of the Panel's approach to consideration of India's claims

7.5 India has made two types of claims concerning the EBR: (i) It has challenged *as such* the laws, regulations and instruments of the United States that comprise the Amended CBD and authorize the imposition of the EBR, together with a US statutory provision (19 U.S.C. § 1623) and a US Customs regulation (19 C.F.R. § 113.13); and (ii) it has challenged the *application* of the Amended CBD, i.e. the imposition of the EBR, to subject shrimp from India.

7.6 India's *as such* claims concern: the consistency of the Amended CBD and the abovementioned US statutory and regulatory provisions with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*; their consistency with Article VI and the Ad Note; their consistency with Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement*; their consistency with Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*; their consistency with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement*; their consistency with Articles I, II:1(a) and II:1(b), first and second sentences, of the *GATT 1994*; and, in the alternative, their consistency with Article XI of the *GATT 1994*.

7.7 As regards its *as applied* claims, India challenges the consistency of the EBR with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 7.5, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the *Anti-Dumping Agreement*, and Articles I:1, II:1(a) and (b), VI:2, X:3(a) of the *GATT 1994*, and alternatively, Articles XI:1 and XIII of the *GATT 1994*.

7.8 India also claims that the United States has acted inconsistently with Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* by not notifying the Amended CBD to the Anti-Dumping and SCM Committees.

7.9 The Panel notes that India, in its Request for Establishment, additionally made claims under Articles 2.2, 2.3 and 2.4 of the *Anti-Dumping Agreement*, *as such* and *as applied*; Articles 1 and 14 of the *SCM Agreement*, *as such*; Article 7.5 of the *Anti-Dumping Agreement*, *as such*; and Article 17.5 of the *SCM Agreement*, *as such*. However, India did not present arguments nor request Panel findings

on these claims in any of its submissions. The Panel will therefore not address these claims in its Report.<sup>47</sup>

### 3. Order of analysis

7.10 India has presented its *as such* and *as applied* claims sometimes together, and in other instances separately. The Panel, for the sake of clarity and consistency with the parallel proceedings in DS343 *US – Shrimp (Thailand)*<sup>48</sup>, has decided first to address India's *as applied* claims followed by the consideration of its *as such* claims. Finally, we will consider India's claim under Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*.

#### B. INDIA'S AS APPLIED CLAIMS

##### 1. Scope of the measure concerned

7.11 India's *as applied* claims concern the application of the Amended CBD, i.e. the EBR, to imports of subject shrimp from India. Before entering into an analysis of each of the *as applied* claims raised by India, the Panel first must identify which are the legal instruments that comprise the Amended CBD.

7.12 We recall that the terms of reference that govern the present dispute are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS345/6, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."<sup>49</sup>

7.13 In its Request for Establishment, India specified that the measure at issue consists of the following legal instruments:<sup>50</sup>

- (a) the 1991 Customs Bond Directive;
- (b) the July 2004 Amendment;<sup>51</sup>
- (c) the document Current Bond Formulas;<sup>52</sup>
- (d) the August 2005 Clarification;<sup>53</sup> and
- (e) "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs."<sup>54</sup>

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<sup>47</sup> The Panel further notes that, in its first written submission, India requested the Panel to find that the application of the EBR violates Article 7.5 of the *Anti-Dumping Agreement*. However, India did not present any arguments for this claim. Accordingly, the Panel declines to make any findings for the claim.

<sup>48</sup> Section VII.A.1 concerning the organization of the parallel proceedings.

<sup>49</sup> WT/DS345/7.

<sup>50</sup> India's first written submission, para. 17. We note that India has explained in its first oral statement that, although it had referred interchangeably to the Amended CBD and EBR in the context of its *as such* claims, its claim only addresses the Amended CBD "to the extent that it *authorizes*, imposes and describes the EBR". (See India's first oral statement, para. 14).

<sup>51</sup> Exhibit IND-3.

<sup>52</sup> Exhibit IND-4.

<sup>53</sup> Exhibit IND-5.

<sup>54</sup> India's first written submission, para. 17.

7.14 In its first written submission, India submitted to the Panel that the October 2006 Notice,<sup>55</sup> which was published on 24 October 2006 following the submission of India's Request for Establishment, should also be considered as one of the instruments comprising the Amended CBD.<sup>56</sup> The United States has not contested the inclusion of the October 2006 Notice within this Panel's terms of reference.

7.15 We recall that the Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature", issues that go to the root of their jurisdiction, on their own motion if the parties to the dispute remain silent on those issues.<sup>57</sup> Whether a measure falls within our terms of reference is clearly an issue that goes to the root of our jurisdiction. Therefore, even though the United States does not contest the inclusion of the October 2006 Notice, we must determine whether this Notice is within our terms of reference.

7.16 Article 7 of the *DSU*, governing the Panel's terms of reference, Article 4 of the *DSU*, governing a complainant's request for consultations, and Article 6 of the *DSU*, governing a complainant's request for establishment of a panel are relevant to this issue. Article 7.1 of the *DSU* provides:

"Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

7.17 Article 4.4 of the *DSU* provides:

"All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and *shall give the reasons for the request, including identification of the measures at issue* and an indication of the legal basis for the complaint."(emphasis added)

7.18 Article 6.2 of the *DSU* provides:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."(emphasis added).

7.19 The Appellate Body affirmed in *US – Upland Cotton* that, "pursuant to Article 7 of the *DSU*, a panel's terms of reference are governed by the request for establishment of a panel".<sup>58</sup> As evident

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<sup>55</sup> Exhibit IND-6.

<sup>56</sup> India's first written submission, para. 18.

<sup>57</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; see also Appellate Body Report, *US – Carbon Steel*, para 123.

<sup>58</sup> See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing Appellate Body Report, *US – Carbon Steel*, para. 124.

from the text of Articles 4 and 6 of the *DSU*, the complainant must identify the measure at issue in both the request for consultations and request for panel establishment.

7.20 The Appellate Body considered in *Chile – Price Band System* whether an amendment to a measure that was enacted *after* the Panel had been established should nevertheless be considered as within the Panel's terms of reference.<sup>59</sup> In that case, the Appellate Body determined that the amendment at issue should be considered as part of the measure at issue since the amendment served the purpose of clarifying the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment.<sup>60</sup> This determination was considered consistent with earlier jurisprudence<sup>61</sup> and was also found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the *DSU*, to "secure a positive solution to a dispute". The Appellate Body explained:

"If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."<sup>62</sup>

7.21 In the case before us, we note that the October 2006 Notice further describes the process to determine enhanced continuous bond amounts for importations involving what the United States describes as elevated collection risks, and seeks public comment concerning that process. We also note that the United States describes the 2006 Notice as the "comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on CBP's Web site, and the August 2005 Clarification".<sup>63</sup> In addition, we note that neither India or the United States stated that the 2006 Notice should be excluded when asked directly whether the Panel should consider the 2006 Notice within its terms of reference.<sup>64</sup> Instead, both India and the United States agreed to the October 2006 Notice's inclusion and both referred to the Appellate Body's findings in *Chile – Price Band System* in this regard.<sup>65</sup>

7.22 We agree with and adopt as our own the Appellate Body's rationale as provided in *Chile – Price Band System*. In the dispute before us, the United States published the October 2006 Notice after this Panel had been established. Moreover, in our view, India's inclusion of the language "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs" in its Request for Establishment is broad enough to allow for the inclusion of the 2006 Notice. The October 2006 Notice seeks to clarify the legislation that established the measure at issue and does not change the essence of the original

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<sup>59</sup> Appellate Body Report, *Chile – Price Band System*, para. 137.

<sup>60</sup> Appellate Body Report, *Chile – Price Band System*, para. 137.

<sup>61</sup> The Appellate Body in *Chile – Price Band System* cited to a passage from the Panel's finding in *Argentina – Footwear (EC)* which concluded that modifications made to the measure at issue during the panel proceedings did:

"... not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint."

(See Appellate Body Report, *Chile – Price Band System*, para. 138.)

<sup>62</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>63</sup> See Exhibit IND-6, p. 62,277.

<sup>64</sup> India's responses to First Set of Panel Questions, paras. 51 and 52, United States' responses to First Set of Panel Questions, para. 65.

<sup>65</sup> India's responses to First Set of Panel Questions, para. 51 and United States' responses to First Set of Panel Questions, para. 55.

measure into something different than what was in force before its issuance (in this regard, we recall that the October 2006 Notice includes in its text the statement that it is the "comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on [US Customs'] Web site, and the August 2005 Clarification"). In our view, the inclusion of October 2006 Notice allows the Panel to achieve a positive resolution to the dispute, and additionally, accords with the interests of both parties.

7.23 The Panel therefore finds that the October 2006 Notice is properly part of the measure at issue and within the Panel's terms of reference.

## **2. Articles 1 and 18.1 of the *Anti-Dumping Agreement*, and the Ad Note**

7.24 India claims that the application of the EBR to subject shrimp is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and the Ad Note thereto. We shall begin by assessing India's claim under Article 18.1 of the *Anti-Dumping Agreement*.

7.25 For the most part, the issues arising in respect of India's Article 18.1 claim under these proceedings are the same as those that we considered in the context of the same claim made by Thailand in *US – Shrimp (Thailand)*. This is reflected in the fact that there is significant overlap in the arguments of India and Thailand regarding these issues.<sup>66</sup> Similarly, the arguments made by the United States in respect of this claim are virtually identical to the arguments that it made in respect of the same claim in *US – Shrimp (Thailand)*.<sup>67</sup> As a result, the findings that we make in respect of India's Article 18.1 claim closely resemble those that we made in respect of the same claim by Thailand in *US – Shrimp (Thailand)*.

7.26 India submits that the application of the EBR to subject shrimp from India is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Article 1 provides that:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of *GATT 1994* and pursuant to investigations initiated (*footnote omitted*) and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of *GATT 1994* in so far as action is taken under anti-dumping legislation or regulations."

7.27 Article 18.1 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."

7.28 India submits that the application of the EBR to subject shrimp from India constitutes specific action against dumping in a form other than a permitted response to dumping under the provisions of the *GATT 1994* as interpreted by the *Anti-Dumping Agreement*. The United States rejects India's claim.

7.29 We begin our evaluation of India's claim by considering whether or not the application of the EBR constitutes "specific action against dumping". Thereafter, we turn to the issue of whether or not

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<sup>66</sup> E.g. at para. 79 of its second written submission, India refers to "the differences in interpretation of the Ad Note between India and Thailand, on the one hand, and the United States, on the other," thereby indicating that India and Thailand share the same interpretation of the Ad Note.

<sup>67</sup> This is further reflected in the fact that the oral statement made by the United States at each of our substantive meetings with the parties addressed the claims of India and Thailand jointly.

the EBR is applied "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

(a) Does the application of the EBR constitute "specific action against dumping"?

(i) *Main arguments of India*

7.30 India asserts that the application of the EBR constitutes "specific action against dumping" because it is (i) "specific action" in response to dumping that (ii) also acts "against" dumping.

"Specific action" in response to dumping

7.31 India submits that the Appellate Body has defined "specific action" against dumping or subsidization as "action that is taken in response to situations presenting the constituent elements"<sup>68</sup> of dumping or subsidization and has explained further that the measure must "... be inextricably linked to or have a strong correlation with the constituent elements of dumping or of a subsidy. Such a link ... may be derived from the text of the measure itself."<sup>69</sup> India asserts that it is indisputable that the EBR is "specific" to dumping or subsidization because the Amended CBD expressly states that it applies only to importers of designated merchandise that is subject to anti-dumping or countervailing duties, i.e., when all the conditions for imposition of anti-dumping or countervailing duties have been fulfilled. India asserts that, accordingly, and as the United States argued before the Appellate Body in *US – Offset Act (Byrd Amendment)*, to the extent that the EBR "... imposes ... liability on importers/producers/exporters when dumping or subsidization is found ...", it is clearly "specific action" with respect to dumping and subsidization.<sup>70</sup> India states, in addition, that one important element of the formula for calculating the bond liability amount is the amount of anti-dumping or countervailing duties owed based on the dumping margin or the individual net subsidy rate. India submits that there is therefore clearly an inextricable link between the EBR and the constituent elements of dumping or of a subsidy. India also notes that one of the stated purposes of the EBR is to ensure that anti-dumping and countervailing duties are collected for payment to domestic industry under the Continued Dumping and Subsidy Offset Act (hereafter the "CDSOA"), which the Appellate Body has found to be a "specific action" against dumping or subsidization. According to India, regulations or administrative procedures by US Customs to implement the CDSOA also constitute specific action against dumping.

Specific action "against" dumping

7.32 India asserts that, to be "against" dumping, the measure must have "...an adverse bearing on, or more specifically, [have] the effect of dissuading the practice of dumping ...."<sup>71</sup> India asserts that the application of the EBR has a serious, adverse impact on importers and, therefore, on dumping. India asserts that the demand of 100 per cent collateral by sureties acceptable to US Customs for the issuance of enhanced bonds, together with high bond premiums and other charges associated with providing the collateral, impose a heavy burden on importers. India further asserts that the bonds initially posted by importers inevitably get exhausted or saturated well before the first administrative review and liquidation of entries are completed, with the result that importers are forced to post additional, enhanced bonds. India states that sureties again subject importers to additional demands for collateral and high bond premiums, which result in further charges and further depletion of their capital and credit. Relying on findings of the USCIT, India asserts that importers are forced to incur serious losses in profits and business opportunities. India argues that this in turn has a serious

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<sup>68</sup> Appellate Body Report, *US – 1916 Act*.

<sup>69</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 239.

<sup>70</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 16-17.

<sup>71</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

deterrent effect on exporters of the merchandise subject to the EBR as is evident from the 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.

(ii) *Main arguments of the United States*

7.33 The United States denies that the application of the EBR is either "specific action" in response to dumping, or specific action "against" dumping.

"Specific action" in response to dumping

7.34 Regarding India's argument that the EBR is specific to dumping because it may be and has been applied only to importers of goods subject to a US anti-dumping order and the formula it contains uses the anti-dumping rate as one variable in determining the amount of additional security that may be prescribed, the United States asserts that these features merely reflect the fact that the directive is, like various measures referred to by the Appellate Body in *US – Offset Act (Byrd Amendment)*, "related to" dumping or subsidies insofar as the unsecured liability it is designed to secure is anti-dumping and countervailing duty liability. The United States asserts that, according to the Appellate Body, "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*."<sup>72</sup> The United States asserts that the directive is applied in response to noncollection risk – the mere fact that the particular noncollection risk at issue relates to anti-dumping 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." The United States submits that "the constituent elements of 'dumping'" are not "built into the essential elements" of the additional bond directive,<sup>73</sup> since US Customs does not determine anti-dumping or countervailing duty margins, and the directive does not purport to establish margins of dumping or subsidization. The United States also asserts that the additional bond directive does not apply to all entries subject to anti-dumping or countervailing duties – rather it only applies to those for which a specific noncollection risk has been identified. The United States submits that the sole reason the directive is designed to secure anti-dumping liability is because the vast majority of unsecured liability that has resulted in noncollection happens to be anti-dumping duty liability.

7.35 According to the United States, 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 United States asserts that none of the information US Customs 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.<sup>74</sup> Likewise, none of the information US Customs 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 US Customs exercises over the transaction, the prior record of the importer in honouring bond commitments, and evidence of the importer's ability to pay duties assessed – has any bearing on the constituent elements of dumping or subsidization.<sup>75</sup> The United States submits that all of these factors are, however, relevant to establishing noncollection risk.

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<sup>72</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262.

<sup>73</sup> Appellate Body Report, *US – 1916 Act*, para. 130.

<sup>74</sup> Exhibit IND-6 at 62,277.

<sup>75</sup> Exhibit IND-6 at 62,277.

7.36 The United States acknowledges that the formulas for determining bond amounts incorporate the anti-dumping rate, but only because from the standpoint of US Customs it is the best and only available baseline proxy of duties that ultimately may be assessed. According to the United States, the inclusion of the anti-dumping rate in the formulas thus does not support the conclusion that the directive itself relies on the constituent elements of dumping or subsidization.

#### Specific action "against" dumping

7.37 The United States asserts that the sole evidence that India cites in support of its argument that the directive operates "against" dumping is either inaccurate or irrelevant.

7.38 First, the United States asserts that the record does not support India's assertion that the directive reduced shipments from countries subject to it.<sup>76</sup> The United States refers to the USGAO Report, which indicates that 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."<sup>77</sup>

7.39 Second, with regard to India's argument concerning surety fees, the United States asserts that US Customs neither sets surety fees, nor requires importers to post collateral in support of bonds. The United States argues that US Customs is a third party beneficiary to bond contracts, which are private contracts negotiated between the surety and the importer. The United States further asserts that US Customs neither requested nor encouraged sureties to require collateral with respect to the bonds at issue.

7.40 Furthermore, the United States asserts that the Appellate Body noted in *US – Offset Act (Byrd Amendment)* that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."<sup>78</sup> According to the United States, the *GATT 1994* and the *Anti-Dumping Agreement* do not prohibit the United States from obtaining payment for the anti-dumping duties in question, and the bond requirement facilitates its ability to do so.

#### (iii) Evaluation by the Panel

7.41 In considering the text of Article 18.1 of the *Anti-Dumping Agreement*, we note that the relevant language was considered in detail by the Appellate Body in *US – Offset Act (Byrd Amendment)*. In that case, the Appellate Body found:

"Looking to the ordinary meaning of the words used in these provisions, we read them as establishing two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be "specific" to dumping or subsidisation. The second is that a measure must be "against" dumping or subsidisation. These two conditions operate together and complement each other. If they are not met, the measure will not be governed by Article 18.1 of the *Anti-Dumping Agreement* or by Article 32.1 of the *SCM Agreement*. If, however, it is established that a measure meets these two conditions, and thus falls within the scope of the prohibitions in those provisions, it would then be necessary to move to a further step in the analysis and to determine whether the measure has been "taken in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement* or the *SCM Agreement*. If it is determined that this is not the

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<sup>76</sup> India's first written submission, para. 62.

<sup>77</sup> USGAO Report, p. 24, Exhibit IND-26.

<sup>78</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

case, the measure would be inconsistent with Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."<sup>79</sup>

7.42 We agree with this analysis by the Appellate Body, and adopt it as our own. Accordingly, in order to establish whether the application of the EBR constitutes "specific action against dumping", we shall first examine whether or not the application of the EBR is "*specific*" to dumping. If so, we shall then consider whether or not the application of the EBR acts "*against*" dumping.

Whether or not the application of the EBR is "specific" to dumping

7.43 The degree of specificity needed for action to fall within the scope of Article 18.1 was addressed by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*. In its report in *US – 1916 Act*, the Appellate Body found that:

"[T]he ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present."<sup>80</sup>

7.44 In *US – Offset Act (Byrd Amendment)*, the Appellate Body explained further that:

"The criterion we set out in *US – 1916 Act* for specific action in response to dumping is not whether the constituent elements of dumping or of a subsidy are explicitly referred to in the measure at issue, nor whether dumping or subsidization triggers the application of the action, nor whether the constituent elements of dumping or of a subsidy form part of the essential components of the measure at issue. Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy. In noting that the "wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of 'dumping'", we did not *require* that the language of the measure include the constituent elements of dumping or of a subsidy. This is clear from our use of the word "also", which suggests that this aspect of the 1916 Act was a supplementary reason for our finding, and not the basis for it. Indeed, we required that the constituent elements of dumping (or of a subsidy) be "present", which in our view can include cases where the constituent elements of dumping and of a subsidy are implicit in the measure."<sup>81</sup>

7.45 We agree with the Appellate Body's interpretation of the phrase "specific action", and adopt it as our own. Accordingly, we shall determine whether or not the application of the EBR is "specific" to dumping by examining whether or not the application of the EBR is inextricably linked to, or has a strong correlation with, the constituent elements of dumping.

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<sup>79</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 236.

<sup>80</sup> Appellate Body Report, *US – 1916 Act*, para. 122 (footnote omitted, original emphasis). Although the Appellate Body's finding refers to the phrase "specific action against dumping" in its entirety, the Appellate Body confirmed in *US – Offset Act (Byrd Amendment)* (para. 245) that its finding concerned the phrase "specific action", rather than the word "against".

<sup>81</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 244 (footnote omitted).

7.46 In our view, the constituent elements of dumping are implicit in the express conditions for the application of the EBR, since the EBR may be applied only to goods subject to a US anti-dumping (or countervailing) duty order.<sup>82</sup> If there were no finding that the constituent elements of dumping were present, there would be no anti-dumping order against subject shrimp, and therefore no basis for applying the EBR in respect of subject shrimp imports. For this reason, the existence of the constituent elements of dumping is a legal pre-requisite for the application of the EBR. This is further confirmed by the fact that the formula in the Amended CBD for calculating the EBR includes direct reference to the anti-dumping duty rate, and therefore the constituent elements of dumping. If the constituent elements of dumping were not present, the US would not have found cause to determine an anti-dumping rate, and the formula would not apply.

7.47 We note the US argument that although the application of the EBR may be related to dumping, the application of the EBR is not "specific" to dumping because it is based on non-collection risk rather than the constituent elements of dumping, in the sense that the EBR does not "apply to all entries subject to anti-dumping or countervailing duties – but only to those for which a specific non-collection risk has been identified". We recall, though, that the Appellate Body has already determined<sup>83</sup> that a measure need not be *triggered* by the constituent elements of dumping in order for that measure to constitute "specific action" in respect of dumping. Nor does the existence of "additional requirements" transform a "specific action against dumping" into something else.<sup>84</sup> Even though the application of the EBR might ultimately be triggered by a risk of non-collection, the fact remains that the EBR is only applied in respect of imports subject to anti-dumping (or countervailing duty) orders. There remains, therefore, a significant degree of correlation between the application of the EBR and the constituent elements of dumping. In our view, such a degree of correlation demonstrates that the application of the EBR is "specific", rather than merely related, to dumping.

Whether or not the application of the EBR acts "against" dumping

7.48 In our view, a measure will only act "against" dumping if it has some form of adverse bearing on dumping. This is consistent with the approach of the Appellate Body in *US – Offset Act (Byrd Amendment)*, where it found that:

"[T]o determine whether a measure is 'against' dumping or a subsidy, [] it is necessary to assess whether the design and structure of a measure is such that the measure is 'opposed to', has an adverse bearing on, or, more specifically, has the effect of

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<sup>82</sup> The United States has not disputed the factual accuracy of India's argument (see India's first written submission, para. 60) that the July 2004 Amendment limits the application of the EBR to merchandise upon which USDOC has issued an anti-dumping order, setting out that "[a]ny increase in bond liability will become effective when the Department of Commerce (DOC) issues its Order on the case", and that the August 2005 Clarification characterises the July 2004 Amendment as containing "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*".

<sup>83</sup> *US – Offset Act (Byrd Amendment)* (para. 243), the Appellate Body found that the relevant measure constituted "specific action against dumping" notwithstanding the US argument that the relevant measure was not triggered by the constituent elements of dumping, but rather by an applicant's qualification as an "affected domestic producer" which has incurred qualifying expenditures. We further recall that in *US – 1916 Act*, the Appellate Body held that "an additional requirement" for the taking of action (in that case, a finding of intent) did "not transform the 1916 Act into a statute which does not provide for 'specific action against dumping'" (Appellate Body Report, *US – 1916 Act*, para. 132).

<sup>84</sup> In *US – 1916 Act*, the Appellate Body held that "an additional requirement" for the taking of action (in that case, a finding of intent) did "not transform the 1916 Act into a statute which does not provide for 'specific action against dumping'" (Appellate Body Report, *US – 1916 Act*, para. 132).

dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices."<sup>85</sup>

7.49 In light of the ordinary meaning of the term "against", we consider it appropriate to adopt a similar approach in determining whether or not the application of the EBR acts "against" dumping. In doing so, we note that the Appellate Body concluded that the measure at issue in *US – Offset Act (Byrd Amendment)* had an adverse bearing on the foreign producers/exporters because it "created an incentive" for those foreign producers/exporters "not to engage in the practice of exporting dumped or subsidized products or to terminate such practices".<sup>86</sup> In our view, a similar incentive arises as a result of the application of the EBR on imports of subject shrimp. Ordinarily, the application of the EBR results in additional costs<sup>87</sup> that, although initially borne by importers, ultimately impact on foreign producers/exporters of the subject merchandise, just as anti-dumping duties do.<sup>88</sup> As a result of the formulas used to calculate the amount of the EBR, the amount of the EBR, like the amount of anti-dumping duty, is directly linked to a given foreign producer's/exporter's margin of dumping. The higher the margin of dumping, the higher the amount of the EBR, and the higher the cost of the EBR.<sup>89</sup> In order to maintain its level of sales and/or profitability, despite the increased costs for importers as a result of the application of the EBR, foreign producers/exporters have an incentive to reduce, or even eliminate, their margin of dumping (just as they have an incentive to reduce their margin of dumping in order to reduce the amount of anti-dumping duties levied on their goods).<sup>90</sup> Furthermore, shrimp importers have an incentive to avoid the costs associated with the application of the EBR by importing shrimp from foreign producers/exporters whose produce has not been found to have been dumped, and is therefore not subject to the shrimp anti-dumping order. As a result of such incentives, which affect the relevant entities in much the same way as anti-dumping duties do, we find that the application of the EBR constitutes specific action "against" dumping.

