ANNEX C

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSION OF THE THIRD PARTIES

ANNEX C - 1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF BRAZIL

(18 May 2007)

1. Introduction

1. In this submission, Brazil sets out its views on the reasons why the special bonding requirement applied by the United States against imports of certain frozen warm-water shrimp subject to anti-dumping duties, originating in Brazil, China, Ecuador, India, Thailand and Vietnam ("Enhanced Bond Requirement" or "EBR")[1] violates Articles 18.1 and 1 of the Agreement on Implementation of Article VI of the GATT 1994 (the "AD Agreement") and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative Articles 9 and 1 of the AD Agreement. Further, the EBR is not "reasonable security" under Note 1 Ad Article VI:2-3 and cannot be justified pursuant to Article XX(d) of the GATT 1994.

2. The Measures At Issue

2. Responding to a report by US Customs and Border Protection ("CBP")[2] on fiscal year 2003 uncollected anti-dumping and countervailing duties, on 9 July 2004 CBP amended its existing Bond Directive governing Customs bonding requirements, and set new formulas for calculating minimum continuous bond amounts for importers of agriculture/aquaculture products subject to anti-dumping or countervailing duty (CVD) orders.[3] This EBR requires a bond for 10 percent of duties, taxes and fees paid by the importer in the prior 12 months (i.e., the normal continuous bond amount), plus 100 per cent of the cash deposit rate established in the anti-dumping order (or most recent administrative review), multiplied by the value of the importer's entries of that product over the previous 12 months.[4] Pursuant to a clarification issued by CBP on 10 August 2005, the EBR applies to "shrimp covered by anti-dumping or countervailing duty cases", the only designated "Covered Cases" within the only designated "Special Category", agriculture/aquaculture merchandise.

3. In October 2006, an in-depth examination of the EBR by the US Government Accountability Office ("GAO") concluded that this bonding requirement "represented a significant change from CBP's traditional method of setting bond amounts," and was "inconsistently implemented" as between shrimp importers, due to a lack of "clear and transparent guidance".[5] Days before the US Court of International Trade ("USCIT") issued a stinging judgment against CBP in domestic litigation on the EBR,[6] CBP issued a 24 October 2006 Federal Register notice further modifying the EBR by identifying the factors it would consider in determining, prospectively for individual importers, whether to reduce a bond amount.[7]

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[1] Frozen warmwater shrimp from Brazil, Thailand, India and these other countries subject to anti-dumping duties is referred to herein as "subject shrimp."

[2] Continued Dumping and Subsidy Offset Act (CDSOA) annual report for fiscal year 2003, Exhibit THA-11 (WT/DS343).

[3] Exhibit THA-2.

[4] Exhibit THA-5. The EBR is specific to subject shrimp, but if any other goods were subject to the EBR but not to AD/CV duties, they would have no cash deposit rate, and the bond amount would be the same as under a normal continuous bond.

[5] Exhibit THA-10 (WT/DS343) at 7.

[6] Exhibit THA-9.

[7] Exhibit THA-5.

3. The Enhanced Bond Requirement Is Inconsistent "As Such" With Articles 18.1 and 1 of the Anti-Dumping Agreement

4. The EBR should be analyzed as a separate measure, and as constituting "specific action" imposed "against" dumping inconsistent with Articles 18.1 and 1 of the AD Agreement.

(b) The Enhanced Bond Requirement Is "Specific Action" and Is Imposed "Against Dumping"

5. As the Appellate Body stated in *US – Offset Act (Byrd Amendment)*, if a measure "may be taken only when the constituent elements of dumping . . . are present", it is a "specific action" within the meaning of Article 18.1.[8] The CBP notices imposing or clarifying the EBR state that it applies *only* to goods subject to a US anti-dumping or CVD order. Since US law only permits such orders to be imposed where the US authorities have determined that the constituent elements of dumping or subsidization are present, the EBR is a "specific action against dumping."

6. The EBR corresponds to the fines on importers provided by Article 93V of Mexico's Foreign Trade Act, which the panel in *Mexico – Anti-Dumping Measures on Rice* condemned under Article 18.1. That panel also found that by *threatening* to impose fines on importers of a product subject to an anti-dumping or CVD investigation, Article 93V provided a "specific action" not permitted by the AD or SCM Agreements.[9]

7. The United States asserts that the EBR responds to "noncollection risk.[10] Yet Customs is not acting against all importers whose circumstances indicate high noncollection risk-it is only acting against those who import subject shrimp.

8. The EBR is specific action "against" dumping because, in effect, it punishes importers for importing subject shrimp. The EBR indisputably meets the test explained by the Appellate Body in *US – Offset Act (Byrd Amendment)*.[11] It imposes a much larger bond requirement, and thus a significantly greater financial burden[12], on certain importers simply because they import shrimp subject to anti-dumping measures. Furthermore, the 10 August 2005 notice makes it clear that the bond requirement may be altered if the importer can show that it has ceased importing subject shrimp, as also acknowledged by the USCIT.[13]

(c) The Enhanced Bond Requirement Is Not a Permissible Response to Dumping

9. The EBR is also not taken "in accordance with the provisions of GATT 1994, as interpreted by [the AD] Agreement". The only permissible responses to dumping are definitive anti-dumping duties, provisional measures and price undertakings—and the EBR is none of these. It is therefore inconsistent with Article 18.1 of the AD Agreement.

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[8] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

[9] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.276, 7.278.

[10] United States' first written submission, para. 35.

[11] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 250.

[12] The United States contends that the prohibitive cost of an enhanced bond, including the requirement of collateral, is a matter between the surety and the importer and not the responsibility of the United States. However, because surety companies must have sureties for customs bonds authorized and certified by the US Government in order to be permitted to write such bonds, and CBP may collect duties from the surety if the principal defaults, the United States has a direct interest in the amount of security required by sureties.

[13] Thailand's first written submission, para. 183.

10. The EBR on subject shrimp is inconsistent with Article 18.1 of the AD Agreement "as such". It is a "rule or norm" attributable to a WTO Member, which mandates enhanced bonding requirements on subject shrimp and which has general and prospective application on imports of subject shrimp.[14]

4. The Enhanced Bond Requirement Does Not Constitute "Reasonable Security" Permitted by Note 1 Ad Article VI:2-3

11. The United States places the weight of its defence in this dispute on the assertion that the EBR is a "reasonable" surety system permitted under Note 1 Ad paragraphs 2 and 3 of GATT Article VI. However, the EBR falls outside the scope of the Ad Note. The text of the Note refers to security for payment of anti-dumping or countervailing duties "pending final determination of the facts in any case of suspected dumping or subsidization", i.e. the Note only applies during an anti-dumping investigation, and does not apply beyond the date of the final anti-dumping determination and order. The US argument that the "final determination of the facts" does not arrive until the final duty assessment[15] is misplaced. The Note refers to security in cases of "suspected dumping," but dumping is only "suspected dumping" *before* the anti-dumping investigation has concluded. The US imposed the EBR on importers of subject shrimp only after final anti-dumping measures were imposed on 1 February 2005, and over two years later the EBR continues in effect.

12. Even assuming that the EBR falls within the scope of the Ad Note, the EBR does not constitute "reasonable security" under that provision. The use of "or" in "bond *or* cash deposit" in the Ad Note gives the importing Member a choice between either bond *or* cash deposit as a "reasonable security" – not both at once. Furthermore, the reasonableness of any "security for the payment of anti-dumping or countervailing duties" must relate to a risk-based standard for the need for security against non-payment. The decision to apply the EBR to shrimp was not based on any evidence of actual default; moreover, to date, CBP continues *not* to apply the EBR to imports with proven high default rates without providing any explanation, continues to apply the EBR to importers without any default history and refuses to reduce the amounts of enhanced bonds already provided. Remarkably, the USCIT itself has issued a preliminary injunction (although only for eight importers) on the basis that the EBR is likely to be found "arbitrary and capricious" – confirming that the EBR is *un*reasonable.[16]

5. The Enhanced Bonding Requirement is Also Inconsistent with Articles VI:2 and II:1(b) of the GATT and Article 1 of the *Anti-Dumping Agreement*

13. The fees and interest costs associated with the duplicative requirements to pay a cash deposit *and* provide an enhanced bond also have the result that the total duty burden on the importer will exceed the amount of the dumping margin in violation of Article VI:2 of the GATT. Panels have recognized that the fees and interest costs associated with a bonding requirement are a real cost to importers.[17] Because the EBR is applied other than under the circumstances provided for in Article VI, it constitutes a breach by the United States of its obligations under Article 1 of the *AD Agreement* and Article VI of the GATT. As a consequence, the EBR and the anti-dumping measures on subject shrimp are not an "anti-dumping or countervailing duty applied consistently with the provisions of Article VI," within the meaning of GATT Article II:2(b), and these measures therefore impose an "other duty or charge" in breach of US obligations under GATT Article II:1(b).

