BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2008-4)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

May 6, 2008

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EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
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I. Introduction and Executive Summary

1. The United States appeals the Panel's legal conclusion that the enhanced bond requirement,[1] as applied to importers of shrimp from India is not consistent with paragraph 1 of the Ad Note ("Ad Note") to paragraphs 2 and 3 of Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and thus is inconsistent with Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The Panel committed legal error in reaching this conclusion because it relied on an incorrect standard to determine whether the additional security required under the enhanced bond requirement was "reasonable" within the meaning of the Ad Note. In its report, the Panel determined that such additional security may only be "reasonable" if a Member first determines that the rates of dumping provided in the anti-dumping order are "likely" to increase – apparently requiring the same high degree of likelihood for all Members in all instances – and then determines the "likely amount" of such increase (again with the same high degree of likelihood in all instances). While the Panel purported to rely on the ordinary meaning of the term "reasonable" and the text of the Ad Note to support this analysis, its approach is in fact contrary to the ordinary meaning of "reasonable", contradicted by the immediate context in which the term appears, and contradicted by other aspects of the Panel's own findings. If accepted, the Panel's analysis would suggest that ordinary revenue collection strategies may not be applied to importers subject to antidumping duties.

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[1] The Panel identifies the measure at issue in this proceeding as the "application ... to imports of subject shrimp from India" of the "Enhanced Bond Requirement", which it describes as encompassing the July 2004 Amendment, the August 2005 Clarification, the Current Bond Formulas, and the October 2006 Notice. Panel report, para. 2.2. For clarity, the United States will use the term "enhanced bond requirement" in the manner set forth by the Panel in this paragraph of the Report.

2. The United States also appeals the Panel's conclusion that the enhanced bond requirement is not justified pursuant to GATT 1994 Article XX(d). In concluding that additional security was not "necessary" within the meaning of GATT 1994 Article XX(d), the Panel committed legal error by using the same flawed analysis it applied to assess whether the enhanced bond requirement as applied to importers of shrimp from India was "reasonable." Specifically, the Panel found that such security may not be considered "necessary" unless a Member establishes that rates are "likely" to increase following imposition of the antidumping order and establishes the "likely amount" of increase.[2] This analysis however, is not supported by the text of Article XX(d) and, for reasons similar to those described with respect to the Panel's "reasonable" standard, does not provide a useful means of evaluating whether a security requirement is "necessary" to ensure collection of duties lawfully owed. The United States notes that the Appellate Body need not reach this issue if it reverses the Panel's findings that the United States breached Article 18.1 of the AD Agreement and the Ad Note, and if it does not otherwise modify the findings of the Panel as requested by India in its appellant submission.

II. Statement of Facts

3. In 2003 and 2004, U.S. Customs and Border Protection ("CBP") determined that importers were defaulting on hundreds of millions of dollars of antidumping duties lawfully owed to the United States. Often, the defaults occurred when the assessment rate established in an administrative review exceeded the cash deposit rate established in the investigation, and thus

[2] Panel report, para. 7.118.

the duties in question were not secured by cash deposits.[3] Nor were the duties otherwise secured by sufficient bonds or other guarantees; thus, when an importer defaulted, CBP could not recover the duties owed from the sureties that ordinarily protect CBP from default risk.

4. To address the problem, CBP developed the enhanced bond requirement to establish procedures for increasing security requirements on merchandise with higher risk of default. CBP determined that antidumping rates increased in the assessment review 38% of the time, and that when rates increased, they do so by on average 285%. CBP's analysis also indicated that importers of agriculture/aquaculture merchandise in particular were the source of the bulk of the defaults. CBP applied the enhanced bond requirement to shrimp subject to the antidumping orders because the potential unsecured liability appeared significant (due to the fact that in excess of $2.5 billion in shipments were subject to such orders), as did the risk of default (because the industry shared characteristics similar to those of other industries that in the past had been the source of substantial defaults).[4] CBP also provided a process for importers to request individual bond amounts based on importer-specific risk.[5]

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[3] As the Panel noted, in an antidumping order, "USDOC sets forth ad valorem cash deposit rates ... based on the overall margin of dumping ... found for the exporter or producer during the investigation phase." Panel report, para. 2.5. In the United States, the dumping calculations in an administrative review are based on different transactions than those evaluated in the investigation. Panel report, para. 2.6. Therefore, "[t]he dumping or subsidisation margins calculated in the administrative review may be either higher or lower than the margins calculated in the investigation," and if higher, the cash deposit will not be sufficient to cover the final liability. *Id.,* paras. 2.6-2.7.

[4] *See e.g.,* Panel report, para. 7.306.

