

ANNEX A

**EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSION
OF THE PARTIES**

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(11 May 2007)

1. Introduction

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

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

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

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

2. Factual Background

5. CBP is the US agency responsible for collection of customs duties. Under the US system, goods are permitted to enter the customs territory of the United States without having paid duties or other liabilities imposed by law. In this manner, the United States expedites the entry of goods and does not make the importer wait on the final determination of duties owed or other liabilities under the law. However, since the goods will have been long since released from CBP's custody and are not available for

return to satisfy any obligations of the importer when they are legally determined to be due, it is necessary for CBP to have some security against payment of amounts lawfully owed. Consequently, CBP requires single transaction bonds or continuous bonds for entries of merchandise as a matter of course. As a rule, all entries must be accompanied by evidence that a bond is posted with CBP to cover any potential duties, taxes, and charges that may accrue. Pursuant to CBP's regulatory authority, a port director may require additional bond amounts or other additional security in order to ensure that the acceptance of an entry will be adequately protected against any duties or other liabilities imposed by law.

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

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

8. Surety systems are contemplated by, among other provisions, Article 13 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), which provides that Members shall allow importers to withdraw goods from customs pending final determination of customs value if the importer "provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable." In addition to Article 13 of the Customs Valuation Agreement, surety systems are explicitly provided for in the Kyoto Convention on the Simplification and Harmonization of Customs Procedures. The Convention, like the Customs Valuation Agreement, encourages the early release of merchandise, and permits the adoption of surety systems to ensure compliance with regulatory undertakings, as well as to ensure collection of any *additional* import duties and taxes that might become chargeable. Thus, the Convention explicitly contemplates that, as a necessary consequence of the early release of merchandise, it might become necessary to impose bond requirements to ensure the collection of assessed duties beyond the estimated duties for which an importer might be liable based on information at the time of entry.

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

10. With respect to merchandise subject to an antidumping or countervailing duty order, the Anti-Dumping Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment of antidumping duties. The United States has adopted a retrospective system of duty assessment. In the US system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Once a year (during the anniversary month of the order) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year. Between the time that the good is entered and the time that duties are finally assessed following this review, importers of merchandise subject to antidumping or countervailing duties are required to provide (1) a cash deposit in the amount of the antidumping or countervailing duty rate determined in the investigation; and (2) like importers of all goods, a bond to secure against duties, taxes or charges that may accrue. Under its 1991 Bond Guidelines, CBP provides that the amount of this bond should be equal to 10 per cent of the duties, taxes, and fees paid by the importer in the previous 12

months, or a minimum of \$50,000. In general, an importer may obtain either a bond covering a single entry (a single entry bond) or a continuous bond (a bond that provide security for all entries filed by the bond principal during the period of time covered by the bond, usually one year) to satisfy this requirement.

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

12. Facing a serious and growing noncollection problem, CBP reconsidered its general continuous bond formula, which provides that the minimum continuous bond may be in an amount equal to the greater of \$50,000 or ten per cent of the amount of the previous year's duties, taxes and fees. On 9 July 2004, CBP published on its website a Memorandum announcing an enhanced customs bond amount for those continuous bonds that secure the promise to pay all duties finally determined to be due on certain merchandise subject to antidumping or countervailing duties (July 2004 Amendment). The formula set forth in the July 2004 Amendment is the USDOC rate in the antidumping or countervailing duty order, or the cash deposit rate at the time of entry, multiplied by the value of subject merchandise that the importer entered during the previous year. The formula in effect ensured that, should the antidumping duty rate actually assessed for an importer increase from that determined during the investigation, CBP would be at least partially secured for the difference. The additional bond directive does not apply to single entry bonds.

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

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

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

16. In a further effort to minimize burdens on importers resulting from the additional bond amount, on 24 October 2006, CBP published a Notice in the Federal Register amending its procedure for determining bond amounts for covered categories of merchandise. The October 2006 Notice "represents the comprehensive and exclusive statement of the policy and processes expressed in" the July 2004 Amendment, the 2005 Bond Formulas, and the August 2005 Clarification. As described in the October 2006 Notice, importers are offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer and CBP determines bond amounts based on that information, the importer's compliance history and other relevant information available to CBP. CBP will evaluate this information promptly and provide an importer-specific bond sufficiency assessment for the importer concerned. In the absence of this information, CBP calculates the bond amount using the formulas. This procedure allows importers to obtain an individualized determination, rather than a determination based upon the formulas.