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[14] Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also Appellate Body Report, *US – Zeroing (EC)*, para. 188, and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[15] United States' first written submission, para. 22. Brazil also notes the striking difference between the texts of Ad Note 1 (*final determination of facts*) and Article 9.3.1 of the AD Agreement, cited by the United States in support of its argument (*determination of the final liability for payment of anti-dumping duties*).

[16] Exhibit THA-9, p. 46-47, 53, 57-61.

[17] See, e.g., *EEC – Minimum Import Prices*, para. 4.6 (accepting that interest charges and costs in connection with the lodging of a security associated with an import certificate were in excess of bound duties).

6. In the Alternative, the Enhanced Bond Requirement is Inconsistent as such with Articles 9 and 1 of the *Anti-Dumping Agreement*

14. In the alternative, even if the EBR is to be analyzed together with the anti-dumping measures it enforces, it is inconsistent with Article 9 of the AD Agreement, because the United States is collecting duties in excess of the amounts permitted thereunder. The EBR is inconsistent with Article 9.1, because the charges imposed by the US are not the "full margin of dumping or less"; with Article 9.2, because the anti-dumping duty collected by the United States is not collected in the "appropriate amounts"; and Article 9.3, because the amount of the anti-dumping duty exceeds the margin of dumping.

15. In consequence, the US anti-dumping measures on subject shrimp are imposed inconsistently with the United States' obligations under Article 1 of the AD Agreement. As a further consequence, the EBR and the anti-dumping measures on subject shrimp fall outside GATT Article II:2(b) and are in breach of GATT Article II:1(b) for the reasons set forth in the preceding paragraph.

16. While the United States may have a right to collect cash deposits, it has no right to require *both* a cash deposit equivalent to the full amount of the dumping margin *and* a bonding requirement as an anti-dumping enforcement measure.

7. The Enhanced Bond Requirement Cannot be Justified under Article XX(d) of the GATT 1994

17. The United States has invoked Article XX(d) of the GATT 1994 as an affirmative defence.[18] The United States bears the burden of proof to demonstrate that all conditions of Article XX(d) are fulfilled. Brazil offers the following comments on Article XX(d) without prejudice to its right to submit further arguments at the oral hearing.[19]

(b) The Enhanced Bond Requirement Is Not "Necessary to Secure Compliance" Within the Meaning of Article XX(d) of the GATT 1994

18. The United States has not demonstrated that the EBR satisfies the requirements of Article XX(d).[20] The United States has done no more than make unsubstantiated assertions that agriculture/aquaculture products in general, or shrimp in particular, create *per se* a critical risk of default in AD/CV duty collection. General, abstract allegations such as these are insufficient to satisfy the burden of proof under Article XX.

19. Moreover, the GAO's finding that when the CBP examined AD and CVD cases to evaluate the risk of uncollected duties, 67 per cent of the time, duty rates *decreased* or stayed the same between the time of entry and final liquidation[21], contradicts the United States' general assertion that there is a need to impose untargeted surety requirements to guarantee increased future duty payments.

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[18] United States' first written submission, paras. 61-77.

[19] It is not entirely clear whether the references made by the United States to Article XX encompass claims advanced by the complainants under Article 18.1 of the AD Agreement. The United States simply argues that Article XX reinforces its allegations that the EBR is not inconsistent with "US WTO *obligations*" (emphasis added). Brazil proceeds, however, under the assumption that the US defense relates exclusively to claims under the GATT provisions.

[20] United States' first written submission, paras. 61-77.

[21] Exhibit THA-10, at 16. Where no administrative review of an order is requested on the anniversary of the order or no administrative review is conducted, liquidation is set at the rates set by the final determination and order. It is only when an administrative review is conducted that a rate may change.

20. The United States suggests that its decision to designate the shrimp anti-dumping orders as "Covered Cases" is "due in part to low capitalization and high turnover rates in the industry as a whole" [22], and a belief "that importers of agriculture/aquaculture merchandise tended to be undercapitalized.[23] Yet importers of agriculture and aquaculture products do not necessarily have low capitalization. Conversely, any consumer goods industry where the importer is a middleman rather than a user of the product imported is likely to be characterized as thinly capitalized and subject to high turnover rates. Thus, the US concerns do not apply to all agriculture and aquaculture importers, and can apply to importers in many other sectors.

21. Even assuming that the United States can demonstrate that particular features of aquaculture and agriculture imports warrant particular surety measures, the United States had at its disposal less trade restrictive measures that it could reasonably employ (e.g. more frequent investigations, raising the cash deposit rate immediately upon making a preliminary finding in an anti-dumping administrative review, etc.).[24]

22. Finally, Brazil recalls that as the GAO Report states, adoption of the EBR – by transferring the burden of higher bonds to foreign-based suppliers – is already giving rise to results that *defeat*, rather than make a contribution to, the purpose allegedly pursued by the US Customs authorities.[25]

(c) The Enhanced Bond Requirement Does Not Secure Compliance with Measures That Are "Not Inconsistent" With the WTO Agreement

23. Furthermore, the adoption of the EBR was directly related to enforcement of the *Byrd Amendment*[26] in defiance of the adopted Panel and Appellate Body reports condemning that illegal measure and in disagreement with the US's stated intentions to comply with the DSB's rulings and recommendations.[27] The explicit nexus traced by the US authorities between the EBR and the Byrd Amendment constitutes undeniable evidence of a bias that no legitimate reading of Article XX can support.

8. Conclusions

24. Brazil respectfully requests that the Panel find that the EBR is inconsistent as such with Articles 18.1 and 1 of the AD Agreement, and Articles VI:2 and II:1(b) of the GATT 1994, or in the alternative with Articles 9 and 1 of the AD Agreement. Brazil further requests that the Panel find that the EBR does not constitute "reasonable security" under Note 1 Ad Article VI:2-3 of the GATT 1994, and that the EBR cannot be justified under Article XX(d) of the GATT 1994. Brazil supports the request of Thailand that the Panel, pursuant to its authority under Article 19.1 of the DSU, suggest that the United States bring its measure into conformity with its WTO obligations, by immediately releasing any bonds held by the CBP for imports of any subject shrimp pursuant to the EBR, so that those imports would be secured by the normal basic bond requirements applying to all other US imports.

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[22] United States' first written submission, para. 27.
[23] United States' first written submission, para. 14.
[24] Thailand's first written submission, paras. 84-89.
[25] Exhibit THA-10, at p. 6. See also Thailand's first written submission at p. 35, 43-44.
[26] Thailand's first written submission, paras. 94-97.
[27] Dispute Settlement Body, Minutes of the Meeting of 27 January 2003 (WT/DSB/M/142, 6 March 2003), para. 60. At the time the "9 July 2004 Amendment" was adopted by the US Customs authorities, almost 18 months had passed from the date on which the United States announced its intention to implement the DSB's rulings and recommendations in the Byrd Amendment dispute.

ANNEX C - 2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHILE

(10 May 2007)

1. Introduction

1. This submission containing the grounds and legal argument in support of Chile's position is made under Articles 10.2 and 10.3 of the Dispute Settlement Understanding ("the DSU"). Chile makes this submission in light of its systemic interest in the correct application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement).

2. Thailand asserts that the United States used the "zeroing" methodology in the determination of margins of dumping and applied significantly enhanced bonding requirements with respect to imports of certain frozen warmwater shrimp from Thailand.

3. Chile submits, in accordance with the factual evidence provided by Thailand, that the measures concerned are inconsistent with the United States obligations under Articles 2.4.2. and 18.1 of the Anti-Dumping Agreement and Articles XI:1, I, II:2 (b), first and second sentences, and X:3 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

(b) The USDOC's Use of Zeroing

4. Repeated reports by panels and the Appellate Body have declared that the use of "zeroing" methodology during the investigations to determine margins of dumping is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. As it is described by the panel in *US – Zeroing (Japan)*:

> Where an authority establishes the existence of margins of dumping during the investigation phase by making multiple, model-by-model comparisons between average export prices and average normal values and by aggregating the results of those comparisons into an overall margin of dumping, Article 2.4.2. of the AD Agreement requires that the results of those comparisons be fully taken into account in the numerator of the overall margin of dumping.

5. There is a consistent line of reasoning in the Appellate Body reports, from *EC – Bed Linen* to *US Zeroing (EC)*, that holds that "zeroing" in the context of the weighted-average-to-weighted-average methodology in original investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

6. As Chile has submitted in past disputes, involving "zeroing" methodology, it is urgent that the United States and in particular the United States Department of Commerce (USDOC) relinquishes for good the application of this methodology in original investigations and subsequent reviews in full implementation with the abovementioned reports.

(c) The Enhanced Bond Requirement

7. Article 18.1 of the Anti-Dumping Agreement is clear in stating 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 the Agreement.