7.50 The United States argues that, rather than being specific action "against" dumping, the application of the EBR merely facilitates the collection of anti-dumping duties. In assessing this argument, we note that in *US – Offset Act (Byrd Amendment)* the Appellate Body disagreed with the panel's finding that the CDSOA is a measure against dumping because the CDSOA provides a

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<sup>85</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

<sup>86</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 256.

<sup>87</sup> The financial costs of obtaining enhanced bonds include the fees and collateral requirements imposed by surety companies for providing such bonds. Although the United States does not itself determine the terms and conditions under which surety companies provide bonds, the United States must have been aware that importers would necessarily incur costs in procuring the bonds that it required them to provide.

<sup>88</sup> Although the parties have made arguments regarding the actual impact of the EBR on the volume and market share of imports from India, we do not consider these to be relevant to the issue before us. In our view, Article 18.1 of the *Anti-Dumping Agreement* is concerned with the effect of actions on the practice of dumping, rather than trade flows in the relevant imports. We note that the Appellate Body has confirmed that "the test should focus on dumping [or subsidization] as practices" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 253), and that the appropriate "analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete" (see Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 257).

<sup>89</sup> In this regard, the adverse bearing of the application of the EBR is similar to that of the measure at issue in *US – Offset Act (Byrd Amendment)* (where the adverse bearing resulted from the collected anti-dumping duties being transferred to domestic producers), in the sense that the adverse bearing is directly linked to the margin of dumping of the foreign producer/exporter. Indeed, the adverse bearing of the EBR is similar to that of an anti-dumping duty, in the sense that both result in increased costs that the relevant entities have an incentive to avoid or mitigate.

<sup>90</sup> In reply to Question 2 from the First Set of Panel Questions, para. 5, the United States asserted that "[i]f the cash deposit rate in the most recently completed administrative review is determined to be zero, any new continuous bond obtained after completion of the administrative review would reflect an enhanced bond amount of \$0."

financial incentive for domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, and that such an incentive would likely result in a greater number of applications, investigations and orders. In particular, we note that the Appellate Body found that "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent."<sup>91</sup> Upon careful reflection, we do not consider that the Appellate Body's reasoning should preclude our finding that the application of the EBR constitutes specific action "against" dumping. Instead, the Appellate Body's reasoning means that we would be precluded from concluding that the application of the EBR constitutes specific action "against" dumping *simply* because it may also facilitate the collection of WTO-consistent anti-dumping duties. However, this does not preclude us from concluding, as the Appellate Body and panel did in *US – Offset Act (Byrd Amendment)*, that the application of the measure at issue constitutes specific action "against" dumping on the basis of other considerations, notwithstanding the fact that the application of that measure might also facilitate the collection of WTO-consistent anti-dumping duties.

7.51 Our finding that the application of the EBR constitutes "specific action against dumping" is supported by the United States' view that provisional measures taken in the form of bonds constitute "specific action against dumping".<sup>92</sup> If a bond applied as a *provisional* measure should be treated as a "specific action against dumping", it would appear reasonable to conclude that a bond applied as a *definitive* measure should be similarly categorized: in both cases, the adverse bearing of the bond on foreign producers/exporters and importers (and the correlation with the constituent elements of dumping) is the same. The United States asserts, though, that unlike a bond required as a provisional measure, the enhanced bond directive provides for security after the existence of dumping has been established, pending determination of the facts with respect to payment of duties. The United States submits that the application of the EBR "facilitates the exercise of WTO-consistent rights"<sup>93</sup> – *i.e.*, the collection of duties owed following the imposition of an order. The United States asserts that, by contrast, certain bonds required before an anti-dumping duty order has been imposed may not be viewed as "facilitating" the exercise of WTO-consistent rights, insofar as, before the order is imposed, it has not been established that a Member is entitled to collect duties. We are not persuaded by the US argument, however, since we have already concluded that the fact that the application of the EBR may facilitate the exercise of WTO-consistent rights is not determinative of whether or not the application of the EBR constitutes "specific action against dumping" (in the sense that this fact does not preclude a finding that a measure constitutes "specific action against dumping" on the basis of other considerations).

## Conclusion

7.52 In light of the above, we conclude that the application of the EBR constitutes "specific action against dumping" in the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

7.53 Accordingly, we must now consider the remaining elements of Article 18.1, regarding the question of whether or not the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*.

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<sup>91</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

<sup>92</sup> See United States' responses to Second Set of Panel Questions, para. 4, in which the United States asserts that "a bond requirement prior to imposition of an order may be considered an action 'against' dumping".

<sup>93</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

- (b) Was the EBR applied "in accordance with" the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*?

7.54 The United States submits that the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*, because the application of the EBR is authorized by the Ad Note. India rejects the US reliance on the Ad Note.

- (i) *Main arguments of India*

7.55 India notes that the Appellate Body found in *US – 1916 Act* that:

"Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."<sup>94</sup>

7.56 India further notes that similarly, in *US – Offset Act (Byrd Amendment)*, the Appellate Body found that:

"The *GATT 1994* and the *[SCM] Agreement* provide four responses to a countervailable subsidy: (i) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally sanctioned countermeasures under the dispute settlement system. No other response to subsidization is envisaged in the text of the *GATT 1994*, or in the text of the *[SCM] Agreement*. Therefore, to be 'in accordance with the *GATT 1994*, as interpreted by' the *[SCM] Agreement*, a response to subsidization must be in one of those four forms."<sup>95</sup>

7.57 India asserts that the application of the EBR does not involve the collection of a definitive (anti-dumping or countervailing) duty or a price undertaking by exporters. India asserts that it is also not a provisional measure to the extent that it is applied (a) in addition to, and on top of, the provisional measures contemplated by Article 7 of the *Anti-Dumping Agreement* such as cash deposits or bonds in an amount not greater than the provisionally estimated margin of dumping, and (b) even after these provisional measures have run their course and the decision to impose definitive duties has been taken under Article 9.1 of the *Anti-Dumping Agreement*, as the case may be. India further submits that the application of the EBR is inconsistent with the requirements of Articles 7 and 9 of the *Anti-Dumping Agreement*.

7.58 India asserts that in *US – 1916 Act*, the Appellate Body found that "[t]he *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.'" India submits that, accordingly, "Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement* ..."<sup>96</sup> India states that, as an interpretative note to paragraphs 2 and 3 of Article VI of the *GATT 1994*, it is clear that the Ad Note is part and parcel of Article VI and cannot be separated from it. For this reason, India submits that the Ad Note therefore cannot support any response to dumping or subsidization other than those recognized by the Appellate Body in *US – Offset Act (Byrd Amendment)*.

7.59 India also asserts that the Ad Note limits the permissible measures to a single security in the form of a "cash deposit or bond", rather than a combination of both cash deposits and bonds.

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<sup>94</sup> Appellate Body Report, *US – 1916 Act*, para 137. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 265.

<sup>95</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para 269.

<sup>96</sup> Appellate Body Report, *US – 1916 Act*, para. 114.

(ii) *Main arguments of the United States*

7.60 The United States submits that India offers an interpretation of the Ad Note in relation to the *Anti-Dumping Agreement* that is inconsistent with the terms of the *Anti-Dumping Agreement* and fails to give the Ad Note any meaning or legal effect, contrary to the relationship between the *GATT 1994* and other WTO Agreements contemplated by the *WTO Agreement*. The United States asserts that the *GATT 1994*, including the Ad Note, is an "integral part" of the *WTO Agreement*.<sup>97</sup> The United States argues that past panels and the Appellate Body have noted that Article VI is "part of the same treaty" as the *Anti-Dumping Agreement*, and "should not be interpreted in a way that would deprive it or the *Anti-Dumping Agreement* of meaning."<sup>98</sup> The United States argues that panels "should give meaning and legal effect to all the relevant provisions," including the Ad Note. According to the United States, the Ad Note permits Members to require "reasonable security (cash deposit or bond)" for the payment of anti-dumping and countervailing duties. For the United States, no other provision of the *Anti-Dumping Agreement* or the *GATT 1994* specifically addresses security for the payment of duties after the final determination in an investigation, including the collection of cash deposits, and, moreover, no provision prohibits a Member from requiring this security.

7.61 The United States submits that, instead of "reading Article VI in conjunction with the *Anti-Dumping Agreement*," as the Appellate Body in *US – 1916 Act* suggested, India, through a misreading of Articles 7 and 9 of the *Anti-Dumping Agreement*, attempts to read Article VI and the Ad Note out of the covered agreements entirely, depriving both provisions of any meaning. The United States asserts that, if accepted, India's various theories would mean that security pending final assessment of anti-dumping and countervailing duties is nowhere permitted by the *Anti-Dumping Agreement*, *SCM Agreement*, or the *GATT*. The United States asserts that, if India's arguments were accepted, Members would not be permitted to maintain security requirements pending final determination of liability. The United States argues that to preclude a Member with a retrospective system from requiring the posting of security prior to the determination of final liability would create a disparity between retrospective and prospective systems. The United States argues that 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.

(iii) *Evaluation by the Panel*

7.62 At this juncture, we are examining the issue of whether or not the EBR was applied "in accordance with the provisions of the *GATT 1994*", as interpreted by the *Anti-Dumping Agreement*. The parties agree that the relevant provision of the *GATT 1994* in this regard is Article VI, and specifically the Ad Note thereto.<sup>99</sup> This is also consistent with the view expressed by the Appellate Body in *US – 1916 Act*.<sup>100</sup> The Ad Note provides that:

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<sup>97</sup> Article II:2 of the *WTO Agreement*.

<sup>98</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.97.

<sup>99</sup> We note that the *GATT 1994* consists *inter alia* of the *GATT 1947*. Article XXXIV of the *GATT 1947* provides that the annexes to the *GATT 1947* are "an integral part" thereof. The Ad Note, which is contained in Annex I to the *GATT 1947*, is therefore "an integral part" of the *GATT 1947*. As such, the Ad Note is necessarily part of the *GATT 1994*. We conclude from the fact that the Ad Note is included under the heading "Ad Article VI" that the Ad Note is part of Article VI of the *GATT 1994*. Both parties agree with this approach (See e.g. para. 44 of India's second oral statement, and para. 14 of the United States' second written submission).

<sup>100</sup> In particular, the Appellate Body clarified "Since the only provisions of the *GATT 1994* "interpreted" by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any "specific action against dumping" of exports from another Member be in accordance with the relevant provisions of Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*". Appellate Body Report on *US – 1916 Act*, para. 124. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.214-218 and 6.264; and Panel Report on *US – 1916 Act (EC)*, paras. 6.197-6.199.

"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."

7.63 We first consider the relationship between the Ad Note and the *Anti-Dumping Agreement*, and the question of whether or not the Ad Note may authorize the imposition of security requirements that are not expressly envisaged by the *Anti-Dumping Agreement*. If we find that the Ad Note may authorize such security requirements, we consider the temporal scope of the security requirements that Members may impose pursuant to the Ad Note. Thereafter, we consider the question of whether or not Members may require security combining both cash deposits and bonds. Finally, we examine whether the application of the EBR constitutes "reasonable" security.

#### The relationship between the Ad Note and the *Anti-Dumping Agreement*

7.64 India submits that the relationship between the *WTO Agreement* and the *Anti-Dumping Agreement* and the *SCM Agreement* has been explored by the Appellate Body in previous disputes. According to India, it is in light of this relationship that the Appellate Body interpreted Article VI of the *GATT 1994*, as interpreted by the provisions of these Agreements, to permit only the specific responses to dumping and subsidization contemplated by these Agreements.

7.65 India asserts that, in *Brazil – Desiccated Coconut*, the Appellate Body found that "... the authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system". India states that the Appellate Body based its reasoning on (a) the preamble to the *WTO Agreement*, (b) the provisions of Article II:2 of the *WTO Agreement* providing that the Multilateral Trade Agreements form an "integral part" of the *WTO Agreement*, (c) the single undertaking reflected in the provisions of the *WTO Agreement*, and (d) the "integrated dispute settlement system" established under the *DSU* "... allowing all relevant provisions of the *WTO Agreement* to be examined in one proceeding".<sup>101</sup>

7.66 India asserts that it is based on this reasoning that, unlike the position while the Tokyo Round Subsidies Code was in force, the Appellate Body found that, after the *WTO Agreement* entered into force, Article VI of the *GATT 1994* could not be applied independently of the *SCM Agreement*.<sup>102</sup> India notes that the Appellate Body agreed with the Panel further that:

"[T]he question for consideration is not whether the *SCM Agreement* supersedes Article VI of *GATT 1994*. Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction."<sup>103</sup>

7.67 India notes that the Appellate Body went on to find that, after the *WTO Agreement* entered into force, both Article VI and the *SCM Agreement* must be read together.

7.68 According to India, therefore, it is clear that, even if the provisions of Article VI of the *GATT 1994*, the *Anti-Dumping Agreement* and the *SCM Agreement* must all be read together as a single legal instrument, the provisions of these Agreements themselves may set out rules that govern the relationship between the *GATT 1994* and the Agreements. Such provisions also must be given

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<sup>101</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

<sup>102</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 17.

<sup>103</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

meaning. India asserts that, in fact, the Appellate Body took this into account in *US – Antidumping Act of 1916* when it found that:

"Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI ...' Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9."<sup>104</sup>

7.69 India submits that the Appellate Body also found that Article 1 of the *Anti-Dumping Agreement* provides that "'an anti-dumping measure' must be consistent with Article VI of the *GATT 1994* and the provisions of the *Anti-Dumping Agreement*"<sup>105</sup> and that "... the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*".<sup>106</sup> India further asserts that it is worth noting that, after the Appellate Body concluded that the Antidumping Act of 1916 was inconsistent with Article VI:2 and the *Anti-Dumping Agreement*, it agreed with the conclusion of the Panel that "the 1916 Act violates Article VI:2 of the *GATT 1994*" only after recording "... the caveat that Article VI:2 must be read together with the relevant provisions of the *Anti-Dumping Agreement*".<sup>107</sup>

7.70 According to India, therefore, the Appellate Body's conclusion that "Article VI, and in particular, Article VI:2 read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings"<sup>108</sup> was based on an exhaustive analysis and interpretation of the provisions of the *Anti-Dumping Agreement* that govern the relationship between Article VI and the *Anti-Dumping Agreement*. India asserts that, because the application of the EBR is neither a provisional measure, a price undertaking, or a definitive anti-dumping duty, the application of the EBR is not envisaged by the Ad Note, and therefore cannot be authorized by the Ad Note.

7.71 We note that the Appellate Body found in *Brazil – Desiccated Coconut* that "Article VI of the *GATT 1994*" cannot "be applied independently of the *SCM Agreement* in the context of the WTO" as "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system".<sup>109</sup> At first glance, this finding might seem to support India's view regarding the non-applicability of the Ad Note, which is an integral part of Article VI of the *GATT 1994*. However, we also note that the Appellate Body findings relied on by India were prefaced by the following observations:

"The relationship between the *GATT 1994* and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the *GATT 1947* were incorporated into, and became a part of the *GATT 1994*, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the *GATT 1994* alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in

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<sup>104</sup> Appellate Body Report, *US – 1916 Act*, para. 114.

<sup>105</sup> Appellate Body Report, *US – 1916 Act*, para. 119.

<sup>106</sup> Appellate Body Report, *US – 1916 Act*, para. 121.

<sup>107</sup> Appellate Body Report, *US – 1916 Act*, para. 138.

<sup>108</sup> Appellate Body Report, *US – 1916 Act*, para. 137.

<sup>109</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

many ways, represent a substantial elaboration of the provisions of the *GATT 1994*, and to the extent that the provisions of the other goods agreements conflict with the provisions of the *GATT 1994*, the provisions of the other goods agreements prevail. *This does not mean, however, that the other goods agreements in Annex 1A, such as the SCM Agreement, supersede the GATT 1994.* As the Panel has said:

... the question for consideration is not whether the *SCM Agreement* supersedes Article VI of *GATT 1994*. Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction."<sup>110</sup> (emphasis supplied, footnote omitted)

7.72 Thus, despite the complexity of the issue under consideration, the Appellate Body was abundantly clear in stating that Article VI of the *GATT 1994* was not superseded by the *SCM Agreement*. The findings of the panel, which were upheld by the Appellate Body without modification, similarly excluded the possibility that the *SCM Agreement* might be superseded by Article VI of the *GATT 1994*. Thus, neither the panel nor Appellate Body findings in *Brazil – Desiccated Coconut* provide any basis for concluding that Article VI of the *GATT 1994* is superseded by the *SCM Agreement*.<sup>111</sup> We emphasise this point because, in our view, India's specific argument regarding the relationship between the Ad Note and the *Anti-Dumping Agreement* suggests that the latter supersedes the former.

7.73 Thus, although the Panel and Appellate Body in *Brazil – Desiccated Coconut* found that Article VI could not be applied "without reference" to, or independently of, the *SCM Agreement*, this finding cannot mean that the Ad Note may not authorize action that is not envisaged by the *SCM* or *Anti-Dumping Agreement*.<sup>112</sup> In our view, the findings in *Brazil – Desiccated Coconut* that Article VI may not be applied independent of, or without reference to, the *Anti-Dumping Agreement* simply mean (consistent with the conflict mechanism set forth in the general interpretative note to Annex 1A) that Article VI may not be interpreted to justify action that is prohibited by the *Anti-Dumping Agreement*. It is in this sense that Article VI must be applied with reference to the *Anti-Dumping Agreement*. If the Ad Note authorizes conduct, and reference to the *Anti-Dumping Agreement* confirms that such conduct is not prohibited by the *Anti-Dumping Agreement*, we see no basis in the *Anti-Dumping Agreement*, the *GATT 1994*, or the abovementioned findings of the panel and Appellate Body, to prohibit such conduct.<sup>113</sup> Any other approach would deprive the Ad Note of meaning and

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<sup>110</sup> Appellate Body Panel, *Brazil – Desiccated Coconut*, p. 14.

<sup>111</sup> Although the findings of the panel and Appellate Body in *Brazil – Desiccated Coconut* were concerned with the relationship between Article VI of the *GATT 1994* and the *SCM Agreement*, we see no reason why (and the parties have not argued that) those findings should not guide us in assessing the relationship between Article VI and the *Anti-Dumping Agreement*, especially since the Appellate Body's findings concerned the broader "relationship between the *GATT 1994* and the other goods agreement in Annex 1A" to the *WTO Agreement*.

<sup>112</sup> Such result would conflict with the Appellate Body's conclusion that the *SCM Agreement* does not supersede Article VI of the *GATT 1994*.

<sup>113</sup> We note India's argument that Article 18.1 refers to "the provisions of *GATT 1994*, as interpreted by this Agreement" (emphasis added). According to India, this means that the relevant provisions of the *GATT 1994* are those that have been implemented through the *Anti-Dumping Agreement*. India notes that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*. We note that this was not the approach adopted by the Appellate Body in *US – Offset Act (Byrd Amendment)*. In that case, the Appellate Body did not consider whether any of the relevant provisions of Article VI of the *GATT 1994* had been expressly implemented through the *Anti-Dumping Agreement*. Instead, the Appellate Body simply interpreted

legal effect, and would effectively mean that it has been superseded by the *Anti-Dumping Agreement*.<sup>114</sup>

7.74 In our view, such an approach to the relationship between the Ad Note and the *Anti-Dumping Agreement* is entirely consistent with the interpretation set forth by the Appellate Body in *Brazil – Desiccated Coconut*. It also respects the Appellate Body's concern that the WTO system should not reintroduce "the fragmentation that had characterized the previous system".<sup>115</sup> The fragmentation with which the Appellate Body was concerned in *Brazil – Desiccated Coconut* resulted from the fact that, under the GATT regime, Contracting Parties could take anti-dumping action under Article VI even if they had not signed – and were therefore not bound by – the Tokyo Round Anti-Dumping Code. Non-signatories of the Code could therefore act (under Article VI) "independently" of, or "without reference" to the Code. Such fragmentation, which is precluded under the "single undertaking" in the WTO regime, would not be re-introduced by our interpretation of the relationship between Article VI and the *Anti-Dumping Agreement*, since our interpretation is premised on the notion that Article VI may not be applied "independently" of, or "without reference" to, the *Anti-Dumping Agreement*.

7.75 India claims that the application of the EBR is inconsistent with Articles 7 and 9 of the *Anti-Dumping Agreement*. This claim is concerned with the application of the EBR *after* the imposition of the anti-dumping order. Accordingly, the application of the EBR is not a provisional measure and therefore falls outside the scope of Article 7 of the *Anti-Dumping Agreement*. We reject India's Article 9 claim for the reasons set forth at paragraphs 7.96 - 7.107. India has not identified any other provision of the *Anti-Dumping Agreement* that would prohibit the security requirements resulting from the application of the EBR. Nor are we able to identify any. As a matter of law, therefore, such security requirements would be authorized by the Ad Note, provided they are in conformity with the substantive provisions thereof. This is the issue we will turn to shortly.

7.76 Before concluding on the relationship between the Ad Note and the *Anti-Dumping Agreement*, though, we must consider India's specific argument that the Appellate Body has found that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping*

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the phrase "the provisions of *GATT 1994*, as interpreted by this Agreement" as a reference to Article VI of the *GATT 1994*. (see *US – Offset Act (Byrd Amendment) (AB)* paras. 264 and 265). We therefore conclude that the phrase "as interpreted by [the *Anti-Dumping*] Agreement" is simply designed to clarify that the relevant provision of the *GATT 1994* is Article VI, since that is the provision interpreted by the *Anti-Dumping Agreement*. Furthermore, we note that India's argument would result in the Ad note being rendered inutile, simply because it has not been expressly implemented through the *Anti-Dumping Agreement*. In light of our findings regarding the relationship between the Ad Note and the *Anti-Dumping Agreement*, and particularly bearing in mind the Appellate Body jurisprudence to the effect that the provisions of Article VI, including the Ad Note, are not superseded by the *Anti-Dumping Agreement*, we are unable to accept the interpretation proposed by India. We also note that Article 1 of the *Anti-Dumping Agreement* provides in relevant part that the provisions of the *Anti-Dumping Agreement* "govern the application of Article VI of *GATT 1994*". Consistent with our reasoning above, we consider that the *Anti-Dumping Agreement* can only govern the application of Article VI to the extent that it expressly addresses issues covered by Article VI. In our view, the *Anti-Dumping Agreement* cannot govern the application of Article VI in respect of security for definitive anti-dumping duties if the *Anti-Dumping Agreement* contains no provisions expressly dealing with such security.

<sup>114</sup> Any other approach would also render other parts of Article VI, such as paragraph 6(b) thereof, inutile. As noted by the panel in *Brazil – Desiccated Coconut* (note 60), the *Anti-Dumping Agreement* "does not replicate or elaborate on Article VI:5 of the *GATT 1994*, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of *GATT 1994*. If the [Anti-Dumping] Agreement were considered to supersede Article VI of the *GATT 1994* altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended."

<sup>115</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

*Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings".<sup>116</sup> While we acknowledge that such statements were made by the Appellate Body in *US – 1916 Act* and *US – Offset Act (Byrd Amendment)*, we note that the Appellate Body was not considering the WTO-consistency of security imposed pursuant to the Ad Note in those cases. By contrast, we have conducted a careful examination of the relationship between the Ad Note and the *Anti-Dumping Agreement*, and find that the Ad Note may permit responses to dumping in the form of particular security requirements. In doing so, we note that Appellate Body jurisprudence clearly indicates that the Ad Note has not been superseded by the *Anti-Dumping Agreement*. In such circumstances, we are not prepared to find that the Ad Note has been rendered superfluous by dicta in an Appellate Body Report that does not even refer to the provisions of the Ad Note. Instead, we shall base ourselves on the clear-cut guidance that has been provided by the Appellate Body in *Brazil – Desiccated Coconut*.

7.77 For all the above reasons, we find that the relationship between the Ad Note and the *Anti-Dumping Agreement* is not such as to preclude the Ad Note authorizing certain types of security that are not expressly envisaged by the *Anti-Dumping Agreement*.

#### The temporal scope of the Ad Note

7.78 We recall that the EBR was applied on imports entering the United States after the shrimp anti-dumping order was imposed. The first substantive issue we must consider is whether the temporal scope of the Ad Note covers the period of application of the anti-dumping order (as alleged by the United States), or whether it is limited to provisional measures taken prior to the final determination of dumping preceding the imposition of the anti-dumping order (as alleged by India).

#### Ordinary meaning of the text of the Ad Note

7.79 By its express terms, the Ad Note is applicable "pending final determination of the facts in any case of suspected dumping or subsidization". The United States argues that the temporal scope of the Ad Note covers the period of application of the anti-dumping order since, in a retrospective system such as the US system, there remains a "case of suspected dumping" pending completion of the assessment review. India argues that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, regarding the application of provisional measures. According to India, therefore, the application of the Ad Note is expressly limited to provisional measures taken prior to a final determination of dumping.

7.80 The Ad Note refers to "suspected dumping." We interpret "dumping" in light of Article 2.1 of the *Anti-Dumping Agreement*. Having regard to the dictionary definition,<sup>117</sup> we understand the term "suspected" to refer to dumping that is suspected to exist, in the sense that its existence may be likely.  
<sup>118</sup>

7.81 In order to determine whether or not there remains "a case of suspected dumping" after the determination of dumping preceding the imposition of a US anti-dumping order, we must carefully consider the analyses of dumping undertaken in the US retrospective system. In order to impose an anti-dumping order, the United States first determines, through an analysis of import entries during a given period of investigation, whether margins of dumping exist, and whether dumped imports cause

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<sup>116</sup> Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.