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

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

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

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

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

21. Thailand appears to conflate the requirement of reasonable security contained in the Ad Note with Article 7 of the Antidumping Agreement regarding provisional measures (i.e., measures taken prior to a final determination of dumping or subsidization). The bond directive, however, is a security requirement

imposed *after* the final determination of dumping or subsidization, pending "determination of the final liability for payment of anti-dumping duties." It is not a "provisional measure" within the meaning of Article 7.

4. Additional Bond Directive Is Not a "Specific Action Against Dumping"

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

23. Thailand cites four aspects of the directive that it claims "dissuade the practice of dumping" and therefore support the conclusion that, as applied to importers of shrimp from Thailand, it is action "against" dumping. However, a review of Thailand's assertions demonstrates that the additional bond directive does not meet the second prong of the test set forth by the Appellate Body under Article 18.1: it is not an action taken "against" dumping or subsidization. First, Thailand claims that the directive reduced shipments from countries subject to it. However, the record simply does not support this assertion. According to a study prepared by the Government Accountability Office (GAO), after the petition was filed in late 2003, *but before the bond directive was announced*, the share of imports from Thailand decreased from 30 per cent of total US shrimp imports to 15 per cent. *After* the bond directive was announced in July 2004, Thailand's share of shrimp imports actually increased significantly, returning to approximately 30 percent. Based on GAO's analysis, there is no evidence that the bond directive in fact adversely affected imports of merchandise subject to the antidumping order.

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

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

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

additional bond directive represents unreasonable, partial, or nonuniform administration of US customs laws, within the meaning of GATT Article X.

6. The Additional Bond Directive Does not Breach GATT Article XI

26. With respect to GATT Article XI, as was the case with the bond measure at issue in *Dominican Republic – Cigarettes*, the bond directive does not prevent importers from importing shrimp into the United States. The directive does not mandate an increased bond amount – as noted previously, importers can obtain individual bond determinations and, depending on their ability to pay and history of compliance with US customs laws and regulations, may not be required to obtain a higher bond. Furthermore, even those importers that have not demonstrated an ability to pay or have not complied with US customs laws in the past are able to import even without participating in the process outlined in the directive or providing additional bond amounts.

7. The Directive Is Not Inconsistent with GATT Article I or II

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

28. Thailand claims that the application of the bond directive to importers of shrimp subject to antidumping duties is inconsistent with Article I because it allegedly discriminates between products originating in Thailand and products originating in other countries. Thailand claims that even the imposition of additional "evidentiary burdens" constitutes discrimination under Article I. This assertion is incorrect, because the US action of increasing bond amounts merely addressed the particular risks associated with these entries, risks not present with respect to entries of other products from other countries. The particular risks associated with these entries arose in connection with imposition of the antidumping duty order on shrimp, which as explained previously gave rise to significant unsecured liability on the entries at issue. Importers of shrimp from other countries not subject to the antidumping order are not required to pay antidumping duties, and therefore no additional security is necessary with respect to their entries. In the absence of higher bond amounts, CBP faced the risk that existing bonds would not provide sufficient recourse if importers refused to pay the difference between estimated duties and the higher duties which might ultimately be assessed. Thus, in imposing different bond requirements on these entries, the United States did no more than respond to the special risks associated with these entries.

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

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

30. The additional bond directive is "necessary to secure compliance" with US antidumping and countervailing duty assessment laws, in particular 19 USC. 1673e(a)(1) governing the assessment of antidumping duties and general customs and regulations requiring the payment of duties owed to the US Treasury. The fact that the directive and its application to shrimp secures compliance with this obligation and general customs laws and regulations requiring payment of duties owed to the US Treasury is evident

on its face. The directive is "necessary" to secure compliance with US laws and regulations. Revenue collection is among the most fundamental responsibilities of governments. As explained above, the directive secures an otherwise unsecured liability in the form of additional antidumping duties owed upon assessment that exceed cash deposits, and thus permits collection of revenue that in the past has been subject to unprecedented default.