8. United States in paragraph 31 of its First Submission states that the Additional Bond Directive does not constitute a specific action against dumping because it does not meet any of the criteria singled out in the same paragraph: (1) the action is taken only when the constituent elements of dumping are present (i.e. it is specific to dumping); (2) the action is taken "against dumping"; and (3) it is inconsistent with the provisions of GATT 1994. United States explained that 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.

9. However, we consider that the elements provided by the parties indicate that we are in the presence of a measure within the terms of Article 18.1 of the Anti-Dumping Agreement. The panel in *US – Offset Act*, states that all types of specific actions against anti-dumping, which are not those permissible under GATT 1994 as interpreted by the Anti-Dumping Agreement (i.e. definitive anti-dumping duties, provisional measures and price undertakings) are not permitted. In addition, the Appellate Body in *US – Offset Act*, clarifies that the constituent elements of dumping are present when the measure is inextricable linked to, or have a strong correlation with, the constituent elements of dumping.[1]

10. In accordance with the *Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases*[2] and the *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*[3], it appears clearly that the application of the Enhanced Bond Requirement is limited to goods upon which USDOC has issued an anti-dumping order. With that, the inextricability relationship between the Enhanced Bond Requirement and the constituent elements of dumping is established, meeting the specificity dimension of the measure.

11. Regarding the requirement that the measure constitutes an specific action *against* dumping, the Appellate Body in *US – Offset Act*, held that the measure:

> has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices.[4]

12. The evidence submitted by Thailand demonstrates that the Enhanced Bond Requirement is within the meaning stated by the Appellate Body. It has an adverse bearing and serves to dissuade the practice of dumping by increasing the costs to importers, exporters, or foreign producers of importing the merchandise in question to the United States.

13. Furthermore the Enhanced Bond Requirement is inconsistent with GATT 1994. Specifically, Article XI:1 prohibits restrictions on importation that do not take the form of duties, taxes or other charges. We agree with the view of Thailand that the Enhance Bond Requirement imposes a restriction within the meaning of Article XI:1and it does not constitute a duty, tax or other charge. The United States concedes that the bond provided takes the form of a security that does not involve a transfer of funds to the United States treasury.[5]

14. In accordance with the elements mentioned above, Chile considers that the Enhanced Bond Requirement constitutes a specific action against dumping, and therefore inconsistent with Article 18.1 of the Anti-Dumping Agreement.

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[1] Appellate Body Report, *US – Offset Act*, para. 239.
[2] Exhibit THA – 2.
[3] Exhibit THA – 4.
[4] Appellate Body Report, *US – Offset Act*, para. 254.
[5] United States' first written submission, para. 10.

2. Conclusion

15. Chile respectfully requests that the Panel does not divert from previous and conclusive rulings and recommendations of the DSB and confirms that "zeroing" is a methodology inconsistent with Article 2.4.2 of the Anti-Dumping Agreement and that the Enhanced Bond Requirement is inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article XI:1 of GATT 1994.

ANNEX C - 3

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(16 May 2007)

1. Enhanced Bond Requirement

(a) Principal factual features of the EBR which affect the EC legal analysis

1. As explained by Thailand (and not disputed by the US) the Enhanced Bond Requirement ("EBR")[1] applies *in addition* to the cash deposit rate.[2] Hence, the EBR is not supposed to ensure the collection of dumping duties assessed at the rate initially determined by the US investigating authorities (as the collection of these duties is ensured by the cash deposit rate). The EBR is designed to ensure collection of final anti-dumping duties that would be due in case dumping would increase dramatically from one year to another.[3] The EBR is therefore a measure designed to address a *hypothetical* problem in the collection of a *hypothetical* dumping duty reflecting a *hypothetical* dramatic increase in dumping (up to 100 per cent) from the level of dumping that has been initially determined by the investigating authorities.

(b) Measure designed to ensure collection of an anti-dumping duty cannot be more onerous that the anti-dumping duty itself

2. In the European Communities' view, one of the main reasons behind the existence of Article VI GATT and the Anti-Dumping Agreement was a desire to create a set of anti-dumping disciplines acceptable to all Members and capable of curbing the possibilities of a misuse – deliberate or not – of anti-dumping policies by Members. Yet, what would be the purpose of creating these rather detailed and carefully balanced rules, such as those on the calculation of dumping margin and the amount of anti-dumping duty, if the effect on trade of the duties determined pursuant those rules could be in practice much less important that the impact of measures ensuring the collection of those duties?

3. By definition, measures designed to ensure the collection of anti-dumping duties are merely *ancillary* to the duties themselves. If no dumping is determined which would give a rise to an anti-dumping duty, there cannot be an ancillary measure that is supposed to ensure the collection of such duty. Moreover, even if a margin of dumping is determined and a corresponding anti-dumping duty is assessed, the mechanism for securing the collection of that anti-dumping duty cannot impose a burden which would be greater than the duty itself – otherwise the Anti-Dumping Agreement would contain detailed rules only on the determination of a collection mechanism and not on the determination of dumping.

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[1] In its first written submission, Thailand refers to a number of US measures challenged in the present dispute as "Enhanced Bond Requirement". The US uses, in its first written submission, another set of abbreviations to refer to these measures, or some of those measures (as the reference does not seem to be always consistent). For ease of reference and to prevent confusion, the European Communities will refer in this submission to these measures, identified by Thailand, as the "Enhanced Bond Requirement" or "EBR".

[2] Thailand's first written submission, para 5, for instance, and Exhibit THA-2. US first written submission, paras 11-13.

[3] This also is confirmed by the statements made by the US authorities. See Thailand's first written submission, para 73, third bullet point.

4. The temporary nature of EBR (the fact that once the margin of dumping for the period covered by EBR is definitely determined and the anti-dumping duties finally collected, the remaining funds previously "frozen" in the enhanced bonds can be used for other purposes) does not affect this assessment. To the contrary, it actually underlines it. What sort of a temporary measure of an ancillary nature can be given such an effect which actually removes the very reason for the existence of and imposition the anti-dumping duties – namely the exports by dumping companies – by eliminating in practice these companies themselves (or their ability to export to the US)? [4]

(c) EBR is inconsistent with the provisions of Article 9 Anti-Dumping Agreement

5. The European Communities recalls the far-reaching nature of the EBR: the EBR is not merely a "collection-ensuring mechanism", it is a measure against potential *future* dumping which is put in place without any evidence and actual determination of dumping. This contradicts a number of distinct provisions of Article 9 Anti-Dumping Agreement. Article 9, as indicated in its title, sets forth – for the purposes of the Anti-Dumping Agreement – rules governing the imposition and collection of anti-dumping duties. The first three paragraphs of Article 9 set out rules governing this issue.

6. First, following on the preceding provisions of the Anti-Dumping Agreement, Article 9.1 makes clear that the determination of a margin of dumping is an inherent pre-condition for the imposition of any anti-dumping duty. At any stage, an anti-dumping duty has to be calculated and imposed *on the basis of* and *in correspondence to* positive evidence of dumping. The latter element – the existence of a *corresponding* relationship between the evidenced margin of dumping and the amount of duty – is also reflected in the second sentence of Article 9.1 of the Anti-Dumping Agreement: Members are encouraged to impose a lesser duty than the margin of dumping if such lesser duty would be adequate to remove the injury to domestic industry. However, Members certainly cannot, under this provision, impose a duty which would be *more* than the margin of dumping.

7. Article 9.2 of the Anti-Dumping Agreement confirms the above understanding. The reference to "appropriate amounts" in Article 9.2 follows on the principle set out in Article 9.1: an anti anti-dumping duty *imposed* (in accordance with Article 9.1) shall also be collected in *appropriate amounts*.

8. In other words, the rule resulting from Articles 9.1 and 9.2 is that the "appropriate amounts" have to *correspond* to the imposed duty and the duty itself has to *correspond* to the margin of dumping (or less than the margin of dumping, if deemed sufficient to remove injury). This principle is further elaborated in Article 9.3 of the Anti-Dumping Agreement. This provision states, in its *chapeau*, the fundamental principle that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2." To ensure that this principle is respected, Articles 9.3.1 and 9.3.2 of the Anti-Dumping Agreement set forth refund rules for both the retrospective and prospective systems. The existence of these rules makes it clear that the collected anti-dumping duties may *temporarily* exceed the actual contemporaneous margin of dumping (as opposed to the margin of dumping calculated during the original investigation) – for example if dumping decreases. This is a natural implication of the technical mechanics of the dumping determination, nothing more. An attempt to read into these refund rules a new rule, namely one allowing a temporary increase of collected anti-dumping duty bearing no relation to the margin of dumping actually ascertained would not be based on the text of these provisions.[5] Both the text and context make clear that the purpose of Article 9.3.1 and 9.3.2 is to set forth refund rules and not to provide a ground for a departure from the principles established in Articles 9.1 and 9.2 of the Anti-Dumping Agreement.

[4] See, for instance, Thailand's first written submission, paras 121 et seq.
[5] It seems that the US might actually be taking this position (cf. United States first submission, para 23).

