



UNITED STATES - ORIGIN MARKING REQUIREMENT

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS597/R.

LIST OF ANNEXES**ANNEX A****WORKING PROCEDURES OF THE PANEL**

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures concerning Business Confidential Information (BCI)	11
Annex A-3	Additional Working Procedures concerning Substantive Meetings with Remote Participation	13

ANNEX B**ARGUMENTS OF THE PARTIES**

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Hong Kong, China	18
Annex B-2	Integrated executive summary of the arguments of the United States	39

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Brazil	63
Annex C-2	Integrated executive summary of the arguments of Canada	66
Annex C-3	Integrated executive summary of the arguments of China	71
Annex C-4	Integrated executive summary of the arguments of the European Union	73
Annex C-5	Integrated executive summary of the arguments of Japan	77
Annex C-6	Integrated executive summary of the arguments of Norway	80
Annex C-7	Integrated executive summary of the arguments of the Russian Federation	84
Annex C-8	Integrated executive summary of the arguments of Singapore	89
Annex C-9	Integrated executive summary of the arguments of Switzerland	94
Annex C-10	Integrated executive summary of the arguments of Ukraine	99

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures concerning Business Confidential Information (BCI)	11
Annex A-3	Additional Working Procedures concerning Substantive Meetings with Remote Participation	13

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 21 May 2021

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, as well as any additional working procedures, after consultation with the parties.

Confidentiality

2. (1) In accordance with the DSU, the deliberations of the Panel shall be confidential, and the documents submitted to it shall be treated as confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless a different due date is granted by the Panel upon written request of a party showing good cause.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission. Hong Kong, China, shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Hong Kong, China should be numbered HKG-1, HKG-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered HKG-5, the first exhibit in connection with the next submission thus would be numbered HKG-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit "exhibit withdrawn" or "exhibit left intentionally blank", as the case may be.

(2) With each submission, oral statement, and response to questions attaching new exhibits, a party shall provide an updated list of exhibits in Word or Excel format.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 22 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation to a WTO working language by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Hong Kong, China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Hong Kong, China presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.
16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.
17. The Panel reserves the right to adopt additional working procedures governing substantive meetings with remote participation, as necessary.
- Third party session**
18. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.
19. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.
20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
21. A request for interpretation by any third party to a WTO working language should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.
22. The third-party session shall be conducted as follows:

- a. The parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
- c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least seven days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party, for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

23. The Panel reserves the right to adopt additional working procedures governing third-party sessions with remote participation, as necessary.

Descriptive part and executive summaries

24. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

25. Each party shall submit a single integrated executive summary. The integrated executive summary shall summarize, in separate sections pertaining to each submission, only those facts and arguments as presented to the Panel in its written submissions and oral statements in accordance with the timetable adopted by the Panel. This summary may also include a summary of its responses to written questions from the Panel and any comments to the responses of the other party, where applicable.

26. The integrated executive summary shall not exceed 30 pages.

27. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission

and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

28. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

29. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

30. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

31. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

32. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org> by 6:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.
- b. By 5:00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall deliver one paper copy of all documents it submits to the Panel, including the exhibits, to the DS Registry (Office No. 2047) for the DS Registry's archive. The DS Registrar shall stamp the documents with the date and time of delivery of the paper copy. If an exhibit is in a format that is impractical to deliver as a paper copy, then the party may deliver such exhibit in electronic format (email or on a CD-ROM, DVD or USB key). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.¹
- c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.
- d. For any *ad hoc* communications (i.e. communications other than those identified in the Panel's timetable) made by the Panel through DORA, the Panel shall notify the parties and third parties via email of such a communication. Likewise, for any such communication sent by a party through DORA, the party shall notify the Panel, the other party, and the third parties of such a communication via email. The Panel and the parties would nonetheless follow the procedures set forth in paragraphs 30B a., b., and c. above.

¹ If the DS Registry office is unavailable for the service of paper copies on account of restrictions relating to the current COVID-19 pandemic, the "next working day" shall mean the day following the 48 hours after which the Panel informs the parties that normal operations have resumed.

- e. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).²
- f. If any party or third party is unable to meet the 6:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 7:00 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (Office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient.³ In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.
- g. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5:00 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

Correction of clerical errors in submissions

33. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.

² Please note that assistance can only be provided until 5:00 p.m.

³ If the DS Registry office is unavailable for the service of the electronic files of large exhibits that cannot be sent via email, on account of restrictions relating to the current COVID-19 pandemic, the party or third party filing the exhibit shall coordinate with the DS Registry on an acceptable manner for the submission of those exhibits as soon as practicable.

ANNEX A-2

**ADDITIONAL WORKING PROCEDURES CONCERNING
BUSINESS CONFIDENTIAL INFORMATION (BCI)**

Adopted on 21 May 2021

1. These procedures are additional to the general protection of confidential information set forth in paragraph 2(1) of the Panel's Working Procedures, and they apply to any business confidential information ("BCI") that a party wishes to submit to the Panel.
2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the submitting Member.
3. No person may have access to BCI except a member of the Panel or the WTO Secretariat assisting the panel, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products at issue or an officer or employee of an association of such enterprises.
4. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
5. The party or third party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party or third party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit HKG-1 (BCI), Exhibit USA-1 (BCI)). Should the party or third party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".
6. Any BCI that is submitted in an electronic format shall be clearly marked with the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the terms "Business Confidential Information" or "BCI".
7. If a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions, written versions of oral statements, and documents submitted in an electronic format, shall mark the document and any storage medium, and use double brackets, as set out in paragraphs 5 and 6.
8. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel one week in advance that the statement will contain BCI, and the Panel shall ensure that only persons authorized to have access to BCI pursuant to these procedures are present to hear that statement, subject to any additional working procedures that the Panel may adopt for meetings with remote participation.

9. If a party considers that information submitted by the other party or a third party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The same procedure shall be followed if a party considers that information submitted by the other party or a third party with the notice "Contains Business Confidential Information" should not be designated as BCI. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings, as appropriate, in accordance with the criteria set out in paragraph 2 of these procedures. The information subject to an objection shall be treated as BCI in accordance with these procedures until the Panel issues its decision. Each party and third party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

10. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has designated as BCI.

12. If (a) pursuant to Article 16.4 of the DSU, the Panel Report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel Report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that designated such information as BCI, or certify in writing to the Panel and the other party or third party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. The parties and third parties may, however, retain one copy of each of the documents containing BCI for their archives, subject to prior written agreement of the party or third party having designated such information as BCI and their continued adherence to the terms of these Additional Working Procedures. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 13 below.

13. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel Report.

14. The Panel reserves the right, after consulting with the parties, to amend and/or supplement these Additional Working Procedures concerning BCI.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES CONCERNING SUBSTANTIVE MEETINGS WITH REMOTE PARTICIPATION

Adopted on 6 August 2021

General

1. These Additional Working Procedures set out terms for holding the substantive meetings of the Panel in which participants may attend by remote means.

Definitions

2. For the purposes of these Additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel by remote means join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. Technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the Host and remote participants provided for in paragraph 7 below.

Technical support

5. (1) In light of the Secretariat's limited ability to offer remote assistance during, and in advance of the meeting, each party and third party is responsible for providing its own technical support to the members of its delegation.
(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel. The host will prioritize assisting those participants designated as main speakers on the delegations' lists.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation on the dedicated form in Annex 1 below, no later than 5 p.m. (Geneva time) on a date to be established by the Panel and communicated to the parties.

Advance testing

7. Each group of remote participants (members of each party's and third party's delegation) will hold two testing sessions for each substantive meeting, with the Secretariat before the meeting with the Panel: a separate one for each group, and a joint session with all remote participants in the meeting. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

8. The meeting shall be confidential.

9. Each party and third party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the meeting.

10. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meetingRecording

11. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the panel record.

12. The parties and third parties are strictly prohibited from:

- (1) recording, through any means, including audio or video recording, or screenshot, the meeting or any part thereof; and
- (2) permitting any non-participant to record, through any means, including audio or video recording, or screenshot, the meeting or any part thereof.

Access to the virtual meeting room

13. The participants shall access the virtual meeting room remotely in accordance with these Additional Working Procedures.

14. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation join the virtual meeting room.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) In order to ensure that the meeting will start as scheduled, participants accessing the meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants accessing the meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA.
- (2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA, before first referring to such document at the meeting.

Communication breakdown

17. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

- (1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or
- (2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to `***.***@wto.org`, or by calling at +41 22 739 5103.

18. The Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected or are physically present in the meeting room at the WTO.

Pauses for internal coordination and consultation

19. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Participation

20. If a remote participant wishes to take the floor, such participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

Relationship with the Working Procedures of the Panel adopted on 21 May 2021

21. These Additional Working Procedures complement the Working Procedures of the Panel adopted on 21 May 2021. To the extent that these Additional Working Procedures conflict with the Working Procedures of the Panel, these Additional Working Procedures shall prevail.

UNITED STATES — ORIGIN MARKING REQUIREMENT (DS597)

MEETING NAME AND DATE

DELEGATION LIST OF [MEMBER]

Full name	Position / Title	Email address	Phone number where the participant can be reached on meeting day	Whether the participant plans to attend the virtual meeting remotely or from the WTO premises

Using boldface, please indicate who on the above list will deliver statements and/or is likely to take the floor during the meeting.

Name of contact person who will serve as the contact person to liaise with the host on technical issues:

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Hong Kong, China	18
Annex B-2	Integrated executive summary of the arguments of the United States	39

ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF HONG KONG, CHINA****I. HONG KONG CHINA'S FIRST WRITTEN SUBMISSION****A. Introduction**

1. This is a legal dispute concerning country of origin marking requirements arising principally under the Agreement on Rules of Origin ("ARO") and the Agreement on Technical Barriers to Trade ("TBT Agreement"). The measures at issue in this dispute involve a determination by the United States that goods indisputably manufactured or processed within the customs territory of Hong Kong, China originate within the People's Republic of China, a different World Trade Organization ("WTO") Member, and require these goods to be marked to indicate this origin.

2. Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, requires goods imported into the United States to be marked with their country of origin. U.S. Customs and Border Protection ("USCBP") is responsible for implementing section 304 of the Tariff Act of 1930. Part 134 of USCBP's regulations, 19 C.F.R. Part 134, prescribes detailed rules concerning compliance with the origin marking requirement.¹ Through its regulations, USCBP has defined the term "country of origin" for the purpose of section 304 as "the country of manufacture, production, or growth of any article of foreign origin entering the United States".² The definition additionally provides that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin'".³ Thus, the "country of origin" for the purpose of the origin marking requirement is the country in which the imported article was manufactured, produced, or grown, or the country in which the article underwent a substantial transformation.

3. For the purpose of the origin marking requirement, USCBP has consistently treated Hong Kong, China as a "country of origin".⁴ Such treatment of Hong Kong, China by USCBP for customs and origin marking purposes is consistent with the fact that Hong Kong, China is a separate customs territory and as such falls within the scope of "country" for the purposes of the WTO covered agreements and is thus a distinct country of origin from which goods may originate under the rules prescribed by the ARO (and for all purposes under the WTO covered agreements for which a determination of origin is required).

4. With regard to the specific words used on an imported article to indicate its country of origin, USCBP's regulations provide that "the markings required by this part shall include the full English name of the country of origin, unless another marking to indicate the English name of the country of origin is specifically authorized by the Commissioner of Customs".⁵ Abbreviations which "unmistakably indicate the name of a country" are acceptable, as are alternative spellings "which clearly indicate the English name of the country of origin".⁶ Under section 304 of the Tariff Act of 1930 and USCBP's regulations, imported articles not marked as required by law are subject to additional duties of 10 percent, assessed on top of other duties that may apply.⁷

5. On 11 August 2020, USCBP published a Federal Register notice indicating that, after 25 September 2020, imported goods manufactured or produced in Hong Kong must be marked to indicate that their origin is "China".⁸ By subsequent notice, USCBP extended the date for compliance

¹ 19 C.F.R. Part 134 (Exh. **HKG-3**).

² 19 C.F.R. § 134.1(b) (Exh. **HKG-3**).

³ 19 C.F.R. § 134.1(b) (Exh. **HKG-3**).

⁴ See 19 C.F.R. § 134.1(a) (Exh. **HKG-3**). See also, e.g. USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Children's Computer Games (26 January 1990) (Exh. **HKG-4**); USCBP Ruling Letter HQ 560337 Re: Country of origin marking for products of Hong Kong imported on or after July 1, 1997 (27 June 1997) (Exh. **HKG-5**).

⁵ 19 C.F.R. § 134.45(a)(1) (Exh. **HKG-3**).

⁶ 19 C.F.R. § 134.45(b) (Exh. **HKG-3**).

⁷ See 19 U.S.C. § 1304(i) (Exh. **HKG-2**); 19 C.F.R. § 134.2 (Exh. **HKG-3**).

⁸ 85 Fed. Reg. 48551 (11 August 2020) ("August 11 Federal Register notice") (Exh. **HKG-10**).

with this requirement to 10 November 2020.⁹ USCBP has rejected any use of the words "Hong Kong" in the required mark of origin after 9 November 2020 (including "Hong Kong, China"). Thus, the United States now requires a mark of origin ("China") that it previously rejected in the case of goods manufactured or produced in Hong Kong, China, while rejecting the use of a mark of origin ("Hong Kong") that it previously required as the exclusive mark of origin for such goods.

6. USCBP issued the August 11 Federal Register notice under the authority of Executive Order 13936, issued by former U.S. President Donald J. Trump on 14 July 2020.¹⁰ Under section 201(a) of the United States-Hong Kong Policy Act of 1992, the laws of the United States apply to Hong Kong, China in the same manner that those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997.¹¹ Under section 202(a) of that Act, the U.S. President can suspend the application of section 201(a) if the President "determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China".¹² Executive Order 13936 contains a finding that Hong Kong, China is not "sufficiently autonomous" in the view of the United States and suspends the application of section 201(a) to a number of U.S. laws, including the origin marking requirement set forth in section 304 of the Tariff Act of 1930.

7. Section 304 of the Tariff Act of 1930, Part 134 of the USCBP's regulations, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice interacted with each other as described above to create the present circumstance in which the United States: (i) concludes, for the purpose of its origin marking requirement, that the People's Republic of China is the country of origin of goods manufactured or produced in the customs territory of Hong Kong, China; and (ii) requires goods imported from the customs territory of Hong Kong, China to be marked with this country of origin determination. Hong Kong, China will refer to this conclusion and requirement as, collectively, "the revised origin marking requirement".

B. The Revised Origin Marking Requirement Is Inconsistent with the ARO

8. Article 1.1 of the ARO defines "rules of origin" as "those laws, regulations and administrative determinations of general application applied by any Member to *determine the country of origin of goods*".¹³ Article 1.2 elaborates upon this definition by stating that "rules of origin" include all rules of origin used in, *inter alia*, "origin marking requirements under Article IX of GATT 1994".

9. It follows from these definitional elements that: (i) origin marking requirements involve laws, regulations and administrative determinations of general application applied by a Member to determine the country of origin of goods; and (ii) the requirement to mark a good with a particular country of origin is a "determination concerning the country of origin" of that good, i.e. that the origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good. Any such determination must be made in accordance with the requirements of the ARO.

10. The first explanatory note to the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") explains that "[t]he terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO." The ARO is one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the WTO Agreement. Thus, where the ARO uses the term "country", including in the phrase "country of origin", that term includes Hong Kong, China as a separate customs territory Member of the WTO.

i. The Revised Origin Marking Requirement Is Inconsistent with Article 2(c) of the ARO

⁹ See USCBP, CSMS #43729326 – GUIDANCE: Additional 45-day Compliance Period for Executive Order 13936 – Hong Kong Normalization (21 August 2020) (Exh. **HKG-11**).

¹⁰ See The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020) ("Executive Order 13936") (Exh. **HKG-13**).

¹¹ See United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 201(a) (Exh. **HKG-14**).

¹² United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 202(a) (Exh. **HKG-14**).

¹³ Emphasis added.

