OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

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

JULY 24, 2007

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for this additional opportunity to present the views of the United States in this dispute. We do not intend to offer a lengthy statement, but instead will focus on the core issues and respond to certain new arguments raised by India and Thailand in their second submissions.

The Ad Note to Article VI Permits Reasonable Security Requirements

2. The U.S. position in this dispute is straightforward. The Ad Note to Article VI of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) states that "as in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of antidumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization." The Ad Note means what it says: quite simply, that Members may require security for the payment of antidumping and countervailing duties until the facts with respect to payment of those duties are finally determined, provided that the security is "reasonable." If it is "reasonable," requiring security for those duties is not prohibited. The enhanced bond directive provides for just such security – in the form of a bond – for payment of antidumping and countervailing duties in the amount

established through the assessment review process. The additional bond amount secures CBP against the risk that an importer will default on duties finally determined to be owed on a given set of entries. And, for reasons to be discussed shortly, it is "reasonable."

3. The U.S. interpretation of the Ad Note is consistent with the ordinary meaning of each of the terms used therein, in particular the references to "other cases in customs administration," "security," "payment," the "final" determination of the facts, and "suspected dumping or subsidization." It is consistent with the reference to "other cases in customs administration," because requiring a bond pending payment of the duties being secured, when the final liability is not known at entry, is common practice among customs administrators in the United States and other countries, including India. It is consistent with the reference to "security" – indeed, a bond is specifically enumerated as a type of security in the Ad Note.

4. The U.S. interpretation is consistent with the reference to "payment" and the "final determination of the facts": it is supported by the fact that the language is very similar to language in Article 9.3.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") – the "determination of the final liability for payment" – describing the results of an assessment review in a retrospective duty assessment system. Finally, it is consistent with the reference to a "case of suspected dumping or subsidization." As the United States has explained, in the context of payment, dumping is "suspected" after the investigation and pending assessment because it is not known whether any duties will be owed on the set of entries secured by the bond until the assessment review process is complete.

5. The U.S. interpretation also accords with the context in which the Ad Note appears,

including GATT 1994 Article VI and the AD Agreement. Article VI:2-3, which references "levy[ing]" antidumping and countervailing duties, supports the U.S. interpretation. The term "levy" is defined in the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") as "the definitive or final legal assessment or collection of a duty or tax," and thus it is logical that a provision on levying duties would be accompanied by an Ad Note addressing security for payment, pending final legal assessment of those duties. And it does not conflict with Article 9, which addresses the assessment and collection of duties through the administrative review process, and which permits a Member to collect duties in an amount up to the "final liability" described in Article 9.3. The security requirement is precisely what enables the United States to collect that amount of duty.

6. By contrast, India and Thailand's interpretation – that the Ad Note governs "provisional measures" but not security pending payment, and that security is limited to the margin established in the investigation phase or previous assessment review – is utterly contrary to the text. With respect to the Ad Note, it is at odds with the use of the term "security for payment", as it would suggest that the Ad Note does not govern security for payment. It is at odds with the reference to the "final" determination of the facts, when interpreted in the context of "payment" because, in a retrospective duty assessment system, a final determination in the investigation phase of a proceeding does not address payment, and the final results of a previous administrative review only address payment for the entries covered by that review, not the entries subject to the security requirement. These determinations are simply not the relevant "final determination of the facts" in the context of the Ad Note. India and Thailand's interpretation also is at odds with the reference to "other cases in customs administration" –

India and Thailand have identified no other cases in customs administration in which the administrator stops requiring security for payment before duties have been paid. And, with regard to India and Thailand's suggestion that any such security cannot exceed a specified amount, it is contrary to the use of the term "reasonable" security, rather than a specific limit on the amount of security as is the case in AD Agreement Article 7.

7. India and Thailand's interpretation of the AD Agreement is likewise flawed. First, their reading of Article 7 as "superseding" the Ad Note or otherwise restricting security requirements imposed after the final determination is unsupported by its terms. Nothing in Article 7 suggests that it places limits on the amount of security after the final determination in the investigation. The mere fact that Article 7 refers to security requirements does not support the conclusion that the limits it contains apply to *all* security requirements relating to AD/CVD. Indeed, the text explicitly refers to measures taken "during the investigation" phase of a proceeding.

8. With respect to Article 9 of the AD Agreement, India and Thailand likewise ask this Panel to find a breach based on an interpretation of the text that is contrary to its plain meaning. India and Thailand ask the Panel to treat "security" as synonymous with "duty" – an assertion that is contradicted by the ordinary meaning of the term "security" and the context provided by references to security elsewhere in the text that explicitly distinguish it from a duty, such as Article 7 of the AD Agreement. Furthermore, India and Thailand ask that the Panel interpret the phrase"margin of dumping" in Article 9 to mean the margin of dumping established in the investigation, or for previous entries, but not the margin of dumping actually determined for the entries being secured.