[5] *See e.g.,* Panel report, para. 7.288.

III. The Test Applied by the Panel to Determine Whether the Enhanced Bond Requirement as Applied to Shrimp from India Constitutes "Reasonable Security" Does Not Accord with the Ordinary Meaning of the Text of the Ad Note

5. The Ad Note states:

> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

Under the Ad Note, as the Panel found, a Member may require that an importer provide "reasonable security" for the payment of antidumping or countervailing duties.[6] Furthermore, the Ad Note does not preclude a Member from requiring security in addition to the basic cash deposit requirement, provided that such additional security is also "reasonable."[7]

6. However, having made these findings, the Panel then proceeded to assert that "there would only be an appropriate basis for such increased security if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase..." and that "[t]he Member would also need to determine the likely amount of such increase" since "[o]nly then could that Member demonstrate that the additional security properly and reasonably relates to an established case of suspected dumping, consistent with the requirements of the Ad Note."[8] And the Panel apparently considered the term "likely" to mean "substantial certainty."[9]

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[6] Panel report, para. 7.115.

[7] Panel report, paras. 7.115-7.117.

[8] Panel report, para. 7.118.

[9] See Panel report, paras. 6.33, 6.44. In paragraph 6.33, the Panel refers to the U.S. concern that the Panel's use of the term "likely" suggests that it means "substantial certainty." The United States had requested some changes to the interim report in order to avoid such a

7. The Panel concluded that the customs authority must determine that rates are likely to increase "by making a prospective determination of the likelihood of rates of dumping increasing on the basis of the information available to it at the relevant time"[10] (which the Panel elsewhere describes as "the time ... the EBR was imposed on shrimp"[11]).

8. In so reasoning, the Panel erred. The rationale used by the Panel to justify its conclusions accords neither with the text of the agreement nor can it be logically reconciled with the Panel's observations elsewhere in the report regarding how the antidumping liability being secured is determined in a retrospective duty assessment system.

9. Consistent with the customary rules of interpretation of public international law reflected in the *Vienna Convention on the Law of Treaties*, the term "reasonable" should be interpreted based on its ordinary meaning in context. The ordinary meaning of the term "reasonable" is "in accordance with reason; not irrational or absurd."[12] With respect to amounts, "reasonable" is additionally defined as "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate."[13] Thus, under a straightforward reading of this definition, if

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reading of "likely." However, in paragraph 6.44, the Panel expressly declined to make those changes on the grounds that such changes "might weaken" the standard set forth by the Panel. Indeed, the Panel nowhere disputed the U.S. reading that the Panel equated the term "likely" to "substantial certainty."

[10] Panel report, para. 6.32.

[11] Panel report, para. 7.125.

[12] Panel report, para. 7.116; *New Shorter Oxford English Dictionary*, p. 2496 (Exh. US-20).

[13] Panel report, para. 7.116; *New Shorter Oxford English Dictionary*, p. 2496 (Exh. US-20).

security is "in accordance with reason" and "not irrational or absurd", it should be deemed "reasonable" security for purposes of the Ad Note.

10. The Ad Note also refers to "other cases in customs administration," suggesting that it is appropriate to consider ordinary customs practice in evaluating whether security is "reasonable." In its submissions, the United States repeatedly described how customs authorities establish security in "other cases in customs administration."[14] India did not dispute the U.S. description. As the United States explained, whether CBP requires security and the amount it requires depends upon the amount of potential liability being secured and the likelihood of default.[15] With respect to the amount of potential liability, as the Panel elsewhere noted, due to the risk of increases in the dumping margin between the investigation and the assessment review and because the amount of liability for antidumping duties is calculated on an *ad valorem* basis following the assessment review, the potential additional liability depends on the likelihood of an increase in the margin of dumping during the assessment review, the likely size of that increase, and the total value of shipments subject to that margin of dumping.[16] Regarding the likelihood of default, a range of factors may be relevant to establishing noncollection risk, including industry characteristics, ability to pay, and compliance history. To analyze whether additional security should be required in a given case, customs authorities use historical data, and draw conclusions from available information regarding companies and commodities with similar characteristics.

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[14] *E.g.,* U.S. First Written Submission, paras. 26-29; U.S. Second Written Submission, paras. 25-26; U.S. Answers to First Questions, para. 27; U.S. Answers to Second Questions, paras. 14-15.

[15] *Id.*

[16] Panel report, para. 6.34.

11. The Panel's approach, however, departs from ordinary customs practice in important respects. In suggesting that a customs authority may secure additional antidumping liability only if it can establish that the antidumping rate is "likely" to increase between the imposition of the order and final legal assessment, it appears to preclude additional bonding where there is less than "substantial certainty" that such an increase will occur.