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

9. Zeroing

32. According to Thailand, the "zeroing" in which USDOC engaged in this investigation is the same as the "zeroing" in which USDOC engaged in *Ecuador Shrimp*. The United States did not disagree with Ecuador's description of the "zeroing" in that dispute. Further, the same type of "zeroing" occurred in the investigation of shrimp from Thailand. The United States recognizes that a measure using a similar calculation was the subject of the *Softwood Lumber* report, and the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence, because of that calculation.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THAILAND

(30 March 2007)

1. Measures at Issue

1. This complaint concerns two measures applied by the United States that affect imports of certain frozen warmwater shrimp from Thailand. First, in February 2005, the United States imposed definitive anti-dumping duties on imports of certain frozen warmwater shrimp from Thailand (the "Anti-Dumping Measure") and five other countries¹. Second, in conjunction with the imposition of these anti-dumping duties, the United States changed its normal practices regarding the provision of security for the payment of duties and began to apply significantly enhanced bonding requirements to imports of subject shrimp. The main measure at issue in this dispute is the application of this Enhanced Bond Requirement² to imports of subject shrimp from Thailand.

2. Legal Argument

(a) The USDOC's use of zeroing was contrary to Article 2.4.2 of the Anti-Dumping Agreement

2. The US Department of Commerce ("USDOC") has admitted that it used zeroing in calculating the dumping margins of Thai shrimp exporters on the basis of average-to-average comparisons in the final determination³ of dumping and the Anti-Dumping Measure.

3. This methodology was found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement by the Appellate Body in *US – Softwood Lumber V*⁴ and by the recent panel in *US – Shrimp (Ecuador)*.⁵ For the same reasons as articulated by the Appellate Body and the panel in those cases, therefore, the use of this same zeroing methodology by the USDOC in this case was inconsistent with Article 2.4.2 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").

¹ *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (February 1, 2005), Exhibit THA-14. At the same time, the United States also imposed anti-dumping measures on imports of shrimp from Brazil, China, Ecuador, India and Vietnam. Frozen warmwater shrimp from Thailand and these other countries subject to anti-dumping duties is referred to in this Executive Summary as "subject shrimp".

² The "Enhanced Bond Requirement" refers to the application by the United States Bureau of Customs and Border Protection ("CBP") to subject shrimp from Thailand of the following amendments and clarifications to Customs Directive 99-3510-004 of 23 July 1991: the "Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases" dated 9 July 2004 (the "9 July 2004 Amendment"); the CBP document titled "Current Bond Formulas" dated 25 January 2005 (the "25 January 2005 Amendment"); the CBP document titled "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" dated 10 August 2005 (the "10 August 2005 Clarification"); and the CBP Federal Register notice USCBP-2006-0119 titled "Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements" dated 24 October 2006 (the "24 October 2006 Notice"). It also includes any amendments, extensions, and related or implementing measures.

³ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp From Thailand To James J. Jochum From Barbara E. Tillman, 23 December 2004, Exhibit THA- 16. Also *Notice of Final Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 76918 (December 23, 2004), Exhibit THA-15.

⁴ Appellate Body Report, *US – Softwood Lumber V*, para. 101.

⁵ Panel Report, *US – Shrimp (Ecuador)*, para. 7.41.

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

4. The application of the Enhanced Bond Requirement to subject shrimp from Thailand is inconsistent with Article 18.1 of the Anti-Dumping Agreement because it (1) constitutes "specific action against dumping" and (2) is not otherwise permitted under the Anti-Dumping Agreement or Article VI of the GATT 1994.