9. To summarize: the EBR attempts to ensure the collection of an anti-dumping duty for which a margin of dumping has not at all been established. In that respect, the measure directly violates Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement.

10. The European Communities also notes that Thailand argues that the EBR is not an anti dumping "duty".[6] Irrespective of whether EBR is seen as a "part" of a provisional duty collected or as something else, the legally significant aspect is that the EBR distorts, in a very rampant way, the balance reached in the provisions of Article 9. The European Communities also does not take the view that the drafters chose to leave out the question of the adequateness of security for the collection of anti-dumping duty outside the scope of the Anti-Dumping Agreement. The applicable rules are embodied in the provisions of Article 9 discussed above.

(d) Ad Note to paragraphs 2 and 3 of Article VI GATT confirms that EBR violates Article VI:2 GATT and the Anti-Dumping Agreement

11. The European Communities is of the view that EBR is prohibited by Article VI:2 GATT for the same reasons as discussed above: the EBR requires a surety with respect to anti-dumping duties based on dumping which had not yet been determined and, in fact, had not occurred. The Ad Note to paragraphs 2 and 3 of Article VI GATT confirms this conclusion as it allows a Member to "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] In many respects, this provision addresses the very matter at issue. The EBR is not a "security … *pending final* determination of the facts". As the European Communities mentioned at the outset, the EBR is targeted at a potential future dramatic increase (up to 100 per cent) in dumping *beyond* the level of the dumping incurred in the past assessment period. Hence, in contrast to a cash deposit applied by the US, the EBR is not a security required *pending* the *final* determination of the facts in a case of suspected dumping. A "final determination" implies that there already has been a preliminary or initial determination of dumping which is then verified – and, if necessary, adapted – and becomes final. Yet, when EBR is applied, there is no preliminary or initial determination of the facts of dumping with respect to the dramatically increased dumping that is addressed by EBR.

(e) Article 7.2 Anti-Dumping Agreement confirms that security cannot exceed the margin of dumping

12. In the preceding section, the European Communities explained that EBR violates Article 9 as it attempts to ensure the collection of duties designed to offset dumping which has not yet occurred and has not been established. This view is further confirmed by Article 7.2 Anti-Dumping Agreement. While this provision relates to provisional measures, the principle holds equally well with respect to the issue at hand: if there is a margin of dumping determined, and if there is a duty assessed on the grounds of that margin, then a security can be requested that, however, has to *correspond to the amount of that duty*. In other words, the security cannot be determined in the absence of a margin of dumping and duty determination. If this rule were not applicable beyond the stage of preliminary measures, then one would end up with a rather absurd result: one would have to accept that the Anti-Dumping Agreement for some reason only protects the preliminary phase against a misuse and that the main and principle part of the anti-dumping regime, which can and does last for years, is fully open to all kinds of measures which can bypass the anti-dumping duty and be, as far as their effect is concerned, much more onerous.

[6] Thailand's first written submission, paras 203 – 210.
[7] Emphasis added.

(f) EBR violates Article 18.1 Anti-Dumping Agreement

13. Like Thailand, the European Communities is also of the view that EBR is a "specific action against dumping" which is not permitted by Article 18.1 of the Anti-Dumping Agreement. Instead of repeating the arguments made by Thailand, however, the European Communities would limit itself to pointing out a few factual and legal aspects of the EBR which it considers particularly relevant. First, in the European Communities' view, there can be no doubt that the EBR is a "specific" action against dumping. As the European Communities mentioned above, the EBR is a measure ancillary to the anti dumping duties, not the other way round. Without an anti-dumping proceeding and an initial finding of dumping, the EBR would/could not be imposed and, in fact, would be without purpose. Second, there is no doubt that the EBR is a specific action "against" dumping. The European Communities recalls that under the Appellate Body case law, the legal test in this respect should focus on dumping (or subsidization) as "practices"[8] and, particularly, on the assessment of "whether the design and structure of a measure is such that the measure … has an adverse bearing on … or, more specifically, has the effect of dissuading the practice of dumping … or creates an incentive to terminate such practices".[9] The effect of the measure in question on the competitive position of the domestic industry vis-à-vis their foreign competitors subject to anti-dumping duties is at least one of the elements in the above test.[10] The harmful effects of EBR on the competitors of the US domestic industry have been well documented in the submission of Thailand.[11]

(g) Other claims raised by Thailand and alternative measure ensuring collection of anti-dumping duties

14. The European Communities does not address other claims raised by Thailand in detail as it believes that a Panel finding made under the legal provisions discussed in the preceding sections of this submission (i.e., provisions which pertain specifically to dumping) would correspond to and address more pertinently the problem at issue. For the sake of completeness, the European Communities notes, however, that it disagrees with the US view that the EBR can be justified under Article XX(d) GATT.[12] In particular, contrary to what the US argues, the EBR is not "necessary to secure compliance" with US anti-dumping duty laws. Alternative measures, such as variable duties, are reasonably available[13] and, if adopted, would lead to a considerably less onerous and restrictive impact upon trade.

2. The Anti-Dumping Measure

15. The European Communities notes that the US acknowledged that US DOC used in the case referred to by Thailand the same zeroing methodology as was used in the *US – Zeroing (Ecuador)* case and that it did not put forward any arguments justifying the use of this methodology. There is no question that the Panel should consider itself bound by what is now a well established case law on the issue and find that the US violated its obligations under Article 2.4.2 of the Anti-Dumping Agreement.

3. Conclusion

16. The European Communities is of the view that the EBR, as challenged by Thailand, is inconsistent with Articles 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the Anti-Dumping Agreement and with Article VI:2 GATT including the Ad Note to Paragraphs 2 and 3 of Article VI GATT. The European

[8] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 253.
[9] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 254.
[10] *US – Offset Act (Byrd Amendment)*, Appellate Body Report, para 256.
[11] See, for instance, Thailand's first written submission, paras 121 et *seq*.
[12] United States' first written submission, paras 61 *et seq*.
[13] United States' first written submission, para 70.

Communities is also of the view that the Anti-Dumping Measure is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

ANNEX C - 4

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

(20 May 2007)

1. Zeroing.

(a) "Zeroing" is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

1. India has consistently opposed the use of zeroing methodology in calculating dumping margins beginning with the dispute that it initiated against the European Communities in *EC - Bed Linen*. The findings of the Appellate Body in that dispute have been confirmed and extended in subsequent panel and Appellate Body reports.

2. In its first written submission, Thailand notes that the zeroing methodology used by the United States in calculating dumping margins of Thai exporters of subject shrimp[1] is identical to that found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *US – Softwood Lumber V*. Thailand relies on the repeated findings in panel and Appellate Body reports that zeroing is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Thailand also relies on a recent report in *US – Shrimp (Ecuador)* where the Panel found that the zeroing methodology used by United States to calculate dumping margins is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. In its first submission, the United States has conceded that the same type of zeroing as in *US – Shrimp (Ecuador)* has occurred in the investigation of subject shrimp from Thailand and 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". India considers, therefore, that Thailand has discharged its burden of making a *prima facie* case establishing the inconsistency of the zeroing methodology used by the United States with its obligations under Article 2.4.2 of the Anti-Dumping Agreement.

2. The Enhanced Bond Requirement.

(a) The Enhanced Bond Requirement is inconsistent with Article 18.1 of the Anti-Dumping Agreement.

3. The Enhanced Bond Requirement constitutes an impermissible "specific action" against dumping that is inconsistent with the obligations of the United States under Article 18.1 of the Anti-Dumping Agreement. According to the Appellate Body ruling in *US – Offset Act*, a three-step analysis is necessary to determine whether a measure constitutes impermissible specific action against dumping. The two basic conditions precedent are that the measure must be (a) "specific" to dumping, and (b) "against" dumping. If these two conditions are met, it is necessary to determine whether the measure has been taken in accordance with the provisions of Article VI of the GATT 1994 as interpreted by the provisions of the Anti-Dumping Agreement.

4. The Enhanced Bond Requirement is "specific" to dumping because it applies only to importers of designated merchandise that is subject to anti-dumping duties, i.e., when all the conditions for imposition of anti-dumping duties have been fulfilled. As the United States itself has admitted in *US- Offset Act*, a measure such as the Enhanced Bond Requirement that "… imposes … liability on importers/producers/ exporters when dumping … is found …" will constitute "specific action" with respect to dumping. In addition, one important element of the formula for calculating the

[1] Terms used but not defined in this Executive Summary of the third party submission of India have the meanings assigned to them in the first written submission of Thailand in this dispute.

bond liability amount is the amount of anti-dumping duties owed based on the dumping margin. Moreover, one of the stated purposes of the Enhanced Bond Requirement is to ensure that anti-dumping duties are collected for payment to domestic industry under the Byrd Amendment, which the Appellate Body has found to be a "specific action" against dumping. Regulations or administrative procedures by CBP to implement the Byrd Amendment such as the Enhanced Bond Requirement also, therefore, constitute specific action against dumping or subsidization. Therefore, there is clearly an inextricable link between the Enhanced Bond Requirement and the constituent elements of dumping.