11. Under Article 2(c), a Member may not condition the conferral of a particular country of origin as indicated in a mark of origin upon conditions unrelated to manufacturing or processing. The revised origin marking requirement imposes a condition "not related to manufacturing or processing" as a prerequisite for the determination that an imported good is of Hong Kong, China origin. The conditions that the United States imposes for this purpose under the United States-Hong Kong Policy Act of 1992 are political conditions subjectively determined by the United States, not conditions related to manufacturing or processing. Executive Order 13936 relied upon section 202 of the United States-Hong Kong Policy Act of 1992 to suspend the ordinary operation of the origin marking requirement to goods produced in Hong Kong. Nothing in the August 11 Federal Register notice, or elsewhere in the relevant measures, relates to the manufacturing or processing of goods within the customs territory of Hong Kong, China.

12. These considerations further demonstrate that the "sufficient autonomy" condition is a rule of origin, i.e. it is a law or regulation of general application applied by the United States to determine the country of origin of certain goods. The "sufficient autonomy" condition set forth in the United States-Hong Kong Policy Act of 1992, while applying only to goods imported from Hong Kong, China, is of "general application" because it affects an unidentified number of economic operators and is not addressed to a specific company or transaction.¹⁴ This condition "is applied ... to determine the country of origin of goods" because it was the finding of an alleged absence of "sufficient autonomy" that required USCBP to determine, for origin marking purposes, that the country of origin of goods imported from Hong Kong, China is the People's Republic of China. The requirement of "sufficient autonomy" is a "condition not related to manufacturing or processing" that the United States has imposed as a prerequisite for "a qualifying good to be accorded the origin of a particular country", namely as a prerequisite for according the origin of Hong Kong, China to goods manufactured or processed in the customs territory of Hong Kong, China.

13. This imposition of a condition unrelated to manufacturing or processing as a prerequisite for a determination of the country of origin is inconsistent with Article 2(c) of the ARO. For the same reason, the requirement to mark goods manufactured or processed in Hong Kong, China as goods of "China" origin is inconsistent with Article 2(c) because it incorrectly indicates the country of origin of these articles when considerations relating exclusively to manufacturing or processing are taken into account.¹⁵

ii. The Revised Origin Marking Requirement Is Inconsistent with Article 2(d) of the ARO

14. Article 2(d) of the ARO provides, in relevant part, that "the rules of origin that [Members] apply to imports ... shall not discriminate between other Members". Article 2(d) requires importing Members to apply the same rules of origin to goods imported from any Member. Under U.S. law, the United States applies a condition to goods imported from the customs territory of Hong Kong, China – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – to determine the country of origin of goods imported from that customs territory. The United States does not apply this same condition to goods imported from other Members. The United States therefore "discriminate[s] between other Members" in respect of the rules of origin that the United States applies to imports, in contravention of Article 2(d).

¹⁴ Appellate Body Report, *EC – Poultry*, para. 113. See also Appellate Body Report, *US – Underwear*, p. 21; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.773; Panel Report, *EC – Selected Customs Matters*, para. 7.116.

¹⁵ Hong Kong, China notes that USCBP has rejected a request by Hong Kong enterprises to mark their products as goods of "Hong Kong, China" origin under the revised origin marking requirement (as compared to the "Hong Kong" marking previously required under U.S. law). The enterprises submitting this request explained that their products are produced in Hong Kong and that using the words "Hong Kong, China" to mark their products would therefore be consistent with 19 U.S.C. 1304 and 19 C.F.R. Part 134. USCBP rejected "Hong Kong, China" as well as any variation that includes the words "Hong Kong" on the grounds that "[t]he reference to Hong Kong under the current policy may mislead or deceive the ultimate purchaser as to *the actual country of origin of the article*".

C. The Revised Origin Marking Requirement Is Inconsistent with Article 2.1 of the TBT Agreement

15. The U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a "technical regulation" within the meaning of Annex 1, paragraph 1, of the TBT Agreement. The requirement to mark an imported product with its country of origin is a "marking ... requirement" that "appl[ies] to a product". The U.S. origin marking requirement as set forth in section 304 of the Tariff Act of 1930 and Part 134 of USCBP's regulations, as well as rulings and notices relating thereto, is therefore a "technical regulation" that falls within the scope of the TBT Agreement.

16. A party asserting a claim under Article 2.1 of the TBT Agreement must demonstrate that (i) the imported products in question are like the products of national origin or the products of other origins; and (ii) the treatment accorded to products imported from the complaining Member is less favourable than that accorded to like products of national origin or like products originating in other Members (and non-Members).¹⁶

17. The measures at issue draw a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members). The United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People's Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of "China". The United States has expressly rejected marking goods imported from Hong Kong, China as goods of "Hong Kong, China" origin, which is the full English name of the customs territory in which the goods originate. Because this *de jure* difference in regulatory treatment is based on the origin of the goods rather than any characteristic(s) of the goods themselves, the presumption of likeness is established.¹⁷

18. There is often considerable brand and reputational value to be derived from marking a product as one having the origin of a particular Member. Annex A of Hong Kong, China's first written submission provides some examples of Hong Kong, China enterprises that export goods to the United States whose brand and reputational values are inextricably linked to the fact they are of Hong Kong, China origin. By depriving these exporters and others like them of the ability to mark their products as products of Hong Kong, China origin, the origin marking requirement as applied by the United States modifies the conditions of competition in the U.S. market to the detriment of goods imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members). The requirement to mark goods exported from Hong Kong, China as having an origin of "China" when destined for the United States has also increased the cost and complexity of exportation for Hong Kong enterprises. Finally, the inaccurate marking of the customs origin of a good is liable to cause confusion and potential error in the regulatory treatment of that good, and in fact has had those effects as detailed in Annex A of Hong Kong, China's first written submission.

19. For these reasons, the U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a technical regulation that accords less favourable treatment to goods imported from Hong Kong, China as compared to the treatment accorded to like products originating in other Members (and non-Members). It is therefore inconsistent with Article 2.1 of the TBT Agreement.

¹⁶ See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, para. 202.

¹⁷ With regard to the requirement of likeness, it is well established that "when origin is the sole criterion distinguishing the products", it is "sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are 'like'". Panel Report, *US – Poultry (China)*, paras. 7.424-7.429. The Appellate Body has observed that "measures allowing the application of a presumption of 'likeness' will typically be measures involving a *de jure* distinction between products of different origin." Appellate Body, *Argentina – Financial Services*, para. 6.36.

D. Claims Under the GATT 1994

20. Hong Kong, China believes that the Panel must begin its analysis with Hong Kong, China's claims under the ARO, followed by its claims under the TBT Agreement and only then the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Hong Kong, China requests that the Panel address its claims under the GATT 1994 only in the event that the Panel finds, for whatever reason, that the measures at issue are not inconsistent with both the ARO and the TBT Agreement.

i. The Measures at Issue Are Inconsistent with Article IX:1 of the GATT 1994

21. The measures at issue are inconsistent with Article IX:1 of the GATT 1994 for the same essential reasons that they are inconsistent with the Most-Favoured-Nation ("MFN") treatment obligation contained in Article 2.1 of the TBT Agreement. First, the requirement of likeness is satisfied because the measures at issue discriminate exclusively on the basis of origin and there can or will be products imported from other Members that are like those imported from Hong Kong, China. Second, the measures at issue accord less favourable treatment to goods of Hong Kong, China in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China in the same manner that it determines the country of origin of like products imported from other Members, with the result that goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin. For these reasons, the measures at issue are inconsistent with Article IX:1 of the GATT 1994.

ii. The Measures at Issue Are Inconsistent with Article I:1 of the GATT 1994

22. Origin marking requirements are clearly a "rule" or "formality" "in connection with importation". The requirement of likeness is satisfied because the measures at issue discriminate exclusively on the basis of origin and there can or will be products imported from other Members that are like those imported from Hong Kong, China.

23. For the reasons that Hong Kong, China explained in relation to Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994, it is an "advantage" for enterprises to be able to mark their goods with a single mark of origin using the English name of the actual country of origin. It is also an "advantage" for Members and their enterprises to be able to mark a product with its *correct* country of origin, i.e. the country of origin that results from the proper application of the rules of origin set forth in the ARO, including the requirement that any determination of origin must be based exclusively on considerations relating to where a good was manufactured or processed.

24. The United States has not extended these advantages "immediately and unconditionally" to like products originating in the customs territory of Hong Kong, China. In particular, the United States has denied Hong Kong, China enterprises the advantage of marking their products with the English name of the actual country of origin on the grounds that, in the view of the United States, Hong Kong, China lacks "sufficient autonomy" from the People's Republic of China. For these reasons, the measures at issue are inconsistent with Article I:1 of the GATT 1994.

II. HONG KONG CHINA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

25. The only defence that the United States has put up is what we would call a "double maximalist" position, that is – Article XXI of the GATT 1994 is applicable to all of the multilateral agreements on trade in goods under the WTO Agreement (referred to as the "Annex 1A Agreements" below, which include the ARO and the TBT Agreement) and is self-judging in its entirety. This "double maximalist" defence is erroneous from a treaty interpretation perspective and is one that is doomed to fail.

26. The United States suggests two arguments to support its contention that Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. First, the United States contends that Article XXI applies to all of the Annex 1A agreements merely by virtue of the fact that all of the Annex 1A agreements relate in some way to trade in goods.¹⁸

¹⁸ See United States' first written submission, paras. 268-279; 297.

27. The essence of the United States' argument is that Article XXI of the GATT 1994 must apply to the other Annex 1A agreements because, in the United States' view, it would not make any sense for the security exception to apply to the "general agreement" on trade in goods but not to the more specific agreements on trade in goods.¹⁹ What the United States' submission overlooks is the fact that each of the more specific agreements on trade in goods reflects a carefully negotiated balance of rights and obligations pertaining to the subject matter of each agreement. In some cases the Members chose to incorporate some or all of the GATT exceptions into that balance, and in other cases they did not. To conclude that the GATT exceptions apply to all of the Annex 1A agreements whether or not they incorporate those exceptions would upend the balance that the Members struck in the context of each agreement. The Panel must reject this proposition.

28. Evidently aware that its maximalist position has no interpretive support, the United States tries its hand at applying the interpretive principles that prior panel and Appellate Body reports²⁰ have used to determine whether a GATT exception applies to a different covered agreement, and argues on this basis that Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. The only two cases in which a GATT exception has been found to apply to other WTO legal instruments were cases involving Protocols of Accession, not another Annex 1A agreement. No similar textual linkages as found in the two cases involving the Protocols of Accession are present in this case. Given that the drafters of the Uruguay Round agreements knew how to, and indeed did incorporate one or both of the GATT exceptions when they considered it appropriate, as discussed above, it is difficult to envision the circumstance in which it would be appropriate to conclude as an interpretive matter that the drafters of an Annex 1A agreement incorporated one or both of the GATT exceptions merely by implication.

29. In sum, there is no credible argument that Article XXI of the GATT 1994 applies to the ARO or the TBT Agreement. Hong Kong, China has demonstrated, and the United States has not disputed, that the measures at issue in this dispute are inconsistent with the ARO and the TBT Agreement. The Panel should therefore find that the challenged measures are inconsistent with the ARO and the TBT Agreement and exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994. This resolution of the matter would achieve a satisfactory resolution to the dispute and obviate the need for the Panel to interpret and apply Article XXI of the GATT 1994, other than as necessary to conclude that it does not apply to the ARO or the TBT Agreement.

30. Hong Kong, China will therefore not devote a significant amount of time in the first substantive meeting to rebutting the United States' erroneous contention that Article XXI(b) of the GATT 1994 is "self-judging" in its entirety. The fundamental problem with the United States' interpretation of Article XXI(b) remains what it has always been – the United States' failure to give meaning and effect to the subparagraphs of that provision. Like their counterparts in Article XX of the GATT 1994, the subparagraphs of Article XXI(b) define the specific circumstances in which the exception can be invoked. In other words, they serve to limit the subject matter applicability of Article XXI(b) to the three circumstances therein enumerated. The United States engages in syntactic contortions to try to place the subparagraphs within the portion of Article XXI(b) which is committed to the invoking Member's discretion, subject to the obligation of good faith. But if the applicability of the subparagraphs to a particular action for which justification is sought were committed to the invoking Member's discretion, then one may justifiably ask what purpose would those subparagraphs serve? The meaning and effect of Article XXI(b) would be exactly the same as if the subparagraphs did not exist, in contravention of the principle of effective treaty interpretation.

31. Properly interpreted, each of the subparagraphs of Article XXI(b) modifies the term "action" in the chapeau to this provision. The United States is forced to concede this point in the case of the third subparagraph, which, as a matter of English grammar, can only modify the term "action". The fact that each of the subparagraphs of Article XXI(b) modifies the term "action" is confirmed by the equally authentic Spanish text, which, due to the gender agreement of the word "relativas" with the word "medidas", leaves no possible doubt that each of the subparagraphs of Article XXI(b) modifies the term "action" in the English text. It is therefore apparent that each of the subparagraphs of Article XXI(b) forms a noun phrase with the term "action" in the chapeau, serving to define the three exclusive types of "actions" for which justification may be sought under this exception. Whether or

¹⁹ United States' first written submission, paras. 273-279.

²⁰ See Appellate Body Report, *China – Rare Earths*, para. 5.74.

not an "action" for which justification is sought is one of these three types is a question that is objectively reviewable by a panel in dispute settlement.

32. Under the chapeau to Article XXI(b), what a Member is allowed to "consider" in its own judgment, subject to the obligation of good faith, is the necessity of a particular action for the protection of its essential security interests. This is an issue that comes *after* it is properly determined that the action for which justification is sought is one that falls within the scope of one or more of the three subparagraphs. Under Article XXI(b), like Article XX, a Member invoking this exception must first demonstrate the *prima facie* subject matter applicability of one or more of the subparagraphs. Only then does it become necessary for a panel to evaluate the conformity of the measure with the requirements of the chapeau.

33. In its first written submission, the United States has not identified which of the three subparagraphs of Article XXI(b) it considers applicable to the GATT-inconsistent actions for which it seeks justification in this dispute, let alone established a *prima facie* case of the applicability of that subparagraph. Unless and until the United States demonstrates the objective applicability of one or more of the subparagraphs to the measures at issue, no purpose would be served by evaluating the conformity of those measures with the requirements of the chapeau. At this stage, Hong Kong, China will merely observe that it does not perceive any relationship, let alone a minimally plausible relationship, between any "essential security interests" of the United States and a requirement to mark goods of Hong Kong, China origin incorrectly as goods that originate within the customs territory of a different WTO Member.

34. For these reasons, even if it were necessary for the Panel to interpret and apply Article XXI(b) of the GATT 1994 in order to resolve this dispute, the United States has failed to demonstrate the conformity of the measures at issue with the requirements of that exception. Most importantly, the United States has failed to demonstrate the objective applicability of any of the three subparagraphs of that exception to the challenged measures. The United States has therefore failed to sustain its burden of proof as the party invoking the exception.

III. HONG KONG, CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Response to Panel Question No. 5.

35. ... It is the prior country of origin determination that establishes the name of the country with which a good must be marked. Were that not the case, the ARO would not in any meaningful sense apply to rules of origin used in the application of origin marking requirements, contrary to the express text of Article 1.2. ...

36. The United States has recognized that marks of origin necessarily involve a prior determination of the country of origin of a good. The U.S. International Trade Commission ("USITC") has explained in the context of origin marking requirements that "the origin determination is used *to establish the name of the country that must be marked on an imported article*".²¹ As this explanation makes clear, the country applying the origin marking requirement must first determine the country of origin of the good, and that determination in turn "establish[es] the name of the country that must be marked" on the imported article. In other words, the requirement to mark an imported article with the name of a particular country is the result of a prior country of origin determination.

37. Consistent with this fact, the United States has previously notified its origin marking measures to the Committee on Rules of Origin, as required by Article 5.1 of the ARO. ... For these reasons, and as explained further below, a requirement to mark an imported good with the name of a particular country necessarily involves a prior determination that that country is the country of origin as determined in accordance with the rules of the ARO. ...

Excerpt from Hong Kong, China's Response to Panel Question No. 6.

38. It is self-evident that for the ARO to apply to origin marking requirements, as provided for in Article 1.2, there must be a *correspondence* between the country of origin of a good, properly

²¹ U.S. International Trade Commission, "Country-of-Origin Marking: Review of Laws, Regulations, and Practices" (USITC Pub. No. 2975) (July 1996), p. 2-1 (Exh. **HKG-21**) (emphasis added).

determined in accordance with the rules of the ARO, and the specific country of origin mark that an importing Member requires that good to bear. As the USITC has correctly and succinctly explained, rules of origin are used in the application of origin marking requirements "to establish the name of the country that must be marked on an imported article".²² It would not be meaningful to say that the ARO applies to origin marking requirements if, for example, the rules of the ARO require the conclusion that a good is of Canadian origin and yet it were nevertheless permissible for an importing Member to require that good to be marked as a product of the United Kingdom, a different Member. The ARO applies to marks of origin precisely so that a required mark of origin *correctly* indicates the customs territory of a Member from which a good originates. There is no other respect in which the ARO could meaningfully apply to marks of origin.