<sup>117</sup> *The New Shorter Oxford English Dictionary* (Clarendon Press, 4<sup>th</sup> Ed. 1993), page 3162 (which defines the word "suspected" in relevant part as "that one suspects to exist or to be such; imagined to be possible or likely").

<sup>118</sup> As noted below at note 148, we do not consider that the mere possibility of dumping would be sufficient to justify reasonable security under the Ad Note.

or threaten to cause material injury to a domestic industry. If a determination of injurious dumping is made, the United States issues an anti-dumping duty order. In its anti-dumping duty order, the United States sets forth *ad valorem* cash deposit rates for producers/exporters individually investigated, as well as an "all-others" rate applicable to all other subject producers/exporters. Pursuant to the anti-dumping duty order, importers must post a cash deposit of estimated anti-dumping duties for each import transaction. This cash deposit is based on the overall margin of dumping found for the exporter or producer during the investigation phase. Thereafter, the US retrospective duty assessment system provides that, every twelve months, during the anniversary month of the anti-dumping duty order, importers, exporters, producers, and domestic interested parties have the opportunity to request that USDOC conduct an assessment review of the import entries that occurred in the prior year (but following imposition of the anti-dumping order). During any such review, the United States analyses all of the import entries for the relevant period of review (i.e., the prior 12 months) to determine the final amount of the anti-dumping duty payable on imports from the relevant producer or exporter. For those entries not covered by a request for an assessment review, USDOC instructs US Customs to assess anti-dumping duties at the cash deposit rate required upon entry.

7.82 In our view, there is no certainty that imports entering the United States following imposition of an anti-dumping order are *in fact* dumped. The determination of dumping made during the initial investigation underlying the anti-dumping order does not apply to these imports, since that determination was made on the basis of imports occurring during an earlier period of investigation. Rather, the final determination (of the existence and amount) of dumping is only made in respect of imports entering the United States following imposition of the anti-dumping order when an assessment review is undertaken. Until that time, it is not possible to state with certainty whether or not those imports are dumped. Indeed, the assessment review may demonstrate that those import entries were not dumped, such that no anti-dumping duties may be collected.

7.83 While there is no certainty that import entries subject to an anti-dumping order are dumped, there is a reasonable basis for *suspecting* that they might be. Such suspicion of dumping results from the finding of dumping made in respect of import entries of subject merchandise during the initial period of investigation, i.e., the finding of dumping that gave rise to the anti-dumping order. In our view, that suspicion of dumping may last until a final determination of dumping is made in the assessment review, whereupon both the existence and amount of dumping may be determined with precision.<sup>119</sup>

7.84 We acknowledge that the United States must determine the existence of dumping (and injury and causality) in order to impose an anti-dumping order. That determination, however, relates to imports during the period of investigation underlying the initial investigation. It does not relate to imports entering the United States after the anti-dumping order is imposed. Accordingly, the initial determination does not remove the suspicion of dumping in respect of those later imports. In fact, as noted above, that initial determination is actually the basis for the suspicion of dumping in respect of those later imports.

7.85 India raises arguments regarding the meaning of the phrase "final determination" in the Ad Note. India argues that it is no coincidence that, in almost every context in the *Anti-Dumping Agreement* in which the term "final determination" occurs, it is referred to in the singular in the context of the determination immediately preceding the application of "final measures" or "definitive

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<sup>119</sup> A new determination of dumping in an assessment review would, of course, give rise to a further suspicion of dumping. Even if the results of the first assessment review indicate that there was no dumping during the period under review, we consider it reasonable to continue to suspect – on the basis of the initial investigation underlying the anti-dumping order – that future imports may be dumped. This interpretation is consistent with, and indeed supported by, note 22 of the *Anti-Dumping Agreement*.

duties". In this regard, India notes that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body found that:

"Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, ... Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* ... indicate that a definitive duty is imposed subsequent to a final affirmative determination. We are of the view... that a duty becomes 'definitive' ... at the time of the investigating authority's final affirmative determination.

... The Agreements therefore use the term 'definitive' to distinguish duties imposed after a *final* determination (following an investigation) from 'provisional' duties that may be imposed under certain conditions during the course of an investigation, namely, after a *preliminary* determination."<sup>120</sup> (emphasis in original)

India further notes that in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body found that:

"Members have the right to impose and collect anti-dumping duties only *after* the completion of an investigation in which it *has been established* that the requirements of dumping, injury, and causation *'have been fulfilled'*. In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link."<sup>121</sup> (emphasis in original)

7.86 We recall that the *Mexico – Anti-Dumping Measures on Rice* and *EC – Bed Linen (Article 21.5 – India)* cases concerned anti-dumping measures applied in the context of prospective assessment systems. In such systems, one may legitimately refer to anti-dumping duties being levied pursuant to the "final determination" at the end of the initial investigation. In the present case, though, we are concerned with the US retrospective assessment system. Under that system, anti-dumping duties are not levied pursuant to the final determination at the end of the initial investigation. Accordingly, we see no reason why the "final determination" in the Ad Note may not be interpreted (in the context of a retrospective duty assessment system) as the "determination of the final liability for payment of anti-dumping duties" referred to in Article 9.3.1 of the *Anti-Dumping Agreement*.<sup>122</sup> Since we are not prepared to interpret the Ad Note in a way that would not make sense in the context

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<sup>120</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 345-346.

<sup>121</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 123.

<sup>122</sup> In particular, we see no reason why the determination referred to in Article 9.3.1 may not be considered as a final determination. Furthermore, we note that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "the conditions to impose [an anti-dumping duty] are to be assessed with respect to the current situation" (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165). We understand this to mean that, according to the Appellate Body, the conditions for imposing anti-dumping duties, including the existence of dumping, must be established in respect of the "current situation" (at the time of imposition). There is no obligation on Members, at the time of imposition, to establish the existence of dumping prospectively, by reference to any *future* situation. Indeed, any such obligation would be impossible to fulfil. While Members applying a prospective system of anti-dumping duty collection may use their findings in respect of the period of investigation as a proxy for the period following imposition of a definitive anti-dumping measure, there is no obligation on Members to do so. Indeed, Members applying a retrospective system of anti-dumping duty assessment (which is specifically contemplated by Article 9.3.1) choose not to do so. Accordingly, we see no basis to conclude that the United States, which applies a retrospective system, already determines the existence of dumping in respect of future import entries at the time that it imposes an anti-dumping order. The fact that Article 5.1 requires the United States to establish the existence of dumping at the time it imposes such order, does not mean that the United States is at the same time establishing the existence of dumping in respect of future import entries covered by that order.

of a retrospective duty assessment system,<sup>123</sup> we reject India's argument that the phrase "final determination" in the Ad Note necessarily refers to the final determination made at the end of the initial investigation.

7.87 India further argues that, even going by the arguments of the United States, there cannot be a single "final determination" of the liability for payment of anti-dumping duties because, under Article 9.3.1, there will be as many determinations of the final liability for payment as there are administrative reviews. As noted by the United States,<sup>124</sup> though, in the US system of duty assessment, each set of entries is covered by only one assessment review. Thus, while there may be multiple determinations over the life of an anti-dumping duty order, for each entry, there is only one final determination of the facts with respect to payment.

7.88 India also argues that the arguments of the United States beg the question of why the Ad Note was not implemented by introducing similar provisions and associated disciplines on the taking of security in Article 9 of the *Anti-Dumping Agreement*. India asserts that, if Members had wanted, or perceived a need, to do so, they would have introduced additional provisions in Article 9 of the *Anti-Dumping Agreement* to permit the taking of security after the final determination. In light of our findings regarding the relationship between the Ad Note and the *Anti-Dumping Agreement*, we are not persuaded that Members would have needed to incorporate a specific authorization into the *Anti-Dumping Agreement* in order for the United States to be entitled to require security in respect of imports entering after imposition of an anti-dumping order. In our view, the United States is entitled to require such security on the basis of the authorization provided for in the Ad Note.

7.89 We note India's argument that the above analysis fails to take into account that in many cases no assessment review is conducted.<sup>125</sup> The United States argues that in no case is assessment – whether at the cash deposit rate or otherwise – conducted at the time of entry, and in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability. The United States assert that while, in some cases, the amount of the cash deposit happens to equal the amount of the final liability, it cannot be known at the time of entry whether this will be the case (since it cannot be known whether an interested party intends to request a review).

7.90 Although there may be cases in which no assessment review ultimately takes place, there is no means of knowing this at the time that the import entry is made. Whether or not an assessment review is to take place will only be known once either the assessment review is requested, or the deadline for requesting such review has passed without any such request having been made. Thus, even though imports may ultimately be liquidated at the cash deposit rate in the anti-dumping order, there remains the possibility that an assessment review may be requested, and that such review may indicate that those imports are not dumped (i.e., that no anti-dumping duties are to be assessed). At the time of entry, therefore, such imports may only be suspected of being dumped.

#### Contextual considerations regarding Article 7 of the *Anti-Dumping Agreement*

7.91 India asserts that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, and may not be applied independently of that provision. Accordingly, India submits that the Ad Note may only justify imposing security for provisional measures, as envisaged by Article 7.

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<sup>123</sup> We recall in this regard that the *Anti-Dumping Agreement* is "neutral as between different systems for levy and collection of anti-dumping duties" (Appellate Body Report, *US – Zeroing (Japan)*, para. 163).

<sup>124</sup> See United States' second written submission, note 2.

<sup>125</sup> See India's second written submission, para. 81.

7.92 The United States asserts that nothing in the text of the Ad Note suggests that it is limited to "provisional measures". The United States also contends that neither Article 7 nor the concept of "provisional measures" existed at the time the Ad Note was negotiated.

7.93 In support of its view that the Ad Note is implemented through Article 7 of the *Anti-Dumping Agreement*, India argues that the Ad Note only provides for provisional security measures, i.e., security measures applied before the final determination prior to the imposition of anti-dumping order. For the reasons set forth in the preceding sub-section, we are unable to accept that the temporal scope of the Ad Note is limited in this way.

7.94 In support of its argument, India relies on a single paragraph in a 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties to assert 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 *Anti-Dumping Agreement*."<sup>126</sup> That paragraph provides:

*"Provisional anti-dumping measures*

19. The Group discussed the question of provisional anti-dumping measures. It was recognized that in certain circumstances the use of such measures might be justified in order to limit the material injury to a domestic industry, even though it was noted that Article VI made no mention of them. On the other hand, it was generally felt that provisional measures should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character. For this reason, any such measures should preferably be introduced after the responsible administration of the importing country had carried out an initial confidential investigation that revealed that there was a serious case to consider further. Moreover, where possible, the provisional measures should not lead to a situation in which either the exporter or the importer of the product under investigation would suffer if the eventual decision were not to impose an anti-dumping duty. The Group agreed that it was desirable that such provisional measures should not be of retroactive application and that they should preferably take the form of bond or cash deposits as mentioned in Interpretative Note 1 to paragraphs 2 and 3 of Article VI. Furthermore, they should be based on provisions which would, as far as possible, permit the importer to determine the maximum duty which could be assessed."

7.95 In the second sentence of the above extract from their Report, therefore, the Group of Experts "noted that Article VI made no mention of [provisional measures]". Since the Ad Note was introduced into *GATT 1947* in 1948,<sup>127</sup> and was therefore an integral part of Article VI of the *GATT 1947* at the time that the Group of Experts issued its Report, this statement by the Group of Experts must mean that neither Article VI generally, nor the Ad Note specifically, provided for provisional anti-dumping measures. This statement by the Group of Experts is therefore fundamentally at odds with India's argument that the Ad Note is expressly limited to provisional measures taken prior to a final determination of dumping.

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<sup>126</sup> India's first written submission, para. 92.

<sup>127</sup> The Ad Note to Article VI was included in Article 34 of the Havana Charter and was incorporated into the *GATT 1947* 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)).

Contextual considerations regarding Article 9 of the *Anti-Dumping Agreement*, and the WTO-conformity of cash deposits

7.96 A further contextual consideration arises from the United States' assertion that India's arguments would mean that no security is permissible pending final assessment, including cash deposits. India rejects this argument, asserting instead that cash deposits could be collected pursuant to Article 9 of the *Anti-Dumping Agreement*. India argues that, from the standpoint of both the United States, as the Member collecting anti-dumping duties, and the importer, who is liable to pay the anti-dumping duties following the decision to impose definitive duties, there is no substantive difference between accepting (or paying) "cash deposits" instead of "cash" in payment of anti-dumping duties. India asserts that whether cash is accepted as a "cash deposit" or as "payment of duties" is a difference only in nomenclature and not in substance. India refers in this regard to the statement by the Appellate Body in *US – Zeroing (Japan)*, where it held that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales ...".<sup>128</sup> The United States maintains that cash deposits are not duties within the meaning prescribed under Article 9 of the *Anti-Dumping Agreement*, but instead are a form of security or estimate of the amount of duties that will ultimately be owed on a given entry. The United States also calls attention to the fact that Article 7.2 of the *Anti-Dumping Agreement* distinguishes cash deposits from duties by stating that "provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond ...".<sup>129</sup>

7.97 We consider that the United States' argument raises an extremely important consideration, for the ability to require security is an essential element of a retrospective assessment system (which is specifically contemplated by Article 9.3.1 of the *Anti-Dumping Agreement*). If security, including even cash deposits, may not be required pursuant to the Ad Note, we consider it important to establish what provision of the *GATT 1994* or *Anti-Dumping Agreement* it may be required under. If security, including even cash deposits, may not be imposed under such other provisions, we consider that an interpretation of the Ad Note permitting such security would be further justified. Thus, even though we are not required to rule on whether or not cash deposits may be imposed pursuant to the Ad Note in order to resolve the dispute before us, this issue is an important contextual consideration to which we should have regard when interpreting the Ad Note.

7.98 As to the question of whether or not cash deposits may be justified under other provisions of the *GATT 1994* or *Anti-Dumping Agreement*, India argues that cash deposits may be imposed pursuant to Article 9 of the *Anti-Dumping Agreement*. We are not persuaded by this argument, though, for Article 9 provides only for the imposition of definitive anti-dumping *duties*. As noted by India,<sup>130</sup> the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods ...".<sup>131</sup> In our view, this definition of the term "duty" is not broad enough to encompass cash deposits. Unlike duties, cash deposits do not yield public revenue, in the sense that cash deposits have no intrinsic value in and of themselves. Although cash may have intrinsic value, a cash deposit, on the other hand, is not liquidated revenue is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. A cash deposit will not yield public revenue until some point in the future. In the context of the US retrospective assessment system, that point comes when – and only when – either duties are assessed pursuant to an assessment review, or the cash deposits are liquidated once the deadline for requesting an assessment review has expired (without any assessment review having been requested). Until that point, a cash deposit has no intrinsic value in and of itself. Indeed, India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security",

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<sup>128</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

<sup>129</sup> United States' second written submission, para. 16.

<sup>130</sup> See India's responses to Second Set of Panel Questions, para. 29.

<sup>131</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.

there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."<sup>132</sup> Since we are required to interpret the relevant provisions of the covered agreements by reference to the ordinary meaning of the terms,<sup>133</sup> (and since the ordinary meaning of the terms reflects fundamental differences in the substantive consequences of those terms), we are unable to accept India's argument that whether cash is accepted as a "cash deposit" or as "payment of duties" is a difference only in nomenclature and not in substance.

7.99 Furthermore, we note that Article 9.3.1 of the *Anti-Dumping Agreement* refers to circumstances "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis". If the cash deposit applied in a retrospective system were a duty, it would make no sense to talk of the amount of the duty being assessed on a *retrospective* basis, as the amount of the cash deposit, which India refers to as a "duty", is fixed *prospectively*.

7.100 In addition, we observe that Article 9.3 of the *Anti-Dumping Agreement* provides that the amount of the anti-dumping duty "shall not exceed the margin of dumping as established under Article 2". The Appellate Body has confirmed that the margin of dumping established in an assessment review is a margin of dumping "as established under Article 2".<sup>134</sup> This is also consistent with note 22 to the *Anti-Dumping Agreement*, which applies "when the amount of the anti-dumping duty is assessed on a retrospective basis", and which envisages definitive duties being levied pursuant to "assessment proceeding[s]". Since note 22 accepts that amounts of anti-dumping duties, which (according to Article 9.3) must not exceed the margin of dumping established under Article 2, may be assessed pursuant to assessment proceedings, necessarily note 22 also accepts that the margins of dumping established in assessment proceedings are margins of dumping "established under Article 2". Accordingly, and consistent with Article 9.3, the margin of dumping in the assessment review operates as a ceiling for the amount of anti-dumping duty. If the cash deposit were an anti-dumping duty, and the cash deposit were in excess of the margin of dumping established subsequently in the assessment review, the imposition of that cash deposit would violate Article 9.3. This cannot be a correct interpretation, though, for under this interpretation it would be impossible for a Member requiring cash deposits to know, at the time of application, whether or not it was acting in conformity with Article 9.3.

7.101 We recall India's reference<sup>135</sup> to the statement by the Appellate Body in *US – Zeroing (Japan)* that "[a]t the time of importation, an administering authority may collect duties, in the form of a cash deposit, on all export sales...".<sup>136</sup> However, in that case the Appellate Body was not addressing, and

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<sup>132</sup> See India's responses to Second Set of Panel Questions, para. 33.

<sup>133</sup> Article 3.2 of the DSU provides that WTO Members recognise that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31 of the Vienna Convention on the Law of Treaties, considered as one such rule, reads that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Appellate Body Report on *US – Gasoline*, p. 17. See also Appellate Body Report on *India – Patents (US)*, para. 46; Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 10-12; and Panel Report on *US – DRAMS*, para. 6.13.

<sup>134</sup> In *US – Zeroing (EC)* (para. 130) the Appellate Body stated that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding." In the context of that case (starting with the Appellate Body's reference to the need to establish a margin of dumping (under Article 2) for the product as a whole, and for each exporter or foreign producer (see paras. 127-129)) it is clear to us that the Appellate Body was referring to the margin of dumping established in an assessment review as a margin of dumping "established under Article 2".

<sup>135</sup> See India's second written submission, para. 71.

<sup>136</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

did not need to address, the issue of whether or not cash deposits constitute duties. The Appellate Body's statement therefore constitutes *obiter dictum* in the discussion of a different issue, which we do not feel compelled to treat as authoritative guidance on the issue before us here. Furthermore, in its earlier Report on *US – Zeroing (EC)*, the Appellate Body included dicta to the effect that, under the US retrospective duty assessment system, "the United States collects security in the form of a cash deposit at the time a product enters the United States, and determines the amount of duty due on the entry at a later date."<sup>137</sup> This suggests that in that earlier case the Appellate Body treated cash deposits as a form of security for duties to be collected later, rather than as duties *per se*. Thus, even if we were required to follow Appellate Body dicta, it is unclear exactly how this dicta should be interpreted.

7.102 In addition, we observe that Article 9.3.1 of the *Anti-Dumping Agreement* refers to "refund[s]" to be made in the context of retrospective assessment systems. Article 9.3.1 does not stipulate what precisely must be refunded. Article 9.3.2, by contrast, which applies in the context of prospective assessment systems, refers to "refund[s] ... of any ... duty paid". Unlike Article 9.3.2, therefore, Article 9.3.1 does not characterize what is being refunded as a "duty", even though (as acknowledged by India<sup>138</sup>) Article 9.3.1 is the mechanism by which cash deposits are refunded. If cash deposits were duties, there would have been no need to use different language in Articles 9.3.1 and 9.3.2.

7.103 India also argues that the *Anti-Dumping Agreement* expressly mentions the interpretative and supplementary notes to Article VI that are not subsumed by the provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. India notes in this regard that Article 2.7 of the *Anti-Dumping Agreement* expressly states that "[t]his Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to *GATT 1994*." India asserts that if the drafters of the *Anti-Dumping Agreement* had intended to keep the Ad Note available to Members after the final determination, they would similarly have said so. India also submits that the arguments of the United States beg the question of why the Ad Note was not implemented by introducing similar provisions and associated disciplines on the taking of security in Article 9 of the *Anti-Dumping Agreement* in the case of the retrospective system. India asserts that if Members had wanted, or perceived a need, to do so, they would have introduced additional provisions in Article 9 of the *Anti-Dumping Agreement* during the Tokyo Round or the Uruguay Round process to permit the taking of security after the final determination.

7.104 The implication of India's argument regarding Article 2.7 of the *Anti-Dumping Agreement* is that the Ad Note, together with the majority of other Notes and Supplementary Provisions to Article VI of the *GATT 1994*, are superseded by the *Anti-Dumping Agreement*. We have already explained that there is no basis for reaching any such conclusion. We have also already explained that, based on our interpretation of the relationship between the Ad Note and the *Anti-Dumping Agreement*, there was no need for Members to include an express authorization for collection security (after imposition of the anti-dumping order) in Article 9, for the authorization provided for in the Ad Note remains valid.

7.105 As further contextual support for our view that cash deposits required following imposition of an anti-dumping order are not anti-dumping duties, we note that Article 7.2 of the *Anti-Dumping Agreement*, regarding provisional measures, draws a clear distinction between a (provisional) "duty" and a "cash deposit". India's argument that cash deposits are duties is therefore at odds with the plain language of Article 7.2.

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<sup>137</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 109.

<sup>138</sup> See e.g. India's first written submission, para. 79.

7.106 Accordingly, we are not persuaded by India's argument that cash deposits may be imposed pursuant to Article 9 (as anti-dumping duties). Nor has India advanced any other basis for Members to require security in the form of cash deposits. We recall, though, that we consider that the ability of Members to require security such as cash deposits pending final assessment is an essential requirement for the operation of a retrospective assessment system. Such contextual considerations support our interpretation of the ordinary meaning of the Ad Note as permitting such security.

7.107 In light of the above, we find that the application of the EBR falls within the temporal scope of the Ad Note, in the sense that the Ad Note authorizes the imposition of security requirements during the period following the imposition of a US anti-dumping order.

The combined use of bonds and cash deposits

7.108 We recall that the EBR was applied in conjunction with cash deposits, in the sense that importers had to provide both enhanced bonds and cash deposits covering the same subject import entries. We next consider whether the Ad Note allows the imposition of security requirements combining both cash deposits and bonds, or whether the Ad Note requires Members to choose between either (i) cash deposits or (ii) bonds.

7.109 India asserts that the plain meaning of the disjunctive "or" between the terms "bond" and "cash deposit" is that either a bond or a cash deposit may be required as security for the potential liability for anti-dumping or countervailing duties and not both at the same time.

7.110 The United States submits that nothing in the text or context supports this reading of the term. According to the United States, the phrase "bond or cash deposit" is a parenthetical that appears after the term "reasonable security" and that term provides relevant context for interpretation. The United States asserts that India fails to explain how requiring two types of security instead of one is relevant to determining what constitutes "reasonable security". The United States also argues that India fails to explain why the Agreement should be read to proscribe US Customs from, for example, replacing a portion of the existing cash deposit requirement with a bond requirement. The United States argues that the Appellate Body has interpreted other uses of "or" in the *WTO Agreements* as covering one or the other item, as well as both items, in a phrase. The United States notes that, in its report in *US – FSC (Article 21.5 II)*, the Appellate Body interpreted Article 21.5 of the *DSU* in this manner. Article 21.5 states:

"Where there is disagreement as to the existence *or* consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."<sup>139</sup>

7.111 The United States argues that the Appellate Body interpreted this provision to mean that "an Article 21.5 panel may be called upon to examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or, when such measures exist, the 'consistency' of those measures with the covered agreements, *or a combination of both*, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."<sup>140</sup> The United States submits that, like the language interpreted by the Appellate Body in *US – FSC (Article 21.5 – EC)*, based on the text and context, the "or" in the Ad Note encompasses a cash deposit, a bond, or a combination of both.

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<sup>139</sup> Article 21.5 of the *DSU* (emphasis added).

<sup>140</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60 (emphasis added).

7.112 The Ad Note authorizes the imposition of "reasonable security (bond or cash deposit)". In our view, the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. In terms of form, the phrase "(cash deposit or bond)" in the Ad Note serves to clarify that both cash deposits and bonds constitute reasonable forms of security. Since that is the case, we see nothing in the text of the Ad Note to suggest that the combination of both (otherwise reasonable) forms of security necessarily results in a measure that is unreasonable. In particular, the text of the Ad Note does not provide that the form of security will only be reasonable if *either* (i) cash deposits *or* (ii) bonds are required.

7.113 We consider that an interpretation of the word "or" to permit the combined use of bonds and cash deposits is consistent with the Appellate Body's interpretation of the word "or" in *US – FSC (Article 21.5 – EC II)*. In that case, the Appellate Body found<sup>141</sup> that the word "or" in respect of the phrase "existence or consistency" in Article 21.5 of the *DSU* should be interpreted to permit Article 21.5 proceedings addressing both the "existence" and the "consistency" of implementation measures, not only one or the other. Since the Appellate Body was interpreting a similar use of the word "or" in *US – FSC (Article 21.5 – EC II)*, the Appellate Body's findings regarding that matter offer useful guidance that we consider it appropriate to follow in these proceedings.