- (ii) *The Enhanced Bond Requirement is specific action against dumping*

The Enhanced Bond Requirement is "specific action" against dumping

5. The Enhanced Bond Requirement is "specific action" against dumping within the meaning of Article 18.1 of the Anti-Dumping Agreement because it is inextricably linked to a determination of dumping as defined in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement.⁶

6. The Enhanced Bond Requirement is "action that may be taken *only* when the constituent elements of 'dumping' are present".⁷ This is because the application of the Enhanced Bond Requirement is limited to merchandise upon which USDOC has issued an anti-dumping order. The CBP has stated that "[a]ny increase in bond liability will become effective when the Department of Commerce (DOC) issues its Order on the case".⁸ The Enhanced Bond Requirement is based on "specific guidelines for bonds covering certain merchandise *subject to antidumping/countervailing duty cases*",⁹ and applies only to "covered cases" within "special categories" of merchandise. The 24 October 2006 Notice confirms that relevant "Special Category merchandise ... is merchandise *subject to AD/CVD*".¹⁰ In fact, the formulae for calculating the amount of the Enhanced Bond Requirement all require the use of a USDOC-determined anti-dumping duty rate as the multiplier.¹¹

7. A recent decision of the US Court of International Trade ("USCIT") that enjoined the application of the Enhanced Bond Requirement found that "the administrative record indicates that the plaintiffs are likely to succeed in showing that the bond formulas were applied to these plaintiffs for the sole reason that these plaintiffs were importers of shrimp subject to antidumping duty orders",¹² and that "Customs did not consider each individual importer's financial condition or ability to pay prospective antidumping duties, but rather appeared to base the application of the formulas on one critical factor – that the importer engages in the importation of subject shrimp."¹³

8. That the Enhanced Bond Requirement has been applied only to imports of subject shrimp further illustrates that it constitutes "specific action" against dumping.¹⁴ This is confirmed by the CBP's stated

⁶ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 242.

⁷ Appellate Body Report, *US – 1916 Act*, para. 122.

⁸ 9 July 2004 Amendment. Exhibit THA-2.

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

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

¹¹ Either the final determination dumping rate, the most recent administrative review dumping rate, the preliminary determination dumping rate, or the applicable deposit rate.

¹² *National Fisheries Institute, Inc., et al., v. United States Bureau of Customs and Border Protection*, Court No. 05-00683, Slip Op. 06-166, 13 November 2006, (Stanceu J.) ("*NFI v. U.S.*"). Exhibit THA-9, p. 58.

¹³ *Ibid.*, p. 60. See also Government Accountability Office, *Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about uneven Implementation and Effects Remain*, GAO-07-50 (Washington D.C.: October 2006), (the "GAO Report"), Exhibit THA-10, p. 5.

¹⁴ 10 August 2005 Clarification, Exhibit THA-4, p. 3.

policy that it would alter the enhanced bond amount if importers stopped or limited imports of subject shrimp.¹⁵

9. In addition, the CBP's stated policy reasons for introducing the Enhanced Bond Requirement confirm the clear connection to dumping. These include "[d]ifficulties in collecting the antidumping duties" and "the impact of these collections on the amount of disbursements pursuant to the Continued Dumping and Subsidy Offset Act",¹⁶ (*i.e.* disbursements previously found to be inconsistent with Article 18.1 of the Anti-Dumping Agreement).¹⁷

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

The Enhanced Bond Requirement is specific action "against" dumping

11. The application of the Enhanced Bond Requirement to subject shrimp acts "against dumping" as it has an adverse bearing on, and has the effect of dissuading, the practice of dumping.

12. First, the Enhanced Bond Requirement dissuades imports into the United States of subject shrimp. Thus, the 10 August 2005 Clarification lists as a factor that may result in altering the amount of the enhanced bond "whether the importer can show that it has switched to a new source of imports or a shift in the pattern of imports".¹⁸ The USCIT found that "only those eight importers who promised not to import subject shrimp, or to limit such imports, were able to negotiate a lower minimum bond amount than the bond formulas required".¹⁹

13. The GAO Report found that the Enhanced Bond Requirement would tend to "cause importers to change business practices" and to "reduce imports from countries subject to AD/CV duties".²⁰ The CBP itself confirmed that "NFI importers have increased their sourcing from countries not affected by the antidumping order, from 21 per cent to 32 per cent".²¹

14. The adverse bearing of the Enhanced Bond Requirement is also demonstrated by the significant shift in trading patterns of Thai shrimp exports: while 100 per cent of exports were made on a CIF basis in 2003, over 50 per cent of exports were made on a DDP basis in 2006.²² This shift to DDP exports "makes the foreign-based supplier the U.S. importer of record and shifts the burdens of the higher bonds to them".²³

15. Second, the Enhanced Bond Requirement results in enhanced bonds significantly greater than those required of other goods solely *because* those goods are subject to anti-dumping measures.