Excerpts from Hong Kong, China's Responses to Panel Questions Nos. 15 and 16

39. In relation to the present dispute, the parties agree that where the distinction at issue is origin-based, there is no need for a panel to evaluate whether any detrimental impact on imports stems exclusively from a legitimate regulatory distinction. In cases where there is a *de jure* origin-based distinction, the fact that there is discrimination against imported products is evident on the face of the measure, and so there is no need for additional analysis. This is such a case: where the *de jure* discriminatory measures at issue apply to all products originated in the customs territory of Hong Kong, China.

40. Setting aside the parties' agreement that no "second step" is required in cases of origin-based distinction, Hong Kong, China notes in relation to the Panel's question that the burden would be on the United States to *articulate* its essential security interests in the first instance. In no event would it be possible to take into account a Member's essential security interests if the Member does not articulate what those interests are. ...

Excerpt from Hong Kong, China's Response to Panel Question No. 27

41. The United States has provided no interpretative basis for its assertion that an exception available under one agreement must be available for "the same" violation under another agreement. As Hong Kong, China has explained, the drafters of the Annex 1A agreements made clear choices about when certain exceptions would or would not be available under each of those agreements, and those choices must be given effect regardless of whether a claim under an agreement other than the GATT 1994 might in some sense be considered "the same" as a claim under the GATT 1994. But in any event, Hong Kong, China's claims under the ARO and the TBT Agreement are *not* "the same" as its claims under the GATT 1994. Thus, even if the U.S. position had any interpretative basis, which it does not, the premise of the U.S. position is mistaken.

Excerpt from Hong Kong, China's Response to Panel Question No. 44

42. As the panel in the *Russia – Traffic in Transit* dispute correctly found, although the invoking Member retains the discretion to determine the necessity of the measure at issue and to define for itself what it considers to be its essential security interests,²³ this does not mean, that the invoking Member is free to label any interest an "essential security interest".²⁴ Nor does it mean that the invoking Member is free to assert that any measure, however remote from the proffered essential security interest, is a measure protective of that interest.²⁵ These limitations reflect the fact that the entirety of the adjectival clause is subject to the overarching obligation of good faith. Thus, the

²² U.S. International Trade Commission, "Country-of-Origin Marking: Review of Laws, Regulations, and Practices" (USITC Pub. No. 2975) (July 1996), p. 2-1 (Exh. **HKG-21**).

²³ Panel Report, *Russia – Traffic in Transit*, para. 7.131.

²⁴ Panel Report, *Russia – Traffic in Transit*, paras. 7.131 and 7.132 ("For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests. However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.").

²⁵ Panel Report, *Russia – Traffic in Transit*, paras. 7.138 and 7.139 ("The obligation of good faith ... applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.").

legal effect of the phrase "which it considers" does not require complete and total deference to the respondent's assertion that an action is necessary for the protection of its essential security interests. Rather, the invoking Member's asserted essential security interests and the relationship between those interests and the measures at issue are subject to review by a panel for the limited purpose of evaluating whether the Member has acted in good faith.

IV. HONG KONG CHINA'S SECOND WRITTEN SUBMISSION

A. The ARO Requires Members to Determine the Country of Origin of Goods in Accordance with the ARO-Compliant Rules of Origin and to Treat Imported Goods in Accordance with Their Origin, Properly Determined

43. Article 1.1 of the ARO defines "rules of origin" as "laws, regulations and administrative determinations of general application applied by any Member to *determine the country of origin of goods*". Article 1.2 of the ARO further provides that "[r]ules of origin ... shall include all rules of origin used in non-preferential commercial policy instruments", and then proceeds to provide five examples of where rules of origin are used "in the application of" such instruments: (i) MFN treatment under the MFN-related provisions of the GATT 1994; (ii) anti-dumping and countervailing duties under Article VI of the GATT 1994; (iii) safeguard measures under Article XIX of the GATT 1994; (iv) origin marking requirements under Article IX of the GATT 1994; and (v) "any discriminatory restrictions or tariff quotas".

44. Turning to marks of origin – the type of non-preferential commercial policy instrument at issue in the present dispute – three things are evident from the ARO's scope of coverage as specified in Article 1.2: (i) that every mark of origin involves a country of origin determination (i.e. that a mark of origin necessarily involves "laws, regulations and administrative determinations of general application applied by [a] Member to determine the country of origin of goods"); (ii) that this country of origin determination must be made in accordance with ARO-compliant rules of origin; and (iii) that the determination of origin made in accordance with ARO-compliant rules of origin must govern the actual treatment of the origin of imported goods for origin marking purposes (i.e. the actual origin of the goods, lawfully determined, cannot be disregarded for origin marking purposes).

45. To be clear, there is scope, albeit not unlimited, under the ARO for a Member to determine the terminology used to *indicate* the country of origin, once that country of origin is properly determined based on the application of ARO-compliant rules of origin. Moreover, questions of terminology come *after* the importing Member has determined the country of origin based on the application of rules of origin. Contrary to what the United States suggests in its answers to the Panel's questions, the present dispute is not a dispute about terminology. This is confirmed, *inter alia*, by the fact that the United States has rejected any mark of origin for goods manufactured or processed in Hong Kong, China that includes the words "Hong Kong" on the grounds that such a mark would not indicate the "actual country of origin", which the United States considers to be the People's Republic of China.

46. Nor is the present dispute a dispute about the boundaries of the customs territory in which particular goods were manufactured or processed. The United States acknowledges that the revised origin marking requirement applies to goods "produced in the geographic region of Hong Kong, China".²⁶ The United States further acknowledges that the geographical boundaries of the separate customs territory of Hong Kong, China are not in dispute,²⁷ and that the United States continues to treat goods manufactured or processed in Hong Kong, China as goods of Hong Kong, China origin for all other purposes.²⁸ The United States thereby recognizes that Hong Kong, China is a distinct "country of origin" from which goods may originate, that the geographical boundaries of the separate customs territory of Hong Kong, China are not in dispute, and that the revised origin marking requirement applies exclusively to goods produced within those boundaries.

²⁶ United States' response to Panel question Nos. 6 and 7, para. 25.

²⁷ United States' response to Panel question No. 9(d), para. 38 ("While decisions regarding marking could reflect decisions as to territory (for example, the marking permitted with respect to a good produced in a disputed territory), *the U.S. measures at issue do not themselves address the territorial boundaries of Hong Kong, China.*") (emphasis added).

²⁸ United States' response to Panel question No. 3, para. 12 ("The United States confirms that it continues to treat goods manufactured, produced, or substantially transformed, in Hong Kong, China, as goods originating in Hong Kong, China, for purposes of determining the applicable tariff rate.").

B. The Revised Origin Marking Requirement Is Based on a Determination that Goods Manufactured or Processed in Hong Kong, China Originate in the People's Republic of China

47. The title of the August 11 Federal Register notice is "Country of Origin Marking of Products of Hong Kong". The notice states that the purpose of the document is to "notif[y] the public that ... goods produced in Hong Kong ... must be marked to indicate that their origin is 'China' for purposes of 19 U.S.C. 1304." As discussed above, section 304(a) (19 U.S.C. § 1304) requires an imported good to be marked with "the English name of the country of origin of the article".²⁹ The requirement to mark goods as having an origin of "China", which in U.S. practice refers to the People's Republic of China, is therefore a determination by the United States that the goods to which the August 11 Federal Register notice applies (i.e. "goods produced in Hong Kong") in fact have an origin of the People's Republic of China.

48. The fact that the revised origin marking requirement entails a determination by the United States that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China is confirmed by the subsequent actions of USCBP. These actions confirm, moreover, that the revised origin marking requirement is not a question of the terminology used to indicate the origin of goods made in Hong Kong, China, as the United States implies. For these reasons, the United States' suggestion that this dispute pertains to the terminology used to indicate goods having an undisputed origin of Hong Kong, China is disingenuous and contrary to the evidence.

C. The Revised Origin Marking Requirement Is Governed by the ARO Even Under the United States' Mischaracterization of the Measures

49. Notwithstanding the clear and undisputed evidence to the contrary, the United States contends that the present dispute concerns the *terminology* used to indicate goods originating in Hong Kong, China, which the United States acknowledges as a distinct country of origin under the ARO. It is undisputed in this regard that a mark of origin of "China" indicates an origin of the People's Republic of China. It is further undisputed that the full English name of the separate customs territory of Hong Kong, China is "Hong Kong" or "Hong Kong, China", and that the United States has expressly rejected the use of any mark of origin that includes the words "Hong Kong". Thus, according to the United States, this dispute concerns whether it is permissible under the ARO for a Member to require goods that indisputably originate in "Country A" to be marked as goods originating in "Country B".

50. Hong Kong, China understands why the United States has sought to mischaracterize the present dispute in this way. There is no credible argument that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China when the requirements of Article 2 of the ARO are adhered to. The United States must further understand that there is no basis under the ARO to conclude that the same good may simultaneously originate in two different countries of origin, which is how the United States presently treats goods manufactured or processed in Hong Kong, China. A determination that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China is obviously inconsistent with the rules of the ARO.

51. While Hong Kong, China welcomes the United States' recognition that goods manufactured or processed in Hong Kong, China have an origin of Hong Kong, China, the United States is mistaken that the ARO does not prohibit a Member from requiring goods originating in Country A to be marked as goods that originate in Country B. The ARO requires Members to make these country of origin determinations in accordance with ARO-compliant rules of origin, and to treat the origin of goods in practice in accordance with a lawful country of origin determination. It follows that where a Member treats a good in practice as having the origin of a particular country, that treatment is necessarily based on a determination by that Member that the goods in question originate within that particular country.

52. If the ARO did not govern how Members treat the origin of goods in practice, the ARO would impose no meaningful or effective disciplines upon the application of rules of origin to non-preferential commercial policy instruments, which is the entire subject matter of the agreement. Through the simple expedient of avoiding a formal country of origin determination, or even denying that a country of origin determination has been made when such a determination has in fact been made, a Member could free itself from any obligation to treat the origin of goods in accordance with

²⁹ See August 11 Federal Register notice (Exh. **HKG-10**) (emphasis added).

the rules prescribed by the ARO. The ARO would become a purely theoretical agreement having no practical effect upon the application of non-preferential commercial policy instruments. Such an interpretation would do more than "reduc[e] whole clauses or paragraphs of a treaty to redundancy or inutility"³⁰ – it would reduce *the entire agreement* to inutility because the agreement would no longer discipline the actual conduct of Members in relation to how they treat the origin of goods.

53. Based on its answers to the Panel's questions, it appears to be the U.S. position that the ARO does not prevent a Member from treating goods that have an origin of Country A as having an origin of Country B. That is, the United States believes that the ARO does not require Members to treat the origin of goods in accordance with their country of origin, properly determined in accordance with ARO-compliant rules of origin. In relation to marks of origin, the United States evidently considers that a Member may determine, in some sense, that goods have an origin of Country A but require them to be marked as having an origin of Country B, and that this marking decision "does not implicate any discipline under the Agreement on Rules of Origin".³¹

54. The United States provides no interpretative support for this position. It merely asserts that the name of the country with which a good must be marked for origin marking purposes need not bear any relationship to the actual country of origin of the goods, i.e. the country of origin of the goods as determined in accordance with ARO-compliant rules of origin. Most importantly, the United States makes no effort to explain how the ARO would have any practical effect if the disciplines that the agreement imposes upon country of origin determinations did not govern a Member's actual treatment of the origin of goods. Once that critical interpretative consideration is taken into account, it is evident that a required mark of origin must *correctly* indicate the country of origin of the marked goods as determined in accordance with ARO-compliant rules of origin, and that a Member acts inconsistently with the ARO when no such correspondence exists.³²

D. The Revised Origin Marking Requirement Is Inconsistent with Article 2(c) of the ARO Under Either Characterization of the Measures

55. Regardless of how one characterizes the measures at issue (i.e. regardless of whether one views the measures as based on a determination that goods made in Hong Kong, China are goods that originate in the People's Republic of China, or whether one views the measures as requiring that goods of an undisputed origin (Hong Kong, China) be treated as goods of a different origin (the People's Republic of China)), there is no question that the revised origin marking requirement "require[s] the fulfilment of a certain condition not related to manufacturing or processing" as a condition "that must be fulfilled for a qualifying good to be accorded the origin of a particular country".³³ In the context of origin marking requirements, the name of the country with which a good must be marked *is* the relevant "conferral of origin".³⁴ The Hong Kong Trade Development Council ("HKTDC") submitted a request to USCBP seeking the conferral of Hong Kong, China origin for goods manufactured or processed in Hong Kong, China. USCBP rejected this request. Its rationale for rejecting the request was that Hong Kong, China is not the "actual country of origin". But whatever the rationale, it is evident from this determination that the revised origin marking requirement requires the fulfilment of some condition unrelated to manufacturing or processing as a prerequisite to the conferral of Hong Kong, China origin. This, by itself, is sufficient to establish that the revised origin marking requirement is inconsistent with Article 2(c) of the ARO.

³⁰ Appellate Body Report, *Korea–Dairy*, para. 80 (citing Appellate Body Report, *US – Gasoline*, p. 17; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11; Appellate Body Report, *India – Patents (US)*, para. 46; Appellate Body Report, *EC – Computer Equipment*, para. 84; and Appellate Body Report, *US – Shrimp*, para. 114).

³¹ United States' response to Panel question Nos. 6 and 7, para. 25.

³² The fact that the word "China" appears in the full English name of "Hong Kong, China" does not mean that the required correspondence exists in the case of the revised origin marking requirement. It is undisputed that, in both U.S. and international practice, "China" refers to the People's Republic of China, not Hong Kong, China. For a mark of origin to indicate an origin of Hong Kong, China, the words "Hong Kong" must appear in the mark of origin (either alone or together with "China"). The United States has rejected any mark of origin for goods produced in Hong Kong, China that includes the words "Hong Kong" precisely because such a mark would indicate a country of origin *other than the People's Republic of China*. The revised origin marking requirement is therefore a case of requiring goods that have an origin of Country A to be marked as having an origin of Country B.

³³ Panel Report, *US – Textiles Rules of Origin*, para. 6.218 (emphasis added).

³⁴ Panel Report, *US – Textiles Rules of Origin*, para. 6.208 (emphasis added).

E. The Revised Origin Marking Requirement Is Inconsistent with Article 2(d) of the ARO Under Either Characterization of the Measures

56. Regardless of how one characterizes the measures at issue, there is no question that the revised origin marking requirement is the result of measures that do not impose "the same" requirements for a good "to be accorded the origin of a particular Member ... regardless of the provenance of the good in question".³⁵ The HKTDC submitted a request to USCBP seeking the conferral of Hong Kong, China origin for goods manufactured or processed in Hong Kong, China. USCBP denied this request. Regardless of the USCBP's rationale, it is evident from this determination that the revised origin marking requirement is the result of a rule of origin that discriminates between Hong Kong, China and other Members. This is because it is undisputed that, under the United States' "normal rules of origin", goods made in Hong Kong, China are goods of Hong Kong, China origin and would be accorded this treatment for origin marking purposes but for the revised origin marking requirement.