9. Based on this contorted reading of the text, India, for example, asserts in its second

submission that "Under Article 9.2 ... the only option available to a Member is to collect antidumping duties to the extent of the dumping margin determined in the final determination that precedes the imposition decision under Article 9.1." India asserts that the margin determined in the investigation phase of a proceeding operates as a "ceiling" for the amount of duties that may be collected following assessment. This assertion is unsupported by the text of Article 9, as explained above, as well as previous panel and Appellate Body reports and basic logic. If accepted, India's argument would mean that Members may not collect duties equal to the final liability established in the assessment review, and that a margin calculated based on an entirely different set of entries – and entirely different set of facts – dictates the amount of duties that may be assessed and collected on subsequent entries.

10. In *Argentina – Poultry*, the panel rejected a similar claim, advanced by Brazil, that the margin of dumping referred to in Article 9.3 is that established during the period of investigation. Furthermore, with respect to Article 9.2, the panel stated that "In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be 'appropriate' within the meaning of Article 9.2." The margin of dumping determined in accordance with an assessment review conducted consistently with Article 9.3.1 is precisely the margin of dumping that the bond requirement is intended to secure, so that the United States is able to obtain payment for duties equal to that margin. Thailand and India fail to demonstrate how a bond requirement established as security for payment of this amount of duties is inconsistent with either Article 9.2 or Article 9.3.

11. India and Thailand's interpretations of the AD Agreement and the Ad Note thus share a

common flaw: they are fundamentally at odds with the ordinary meaning of the terms of the treaty in their context. As Article 31(1) of the *Vienna Convention* states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." India and Thailand's interpretation does not accord with this customary rule of treaty interpretation, and thus cannot be sustained.

12. Finally, with respect to the question of "reasonableness", we will not repeat all of the points we have made before, but would simply highlight a few facts. First, the Ad Note uses the term "reasonable" – unlike, for example, Article 7 of the AD Agreement, it does not specify a particular limit on the amount of security that is "reasonable." As the Appellate Body noted in *US – German Steel* and *Japan – Alcohol*, when interpreting a text, omissions have significance; the absence of a specific limit in the Ad Note likewise has significance. Second, the measure in question was adopted in response to a serious, and unprecedented, problem: importers of merchandise subject to antidumping duties have not paid in excess of $600 million in duties lawfully owed. Most of the bills have now been outstanding for several years, and, because they were not secured, it is unlikely CBP will ever be able to collect on them. The main problem was not surety bankruptcies, new shipper reviews, or, as Thailand and India assert, some undefined feature of nonmarket economies; rather, it was the fact that the importers involved in the industry in question were not financially sound and had defaulted, and that the duties in question were largely unsecured.

13. Third, to establish security amounts, CBP, like any customs authority, must evaluate risk of default and make predictions about final liability – as noted, contrary to India and Thailand's

suggestion, this is the liability established following the *assessment* process. CBP identified a risk with respect to shrimp imports, due to similarities in the characteristics of the industry with those of the industries that had been responsible for previous defaults. It could not ignore the potential liability at stake, given the value of the shipments in question – a mere 1% increase in the margins overall would result in about $25 million in unsecured duties. CBP's analysis indicated that, historically, margins increase 33% of the time, often by significant amounts, and when they do, defaults may occur. Indeed, substantial defaults had occurred in the past, in industries that, in terms of financial structure, shared similarities to the shrimp industry. Moreover, CBP has worked to minimize the burden on importers – all it asks of an importer that would like a bond amount other than that established in the formula is to provide some basic information so that CBP can confirm that it is able to pay. Nothing in the enhanced bond directive supports the conclusion that this is a "burdensome" process or otherwise results in unreasonable security, and, beyond simple assertion, Thailand and India have offered no evidence to the contrary.

Additional Bond Directive Is Not a "Specific Action Against Dumping" or "Subsidy"

14. Moving to Thailand and India's claim that the additional bond directive is a "specific action against dumping" (and, in the case of India, "subsidy"), each continues to rely on a single sentence in an Appellate Body report, unaccompanied by any relevant analysis, in support of the assertion that Article 18.1 implicitly prohibits what the Ad Note to GATT Article VI expressly permits. As the United States has explained, the enhanced bond directive is not an "action against dumping" or "subsidy" – it merely provides for security to enable CBP to collect antidumping duties lawfully owed. The sole reason the directive is designed to secure these

duties is because they account for the vast majority of duties that importers have not paid. We further note that other provisions of the WTO Agreement, such as GATT Article X and Article XX(d), contemplate a distinction between the measure that requires a particular action and the measure that enforces that requirement. A bond is no different in this respect: it is distinct from the measure it is enforcing -- the antidumping duty -- and is not itself an action against dumping.