7.114 In light of the above, we find that the application of the EBR is consistent with the temporal scope of the Ad Note, and that the United States is entitled to impose security requirements combining both cash deposits and bonds. The final substantive issue for us to examine is whether or not the security requirements established by the EBR in this case were "reasonable" in the meaning of the Ad Note.

Whether the application of the EBR resulted in "reasonable" security requirements

7.115 The Ad Note only permits the imposition of "reasonable" security requirements. Thus, the application of the EBR may only be found to be in accordance with the Ad Note to the extent that it provides for "reasonable" security. The United States asserts that the application of the EBR provided for reasonable security, whereas India contends that the resultant security requirements were not reasonable. As noted in the preceding section, the reasonableness of the security is to be assessed by reference to both the form and the amount thereof. Having already dealt with India's claim regarding the form of the security required by the United States, in this section we consider the reasonableness of the amount thereof.

7.116 The United States submits that the ordinary meaning of the term "reasonable" is "in accordance with reason; not irrational or absurd."<sup>142</sup> The United States further asserts that, with respect to amounts, "reasonable" is additionally defined as "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate."<sup>143</sup> We consider it appropriate to consider the meaning of the term "reasonable" in light of this definition.<sup>144</sup> We believe it equally important, though, to consider the context in which the term "reasonable" is used. In particular, since the Ad Note only permits security in a given "case of suspected dumping", the reasonableness of that security should be assessed in light of the circumstances of that case of suspected dumping.

7.117 In this regard, we recall that the EBR is applied in conjunction with cash deposits. While the cash deposits are designed to secure the duty liability established as a result of the anti-dumping order (or most recent assessment review), the EBR is applied to secure against liability resulting from increases in the rate of dumping over and above that established in the order (or most recent

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<sup>141</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.

<sup>142</sup> The United States refers to *New Shorter Oxford English Dictionary*, p. 2496.

<sup>143</sup> The United States refers to *New Shorter Oxford English Dictionary*, p. 2496.

<sup>144</sup> We note that India has not challenged the definition proposed by the United States.

assessment review).<sup>145</sup> Since the amount of cash deposits is limited to the rate of dumping established in the anti-dumping order (or most recent assessment review), such security corresponds to the given case of suspected dumping, and is therefore in principle "reasonable" within the meaning of the Ad Note. The same reasoning does not cover the application of the EBR, however, since the application of the EBR increases the level of security beyond the dumping liability established as a result of the anti-dumping order. By virtue of the reasonableness requirement in the Ad Note, such increased security would only be permitted if there were some other basis which renders it reasonable in a particular case.

7.118 In light of the abovementioned dictionary definition (whereby reasonableness may be defined as "not irrational or absurd" and, with respect to amounts, as "not greatly less or more than might be thought likely or appropriate"), we consider that there would only be an appropriate basis for such increased security if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping).<sup>146</sup> The Member would also need to determine the likely amount of such increase, in order to ensure that the amount of the additional security requirement is not greatly more than the amount by which the final dumping liability would likely exceed the dumping liability established as a result of the anti-dumping order. Only then could that Member demonstrate that the additional security properly and reasonably relates to an established case of suspected dumping, consistent with the requirements of the Ad Note. Without this type of analysis, the rate in the anti-dumping order remains "the best and only available baseline proxy of duties that ultimately may be assessed",<sup>147</sup> and therefore the best estimate of suspected dumping for which security may be required pursuant to the Ad Note. Security exceeding this estimate would not be "reasonable" in the meaning of the Ad Note.

7.119 We shall therefore examine whether the United States properly determined that the rate of dumping envisaged in the anti-dumping order would likely increase. If we find that it did, we shall then examine whether the United States properly established the likely amount of such increase.<sup>148</sup>

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<sup>145</sup> India has not argued that the United States would not be entitled to collect duties in respect of any amount by which the rate of dumping established in an assessment review exceeds the cash deposits made in respect of the relevant import entries.

<sup>146</sup> Both parties argue that the reasonableness of the application of the EBR should be assessed in light of the likelihood of increases in the rates of dumping. See e.g. United States' responses to First Set of Panel Questions, para. 27, and para. 7 of India's oral statement at the second substantive meeting. We acknowledge that rates of dumping may increase, and that the United States would be entitled to collect anti-dumping duties commensurate with the full amount of dumping. In our view, though, it would not be reasonable to require additional security simply because of the possibility of rates of dumping increasing. (Otherwise, since rates may also possibly decrease, one could argue that a reduction in security would be equally reasonable.) The possibility of rates increasing beyond a reasonable level of security, and importers defaulting on that excess, is a risk inherent in the retrospective system. The Ad Note does not allow Members to seek to eliminate that risk through the application of unreasonably excessive security requirements.

<sup>147</sup> United States' first written submission, para. 37.

<sup>148</sup> The United States also argues that the application of the EBR is reasonable because, in addition to the likelihood of anti-dumping rates increasing, it also reflects the amount of potential liability in the event of default and the likelihood of default (see para. United States' second written submission, para. 24). Both parties submitted argumentation regarding the US assessment of the risk of shrimp importers defaulting on anti-dumping duties in excess of the cash deposits. If the United States had properly established the likelihood of rates increasing, and the amount of likely increase, we consider that the United States would have been able to introduce additional security requirements up to that amount. In the context of the application of the EBR, there is no additional obligation under the Ad Note to assess the risk of default of individual importers. By virtue of the Ad Note, security may be imposed once a case of suspected dumping is established, such that anti-dumping duties may be payable. There is nothing in the Ad Note to suggest that security may only be required if it is further established that importers would not otherwise pay the relevant anti-dumping duties. It is the case of

7.120 The United States asserts that "[t]o analyse the likelihood of potential increases, US Customs used historical data on increases in the anti-dumping rate".<sup>149</sup> In this regard, the United States refers to note 29 to para. 27 of its first written submission, where it is stated that "CBP's analysis at the time indicated that with respect to agriculture/aquaculture cases, rates increased 33 per cent of the time, did not change 11 per cent of the time, and decreased 56 per cent of the time".

7.121 We note that the United States has not submitted any documentary evidence in support of its assertion that anti-dumping rates increased 33 per cent of the time. It is, therefore, impossible to assess the rigour of the United States' analysis. In particular, it is impossible to verify how the United States treated cases where the rate may have increased as a result of error on the part of Customs, or error or fraud on the part of other parties.<sup>150 151</sup> In our view, apparent rate increases resulting from error or fraud should not be confused with genuine increases in exporters' actual rates of dumping.

7.122 Leaving aside the lack of supporting documentary evidence, we are in any event not persuaded that an objective and impartial investigating authority could properly conclude that rates of dumping for subject shrimp were likely to increase on the basis of a finding that, historically, rates only increased in one third of agriculture/aquaculture cases generally.<sup>152</sup> Furthermore, the United States has provided no explanation as to how any alleged historical trend in respect of dumping rates for agriculture/aquaculture cases generally might justify conclusions regarding the likelihood of dumping rates for subject shrimp specifically. In addition, we recall that the EBR is applied on all imports of subject shrimp. A finding that, historically, rates have increased 33 per cent of the time in respect of agriculture/aquaculture cases generally is not sufficient, in our view, to demonstrate that all rates for subject shrimp (in respect of all imports, from all sources) are likely to increase.

7.123 The United States seeks to support its conclusion that rates of dumping would likely increase by asserting that "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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suspected dumping that triggers the right to impose security requirements under the Ad Note, not the risk of default of individual importers. (If this were not the case, the United States would be required to assess the risk of individual importers defaulting before imposing cash deposits.) Although the risk of default does not provide a basis for requiring security under the express terms of the Ad Note, we see no reason why a Member could not choose to impose security requirements authorized under the Ad Note only in respect of those importers with a greater risk of default.

<sup>149</sup> See United States' Responses to First Set of Panel Questions, para. 20.

<sup>150</sup> See e.g. Exhibit IND-8, bottom of p. 10.

<sup>151</sup> India argues that "the real source of defaults in payment of anti-dumping duties appears to be associated with non-market economy cases, surety bankruptcies, new shipper reviews, etc." (see India's responses Second Set of Panel Questions, para. 76). India also asserts that a "GAO Report concluded that most defaults in payments of anti-dumping duties arose out of one country (China) and one sector (crawfish)" (see India's second written submission, para. 87). We do not consider it necessary to review these arguments, though, since at this juncture we are addressing US evidence regarding cases in which the rates of dumping increased, rather than cases resulting in uncollected, or defaulted, anti-dumping duties more generally. (As illustrated at page 8 of Exhibit IND-8, not all uncollected anti-dumping duties in the crawfish case resulted from increased rates of dumping. Scenario 1, e.g. which concerns the majority of the unpaid anti-dumping duties in the crawfish case, concerned the problem of importers from new shippers being allowed to post single entry bonds, rather than cash deposits, and then defaulting on those bonds (with CBP not able to collect from the surety because the latter had gone bankrupt).) Furthermore, Exhibit US – 10 suggests that the United States had evidence of rate increases extending beyond the crawfish case (the United States claims that it had evidence of rate increases in respect of 13 anti-dumping cases involving 340 exporter/producers; see United States' responses to Second Set of Panel Questions, note 28; see also the Amendment, which although it refers explicitly to the crawfish case, also states that "[r]ecent anti-dumping cases for agriculture/aquaculture merchandise have also resulted in considerable rate increases"). Given the broad nature of this evidence, there is no basis to query such evidence by reference to the alleged particularities of a single case.

<sup>152</sup> See United States' first written submission, para. 27.

deposits at the 10.17% rate established in the investigation, may be subject to an assessment rate in excess of 82%.<sup>153</sup> Increases such as these result in unsecured liability, often in excess even of the additional bond amount."<sup>154</sup>

7.124 India retorts that the US reliance on the preliminary results of the first administrative review for Indian shrimp exporters to support its argument that shrimp exporters pose a genuine non-collection risk is clearly misplaced. First, the preliminary results issued on 9 March 2007 cannot justify the imposition of the EBR on 9 July 2004. Second, the results are "preliminary," by definition, and remain subject to correction in the final results of the administrative review. Third, major Indian exporters have complained that there are obvious calculation errors that, if corrected, will lower duty rates considerably. Fourth, the EBR is a self-fulfilling prophecy: US Customs allegedly imposed the EBR on the basis of its prediction that duty rates will be significantly higher at the end of the administrative review; however, exporters who are forced to quit the US market on account of the high costs and collateral requirements of complying with the EBR will not cooperate in the review and will, therefore, suffer higher duty rates. Fifth, contrary to US suggestions, an initial analysis by India's Marine Products Export Development Authority ("MPEDA") reveals that only about 4 % of total shrimp exports by value from India during the period of review were subject to the highest duty rate of 82%. India submits that, if non-producer exporters are excluded on the ground that the shrimp they exported was covered in the responses of the actual producers, only about 1.5% of total shrimp exports from India would be subject to the highest rate of 82%. India further asserts that, in fact, of the 17 exporters who have been subjected to an adverse rate of 82%, eight have not exported at all during the period of review, three are not producer exporters and six have insignificant exports, with total exports of less than \$2,000,000. 44 exporters subject to the "all others rate" have an average rate of 10.54% against 10.17% in the original investigation, a minor difference of 0.37%. India states that the three largest exporters received rates of 4.03%, 11.05% and 24.52% respectively, and that this will result in a refund of \$2.88 million to the first company and payments of approximately \$250,000 and \$1,000,000 by the other two companies. According to India, therefore, the US assertion that 63 out of 70 companies have suffered higher rates, though factual, does not correctly represent the facts.

7.125 In principle, we do not consider that the preliminary results of the first administrative review of the shrimp anti-dumping order are relevant to a determination of whether or not an objective and impartial investigating authority could properly have found, at the time that the EBR was imposed on shrimp, that rates of dumping by shrimp exporters were likely to increase. We therefore decline to base our findings on such *ex post* rationalization. Even if such analysis were relevant, though, it would not favour the position of the United States, for India has demonstrated – and the United States has not disputed – that rates only increased for a very small proportion of shrimp imports from India, and then only to a minor degree.

7.126 For these reasons, we do not consider that an objective and impartial investigating authority could properly have found, on the basis of the evidence relied on by the United States at the relevant time, that the rates of dumping established in the shrimp order were likely to increase.

7.127 In light of our conclusion in the preceding sub-section, we see no need to consider whether or not the United States properly determined the amount by which rates of dumping were likely to increase.

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<sup>153</sup> Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 Fed. Reg. 10,658, 10,667-68 (9 Mar. 2007) (Exhibit US-6).

<sup>154</sup> See United States' first written submission, para. 27.

(iv) *Summary*

7.128 As a result of our finding that the United States failed to properly establish that the rates of dumping provided for in the anti-dumping order were likely to increase, we find that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order. Accordingly, we conclude that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note.

(v) *Finding on whether or not the application of the EBR was "in accordance with" the Ad Note*

7.129 In light of our finding that the application of the EBR was not "reasonable" within the meaning of the Ad Note, we further find that the application of the EBR was not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*.

(c) *Conclusion*

7.130 Since we have found that the application of the EBR constitutes "specific action against dumping" that is not "in accordance with the provisions of the *GATT 1994*, as interpreted by" the *Anti-Dumping Agreement*, we conclude that the application of the EBR is inconsistent with Article 18.1 of the *Anti-Dumping Agreement*. In light of the above analysis, we also find that the application of the EBR to subject shrimp is inconsistent with the Ad Note.

7.131 We note that India has also made a claim under Article 1 of the *Anti-Dumping Agreement*. That claim is necessarily dependent on India's Article 18.1 claim. Since we have found that the application of the EBR to subject shrimp is inconsistent with Article 18.1, we likewise find that it is in violation of Article 1 of the *Anti-Dumping Agreement*.

**3. Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement***

(a) *Main arguments of India*

7.132 India submits that the application of the EBR is inconsistent with the requirements of Article 7 of the *Anti-Dumping Agreement as applied* to importers of shrimp from India. India explains that it considers it necessary to evaluate the consistency of the EBR with the provisions of Article 7 of the *Anti-Dumping Agreement as applied* for two reasons:

- (1) The United States served notices requiring importers of shrimp from India to provide enhanced, continuous bonds shortly after the preliminary affirmative determination dated 4 August 2004 and well before the Anti-dumping Order on 1 February 2005. Further, the Amended CBD does not make provision for the termination of the EBR after the issuing of the Order in the case. Rather, it requires the enhanced bond to be renewed so as to reflect the duty rate currently specified in the Order.
- (2) The United States may seek to defend the EBR as being a "provisional measure" consistent with Article 7 of the *Anti-Dumping Agreement* even in cases where the United States imposed the EBR on importers after the order in an anti-dumping or countervailing duty case. India submits that the United States may argue that the EBR is intended to secure the collection of duties after the final liability is assessed in administrative review proceedings under its retrospective assessment system.

7.133 India submits that, in both instances, the application of the EBR is inconsistent with Article 7 of the *Anti-Dumping Agreement*.

7.134 India asserts that, under Article 7.1(iii) of the *Anti-Dumping Agreement*, it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". According to India, the stated reasons for introducing the EBR, however, do not mention injury being caused during the investigation at all and focus rather on protecting revenue against any failure on the part of importers to pay the duties finally assessed and ensuring that payments are made to domestic industry pursuant to the CDSOA that was held to be inconsistent with the obligations of the United States in *US – Offset Act (Byrd Amendment)*. India therefore submits that, if the EBR is a provisional measure, it is inconsistent with Article 7.1(iii) of the *Anti-Dumping Agreement*.

7.135 India asserts that the EBR is also inconsistent with Article 7.2 of the *Anti-Dumping Agreement*, since provisional measures, whether in the form of a cash deposit or a bond, may not be for an amount in excess of the "provisionally estimated margin of dumping" or the "provisionally calculated amount of subsidization", as the case may be.

7.136 India also submits that the EBR is inconsistent with Article 7.4 of the *Anti-Dumping Agreement*, which limits application of provisional measures to "a period not exceeding four months," to the extent that the EBR on importers is introduced or remains in place on any date after six months have elapsed in the anti-dumping case from the date on which provisional measures are first imposed.

(b) Main arguments of the United States

7.137 The United States submits that Article 7 of the *Anti-Dumping Agreement* does not apply to the EBR. The United States argues that India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the *Anti-Dumping Agreement* regarding provisional measures (i.e., measures taken prior to a final determination of dumping or subsidization).<sup>155</sup> The United States asserts that 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," and is therefore not a "provisional measure" within the meaning of Article 7 of the *Anti-Dumping Agreement*.

7.138 With respect to India's argument that EBR was applied in certain cases prior to the issuance of the order and therefore constitutes a "provisional measure" inconsistent, *as applied*, with Article 7 of the *Anti-Dumping Agreement*,<sup>156</sup> the United States asserts that the October 2006 Notice makes clear that the directive no longer covers additional bond amounts requested prior to issuance of an order.<sup>157</sup>

(c) Evaluation by the Panel

7.139 We first note the relevant provisions as discussed by India in its claims under Article 7 of the *Anti-Dumping Agreement*:

7.140 Article 7.1(iii) provides:

"Provisional measures may be applied only if:

- (iii) the authorities concerned judge such measures necessary to prevent injury being caused."

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<sup>155</sup> India's first written 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 *Anti-Dumping Agreement*.").

<sup>156</sup> India's first written submission, para. 85.

<sup>157</sup> Exhibit IND-6, p. 62,277 (cf. Exhibit IND-3, p. 2-3).

7.141 Article 7.2 provides:

"Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures."

7.142 Article 7.4 provides:

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively."

7.143 We recall that India advanced two reasons for raising its Article 7 claims. First, India alleged application of the EBR as a provisional measure, prior to the imposition of the anti-dumping order. Second, in the event that the United States would seek to defend the application of the EBR by reference to Article 7 of the *Anti-Dumping Agreement*. In view of the US arguments set forth above, it is evident that the United States has not sought to defend the application of the EBR under Article 7. Accordingly, we shall focus our evaluation on India's claim regarding the alleged application of the EBR prior to the imposition of the anti-dumping order.

7.144 Prior to the imposition of the anti-dumping order on subject shrimp from India on 1 February 2005, and on the basis of its preliminary determination of dumping, injury, and causality, in August 2004 the United States imposed provisional measures on imports of subject shrimp in the form of cash deposits or (non-EBR) bonds. We refer to these as the "initial provisional measures". The amount of these initial provisional measures was "equal to the weighted-average amount by which the [normal value] exceeds the [export price]".<sup>158</sup>

7.145 In response to a question from the Panel, the United States acknowledges that, prior to the publication of the anti-dumping order on 1 February 2005, certain importers were also requested to submit enhanced bonds in addition to the abovementioned initial provisional measures. In particular, the United States accepts that, from 6-10 August 2004, officers in one US Customs office sent requests for additional bonds to eleven importers of shrimp (including one importer of shrimp from Thailand and India), referring to the enhanced bond directive. Subsequently, on 22 October 2004, once in November 2004 and three times in January 2005, US Customs officers sent requests for additional bonds to a total of 21 importers.<sup>159</sup> In our view, these additional bond requests should be treated as provisional measures, since they were issued prior to the publication of the anti-dumping order.

7.146 In accordance with Article 7.2 of the *Anti-Dumping Agreement*, provisional measures may not exceed "the amount of the anti-dumping duty provisionally estimated." Since the United States applied initial provisional measures in "the amount of the anti-dumping duty provisionally estimated", the application of the EBR (prior to imposition of the anti-dumping order) in conjunction with the initial provisional measures necessarily resulted in the imposition of provisional measures (i.e., the

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<sup>158</sup> See Notice of Preliminary Determination, page 47,119.

<sup>159</sup> See United States' responses to First Set of Panel Questions, paras. 34-35.

initial provisional measures together with the EBR) in excess of "the amount of the anti-dumping duty provisionally estimated," contrary to Article 7.2 of the *Anti-Dumping Agreement*.

7.147 In light of our finding under Article 7.2 of the *Anti-Dumping Agreement*, we do not consider it necessary to examine India's claims under Articles 7.1(iii) and 7.4 of the *Anti-Dumping Agreement*.

**4. Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*, and Article VI:2 of the *GATT 1994***

(a) Main arguments of India

7.148 India also claims that the EBR *as applied* to importers of shrimp from India is inconsistent with Article 9 of the *Anti-Dumping Agreement* because "it is impermissible to demand an enhanced, continuous bond in addition to the duties collected in an amount equal to the dumping margin or the amount of the subsidy found to exist"<sup>160</sup> following a final determination in the initial investigation.

7.149 India asserts that Article 9.2 of the *Anti-Dumping Agreement* only permits the imposition of anti-dumping duties in "appropriate amounts." As an "appropriate amount," India claims that Article 9.3 of the *Anti-Dumping Agreement* does not permit anti-dumping duties that exceed the margin of dumping.

7.150 Additionally, India argues that Article 9.3.1 of the *Anti-Dumping Agreement* does not confer any right to Members operating a retrospective duty assessment system to impose any additional measure except for anti-dumping duties. According to India, this was confirmed by the Appellate Body in *US – 1916 Act*, with the finding that the *Anti-Dumping Agreement* limits permissible responses to dumping to definitive anti-dumping duties, provisional measures, or price undertakings.<sup>161</sup> Thus, after issuance of an anti-dumping order, India argues that the United States may only collect anti-dumping duties in an amount no greater than specified dumping margins, and not additionally a bond as a provisional measure. India claims that Article 9.3.1 of the *Anti-Dumping Agreement* would not have referred to a refund unless some amount had already been collected prior to determination of final liability, i.e. cash deposit that are collected in the United States' retrospective system. Moreover, India believes that discussion of a refund in Article 9.3.1 of the *Anti-Dumping Agreement* presupposes the collection of duties in cash or cash deposits, and not the taking of a bond or other measure based on this language choice.

(b) Main arguments of the United States

7.151 The United States argues that the context provided by Article 9 of the *Anti-Dumping Agreement* supports its interpretation that the Ad Note permits a Member to take reasonable security during the period in a retrospective assessment system following a final determination and prior to a final assessment review for a transaction of goods. The United States argues that Article 9.2 of the *Anti-Dumping Agreement* does not preclude a Member from requiring security after the final determination in the investigation and pending final determination of the facts with respect to payment of duties. The United States submits that Article 9.2 of the *Anti-Dumping Agreement* allows Members to collect anti-dumping duties "in the appropriate amounts in each case." Moreover, Article 9.3 states that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." According to the United States, the margin of dumping established following the assessment review described in Article 9.3.1 of the *Anti-Dumping Agreement* is a margin of dumping that is calculated in accordance with Article 2 of the *Anti-Dumping Agreement*.

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<sup>160</sup> See India's first written submission, para. 77.

<sup>161</sup> Appellate Body Report, *US – 1916 Act (EC)*, para. 114; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 269.

The United States argues that the cash deposit and EBR ensure or secure payment of this amount of duty in accordance with Article 9.2 of the *Anti-Dumping Agreement*. The United States submits that Article 9.3.1 of the *Anti-Dumping Agreement* reaffirms this. According to the United States, Article 9.3.1 of the *Anti-Dumping Agreement* also clarifies that final liability for payment of anti-dumping duties occurs as the final determination of the facts with respect to payment—the end of an assessment period—like the terminology used in the Ad Note.<sup>162</sup>

7.152 The United States criticises India's argument that the phrase "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* refers to the margin of dumping established in a dumping investigation or during a previous administrative review.<sup>163</sup> The United States argues that the margin of dumping is based on actual analysis of particular entries during an assessment review in order to establish the final liability for payment of anti-dumping duties.

(c) Evaluation by the Panel

7.153 We first note the relevant provisions as discussed by India in its claims under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*.

7.154 Article 9.1 provides:

"The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

7.155 Article 9.2 provides:

"When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

7.156 Article 9.3 provides:

"The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

7.157 Article 9.3.1 provides:

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<sup>162</sup> United States' second written submission, para. 6-7.

<sup>163</sup> United States' second written submission, para. 18.

"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.(footnote omitted) Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested."

7.158 Article VI:2 of the *GATT 1994* provides:

"In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

7.159 As indicated by the title to that provision, Article 9 of the *Anti-Dumping Agreement* is concerned with the "imposition and collection of anti-dumping *duties*" (emphasis added). Consistent with this title, the disciplines set forth in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* concern the imposition and collection of anti-dumping *duties*. In our view, therefore, measures other than anti-dumping duties fall outside the scope of those provisions. Accordingly, we shall begin our analysis of India's claim by considering whether or not the enhanced bond required by the EBR is an anti-dumping duty. If it does not, India's claim must necessarily fail.

7.160 In the context of our review of India's claim under Article 18.1 of the *Anti-Dumping Agreement*, we noted India's argument<sup>164</sup> that the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods ...".<sup>165</sup> In our view, this definition of the term "duty" is not broad enough to encompass the enhanced bond requirements imposed in respect of subject shrimp. Unlike duties, bonds do not yield public revenue, in the sense that bonds have no intrinsic value in and of themselves. A bond is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. A bond will not yield public revenue until some point in the future when it is converted from a security into a form of payment. Indeed, we recall that India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security", there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."<sup>166</sup>

7.161 For these reasons, we conclude that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement*.

7.162 We also note India's claim under Article VI:2 of the *GATT 1994*. Like Article 9 of the *Anti-Dumping Agreement*, that provision contains disciplines regarding the levy of anti-dumping "duties". Accordingly, the application of the EBR also falls outside the scope of Article VI:2 of the *GATT 1994*.