F. The Revised Origin Marking Requirement Is Inconsistent with Article 2.1 of the TBT Agreement

57. The United States maintains that while the measures reflect a specific determination that "Hong Kong, China is no longer sufficiently autonomous with respect to the People's Republic of China", what matters is that this determination is allegedly based on "U.S. concerns for human rights, fundamental freedoms, and democratic norms".³⁶ The United States argues that because these underlying concerns are "origin-neutral", the measures do not reflect origin-based discrimination.³⁷

58. This argument is nonsensical. Setting aside the merits of the U.S. argument that the measures are based on "concerns for human rights, fundamental freedoms, and democratic norms", the question that should be asked is whether the United States also has such concerns in relation to other Members around the world? Presumably, the answer is yes. And yet, the United States, notwithstanding having these "origin-neutral" concerns, adopted measures to address these concerns that are aimed *explicitly and exclusively* at goods originating in Hong Kong, China. This only serves to reinforce the fact that the measures reflect origin-based discrimination.³⁸

59. None of the third parties has adopted the U.S. view that the measures are origin-neutral. Certain of the third parties have suggested, however, that even where the measures at issue reflect *de jure* origin-based distinctions, that may not be the end of the Panel's analysis.³⁹ Canada in particular has argued that the Panel should still take into account the United States' essential security interests in some sort of modified version of the "legitimate regulatory distinction" ("LRD") test developed by the Appellate Body.⁴⁰

60. As Hong Kong, China explained at the first substantive meeting, the United States' steadfast refusal to articulate its essential security interests makes this line of argument entirely hypothetical. If the Panel wanted to "take into account" the essential security interests that the United States has broadly described in considering whether the revised origin marking requirement is inconsistent with Article 2.1, the Panel would have to address the U.S. assertion that its essential security interests are implicated in the present case, which is an unfounded assertion that Hong Kong, China strongly contests. The Panel would also have to address the relationship between those alleged essential security interests, strongly contested by Hong Kong, China as aforesaid, and the revised origin marking requirement. For purposes of this purely hypothetical discussion, Hong Kong, China will

³⁵ Panel Report, *US – Textiles Rules of Origin*, para. 6.248.

³⁶ United States' response to Panel question No. 14, para. 60.

³⁷ United States' response to Panel question No. 14, para. 60.

³⁸ See also Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.744-7.746 (rejecting Thailand's argument that the challenged VAT regime was consistent with Article III:4 of the GATT 1994 because its purpose was "combatting tax evasion, fraud, and counterfeiting of foreign cigarettes", when the panel concluded that it was "the foreign origin of the imported cigarettes that distinguish[ed] them from like domestic cigarettes").

³⁹ See Canada's response to Panel question No. 11; European Union's response to Panel question No. 11.

⁴⁰ See Canada's response to Panel question No. 11; see also Brazil's responses to Panel question Nos. 10(c) and 11.

focus only on the latter issue – namely, the relationship between the challenged measures and the essential security interests that the United States claims to have articulated.

61. In the U.S. view, the question is not whether the measures at issue are "necessary" for the protection of its essential security interests. Rather, the United States maintains that the Panel would need to evaluate whether there is a "rational relationship" between the measures and its essential security interests.⁴¹ For the sake of argument, Hong Kong, China will set aside the fact that the United States has provided no textual basis whatsoever for the "rational relationship" standard that it articulates. In Hong Kong, China's view, it is not necessary to debate the relevant standard, because it is clear that the contested measures bear *no* relationship to the U.S. essential security interests, rational or otherwise.

62. The measures at issue require products that are indisputably manufactured or produced in the customs territory of Hong Kong, China be marked with an origin of "China", which is a separate WTO Member. For all other purposes, including duty assessment, the United States continues to treat such products as having Hong Kong, China origin. In Hong Kong, China's view, it is inconceivable that the United States could argue that there is a "rational relationship" between the U.S. essential security interests and the labeling (or rather, mislabeling) of the origin of products imported from the customs territory of Hong Kong, China. It is therefore unsurprising that the United States has not even attempted to make this linkage.⁴²

63. To be clear, Hong Kong, China does not believe that the Panel should ever reach a point in its analysis of Hong Kong, China's claim under Article 2.1 where it is evaluating the relationship between the measures at issue and the U.S. essential security interests. Based on the foregoing, the Panel should conclude that Hong Kong, China has established a *prima facie* case with respect to all elements of its claim, and that this case remains unrebutted. The U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a technical regulation that accords less favourable treatment to goods imported from Hong Kong, China as compared to the treatment accorded to like products originating in other Members (and non-Members). It is therefore inconsistent with Article 2.1 of the TBT Agreement.

G. The Revised Origin Marking Requirement Is Inconsistent with Articles IX:1 and I:1 of the GATT 1994

64. For the reasons explained in its first written submission, Hong Kong, China believes that the Panel must begin its analysis with Hong Kong, China's claims under the ARO, followed by its claims under the TBT Agreement and only then the GATT 1994. Furthermore, Hong Kong, China has explained that the Panel would only need to address its claims under the GATT 1994 if it were to conclude that the measures at issue are not inconsistent with both the ARO and the TBT Agreement. In the unlikely event that the Panel were to reach these claims, because the United States has expressly agreed that the goods subject to the revised origin marking requirement are goods of Hong Kong, China under USCBP's "normal rules of origin", the violations of Articles IX:1 and I:1 are indisputable.

H. Article XXI(b) of the GATT 1994 Does Not Apply to the ARO or the TBT Agreement

65. As best as Hong Kong, China can determine, the United States' contention that Article XXI(b) of the GATT 1994 applies to the ARO and TBT Agreement rests on two propositions: (i) the proposition that Article XXI(b) applies to *all* of the Annex 1A agreements by virtue of the overall architecture of the WTO Agreement as a single package of rights and obligations (or, to the same effect, by virtue of the fact that all of the Annex 1A agreements relate to trade in goods); and (ii) the proposition that Article XXI(b) must apply as a matter of "logic" to claims under the other Annex

⁴¹ See United States' response to Panel question No. 14, para. 58.

⁴² In this respect, Hong Kong, China notes Canada's observation made "in respect of the ARO", but which is equally applicable here:

[I]t is not clear that country of origin marking could ever be a matter of essential security as the WTO disciplines provide a multitude of other options for dealing with matters of essential security beyond country of origin marking. For example, certain products from a country which may cause essential security risks to an importing Member could justifiably be banned under a variety of WTO provisions, in which case their origin marking would not be relevant.

Canada's response to Panel question No. 19, para. 64.

1A agreements that are in some way related to provisions of the GATT 1994, either in terms of subject matter or the nature of the discipline imposed. Both of these propositions are unfounded.

66. As Hong Kong, China and a number of the third parties have demonstrated at length, the fact that all of the Annex 1A agreements relate to trade in goods and form part of a single undertaking is not a sufficient basis to conclude that Article XXI(b) of the GATT 1994 is available as a potential justification under all of the Annex 1A agreements. This proposition overlooks both the text of Article XXI(b) itself and the context provided by the other Annex 1A agreements.

67. Evidently aware of the shortcomings of its first interpretative approach, the United States attempts to apply something more closely resembling accepted interpretative methods for evaluating whether an exception contained in one of the covered agreements is available as a potential justification for violations of a different covered agreement. Here again the United States falls short. Unable to identify any language in either the ARO or TBT Agreement that establishes a specific textual linkage to Article XXI(b), the United States appears to suggest that what matters under the interpretative framework articulated in reports such as *China – Raw Materials* and *Russia – Traffic in Transit* is whether there is some sort of "overlap" between the *claims* that a party may choose to advance under the two agreements in question, either in terms of their subject matter or the nature of the discipline imposed. The United States suggests that where a claim under a non-GATT agreement "overlaps" with a claim that a party could advance under the GATT 1994, the exceptions available in respect of the latter claim must apply to the former claim as a matter of "logic".⁴³

68. There are multiple problems with the United States' argument. In sum, the United States' "overlapping claims" theory ignores the fact that each of the Annex 1A agreements is a distinct agreement with its own substantive provisions and its own balance of rights and obligations, and is also based on the mistaken premise that Hong Kong, China's claims under the ARO and TBT Agreement are "the same substantive claims" as its claims under the GATT 1994. Even where claims under different Annex 1A agreements relate to or affect the same general topic (e.g. marks of origin) or impose a similar discipline (e.g. an obligation of non-discrimination), it does not follow as a matter of "logic" that Article XXI(b) (or, for that matter, other GATT exceptions) apply to claims under the non-GATT agreements.

I. Article XXI(b) of the GATT 1994 Is Not Entirely Self-Judging

- i. The Application of Article 31 of the Vienna Convention to Article XXI(b) of the GATT 1994 Establishes that Article XXI(b) of the GATT 1994 Is Not Entirely Self-Judging

69. The U.S. view is that all of the elements in the text, including each subparagraph, are part of a single relative clause, and left to the determination of the Member.⁴⁴ This is the basis for the U.S. view that Article XXI(b) is entirely self-judging. The U.S. interpretation must be rejected, because it is grammatically unsound, inconsistent with the principle of *effet utile*, and irreconcilable across the three equally authentic English, Spanish, and French texts.

70. The U.S. interpretation is grammatically unsound because it interprets the relationship between the subparagraphs and the chapeau in an inconsistent manner: under the U.S. interpretation, the first two subparagraphs modify the term "essential security interests", whereas the third modifies the noun "action".⁴⁵ The more fundamental problem with the U.S. interpretation, however, is that it renders the subparagraphs *inutile*. The United States continues to argue that the subparagraphs retain meaning by offering "guidance" to the invoking Member. However, as Hong Kong, China has previously explained,⁴⁶ the principle of *effet utile* demands that the subparagraph endings do more than merely "help guide a Member's exercise of its rights under Article XXI(b) by identifying the circumstances in which it is appropriate for a Member to invoke those rights".⁴⁷ The subparagraphs must have *objective* meaning among the Members. Unsurprisingly, the U.S. position

⁴³ See, e.g. United States' opening statement at the first meeting of the Panel, paras. 41 and 43-44, and the United States' response to Panel question No. 27.

⁴⁴ See, e.g. U.S. response to Panel question No. 46, para. 210.

⁴⁵ Hong Kong, China's response to Panel question No. 44, paras. 142-144.

⁴⁶ Hong Kong, China's opening statement at the first meeting of the Panel, para. 37; Hong Kong, China's response to Panel question No. 44, para. 148; Hong Kong, China's responses to Panel question Nos. 46 and 47.

⁴⁷ United States' response to Panel question No. 46, para. 210.

that the phrase "which it considers" introduces a single relative clause that renders Article XXI(b) self-judging in its entirety has been rejected by all of the third parties to comment on the issue.⁴⁸

71. Finally, the U.S. interpretation remains irreconcilable with the equally authentic Spanish text of Article XXI(b). Faced with this incontrovertible fact, the United States jettisons the "logic" underlying its own relative clause theory in the English text in order to advance what it admits to be an incoherent interpretation that "reconciles" all three treaty texts.⁴⁹ Any need to reconcile the three texts is easily avoided, however, by rejecting the United States' flawed interpretation of the English text in favour of the interpretation advocated by Hong Kong, China, adopted by two prior panels, and overwhelmingly endorsed by the third parties.

72. The U.S. interpretation of the ordinary meaning of the exception must also be rejected because it fails to properly take into account the relevant context, notably that provided by Article XX of the GATT 1994. Instead, the United States cites other provisions that do not support its interpretation and, in several cases, they are directly contradictory. None of the other provisions cited by the United States supports an interpretation of Article XXI(b) as entirely self-judging, with the subparagraphs serving only to "guide a Member's exercise of its rights".⁵⁰

73. Hong Kong, China has established that its interpretation of Article XXI(b) is consistent with the object and purpose of the GATT 1994. As Hong Kong, China explained in response to Panel Question 55, and as the panel in *Russia – Traffic in Transit* correctly found, the objectives of the Members set forth in the preambles to the GATT 1994 and the WTO Agreement, including, *inter alia*, the "reduction of tariffs and other barriers to trade" and the "elimination of discriminatory treatment in international trade relations" are irreconcilable with an entirely self-judging interpretation of Article XXI(b). Such an interpretation would threaten the security and predictability of the multilateral trading system. All third parties who have commented on this issue agree with Hong Kong, China that the U.S interpretation of Article XXI(b) is unsupported by the object and purpose of the GATT 1994.⁵¹

74. The United States' desperate search for context in support of its flawed interpretation of Article XXI(b) culminates in its reliance on the 1949 GATT Council decision in *United States – Export Measures* ("1949 Decision") and the 1982 decision adopted by the GATT Contracting Parties concerning invocations of Article XXI ("1982 Decision"). As Hong Kong, China has explained, the 1949 Decision does not constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention, nor does it support the U.S. interpretation of Article XXI(b) of the GATT 1994 as entirely self-judging.⁵² Similarly to the 1949 Decision, the United States misreads the 1982 Decision as relevant context and as supporting its interpretation of Article XXI(b) as entirely self-judging.⁵³

75. Tellingly, the United States does not even attempt to construe the "views" expressed by the GATT Contracting Parties prior to the entry into force of the WTO Agreement as a "subsequent agreement" or "subsequent practice" within the meaning of Articles 31(3)(a) and (b) of the Vienna Convention. As Hong Kong, China has explained, such statements are not relevant under either of these provisions, nor do they establish a consensus view on the correct interpretation of Article

⁴⁸ See Brazil's response to Panel question No. 48, para. 68; Canada's response to Panel question No. 48, para. 132; China's response to Panel question No. 33, para. 10; European Union's response to Panel question No. 48, para. 152; Norway's response to Panel question No. 49, para. 20; Russia's third-party oral statement, para. 7; Ukraine's response to Panel question No. 48, paras. 17-19; Singapore's response to Panel question No. 56; Switzerland's response to Panel question No. 45, para. 36.

⁴⁹ United States' response to Panel question No. 63, para. 265 (arguing that "[r]econciling the texts leads to the interpretation that all of the subparagraphs modify the terms 'any action which it considers' in the chapeau, because this reading is consistent with the Spanish text, and also –while less in line with rules of grammar and conventions – permitted by the English and French texts.").

⁵⁰ United States' response to Panel question No. 45, para. 199.

⁵¹ See Brazil's response to Panel question No. 38, paras. 66 and 67; Switzerland's response to Panel question No. 38, paras. 18-21; Canada's response to Panel question No. 38; Norway's response to Panel question No. 38, paras. 115-117; Russia's response to Panel question No. 38.

⁵² See Hong Kong, China's response to Panel question No. 56.

⁵³ See United States' response to Panel question No. 61, para. 252.

XXI(b), as the panel in *Russia – Traffic in Transit* correctly found, and as several of the third parties have also noted in their responses to questions from the Panel.⁵⁴

76. Thus, in the event that the Panel were to evaluate the U.S. invocation of Article XXI(b), which remains unnecessary for the reasons Hong Kong, China has explained, the Panel can and should dispense quickly with the U.S. interpretation, uphold the interpretation advocated by Hong Kong, China, and find that in failing to establish a *prima facie* case of the objective applicability of one or more of the enumerated subparagraphs, the United States has failed to satisfy its burden of proof under Article XXI(b).

ii. Supplementary Means of Interpretation Under Article 32 of the Vienna Convention
Only Serve to Confirm that Article XXI(b) Is Not Entirely Self-Judging

77. The meaning of Article XXI(b) advocated by Hong Kong, China is clear and thus does not require confirmation under Article 32 of the Vienna Convention. Nor does Hong Kong, China's interpretation result in a meaning that is ambiguous or obscure, manifestly absurd or unreasonable.⁵⁵ Nevertheless, should the Panel consider it necessary to have recourse to supplementary means of interpretation, Hong Kong, China will briefly review the relevant sources of interpretation and explain why they only serve to confirm the interpretation that Article XXI(b) is not entirely self-judging.

78. The parties agree that the negotiating history of the International Trade Organization ("ITO") Charter may be considered part of the "preparatory work" to the GATT 1994.⁵⁶ As Hong Kong, China has already addressed those ITO documents in its responses to Panel questions, Hong Kong, China will only emphasize that the conclusion reached by the United States through its selective reading of these documents was decisively rejected by the panel in *Russia – Traffic in Transit*. No third party supports the U.S. conclusion that the drafting history of Article XXI(b) confirms the interpretation that the subparagraphs are self-judging.⁵⁷

79. The drafters' intent for the subparagraphs of the exception that became Article XXI(b) to be objectively reviewable is further confirmed by internal documents of the U.S. delegation at the time the exception was drafted. It is evident from these documents, as Hong Kong, China has previously shown, that the U.S. delegation carefully considered and explicitly rejected revisions to the draft language of the exception intended to render it self-judging in its entirety.⁵⁸

80. The United States makes a similar attempt to reframe the negotiating history to support its argument that the availability of non-violation, nullification or impairment claims supports an interpretation of Article XXI(b) as entirely self-judging.⁵⁹ This negotiating history is irrelevant and, in any event, does not support the U.S. argument.

81. Hong Kong, China respectfully submits that it should be unnecessary for the Panel to reach and interpret Article XXI(b). If the Panel were to conclude otherwise, however, then Hong Kong, China believes that the U.S. interpretation that Article XXI(b) is entirely self-judging must be rejected. The U.S. interpretation is grammatically unsound, inconsistent with the principle of *effet utile*, and irreconcilable across the three equally authentic English, Spanish, and French texts.