16. The adverse effects of the Enhanced Bond Requirement include costs associated with the enhanced bonds, such as the fees charged by sureties of 10 per cent of the value of the bonds.²⁴ These

¹⁵ See below, para. 12.

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

¹⁷ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 318.

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

¹⁹ *NFI v. U.S.*, Exhibit THA-9, pp. 52-53.

²⁰ GAO Report, Exhibit THA-10, p. 32.

²¹ Declaration of Bruce W. Ingalls to the USCIT in *NFI v. U.S.*, Exhibit THA-7, para. 17.

²² Thai Shrimp Industry Survey, Department of Foreign Trade, Exhibit THA-12.

²³ GAO Report, Exhibit THA-10, p. 6.

²⁴ Exhibit THA-18.

effects are compounded by the demands of sureties for 100 per cent collateral to secure the enhanced bonds²⁵ and the "stacking" of bonds due to regular three to five year delays before final liquidation, which results in the tying up of assets and cash that forces companies to forego business opportunities.²⁶

17. For all these reasons, the Enhanced Bond Requirement is "specific action" that acts "against" dumping within the scope of application of Article 18.1 of the Anti-Dumping Agreement.

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

18. Article 18.1 of the Anti-Dumping Agreement prohibits any "specific action against dumping" not taken "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The Appellate Body found that "the permissible responses to dumping" are limited to "provisional measures, price undertakings, and definitive anti-dumping duties".²⁷ Thailand submits that the Enhanced Bond Requirement is not a permissible provisional measure, price undertaking, or definitive anti-dumping duty within the meaning of Articles 7, 8, and 9 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Note 1 to paragraphs 2 and 3, Ad Article VI of the GATT 1994.²⁸

The Enhanced Bond Requirement is not a provisional measure

19. The application of the Enhanced Bond Requirement to subject shrimp from Thailand does not take the form of a permitted provisional measure within the meaning of Note 1 to paragraphs 2 and 3, Ad Article VI of GATT 1994 or Article 7.1 of the Anti-Dumping Agreement as it is applied *after* the definitive determination of dumping. It is also not a provisional measure taken in accordance with Articles 7.2 and 7.5 of the Anti-Dumping Agreement or Note 1, Paragraphs 2 and 3 to Ad Article VI of the GATT 1994, because it exceeds the amount of the provisional measures contemplated by those provisions. Furthermore, it is not taken in accordance with Article 7.4 of the Anti-Dumping Agreement as its application has not been limited to "as short a period as possible".

The Enhanced Bond Requirement is not a price undertaking

20. The Enhanced Bond Requirement is evidently not a voluntary price undertaking in accordance with Article 8 of the Anti-Dumping Agreement.

The Enhanced Bond Requirement is not an anti-dumping duty

21. As the Enhanced Bond Requirement is a "bond" that operates as a security for the payment of duties, it is of a fundamentally different character to an anti-dumping "duty" taken in accordance with Article VI:2 of the GATT 1994 and Article 9 of the Anti-Dumping Agreement. Even if it were considered to be an anti-dumping "duty", the measure is not applied in accordance with Articles 9.2, 9.3 and 2 of the Anti-Dumping Agreement, as it would impose an obligation to provide duties *additional* to the amount permitted in those provisions.

²⁵ GAO Report, Exhibit THA-10, p. 6. *NFI v. U.S.*, Exhibit THA-9, at p. 38.

²⁶ GAO Report, Exhibit THA-10, pp. 6 and 35. *NFI v. U.S.*, Exhibit THA-9, p. 31.

²⁷ Appellate Body Report, *US – 1916 Act*, para. 137; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.

²⁸ Thailand has made separate claims that the Enhanced Bond Requirement is inconsistent with the provisions of Articles 7.1, 7.2, 7.4, and 7.5 of the Anti-Dumping Agreement, Article VI:2 of the GATT 1994, and Note 1 to paragraphs 2 and 3, Ad Article VI of GATT 1994, governing the application of provisional anti-dumping measures, and Articles 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, governing the imposition and collection of anti-dumping duties. The arguments supporting those claims are essentially those used in the context of Thailand's Article 18.1 claim. Thailand notes, however, that these claims are subsidiary and alternative to Thailand's Article 18.1 claim.