12. Each Member may have its own level of risk of inability to collect the antidumping duties owed that it is willing to accept. That level may be influenced by a range of factors such as the amount of potential liability, the risk of default in the event of an increase, the importance of the revenue to that Member, and public perception of whether the government is collecting amounts owed. Under the Ad Note it would be necessary to examine whether under the circumstances, taking into account all the relevant factors, any additional security required was "reasonable" Yet the Panel's approach is a one-size-fits-all approach that does not recognize that a Member may be more or less willing to accept the risk of non-collection than another Member or in one situation compared to another situation.

13. For the Panel, a customs authority would not be permitted to require additional security where, for example, there is a *reasonable possibility* that importers will owe additional duties but a high likelihood of default on any additional duties owed (perhaps because importers with similar characteristics to the companies in question defaulted on significant amounts in the past). While the risk of non-collection in such circumstances may be equally significant as that for the case in which the antidumping rate is "likely" to increase but defaults are less common, under the

Panel's analysis, no additional security would be allowed. Indeed, the Panel asserts that default risk is irrelevant to a determination of whether security is "reasonable."[17]

14. Risk of default is routinely taken into consideration by customs authorities in establishing security requirements, and indeed, risk of default was an important element of the analysis that led CBP to apply the enhanced bond requirement in this case.[18] If the evidence demonstrated a significant risk of default, the Panel should have concluded that the security requirement was "reasonable", even if the likelihood of an increase was less than "substantial certainty."

15. The Panel's sole argument in support of its position that it cannot be "reasonable" to require security when there is a reasonable chance that rates will increase (even if not substantial certainty), is that "[o]therwise, since rates may also possibly decrease, one could argue that a reduction in security would be equally reasonable."[19] This observation, however, is a *non sequitur*. There may in fact be more than one security requirement that could be considered "reasonable" in a given case, yet the existence of multiple possible "reasonable" security requirements does not support the conclusion that one is impermissible or that a Panel is to apply a standard other than that set forth in the text of the Ad Note. Fundamentally, the Panel's test bears no relation to how customs authorities establish security in other cases of customs administration.[20] Indeed, to the U.S. knowledge, it bears no relation to how security is

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[17] Panel report, para. 7.119 n.149.

[18] *E.g.,* U.S. First Written Submission, paras. 26-29; U.S. Second Written Submission, paras. 25-26; U.S. Answers to First Questions, para. 27; U.S. Answers to Second Questions, paras. 14-15.

[19] Panel report, para. 7.118 n.147.

[20] *See e.g.,* U.S. First Written Submission, paras. 26-29; U.S. Second Written Submission, paras. 25-26; U.S. Answers to First Questions, para. 27; U.S. Answers to Second

established in other cases generally. For example, if extended to the insurance industry, the Panel's test would mean that because house fires are not "likely" in a given case, it would not be reasonable for a mortgagor to require that a homeowner obtain fire insurance.

16. The Panel appears to have relied upon two sources in support of its position: first, the dictionary definition of the term "reasonable" and second, the reference to "case of suspected dumping" in the Ad Note.[21] Neither, however, permits the conclusion the Panel reaches. First, while the term "likely" is used in the definition with respect to amounts, it is accompanied by several other terms ("*not greatly less or more*", "*might be thought*", *"likely or appropriate*"), none of which imply that a "reasonable" amount is only that amount definitively determined to be "likely" to accrue. Furthermore, the Panel's use of the term "likely" in connection with the customs authority's evaluation of whether or not rates may increase bears no relation to the definition. This evaluation does not involve determination of an *amount* of increase, but rather is an estimate of the *propensity* for increase. Thus, by omitting "not greatly less or more", "might be thought", and "appropriate," and by applying the remaining term "likely" to a subpart of its analysis that does not itself involve an amount, the Panel has generated an entirely different definition of the term "reasonable" than that contained in the dictionary upon which it relied.

17. Second, while the Panel asserted that its test was supported by the use of the phrase "case of suspected dumping", as its analysis elsewhere in the report demonstrates, this phrase does not accord with the standard it advances. The Panel stated that "since the Ad Note only permits security in a given 'case of suspected dumping', the reasonableness of that security should be

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Questions, paras. 14-15.