⁵⁴ See Canada's response to Panel question No. 40, para. 105 and No. 43; Switzerland's response to Panel question No. 43, paras. 32-35.

⁵⁵ See also Canada's response to Panel question No. 40, para. 104; Russia's response to Panel question No. 40.

⁵⁶ See Hong Kong, China's response to Panel question No. 57, para. 204; United States' response to Panel question No. 57, para. 241.

⁵⁷ See European Union's response to Panel question No. 40, para. 122; Canada's response to Panel question No. 42, paras. 112 and 113; Russia's response to Panel question No. 41; Switzerland's response to Panel question No. 41, paras. 23-25.

⁵⁸ See Hong Kong, China's response to Panel question No. 59(a), paras. 211-215. See also European Union's response to Panel question No. 42, para. 125; Switzerland's response to Panel question No. 41, paras. 26-31; Russia's response to Panel question No. 42(c).

⁵⁹ See United States' response to Panel question No. 64.

V. HONG KONG CHINA'S OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

82. Properly interpreted, a Member's invocation of Article XXI(b) must begin with a *prima facie* demonstration that one or more of the subparagraphs of that provision is objectively applicable to the measures for which justification is sought. The United States has not even attempted to discharge that burden of proof by presenting evidence and legal argument in support of the objective applicability of any one of the Article XXI(b) subparagraphs. Nor has the United States attempted to demonstrate in accordance with the requirement of the chapeau of Article XXI(b) that the measures bear a plausible relationship to any essential security interests of the United States, such that the invocation of Article XXI(b) would have been made in good faith.

83. Having disposed of the United States' attempt to justify the revised origin marking requirement under Article XXI(b) of the GATT 1994, Hong Kong, China will turn to the United States' responses to Hong Kong, China's claims on the merits under the ARO, the TBT Agreement, and the GATT 1994, respectively.

84. The United States' apparent acknowledgement that the goods covered by the revised origin marking requirement originate in Hong Kong, China when ARO-compliant rules are applied is tantamount to a concession that the United States is acting inconsistently with the ARO. The United States appears to acknowledge that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin when the United States' "normal rules of origin" – that is, the United States ARO-compliant rules of origin – are applied.⁶⁰ The United States nevertheless requires these goods to be marked as having the origin of a different WTO Member, the People's Republic of China.

85. As for the TBT Agreement, in relation to Hong Kong, China's claim under Article 2.1 of the TBT Agreement, the United States focuses its second written submission on its assertion that Hong Kong, China has "walk[ed] away from its own theory of the case" simply because Hong Kong, China has stated that the challenged measures are *de jure* discriminatory.⁶¹ To be clear, Hong Kong, China's argument has been from the very beginning, and remains, that the measures at issue are *de jure* discriminatory. Further, Hong Kong, China has also provided evidence of the detrimental impact of the origin-based distinction in the revised origin marking requirement in fact to facilitate the Panel's objective assessment in the present dispute.

86. Turning to Hong Kong, China's claims under the GATT 1994, it is apparent from the United States' second written submission that it has no meaningful response to Hong Kong, China's claims under Article IX:1 and Article I:1. The United States' attempt to rebut these claims is based on an obvious mischaracterization of the relevant legal standard under these provisions. The essence of the United States' response to Hong Kong, China's claim under Article IX:1 is that Article IX:1 does not prescribe any rules about how a Member determines the country of origin for origin marking purposes, or what terminology it permits or requires to indicate the country of origin.⁶² This response shows a lack of accurate appreciation of the nature of Article IX:1. Article IX:1 is an *anti-discrimination* provision, not a provision that prescribes specific substantive rules governing how Members implement origin marking requirements. The United States engages in the same tactic with respect to Hong Kong, China's claim under Article I:1 of the GATT 1994. The question under Article I:1 is not, as the United States suggests, whether this provision prescribes specific substantive rules about how Members implement origin marking requirements.

VI. HONG KONG CHINA'S CLOSING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

The United States' Allegedly "Origin-Neutral" Regulatory Objectives

87. Hong Kong, China's view, shared by all of the third parties, is that the U.S. position on the applicability of Article XXI(b) to the TBT Agreement is baseless. In the context of Hong Kong, China's claim under Article 2.1, the repeated U.S. references to its "self-judging essential security interests" are therefore a non-sequitur. Where this leaves the United States is with its theory that measures

⁶⁰ United States' second written submission, para. 165.

⁶¹ United States' second written submission, para. 177.

⁶² See, e.g., United States' second written submission, paras. 194-195.

that are *de jure* discriminatory are not in violation of Article 2.1 if a Member can identify an origin-neutral concern operating somewhere in the background.

88. The alleged origin-neutral concerns that the United States has claimed in this case are its professed global concerns about democratic norms and fundamental freedoms. The measure that Hong Kong, China is challenging is a technical regulation that precludes Hong Kong, China goods from being marked with the name "Hong Kong, China". Hong Kong, China cannot conceive of any relationship between this technical regulation and the United States' professed global concerns about democratic norms and fundamental freedoms, and the United States appears determined not to explain what this relationship might be. But what the United States is asking the Panel to accept is quite clear – namely, that its professed origin-neutral concerns about democratic norms and fundamental freedoms could be used to demonstrate that any origin-based discrimination is in fact "origin-neutral" and not inconsistent with Article 2.1. This is true even if the measures are discriminatory on their face, as is the case here, and even if the measures have no relationship to the United States' professed "global concerns", as is also the case here. Hong Kong, China trusts that it is evident to the Panel that accepting the U.S. "origin-neutral" theory would obliterate the straightforward prohibition on origin-based discrimination contained in Article 2.1 of the TBT Agreement.

The United States' Failed Invocation of Article XXI(b) of the GATT 1994

89. Beginning with the subparagraphs of Article XXI(b), i.e. the types of GATT-inconsistent "actions" for which a responding Member may seek justification, Hong Kong, China does not consider that the United States has even attempted to demonstrate the objective applicability of any of these subparagraphs. While the United States has made vague references to Article XXI(b)(iii) and may have implied that the challenged measures constitute an "action ... taken in time of ... [an] other emergency in international relations", the United States has made no effort to identify that any such "emergency in international relations" exists, as that term is properly understood.

90. Even if the United States had demonstrated the objective applicability of Article XXI(b)(iii), which it has not, the same basic problem would arise were the United States to attempt to demonstrate that it has invoked this exception in good faith. As the panel in *Russia – Traffic in Transit* correctly held, the obligation of good faith requires the "invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".⁶³ While sticking to its position that what constitutes an "essential security interest" is exclusively for the invoking Member to determine, the United States nevertheless suggests that any situation in the world that may implicate the United States' alleged global concern of "fundamental freedoms, human rights, and democratic norms" necessarily implicates the "essential security interests" of the United States.

91. The problem for the United States is that not every foreign policy or political concern, no matter how sincerely held, necessarily implicates a Member's essential security interests as this term is properly understood. Even if one were to take at face value the United States' asserted interest in promoting "fundamental freedoms, human rights, and democratic norms" around the world, the United States has failed to demonstrate how the alleged situation with regard to "fundamental freedoms, human rights, and democratic norms" in other parts of the world relates to the protection of the United States' territory and its population from external threats, or the maintenance of law and public order internally. Article XXI of the GATT 1994 is entitled "Security Exceptions", not "Foreign Policy" or "Political" exceptions. The United States itself has stated in these proceedings on more than one occasion, that "support for democratization is a fundamental principle of *overall U.S. foreign policy*". Irrespective of the veracity of this position, such purported foreign policy interest could not possibly be described as an "essential security interest" under Article XXI.

92. Finally, and where the wheels ultimately come off the bus for the United States' attempted invocation of Article XXI(b), the United States has completely failed to demonstrate that there is any nexus whatsoever between the GATT-inconsistent action for which it seeks justification and any "essential security interests" of the United States, *even accepting* for this purpose that the promotion of "fundamental freedoms, human rights, and democratic norms" in other parts of the world is such an "interest". The measures at issue in this dispute relate exclusively to a country of origin labelling requirement. The United States has not even attempted to explain how the discriminatory treatment

⁶³ Panel Report, *Russia – Traffic in Transit*, para. 7.134.

of Hong Kong, China goods in respect of this origin labelling requirement – in particular, the refusal to allow these goods to be marked with the full English name of the customs territory in which they were manufactured or produced, the treatment that the United States accords to the goods of all other Members – has anything to do with protecting any "essential security interests" of the United States, whatever those "interests" might be. There is no plausible connection between requiring the origin of goods to be mislabelled and the protection of any "essential security interests" of the United States. More importantly, the United States has not offered any explanation of what this connection might be – in fact, in the U.S. closing statement at the second substantive meeting, the United States has made clear that it has no intention of demonstrating this connection. This is presumably because there is none.

93. In conclusion, the matter before the Panel is a legal dispute narrowly focused on whether the United States' discriminatory treatment of Hong Kong, China goods in respect of the United States' country of origin labelling requirement is consistent with the identified provisions of the covered agreements. It is not about the veracity of the United States' views concerning the relationship between Hong Kong, China and the People's Republic of China. While the United States has attempted to justify these violations under Article XXI(b) of the GATT 1994 – effectively conceding those violations – that exception does not apply to the ARO and TBT Agreement and, in any event, the United States has failed to discharge its burden of proof under that exception.

VII. HONG KONG, CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Response to Panel Question 72

94. ... Hong Kong, China agrees with the Appellate Body that an LRD analysis only makes sense in cases of alleged *de facto* discrimination, where the discrimination against imported products "will not be *immediately discernible from the text of a measure*".⁶⁴ Furthermore, as Hong Kong, China explained in its response to the prior question, the United States appears to agree that where a measure "*on its face, treat[s] imported products less favorably than other like foreign products*", no further analysis is required.⁶⁵

95. The reason that the parties and the Appellate Body are all in agreement on this point is that Article 2.1 of the TBT Agreement states quite clearly that "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to ... like products originating in any other country." If the origin-based less favourable treatment is evident on the face of the measure, the violation of Article 2.1 is incontrovertible. ... It is difficult to hypothesize many circumstances in which a technical regulation would need to draw origin-based distinctions to achieve a legitimate regulatory objective that could not otherwise be achieved on an origin-neutral basis – i.e. by focusing on product characteristics or their related processes and production methods, rather than the origin of the products.

96. Finally, Hong Kong, China would once again emphasize that the United States has *never* suggested that the detrimental impact on Hong Kong, China products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."⁶⁶ If the United States had ever suggested that the detrimental impact here was based exclusively on a legitimate regulatory distinction (and if the Panel disagreed with both parties and the Appellate Body and found an LRD analysis appropriate in a case of *de jure* discrimination), then Hong Kong, China would agree with the Appellate Body that the Panel would need to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."⁶⁷

⁶⁴ Appellate Body Report, *US – COOL (Article 21.5)*, para. 5.95 (emphasis added).

⁶⁵ United States' response to Panel question No. 14, para. 55 (emphasis added).

⁶⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

⁶⁷ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

Excerpt from Hong Kong China's Response to Panel Question 82

97. The problem, to be clear, is that while the United States has suggested that the alleged global concerns of "the values of fundamental freedoms and human rights" *are* its essential security interests under Article XXI(b), the United States has made *no* attempt to explain how protecting "the values of fundamental freedoms and human rights" *in Hong Kong, China* as alleged has anything to do with the protection of the United States from external threats or the maintenance of law and public order *internally*. This is why Hong Kong, China maintains that the United States has not sufficiently articulated its essential security interests – because what the United States has in fact articulated cannot conceivably fall within the undisputed understanding of what constitutes an "essential security interest" under Article XXI(b).

Excerpts from Hong Kong China's Response to Panel Questions 113 and 114

98. ... Members certainly retain some level of flexibility to determine, for themselves, what constitutes an emergency in international relations. As Canada further notes, however, this flexibility does not detract from the requirement that the invoking Member demonstrate that an "emergency in international relations" objectively exists, under a proper interpretation of that term, and that there is a sufficient nexus between the action for which justification is sought and the circumstances shown to constitute an "emergency in international relations".

99. ... The said nexus requirement extends both to the *temporal* connection, as highlighted by the European Union, and to the *subject matter* connection between the GATT-inconsistent action and the demonstrated "emergency in international relations", to which Canada refers. In respect of the latter requirement, it would not make sense if, for example, a Member could invoke Article XXI(b)(iii) to justify a GATT-inconsistent action that does nothing to protect the invoking Member from the defence and military concerns, or maintenance of law and public order concerns, implicated by the "emergency in international relations" shown to exist.

VIII. HONG KONG, CHINA'S COMMENTS ON THE U.S. RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Introductory Comments

100. ... In no event would the Panel need to evaluate or pass judgment on the merits of the United States' "sufficient autonomy" determination. The United States' consistent focus in its responses to the Panel's questions on the legitimacy of its "sufficient autonomy" determination is, therefore, a complete red herring. The United States repeatedly highlights this issue, despite its irrelevance, because it has no credible response to Hong Kong, China's legal claims of violation under the relevant WTO covered agreements in this dispute.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 68

101. ... The United States appears to believe, without any legal basis, that it has a blank check to impose *de jure* discriminatory measures with respect to products imported from Members around the world, so long as those measures are ostensibly related to the United States' overarching "origin neutral" global concerns.

102. The fallacy of the U.S. theory is obvious. If this theory applies to technical regulations adopted by all Members (and it must), and the presence of any relevant "origin-neutral governmental objective" renders all origin-based less favourable treatment non-discriminatory, it would be hard to imagine that *any* discriminatory measure could not be excused pursuant to this standard. When Members treat products from a particular Member less favourably, they tend to have a reason for doing so. If extrapolated out far enough, it seems to Hong Kong, China that those reasons could always be linked to a high-level "origin neutral governmental objective". But there is *nothing* in Article 2.1 of the TBT Agreement that suggests that the reason for the less favourable treatment is relevant, much less the high-level government objective behind the reason. The United States is reading gaping exceptions into an agreement where no such exceptions exist, and adopting the United States' amorphous "origin neutral" theory would have obvious and far-reaching implications for the rules-based multilateral trading system beyond the current dispute.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 103

103. ... As Hong Kong, China explained in response to Panel question No. 104, a situation alleged to constitute an "emergency in international relations", even if taking place in another part of the world, must nevertheless implicate defence or military interests, or maintenance of law and public order interests, *of the invoking Member*. Those interests must, in all events, concern the "essential security interests" of the invoking Member, i.e. "those interests relating to the quintessential functions of the state, namely the protection of its territory and its population from external threats, and the maintenance of law and public order internally."⁶⁸ Events taking place in other parts of the world could constitute an "emergency in international relations" under this interpretation, provided that this condition is satisfied.

104. As discussed further in Hong Kong, China's comment on the United States' response to Panel question No. 116, the United States has provided no explanation of how events taking place in Hong Kong, China implicate any defence or military interests, or maintenance of law and public order interests, *of the United States*, even if one were to credit in full the United States' characterization of those events. At most, what the United States has described is a political or foreign policy concern relating to those events. The United States has failed to demonstrate how this concern, even if sincerely held, constitutes an "emergency in international relations" for the United States.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 114

105. ... Even if, purely on an *arguendo* basis, one were to assume that "the situation with respect to Hong Kong" constitutes an "emergency in international relations" in relation to the United States, contrary to a proper understanding of that phrase, the United States has failed to explain how prohibiting Hong Kong, China exporters from marking their products with the "full English name" of the customs territory in which the products were manufactured or produced – the treatment that the United States accords to the products of all other Members – does anything to protect the United States from the alleged "threat" arising from this "national emergency". That is, the United States has failed to explain how violating Articles IX:1 and I:1 of the GATT 1994 – the GATT-inconsistent action for which justification is sought – does anything to protect the United States from any "threat" to the United States arising from this putative "emergency in international relations". Thus, the United States has failed to demonstrate the required nexus between the action for which justification is sought and the alleged "emergency in international relations", even if one were to assume that "the situation with respect to Hong Kong" is such an "emergency", contrary to a proper interpretation of this phrase.

⁶⁸ Panel Report, *Russia – Traffic in Transit*, para. 7.130.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****I. EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION**

1. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. This right is reflected in Article XXI(b) of the *General Agreement on Tariffs and Trade* ("GATT 1994"), and WTO Members have not agreed to subject the exercise of this right to legal review.