15. Fundamentally, Thailand and India's argument appears to rest on an incorrect understanding of the relationship between the GATT 1994 and the AD Agreement. The GATT 1994, including the Ad Note to Article VI, is an "integral part" of the *Marrakesh Agreement Establishing the World Trade Organization* ("Marrakesh Agreement"). Article VI is "part of the same treaty" as the AD Agreement, and, as the Appellate Body suggested in *Argentina – Footwear Safeguard* and the panel stated in *US – 1916 Act (EC)*, should not be interpreted in a way that would deprive it or the Antidumping Agreement of meaning. The terms of Article 18.1 reflect the relationship between the annexed agreements described in the Marrakesh Agreement. Article 18.1 provides that "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." The security is "in accordance with the provisions of GATT 1994, as interpreted by" the AD Agreement because it is consistent with the GATT 1994 and nothing in the AD Agreement alters that. The AD Agreement permits Members to collect duties in the amount of the final liability and the Ad Note permits "reasonable" security for the payment of duties equal to that final liability. As explained previously, only by distorting the language of Articles 7 and 9 do India and Thailand create a conflict where none exists. Furthermore, in reading Article 18.1 as superseding the Ad Note in the absence of a conflict, Thailand and India improperly deprive

the Ad Note of meaning, contrary to the relationship between the annexed agreements contemplated by the Marrakesh Agreement.

India and Thailand's Claim under GATT Article X:3(a)

16. With respect to GATT Article X:3(a), Thailand and India now appear to argue that they are not contesting the application of the directive to shrimp, but rather the directive's "substantive content" as a legal instrument that "regulates the administration of a legal instrument of the kind described in Article X:1" – i.e., 19 C.F.R. 113.13. However, if this is their claim, they have plainly failed to meet the burden described by the Appellate Body in *EC – Customs Matters*. They have failed to prove that the directive "necessarily leads to a lack of uniform, impartial or reasonable administration." In this regard, it is notable that the directive does not say that it applies only to shrimp; rather it establishes an approach to reviewing continuous bonds for merchandise determined to be subject to increased default risk. Yet the only evidence Thailand and India have offered in support of their Article X claim relates to their assertion that *shrimp* importers should not be treated differently than other importers. They fail to demonstrate how the directive necessarily results in this treatment. Insofar as India and Thailand's claims pertain to the administration of the *directive*, neither offer new arguments on the issue and therefore the United States refers the Panel to its previous submissions.

The Directive Is Not Inconsistent with GATT Articles I, II, or XI

17. With respect to their claims under GATT Articles I, II, and XI, neither Thailand nor India has established a breach. With regard to India's reference to the notion that a bond requirement must be evaluated in conjunction with the obligation it secures, that linkage was rejected by the Appellate Body in *US – Certain EC Products*, one of the very cases that India cites.

Furthermore, even were the linkage theory valid, it should be noted that neither India nor Thailand have demonstrated that the AD Agreement prohibits the United States from obtaining payment for duties determined in accordance with an assessment review – in particular, as noted previously, their interpretation of Article 9 simply defies logic.

18. Like any security requirement, the additional bond amount is required at the time of entry, before the actual amount of duties owed is known. Contrary to Thailand and India's suggestion, the mere fact that the final liability has not been definitively established when the bond is requested is *irrelevant* to the question of whether the obligation being secured is lawful. Were that the case, no bond would be found to secure a lawful obligation, since a bond's very purpose is to provide security when goods are being entered before final liability has been definitively established. In this case, consistent with the findings of the Appellate Body in *US – Certain EC Products*, there is no basis on the record before this Panel to conclude that the duties ultimately assessed – the duties secured by the bond – are unlawful.

19. In addition, with regard to GATT Article I, as explained, the measure in question does not discriminate between Members. It is applied to importers of shrimp subject to the antidumping order, without regard to nationality. Thus, unlike the bond requirement at issue in *US – Certain EC Products*, which applied only to EC products, the bond requirement in this case has been applied to importers of shrimp from all countries subject to an antidumping order on shrimp. There are no, as Thailand puts it, "preferred countries." Indeed, GATT Article VI specifically contemplates that Members may apply duties to some countries and not others in the antidumping context, and thus to suggest that it is inconsistent with GATT Article I to distinguish between importers based on whether they are subject an antidumping order is

inconsistent with the premise of GATT Article VI.