(c) The Enhanced Bond Requirement is inconsistent with Article XI:1 of the GATT 1994

22. The Enhanced Bond Requirement is inconsistent with Article XI:1 in that (1) it imposes a restriction on the importation of subject shrimp from Thailand and (2) this restriction cannot be classified as a duty, tax or other charge.

23. First, the Enhanced Bond Requirement constitutes a clear restriction on the importation of subject shrimp from Thailand. By imposing considerable additional financial costs and procedural burdens on importers, the Enhanced Bond Requirement makes the importation of subject shrimp from Thailand more burdensome than the importation of goods not subject to anti-dumping duties and the importation of goods subject to other U.S. anti-dumping measures. It is also clear that the Enhanced Bond Requirement has a limiting effect on shrimp imports from Thailand, confirmed by the evidence that importers have reduced the share of imports of shrimp subject to anti-dumping duties and have increased the share of shrimp sourced from countries exempted from the Enhanced Bond Requirement. Moreover, the Enhanced Bond Requirement has forced Thai exporters to considerably change their terms and channels of sale. For these reasons, the Enhanced Bond Requirement imposes a "restriction" within the meaning of Article XI:1 of the GATT 1994.

24. The Enhanced Bond Requirement clearly imposes a restriction *on importation* as it is applied at the border and imposed solely on importers of subject shrimp.

25. Second, the obligation to provide a bond in an amount determined pursuant to the Enhanced Bond Requirement cannot be characterised as a requirement to pay a duty, tax or charge, as it does not involve a monetary imposition that yields public revenue.

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

26. Thailand also claims, in the alternative, that if the Enhanced Bond Requirement is considered to constitute a duty or charge imposed on or in connection with importation, it is inconsistent with Articles II:1(a) and (b) of the GATT 1994. If considered a "duty", it would be in excess of the bound rates set forth in the United States' Schedule and cannot be characterised as anti-dumping duties that would otherwise be permitted under Article II:2(b) of the GATT 1994 and is therefore cannot be reconciled with Article II:1(b). If the charges, costs, and fees incurred in connection with the Enhanced Bond Requirement are considered other "charge[s]", they are inconsistent with the second sentence of Article II:1(b) of the GATT 1994, read in conjunction with the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. By applying the measure to subject shrimp, the U.S. fails to accord to those imports treatment no less favourable than provided in its Schedule contrary to Article II:1(a).

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

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

(ii) *The United States fails to administer its customs laws and regulations relating to bonds in a "uniform" manner*

28. In its administration of customs laws and regulations requiring importers to provide a bond in a sufficient amount in order to secure possible liabilities, the United States differentiates between importers solely on the basis of whether they import subject shrimp.

29. Importers of subject shrimp are being treated differently from other importers. They are (1) subject to unique evidentiary burdens from which importers of all other goods subject to anti-dumping duties are exempt and (2) must post continuous bonds in higher amounts than importers of all other goods subject to anti-dumping duties. Thus, the United States fails to treat the narrow category of importers of goods subject to anti-dumping duties equally. This special and adverse treatment is inconsistent with the "more demanding requirement of uniformity" identified by the panel in *EC – Selected Customs Matters* and constitutes a failure by the United States to administer these laws in a uniform manner within the meaning of Article X:3(a) of the GATT 1994.

(iii) *The United States fails to administer its customs laws and regulations relating to bonds in a "reasonable" manner*

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

31. Moreover, the CBP should have taken further steps to ensure that its bond amount assessments are reasonably related to the actual risk represented by individual importers. It is unreasonable for the CBP to impose the Enhanced Bond Requirement selectively on imports of one product without conducting an individual analysis of a variety of relevant factors such as the importers' individual compliance records and their capitalisation, using exactly the same standards as the CBP would apply to other industries, such as the steel or chemicals industries. Indeed, Section 113.13 of the Customs Regulation²⁹ requires the CBP to consider the individual compliance record of the importer in determining whether the amount of a continuous bond is sufficient. These standards cannot reasonably be abandoned simply because an importer imports subject shrimp. Thus, the United States fails to administer its customs laws and regulations relating to bonds in a "reasonable" manner because it fails to consider the individual circumstances of importers of subject shrimp in its analysis of bond amounts.