2. The United States-Hong Kong Policy Act of 1992 provides for the continued application of U.S. laws to Hong Kong, China, in the same manner as applied prior to July 1, 1997, unless otherwise provided for by law or by an Executive order. In its 2020 report under the Act, the Secretary of State explained that the People's Republic of China had fundamentally undermined the autonomy of Hong Kong, China, and decertified Hong Kong, China, as warranting treatment under U.S. law in the same manner as U.S. laws were applied before July 1, 1997. On July 14, 2020, the President of the United States issued the Executive Order on Hong Kong Normalization. Citing the report by the Secretary of State as well as the National Security Legislation imposed by the People's Republic of China on Hong Kong, China, the President determined that Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" for purposes of a number of U.S. laws. The Executive Order further determined "that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States." The President declared a national emergency with respect to that threat.

3. On August 11, 2020, U.S. Customs and Border Protection issued a clarification in the *Federal Register* indicating that in light of Executive Order 13936, for purposes of 19 U.S.C. § 1304, imported goods produced in Hong Kong, China, may no longer continue to be marked as "Hong Kong," as was the case prior to July 1, 1997. The United States considers that the requirement to mark goods of Hong Kong, China, to indicate "China," pursuant to Executive Order 13936, is an action necessary to protect U.S. essential security interests consistent with Article XXI(b) of the GATT 1994.

A. The text of GATT 1994 Article XXI(b) in its context, and in light of the Agreement's object and purpose, establishes that the exception is self-judging.

4. Under DSU Article 3.2, the provisions of the GATT 1994 are to be interpreted "in accordance with customary rules of interpretation of public international law." Section 3 (Articles 31 to 33) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention" or "VCLT") reflects the rules for such interpretation. An interpretation of Article XXI(b) of the GATT 1994 applying the rules in VCLT Articles 31 through 33 establishes that Article XXI(b) is self-judging.

5. The plain meaning of the text of Article XXI(b) of the GATT 1994 establishes that the exception is self-judging. As this text provides "[n]othing" in the GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

6. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision's reference to actions that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be." Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it

is the Member ("which it") that must regard ("consider[.]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

7. The ordinary meaning of the terms in the phrase "its essential security interests," also supports the self-judging nature of Article XXI. The word "interest" is defined as "[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage." The term "security" refers to "[t]he condition of being protected from or not exposed to danger." The definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."

8. And it is "its" essential security interests—the Member's in question—that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

9. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

10. Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests" in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase "essential security interests" and thus illustrate the types of "essential security interests" that Members considered could lead to action under Article XXI(b).

11. Subparagraphs (i) and (ii) do not limit a Member's essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what "its interests" are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member's essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

12. Subparagraph (iii) begins with temporal language: "*taken in time of war or other emergency* in international relations." The phrase "taken in time of" echoes the reference to "taking any action" in the chapeau of Article XXI(b), and it is actions that are "taken", not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly, Article XXI(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations. Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

13. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article XXI(b). In this way, the subparagraphs guide a Member's exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

14. The context of Article XXI(b), provided by Articles XXI(a) and XXI(c), Article XX, and other WTO provisions supports that Article XXI(b) is self-judging.

15. First, Article XXI(a) is immediate context for understanding the ordinary meaning of the terms of Article XXI(b). Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to "test" a Member's invocation of Article XXI(b). Moreover, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls.

16. Second, the context provided by Article XX also supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI. The chapeau of Article XX includes an additional non-discrimination requirement, which subjects a Member's action to additional scrutiny based on the particular factual circumstances. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau.

17. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee.

18. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. In this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c). The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member's judgment is set out in Article XXI(b).

19. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 set forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." Particularly with these references to arrangements that are "mutually advantageous" and tariff reductions that are "substantial" (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

B. Supplementary means of interpretation, including negotiating history, confirm that Article XXI(b) is self-judging

20. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirm that Article XXI(b) is self-judging. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). The drafting history shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other

interests that, unlike the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

21. Regarding the exception's scope, exchanges at a July 1947 meeting of the ITO negotiating committee demonstrate that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment. Documents from early 1948 further confirm the drafters' understanding that non-violation, nullification or impairment claims – and not breach claims – would be the appropriate recourse for countries affected by essential security actions.

22. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT negotiations. The panel erred in relying on such material because it is not "negotiating history" within the meaning of the Vienna Convention. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

23. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

C. Reconciliation of the English, Spanish and French versions of Article XXI(b) does not alter the self-judging nature of the provision

24. The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs – in particular, use of the feminine plural "relativas" – indicates that they must be read to modify the term "action" in the chapeau of Article XXI(b), whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau while the temporal limitation in subparagraph (iii) relates to "action". The meaning that best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

25. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms "any action which it considers" in the chapeau, because this reading is consistent with the Spanish text, and also—while less in line with rules of grammar and conventions—permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. All of the elements in the text, including each subparagraph ending, are part of a single relative clause beginning with "which it considers necessary" and ending at the end of each subparagraph ending, and are left to the determination of the Member. Idiosyncrasies in the Spanish text of Article XXI(b), compared to the English and French texts of Article XXI, as well as the Spanish texts of security exceptions in the GATS and TRIPS Agreement, do not warrant a different interpretation.

D. The *Russia – Traffic In Transit* panel erred in deciding it had authority to review a responding party's invocation of Article XXI.

26. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision." Furthermore, in its

examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

E. The Exception under Article XXI of the GATT 1994 Applies to the Claims under the Agreement on Rules of Origin.

27. The structure of the WTO Agreement shows that the essential security exception applies to the Multilateral Agreements on Trade in Goods, including the *Agreement on Rules of Origin*. The starting point for establishing that the essential security exception applies to the *Agreement on Rules of Origin* is to examine the structure of the WTO Agreement as a whole.

28. The Marrakesh Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking. In particular, Annex 1A consists of the Multilateral Agreements on Trade in Goods (including the *Agreement on Rules of Origin* and the *Agreement on Technical Barriers to Trade*), Annex 1B consists of the GATS, and Annex 1C consists of the *Agreement on Trade Related Aspects of International Property Rights* (TRIPS). Two possibilities arise from this structure. The first is that the negotiators understood that the GATT 1947/1994 essential security exception applies to the new agreements on trade in goods contained in Article 1A. The other possibility is that for some reason, the negotiators believed that the essential security exception applied to the fundamental disciplines in the GATT 1994, but not to the elaborations upon those disciplines as set out in the other trade-in-goods agreements. This second interpretation is untenable as a matter of logic or common sense.

29. The General Interpretative Note to Annex 1A supports the interpretation that the GATT 1994 essential security exception applies to the new trade-in-goods agreements. In addition, the interpretation that the GATT 1994 essential security exception applies throughout Annex 1A is fully consistent with the conflict rule set out in the interpretive note. In particular, none of the new trade-in-goods agreements contains a provision stating that the GATT 1994 Article XXI exception is inapplicable to the obligations under those agreements.

30. It is not the case that the negotiators thought that in 1994, as compared to when the GATT was agreed to in 1947, essential security was no longer an over-riding concern. To the contrary, when the parties decided to extend disciplines to new areas—services, and intellectual property—the new agreements contain the essential security exception.

31. Further, it is not the case that negotiators thought that basic disciplines should be subject to the essential security exception, but not more detailed or elaborated exceptions. First, no logical rationale exists for such distinction, nor in most cases can the distinction even be made. Rather, substantial overlap exists between the disciplines in the GATT 1994 and the new Uruguay Round Agreements on trade in goods. Second, in the new areas—Annex 1B services and Annex 1C intellectual property—the essential security exception applies to every obligation—whether fundamental or more detailed. No rationale would point to a different intent for obligations with respect to trade in goods.

32. The *Agreement on Rules of Origin* includes multiple textual links to the GATT 1994. The Preamble includes multiple references to the GATT 1994, and in light of that link the Agreement aims to increase transparency, predictability, and consistency in the preparation and application of rules of origin, and ultimately to harmonize rules of origin. That is, the Preamble confirms that while the Agreement establishes certain principles with respect to rules of origin, at least until completion of the Harmonized Work Program provided for in Part IV of the Agreement, it does not constrain a Member's discretion in a way that would prevent it from acting to protect its essential security interests.

33. In the "Definitions and Coverage" provisions in Part I of the *Agreement on Rules of Origin*, Article 1.1 defines "rules of origin" for purposes of the agreement with reference to the GATT 1994, and Article 1.2 further establishes the linkage to the GATT 1994, providing that "[r]ules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III,

XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas." Each of these underlying GATT 1994 provisions is subject to the GATT 1994 essential security exception; logic dictates that the associated rules of origin would be subject to the same provision.

34. Article 2(b) of the *Agreement on Rules of Origin* also confirms the connection between the GATT 1994 and the availability of Article XXI of the GATT 1994 as a defense to breaches of the *Agreement on Rules of Origin*. Article 2(b) confirms that rules of origin disciplined by the *Agreement on Rules of Origin* are linked to "commercial policy" instruments disciplined by the GATT, as provided in Article 1.2.

35. In addition, Articles 7 and 8 of the *Agreement on Rules of Origin* provide that the provisions of Articles XXII and XXIII of the GATT 1994, respectively, as elaborated and applied by the DSU, are applicable to the *Agreement on Rules of Origin*. For purposes of Article 8, which provides that the provisions of Article XXIII shall be followed "mutatis mutandis," the reference to "its obligations under this Agreement" in Article XXIII:1 include the substantive provisions of both the *Agreement on Rules of Origin* and the GATT 1994. A further link is provided by the first sentence of Article 1.1 of the DSU, which provides that "[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement provisions listed in Appendix 1." Appendix 1 includes the agreements in Annex 1A to the WTO Agreement, which in turn include both the GATT 1994 and the *Agreement on Rules of Origin*. Both Article XXIII of the GATT and Article 8 of the *Agreement on Rules of Origin* are "consultations and dispute settlement provisions" under the DSU to be read together and subject to Article XXI. The overall structure of the WTO Agreement, as discussed above, indicates that essential security exception applies to the Annex 1A multilateral agreements on trade in goods, including the *Agreement on Rules of Origin*.

36. Moreover, the structure of the *Agreement on Rules of Origin*, and the distinct disciplines that apply before and after completion of the work program for the harmonization of rules of origin, provide discretion to Members, including to take action to protect their essential security interests, and further confirm the availability of Article XXI of the GATT 1994 as a defense.

37. Although not necessary for purposes of interpreting the *Agreement on Rules of Origin* in this dispute, supplementary means of interpretation confirm that Members (at the time of the Uruguay Round, Contracting Parties) understood the close link between the GATT and rules of origin. The negotiators of the *Agreement on Rules of Origin*, in discussing the scope of the potential agreement, specifically considered that it should cover rules of origin "subject to GATT disciplines," as well as the extent to which it should cover rules beyond those disciplines, such as government procurement. They understood the *Agreement on Rules of Origin* as linked to the GATT 1994.

38. The claims in this dispute confirm the link between the GATT 1994 and the *Agreement on Rules of Origin*, and the availability of Article XXI(b). With regard to the specific claims at issue, Hong Kong, China, itself acknowledges the link between the *Agreement on Rules of Origin* and the GATT 1994. Hong Kong, China, states that its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* are "essentially the same" as its claims of breach of Articles I:1 and IX:1 of the GATT 1994 (as well as Article 2.1 of the TBT Agreement), and requests further that the Panel exercise judicial economy with respect to its GATT 1994 claims.

39. Just as the origin marking requirement is subject to an exception to claims under Articles I:1 and IX:1 as an action taken to protect U.S. essential security interests under Article XXI of the GATT 1994, so too is this action subject to an exception to the same substantive claims under the *Agreement on Rules of Origin*. To consider otherwise would suggest that, while a Member could invoke the exception under Article XXI of the GATT 1994 for a measure that it considers necessary to protect its essential security interests in relation to commitments under Articles I, II, III, VI, IX, XI, XIII, and XIX of the GATT 1994, the rules of origin used to apply those measures could nonetheless be found to breach the *Agreement on Rules of Origin* with no regard for the Member's essential security interests at issue. Such a finding would not only undermine the self-judging nature of the Article XXI exception, but also appear to mean that a Member would have no defense under the *Agreement on Rules of Origin* for essential security measures.

F. The Exception under Article XXI of the GATT 1994 Applies to the Claims under the TBT Agreement

40. The explanation that the structure of the WTO Agreement as a whole shows that the GATT 1994 essential security exception applies to the Annex 1A Multilateral Agreement on Trade in Goods, including the *Agreement on Rules of Origin* applies with equal force to the TBT Agreement.

41. Multiple provisions of the TBT Agreement link the Agreement to the GATT 1994 and essential security considerations. The seventh recital of the preamble to the TBT Agreement unambiguously states, "*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest." The seventh recital does not refer to any qualification or condition with respect to a Member's right to take measures to protect its essential security interests. Like Article XXI(b), the seventh recital reflects that measures taken to protect a Member's essential security interests are not subject to additional requirements or scrutiny. In contrast, the sixth recital, which provides immediate context for the seventh recital, provides a list of certain types of measures that Members are not prevented from taking, "subject to" certain requirements. The contrast between the sixth and seventh recitals reflects an important difference between Articles XX and XXI of the GATT 1994. That is, while the former subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination, and in turn to review in a possible dispute settlement proceeding, the latter provision is self-judging as to what actions are necessary for a Member to protect its essential security measures.

42. Annex 1.1 of the TBT Agreement provides the definition of a technical regulation, and the second sentence of the definition identifies "marking" as an example of a requirement that might be a technical regulation. At the same time, Article IX of the GATT 1994 specifically disciplines origin marking requirements. That is, while the TBT Agreement imposes disciplines on technical regulations, standards, and conformity assessment procedures, each of which might address a range of subjects, Article IX of the GATT 1994 imposes disciplines specifically on marks of origin. This confirms that, to the extent that a technical regulation provides for origin marking that is disciplined under Article IX of the GATT 1994, Article XXI of the GATT 1994 is available as an exception to both commitments, and a defense for a claimed breach of both the GATT 1994 and the TBT Agreement.

43. Article 2.1 of the TBT Agreement sets forth MFN and national treatment obligations that are similar to that provided by Articles I and III:4 of the GATT 1994. With respect to the issue of discriminatory treatment, Article 2.1 mirrors Articles I:1 and III:4 of the GATT 1994. The overlap between the disciplines of Article 2.1 of the TBT Agreement and Articles I and III:4 of the GATT 1994 confirms that Article XXI applies to Article 2.1 of the TBT Agreement just as it applies to Article I and III of the GATT 1994. This is especially true when read in light of the object and purpose of the TBT Agreement provided in the seventh recital. To conclude otherwise would suggest that a Member would not be able to defend a measure taken to protect its essential security interests, simply because it is a technical regulation.

44. Article 10.8.3 refers specifically to essential security with respect to the disclosure of information. This reference confirms that, as discussed below, the negotiators of the TBT Agreement did not intend for the agreement to "supplement" or "replace" essential security concerns. This explicit reference to the GATT 1994 further confirms the understanding that essential security measures are not subject to the disciplines of the TBT Agreement, especially when read in light of the object and purpose of the TBT Agreement provided in the seventh recital.

45. Like Articles 7 and 8 of the *Agreement on Rules of Origin*, Article 14 of the TBT Agreement references GATT 1994 and the DSU. As explained above with respect to Articles 7 and 8 of the *Agreement on Rules of Origin*, both Article XXIII of the GATT and Article 14 of the TBT Agreement are "consultations and dispute settlement provisions" under the DSU to be read together, and subject to Article XXI. This is further confirmed by the object and purpose of the TBT Agreement, as provided in the seventh recital.

46. The negotiating history of the TBT Agreement supports the understanding that essential security measures are not reviewable under the TBT Agreement. Prior to the negotiation and completion of the TBT Agreement in the Uruguay Round, an earlier agreement on technical barriers to trade was negotiated as part of the Tokyo Round in 1979. Tokyo Round Standards Code negotiators contemplated that the preamble should "refer" to the exception articles of the GATT,

specifically Articles XX and XXI. This supports the interpretation that the seventh recital of the preamble reflects Article XXI of the GATT.