5. Further, the Enhanced Bond Requirement also clearly acts "against" dumping. It has a serious, adverse impact on importers and, therefore, on dumping. The demand of 100 per cent collateral by sureties acceptable to CBP to issue enhanced bonds and high bond premiums and other charges impose a heavy burden on importers. The bonds initially posted inevitably get saturated before the first administrative review and liquidation are completed. As a result, importers are forced to post additional enhanced bonds, which results in further charges and further depletion of their capital and credit. Thus, as found by the USCIT, importers suffer serious losses in profits and business opportunities. This has a serious deterrent effect on exports subject to the Enhanced Bond Requirement as is evident from the sharp drop between 2005 and 2006 in the quantity and value of subject shrimp exported from India as well as in the total number of exporters from India.

6. The last step in the analysis is to determine whether the Enhanced Bond Requirement accords with the requirements of Article VI of the GATT 1994 as interpreted by the provisions of the Anti-Dumping Agreement. In *US –1916 Act*, the Appellate Body found that the Anti-Dumping Agreement limits the permissible responses to dumping to (a) definitive anti-dumping duties, (b) provisional measures and (c) price undertakings. By definition, the Enhanced Bond Requirement does not involve the collection of a definitive anti-dumping duty or a price undertaking by exporters. 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, and (b) even after the provisional measures contemplated by these provisions have run their course and the decision to impose definitive duties has been taken. Accordingly, the Enhanced Bond Requirement is inconsistent with the obligations of the United States under Article 18.1 of the Anti-Dumping Agreement.

7. Further, the United States cannot rely on footnote 24 to the Anti-Dumping Agreement to justify the Enhanced Bond Requirement under other provisions of the GATT 1994. Footnote 24 qualifies Article 18.1 of the Anti-Dumping Agreement by stating that it is not "…intended to preclude action under other relevant provisions of GATT 1994, as appropriate." In *US – Offset Act*, the Appellate Body clarified that these provisions only "… confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* …, namely, that an action that is not 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement*…, but is nevertheless related to dumping …, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement*". Therefore, a measure that constitutes specific action against dumping cannot be justified under footnote 24. The Enhanced Bond Requirement clearly constitutes specific action against dumping. Accordingly, the United States cannot justify it under any other provision of the GATT 1994.

(b) The Enhanced Bond Requirement is inconsistent with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement.

8. Under Article 9.1 of the Anti-Dumping Agreement, the decision to impose definitive duties follows upon an affirmative finding of dumping and of consequent injury. Under Article 9.2 of the Anti-Dumping Agreement, the only measure that may be taken as a result of the decision to impose definitive duties under Article 9.1 is that duties shall be collected in the "appropriate amounts". Further, under Article 9.3, the amount of the duty shall not exceed the "margin of dumping".

Therefore, it is clearly impermissible to demand an enhanced bond in addition to the duties collected in an amount equal to the dumping margin.

9. The United States cannot justify the Enhanced Bond Requirement on the basis that it follows the retrospective system of assessment referred to in Article 9.3.1 of the Anti-Dumping Agreement. Article 9.3.1 clarifies that the "final liability" for anti-dumping duties will be fixed at the stage of administrative review and that any refund must be made normally within a period of 90 days from the determination of the final liability. The terms "final liability" and "refund" in Article 9.3.1 of the Anti-Dumping Agreement have the following implications. First, there must be a prior liability that is not "final", which can only refer to the liability fixed at the time of the imposition decision in Article 9.1. Second, it is permissible under Article 9.3.1 for the United States to collect higher anti-dumping duties after the administrative review under Article 9.3.1 than were collected under Article 9.2 consequent upon the imposition decision taken under Article 9.1. Third, Article 9.3.1 could not have contemplated a refund unless some amounts have already been collected prior to the determination of the final liability. However, the duties may be collected only "in the appropriate amounts" consequent upon the imposition decision in Article 9.1. Lastly, the absence of any reference to a discharge of bonds in Article 9.3.1 (unlike in Articles 10.4 and 10.5 of the Anti-Dumping Agreement) confirms that no measure other than the collection of definitive anti-dumping duties in "appropriate amounts" is contemplated after the imposition decision in Article 9.1 and prior to the determination of final liability in Article 9.3.1. Even by implication, however, Article 9.3.1 does not confer any special right on Members that choose to follow the retrospective assessment system to take any measure after the imposition decision in Article 9.1 other than to collect anti-dumping duties.

10. The ordering of the paragraphs of Article 9 of the Anti-Dumping Agreement makes it clear that Articles 9.1 and 9.2 also govern the retrospective assessment system. That Article 9.3 and Article 9.3.1 follow after Article 9.2 does not mean that some additional right to take security exists in the case of retrospective assessment systems. In fact, the first sentence of Article 9.3 prohibiting collection of duties in excess of the dumping margin qualifies the "appropriate amounts" in which anti-dumping duties may be collected under Article 9.2.

11. Moreover, it is important to keep in mind the policy consequences of conceding any right to take enhanced bonds that is not governed by the strict disciplines contained in the Anti-Dumping Agreement. Members may well demand a continuous bond amounting to 200 per cent or 300 per cent of anti-dumping duties payable on imports for the immediately preceding one-year period. Therefore, the Enhanced Bond Requirement is inconsistent with the provisions of Articles 9.1, 9.2, 9.3 and 9.3.1 of the Anti-Dumping Agreement.

(c) The Enhanced Bond Requirement is inconsistent with Article 7 of the Anti-Dumping Agreement.

12. The Enhanced Bond Requirement cannot be justified under Article 7 of the Anti-Dumping Agreement. Under Article 7.1(iii), it is necessary that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". The stated reasons for introducing the Enhanced Bond Requirement do not mention injury being caused during the investigation and focus on ensuring that payments are made to domestic industry pursuant to the Byrd Amendment. Therefore, if the Enhanced Bond Requirement is a provisional measure, it is inconsistent with Article 7.1(iii) of the Anti-Dumping Agreement.

13. The Enhanced Bond Requirement is also inconsistent with Article 7.2 of the Anti-Dumping Agreement. A provisional measure may not be for an amount in excess of the "provisionally estimated margin of dumping". However, under the Enhanced Bond Requirement, importers are required to provide an enhanced bond for an amount equal to the anti-dumping duties payable on

imports for the previous year rather than a single-entry bond for the amount of anti-dumping duty owed on each shipment.

14. Moreover, Article 7.4 of the Anti-Dumping Agreement provides for limiting a provisional measure to a maximum period of six months. To the extent that the Enhanced Bond Requirement on importers is introduced or remains in place on any date after six months from the date on which provisional measures are first imposed, the Enhanced Bond Requirement constitutes a clear inconsistency with the provisions of Article 7.4.

(d) The Enhanced Bond Requirement is inconsistent with Note 1 to Paragraphs 2 and 3, Ad Article VI.

15. India considers that the United States cannot rely upon the Note 1 to Paragraphs 2 and 3, Ad Article VI to justify the Enhanced Bond Requirement independently of Article 7 of the Anti-Dumping Agreement. In fact, it is clear that the "reasonable security (bond or cash deposit)" referred to in Note 1 to Paragraphs 2 and 3, Ad Article VI is the same as the provisional measures referred to in Article 7 and that this provision merely elaborates upon Note 1 to Paragraphs 2 and 3, Ad Article VI and imposes further disciplines in this regard. The final determination of the facts referred to in Note 1 to Paragraphs 2 and 3, Ad Article VI can only be at the stage of the decision to impose definitive anti-dumping duties under Article 9.1. Thus, Note 1 to Paragraphs 2 and 3, Ad Article VI does not constitute a "general exception" in Article VI of the GATT 1994 that operates independently of the disciplines in Articles 7 and 9.

16. Further, the requirement in Note 1 to Paragraphs 2 and 3, Ad Article VI that any security taken must be "reasonable" is clearly not satisfied in the case of the Enhanced Bond Requirement because the enhanced, continuous bond must be furnished in addition to making cash deposits at the duty rates specified in the Order. Therefore, the Enhanced Bond Requirement imposed by the United States is *per se* unreasonable. In addition, the Enhanced Bond Requirement is clearly not reasonable because it was motivated by political considerations. Further, the designation of products by CBP is also arbitrary and capricious. CBP does not cite a single reason as to why there is a likelihood of a higher rate of default in collection of anti-dumping duties on imports of subject shrimp as opposed to imports of other agricultural or aquacultural merchandise. As imports of subject shrimp were not liquidated, there was no evidence of default by importers of subject shrimp at the relevant time. Further, CBP at no time has offered any explanation of why importers of crawfish or garlic from China were not subject to the Enhanced Bond Requirement. It is clear also that CBP does not engage in any analysis of the likelihood of an increase in dumping margins which is the ostensible justification for applying the Enhanced Bond Requirement to merchandise subject to anti-dumping or countervailing duties.