[21] Panel report, para. 7.118.

assessed in light of the circumstances of that case of suspected dumping."[22] As the Panel recognized, however, the United States cannot know what the dumping liability established in the assessment review is at the time it establishes the security requirement, since security is obtained at the time of entry, whereas assessment does not occur until after that time. As the Panel noted, due to the operation of the U.S. retrospective duty assessment system, "there is no certainty that imports entering the United States following imposition of an anti-dumping order are in fact dumped" and that until assessment "it is not possible to state with certainty whether or not those imports are dumped."[23] Thus, the Panel concluded that dumping is "suspected" with respect to those entries. Under the Panel's own interpretation of "suspected", however, the actual dumping liability is not among the "circumstances of that case of suspected dumping" that can be known at the time of entry (when security is required). The only such circumstances that may be "known" are those that can be inferred from historical information on companies or commodities with similar characteristics to those subject to the order. The reference to a "case of suspected dumping" cannot be read to limit "reasonable security" to a calculation based on information that is impossible to know at the time the security is imposed.

18. Furthermore, as noted above, other context – in particular the reference to "other cases of customs administration" – would not support the Panel's interpretation. As explained previously, customs administrators may weigh multiple factors in deciding whether and in what amount to require additional security.[24] The Panel declined to account for the phrase "other cases

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[22] Panel report, para. 7.116.

[23] Panel report, para. 7.82.

[24] *See e.g.,* U.S. First Written Submission, paras. 26-29; U.S. Second Written Submission, paras. 25-26; U.S. Answers to First Questions, para. 27; U.S. Answers to Second

in customs administration" in its analysis, asserting that "such phrase is used for introductory purposes only" and that absent further "details" of other cases of customs administration in the text of the Ad Note, it lacked a "mandate" to give the language meaning.[25] By failing to take this language into account, however, the Panel has rendered it inutile.[26] Moreover, by adopting a standard that does *not* accord with other cases of customs administration – since, as explained above, customs administrators do not merely secure liability that is determined to be "likely" to accrue – the Panel's analysis is at odds with the text of the Ad Note. The Panel's suggestion that it "does not have a mandate" to consider whether or not additional security may be imposed using principles used in other cases of customs administration, absent "details" in the text of the Agreement on the other cases of customs administration referenced, is without merit. The Panel's mandate, consistent with Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and its terms of reference, is to examine the matter referred to it "in light of the relevant provisions" of the WTO Agreements – the mere fact that the provisions in question are not as detailed as the Panel would like them to be does not excuse it from interpreting the text consistently with its terms.

19. Because the Panel used an incorrect test to determine whether the enhanced bond requirement as applied to India was "reasonable" within the meaning of the Ad Note, the Panel's conclusion that the United States acted inconsistently with the Ad Note is in error. First, the

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Questions, paras. 14-15.

[25] Panel report, para. 6.33.

[26] *E.g.*, *US – Shrimp (AB)*, para. 121; *US – Gasoline (AB),* p. 23 ("[A]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutile").

Panel's statement that "the United States provided no documentary evidence in support of its assertion that anti-dumping rates increased 33 per cent of the time," is incorrect insofar as it suggests that the United States did not provide documentation to support its argument regarding rate increases.[27] The United States submitted an analysis that, with the most recent data incorporated, indicated that rates increase 38% of the time,[28] and that when they increased, they did so by on average 285%.[29] Moreover, even if the evidence submitted by the United States regarding antidumping duty rate increases was insufficient to support the conclusion that the antidumping rates established in the orders on shrimp would "likely" increase upon assessment, this finding could not support the conclusion that the enhanced bond requirement as applied to shrimp from India was not "reasonable." To determine whether the requirement was "reasonable", the Panel had to consider the totality of the evidence available at the time regarding the revenue risk the bond secured against – including the likelihood of default, the amount of potential unsecured liability, and likelihood of rate increases. Only then would the Panel be in a position to determine whether the security required was "reasonable" – *i.e.*, whether it was rational to require the importers in question to provide a bond, given the evidence available at the time regarding the risk to the revenue.

20. In summary, the Appellate Body should reverse the Panel's finding that the enhanced bond requirement as applied to India is not consistent with the Ad Note. In addition, because the Panel's finding that the enhanced bond requirement was a specific action against dumping that

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[27] Panel report, para. 7.121.

[28] Exhibit US-19.

[29] Exhibit US-10.

was not "in accordance with the GATT 1994, as interpreted by" the AD Agreement, is premised upon its finding that the United States acted inconsistently with the Ad Note, the Appellate Body should reverse the Panel's finding that the United States acted inconsistently with Articles 1 and 18.1 of the AD Agreement.