47. Even prior to the Tokyo Round, the GATT Committee on Industrial Products created a working group on non-tariff barriers to examine, among other things, standards as a non-tariff barrier to trade. The working group recognized that the most-favored-nation principle needed to be reconciled with any code covering standards. More specifically, the working group considered the general exceptions of Article XX of the GATT 1947 as "being relevant" to the context of the issue of standards and regulations serving as a barrier to trade. The 1970 report of the working group on technical barriers to trade to the GATT Committee on Trade suggests that, while the working group had been considering the need to reconcile the most-favored-nation principle with the goal of maintaining standards, as well as the idea that a standards code should "supplement" the general exceptions in Article XX of the GATT, it did not similarly consider the Article XXI exception as needing to be "supplemented." This confirms that the Article XXI exceptions are not meant to be reconciled with the TBT Agreement, reflecting that measures under that exception need not be "in accordance with the provisions" of the TBT Agreement.

48. The claims in this dispute confirm the link between the GATT 1994 and the TBT Agreement, and the availability of Article XXI(b). The crux of the claims by Hong Kong, China, that the origin marking requirement breaches Articles 2.1 of the TBT Agreement, as well as Articles I:1 and IX:1 of the GATT 1994 (and Article 2.1 of the TBT Agreement) is that the United States applies a condition of "sufficient autonomy" with respect to goods of Hong Kong, China. Just as the origin marking requirement is subject to an exception to claims under Articles I:1 and IX:1 as an action taken to protect U.S. essential security interests under Article XXI of the GATT 1994, so too is this action subject to an exception to the same substantive claims under the TBT Agreement. There is no logical basis to conclude that an origin marking requirement subject to Article IX of the GATT 1994 could be defended as an action taken to protect essential security interests under Article XXI, but only if that marking requirement is not a technical regulation. Indeed, by arguing that a "requirement to mark an imported product with its country of origin" is by definition a technical regulation, Hong Kong, China, would deprive a Member from taking action to protect its essential security interests with respect to origin marking requirements – effectively undoing the availability of Article XXI for Article IX claims. The structure of the WTO Agreement, as well as the text of the TBT Agreement, indicate that the negotiators of the TBT Agreement and the GATT 1994 did not intend such a result.

G. In light of the self-judging nature of Article XXI of the GATT 1994, the sole finding the Panel may make consistent with its terms of reference under Article 7.1 of the DSU is to note the invocation of Article XXI

49. The DSB has established the Panel's terms of reference under Article 7.1 of the DSU. Under these standard terms of reference, the DSB has tasked the Panel: (1) "[t]o *examine*" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"; and (2) to "make such *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

50. DSU Article 11 confirms this dual function of a panel. Article 11 of the DSU states that the "function of panels" is to "assist the DSB in discharging its responsibilities" under the DSU itself and the covered agreements. Article 11 provides that a panel "should make an objective *assessment* of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," and "such other *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

51. In this dispute, the Panel has been tasked by the DSB to examine the matter and to make such findings as may lead to a recommendation to bring a WTO-inconsistent measure into conformity with the WTO Agreement. Article 11 reflects this function of examination and making such findings. In order to make the "objective assessment" that may lead to findings to assist the DSB to make recommendations, the Panel is to make "an objective assessment of the facts of the case" and "of the applicability of and conformity with the relevant covered agreements." In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. And that objective assessment of Article XXI(b) leads to the understanding that the sole finding that the Panel may make is to recognize the Member's invocation of Article XXI(b).

52. The panel objectively assesses the facts of the case by noting that the responding Member has invoked Article XXI(b). The panel objectively assesses the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and—once it has done so and determined Article XXI(b) to be self-judging—finding Article XXI(b) applicable. Nothing in the DSU—including Article 11 of the DSU—requires otherwise.

53. This result is consistent with DSU Article 19. Article 19.1 provides that "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

54. Invocation of Article XXI(b) means that an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement. It would diminish a Member's "right" to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such an action inconsistent with Article XXI(b). Thus, the sole finding that the Panel may make—consistent with its terms of reference and the DSU—is to note in the Panel's report that the United States has invoked its essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b).

H. The Panel should begin its analysis by addressing the invocation by the United States of Article XXI

55. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel's determination. Therefore, contrary to the assertion by Hong Kong, China, that the Panel "must begin its analysis" with the claims under the *Agreement on Rules of Origin*, then the TBT Agreement, and then the GATT 1994, the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel's internal ordering of its analysis, as the United States has explained, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has involved Article XXI. No additional findings concerning the claims raised by Hong Kong, China, in its submissions would be consistent with the DSU, in light of the text of Article XXI(b). Accordingly, the Panel should begin by addressing the invocation by the United States of Article XXI(b).

II. EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE HEARING

56. In this dispute, the Hong Kong Special Administrative Region of the People's Republic of China seeks to use the WTO as a vehicle to second-guess a national security determination of the United States – specifically, a determination that Hong Kong, China, is no longer sufficiently autonomous with respect to the People's Republic of China to warrant differential treatment under U.S. law. A series of recent actions by the People's Republic of China have undermined the autonomy of Hong Kong, China, and the rights and freedoms of its people. These actions include using the National Security Law as a blunt tool to quash democratic dissent, to suppress the freedoms of speech and of the press, and to undermine an independent judiciary. The United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security, and has accordingly taken action it considers necessary to protect its essential security interests.

57. Each WTO Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests. The self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light of the treaty's object and purpose. Although not necessary in this dispute, this interpretation of Article XXI is confirmed by supplementary means of interpretation, including the Uruguay Round negotiating history. A complaining Member is not without any recourse if a Member invokes the essential security exception. A complaining Member may pursue a non-violation nullification or impairment claim in those circumstances.

58. Article XXI applies to the *Agreement on Rules of Origin* and the TBT Agreement. Notably, the structure of the WTO agreements, as well as numerous textual references within the *Agreement on Rules of Origin* and the TBT Agreement, highlight the applicability of Article XXI. The overall structure of the WTO Agreement is critical context for an interpretation of the covered agreements and Article XXI in particular. Consideration of the structure shows that Article XXI applies to the disputed claims under the *Agreement on Rules of Origin* and the TBT Agreement. The U.S. interpretation of the applicability of Article XXI to the *Agreement on Rules of Origin* and the TBT Agreement reflects the principle of effectiveness. The object and purpose of the agreements at issue confirm that Article XXI applies. In light of the proper understanding of Article XXI, the Panel's terms of reference and the DSU direct the Panel to make the sole finding that the United States has invoked Article XXI.

III. EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL'S FIRST SET OF QUESTIONS

U.S. Responses to Questions 5-11

59. The requirement to indicate a particular country as a country of origin does not necessarily involve a prior determination that that country is the country of origin. The determination of what terminology (marking) is permissible is fundamentally different from, and in turn can be made independently of, a determination that the particular country is the country of origin for goods. The former may involve a political or diplomatic determination as to what is a country, and what is its territory. The *Agreement on Rules of Origin* establishes that a "rule of origin" is used to match a good – based on its processing – with a certain territorial region. This matching exercise is fundamentally different than a marking decision. In particular, the marking decision is the name – with which the good must be marked – associated with the geographic region. Each of these marking decisions is independent of the rules of origin that a Member applies, and not governed by the *Agreement on Rules of Origin*. The United States uses its normal rules of origin in determining the applicable region, and then has chosen the name to be associated with the region of Hong Kong, China, based on its essential security interests, in light of China's decision to interfere in the governance, democratic institutions, and human rights and freedoms of Hong Kong, China. This determination of the appropriate marking or label does not implicate any discipline under the *Agreement on Rules of Origin*. The *Agreement on Rules of Origin* does not include any obligation providing for outcomes of the determination of a country of origin; rather, it has explicit disciplines, none of which are implicated by the marking requirement at issue.

U.S. Responses to Questions 12-16

60. In the context of an Article 2.1 analysis of whether a measure accords "less favorable" treatment, there are two approaches before the Panel – the correct one, and the Appellate Body's flawed one – for assessing this element of Article 2.1. Under both approaches, security interests (if applicable) can and should be taken into account. Both approaches take regulatory purposes and objectives of the disputed measures into consideration. Therefore, if the regulatory purpose or objective of the measure is for the protection of security interests, or if the factual circumstances indicate that the measure is for the protection of security, then a panel cannot ignore these purposes or factual circumstances in its assessment of whether the measure accords less favorable treatment.

61. The proper approach is based on the ordinary meaning of Article 2.1. What Article 2.1 prohibits are measures that accord less favorable treatment to the concerned imported products as compared to other foreign like products *based on origin*. That is, if it is found that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and if that detrimental impact is based on the administration of an origin-based discrimination, then the element of "less favorable treatment" can be established. However, if the detrimental impact can be explained on the basis of origin-neutral factors, then those circumstances are indicative of non-discrimination. Under the second approach, it must first be established that there is detrimental impact to the conditions of competition, and second, a panel must then further analyze whether such detrimental impact stems exclusively from a legitimate regulatory distinction.

62. It is incumbent on the complainant to establish detrimental impact in establishing a *prima facie* case. This is a fact-intensive exercise – and one that Hong Kong, China, glosses over in its written submission and oral statements. Even if Hong Kong, China, demonstrates detrimental

impact, the panel would then have to take into account the regulatory purpose of the disputed measures and whether the impact is rationally related to an origin-neutral regulatory purpose. The United States considers that, if detrimental impact can be explained on the basis of origin-neutral factors or is rationally linked to a regulatory purpose or objective that is origin-neutral, then those circumstances are indicative of non-discrimination.

U.S. Responses to Questions 20-43

63. The "subject" of this interpretative exercise is the specific claimed breaches, specifically Articles 2(c) and 2(d) of the Agreement on Rules of Origin, Article 2.1 of the TBT Agreement, and Articles I and IX of the GATT 1994. And the issue is whether Article XXI(b) applies to these specific provisions. That is an interpretive inquiry that the Panel must conduct on a case-by-case basis. The Panel should look to the single undertaking structure of the WTO Agreement, which provides context to the application of Article XXI(b) to the specific claims. The principle of effectiveness is not meant to provide the maximum effectiveness to all provisions, but rather it means that interpretation should not deprive the effectiveness of provisions. The United States considers that previous reports, in analyzing the applicability of GATT Article XX to a non-GATT agreement, correctly recognized that lack of explicit incorporation of an exception is not dispositive.

64. The wholesale incorporation of GATT into the WTO Agreement as the lead agreement in Annex 1A further demonstrates the relationship of other multilateral trade in goods agreements with the GATT "as the central pillar of the MTO package" and the Uruguay Round negotiating history shows a continued interest in maintaining a meaningful essential security exception. That is, the structure of the WTO Agreement establishes that Article XXI(b) applies to the Annex 1A agreements on trade in goods at issue in this dispute. The Annex 1B and 1C agreements were understood not to be as integrally linked to GATT, and therefore each received its own essential security provision.

65. The structural consideration is relevant not only for the relationship between the agreements themselves, but also between the particular claims. Based on the overlaps between the claims at issue under each of the agreements, with respect to the applicability of Article XXI(b), the Panel should find that the exception applies to the specific claims at issue.

U.S. Responses to Questions 44-67

66. The role of the subparagraphs of Article XXI(b) is to guide a Member's discretion by identifying the situation that a Member considers to be present when it takes an action that it considers necessary to protect its essential security interests. Hong Kong, China, suggests that the effectiveness of a treaty provision depends on whether it is reviewable in a dispute settlement mechanism, and whether that review can result in a recommendation to withdraw or modify the underlying measure. This is not correct as a matter of treaty interpretation. "Effective" does not mean that each treaty provision must impose an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism. The VCLT does not suggest that whether a party enters into binding treaty obligations is dependent on that party agreeing to formal dispute settlement. The question of whether a state consents to undertake a particular obligation in international law is simply separate from whether a state consents to dispute settlement in respect of that obligation.

67. In Article XXI(b), the relative clause that follows the word "action" describes the situation which the Member "considers" to be present when it takes such an "action." The clause begins with "which it considers necessary" and ends at the end of each subparagraph. Because the relative clause describing the action begins "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action. Taking essential security actions is a basic function of government. The self-judging nature of Article XXI(b) is established in the text of the provision itself, and reflects the balance between rights and obligations that negotiators struck.

68. Not all preparatory materials may be correctly considered part of a treaty's negotiating history, or *travaux préparatoires*, and therefore appropriate for recourse as a supplementary means of interpretation. Instead, for materials to be so considered, they should be in the public domain, or at least "in the hands of all the parties." The United States considers ITO documents constitute part of the negotiating history or the "preparatory work of the treaty" with respect to the GATT 1994.

69. The United States considers that the Decision Concerning Article XXI of The General Agreement (the 1982 Decision) is a "decision" within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement. However, it does not constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention.

70. The availability of a non-violation nullification or impairment claim is relevant to the question of whether the essential security exception in Article XXI(b) is self-judging because this is the balance negotiators struck in the text. While it affords recourse to a Member aggrieved by another Member's essential security action, the DSB – as a result of the self-judging nature of Article XXI(b) established by the terms of that provision – may not find that a Member is wrong in considering an action necessary to protect its essential security interests, and recommend that the Member bring that measure into conformity with a covered agreement. To make such a recommendation would diminish a Member's "right" to take action it considers necessary to protect its essential security interests, contrary to Articles 3.2 and 19.2 of the DSU.

IV. EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

A. None of the arguments presented by Hong Kong, China, rebut the U.S. interpretation of Article XXI(b) as self-judging.

71. Hong Kong, China, artificially separates the terms in the single relative clause that begins with the phrase "which it considers necessary" and ends at the end of each subparagraph. Hong Kong, China, is effectively asking the Panel to restructure Article XXI and read into it text that is not there.

72. Hong Kong, China, argues that the third subparagraph is not a part of a single relative clause that begins with "which it considers". Rather, Hong Kong, China, considers that the words that follow "its essential security interests" are part of a noun phrase with the word "action". Under the construction offered by Hong Kong, China, the noun phrase, which consists of a noun and its modifier, is separated such that the noun ("action") and its modifier ("relating to fissionable materials or the materials from which they are derived") are separated by a relative clause consisting of twelve words ("which it considers necessary to protect its essential security interests"). This position ignores English grammar rules, in particular the rule that a modifier follows the word it modifies or is otherwise placed as closely as possible to the word it modifies. In Article XXI(b), the dependent clause begins with a relative pronoun – "which" – so this dependent clause is also called a relative clause. Relative clauses "postmodify nouns". Thus, here, the dependent/relative clause modifies the noun "action." The dependent/relative clause therefore describes what action the Member may take regardless of the obligations under the Agreement. To avoid this grammatical issue, Hong Kong, China, suggests that Article XXI(b) should be read as if the language of the subparagraphs does not follow "which it considers". In this rewrite, Hong Kong, China, appears to acknowledge that its own interpretation of Article XXI(b) does not reflect the English text as written.

73. Hong Kong, China, seeks to cleave the single relative clause beginning with "which it considers", and read into Article XXI(b) the clause "and which relates to" in the beginning of subparagraphs (i) and (ii), and "and which is taken in time of" in the beginning of subparagraph (iii). But there are no words before any of the subparagraphs to indicate a break in the single relative clause or to introduce a separate condition. The drafters could have added an introductory clause before the subparagraph endings to indicate that these were intended to be conditions separate from the "which it considers" clause. The drafters *did* add such a clause in other provisions, such as Article XX(i) and Article XX(j), which use the phrase "provided that." Such a clause is absent from Article XXI(b), however, indicating that the text should be read as a single clause, and not as introducing separate conditions.

74. In addition, the suggestion by Hong Kong, China, that Article XXI(b) is not self-judging in that the principle of "good faith" requires a panel to review whether a Member has acted in good faith in invoking Article XXI is inconsistent with the ordinary meaning of Article XXI(b), as well as with the DSU. The interpretation proposed by Hong Kong, China, would rewrite Article XXI(b) to insert the text, and impose the requirements, of the chapeau of Article XX. The chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," both of

which concepts aim to address applying a measure inconsistently with good faith. Again, Hong Kong, China, is effectively asking the Panel to read into Article XXI text that is not there.

B. Reconciling the Authentic Texts of Article XXI(b) under Article 33 of the VCLT Establishes that Article XXI(b) Is Self-judging

75. Hong Kong, China, argues that there is no need to reconcile the different language versions of Article XXI(b). Hong Kong, China, fails to account for the clear differences between the Spanish text of Article XXI(b), and the English and French texts of Article XXI(b) (as well as the English, French, and Spanish texts of the security exceptions in the GATS and the TRIPS Agreement). The VCLT expressly contemplates that there might be differences in authentic texts. Acknowledging those differences does not equate to challenging the authenticity of a text, contrary to the suggestion by Hong Kong, China. Rather, it is part of the process of treaty interpretation, and an effort to give meaning to all authentic texts.