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<sup>164</sup> See India's responses to Second Set of Panel Questions, para. 29.

<sup>165</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.

<sup>166</sup> See India's responses to Second Set of Panel Questions, para. 33.

## 5. Other *as applied* claims by India under the *GATT 1994*

7.163 The Panel notes that India has made a number of additional *as applied* claims under the *GATT 1994*. In particular, India has requested the Panel to find that the EBR *as applied* to imports of shrimp from India is inconsistent with Article X:3(a) of the *GATT 1994* and with Articles I:1, II:1(a) and (b) of the *GATT 1994* or, alternatively, with Articles XI:1 and XIII of the *GATT 1994*.

7.164 We recall that we have found that the application of the EBR is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* because it does not constitute reasonable security in accordance with the provisions of the Ad Note. We have also found that the application of the EBR to importers prior to imposition of the anti-dumping order violated Article 7.2 of the *Anti-Dumping Agreement*.

7.165 The Panel, after careful consideration, on the basis of judicial economy, refrains from ruling on India's claims under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*. The Panel recalls that the principle of judicial economy is recognized in WTO law. The Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party. In fact, a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims are within its terms of reference.<sup>167</sup> The Appellate Body has relied on the explicit aim of the dispute settlement mechanism, which is to secure a positive solution to a dispute, as provided in Article 3.7 of the *DSU*, or a satisfactory settlement of the matter as per Article 3.4 of the *DSU*. The Appellate Body has stressed that the basic aim of dispute settlement in the WTO is to settle disputes and not to "make law" by clarifying existing provisions of the *WTO Agreement* that fall outside the context of resolving a particular dispute:

"[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>168,169</sup>

7.166 We bear in mind that, in *Australia – Salmon*, the Appellate Body cautioned panels against false judicial economy arguing that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"<sup>170</sup>

7.167 The Panel believes that this is not the case in the current proceedings. In making findings under Article 18.1 of the *Anti-Dumping Agreement*, the Panel believes that it has effectively resolved

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<sup>167</sup> Appellate Body Report, *India – Patents (US)*, para. 87.

<sup>168</sup> (footnote original) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

<sup>169</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 340. See also Panel Report, *US – Steel Safeguards*, para. 10.701.

<sup>170</sup> Appellate Body Report, *Australia – Salmon*, para. 223. See also Panel Report, *EC – Sardines*, paras. 7.148-7.152; Appellate Body Report, *US – Steel Safeguards*, para. 10.703.

this aspect of the dispute. The Panel finds support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings. For example, as regards India's claim under Article XI:1 of the *GATT 1994*, the Panel in *US – 1916 Act (Japan)*, after finding a violation of Article VI, held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article XI although this did not mean that Article VI applied to the exclusion of Article XI:1. On that occasion, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.<sup>171</sup> Precedent also exists as regards India's claim under Article X:3(a) of the *GATT 1994*. In previous disputes, after having found violations of, inter alia, Article I of the *GATT 1994*<sup>172</sup>, Article 11.2 of the *Anti-Dumping Agreement*<sup>173</sup> and Article 2.4.1 of the *Anti-Dumping Agreement*<sup>174</sup>, the respective Panels did not consider it necessary to examine the Article X:3(a) claims.

7.168 Even if the Panel would have found that the application of the EBR is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, the Panel is of the view that it would not be appropriate to proceed and rule on India's additional *GATT 1994* claims. We note that the text of Article 18.1 of the *Anti-Dumping Agreement* provides that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement." We recall that this reference to the provisions of *GATT 1994* has been interpreted by the Appellate Body as referring to Article VI of the *GATT 1994*. We further recall that the Ad Note is an integral part of Article VI of the *GATT 1994*. We therefore interpret these provisions to mean that the *WTO Agreements* allow for the imposition of measures which are considered to be specific action against dumping provided they are in accordance with Article VI of the *GATT 1994*, including its Ad Note.<sup>175</sup> Accordingly, we are unable to accept that a measure which constitutes specific action against dumping in accordance with the provisions of the Ad Note, can nevertheless be found inconsistent with other provisions of the *GATT 1994*. For example, if we were to find that the Amended CBD violates the MFN provision of Article I of the *GATT 1994*, such a finding would, as a consequence, render *inutile* the provision in Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note.

7.169 We find additional support for our conclusion in the *General Interpretative Note to Annex IA* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. We have found that the Amended CBD constitutes specific action against dumping or subsidisation in accordance with Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*, and thus, is consistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Therefore, our findings under these provisions of the *Anti-Dumping Agreement* must prevail over any potential finding of violation under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*.

7.170 Finally, we consider the Panel's discussion in *US – 1916 Act (Japan)* further relevant to this issue. After finding a violation of Article VI of the *GATT 1994*, the Panel considered whether it must also analyse a claim under Article III:4 of the *GATT 1994*. It held that, in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article III:4. In doing so, the Panel referred to the international law principle *lex specialis derogat legi generali* in

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<sup>171</sup> Panel Report, *US – 1916 Act (Japan)*, para. 6.281.

<sup>172</sup> Panel Report, *Indonesia – Autos*, para. 14.152.

<sup>173</sup> Panel Report, *US – DRAMS*, para. 6.92.

<sup>174</sup> Panel Report, *US – Stainless Steel*, para. 6.55.

<sup>175</sup> This finding is, of course, without prejudice to the operation and application of note 24 to Article 18.1 of the *Anti-Dumping Agreement*. In this regard, we note and agree with the Appellate Body's finding in *US – Offset Act (Byrd Amendment)* (para. 262) that "an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidisation, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*." Such action would be governed by other provisions of the *GATT 1994*.

support of its reasoning.<sup>176</sup> The Panel did so by virtue of the Appellate Body's finding in *EC – Bananas III* that:

"Although Article X:3(a) of the *GATT 1994* and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the *GATT 1994*."<sup>177</sup>

7.171 We agree that the principle of *lex specialis* should apply in such circumstances. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping and countervailing duties, those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by India. Article VI and the Ad Note therefore constitute *lex specialis* that should prevail over the more general *GATT 1994* provisions cited by India.

7.172 For the above reasons, we conclude that it would not be appropriate for us to proceed and rule on India's claims under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*, and we decline to do so.

#### C. INDIA'S *AS SUCH* CLAIMS

##### 1. Scope of the measure concerned

7.173 As a necessary first step in the analysis of India's *as such* claims, the Panel is to identify the scope of the measure at issue. For its *as such* claims, India has identified as the relevant measure any amendments, clarifications, or extensions comprising the Amended CBD, any related implementing measures, the statutory provision 19 U.S.C. § 1673, and finally the regulatory provision 19 C.F.R. § 113.13.

##### (a) Scope of the Amended CBD

7.174 As we concluded in Section VII.B.1 above when dealing with the scope of the measure at issue in respect to India's *as applied* claims, the Amended CBD comprises (i) the Customs Bond Directive 99-3510-004 on Monetary Guidelines for Setting Bond Amounts, published on 23 July 1991; (ii) the July 2004 Amendment;<sup>178</sup> (iii) the document Current Bond Formulas;<sup>179</sup> (iv) the August 2005 Clarification;<sup>180</sup> and (v) as India indicated in its Request for Establishment, "any amendments, clarifications, or extensions to these measures and all related or implementing measures (together, the 'Amended CBD') issued by US Customs."<sup>181</sup> We also recall that a later instrument, the October 2006 Notice, which was not yet published when India submitted its Request for Establishment, has been found by this Panel to be part of the measure concerned and thus within its terms of reference.

##### (b) The statutory provision 19 U.S.C. § 1673 and the regulatory provision 19 C.F.R. § 113.13

7.175 Having clarified which legal instruments comprise the Amended CBD, the Panel must also address one additional coverage issue: India's request to include the statutory provision 19 U.S.C. §

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<sup>176</sup> Panel Report, *US – 1916 Act (Japan)*, para. 6.269.

<sup>177</sup> Appellate Body Report, *EC – Bananas III*, para. 204.

<sup>178</sup> Exhibit IND-3.

<sup>179</sup> Exhibit IND-4.

<sup>180</sup> Exhibit IND-5.

<sup>181</sup> India's first written submission, para. 17.

1673 and the regulatory provision 19 C.F.R. § 113.13 within the scope of the measure at issue. Both provisions were mentioned in India's Request for Establishment but were not included in its Request for Consultations. Unlike with the October 2006 Notice, the United States has strongly contested the inclusion of both provisions within our terms of reference. The United States argues that we should not consider them because they were not mentioned in India's Request for Consultations.

7.176 The Panel will thus consider whether it may consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 as within its terms of reference. The Panel will first look at the circumstances surrounding the inclusion of these two provisions in India's claim. As mentioned, India did *not* refer to these statutory or regulatory provisions in its Request for Consultations.<sup>182</sup> However, in its Request for Establishment, in addition to identifying the legal instruments encompassing the Amended CBD, India stated:

"[India] understands that the Amended CBD was adopted pursuant to the laws and regulations of the United States that authorize [US Customs] to administer customs laws and regulations including 19 U.S.C. §1484, 19 U.S.C. §1502, 19 U.S.C. §1505, 19 U.S.C. §1623, and 19 U.S.C. §1673g, and the regulations governing the amount and imposition of bonds codified at 19 C.F.R. §113.13, 19 C.F.R. §113.40, 19 C.F.R. §113.62 and 19 C.F.R. §142.2."<sup>183</sup>

7.177 India has commented on the inclusion of these United States customs laws and regulations (which include among them, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13) in its later submissions to the Panel. In its first written submission, India submits that the United States had indicated during the course of consultations that these identical statutory and regulatory provisions authorize US Customs to impose the EBR.<sup>184</sup> India also specified in its first written submission that it considered 19 U.S.C. § 1623(a), 19 C.F.R. § 113.1, and 19 C.F.R. § 113.13 as the authorizing provisions. Subsequently, India clarified that it would focus on 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 with respect to its *as such* claims, claiming that the United States admitted these were the relevant provisions.<sup>185</sup>

7.178 Therefore, for purposes of its *as such* claims, India requests that the Panel consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 alongside the Amended CBD. As an explanation as to why the Panel should consider these provisions within its terms of reference, India argues that the Request for Establishment of a Panel defines the scope of the Panel's terms of reference and there is no requirement of a "precise and exact identity" between the measures subject to consultations and the measures identified in India's Panel request.<sup>186</sup>

7.179 The United States argues that India's claim with respect to 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 is improper since these provisions were not included in India's Request for Consultations and thus do not fall within the Panel's terms of reference. The United States contends that panels are limited to evaluating what was included in the Request for Consultations. Moreover, the United States submits that what may or may not have taken place during consultations is not relevant when reviewing whether a consultation requirement has been met.<sup>187</sup> Regardless of this omission, the

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<sup>182</sup> See WT/DS345/1. India concedes that these measures were not included in its Request. (See India's second written submission, para. 7).

<sup>183</sup> See WT/DS345/6.

<sup>184</sup> India's first written submission, para. 16.

<sup>185</sup> See India's first oral statement, para. 15; India's responses to First Set of Panel Questions, para. 38. In its answers to the First Set of Panel Questions, India reiterated that it wishes to "limit its claims in respect of statute and regulatory provisions to 19 USC. [§]1623 and 19 C.F.R. [§]113.13".

<sup>186</sup> India's second written submission, para. 8.

<sup>187</sup> United States' second written submission, para. 41, citing to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para. 58.

United States argues that these provisions are strictly authorizing provisions and do not require WTO-inconsistent action.

7.180 With the parties views in mind, we now address whether the measure at issue should include 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 within its terms of reference. We indicated what are the terms of reference governing this dispute in paragraph 7.12 above. We explained in paragraphs 7.16-7.19 above that Article 7 of the *DSU* governs the Panel's terms of reference, Article 4 of the *DSU* governs a complainant's request for consultations, and Article 6 of the *DSU* governs a complainant's request for establishment of a panel. We also noted that a panel's terms of reference are governed by the Request for Establishment of a panel.<sup>188</sup> We note that the issue of whether the October 2006 Notice should be included with the Panel's terms of reference has no bearing on whether 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 should also be included, since these provisions are not amendments or modifications to the measure at issue, but altogether separate provisions.

7.181 We adopt the view of the Appellate Body that a panel's terms of reference are governed by the request for establishment of a panel.<sup>189</sup> We also consider this in light of the Article 6.2 of the *DSU*, which requires that the request for establishment of a panel "identify the *specific* measure at issue" (emphasis added), and Article 4.4 of the *DSU*, which provides that any request for consultations must give "identification of the measures at issue". Necessarily then, a panel's terms of reference will include the specific measure as identified in the request for establishment of a panel, and moreover, such a measure should also have been identified in a complainant's request for consultations, to some degree that is less than "specific". Articles 4 and 6, however, do not indicate to what degree the identification of the measure in the request for consultations must relate to the identification of the measure in the request for establishment.

7.182 We therefore must consider if any basis exists, in light of Articles 4 and 6 of the *DSU*, to permit the inclusion of a measure that is mentioned in India's Request for Establishment but not in its Request for Consultations. In attempting to answer this question, we note that the Appellate Body in *Brazil – Aircraft* stated: "Articles 4 and 6 of the *DSU* ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."<sup>190</sup> In this same Report the Appellate Body, however, also rejected the notion that "Articles 4 and 6 of the *DSU* ... require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request of the establishment of a panel."<sup>191</sup> Adhering to its view in *Brazil – Aircraft*, the Appellate Body in *US – Upland Cotton* later cautioned the following:

"We emphasize that consultations are but the first step in the WTO dispute settlement process. They are intended to 'provide the parties an opportunity to define and delimit the scope of the dispute between them'.<sup>192</sup> We also note that Article 4.2 of the *DSU* calls on a WTO Member that receives a request for consultations to 'accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member'. As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the 'precise and exact identity'<sup>193</sup> between the scope of consultations and

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<sup>188</sup> See para. 7.19 above, discussing Appellate Body Report, *US – Upland Cotton*, para. 284.

<sup>189</sup> See e.g. Appellate Body Report, *US – Upland Cotton*, para. 284, citing to Appellate Body Report on *US – Carbon Steel*, para. 124.

<sup>190</sup> Appellate Body Report, *US – Certain EC Products*, para. 70, citing to Appellate Body Report, *Brazil – Aircraft*, para. 131.

<sup>191</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis original).

<sup>192</sup> (footnote original) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

<sup>193</sup> (footnote original) Appellate Body Report, *Brazil – Aircraft*, para. 132 (emphasis omitted).

the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the *DSU*, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise.<sup>194,195</sup>

7.183 In addition to its views presented in *Brazil – Aircraft* and *US – Upland Cotton*, the Appellate Body has also found that a measure challenged by a party does *not* properly fall within a panel's terms of reference simply because that measure was referred to in the panel request. In *US – Certain EC Products*, the Appellate Body addressed a situation where an action undertaken after the consultations was not identified in the Request for Consultations although it was included in the Request for Establishment.<sup>196</sup> The measure was not the subject of the consultations because it happened after the submission of the consultations request. In its analysis, the Appellate Body developed a standard to consider whether an instrument included in the Request for Establishment but absent from the Request for Consultations could nevertheless be considered as a measure at issue and therefore part of the Panel's mandate: whether the alleged measures at issue are *separate* and *legally distinct* measures.<sup>197</sup>

7.184 In the case before us, India's Request for Consultations is clearly silent in respect of 19 U.S.C. § 1623 and 19 C.F.R. § 113.13. The text of India's Request for Consultations (including its footnotes)<sup>198</sup> refers only to the legal instruments that comprise the Amended CBD (with the exception

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<sup>194</sup> (footnote original) Appellate Body Report, *US – Carbon Steel*, para. 124.

<sup>195</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>196</sup> See Appellate Body Report, *US – Certain EC Products*, paras. 69-70.

<sup>197</sup> The Appellate Body evaluated one measure at issue in this dispute, the "increased bonding requirements as of 3 March on EC listed products", against a separate measure, the "19 April action" governing the imposition of 100 per cent duties on certain designated products imported from the European Communities. See Appellate Body Report, *US – Certain EC Products*, para. 60.

<sup>198</sup> India's Request for Consultations provides, in relevant part:

"My authorities have instructed me to request consultations with the United States of America (the 'United States') pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the 'GATT'), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the '*Anti-Dumping Agreement*') and Article 30 of the Agreement on Subsidies and Countervailing Measures (the '*Subsidies Agreement*') with respect to the Customs Bond Directive 99 3510-004 on Monetary Guidelines for Setting Bond Amounts issued on 23 July 1991, as amended by the Amendment to Bond Directive 99-3510-004 for Certain Merchandise subject to Antidumping/Countervailing Duties dated 9 July 2004<sup>1</sup>, and any clarifications and amendments thereof<sup>2</sup> (together, the 'Amended Bond Directive').

...

Pursuant to the Amended Bond Directive, the United States has imposed the enhanced bond requirement on importers of the subject merchandise from India.

The Government of India considers that the Amended Bond Directive is inconsistent *as such* ..."

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<sup>1</sup> Posted on the Internet Website of the United States Customs and Border Protection Service at [http://www.cbp.gov/xp/cgov/import/add\\_cvd/bonds/07082004.xml](http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml), as accessed on 26 May 2006

<sup>2</sup> These include, for example, (i) the document entitled 'Current Bond Formulas', posted on the Internet Website of the United States Customs and Border Protection Service at [http://www.cbp.gov/linkhandler/cgov/import/communications\\_to\\_trade/pilot\\_program/](http://www.cbp.gov/linkhandler/cgov/import/communications_to_trade/pilot_program/)

of the October 2006 Notice, an issue which we have already addressed above in Section VII.B.1 above. India in fact concedes that its Request for Consultations does not refer to any US statutory and regulatory provisions.<sup>199</sup>

7.185 With respect to India's reference to 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 in its Request for Establishment, we note that paragraph 7.176 above lists both of these provisions alongside several other US statutory and regulatory measures.

7.186 We thus consider 19 U.S.C. § 1623 and 19 C.F.R. § 113.13, as identified in India's Request for Establishment of a Panel but *not* its Request for Consultations. The Panel will not consider the actual statements made during consultations, but only the consultation request and the measures themselves in determination of the scope of the measure. As the Appellate Body in *US – Upland Cotton* explained, referring to the approach adopted by the Panel in *Korea – Alcoholic Beverages*, "...[w]hat takes places in ...consultations is not the concern of a panel".<sup>200</sup>

7.187 In light of the Appellate Body's findings in *US – Certain EC Products* that it is necessary to examine what two measures actually *do* in order to determine the legal relationship between these two measures, we will examine, on the basis of factual findings of the Panel, what the Amended CBD, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 each actually do, or provide for.

7.188 We begin our assessment with the Amended CBD. The texts of the instruments comprising the Amended CBD indicate on their face that the measure addresses the imposition of the EBR to "covered cases" of "special category" merchandise. The August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".<sup>201</sup> To accomplish this end, in particular, the instruments provide formulas to determine the amount of the EBR, establish a methodology for making individualized determinations of enhanced bond amounts for individual exporters/producers, and describe notification and publication requirements. We note finally that the 2004 Amendment<sup>202</sup>, 2005 Clarification<sup>203</sup>, and October 2006 Notice<sup>204</sup> also each expressly refer to 19 C.F.R. § 113.13 as constituting the laws and regulations for which United States Customs intends to ensure compliance.<sup>205</sup>

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current\_bond.ctt/current\_bond.doc, on 9 July 2004, as accessed on 26 May 2006; and (ii) the document entitled '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', posted on the Internet Website of the United States Customs and Border Protection Service at [http://www.cbp.gov/linkhandler/cgov/import/add\\_cvd/bonds/bond\\_clarification.ctt/bond\\_clarification.doc](http://www.cbp.gov/linkhandler/cgov/import/add_cvd/bonds/bond_clarification.ctt/bond_clarification.doc), as accessed on 26 May 2006." (See WT/DS345/1, p. 1).

<sup>199</sup> See India's second written submission, para. 7

<sup>200</sup> Appellate Body Report, *US – Upland Cotton*, para. 287, citing to Panel Report, *Korea – Alcoholic Beverages*, para. 10.19. The Appellate Body emphasised that no public record of what actually occurs in consultations exists, and parties are also likely to disagree about what was discussed.

<sup>201</sup> Exhibit IND-3, p. 2.

<sup>202</sup> Exhibit IND-3, p. 1.

<sup>203</sup> Exhibit IND-5, p. 1.

<sup>204</sup> Exhibit IND-6, p. 62,276.

<sup>205</sup> The 2006 Notice identifies 19 C.F.R. § 113.13 as the regulation that governs determination of bond amounts. The 2005 Clarification provides that United States Customs has "broad authority under 19 C.F.R. § 113.13 to formulate guidelines to set the amount of continuous bonds". The 2004 Amendment also refers to 19 C.F.R. § 113.13 as the laws and regulations that *authorize* United States Customs to determine if continuous bond amounts are adequate.

7.189 We next turn to 19 U.S.C. § 1623. Section 19 U.S.C. § 1623 permits the Secretary of the Treasury to authorize US Customs to require bonds or other security to facilitate US Treasury revenue collection or to enforce US laws or regulations. This provision provides in pertinent part:

"In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce."<sup>206</sup>

7.190 Generally, the provisions of 19 U.S.C. § 1623 also govern the conditions and form of the bond, cancellation of a bond, validity of a bond, and making of deposits in lieu of bonds.<sup>207</sup>

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<sup>206</sup> See 19 U.S.C. § 1623(a).

<sup>207</sup> 19 U.S.C. § 1623 provides in full:

(a) Requirement of bond by regulation. In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

(b) Conditions and form of bond. Whenever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may—

(1) Except as otherwise specifically provided by law, prescribe the conditions and form of such bond and the manner in which the bond may be filed with or, pursuant to an authorized electronic data interchange system, transmitted to the Customs Service, and fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum: Provided, That when a consolidated bond authorized by paragraph 4 of this subsection is taken, the Secretary of the Treasury may fix the penalty of such bond without regard to any other provision of law, regulation, or instruction.

(2) Provide for the approval of the sureties on such bond, without regard to any general provision of law.

(3) Authorize the execution of a term bond the conditions of which shall extend to and cover similar cases of importations over such period of time, not to exceed one year, or such longer period as he may fix when in his opinion special circumstances existing in a particular instance require such longer period.

(4) Authorize, to the extent that he may deem necessary, the taking of a consolidated bond (single entry or term), in lieu of separate bonds to assure compliance with two or more provisions of law, regulations, or instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce. A consolidated bond taken pursuant to the authority contained in this subsection shall have the same force and effect in respect of every provision of law, regulation, or instruction for the purposes for which it is required as though separate bonds had been taken to assure compliance with each such provision.

(c) Cancellation of bond. The Secretary of the Treasury may authorize the cancellation of any bond provided for in this section, or of any charge that may have been made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient. In order to assure uniform, reasonable, and equitable decisions, the Secretary of the Treasury shall publish guidelines establishing standards for setting the terms and conditions for cancellation of bonds or charges thereunder.

(d) Validity of bond. No condition in any bond taken to assure compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce shall be held invalid on the ground that such condition is not specified in the law, regulation, or instruction authorizing or requiring the taking of such bond. Any bond transmitted to the Customs Service pursuant to an authorized electronic data interchange system shall have the same force and effect and be binding upon the parties thereto as if such bond were manually executed, signed, and filed.

(e) Deposit of money or obligation of US in lieu of bond. The Secretary of the Treasury is authorized to permit the deposit of money or obligations of the US, in such amount and upon such conditions as he may by

7.191 Lastly, we consider the provision 19 C.F.R. § 113.13. Section 19 C.F.R. § 113.13, which similarly authorizes a US Customs officer to require security in order to facilitate US Treasury revenue collection or enforce US Customs laws or regulations, provides in pertinent part:

"Notwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback officer believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security."<sup>208</sup>

7.192 Generally, the provisions in 19 C.F.R. §113.13 also govern minimum bond amounts, guidelines for determining the bond amounts and periodic review of bond sufficiency.<sup>209</sup>

7.193 Based on our analysis of each of the Amended CBD, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 on its face, and in line with the analysis undertaken in *US - Certain EC Products*, we conclude for several reasons that 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are legally distinct from the legal instruments comprising the Amended CBD. As in *US - Certain EC Products*, the Amended CBD and 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 do not provide for the same action. On the one hand, the Amended CBD specifically permits the imposition of the EBR to "covered cases" of "special category" merchandise to secure collection of *anti-dumping* and/or *countervailing duties*, and provides formulas to determine the amount of the EBR as well as a methodology for making individualized determinations. As we noted, the August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".<sup>210</sup> On the other

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regulation prescribe, in lieu of sureties on any bond required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce.

<sup>208</sup> See 19 C.F.R. § 113.13(d).

<sup>209</sup> 19 C.F.R. § 113.13 provides in full:

(a) Minimum amount of bond. The amount of any Customs bond shall not be less than \$100, except when the law or regulation expressly provides that a lesser amount may be taken. Fractional parts of a dollar shall be disregarded in computing the amount of a bond. The bond always shall be stated as the next highest dollar.