(iv) *The United States fails to administer its customs laws and regulations relating to bonds in an "impartial" manner*

32. The evidence establishes (1) that the CBP has used the Enhanced Bond Requirement to try to limit imports of shrimp subject to anti-dumping duties, (2) that in applying the Enhanced Bond Requirement to subject shrimp the CBP "was motivated, at least in part, by domestic political pressure to take action directed against the shrimp importing industry"³⁰ and (3) that the CBP applied the Enhanced Bond Requirement only to the measures against subject shrimp even though there was no history of marked defaults or other problems with respect to these imports and in face of considerable problems with respect to other products and other anti-dumping orders. This evidence cannot be reconciled with the requirement of impartiality contained in Article X:3(a).

(f) The Enhanced Bond Requirement is inconsistent with Article I:1 of the GATT 1994

33. While the United States applies the Enhanced Bond Requirement to imports of certain shrimp products from Thailand and the five other countries, it exempts like products from *countries other than* Thailand and the five other countries (referred to as the "preferred countries") from this requirement.

²⁹ "Customs Regulation" refers to Chapter 1 of Title 19 of the Code of Federal Regulations.

³⁰ *NFI v. U.S.*, p.57.

Importers of shrimp products from the preferred countries need only provide a bond in an amount that is approximately equal to 10 per cent of the duties and charges paid by the importer in the previous year (the "Basic Bond Requirement"). Importers of subject shrimp, on the other hand, provide a bond calculated in accordance with the Enhanced Bond Requirement, which is far higher than 10 per cent of the duties and charges paid by the importer in the previous year.

34. Imports of subject shrimp from Thailand are "like" shrimp products originating in the preferred countries. The factors commonly used in GATT/WTO practice to determine likeness, such as customs classification, end-use, and the physical properties of the product, all support a finding that shrimp products from these various sources should be treated as like products. However, the United States does not grant the advantage of allowing importation in accordance with the Basic Bond Requirement immediately and unconditionally to imports of subject shrimp from Thailand even though this advantage is granted to imports of shrimp products from the preferred countries. This failure to treat like products equally cannot be reconciled with the United States' obligations under Article I:1 of the GATT 1994.

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

35. Thailand presents a few comments on Article XX of the GATT 1994 without prejudice to its right to develop further argumentation that responds more directly to any defences of the United States.

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

36. Under Article XX(d) of the GATT 1994, the United States bears the burden of proving that the Enhanced Bond Requirement is "necessary" to secure compliance with its laws and regulations. The United States must establish that the less trade-restrictive and less WTO-inconsistent alternative measure of the Basic Bond Requirement would fail to achieve compliance with its laws and regulations imposing anti-dumping duties on imports of subject shrimp and that therefore the Enhanced Bond Requirement is "necessary".

37. The fact that the United States applies the Basic Bond Requirement to 98 per cent of anti-dumping orders currently in place suggests that the United States cannot discharge this burden. The United States must establish that importers of subject shrimp from Thailand have special features that force the United States to resort to more stringent measures.

38. There is no basis to assume that future assessment rates of anti-dumping duties are likely to be higher than cash deposit rates in cases involving imports of subject shrimp from Thailand. As the USCIT ruled, "[t]he record does not identify evidence that the initial cash deposit of plaintiffs will be insufficient to cover the final rates of liquidation".³¹

39. Equally, there is no basis to assume that importers of Thai subject shrimp are far more likely to default when presented with supplemental bills than importers of other products subject to anti-dumping duties. The USCIT ruled that "[c]ustoms ... did not articulate in the Amendment or the Clarification a reason why antidumping duties on shrimp imports are especially susceptible to under-collection, as opposed to duties on imports of other agricultural or aquacultural products subject to antidumping duty orders, or as opposed to all products subject to such orders".³² It also ruled that "no record exists demonstrating that significant numbers of shrimp exporters are defaulting or have defaulted on any obligation to pay antidumping duties on their imports of shrimp".³³ It remains unclear why it is

³¹ *NFI v. US*, Exhibit THA-9, p. 55.