IV. The Test Applied by the Panel to Determine Whether the Enhanced Bond Requirement Is "Necessary" Within the Meaning of GATT Article XX(d) Is Flawed

21. With respect to GATT 1994 Article XX(d), in determining whether the enhanced bond requirement was "necessary" to secure compliance with U.S. antidumping laws and regulations, the Panel applied essentially the same test it used to evaluate whether the additional security as applied to India was "reasonable" for purposes of the Ad Note.[30] For reasons similar to those discussed above, that test provides no insight into whether the measure in question is "necessary." As explained in Part III, security may be necessary even where there is a likelihood that liability will accrue but it is not "likely" (in the sense of substantial certainty) that it will do so.[31]

22. The enhanced bond requirement is "necessary" to secure compliance with U.S. antidumping and countervailing duty assessment laws – in particular 19 U.S.C. 1673e(a)(1) governing the assessment of antidumping duties – in combination with general customs laws and regulations requiring the payment of duties owed to the U.S. Treasury. The requirement was "necessary" to apply to shrimp due to the significant potential unsecured liability in question (attributable to the fact that shipments had been in excess of $2 billion) and the significant risk of

[30] Panel report, para. 7.312.

[31] The United States notes that the Appellate Body need not reach this argument if it modifies the Panel's findings in the manner requested in paragraph 25(a)-(c).

default associated with those entries. Requiring additional security pending final determination of duties owed is a standard approach among WTO Members to address the precise problem confronted by the United States: potential duty liability unsecured pending final assessment. CBP adopted a process for evaluating risk that provides an even more tailored approach to establishing bond amounts. Under this process, the bond amount required of an importer reflects the particular importer's actual ability to pay duties lawfully owed, and thus the "necessity" of any additional amount. The Panel failed to evaluate these aspects of the enhanced bond requirement, notwithstanding the fact that they are relevant to whether or not it is "necessary."

23. India failed to identify any reasonable alternatives to the enhanced bond requirement that would address the particular concern faced by CBP, nor did the Panel conclude that such alternatives exist. As possible WTO-consistent alternatives, India cited cash deposit requirements, civil recovery proceedings and the basic bond requirement. However, all of these measures were in effect when CBP experienced the noncollection problem. Existing cash deposit requirements, civil recovery proceedings, and the basic bond amount do not secure the unsecured liability in question.[32] Cash deposits do not secure liability resulting from a final duty assessment that exceeds the cash deposit rate, because additional amounts owed are not covered by cash deposits. Civil recovery proceedings are not a reasonable alternative to address the problem faced by CBP: like cash deposits, CBP has used civil recovery to try to recover duties when an importer defaults, yet notwithstanding these efforts, uncollected duties have continued to accrue. Civil recovery produces no remedy if the importer cannot be reached or has no attachable assets by the time the proceeding has concluded. Furthermore, with respect to the

[32] *See e.g.,* U.S. Second Submission, para. 52.

basic bond, it was because the basic bond requirement was not sufficient to secure the unsecured liability in question, and did not prevent hundreds of millions of dollars in unpaid duties from accruing, that CBP required the additional bond. Thus, these measures do not constitute reasonably available alternatives that "would preserve for" the United States "its right to achieve ... the objective pursued."[33]

24. The enhanced bond requirement also meets the requirements of the chapeau to Article XX, and if the conditions for examining the U.S. appeal of the Panel's findings are met, the United States requests that the Appellate Body complete the analysis with regard to the chapeau. There is sufficient evidence on the record[34] demonstrating that the enhanced bond requirement has not been applied in a manner that would constitute a "disguised restriction on international trade" or "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." As the United States explained to the Panel, it has been administered uniformly, and does not discriminate.[35]

V. Conclusion

25. For the reasons set forth in this submission, the United States requests that the Appellate Body:

(a) reverse the Panel's finding that "there would only be an appropriate basis for" additional security "if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase..." and that "[t]he Member would also need to determine the likely amount of such increase";

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[33] *US – Gambling (AB)*, para. 308.

[34] *See EC – Asbestos (AB)*, para. 78.

[35] *See* Panel report, para. 7.288; U.S. First Submission, paras. 93-97.

(b) consequently, reverse the Panel's finding that the enhanced bond requirement as applied to India is not consistent with the Ad Note to Article VI of the GATT 1994 because it does not constitute "reasonable" security; and

(c) reverse the Panel's finding that the enhanced bond requirement as applied to India is not consistent with Articles 1 and 18.1 of the AD Agreement because it is not "in accordance with the provisions of the GATT 1994, as interpreted by the Antidumping Agreement."

If the Appellate Body does not reverse the Panel findings and conclusions referenced above, the United States requests that the Appellate Body reverse the Panel's finding that unless a Member demonstrates that rates in the order "are likely to increase", an additional security requirement cannot be considered "necessary" within the meaning of Article XX(d) and complete the Panel's analysis with respect to Article XX(d).