(b) Guidelines for determining amount of bond. In determining whether the amount of a bond is sufficient, the port director or drawback office in the case of a bond relating to repayment of erroneous drawback payment (See §113.11) should at least consider:

(1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments;

(2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations;

(3) The value and nature of the merchandise involved in the transaction(s) to be secured;

(4) The degree and type of supervision that Customs will exercise over the transaction(s);

(5) The prior record of the principal in honouring bond commitments, including the payment of liquidated damages; and

(6) Any additional information contained in any application for a bond.

(c) Periodic review of bond sufficiency. The port directors and drawback offices shall periodically review each bond filed in their respective port or drawback office in the case of a bond relating to repayment of erroneous drawback payment (See §113.11) to determine whether the bond is adequate to protect the revenue and insure compliance with the law and regulations. If the port director or drawback office determines that the bond is inadequate, the principal shall be immediately notified in writing. The principal shall have 30 days from the date of notification to remedy the deficiency.

(d) Additional security. Notwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback office believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security.

<sup>210</sup> Exhibit IND-3, p. 2.

hand, 19 U.S.C. § 1623 provides the Secretary of the Treasury with a general regulatory power to require or authorize customs officers to require bonds or other forms of security in order to protect the revenue or to assure compliance with a US Treasury or US Customs law, regulation, or instruction. Similarly, 19 C.F.R. § 113.13 generally authorizes a port director to require security in the form of a continuous bond in order to protect Treasury revenue or enforce Customs laws or regulations. In our view, the provisions 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 could in fact address many more circumstances entirely distinct from those envisioned through application of an enhanced bond requirement to "covered cases" of "special category" merchandise. Moreover, 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 do not in any way specify particular requirements or limitations related to the imposition of continuous bonds or other types of security requirements, for imports subject to anti-dumping or countervailing duties, other than a \$100 minimum amount, as does the Amended CBD. On the basis of these aspects alone of each the Amended CBD, U.S.C. § 1623 and 19 C.F.R. § 113.13, we consider that the Amended CBD is legally distinct from 19 U.S.C. § 1623 and 19 C.F.R. § 113.13.

7.194 We also note that if the Amended CBD were condemned *as such*, the United States would no longer be permitted to require security in the period following a final determination in the original anti-dumping or countervailing duty investigation until final assessment of liability in order to ensure collection of anti-dumping and/or countervailing duties. However, to condemn 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 would limit the United States' ability to impose security requirements to ensure revenue collection in a wide array of circumstances. Based on its design, the Amended CBD does not encompass or necessarily relate to the same breadth of actions or circumstances. This, in our view, enforces the notion that the Amended CBD is legally distinct from the provisions of 19 U.S.C. § 1623 and 19 C.F.R. § 113.13.

7.195 Finally, we address the fact that the Amended CBD refers to 19 C.F.R. § 113.13 as providing authority for the Amended CBD. We do not consider this fact requires us to conclude that the measures (or 19 U.S.C. § 1623) are somehow inextricably linked. Foremost, the Amended CBD and 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are each distinct legal instruments—one a directive, one a statute, and the third a regulation, respectively. Additionally, as we indicated, the authority embodied in 19 C.F.R. § 113.13 applies broadly and generally to many possible situations and circumstances entirely distinct from that provided for in the Amended CBD. When considering the text of 19 U.S.C. § 1623 (i.e. the fact that both the US Treasury Secretary and US Customs Service are authorized to require security), there are even more occasions for which 19 U.S.C. § 1623 authorizes the US Treasury or US Customs to act that in the case of 19 C.F.R. § 113.13. Thus, both 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are inextricably linked to various additional circumstances and occasions that have no connection with or context relevant to the Amended CBD. As we explained, 19 C.F.R. § 113.13 authorizes US Customs officials to require security under any circumstances where a US Customs official considers revenue to be in jeopardy or US Customs laws to be inhibited, and 19 U.S.C. § 1623 more broadly authorizes US Customs officials or US Treasury officials to require security under any circumstances to assure compliance with *any* provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce. Neither of these provisions strictly addresses the purpose of ensuring collection of anti-dumping or countervailing duties for "covered cases" of "special category" merchandise.

7.196 Accordingly, in light of the fact that we concluded that both 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 are legally distinct from the Amended CBD we find that 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 should not be considered within the scope of the measure at issue, and thus, are not within Panel's terms of reference.

7.197 Based on the foregoing conclusions, the Panel will consider the October 2006 Notice and other instruments comprising the Amended CBD for purposes of resolving India's *as such* claims, but will not address 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 in connection with this dispute.

## 2. Whether the measure at issue may be challenged "*as such*"

7.198 We next consider whether the measure at issue in this dispute may properly be challenged *as such*. According to India, the Amended CBD may be challenged *as such* because together these provisions constitute "rules and norms of general and prospective application that require US Customs to undertake impermissible specific actions against dumping and subsidization by taking security in every case in which it perceives a risk of being unable to collect anti-dumping or countervailing duties at liquidation that it fears may be higher than the duty rates determined on the basis of the final affirmative determination".<sup>211</sup> The United States has argued that India has not sufficiently stated its *as such* claims to merit consideration by this Panel.

7.199 Under WTO law, an *as such* claim challenges "laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations."<sup>212</sup>

7.200 The Appellate Body indicated in *US — Corrosion-Resistant Steel Sunset Review* that "in principle, any act or omission attributable to a WTO Member can be a 'measure' of that Member for purposes of dispute settlement proceedings".<sup>213</sup> The Appellate Body further elaborated on this concept:

"[I]nstruments of a Member containing rules or norms could constitute a 'measure' irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if ... instruments could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged *as such*, but only in the instances of their application. Thus, allowing claims against measures, *as such*, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."<sup>214</sup>

7.201 The concept of what constitutes a measure that may be challenged *as such* was discussed in GATT jurisprudence:

"In the practice under the GATT, most of the measures subject, *as such*, to dispute settlement, were *legislation*. We nevertheless observed in *Guatemala – Cement I* that, in fact, a broad range of measures could be submitted, *as such*, to dispute settlement:

In the practice established under the *GATT 1947*, a 'measure' may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government

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<sup>211</sup> India's responses to First Set of Panel Questions, para. 42. In its first oral submission, India contends that there is no substantive difference between amending a provision in a US anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion. (See India's first oral statement, para. 16; see also India's second written submission, para. 18).

<sup>212</sup> See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

<sup>213</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>214</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

(see *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116)<sup>215</sup> .<sup>216</sup>

7.202 The Appellate body has clarified that both mandatory and non-mandatory measures alike could be challenged *as such* in relation to claims brought under the *Anti-Dumping Agreement*<sup>217</sup>:

"Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the *Anti-Dumping Agreement*. Taken as a whole, 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.<sup>218</sup> If some of these types of measure could not, *as such*, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of 'conformity' set forth in Article 18.4."<sup>219</sup>

7.203 Regarding the form that a measure must take in order for it to be challenged *as such*, in *US – Zeroing (EC)*, the Appellate Body explained the following:

"[w]hen an '*as such*' challenge is brought against a 'rule or norm' that is expressed in the form of a written document – such as a law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged."<sup>220</sup>

7.204 In the dispute before us, we note that the Amended CBD is indeed a rule or norm in the form of a written document that directs the United States to act –in this case, to impose continuous bond security requirements on designated "covered cases" of "special category" merchandise, i.e. shrimp imported from India currently subject to an anti-dumping order. We therefore conclude that the Panel may properly evaluate the measure at issue, the Amended CBD, with respect to India's *as such* claims, regardless of whether these measures are mandatory or discretionary.

### **3. The "mandatory/discretionary" distinction as an analytical tool**

7.205 As a final preliminary matter, we consider whether the "mandatory/discretionary" distinction should be applied when evaluating India's *as such* claims.

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<sup>215</sup> (footnote original) Appellate Body Report on *Guatemala – Cement I*, footnote 47 to para. 69. We note, too, that the panel in *Japan – Semi-Conductors* referred (in para. 107) to another GATT case, *Japan – Agricultural Products I*, where the panel also examined a measure composed, at least in part, of administrative guidance.

<sup>216</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 85. The Appellate Body also refers to the finding in *US – 1916 Act* that Article 17.4 does not place any limit on a panel's jurisdiction to entertain claims against legislation *as such* (See Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 83).

<sup>217</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>218</sup> (footnote original) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

<sup>219</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

<sup>220</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 197.

7.206 India submits that the "mandatory/discretionary" distinction is no longer applicable. India argues that the discretion provided by the Amended CBD assessed together with 19 U.S.C. § 1623 and 19 C.F.R. § 113.13 to undertake impermissible specific action against dumping and subsidisation, renders these provisions WTO-inconsistent *as such*.<sup>221</sup>

7.207 The United States argues that Amended CBD provides US Customs with discretion to apply additional bond requirements on importers, and thus, in light of the "mandatory/discretionary" distinction, is not *as such* WTO-inconsistent.

7.208 The controversial "mandatory/discretionary" distinction was early on developed as an approach under the GATT system to address *as such* claims. Panels that applied the distinction considered whether a disputed measure may only be inconsistent with a GATT or WTO obligation because it *mandates* a violation, or *precludes* action that is consistent with an obligation, or whether the disputed measure may be considered as inconsistent even where the national authorities have *discretion* to apply the measure. In *US – Tobacco*<sup>222</sup> and *US – 1916 Act*<sup>223</sup>, for instance, legislation that merely gave discretion to an authority to violate GATT or WTO obligations could not be condemned *as such* but could still be challenged and condemned *as applied*.

7.209 The scope of applicability of the "mandatory/discretionary" distinction has been a source of debate among WTO members and in WTO jurisprudence. We are aware that the Appellate Body has explained that panels are *not* obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory.<sup>224</sup> For the Appellate Body, "this issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, *as such*, inconsistent with particular obligations."<sup>225</sup> However, the Appellate Body in the same Report commented more broadly on the need to exercise caution when applying the "mandatory/discretionary" distinction<sup>226</sup>:

"[W]e have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the Mandatory/Discretionary distinction.<sup>227</sup> Nor do we

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<sup>221</sup> In its first oral statement, India does not substantively differentiate between amending a provision in a United States anti-dumping or countervailing duty statute to provide discretion, or simply extending the reach of a customs statute, such as 19 USC. § 1623 to confer discretion: See India's first oral statement, para. 16.

<sup>222</sup> See GATT Panel Report, *US – Tobacco*, para. 118.

<sup>223</sup> Appellate Body Report, *US – 1916 Act*, para. 88.

<sup>224</sup> See Section VII.C.2 above.

<sup>225</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. See also, *US – Export Restraints*: The Panel declined to consider the "mandatory/discretionary" distinction as a threshold consideration, and instead identified and addressed the relevant WTO obligations first to assess how the legislation at issue addressed those obligations and whether any violation arose from that (*US – Export Restraints*, paras. 8.11-8.13); *US – Tobacco*: The GATT Panel first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and then considered in light of those findings whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules (*US – Tobacco*, para. 123).

<sup>226</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

<sup>227</sup> (*footnote original*) In our Report in *United States – 1916 Act*, we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the "mandatory/discretionary" distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the *Anti-Dumping Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*". (Appellate Body Report, *US – 1916 Act*, para. 99). We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United

consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'Mandatory/Discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."<sup>228</sup>

7.210 Other recent Appellate Body and panel reports have also recognized the import of the distinction as a technique for evaluating *as such* claims and applied the tool to their analysis, but similarly declined to examine its continuing relevance.<sup>229</sup>

7.211 We likewise consider it unnecessary to undertake a comprehensive examination of the "mandatory/discretionary" distinction in the abstract. Instead, we will address this issue only to the extent necessary in light of our analysis of each of the provisions challenged *as such* by India in this proceeding.

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States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

<sup>228</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93. In that case, the Appellate Body reversed Panel's finding that the Sunset Policy Bulletin was *not* a mandatory legal instrument, thereby eliminating the need to assess the continuing relevance of the "mandatory/discretionary" distinction. See Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 100.

<sup>229</sup> E.g. in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the United States argued that the Panel had erred when it considered whether Section 751(c)(4)(B) of the Tariff Act *could* breach Article 11.3 of the *Anti-Dumping Agreement*, rather than considering whether the statute *mandates* a breach. The Appellate Body concluded that the amended waiver provisions do not preclude the USDOC from making a reasoned determination with a sufficient factual basis, as required by Article 11.3 of the *Anti-Dumping Agreement*, and do not preclude the USDOC from considering other evidence on the record of the sunset review. (See Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 14–20, 120-121.) In *US – Zeroing (EC)* the Appellate Body reiterated its previous statements on the "mandatory/discretionary" distinction in *US – Corrosion-Resistant Steel Sunset Review* that "... as with any such analytical tool, the import of the "'mandatory/discretionary" distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.) (See Appellate Body Report, *US – Zeroing (EC)*, paras. 206-214.) In *Mexico – Anti-Dumping Measures on Rice*, Mexico argued that a provision was WTO consistent because it was not mandatory. The Panel had found that "...by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, [the provision] of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the [*Anti-Dumping Agreement*] or *SCM Agreement*". Moreover, the Panel stated, "[w]hen a law like the Act provides that it 'shall be the responsibility of the Ministry to punish the following infringements', (citation omitted) it does more than just dividing competences among the government, but rather stipulates that fines are to be imposed in case the conditions of [the provision] of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines." [See Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.278 and 7.279.] Mexico argued on appeal that the Panel had failed to read the challenged provisions in the light of another provision, which would have led the Panel to conclude that the measure allowed for discretion to act in a manner consistent with its obligations under the *WTO Agreements*. The Appellate Body rejected this argument. (See Appellate Body Report on *Mexico – Anti-Dumping Measures on Rice*, paras. 271-272.) In *Korea – Commercial Vessels* the Panel found that there had *not* been a rejection by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* of the use of the traditional "mandatory/discretionary" distinction *per se*. The Panel proceeded to resolve the EC's "*as such*" claims on the basis of whether or not the measure at issue mandates the provision of export subsidies. (See Panel Report, *Korea – Commercial Vessels*, paras. 7.58-7.67.) In *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated in footnote 334: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation." (See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, footnote 334.)

7.212 In reviewing each of India's claims *as such*, we will consider each of the instruments comprising the Amended CBD on its face. The Appellate Body has pronounced on the burden of proof and relevant evidence to sustain an *as such* claim with respect to legislation:

"A responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, *as such*, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."<sup>230</sup>

7.213 The Appellate Body has also emphasized that the following:

"When a measure is challenged '*as such*', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure *as such* can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required ..."<sup>231</sup>

7.214 Accordingly, this Panel will apply the "mandatory/discretionary" distinction as an analytical tool where necessary to evaluate India's *as such* claims. We are, however, cognizant of the need to avoid applying it mechanistically.

#### **4. Application of the "mandatory/discretionary" distinction in this dispute**

7.215 Due to our import of the "mandatory/discretionary" distinction for the purpose of evaluating each of India's *as such* claims, we will analyse whether the measure is on its face mandatory or discretionary. The Panel will thus analyse each of the instruments that comprise the Amended CBD on its face.

7.216 We first consider the July 2004 Amendment. The July 2004 Amendment provides that "Port Directors *will be required to review* continuous bonds for importers who import agriculture/aquaculture merchandise subject to anti-dumping and countervailing duty cases *and obtain larger bonds where necessary*".<sup>232</sup> The July 2004 Amendment further provides that Port Directors will be required to review continuous bonds for cases where USDOC has issued a preliminary affirmative determination in an agriculture/aquaculture case, or in the case of new shippers with no prior history of agriculture/aquaculture imports. Finally, we note that the July 2004 Amendment provides that "if [United States Customs] determines any comparable risk with other commodities, a similar review of bond coverage will be performed".<sup>233</sup>

7.217 Similar to the July 2004 Amendment, the August 2005 Clarification authorizes US Customs to designate a "covered case" of "special category" merchandise and apply the EBR to importers

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<sup>230</sup> Appellate Body Report, *US – Carbon Steel*, para. 157 (footnote omitted); Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111 and Appellate Body Report, *US – Gambling*, para. 138.

<sup>231</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112.

<sup>232</sup> See Exhibit IND-3, p. 1 (emphasis added).

<sup>233</sup> Exhibit IND-3, p. 2..

whether subject to an anti-dumping duty order or an affirmative preliminary determination, and for new importers with no prior history of importers of the subject merchandise. The 2005 Clarification reiterates that "[s]pecial categories can be designated where additional bond requirements in the form of greater continuous entry bonds or other security *may be required*".<sup>234</sup> Unlike the July 2004 Amendment, however, the Clarification provides that "[US Customs] may adjust the rates used in the formulas set forth above to calculate different bond amounts as circumstances warrant and to address risks experiences with cases where the [USDOC] deposit rate is 0 percent".<sup>235</sup>

7.218 We next consider the October 2006 Notice. The United States describes the October 2006 Notice as constituting the "comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on CBP's Web site, and the August 2005 Clarification".<sup>236</sup> Similar to the August 2005 Clarification, the October 2006 provides that "[US Customs] will only designate Special Categories, that is, merchandise for which an enhanced bond amount *may be required*"<sup>237</sup>, and, "Special Categories *may be designated* when additional requirements in the form of greater continuous entry bonds or other security *may be required*."<sup>238</sup> However, the 2006 Notice provides that "[US Customs] *may* decide not to require an increased bond amount even though the principal imports Special Category merchandise".<sup>239</sup> The October 2006 Notice also refers to a process that permits importers to attain individualized determinations for EBR amounts. According to the October 2006 Notice, "[i]mporters will be offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and [United States Customs] will determine bond amounts based on that information, the importer's compliance history, and other relevant information available..."<sup>240</sup> Without an importer's submission, the Notice indicates: "[US Customs] *may calculate* the bond amount using the formulas determined on the basis of the risk of non-collection".<sup>241</sup> The 2006 Notice concludes with the statement: "Congress has provided [US Customs] authority to require security in order to ensure the payment of all duties determined to be due to the United States..."<sup>242</sup>

7.219 The document titled "Current Bond Formulas" contains illustrations of the application of the formulas provided in the Amended CBD. We do not find it necessary to consider this document for purposes of determining whether the measure at issue is mandatory or discretionary.

7.220 Based on a review of the text of each of these instruments, we preliminarily conclude that the provisions are not binding on Port Directors, or US Customs more broadly. In other words, the Amended CBD on its face does not appear to require US Customs to designate a particular "covered case" or "special category" of merchandise in order to further impose the EBR to the subject merchandise. In particular, the October 2006 Notice, which represents the United States' most recent publication describing the Amended CBD, indicates that Congress has provided US Customs with the authority to impose enhanced continuous bond amounts. We interpret the language of the October 2006 Notice to reflect an important and inherent limitation on the scope of the Amended CBD. Namely, the Amended CBD instructs US Customs that it may impose the EBR of "covered cases" of "special category" merchandise, and even provides specific instructions for applying the standard formula or making individualized determinations for particular importers. However, the instruments that comprise the Amended CBD (the July 2004 Amendment, August 2005 Clarification, and October

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<sup>234</sup> Exhibit IND-4, p. 2 (emphasis added).

<sup>235</sup> Exhibit IND-4, p. 4.

<sup>236</sup> Exhibit IND-6, p. 62,277.

<sup>237</sup> Exhibit IND-6, p. 62,277 (emphasis added).

<sup>238</sup> Exhibit IND-6, p. 62,277 (emphasis added).

<sup>239</sup> Exhibit IND-6, p. 62,278.

<sup>240</sup> Exhibit IND-6, p. 62,277.

<sup>241</sup> Exhibit IND-6, p. 62,278 (emphasis added).

<sup>242</sup> Exhibit IND-6, p. 62,277.

2006 Notice) do not require that US Customs designate "covered cases" or "special category" merchandise subject to an anti-dumping order prior to applying the EBR. It is in this sense that the August 2005 Clarification provides that "Special Categories of merchandise can be designated where additional bond requirements in the form of greater continuous entry bonds or other security may be required".<sup>243</sup> The October 2006 Notice uses identical language.<sup>244</sup> Rather, the August 2005 Clarification and October 2006 Notice only provide criteria that may be considered to identify "special categories" or "covered cases", such as previous collection problems of a specific industry, the capitalization level of the industry, the projected ability of the industry to pay future duty liabilities, whether the industry is highly leveraged, the history of revenue collection problems of the industry, whether the industry has low duty rates or was duty free previously, and other factors.<sup>245</sup>

7.221 We supplement our analysis with an evaluation of the application of the Amended CBD to date. Primarily, we observe that US Customs has as of yet only designated one "covered case", and thus has only applied the EBR to subject shrimp importers. This has occurred in practice, despite the fact, as the United States revealed, that US Customs has imposed an anti-dumping order on at least one other product in the agriculture/aquaculture category of merchandise, certain orange juice from Brazil, since publication of the Amended CBD. Potentially, US Customs' decision not to apply the EBR to importers of certain orange juice from Brazil could relate to the inherent characteristics of the industry as assessed by US Customs, such as previous collection problems in the industry, the capitalization level of the industry, the projected ability of the industry to pay future duty liabilities, whether the industry is highly leveraged, and so forth. In addition, outstanding anti-dumping orders are in place on other categories of agriculture/aquaculture merchandise, such as crawfish and honey, yet importers of these products are not subject to the EBR. These realities, in our view, indicate that the Amended CBD does not require US Customs to impose the EBR on importers, which would, as India argues, mandate WTO-inconsistent behaviour. In particular, this is telling in the case of outstanding orders on products such as crawfish, where risks of margins increases and default have been alleged, thus suggesting enhanced continuous bond amounts would also be "necessary" within the meaning of the Amended CBD. Instead the Amended CBD functions as a guideline to US Customs officials. Indeed the instruments that comprise the Amended CBD define themselves as "guidelines" in their titles.

7.222 We further note the decision by the USCIT from 13 November 2006 regarding several importers' request for a preliminary injunction against the EBR. The USCIT found US Customs appeared to have *discretion* under US law to consider potential anti-dumping or countervailing duty in setting continuous bond amounts.<sup>246</sup>

7.223 We will also address India's position that the Amended CBD is *as such* inconsistent because the Amended CBD allows for impermissible specific action against dumping or subsidisation by imposing the EBR in every case in which the United States concludes that there is a likelihood of increase in dumping margins or the amount of subsidy found to exist between the final determination and the final assessment in an administrative review. India considers this approach to be consistent with that taken by the panel and upheld by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*<sup>247</sup>. In that case, the United States argued that a Mexican anti-dumping provision allowing for the imposition of a fine for importers which enter products subject to anti-dumping or countervailing duty investigations while such investigations are underway was an impermissible specific action against dumping. Mexico argued that this provision was WTO consistent because it was not

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<sup>243</sup> See Exhibit IND-4, p. 2.

<sup>244</sup> See Exhibit IND-6, p. 62,277.

<sup>245</sup> See Exhibit IND-4, pp. 2-3; Exhibit IND-6, p. 62,277.

<sup>246</sup> See Exhibit IND-16, p. 42.

<sup>247</sup> See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 330; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.278-7.279.

mandatory. The Panel concluded that "...by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, [the provision] of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the [*Anti-Dumping Agreement*] or *SCM Agreement*"<sup>248</sup>. With respect to Mexico's argument that the provision was discretionary and thus, not WTO-inconsistent, the Panel provided:

"When a law like the Act provides that it 'shall be the responsibility of the Ministry to punish the following infringements',<sup>249</sup> it does more than just dividing competences among the government, but rather stipulates that fines are to be imposed in case the conditions of [the provision] of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines."<sup>250</sup>

7.224 Mexico subsequently argued before the Appellate Body that the Panel erred in failing to recognize that the challenged provisions of the FTA are "discretionary" measures that permit the investigating authority to apply them in a WTO-consistent manner.<sup>251</sup> The Appellate Body rejected this argument and found that Mexico improperly failed to bring its claim under Article 11 of the *DSU*.<sup>252</sup>

7.225 We cannot conclude that India's position concerning the findings in *Mexico – Anti-Dumping Measures on Rice* is relevant to the dispute before us. In that case, the Panel found and the Appellate Body agreed that the measure at issue was an impermissible specific action against dumping and subsidization and was therefore, *as such* inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* because it "stipulated" that the ministry responsible for anti-dumping and countervailing duty investigations impose fines in cases where conditions of the measure were met. However, in our case, we do not find that in every occasion that the United States imposes the EBR on importers of a category of merchandise subject to an anti-dumping order its imposition constitutes an impermissible specific action against dumping or subsidisation.

7.226 In our findings presented in Section VII.B.2(b)(iii) above, we determined that the application of the EBR to subject shrimp from India was unreasonable. However, despite the fact that the application of the EBR to subject shrimp constituted an impermissible specific action against dumping in violation of Article 18.1 of the *Anti-Dumping Agreement*, we explained in Section VII.B.2(b)(iii) above that the Ad Note authorises the imposition of security requirements during the period following imposition of a US anti-dumping (or countervailing) duty order so long as the security is reasonable. Thus it would be possible for the United States to apply reasonable security to protect against increases in future anti-dumping duty rates as long as an appropriate basis existed to determine that rates of dumping provided for in the anti-dumping order were likely to increase following a final determination in the original investigation. Based on these findings, we are unable to conclude that a violation will occur for *every* application of the EBR to importers of a designated category of merchandise. In contrast, the measure in *Mexico – Anti-Dumping Measures on Rice* was determined to be an impermissible specific action against dumping which was not permitted under any provision of the *GATT 1994*, the *Anti-Dumping Agreement* or the *SCM Agreement*.