17. Moreover, the extent of the security demanded under the Enhanced Bond Requirement is clearly excessive. As the USCIT found, the effects of imposition of the Enhanced Bond Requirement include (a) a serious depletion of the credit of importers, (b) dropping or scaling back on product lines imported into the United States, (c) preventing the addition of new product lines, (d) causing the loss of spot sales, (e) preventing participation in bids from major supermarket chains, (g) forcing imports of subject shrimp on a delivered, duty-paid basis, thus reducing profit margins, (h) adversely affecting customer and supplier relationships, and (i) inability to fulfil contractual orders. The extent of the harm suffered as a result of the Enhanced Bond Requirement is evidence of its unreasonableness.

18. In fact, until the publication of the 24 October 2006 Notice in the Federal Register, CBP did not take account of the financial soundness of individual importers at all, which presumably should have been its primary concern in imposing the Enhanced Bond Requirement. This is an obvious indicator of the extreme unreasonableness both in conception and in administration of the Enhanced Bond Requirement. Although CBP now claims that it will take into account the financial soundness

of individual importers in fixing the amount of the enhanced bond, they have also clarified that they will not apply this analysis pending liquidation to importers of subject shrimp to reduce the value of enhanced, continuous bonds already furnished. Accordingly, India considers that the Enhanced Bond Requirement is inconsistent with the provisions of Note 1 to Paragraphs 2 and 3, Ad Article VI.

(e) The Enhanced Bond Requirement is inconsistent with Article X:3(a) of the GATT 1994.

19. India submits that the Enhanced Bond Requirement is inconsistent with Article X:3(a) as applied to subject shrimp because it has not been administered in a uniform, impartial and reasonable manner as discussed above. It has been applied only to importers of subject shrimp from the six countries subject to anti-dumping duties and not to other importers. Therefore, the Enhanced Bond Requirement is clearly inconsistent with the requirements of Article X:3(a) as applied to subject shrimp.

(f) The Enhanced Bond Requirement is inconsistent with Articles I and II:1(a) and II:1(b) of the GATT 1994.

20. To the extent that the Enhanced Bond Requirement can be characterized legally as involving duties, taxes or other charges, India submits that it is inconsistent with the obligations of the United States under Articles I:1 and II:1(a) and II:1(b) of the GATT 1994. The Enhanced Bond Requirement certainly involves charges by US surety companies, is "a method of levying … duties", and represents a "rule" and "formality" in connection with importation." Therefore, it is clearly subject to the most-favoured nation obligation in Article I:1 of the GATT 1994. To the extent that the Enhanced Bond Requirement is applied in a discriminatory manner, therefore, to only those Members that are subject to anti-dumping duties in respect of certain designated merchandise, it is clearly inconsistent with the obligations of the United States under Article I:1 of the GATT 1994.

21. Again, to the extent that the Enhanced Bond Requirement necessarily involves payment of (high) charges to US surety companies, it constitutes an inconsistency with the second sentence of Article II:1(b), which provides that the "… products [described in Part I of the Schedule] relating to any [Member] shall also be exempt from all other … charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

22. The duties associated with the Enhanced Bond Requirement are not anti-dumping duties authorized under the provisions of Article VI of the GATT 1994 or the Anti-Dumping Agreement. To the extent that the Enhanced Bond Requirement results in an increase in "contingent tariff liability" above bound levels for Members subject to anti-dumping or countervailing duties, therefore, the Enhanced Bond Requirement is inconsistent with the obligations of the United States under Article II:1(a) and the first sentence of Article II:1(b) of the GATT 1994. Moreover, the increase in contingent tariff liability is only in respect of certain Members whose merchandise is subject to the Enhanced Bond Requirement. Therefore, it is also inconsistent with the "most-favoured nation" treatment obligation of the United States under Article I:1 of the GATT 1994. It is important to note that the bound rate for shrimp falling under tariff headings 0306.13.00 and 1605.20.10 in the Schedule of Concessions of the United States is "0.0%". Therefore, the Enhanced Bond Requirement is inconsistent with Articles I, II:1(a) and II:1(b) as applied to subject shrimp.

(g) In the alternative, the Enhanced Bond Requirement is inconsistent with Article XI of the GATT 1994.

23. Alternatively, to the extent that the Enhanced Bond Requirement may be legally characterized as an import restriction and not as a "duty, tax or other charge," it is clearly inconsistent with

Article XI:1 of the GATT 1994 and is not saved by any of the exceptions contained therein. The Enhanced Bond Requirement operates in a manner that severely restricts imports into the United States of merchandise subject to anti-dumping or countervailing duties. Accordingly, to this extent, the Enhanced Bond Requirement is inconsistent with Article XI:1 of the GATT 1994.

3. Conclusion

24. For the reasons stated above, India requests that the Panel find that (a) the zeroing methodology followed by the United States is inconsistent with its obligations under Article 2.4.2 of the Anti-Dumping Agreement; and (b) the Enhanced Bond Requirement is inconsistent with the provisions of Articles 7.1, 7.2, 7.4, 9.1, 9.2, 9.3, 9.3.1 and 18.1 of the Anti-Dumping Agreement, of Article X:3(a) of the GATT 1994 and of (i) Articles I:1 and II:1(a) and II:1(b) or (ii) alternatively, of XI:1 of the GATT 1994.

ANNEX C - 5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

(18 May 2007)

1. Introduction

1. This dispute brought by Thailand is about the Enhanced Bond Requirement (the "EBR") on certain products subject to antidumping or countervailing duties introduced by the United States. Thailand questions the WTO consistency of this measure on imports of certain frozen warmwater shrimp from Thailand in light of various provisions under the AD Agreement and the GATT 1994. In this submission, Japan, as a third party, would like to focus on the following two issues based on its systemic interest in the interpretation of these agreements ensuring fair and objective application of them:

- whether the EBR constitutes specific action against dumping that is inconsistent with Article 18.1 of the AD Agreement; and

- whether the EBR is inconsistent with the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994.

2. Arguments

(a) Consistency of the EBR with Article 18.1 of the AD Agreement prohibiting *specific actions against dumping* other than those permitted under the AD Agreement

2. Thailand submits that the EBR constitutes an impermissible specific action against dumping under Article 18.1 of the AD Agreement.

3. The Appellate Body stated that a Member's measure constitutes a specific action against dumping, where: (1) the measure is "specific" to dumping; (2) the action is taken "against" dumping, *i.e.*, to counteract dumping; and (3) it is inconsistent with the provisions of *GATT 1994*, as interpreted by the AD Agreement.[1] An action is "specific" where it is "inextricably linked to, or have a strong correlation with, the constituent elements of dumping."[2] An action is taken "against" dumping if the action "has the effect of dissuading the practice of dumping."[3]

4. Regarding the "specific" requirement, Japan considers that the Panel should examine under what situations the EBR is imposed to see whether and how the measure is linked to the "constituent elements" of dumping. In Japan's view, to meet this requirement, it would be necessary that the EBR is imposed only where dumping is found to exist. In this connection, it appears that the bond requirement in question is required only where the United States found the existence of dumping, i.e., constituent elements of dumping. Any additional requirements, such as the risk of non-collection for individual importers, would not change such basic characteristics of the EBR.

5. Regarding the "against" requirement, the Panel should examine at least the purpose as well as the design and structure of the EBR, and its effect, that is, how the bond requirement would reduce shipments from subject countries. In particular, the United States admits that the EBR is to secure

[1] See Appellate Body Report, *US –Offset Act (Byrd Amendment)*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 236.
[2] Ibid., para.239.
[3] Ibid., para.254.

future duty collection in case that "the antidumping duty rate actually assessed increase from that determined during the investigation."[4] By definition, the antidumping duty is a measure "against" dumping. As the bond requirement in question is a measure to complement the imposition of antidumping duty, it must be a measure "against" dumping.

6. The United States argues that the EBR is not an action "against" dumping, but "is designed to secure antidumping liability" only because "the vast majority of unsecured liability that has resulted in noncollection happens to be antidumping duty liability."[5] The United States also argues that it is just a third party beneficiary and "is not itself a party to the contract" with a surety.[6] There is no dispute, however, that the EBR is an action taken by the United States to collect antidumping duty only with respect to imports for which dumping was found. As discussed above, the bond requirement at issue must be a "specific action against dumping".

7. In such case, the Appellate Body clarifies that the permissible action under Article 18.1 of the AD Agreement is limited to the imposition of (i) definitive anti-dumping duties, (ii) provisional measures, or (iii) price undertakings.[7] The EBR is not either one of these three measures, and therefore impermissible under Article 18.1 of the AD Agreement.

8. The United States argues that the EBR is merely "related to" dumping or subsidies[8], and therefore permissible. The United States then relied on the statement of the Appellate Body that footnote 24 of the AD Agreement and footnote 54 of the SCM Agreement is to confirm 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 subsidization, is not prohibited" by those Articles.[9] As the bond requirement in question is "specific" action against dumping or a subsidy as discussed above, the requirement would not be justified by any other provisions of GATT 1994.