³² *Ibid.*, p. 54.

³³ *Ibid.*, p. 54.

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

40. U.S. problems with collecting anti-dumping duties arise almost exclusively in non-market economy cases such as those involving crawfish and garlic. The difficulties arise from the unique manner in which the United States determines dumping margins in non-market economy cases as well as isolated surety bankruptcies and exemptions (now removed) from cash deposit requirements for new shippers of products subject to anti-dumping duties. None of these circumstances applies to Thailand. The USCIT ruled that the record does not "identify evidence that importers of shrimp are particularly susceptible to bankruptcy, likely to go out of business, or operating as "sham" or "alter ego companies".³⁴ For all these reasons, the Enhanced Bond Requirement is not "necessary" to secure compliance with the United States' laws and regulations.

(ii) *The Enhanced Bond Requirement does not meet the conditions set out in the chapeau to Article XX(d) of the GATT 1994.*

41. The Enhanced Bond Requirement also does not conform to the requirements of the *chapeau* to Article XX because the manner in which it is applied constitutes "arbitrary" or "unjustifiable" discrimination and a "disguised restriction on international trade". The lack of any nexus between the purported objective of the Enhanced Bond Requirement (to protect United States' revenue) and the manner in which it is actually applied (solely to subject shrimp) indicates that it constitutes a "disguised restriction on international trade" of shrimp products. Furthermore, the application of the Enhanced Bond Requirement to importers of shrimp from six WTO Members while exempting importers of products from other countries that present equivalent or even greater risks to United States revenue clearly constitutes "arbitrary" and "unjustifiable" discrimination.

42. For these reasons, Thailand does not consider that the application of the Enhanced Bond Requirement to shrimp from Thailand can be justified under GATT Article XX(d) of the GATT 1994. Thailand will expand on this discussion in subsequent submissions in the event that the United States does, indeed, seek to justify its measure under Article XX(d).

3. Summary of Request for Findings, rulings and recommendations

43. Thailand considers that both measures at issue in these proceedings are inconsistent with WTO law. Thailand notes that had the United States not used zeroing to inflate artificially the margin of dumping, it may not have been able to impose dumping duties on Thai shrimp. Then, in turn, the United States would not have imposed the Enhanced Bond Requirement on Thai shrimp exports. Therefore, the concurrent application of these inconsistent measures on imports of subject shrimp from Thailand has, and continues to, adversely and unfairly affect trade in this important export commodity for Thailand.

44. Thailand requests the Panel to find that:

- (a) The application of the Enhanced Bond Requirement to subject shrimp from Thailand is inconsistent with:
 - (i) Article 18.1 of the Anti-Dumping Agreement; or, subsidiarily, Articles 7 and 9 of the Anti-Dumping Agreement, Article VI:2 of the GATT 1994, and Note 1 to paragraphs 2 and 3, Ad Article VI of GATT 1994.
 - (ii) Article XI:1 of the GATT 1994; or, alternatively, Article II:1(a) and the first and second sentences of Article II:1(b) of the GATT 1994.

³⁴ Ibid., p. 55.

- (iii) Article X:3(a) of the GATT 1994.
- (iv) Article I of the GATT 1994.
- (b) The Anti-Dumping Measure is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

45. If the Panel agrees with the claims under Article 18.1 of the Anti-Dumping Agreement, Thailand requests the Panel to nevertheless also address its claims under Articles XI, II, X:3(a), and I of the GATT 1994. Doing so would ensure that the Appellate Body can, if necessary, fully address those claims or, at a minimum, complete any necessary analysis to rule on those claims.

46. Thailand also requests that, pursuant to its authority under Article 19.1, the Panel suggest that the United States bring its measure into conformity by immediately releasing any bonds held by the CBP for imports of subject shrimp from Thailand pursuant to the Enhanced Bond Requirement, so that those imports, like all other US imports subject to anti-dumping duties would be secured by the Basic Bond Requirement.