7.227 We therefore find that the Amended CBD on its face allows US Customs to exercise discretion to designate "covered cases" and "special category" merchandise in order to impose the

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<sup>248</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.278.

<sup>249</sup> (footnote original omitted).

<sup>250</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.279.

<sup>251</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 271.

<sup>252</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 272-274.

EBR, and is thus not mandatory in nature. Moreover, contrary to India's stance, each application of the EBR via the Amended CBD may not constitute an impermissible specific action against dumping in violation of the *GATT 1994* and the *Anti-Dumping Agreement* or a specific action against subsidisation in violation of the *GATT 1994* and the *SCM Agreement*.

**5. Whether the Amended CBD is inconsistent *as such* with Articles 1 and 18.1 of the *Anti-Dumping Agreement*, Articles 10 and 32.1 of the *SCM Agreement*, and the Ad Note**

7.228 The Panel notes that India originally made separate *as such* claims with respect to Articles 1 and 18.1 of the *Anti-Dumping Agreement*, on the one hand and the Ad Note, on the other hand. For purposes of our analysis, we are considering these claims together. Additionally, in the context of India's *as such* claims under the *SCM Agreement*, India originally made separate *as such* claims with respect to Articles 10 and 32.1 of the *SCM Agreement* and the Ad Note. We will also consider these claims together.

(a) Main arguments of India

7.229 We note that India's arguments related to its *as such* claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement*, Articles 10 and 32.1 of the *SCM Agreement*, and the Ad Note are substantially the same as those made in relation to its *as applied* claims under those provisions. India claims that the Amended CBD provides for specific action against dumping and subsidisation that is inconsistent *as such* with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*, and is not in accordance with the provisions of the Ad Note. According to India, the Amended CBD is a "specific action" with respect to dumping and subsidisation because an inextricable link exists between the measure and the constituent elements of dumping or of subsidisation as evidenced by the text of the directive. India also submits that the Amended CBD has a serious, adverse impact on importers due to increased bond amounts and surety requirements and, therefore, is "against" dumping or subsidisation. India contends that the Amended CBD is not a permissible response to dumping or subsidisation in accord with any provision Article VI of the *GATT 1994* (including the Ad Note) as interpreted by the *Anti-Dumping Agreement* or *SCM Agreement*. India submits that the measure does not involve a price undertaking by exporters, is not a provisional measure within the meaning of Articles 7 of the *Anti-Dumping Agreement* and Articles 17 of the *SCM Agreement*, and is not within the meaning of the Ad Note. India also submits that it does not satisfy the restrictions imposed by Article 9 of the *Anti-Dumping Agreement* or Article 19 of the *SCM Agreement* governing the collection of definitive anti-dumping or countervailing duties. Finally, India claims that the Amended CBD cannot be justified under either footnote 24 of the *Anti-Dumping Agreement* or footnote 56 of the *SCM Agreement* because the Amended CBD is not merely related to dumping or subsidisation but is specific action against dumping or subsidisation governed by Article VI of the *GATT 1994*.

7.230 Assuming *arguendo* that the Amended CBD is permitted under the Ad Note, India contends that application of the EBR to any case of subject merchandise could not constitute reasonable security within the meaning of the Ad Note. India considers the requirement for security at a rate of 100 per cent of the duties owed on the previous 12 months' imports at the rate set in the relevant anti-dumping or countervailing duty order is overly burdensome.

(b) Main arguments of the United States

7.231 The United States rejects India's claims that the Amended CBD *as such* constitutes impermissible specific action against dumping and subsidisation that is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. According to the United States, the Amended CBD *as such* cannot constitute specific action against dumping because it does not require importers to comply with the EBR. Moreover, the United States submits

that US Customs retains discretion as to whether to impose the EBR at all, either to an entire category of merchandise or on an individual importers/principal basis. According to the United States, the Amended CBD addresses non-collection problems related to anti-dumping duties and is thus only related to dumping or subsidisation in the sense that unsecured liability is anti-dumping or countervailing duty liability. The United States points to the text and design of the Amended CBD in arguing that the constituent elements of dumping or subsidisation are not built into the directive. The United States submits that the Amended CBD is not "against" dumping or subsidisation because evidence does not support the conclusion that the Amended CBD adversely affected subject imports or dissuaded dumping.

7.232 The United States also argues that bond amounts required under the Amended CBD constitute reasonable security during the period following a final determination but prior to a final assessment review in a dumping or subsidisation investigation, under the Ad Note and therefore, the Amended CBD is in accordance with the provisions of *GATT 1994*. The US argues that the "final determination of the facts" in the text of the Ad Note refers to the determination of the facts with respect to the payment of anti-dumping or countervailing duty which occurs in a retrospective assessment system following an assessment review. In a retrospective system, the US argues that dumping or subsidisation is suspected until completion of an assessment review.

(c) Evaluation by the Panel

7.233 The provisions of Article 1 and 18.1 of the *Anti-Dumping Agreement* appear in paragraphs 7.26-7.27 above.

7.234 We note that the provisions in Articles 10 and 32.1 of the *SCM Agreement* governing countervailing duty investigations are substantively similar to those in Articles 1 and 18.1 of the *Anti Dumping Agreement*. Article 10 of the *SCM Agreement* reads:

*"Application of Article VI of GATT 1994<sup>253</sup>*

Members shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>254</sup> on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of the *GATT 1994* and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated<sup>255</sup> and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture."

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<sup>253</sup> (*footnote original*) The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 3 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

<sup>254</sup> (*footnote original*) The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of *GATT 1994*.

<sup>255</sup> (*footnote original*) The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

7.235 Article 32.1 of the *SCM Agreement* reads: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement."<sup>256</sup>

7.236 We recall in Section VII.C.4 above that we concluded that the Amended CBD is not a mandatory measure, in the sense that the United States has discretion to impose the EBR on designated categories of designated merchandise subject to an anti-dumping or countervailing duty order. More importantly, however, we recall our finding that the EBR does not constitute an impermissible specific action against dumping or subsidisation in *every* occasion that it is imposed on importers of a "covered case" or "special category" merchandise subject to an anti-dumping or countervailing duty order. We based this finding on our earlier determination in Section VII.B.2(b)(iii) above related to India's *as applied* claims under Articles 1 and 18.1 of the *Anti-Dumping Agreement* that the Ad Note permits a WTO Member to require reasonable security in the period between a final determination in the original investigation until the final assessment review in a retrospective duty assessment system. In light of this finding, we do not agree with India's position that the Amended CBD *as such* necessarily constitutes an impermissible specific action against dumping in every case to which it is applied. For the foregoing reasons, we accordingly conclude that the Amended CBD *as such* does not violate Article 18.1 of the *Anti-Dumping Agreement* or the Ad Note.

7.237 We note that India has also made an *as such* claim under Article 1 of the *Anti-Dumping Agreement*. That claim is necessarily dependent on India's Article 18.1 claim. Since we have found that the Amended CBD *as such* is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, we likewise find that it does not *as such* violate Article 1 of the *Anti-Dumping Agreement*.

7.238 Based on our reasoning that the Amended CBD does not constitute an impermissible specific action against dumping in every case to which it is applied, we also conclude that the Amended CBD *as such* does not constitute an impermissible specific action against subsidisation, and thus does not violate Article 32.1 of the *SCM Agreement as such*. Due to the consistency of the Amended CBD with Article 32.1 of the *SCM Agreement*, we also find that the Amended CBD *as such* does not violate Article 10 of the *SCM Agreement*.

**6. Articles 7.1(iii), 7.2, and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement***

(a) Main arguments of India

7.239 India argues that the Amended CBD *as such* violates Articles 7.1(iii), 7.2, and 7.4 of the *Anti-Dumping Agreement* and Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement*. These arguments are similar to those made in relation to India's claim that the EBR *as applied* to subject shrimp importers violates Article 7 of the *Anti-Dumping Agreement*, which are presented in Section VII.B.3 above. India explains that it considers it necessary to evaluate the consistency *as such* of the Amended CBD also with the provisions of Article 7 of the *Anti-Dumping Agreement* and of Article 17 of the *SCM Agreement* based on the following premise: the Amended CBD does not make provision for the termination of the EBR after the issuance of an anti-dumping or countervailing duty order and thus provides for the imposition of the EBR as a provisional measure to importers of covered merchandise after a preliminary affirmative determination in an investigation but prior to the issuing of an order in

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<sup>256</sup> (*footnote original*) This paragraph is not intended to preclude action under other relevant provisions of the *GATT 1994*, where appropriate.

an anti-dumping or countervailing duty case.<sup>257</sup> According to India, the application of the EBR following issuance of an order violates the express limitations governing provisional measures and is thus *as such* inconsistent with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*.

7.240 Based on its argument that the Amended CBD provides for the imposition of a provisional measure, India also claims that the Amended CBD *as such* violates Articles 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement* because it is not designed as a measure necessary to prevent injury being caused during an investigation.<sup>258</sup> India asserts that, under Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*, it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". However, according to India, the stated reasons for introducing the EBR do not mention injury being caused during the investigation at all and focus rather on protecting revenue against any failure on the part of importers to pay the duties finally assessed and ensuring that payments are made to domestic industry pursuant to the CDSOA that was held to be inconsistent with the obligations of the United States in *US – Offset Act (Byrd Amendment)*. India therefore submits that, if the EBR is a provisional measure, it is inconsistent *as such* with Article 7.1(iii) of the *Anti-Dumping Agreement* and Article 17.1(c) of the *SCM Agreement*.

7.241 India asserts that the Amended CBD *as such* is also inconsistent with Article 7.2 of the *Anti-Dumping Agreement* and with Article 17.2 of the *SCM Agreement*, since provisional measures, whether in the form of a cash deposit or a bond, may not be for an amount in excess of the "provisionally estimated margin of dumping" or the "provisionally calculated amount of subsidization", as the case may be. India argues that the requirement to provide cash deposits in addition to the EBR clearly exceeds the provisionally estimated margin of dumping.

7.242 Finally, India argues that the Amended CBD *as such* is inconsistent under Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement* to the extent that the EBR is introduced or remains in place on any date after six months have elapsed in the case of an anti-dumping case or after four months have elapsed in the case of a countervailing duty case from the date on which provisional measures are first imposed. If security required under the Amended CBD would not be released until liquidation at least one year following imposition of an anti-dumping order, then any application of the EBR prior to a final determination of dumping in an original investigation would fail to satisfy the limitations imposed by Article 7.4 of the *Anti-Dumping Agreement* and Article 17.4 of the *SCM Agreement*.

7.243 India thus submits that the Amended CBD *as such* is inconsistent with Article 7 of the *Anti-Dumping Agreement* and with Article 17 of the *SCM Agreement*.

(b) Main arguments of the United States

7.244 As with India's *as applied* claims related to Article 7 of the *Anti-Dumping Agreement*, the United States submits that Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* does not apply to the EBR. The United States argues that India appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* regarding provisional measures (*i.e.*, measures taken

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<sup>257</sup> Thus, the Notice states that the Enhanced Bond Requirement may be imposed on importers where US Customs "... detects sudden changes in declared values, claimed country of origin or declared classification, etc. ..."

<sup>258</sup> India's first written submission, para. 86.

prior to a final determination of dumping or subsidization).<sup>259</sup> The United States asserts that 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," and is therefore not a "provisional measure" within the meaning of Article 7 of the *Anti-Dumping Agreement* or Article 17 of the *SCM Agreement*.

7.245 With respect to India's argument that the Amended CBD applies in the period prior to the issuance of the order and therefore constitutes a "provisional measure" inconsistent, *as such* with Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*,<sup>260</sup> the United States asserts that the October 2006 Notice makes clear that the directive no longer covers additional bond amounts requested prior to issuance of an order.<sup>261</sup>

(c) Evaluation by the Panel

7.246 We first note the relevant provisions as discussed by India in its claims under Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*.

7.247 The text of the relevant provisions under Article 7 of the *Anti-Dumping Agreement* appears in Section VII.B.3 above.

7.248 In addition, Article 17.1(c) of the *SCM Agreement* provides:

"Provisional measures may be applied only if:

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation."

7.249 Article 17.2 of the *SCM Agreement* provides:

"Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization."

7.250 Article 17.4 of the *SCM Agreement* provides:

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months."

7.251 The Panel will begin its analysis by considering the text of the Amended CBD. We note that the United States' most recent instrument on record discussing the Amended CBD is the October 2006 Notice. This Notice does not explicitly address the question of whether or not the EBR could be applied before the imposition of an anti-dumping or countervailing duty order. Nevertheless, we consider that certain parts of the Notice clearly indicate that the EBR could not be applied as a provisional measure. For instance, the 2006 Notice provides that the "amount of additional [bond] coverage" will be calculated using a formula incorporating the "AD/CVD rate established in DOC Order (or the rate established in the most recently completed administrative review)."<sup>262</sup> To the extent that the October 2006 Notice provides that the formula for calculating the amount of the EBR refers to

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<sup>259</sup> India's first written 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 *Anti-Dumping Agreement*").

<sup>260</sup> India's first written submission, para. 85.

<sup>261</sup> Exhibit IND-6, p. 62,277 (cf. Exhibit IND-3, pp. 2-3).

<sup>262</sup> Exhibit IND-6, p. 62,277.

the rate of dumping set forth in the anti-dumping or countervailing duty order (or most recent assessment review), the October 2006 Notice does not on its face permit the imposition of the EBR prior to the completion of a final determination in the US retrospective duty assessment system, which precedes publication of an anti-dumping or countervailing duty order. For this reason, in our view, the language of the October 2006 Notice does not provide for the imposition of provisional measures. Provisional duties would only apply prior to the completion of the original anti-dumping or countervailing duty investigation. Therefore, Article 7 of the *Anti-dumping Agreement* or Article 17 of the *SCM Agreement* are not applicable to the Amended CBD.

7.252 To complete our analysis for India's claims under Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement*, we also consider the July 2004 Amendment, August 2005 Clarification, and the Current Bond Formulas document. Unlike the October 2006 Notice, we note that each of these documents presents a formula to calculate an EBR amount with respect to importers of "special category" or "covered case" merchandise subject to a preliminary affirmative determination of dumping or subsidisation. The inclusion of this formula in the July 2004 Amendment, August 2005 Clarification, and the Current Bond Formulas document suggests that the Amended CBD did or still does govern applications prior to a final affirmative determination of dumping or subsidisation. In our view, however, we consider the October 2006 Notice to have amended the measure at issue. We noted in the preceding paragraph that the October 2006 Notice does not explicitly address the question of whether or not the EBR could be applied before the imposition of an anti-dumping or countervailing duty order. Specifically, the October 2006 Notice does not include a formula to calculate an EBR amount with respect to importers of "special category" or "covered case" merchandise subject to a preliminary affirmative determination of dumping or subsidisation. We consider this to be an intentional omission in light of language elsewhere in the Notice (i.e., that the "amount of additional [bond] coverage" will be calculated using a formula incorporating the "AD/CVD rate established in DOC Order (or the rate established in the most recently completed administrative review)"). Due to the absence of such a formula in the October 2006 Notice, and in light of our view that the October 2006 Notice serves to amend the measure at issue with respect to the EBR's application prior to the imposition of an anti-dumping or countervailing duty order, we conclude that the Amended CBD does not provide for the application of the EBR as a provisional measure. Our conclusion also accords with the United States' position that the Amended CBD no longer covers additional bond amounts requested prior to issuance of an order.

7.253 We therefore conclude that the Amended CBD *as such* is not inconsistent with Articles 7.1(iii), 7.2 and 7.4 of the *Anti-Dumping Agreement* or Articles 17.1(c), 17.2 and 17.4 of the *SCM Agreement*.

**7. Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*, Articles 19.2, 19.3 and 19.4 of the *SCM Agreement*, and Article VI:3 of the *GATT 1994***

(a) Main arguments of India

7.254 We note that India has presented identical arguments for its *as such* claims under Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3 and 19.4 of the *SCM Agreement*, as for its *as applied* claims under Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*. These arguments are presented in Section VII.B.4 above.

(b) Main arguments of the United States

7.255 The United States arguments in relation to India's applied claims under Article 9 of the *Anti-Dumping Agreement* presented in Section VII.B.4 above, also remain relevant for India's claims under Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement* and Articles 19.2, 19.3, and 19.4 of the *SCM Agreement*.

(c) Evaluation by the Panel

7.256 We first note the relevant provisions as discussed by India in its claims under Article 9 of the *Anti-Dumping Agreement*, Article 19 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

7.257 The text of the relevant provisions under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* appear in Section VII.B.4 above.

7.258 In addition, Article 19.2 of the *SCM Agreement* provides:

"The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties (footnote omitted) whose interests might be adversely affected by the imposition of a countervailing duty."

7.259 Finally, Article 19.3 of the *SCM Agreement* provides:

"When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter."

7.260 Article 19.4 of the *SCM Agreement* provides:

"No countervailing duty shall be levied<sup>263</sup> on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."

7.261 Article VI:3 of the *GATT 1994* provides the following:

"No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed,

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<sup>263</sup> (footnote original) As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

directly, or indirectly, upon the manufacture, production or export of any merchandise."

7.262 We refer to our findings in section VII.B.4 above in relation to India's *as applied* claim under Articles 9.1, 9.2, 9.3, and 9.3.1 of the *Anti-Dumping Agreement*. We noted, as its title indicates, that Article 9 of the *Anti-Dumping Agreement* is concerned with the "imposition and collection of anti-dumping duties" (emphasis added). Consistent with this title, we also observed that the disciplines set forth in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement* concern the imposition and collection of anti-dumping duties. For that reason, we concluded that measures other than anti-dumping duties fall outside the scope of those provisions. Accordingly, we turned to the context of our review of India's claim under Article 18.1 of the *Anti-Dumping Agreement*, and directly considered India's argument<sup>264</sup> that the term "duty" is defined in the tax context as "the payment to the public revenue levied on the import, export, manufacture or sale of goods ...".<sup>265</sup> We found that India's definition of the term "duty" was not broad enough to encompass the enhanced bond requirements imposed in respect of subject shrimp because bonds do not yield public revenue and have no intrinsic value in and of themselves. We recalled our findings that a bond is not a payment to yield public revenue at the time it is provided, but rather, is provided as a form of security. Indeed, we recalled that India itself acknowledges that "based on the ordinary meaning and the meaning in legal parlance of the terms "provisional duties" and "security", there is clearly a difference, as a matter of law, between collecting duties, provisionally or otherwise, and the taking of security in the form of bonds or cash deposits."<sup>266</sup>

7.263 Therefore, for the same reasons we concluded that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*; we also conclude that India's *as such* claims under Article 9 of the *Anti-Dumping Agreement* and Article VI:2 fail.

7.264 We note that the provisions in Articles 19.2, 19.3, and 19.4 of the *SCM Agreement* governing countervailing duty investigations are substantively similar to those in Articles 9.1, 9.2, 9.3 and 9.3.1 of the *Anti-Dumping Agreement*. Accordingly, based on our reasoning that the enhanced bond is not an anti-dumping duty, with the result that the application of the EBR falls outside the scope of Article 9 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*; we also conclude that the enhanced bond is not a countervailing duty, with the result that the application of the EBR falls outside the scope of Article 19 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

## **8. Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement***

### (a) Main arguments of India

7.265 India claims that the Amended CBD is inconsistent with obligations under Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*. India considers that the Amended CBD and the identified US statutory and regulatory provisions authorize impermissible specific action against dumping, and also violates Articles 7 and 9 of the *Anti-Dumping Agreement*, as well as Articles 17 and 19 of the *SCM Agreement*. India recognizes that its claims under Article 18.4 of the *Anti-Dumping Agreement* and 32.5 of the *SCM*

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<sup>264</sup> See India's responses to Second Set of Questions, para. 29.

<sup>265</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 769.

<sup>266</sup> See India's responses to Second Set of Panel Questions, para. 33.

*Agreement* are consequential to its claims that the cited provisions are inconsistent *as such* with other provisions of the *GATT 1994*, the *Anti-Dumping Agreement*, or the *SCM Agreement*.<sup>267</sup>

(b) Main arguments of the United States

7.266 Due to the continuing relevance of the "mandatory/discretionary" distinction, the United States argues that the Amended CBD and cited laws and regulations are not *as such* inconsistent with any separate obligations of the covered *WTO Agreements*, and are therefore consistent with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.

(c) Evaluation by the Panel

7.267 We consider India's claims that the Amended CBD is inconsistent with obligations under Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement*, and Article XVI:4 of the *WTO Agreement*.

7.268 Article 18.4 of the *Anti-Dumping Agreement* provides that:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the *WTO Agreement* for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

7.269 Similarly, Article 32.5 of the *SCM Agreement* provides that:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the *WTO Agreement* for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

7.270 Article XVI:4 of the *WTO Agreement* provides that:

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

7.271 We do not make findings on the claims of India that the Amended CBD violates Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI of the *WTO Agreement*. The Appellate Body has previously considered it unnecessary to make findings with respect to claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* when a Panel finds that a complainant fails to establish that an *as such* violation has occurred under any specific obligation of the covered agreements.<sup>268</sup> In our opinion, the Appellate Body's rationale is equally applicable to India's claim under Article 32.5 of the *SCM Agreement*. We therefore, also do not make any findings on the claims of India that the Amended CBD violates Article 32.5 of the *SCM Agreement*.

## 9. Other *as such* claims by India under the *GATT 1994*

7.272 The Panel notes that India has made a number of additional *as such* claims under the *GATT 1994*. In particular, India has requested the Panel to find that the Amended CBD *as such* is

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<sup>267</sup> India's second written submission, para. 58.

<sup>268</sup> See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 210-211.

inconsistent with Articles I:1, II:1(a) and (b) of the *GATT 1994* or, alternatively, with Article XI:1 of the *GATT 1994*.

7.273 The Panel recalls its view in Section VII.B.5 above that, even if it were to find that the EBR *as applied* was not an impermissible specific action against dumping, it would not be appropriate to proceed and rule on India's additional *GATT 1994* claims in light of its findings under Articles VI of the *GATT 1994* and its Ad Note, and Articles 1 and 18.1 of the *Anti-Dumping Agreement*. This view also stands as regards India's claims concerning the Amended CBD *as such*. We have found that the Amended CBD *as such* constitutes "specific action against dumping or subsidisation" which is not inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement* and Articles 10 and 32.1 of the *SCM Agreement*. In particular, we found that the Amended CBD allows for the imposition of reasonable security as permitted under the Ad Note and thus in accordance with the provisions of the *GATT 1994*, as interpreted by the *Anti-Dumping* and *SCM Agreements*. As explained before, the Panel is unable to accept that a measure which constitutes specific action against dumping (or subsidisation) in accordance with the provisions of the Ad Note, could nevertheless be found inconsistent with other provisions of the *GATT 1994*. In light of the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, we concluded that our findings under of the Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note must prevail over any potential finding of violation under Articles I, II:1(a) and (b) and XI of the *GATT 1994*. This also applies to our findings under Articles 10 and 32.1 of the *SCM Agreement*.

7.274 We also found support for our view in the principle of international law *lex specialis derogat legi generali*. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping duties, and those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by India, we concluded that Article VI and the Ad Note thus constitute *lex specialis* and should prevail over the more general *GATT 1994* provisions cited by India. This also applies in the context of collecting security for countervailing duties.

7.275 In light of the above, we conclude that it would not be appropriate for us to proceed and rule on India's *as such* claims under Articles I, II:1(a) and (b) and XI of the *GATT 1994*, and we decline to do so.

D. NOTIFICATION REQUIREMENT UNDER ARTICLE 18.5 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE 32.6 OF THE *SCM AGREEMENT*

**1. Main arguments of India**

7.276 India claims that the United States has violated Articles 18.5 of the *Anti-Dumping Agreement* and 32.6 of the *SCM Agreement* by not informing the Committee on Anti-dumping Practices or the Committee on Subsidies and Countervailing Measures (the "Anti-Dumping and SCM Committees") about the Amended CBD. According to India, the EBR unquestionably constitutes a fundamental change in the United States' administration of its laws and regulations relevant to the *Anti-Dumping* and *SCM Agreements*. India argues that the formal designation of the Amended CBD as a "customs law" is irrelevant.<sup>269</sup> Finally, India submits that Members are obligated to notify changes within a reasonable period of time in order to make notification requirements meaningful.

**2. Main arguments of the United States**

7.277 The United States argues that it did not act inconsistently with Article 18.5 of the *Anti-Dumping Agreement* or Article 32.6 of the *SCM Agreement* because the Amended CBD is a "law or

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<sup>269</sup> India's second written submission, para. 91.

regulation" that relates to the administration of United States customs regulations and continuous bonds, and is not related to the administration of anti-dumping or countervailing duty laws and regulations.<sup>270</sup> The United States submits that a Member is not obligated to notify the Anti-Dumping and SCM Committees about any modification to a customs administrative procedure that incidentally affects merchandise subject to anti-dumping or countervailing duties.<sup>271</sup> Furthermore, according to the United States, neither Article 18.5 nor Article 32.6 specify when a Member must notify the measures specified, thus eliminating the possibility of a violation these provisions.<sup>272</sup>

### 3. Evaluation by the Panel

7.278 India requests the Panel to find that the United States has violated Articles 18.5 of the *Anti-Dumping Agreement* and 32.6 of the *SCM Agreement* by failing to notify the Amended CBD to the Anti-Dumping and SCM Committees. The United States, however, is of the view that it was under no obligation to notify the Amended CBD to either of the Committees.

