EXECUTIVE SUMMARY

The Panel and the Dominican Republic properly stated the basic standard the Appellate Body has applied to determine whether a measure is "necessary" under Article XX(d) of the GATT 1994. Under this standard, "necessary" normally denotes something that is requisite or essential, but is not limited to that which is indispensable. In addition, the necessity of a measure is to be evaluated by "weighing and balancing": (1) the relative importance of the common interests or values that the law or regulation is intended to protect; (2) the extent to which the measure contributes to the realization of the end pursued; and (3) the restrictive impact of the measure on imported goods. Finally, the reasonable availability of measures not inconsistent with the GATT is part of an Article XX(d) "weighing and balancing" analysis.

The United States takes no view on whether the Panel's analysis under Article XX(d) was correct. However, the United States believes that there are additional considerations for the Appellate Body in determining whether a measure is "necessary". First, the United States considers incorrect the notion that Article XX(d) requires a Member to select a less GATT-inconsistent alternative, where no GATT-consistent alternative measure is available. Aside from having no basis in any WTO agreement, such a requirement is logically incoherent and would be impossible to administer. Moreover, in this case, the Panel characterizes as "less GATT-inconsistent" possible alternative measures that may in fact be "less trade-restrictive". In doing so, the Panel impermissibly imports into Article XX(d) a requirement that a Member also use a less trade-restrictive alternative, if one is available. There is no basis in the GATT 1994 for the Panel to do so.

Second, the Panel distorts the meaning of "necessary" under Article XX(d) by equating it with "sufficient", implying that a measure that does not succeed in securing compliance with a Member's desired level of protection is not "necessary".

Finally, WTO Members have the right to determine the level of protection for their domestic laws and regulations, and the question of whether an alternative measure is "reasonably available" must not impinge this right.

The United States also takes no view as to Honduras' claim that the Panel erroneously applied the term "less favourable treatment" to imports under Article III:4 of the GATT 1994. However, the United States notes that the Panel articulated a standard consistent with past disputes. Honduras claims that the Panel erred by not comparing importers' and domestic producers' per-unit costs of the bond and by basing a finding that there was no "less favourable treatment" solely on one importer's decreasing per-unit costs. The Panel did not do what Honduras alleges. Rather, the Panel stated that, without a showing that they had modified the conditions of competition, such differences in the per-unit costs of the bond were in themselves insufficient to demonstrate that importers received "less favourable treatment". It then found that Honduras had not made such a showing.

In addition, throughout its appeal Honduras alleges that the Panel improperly applied Article III:4 because it "took into account the market performance of importers in the past years as the decisive element, rather than the bond requirement itself." While Honduras criticizes the Panel for examining the "market performance of importers", it is Honduras, not the Panel, that improperly seeks a finding of "less favourable treatment" on this basis.

Finally, as the United States noted in its oral statement, the Panel recognized the Appellate Body's view that Article III:4 does not require identical treatment of imported and domestic products, as long as the treatment accorded imported products is no less favorable than that accorded domestic products.