(b) Permissibility of the Enhanced Bond Requirement under the Ad Note

9. The United States argues that the Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994 justifies the EBR,[10] arguing that the EBR is "security against the prospect of a future liability."[11] Thailand considers that the measure which the Ad Note contemplates is the provisional measure provided in Article 7 of the AD Agreement.[12] The United States rebuts that the bond requirement at issue is imposed pending determination of the *final liability for payment of duties*. According to the United States, in the context of its retrospective duty assessment system, the language "final determination of the facts" in the Ad Note means "determination of the *final liability for payment of anti-dumping duties."*[13] Based on the following consideration, Japan is of the view that the "reasonable security" permitted under the Ad Note purports the provisional measures, which are articulated in Article 7 of the AD Agreement or Article 17 of the SCM Agreement.

10. First, the language "pending final determination of the facts" in the Ad Note must be read in the context of the subsequent language "in any case of *suspected* dumping or subsidization" (emphasis

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[4] United States' first written submission, para.13.
[5] Ibid., para. 34.
[6] Ibid., para. 7.
[7] See Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para.137.
[8] United States' first written submission, para.33.
[9] *US – CDSOA (AB)*, para.262. (emphasis in original)
[10] United States' first written submission, paras.20-29.
[11] Ibid., para. 25.
[12] Thailand first written submission, paras.194-198
[13] United States' first written submission, para.22 (emphasis added)

added). The word "suspected" suggests that the facts concerning "dumping" or "subsidization" are still at an unproven stage. Therefore, Japan understands that Ad Note contemplates a situation before the final determination of dumping or subsidization in the original investigation. The language of the Ad Note "determination of *facts* in any case of suspected dumping or subsidization" does not support the United States contention that this "determination" concerns with the final liability for payment of duties in a review. The review, however, does not concern with the determination of the *fact*, or the existence, of dumping or a subsidy. It merely reassesses the amount of dumping or subsidization. The determination in a review, thus, is not related to the "final determination of the facts of dumping or subsidization" as set forth in the Ad Note.

11. Japan considers that the "final determination" in the Ad Note means that of dumping or subsidization as a prerequisite of deciding to impose antidumping or countervailing duties. Therefore, the measure permitted under the Ad Note should be the provisional measures to be taken before the final determination of dumping or subsidization, as provided in Article 7 of the AD Agreement or Article 17 of the SCM Agreement.

12. Even in the retroactive system of duty assessment in the antidumping regime, the United States issues the antidumping order, which embodies the administrative decision to impose antidumping duties on certain products upon affirmative final determination on the facts of dumping. The determination of the assessment of the final duty liability may take place after the review process, if a request for a review is made. The measure purported in the Ad Note, however, is only related to the provisional measure to be taken before the issuance of this order, not after the affirmative final determination on dumping in the original investigation, and not even before the completion of the final liability assessment in a subsequent review. This interpretation equally applies to the imposition of countervailing duties.

13. The United States also quotes the reference to "many other cases in customs administration" to contend that the Ad Note permits the security requirement for the payment of antidumping or countervailing duties apart from provisional measures.[14] However, the mere reference to customs administration does not give support for an interpretation that the Ad Note would broadly permit security requirement, including those imposed even *after* the final determination of dumping or subsidization.

14. For the above reasons, Japan submits that it considers that the Ad Note gives no legal basis for the imposition of the EBR.

3. Conclusion

15. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure fair and objective application of the AD Agreement and the GATT 1994.

[14] United States' first written submission, para.25.

ANNEX C - 6

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

(10 May 2007)

1. Introduction

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first written submissions by Thailand dated 20 March 2007 and the United States dated 1 May 2007, respectively, in *United States – Measures Relating to Shrimp from Thailand* (WT/DS343).

2. Korea has systemic interests in the interpretation and application of provisions of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), which lay out legal guidelines for investigating authorities of the Members in calculating dumping margins in an anti-dumping investigation. Therefore, Korea reserved its third party rights pursuant to Article 10.2 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU"). Korea appreciates this opportunity to present its view to the Panel.

3. In February 2005, the United States Department of Commerce ("USDOC") imposed definitive anti-dumping duties on imports of certain frozen warmwater shrimp from Thailand.[1] In the course of the investigation, the USDOC utilized the practice known as "zeroing" in calculating the dumping margins for Thai exporters of subject product.[2] Korea believes that the anti-dumping investigation conducted by the USDOC against shrimp from Thailand constitutes a serious violation of Article 2.4.2 of the AD Agreement. In Korea's view, this dispute presents a vivid example of the distortive nature of the zeroing practice maintained by the United States for a long time: but for zeroing, the USDOC would have been unable to find a margin of dumping in the underlying investigation.[3]

4. Korea therefore generally supports the arguments raised by Thailand in its first written submission. Rather than covering all the arguments, however, Korea will address in this submission certain critical issues in Korea's view.

2. Legal Arguments

(a) The USDOC's continued utilization of "zeroing" in an original investigation on an average-to-average basis constitutes violation of Article 2.4.2 of the AD Agreement

5. First of all, Korea notes that in *U.S.-Zeroing (Japan)*, the most recent decision relating to zeroing, in which the Appellate Body exercised a comprehensive review of all aspects of zeroing practice under the AD Agreement, the Appellate Body unequivocally held that zeroing in all respects violates relevant provisions of the AD Agreement.[4] Furthermore, there is an ample body of precedents, where panels and the Appellate Body found that the zeroing practice used in average-to-

[1] See 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 (1 February 2005). Not only Thailand but five other countries were also subject to the concurrent investigations.

[2] See USDOC, Decision Memorandum, Exhibit THA-16, p. 8.

[3] See Thailand's first written submeission in U*S—Measures Relating to Shrimp from Thailand* (WT/DS343) (20 May 2007), at para. 4.

[4] See *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted 23 January 2007) ("*U.S.-Zeroing (Japan)*"), at paras. 137-138, 147, 166, 167-169, 177, 186-187.

average comparison in an original investigation (that is, the first methodology in the first sentence of Article 2.4.2 of the AD Agreement) violates Article 2.4.2 of the AD Agreement.[5] In the underlying investigation of this dispute, the USDOC continued to utilize the zeroing practice in exactly the same manner which has been repeatedly found by the panels and Appellate Body to be in violation of Article 2.4.2 of the AD Agreement: it applied the zeroing practice in average-to-average comparison in an original investigation. In Korea's view, therefore, the Panel could easily reach its determination on this issue in this dispute.

6. This dispute provides a showcase example why and how zeroing distorts an anti-dumping investigation. It has allowed the investigating authority to find a dumping margin where there should have been none in the first place. Once an anti-dumping margin was erroneously found as a result of zeroing and duty imposed, another agency of the US government, the Customs and Border Protection ("CBP"), then imposed a further administrative penalty on Thai exporters in the name of an "Enhanced Bond Requirement."[6]

7. If there had not been a zeroing practice, there would not have been an anti-dumping order, hence, probably, no Enhanced Bond Requirement either. In other words, this whole dispute simply stemmed from the zeroing practice. As such, Korea requests the Panel to find that the zeroing practice of the USDOC in an original investigation in an average-to-average comparison methodology is prohibited by Article 2.4.2 of the AD Agreement.

8. Korea is aware that the United States has announced its intention to discontinue the use of zeroing when calculating dumping margins on the basis of average-to-average comparisons in original investigations.[7] Korea hopes that the new calculation methodology of the USDOC faithfully implements the holdings of the panels and the Appellate Body in future anti-dumping investigations. However, (i) given the length of zeroing disputes over the years involving multiple cases, (ii) the history of continued resistance of the United States in implementing the panels' and Appellate Body's zeroing decisions, and (iii) the still seemingly existent leeway of the investigating authority in calculating the dumping margin under the new methodology, Korea believes it worthwhile for the Panel in this dispute to pursue this issue thoroughly and pronounce its confirmation in an unequivocal manner that the zeroing in an original investigation on a weighted-average-to-weighted-average basis violates Article 2.4.2 of the AD Agreement.

(b) Not only in average-to-average comparison in original investigations, but also in any context of dumping investigations and reviews zeroing produces inaccurate dumping margins and thus violates various provisions of the AD Agreement

9. In addition, Korea also requests the Panel, in the course of addressing this issue in the present dispute, to confirm the gist of the Appellate Body decision in *U.S.-Zeroing (Japan)*: the Appellate Body's decision was clearly to the effect that zeroing constitutes a violation not only in the context of an average-to-average comparison in an original investigation as with the case here, but also in all aspects of an anti-dumping administration procedure, including administrative reviews, new shipper reviews, and sunset reviews, regardless of comparison methodologies utilized by investigating

[5] See, e.g., Panel Report, *US – Zeroing (Japan)*, para. 7.86; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Panel Report, *US – Softwood Lumber V*, para. 7.224 and 8.1(a)(i); Panel Report, *US. – Zeroing (EC)*, paras. 7.31-32; Appellate Body Report, *EC – Bed Linen*, paras. 46-66.