7.279 Article 18.5 of the *Anti-Dumping Agreement* provides:

"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."

7.280 Article 32.6 of the *SCM Agreement* identically provides:

"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."

7.281 We note that the United States has stated that the Amended CBD "is not a 'law or regulation' relevant to the *Anti-Dumping* or *SCM Agreements*, and does not relate to the administration of those laws or regulations."<sup>273</sup> Moreover, the United States has described the Amended CBD as containing "administrative procedures applicable to continuous bonds."<sup>274</sup>

7.282 Notwithstanding the United States' views, even if the Amended CBD, as a directive, would not constitute a "law or regulation", and regardless of whether it addresses US Customs regulations and continuous bonds, it amends the procedure for collecting security from importers who may be liable for anti-dumping or countervailing duties. The EBR has been designed as a security for the collection of potential increased anti-dumping or countervailing duties and this security may only be imposed where a given product is subject to an anti-dumping or countervailing order. We also recall our findings that the Amended CBD constitutes specific action against dumping or subsidisation within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. We arrived at this conclusion by finding, *inter alia*, that the constituent elements of dumping and/or subsidisation were present in the Amended CBD. For all of these reasons, we consider that the Amended CBD "changes ... the administration" of anti-dumping or countervailing duty laws and/or regulations and thus falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*.

7.283 In light of our finding that the Amended CBD falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*, we must last address whether the United States has violated its obligations by failing to notify the Amended CBD to the Anti-Dumping

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<sup>270</sup> United States' first written submission, para. 81.

<sup>271</sup> United States' first written submission, para. 81.

<sup>272</sup> United States' first written submission, paras. 79-82.

<sup>273</sup> United States' first written submission, para. 81.

<sup>274</sup> United States' first written submission, para. 81.

and SCM Committees within a specific timeframe. India has argued that a Member must make such notifications within a "reasonable" time period. We note that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* do not specify an exact time limit for a WTO Member to notify its relevant law or regulation. Despite the absence of a specific deadline, in our view, in order for any notification to be effective, it must be made within a reasonable time. It is also our view that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* were originally formulated to address transparency concerns surrounding the administration of anti-dumping and countervailing duty investigations and measures. A failure to properly notify changes in the anti-dumping laws or regulations, or the administration of such laws to the Anti-Dumping and SCM Committees within a reasonable time fails to address that objective.

7.284 In the matter before us, we are unaware that the United States has yet attempted to notify the Amended CBD to the Anti-Dumping and SCM Committees. The United States has failed to do so despite the fact that the Amended CBD became effective more than three years ago with publication of the July 2004 Amendment. We consider this delay to be unreasonable.

7.285 We accordingly find that the United States has failed to meet its obligation to notify the Amended CBD to the Anti-Dumping and SCM Committees.

E. UNITED STATES' DEFENCE UNDER ARTICLE XX(D) OF THE *GATT 1994*

7.286 Having found that the EBR constitutes "specific action against dumping" and that it is not a "reasonable security" under the Ad Note to Article VI of the *GATT 1994*, and thus it is not "in accordance with the provisions of the *GATT 1994*, as interpreted by the [*Anti-Dumping Agreement*]", the Panel will proceed to examine the United States' defence under Article XX(d) of the *GATT 1994*.

**1. Main arguments of the United States**

7.287 The United States argues that the Amended CBD is justified under Article XX(d) of the *GATT 1994* as a measure necessary to secure compliance with United States anti-dumping and countervailing duty assessment laws. According to the United States, the Amended CBD is necessary to secure compliance with 19 U.S.C. 1673e(1), which governs the assessment of anti-dumping duties, as well as general customs regulations related to the payment of duties. Specifically, according to the United States' argument, the Amended CBD is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. The United States has stated that it considers that problems of "significant potential unsecured liability" and "significant risk of default" exist with respect to subject shrimp entries.<sup>275</sup> The United States submits that 19 U.S.C. 1673e(1) and the other relevant laws and regulations that authorize the Amended CBD are not themselves WTO-inconsistent. The United States also argues that no reasonable alternative is available to ensure revenue collection.<sup>276</sup>

7.288 The United States further argues that the Amended CBD is consistent with the chapeau to Article XX. In this regard, the United States submits that the Amended CBD does *not* constitute a disguised restriction on international trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In support of this position, the United States submits that the measure applies to designated merchandise subject to anti-dumping or countervailing duties regardless of origin, and applies to all countries subject to the anti-dumping order on subject shrimp. In addition, the United States submits that bond amounts may be determined based on individualised risk assessments which are available to all importers/principals. Finally, the United

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<sup>275</sup> United States' first written submission, para. 90.

<sup>276</sup> United States' first written submission, para. 92.

States emphasizes that the Amended CBD was published on US Customs' web site when initially introduced. The October 2006 Notice, which was later published in the Federal Register, is described by the United States as a complete statement of the measure's contents and how it would be applied, which allows importers to comment formally on the EBR and its administration, and presents the directive's objective as addressing revenue collection problems.<sup>277</sup>

## 2. Main arguments of India

7.289 India disagrees with the United States and considers that the EBR as authorized by the Amended CBD, is not justified under Article XX(d) of the *GATT 1994* because it is not necessary to secure compliance with US laws. As a general matter, India argues that the measure cannot be considered as necessary or indispensable since the United States has maintained and operated a retrospective system since at least 1979 without previously encountering a need for the type of security provided by the EBR. Also, as specific to subject shrimp, India submits that the US does not have a basis on record or even expertise for determining a higher likelihood of increase in future margins or defaults. India further argues that the United States' assertion is flawed that a high risk of default in payments by subject shrimp importers/principals exists and that such a risk of default should justify imposition of the EBR to subject shrimp imports. In this regard, India submits that the United States improperly established a higher incidence of default in payments by agriculture/aquaculture importers by factoring in margins for crawfish and garlic importers based on adverse facts available, defaults by new shippers not subject to bond requirements, and surety bankruptcies.<sup>278</sup> Additionally, India argues that the application of the EBR should not be considered necessary since less restrictive remedies exist to ensure the collection of anti-dumping or countervailing duties. India has proposed as alternatives, civil remedies, an across-the-board determination of the financial soundness of all importers prior to application of the EBR, or reductions in the duration of assessment review periods.<sup>279</sup> Regardless of whether the measure is considered necessary, and regardless of the existence of less restrictive alternative remedies, India submits that the EBR does not meet the requirements of the chapeau to Article XX(d). According to India, the designation of shrimp subject to an anti-dumping order as a covered case was arbitrary and capricious, and constitutes a disguised restriction on trade. In particular, India considers the EBR's application to discriminate between the six subject countries and other countries where the same conditions prevail.

## 3. Evaluation by the Panel

7.290 Before examining whether the EBR is justified by Article XX(d) of the *GATT 1994*, we recall that the United States has the burden to prove to the Panel that this is the case.<sup>280</sup>

7.291 We will now look at the text of Article XX(d) and the chapeau of Article XX which provide:

"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:

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<sup>277</sup> See United States' first written submission, para. 77.

<sup>278</sup> India's second written submission, para. 110.

<sup>279</sup> India's second oral statement, paras. 56-57; see also India's second written submission, para. 112.

<sup>280</sup> In *US – Wool Shirts and Blouses*, the Appellate Body held that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

(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 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[.]"

7.292 We note that, in *US – Gasoline*, the Appellate Body concluded that the analysis of a measure under one of the paragraphs of Article XX is a "two-tiered" approach:

"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under [in that case] XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX ..."<sup>281</sup>

7.293 We agree and adopt as our own the Appellate Body's reasoning. Therefore, the Panel shall first look at whether the EBR is necessary to secure compliance with the relevant provisions of US law that direct US Customs to assess and collect anti-dumping duties. We will only proceed to analyse whether the EBR meets the requirements of the *chapeau* to Article XX, i.e whether the EBR allows for "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or constitutes a "disguised restriction on international trade", if we have first determined that the EBR has met the requirements under paragraph (d).

(a) Whether the EBR is necessary to secure compliance with US laws and regulations as provided in Article XX(d) of the *GATT 1994*

7.294 The Appellate Body has indicated that two elements should be satisfied in order for a measure to be provisionally justified under paragraph (d) of Article XX:

"For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the *GATT 1994*. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."<sup>282</sup>

(i) *First element: Whether the EBR has been "designed" to secure compliance with US laws and regulations that are not in themselves WTO-inconsistent*

7.295 We shall therefore commence our analysis by examining whether the EBR has been "designed" to secure compliance with US laws and regulations that are not themselves inconsistent with the *GATT 1994*. A necessary step in this analysis is thus to identify which are those US laws or regulations the compliance with which the EBR is aimed at securing, whether they are not themselves WTO-inconsistent, and whether the EBR is itself designed to secure compliance with the aim expressed in the relevant US laws or regulations.

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<sup>281</sup> Appellate Body Report, *US – Gasoline*, p. 22.

<sup>282</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

7.296 The United States claims that the Amended CBD secures compliance with 19 U.S.C. § 1673e(a)(1), which governs assessment of anti-dumping duties and reads as follows:

"Within 7 days after being notified by the Commission of an affirmative determination under section 1673d (b) of this title, the administering authority shall publish an anti-dumping duty order which—

(1) directs customs officers to assess an anti-dumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—

(A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or

(B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of that merchandise."

7.297 The United States further submits that the Amended CBD is necessary to ensure compliance with 19 C.F.R. § 113.13(c), which requires port directors to obtain bonds "adequate to protect the revenue and insure compliance with the law and regulations."<sup>283</sup>

7.298 India submits that 19 U.S.C. § 1673e(a)(1) or 19 C.F.R. § 113.13(c) exclusively do not govern the obligation to require payment of duties owed to the US Treasury. India submits that 19 U.S.C. § 1673e(a)(1) "... directs US Customs to assess anti-dumping duties ... ", and 19 U.S.C. § 1673e(a)(3) "... requires the deposit of estimated anti-dumping duties pending liquidation ... ". India considers that 19 U.S.C. § 1673e(b) titled "Imposition of duty", which governs imposition of anti-dumping duties, read together with provisions of 19 U.S.C. § 1673f titled "Treatment of difference between deposit of estimated anti-dumping duty and final assessed duty under anti-dumping duty order" actually identifies US Customs' obligation to collect anti-dumping duties.<sup>284</sup> Regardless of the inclusion of these additional provisions, India has stated that all of the provisions read together identify the obligation of the US Treasury and/or US Customs to collect anti-dumping duties.<sup>285</sup>

7.299 Taking the parties' views into consideration, in our view, 19 U.S.C. § 1673e(a)(1) in combination with certain additional provisions encompass the United States' obligation to collect anti-dumping duties. Whereas 19 U.S.C. § 1673e(a)(1) directs customs officers to "assess" an anti-dumping duty, the obligation under 19 U.S.C. § 1673e(b)(1) requires that entries of merchandise subject to an anti-dumping order "be subject to the imposition of anti-dumping duties". Although neither the United States or India did not refer to the following, we also note that 19 U.S.C. § 1673 provides that USDOC shall "impose[] upon such merchandise an anti-dumping duty, in addition to any other duty imposed in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." Additionally, we note that 19

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<sup>283</sup> United States' responses to Second Set of Panel Questions, para. 54.

<sup>284</sup> In the case of countervailing duties, India submits that 19 U.S.C. § 1671e(b) read together with 19 U.S.C. § 1671f(b) govern US Customs' obligation to collect countervailing duties.

<sup>285</sup> India's responses to Second Set of Panel Questions, paras. 98-101.

C.F.R. § 351.212(b)(1) requires that "the Secretary will instruct the Customs Service to assess anti-dumping duties by applying the assessment rate to the entered value of the merchandise". Alternately, 19 C.F.R. § 351.211(c)(1) provides that the cash deposit rate will be assessed as the rate of final liability if an administrative review is not requested. We consider each of these provisions govern the final collection of anti-dumping or countervailing duties. Therefore, in our view, 19 U.S.C. § 1673e(a)(1) in combination with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) represents the United States' obligation to collect anti-dumping duties. We note that 19 U.S.C. § 1673e(a)(3) strictly requires the deposit of " ... *estimated* anti-dumping duties pending liquidation ... ".

7.300 Accordingly, the Panel provisionally concludes that for the purpose of considering the United States' defence under Article XX(d), the law or regulation at issue is 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1), all of which together govern the final collection of anti-dumping or countervailing duties. We do not consider it necessary to expand our discussion to include analysis of 19 U.S.C. § 1673e(a)(3), governing the deposit of estimated anti-dumping duties pending liquidation, or 19 U.S.C. § 1673f, governing treatment of difference between deposit of estimated anti-dumping duty and final assessed duty under anti-dumping duty order.

7.301 The Panel must next consider for the purpose of examining the United States' arguments under Article XX(d) whether 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are in themselves not inconsistent with any provision of the *GATT 1994*. When considering the relevant provisions of the *GATT 1994* governing anti-dumping duties, the Panel recognizes that Article VI:2 expressly recognizes Members' ability to levy anti-dumping duties where lawfully owed. As we have established in Section VII.B.2(b) above, the Ad Note permits Members to require reasonable security in a case of suspected dumping until a final determination of dumping is made in the assessment review. The Panel further notes that India has not expressly challenged any of these laws as inconsistent with any provision of the *GATT 1994*. Moreover, regardless of India's expansion of what constitutes the relevant law enforced by the Amended CBD, the Panel does not interpret India's commentary as a challenge to the right of the United States to collect anti-dumping or countervailing duties. Accordingly, the Panel concludes that, for the purpose of its analysis of the US defence under Article XX(d) of *GATT 1994*, 19 U.S.C. § 1673e(a)(1) read together with 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are not in themselves inconsistent with any provision of the *GATT 1994*.

7.302 As a final preliminary matter, the Panel will next consider whether the Amended CBD, which authorizes application of the EBR, has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1). We note that the August 2004 Amendment indicates that one of the goals of amending the bond directive is "ensuring [US Customs'] ability to collect the anti-dumping and countervailing duties at liquidation and ensuring that the revenue is protected".<sup>286</sup> The August 2005 Clarification states that the continuous bond guidelines were modified as "necessary in order to ensure the revenue is adequately protected".<sup>287</sup> The October 2006 Notice explains:

"Congress has provided [US Customs] authority to require security in order to ensure the payment of all duties determined to be due to the United States, including revenue

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<sup>286</sup> Exhibit IND-3, p. 2.

<sup>287</sup> Exhibit IND-4, p. 1.

collection gaps between estimated duty deposits and final assessed duties that the importer fails to satisfy."<sup>288</sup>

7.303 We note that the stated goal of collecting "anti-dumping and countervailing duties at liquidation" or "final assessed duties" potentially includes both the collection of the amount of duties established during the final determination in the original investigation as well as any increases in anti-dumping duties that may arise in the period following a final determination but prior to assessment of final liability.

7.304 In our view, the text of the instruments comprising the Amended CBD clearly indicates that the stated goals of the measure at issue align with the objectives that 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) are designed to secure: the final collection of anti-dumping or countervailing duties equal to the amount by which normal value of subject merchandise exceeds to export price of that merchandise. Thus, for the purpose of examining the United States' arguments under Article XX(d), it is sufficient for the Panel to conclude that the Amended CBD which authorizes the imposition of the EBR has indeed been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1).

(ii) *Second element: Whether the EBR is "necessary to secure compliance with" 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1)*

7.305 Once we have established that the EBR has been designed to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1), the WTO-compatibility of which is not being contested, we will next examine whether the EBR is "necessary" to ensure such compliance.

7.306 In this regard, the United States argues that the Amended CBD, which authorizes the imposition of the EBR, is necessary to secure compliance with US laws governing revenue collection because it secures unsecured liability arising from additional anti-dumping or countervailing duties owed in excess of cash deposits. In particular, the United States is arguing that the application of the measure to subject shrimp importers was and remains necessary to secure against "significant potential unsecured liability" and "significant risk of default" associated with merchandise entries.<sup>289</sup> According to the United States, the Amended CBD was issued in a year following defaults of more than \$225 million on payment of anti-dumping duties, which reached \$629 million as of end of fiscal year 2006.<sup>290</sup> The United States has estimated that the value of subject shrimp imports exceeds \$2.5 billion<sup>291</sup> and thus poses a significant additional risk for uncollected revenue in the event that importer/principals were to default. The United States claims that the likelihood of default by subject shrimp importers, and importers/principals of agriculture/aquaculture merchandise more broadly, is significant due to the fact that such entities tend to be undercapitalised and discontinue operations before payment of final anti-dumping duty liability.<sup>292</sup> With respect to agriculture/aquaculture anti-dumping cases not including subject shrimp, US Customs concluded that anti-dumping duties increased 33 per cent of the time, did not change 11 per cent of the time, and declined 56 per cent of

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<sup>288</sup> Exhibit IND-6, p. 62,278.

<sup>289</sup> United States' first written submission, para. 90.

<sup>290</sup> United States' first written submission, para. 13.

<sup>291</sup> United States' first written submission, para. 2.

<sup>292</sup> United States' first written submission, para. 15.

the time.<sup>293</sup> In cases where anti-dumping duties increased, the United States claims that final liability for anti-dumping duties often exceeded the amount secured by cash deposit and ordinary basic bond.

7.307 India disputes as unreasonable the US' determination that subject shrimp importers' dumping margins are likely to increase and that subject shrimp importers present a heightened risk of default in comparison to other importers of other products subject to anti-dumping orders. Foremost, India emphasizes that the US' own analysis of anti-dumping duties in the case of other agriculture/aquaculture products indicated that rates do not increase 67 per cent of the time.<sup>294</sup> India also notes that the United States' analysis of the likelihood of margin increases and the likelihood of default was based on crawfish and honey imports, and not subject shrimp. India calls into question the accuracy of the US' analysis, since India claims no basis for comparison exists that shrimp and other agriculture/aquaculture merchandise share similar characteristics related to capitalization rates, low entry/exit barriers, history of customs duties payments, reliance on asset-based financing, and levels of cash flow.<sup>295</sup> India also claims that determination of margins for crawfish and garlic importers are inaccurate predictors for subject shrimp since the dumping margin determinations were based on the application of adverse facts available, defaults by new shippers not subject to bond requirements, and surety bankruptcies that led to a higher incidence of default in payments, which in turn, led to defaults on anti-dumping duties in the years between 2004 and 2006.<sup>296</sup> For these reasons, India submits that the US also does not have a basis on record or even expertise for determining a higher likelihood of increase in future margins or even a likelihood defaults by importers of subject shrimp.<sup>297</sup> India also cites a determination by the USCIT that no basis existed in US Customs' administrative record to establish that shrimp exporters were likely to default on payment of increased duties.<sup>298</sup>

7.308 We first look at the ordinary meaning of the word "necessary":

"[t]hat which is indispensable; an essential...;...[that] which is required for a given situation; ...[t]hat cannot be dispensed with or done without; requisite, essential, needful...; [d]etermined by predestination or natural processes, and not by free will;...resulting inevitably from the nature of things or of the mind itself...; [i]nvariably determined or produced by a previous state of things..."<sup>299</sup>

7.309 The Appellate Body has already examined the concept of "necessary" in the context of Article XX(d) of the *GATT 1994* in *Korea – Various Measures on Beef*. In this case, the Appellate Body concluded that, in order to be considered "necessary" to secure compliance, a measure does not need to be "indispensable", but should constitute something more than strictly "making a contribution to":

"We believe that, as used in the context of Article XX(d), the reach of the word 'necessary' is not limited to that which is 'indispensable' or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. as used in Article XX(d), the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We

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<sup>293</sup> United States' first written submission, footnote 29.

<sup>294</sup> See United States' first written submission, footnote 29.

<sup>295</sup> India's responses to Second Set of Panel Questions, para. 72.

<sup>296</sup> India's second written submission, para. 110.

<sup>297</sup> India's second written submission, para. 111.

<sup>298</sup> Exhibit-IND – 16, p. 54.

<sup>299</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3118.

consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.<sup>300</sup>

7.310 The Appellate Body weighed additional factors in evaluating the necessity of a measure, such as: (i) the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect; (ii) the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue; and, (iii) the restrictive impact of the measure on imported goods. In *Korea – Various Measures on Beef* the stated:

"It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument... There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce,[footnote omitted] that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects ..."<sup>301</sup>

7.311 As pertains to this importance of the interest which the EBR allegedly intends to protect, we consider that the assessment and collection of anti-dumping or countervailing duties carries significant importance, specifically in the context of US efforts to enforce trade remedies permissible under the *WTO Agreements*, and generally, for the purpose of securing collection of US Treasury revenue within the context of its retrospective duty assessment system. It is in this regard that Article VI:1 of the *GATT 1994* expressly recognizes WTO Members' ability to collect anti-dumping duties where lawfully owed. It also stands to reason that taking security logically serves the purpose of collecting the full amount of anti-dumping or countervailing duties owed. The United States argues that the Amended CBD which allows for the imposition of the EBR, secures an otherwise unsecured liability – any additional anti-dumping duties owed upon assessment that exceed cash deposits.<sup>302</sup> We agree that this would logically aid in the collection of revenue. India does not seem to dispute that this is the case.<sup>303</sup>

7.312 As the EBR makes clear on its face, however, we are not dealing with a measure that is designed to secure the collection of anti-dumping duties generally. Instead, we are considering a measure designed to protect against the likelihood of anti-dumping duties exceeding cash deposit rates. We have explained earlier that there could only be an appropriate basis for taking such increased security under the Ad Note if a WTO Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping). Notwithstanding that, we found that the United States had failed to properly

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<sup>300</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161.

<sup>301</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-163.

<sup>302</sup> United States' first written submission, para. 90.

<sup>303</sup> Exhibit IND-8, Exhibit 5, p. 6.

establish that rates of dumping provided for in the anti-dumping order were likely to increase would increase and therefore concluded that the United States had failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order. Accordingly, we found that the additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note. In our view, without adequately establishing that anti-dumping duties are likely to increase above the cash deposit rates, it does not logically follow that a security is necessary within the meaning of Article XX(d) of the *GATT 1994*. Given that the likelihood of increased anti-dumping duties has not been properly established by the United States, we do not see the *need* to impose the EBR to secure against such an outcome.

(b) Conclusion

7.313 Therefore, in light of our findings that that the United States failed to demonstrate that the additional security required through the application of the EBR reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order, we cannot determine that the EBR *as applied* to shrimp is in fact necessary within the meaning of Article XX(d) of the *GATT 1994*. Accordingly, we consider that the United States has failed to establish that the EBR *as applied* to shrimp is justified as being necessary to secure compliance with 19 U.S.C. § 1673e(a)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673e(b)(1), 19 U.S.C. § 1673, 19 C.F.R. § 351.212(b)(1), and 19 C.F.R. § 351.211(c)(1) or any other relevant laws.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, we *reject* India's claims that the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with the provisions of Articles 1, 7.1(iii), 7.2, 7.4, 9.1, 9.2, 9.3 (including 9.3.1), 18.1 and 18.4 of the *Anti-Dumping Agreement*; Articles 10, 17.1(c), 17.2, 17.4, 19.2, 19.3, 19.4 and 32.1 of the *SCM Agreement*; Articles VI:2 and VI:3 of the *GATT 1994*; and the Ad Note thereto.

8.2 In light of the above findings, we *uphold* India's claims that:

- (i) the application of the EBR to subject shrimp from India is inconsistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*, and the Ad Note; that
- (ii) the application of the EBR to subject shrimp from India prior to the imposition of the anti-dumping order is inconsistent with Article 7.2 of the *Anti-Dumping Agreement*; and that
- (iii) the United States violated Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* because it failed to notify the Amended CBD to the Anti-Dumping and SCM Committees;

8.3 We *reject* the United States' argument that the application of the EBR is justified under Article XX(d) of the *GATT 1994*.

8.4 In light of the above findings, we *decline to rule* separately on India's claims that:

- (i) the application of the EBR to subject shrimp from India *prior* to the imposition of the anti-dumping order is inconsistent with Articles 7.1(iii), 7.4 and 7.5 of the *Anti-Dumping Agreement*; that

- (ii) the application of the EBR to subject shrimp from India is inconsistent with Articles I:1, Article II:1(a) and (b), X(3)(a), XI:1 and XIII of the *GATT 1994*; and that
- (iii) the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent *as such* with Articles I:1, Article II:1(a) and (b), X(3)(a), XI:1 and XIII of the *GATT 1994*

8.5 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the *GATT 1994*, it has nullified or impaired benefits accruing to India thereunder.

8.6 Article 19.1 of the *DSU* is explicit concerning the recommendation a panel is to make in the event it determines that a measure is inconsistent with a covered agreement:

[i]t shall recommend that the Member concerned bring the measure into conformity with that agreement. (*footnotes omitted*)

8.7 We therefore recommend that the United States bring its measure into conformity with its obligations under the *Anti-Dumping Agreement* and the *GATT 1994*.

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