20. With respect to GATT Article II, we would note that bonds are not "duties", for reasons already explained. As for the claim that they constitute "other charges", the sole support India and Thailand offer for this assertion is the panel's findings in *US – Certain EC Products*. It should be noted that one panelist disagreed with the panel's findings in this regard, and the Appellate Body overturned the panel with respect to those aspects of its Article II analysis that were appealed. Fundamentally, India and Thailand continue to fail to offer a theory of "restriction" that would support anything other than the conclusion that all bond requirements are inconsistent with Article II unless included in a Member's Schedule of Commitments. Thailand's assertion that such requirements could be justified under Article XX does not cure this defect in its position: to read the GATT 1994 as prohibiting all unscheduled security requirements unless justified by a provision of Article XX would effectively reverse the burden of proof in all cases involving security requirements. There is no basis in the text of the WTO Agreement to suggest this is intended, and such a reading raises the question of why the Ad Note was included if bonds must always be justified under Article XX(d).

21. The same flaw persists with respect to India and Thailand's analysis under GATT Article XI. Beyond the points already made on this issue, the United States would only note that Thailand mischaracterizes the panel's findings in *DR – Cigarettes* in suggesting that the panel made no findings with respect to the meaning of "restriction" and whether the measure in question constituted a restriction within the meaning of Article XI. This is simply incorrect – the entirety of the panel's analysis in paragraphs 7.250 through 7.254 pertains to the question of whether the bond requirement at issue was a "restriction." The panel's findings in *DR –*

Cigarettes are instructive. Because, as here, importers were able to import without posting the bond, the requirement was found not to constitute a "restriction" within the meaning of Article XI. To suggest as Thailand and India do that any additional burden on importers constitutes a "restriction" simply proves too much.

The Additional Bond Directive Would be Justified by GATT Article XX(d)

22. With regard to Article XX, we will not repeat the points made in our previous submissions, but would note that, first, the United States has amply described the source of the noncollection problem: unsecured antidumping duties owed in an industry characterized by undercapitalized importers. Second, the record demonstrates that the noncollection problem is serious, a point that Thailand conceded in its first submission. And it has been shown that, absent the additional bond, CBP will not be able to collect duties lawfully owed in the event that an importer defaults. Thailand and India's assertions regarding purported alternate measures are unavailing, for reasons already explained. Neither Thailand nor India have responded to the U.S. position in this regard, and instead continue to recite the same measures as suitable "alternatives" when it has already been demonstrated that they are not.

India's "As Such" Claims

23. Finally, with respect to India's "as such" claims against the directive and its arguments regarding U.S. customs laws and regulations, India has simply failed to discharge its burden of proof. With respect to its claims under the SCM Agreement, it has failed even to articulate a legal theory as to why the directive "as such" breaches the particular obligations it identifies. The same is true with respect to its claims under AD Agreement Articles 7, 9.1, 9.2, and 9.3. All should be rejected. Its "as such" arguments with respect to the Ad Note and AD Agreement

Articles 1 and 18.1 are equally flawed: India continues to rely solely on evidence of the directive's application to shrimp, and fails to proffer any evidence to support the assertion that the directive "as such" is inconsistent with these provisions.

24. As for its arguments regarding U.S. customs laws and regulations, setting aside the procedural defects in its claim, India's argument continues to evolve in its second submission, and it now appears to concede that to prevail on its claims under WTO Agreement Article XVI:4, AD Agreement Article 18.4, and SCM Agreement Article 32.5, it must establish a breach of AD Agreement Article 18.1 or SCM Agreement Article 32.1. However, it has failed to demonstrate that either 19 U.S.C. 1623 or 19 C.F.R. 113.13 constitute "action against dumping" or "subsidy". From its quotations of the regulations regarding the authority to require bonds and a CBP statement, India appears to believe, incorrectly, that authority to secure duties lawfully owed – whether antidumping or otherwise – is somehow intrinsically inconsistent with a Member's obligations under these provisions. It then attempts to characterize the statute, regulations, and directive as a "single, multi-layered measure" and again resorts to its theory that the mere existence of "discretion" itself results in a breach of AD Agreement Article 18.1 and SCM Agreement Article 32.1. None of these arguments have a basis in fact or the text, and India has failed even to respond to the U.S. arguments in this regard.

25. Mr. Chairman, members of the Panel, this concludes our opening statement. We look forward to discussing these issues further.