[6] Although Korea notes that the Enhanced Bond Requirement itself poses a significant violation of Article 18.1 of the *AD Agreement*, in the interest of brevity, it decides not to discuss this issue in this submission. Korea generally supports the argument presented by Thai in its first written submission regarding the "Enhanced Bond Requirement" issue.

[7] See USDOC, *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (27 December 2006).

authorities. Korea views the decision of the Appellate Body in that decision as pronouncing a blanket prohibition of zeroing in any context of anti-dumping investigations and reviews.

10. So, in reaching a decision in this particular dispute, Korea requests the Panel to discharge its obligation taking into account this broad finding of the Appellate Body that zeroing *per se* is simply prohibited in an AD Agreement. Korea is aware that only Article 2.4.2 is implicated in this dispute because zeroing challenged here is only the one used in an original investigation on an average-to-average basis. The broad finding of the Appellate Body in *U.S.-Zeroing (Japan)*, however, is directly relevant in this dispute as well, because it provides the most recent, the most comprehensive and the most reasoned analysis on zeroing, basically wrapping up all the related issues and controversies in this particular area.

11. As the Appellate Body correctly noted in that dispute, the fundamental problem of zeroing is that it produces inaccurate dumping margins and this obvious inaccuracy distorts all aspects of anti-dumping investigations and reviews. Thus zeroing-produced determinations in original investigations and reviews (including periodic reviews, new shipper reviews and sunset reviews) regardless of specific comparison methodologies utilized (whether it is average-to-average basis, transaction-to-average basis or transaction-to-transaction basis) inevitably constitute violations of various provisions of the AD Agreement, such as Articles 2, 9 and 11. In reaching a decision in this dispute, therefore, Korea hopes that the Panel analyses the present case from this broad perspective.

12. Korea also notes that recent panels reviewing zeroing disputes have made efforts to provide consistent and uniform jurisprudence on this volatile issue, and respectfully requests that the current Panel does the same.[8] Korea believes that the Panel's decision in this case will be important in that it will be able to prompt the United States to halt its continued use of zeroing in *any* context in future anti-dumping investigations and reviews.

3. Conclusion

13. For the foregoing reasons, Korea respectfully submits that the Panel finds that the USDOC's anti-dumping investigation against shrimp from Thailand constitutes a violation of Article 2.4.2 of the AD Agreement, and recommends that the United States bring the measure into conformity with its obligation under the AD Agreement. Korea appreciates this opportunity to present its view to the Panel.

[8] See, for instance, Panel Report, *US – Shrimp (Ecuador*), paras. 7.39 et seq.

ANNEX C - 7

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO[1]

(10 May 2007)

1. Introduction

1. The Government of Mexico is grateful for this opportunity to present its views as a third party to these proceedings. Mexico is participating in this dispute as a third party because its interests have been seriously undermined by the systematic application by the United States of WTO-inconsistent zeroing measures identical to those that are being challenged in this dispute. This practice expressly violates the United States' obligations under the WTO Anti-Dumping Agreement.[2] The present case offers an opportunity to reaffirm these obligations and to secure prompt compliance by the United States.

2. Mexico is not taking position on the imposition of more stringent bond conditions for US imports of the subject merchandise in the Warm Water Shrimp anti-dumping proceedings.

3. Mexico would like to share with the Panel a number of observations which it considers important to the Panel's decision.

(a) "consistent line" of Appellate Body Reports have found Zeroing in original investigations to be inconsistent with Article 2.4.2, first sentence

4. The legal conclusion to be drawn concerning the zeroing measures that are before the Panel is clear. As recognized by the United States[3], the zeroing model at issue in Thailand's claim involves the same type of zeroing procedures that were before the Panel in *United States – Anti-Dumping Measure on Shrimp from Ecuador*.[4] In that case, the United States did not contest the inconsistency of its measure with the Anti-Dumping Agreement, and the Panel found the zeroing measure to be inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

5. In its first written submission, 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".[5] However, although this was not expressly acknowledged by the United States, the same legal conclusions were reaffirmed by the Appellate Body in a series of decisions issued since the report in *US – Softwood Lumber V*, for example in *US – Zeroing (EC)* and *US – Zeroing (Japan).* Both of these Appellate Body reports found the zeroing measure to be inconsistent "as such" with the obligations of the United States under Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement because it fails to determine a margin of dumping for the product under investigation taken as a whole. As recently explained by the Panel in *US – Shrimp from Ecuador* (WT/DS335/R):

> [...] Thus, in our view, there is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that "zeroing" in the context of the

[1] This text was originally submitted in Spanish by Mexico.
[2] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*
[3] United States' first written submission (DS343) (20 March 2007), paragraph 80.
[4] WT/DS335/R (30 January 2007).
[5] United States' first written submission, paragraph 80.

> weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2.
>
> We have, as is our duty, carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration the consistent line of Appellate Body Reports as mentioned in the previous paragraph. We find the Appellate Body's reasoning persuasive and adopt it as our own. Given that the issues raised by Ecuador's claims are identical in all material respects to those addressed by the Appellate Body in the *Lumber V* case, we are satisfied that Ecuador has made a *prima facie* case that the use of zeroing by the USDOC in the calculation of the margins of dumping for Exporklore and Promarisco, from which were calculated the "all others" margins in the three measures identified in its request for the establishment of a panel, is inconsistent with the United States' obligations under Article 2.4.2 of the Anti-Dumping Agreement because the USDOC did not calculate these dumping margins on the basis of the "product as a whole" as it failed to take into account all comparable export transactions in calculating the margins of dumping.[6]

6. The above considerations and reasoning are obviously directly related to Thailand's claim with respect to the zeroing measure at issue in these proceedings.

7. Mexico strongly endorses the legal reasoning applied in the uninterrupted string of Appellate Body decisions described above. In each case, the Appellate Body has rightly taken as a starting point the definitions of "dumping" and "margin of dumping" appearing in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement. The Appellate Body has consistently determined that the margins of dumping must be calculated for each exporter or producer at issue with reference to that exporter or producer's sales of the product under investigation taken as a whole. These obligations are fundamental, and apply to the calculation of margins of dumping in all procedural contexts and in all possible comparison methodologies.[7]

(b) There are compelling systemic reasons for this Panel to follow the Appellate Body's ruling

8. Although the quality and persuasiveness of the Appellate Body's reasoning in themselves provide sufficient grounds for this Panel to abide by the Appellate Body's decisions, Mexico notes that there are also other considerations of considerable systemic importance that should prompt this Panel to adopt the reasoning applied in those earlier decisions.

9. Article 3.2 of the Dispute Settlement Understanding identifies the dispute settlement system as a "central element" in providing security and predictability to the multilateral trading system.

10. A panel in a previous dispute rightly pointed out that "[a]lthough previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is an expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed."[8] The Appellate Body supported this principle, *inter alia*, in *US – Oil Country Tubular Goods Sunset Reviews*, in which it stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate but is what would be expected from panels, especially where the issues are the same."[9]

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[6] Report of the Panel, *US – Shrimp from Ecuador*, paragraph 7.40 and 7.41.
[7] See, for example, the report of the Appellate Body in *US – Zeroing (Japan)*, paragraph 109.
[8] Report of the Panel in *US – Zeroing (EC)*, paragraph 7.30.
[9] Report of the Appellate Body, *US – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods*, paragraph 188.

(c) The Panel should note that the United States has modified its WTO–inconsistent practice, but not with respect to initial investigations concluded before 22 February 2007

11. Mexico acknowledges that the United States has modified its WTO-inconsistent zeroing practice in one respect (original investigation using the average-to-average comparison methodology) by virtue of a notice published in the Federal Register in December 2006.[10] However, this change of policy does not address the case at issue directly, since it applies only to investigations subject to determinations made on or after 22 February 2007. The determination in this case was made on 23 December 2004, which means that, if at all, the United States will change the results in this case only with respect to the domestic legal procedures under Section 129 of the Tariff Act of 1930 as amended.

12. It is regrettable that Thailand has found it necessary to resolve this matter through the WTO dispute settlement procedures in spite of the multiple Appellate Body reports that have found this practice to be WTO-inconsistent and in spite of the fact that the United States does not appear to dispute Thailand's claims with regard to zeroing. Mexico respectfully requests that the Panel bear these circumstances in mind when formulating its recommendations in the Report.

2. Conclusion

13. For the reasons stated above, Mexico asks the Panel to uphold Thailand's claim that by using the zeroing methodology with respect to the *Warmwater Shrimp* anti-dumping measure, the United States has acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.

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[10] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations*, 71 Fed. Reg. 77722 (Department of Commerce) (27 December 2006).