76. As the United States has explained, the interpretation that best reconciles the textual differences between the English and French subparagraph texts on one hand, and the Spanish subparagraph text on the other – specifically the different relationship between the subparagraph endings and the chapeau terms – as provided for by Article 33 of the VCLT, leads to the same fundamental meaning: that Article XXI(b) commits the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

C. Interpretation of the subparagraphs of Article XXI(b) as self-judging reflects the principle of effectiveness

77. Hong Kong, China, submits that the interpretation that the subparagraphs of Article XXI(b) are self-judging must be rejected in favor of a principle of effectiveness that is not itself provided for in the principles of treaty interpretation. Article 31 of the VCLT itself embodies the principle of effectiveness. That is, with respect to the interpretation of Article XXI(b) (as for any provision), there is no separate principle of effectiveness that requires an outcome different than an interpretation consistent with Articles 31 through 33.

78. Hong Kong, China, suggests that the subparagraphs must be found not to be self-judging so as to prevent Members from "circumvent[ing] their treaty obligations under the GATT 1994 by disguising discriminatory measures as 'essential security interests'." This outcome-driven approach is one that the International Law Commission rejected in declining to include a separate rule on effectiveness in the VCLT that would have required an interpreter to give a treaty "the fullest weight and effect". The ILC specifically noted that including such a separate rule "might encourage attempts to extend the meaning of treaties illegitimately on the basis of the principle of 'effective interpretation'."

79. With respect to the claim by Hong Kong, China, that, because of the possibility that it perceives of abuse, the GATT 1994 cannot have "appropriate effects" if Article XXI(b) is self-judging, Hong Kong, China, seeks to read into Article XXI(b) language regarding discrimination and disguise that are *not* found in that provision – but are provided for in Article XX. The argument by Hong Kong, China, fails to give effect to the different language in the different exceptions. In addition, this assertion by Hong Kong, China, presumes that, absent panel review of the merits of essential security measures, a Member has no recourse with respect to another Member's essential security actions. This is incorrect. To the extent that Members were concerned with potential abuses of Article XXI(b), they provided for non-violation nullification or impairment claims as an avenue to address such perceived abuses.

80. In addition, the fact that a treaty reserves judgment to a party itself does not render the treaty language "mere suggestions", or "superfluous", as Hong Kong, China, suggests. By serving to guide a Member's exercise of its rights under Article XXI(b), the subparagraphs inform a Member's decision-making when it is considering action to protect its essential security interests. In the experience of the United States, governments do consider the implications of proposed actions with respect to their trade agreements, without being motivated solely by the threat of WTO litigation. This is not a meaningless exercise, and the subparagraphs, like other WTO provisions that do not provide a role for panel review, are not useless in this regard.

D. Article XXI(b) does not require an invoking Member to identify a specific subparagraph

81. Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member's right to take any action which it considers necessary for the protection of its essential security interests. Hong Kong, China, cites nothing in the text of Article XXI(b) that suggests one specific subparagraph must be invoked. A Member invoking Article XXI(b) may nonetheless choose to make information available to other Members. Indeed, the United States has made plentiful information available in relation to its challenged measures, as well as provided that information in the course of this dispute. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

E. The Context of Article XXI(b) Supports that It is self-judging.

82. Hong Kong, China, appears to suggest that Article XXI(a) is not relevant context because the United States has not invoked Article XXI(a) in this dispute, and that in any event Article XXI(a) does not support an interpretation that Article XXI(b) is self-judging because information regarding a Member's invocation of Article XXI(b) will "generally" be publicly available and panels have means to deal with sensitive information. Hong Kong, China, is incorrect with respect to both assertions. Regardless of whether a Member has invoked Article XXI(a) in a particular dispute, or what public information is available about the measures challenged, the circumstances of a particular dispute do not alter the meaning of the terms of either Article XXI(a) or Article XXI(b). Interpreting Article XXI(b) as subjecting a Member's security measures to review by a panel would mean that, at least in some instances, a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a conflict would arise in every instance, the Panel must avoid an interpretation of Article XXI(b) that could undermine the effectiveness of Article XXI(a).

83. Hong Kong, China, also argues that certain similarities between Articles XX and XXI(b) – in particular, the term "relating to" and the fact that both provisions include a chapeau followed subparagraphs – suggest that the analysis of previous reports regarding Article XX apply to the interpretation of Article XXI(b), and that the subparagraphs of Article XXI(b) are subject to objective review. This argument ignores key differences between Articles XX and XXI. Those differences confirm that Article XXI(b) is self-judging.

84. Hong Kong, China, argues that other WTO provisions do not support that Article XXI(b) is self-judging because those provisions are not self-judging. However, Hong Kong, China, fails to acknowledge the text of those provisions. The language of Article XXI(b) contrasts with other provisions in which Members agreed to empower an adjudicator to decide whether a Member could plausibly arrive at a certain conclusion.

85. Hong Kong, China, claims that the *Russia – Traffic in Transit* panel correctly analyzed the object and purpose of the GATT 1994 in determining that Article XXI(b) is not entirely self-judging. However, that panel identified only a general object and purpose of the GATT and WTO agreements based on statements by "[p]revious panels and the Appellate Body," rather than referring to the agreements themselves. Such an approach is not consistent with the customary rules of treaty interpretation. Moreover, the security and predictability of the multilateral trading system is not well-served by converting it into a forum for security issues. Nor would such an effort, in the words of the preamble to the WTO Agreement, contribute to a "more viable and durable multilateral trading system". The GATT 1994 makes available a claim through which an affected Member may seek to maintain the level of "reciprocal and mutually advantageous arrangements", that is, a non-violation nullification and impairment claim.

F. A Subsequent Agreement And Recourse to Supplementary Means of Interpretation Confirms that Article XXI(b) Is Self-Judging.

86. Hong Kong, China, argues that neither the 1949 decision by the GATT contracting parties pursuant to the *United States Export Measures* dispute, nor the the Decision Concerning Article XXI of the General Agreement (the 1982 Decision), is a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT. Hong Kong, China, further asserts that both decisions support its

interpretation of Article XXI(b). While the United States agrees that the 1982 Decision is not a subsequent agreement, the assertions by Hong Kong, China, are otherwise incorrect. The Panel should take into account the subsequent agreement reflected in the *United States Export Measures* decision regarding the self-judging nature of Article XXI(b). The context in which the interpretation was adopted by the GATT Council supports this argument. Hong Kong, China, is incorrect to assert that finding that the *United States Export Restrictions* interpretation is a subsequent agreement would mean that all WTO panel and Appellate Body reports would be "subsequent agreements". The non-binding nature of such reports is established by the text of the WTO Agreement; the WTO Agreement explicitly reserves to the Ministerial Conference and General Council the "exclusive authority" to adopt "authoritative interpretation" of a provision of the covered agreements. The 1982 Decision supports the interpretation that Article XXI(b) is self-judging, contrary to the assertions by Hong Kong, China. The preamble to this decision twice acknowledges the self-judging nature of Article XXI.

87. Materials that are proper supplementary means of interpretation under the VCLT confirm that Article XXI(b) is self-judging. Hong Kong, China, misconstrues certain ITO negotiating materials, and fails to acknowledge other materials, including the Uruguay Round negotiating history, in arguing to the contrary. Those negotiating materials further confirm that non-violation nullification and impairment claims are the appropriate recourse with respect to concerns regarding another Member's essential security measures. While rejecting the relevance of proper negotiating history, Hong Kong, China, nonetheless suggests that the Panel should rely on internal documents of a single delegation in the interpretative exercise. There is no basis in the customary rules of treaty interpretation for such an approach, and in any event Hong Kong, China, is incorrect to argue that those materials support an interpretation that Article XXI(b) is self-judging.

G. Hong Kong, China, Fails to Rebut the U.S. Showing that Article XXI(b) Applies to the Claims under the Agreement on Rules of Origin and the TBT Agreement

88. Hong Kong, China, fails to interpret the plain text of the covered agreements in their context in asserting that Article XXI does not apply to the claims at issue. Hong Kong, China, does not address in any meaningful way either the context served by the single undertaking structure of the WTO Agreement or the textual linkages that, as the United States has shown, support the conclusion that Article XXI applies to the claims at issue.

89. Hong Kong, China, fails to recognize the single undertaking structure of the WTO Agreement by adopting an approach that is not consistent with the customary rules of treaty interpretation as the basis for its erroneous conclusion that Article XXI(b) does not apply to the claims at issue.

90. Hong Kong, China, attempts to dismiss the relevance of the structure of the WTO Agreement as context by mischaracterizing the U.S. explanation regarding applicability as simply an argument that the *Agreement on Rules of Origin* and TBT Agreement "relate in some way to trade in goods." The U.S. explanation, however, does not rely solely on the fact that these agreements all relate to goods, but rather on the single undertaking structure established by the text of the WTO Agreement, and consideration of the structure of a treaty as context is provided for in the customary rules of treaty interpretation. The structure of the WTO Agreement does not support a finding that the essential security exception necessarily only applies to those Annex 1A agreements that expressly incorporate it, as Hong Kong, China, suggests.

91. Hong Kong, China, suggests that the question of whether Article XXI(b) applies to the claims under the *Agreement on Rules of Origin* and the TBT Agreement can be reduced to two questions: whether the non-GATT agreement expressly incorporates the essential security exception, or encompasses it by "necessary implication". Neither the customary rules of treaty interpretation, nor the past reports on which Hong Kong, China, seeks to rely, support the use of this type of two-part analysis, or otherwise limit the applicability of Article XXI to those two circumstances. With respect to the "necessary implication" standard suggested by Hong Kong, China, this language is not treaty text, nor a standard set forth in the customary rules of treaty interpretation.

92. Hong Kong, China, maintains that based on its application of the principle of effectiveness, finding that Article XXI applies to a non-GATT agreement in the absence of language expressly providing as much would render the express incorporations in other WTO agreements ineffective. This purported application of the principle of effectiveness is incorrect. Article XXI(b) may apply without that language, but that does not make the express reference "ineffective". A statement

providing additional clarity to the reader is not "ineffective", under either customary rules of interpretation or as a matter of simple logic. Having applied those rules and interpreted the terms of a treaty in good faith in its context and in light of the treaty's object and purpose, there is no separate inquiry or principle regarding effectiveness to be applied. It does not mean that a reading in which a provision provides explicit clarity on a matter is "ineffective" simply because a careful reading of a provision in its context and in light of the treaty's object and purpose might reach the same result. Thus, the principle does not mean that a treaty should be interpreted in such a way to provide effectiveness in the sense that the outcomes would necessarily be different in the absence of the language at issue. Instead, the principle simply means that interpretation should not be conducted in a way that makes a provision ineffective.

93. Hong Kong, China, generally does not engage with the specific textual links between the *Agreement on Rules of Origin* and the TBT Agreement, respectively, and the GATT 1994. Instead, Hong Kong, China, asserts that those linkages are not "specific" or "objective" and dismisses them as general in nature. The United States disagrees. In its First Written Submission, the United States identified the various specific linkages among the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement, which as part of a holistic reading support that the essential security exception applies to the provisions at issue in this dispute. Further, as explained in the U.S. response to Question 23, those linkages substantively differ from those at issue in past reports in which the linkages between Article XX of the GATT 1994 and a non-GATT agreement were described as "general".

94. Hong Kong, China, has brought what it characterized as essentially the same claims against the same measures under the provisions of three Annex 1A Agreements. Although Hong Kong, China, seeks to distance itself from its previous characterization of its claims in its responses to the questions from the Panel, the overlap between the claims is established by the claims themselves. And the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation, as discussed above. The text of the provisions at issue, and the substantive overlap in terms of the claims themselves, establishes that the claims are essentially the same. The overlap between the claims at issue is relevant in the interpretative exercise because the relationship between those claims is relevant context. Nothing in the single undertaking structure of the WTO Agreement suggests that the MFN principle is different among the agreements, or that Members had a different view of essential security with respect to marking requirements *if* they were also considered to be within the larger set of measures defined to be rules of origin or technical regulations.

95. Furthermore, Hong Kong, China, selectively reads the preambles and certain provisions within the *Agreement on Rules of Origin* and the TBT Agreement to argue that Article XXI does not apply to the claims at issue, and such selective interpretation is inconsistent with the customary rules of treaty interpretation.

H. Hong Kong, China, Has Not Established a Breach of the Agreement on Rules of Origin, the TBT Agreement, or the GATT 1994

96. Hong Kong, China, has failed to establish a breach of the *Agreement on Rules of Origin*. Hong Kong, China, conflates the result of the application of rules of origin, and the name used to reflect that result, with the rules of origin themselves. In addition to failing to establish that the measures at issue are within the scope of the agreement, Hong Kong, China, has otherwise failed to establish that they breach Article 2(c) or 2(d).

97. The *Agreement on Rules of Origin* makes a clear distinction between rules of origin that are applied to determine origin and used in the administration of certain instruments, and the underlying instruments themselves. The logic behind the argument by Hong Kong, China, appears to be as follows: A rule of origin is applied to determine origin for marking purposes; terminology – in the present dispute, the words used to indicate origin – is used in marking; terminology is therefore itself a rule of origin. Hong Kong, China, provides no textual support for this conclusion because there is none.

98. Hong Kong, China, also considers that if the *Agreement on Rules of Origin* does not apply to the terminology used in marking requirements, this would mean that the Agreement "does not apply to rules of origin used in the application of origin marking requirements" at all. This is not the case. The specific disciplines set forth in the *Agreement on Rules of Origin* apply to "rules of origin" as

defined in the Agreement "used in the application of" marking requirements. By its terms, the Agreement does not apply to terminology used in marking requirements. The *Agreement on Rules of Origin* establishes that a "rule of origin" is used to match a good – based on its processing – with a certain territorial region. The Agreement applies to the *process* by which origin of a particular good is matched to a particular geographic area, and does not mandate that a Member under its marking rules use a particular term for that geographic region. The *Federal Register* notice does not make a determination of origin as to any product. It simply provides, in light of the determination in Executive Order 13936, what the name would be in the event that – as a result of application of the normal rules of origin – a good was determined to have been produced in the area of Hong Kong, China.

99. Hong Kong, China, is incorrect in asserting that the *Agreement on Rules of Origin* requires that a specific outcome be reached with respect to the origin of a particular good. Nothing in the *Agreement on Rules of Origin* requires a particular "country" (however defined) to in fact be the country of origin for any particular good. Nor does the Agreement provide that any particular term needs to be used to identify that country.

100. Hong Kong, China, also failed to establish a breach of the TBT Agreement. As an initial matter, Hong Kong, China, does not make a showing that the measure in dispute falls within the scope of the TBT Agreement as a technical regulation. The initial theory of the case proposed by Hong Kong, China, is that it has the burden of establishing that the U.S. measure "detrimentally modifies the condition of competition in the U.S. market." Hong Kong, China, has not elaborated or expanded on such evidence, and thus has failed to establish a breach of Article 2.1. In its written response to Panel questions, Hong Kong, China, attempts to walk away from its own theory of the case. It claims that the disputed measure is actually *de jure* discriminatory; and that "there is no need for a panel to evaluate whether any detrimental impact on imports stem exclusively from a legitimate regulatory distinction. Relabeling its allegations as *de jure* discrimination, however, does nothing to advance the argument by Hong Kong, China. The term "*de jure* discrimination" is found nowhere in Article 2.1, and what Hong Kong, China, means by it in the context of this dispute is completely unclear. What is clear is the text of Article 2.1, and Hong Kong, China, needs to establish all of the requirements in Article 2.1 to support an allegation of breach. It has not done so.

101. The United States does not agree that there is "no need for additional analysis" in cases in which a technical regulation makes an origin-based distinction. An origin-based distinction by itself may not necessarily lead to treatment that is "less favorable" per the plain meaning of the text of Article 2.1. A complainant must still demonstrate how such origin-based distinction is "less favorable." The failure by Hong Kong, China, to make out its case does not excuse it from its burden of showing that the measure does not arise from a legitimate regulatory distinction or consider the regulatory objective of the measure.

102. Hong Kong, China, appears to suggest that "essential security interest" need not be taken into account when making an assessment of an Article 2.1 claim. The position of Hong Kong, China, with respect to the seventh recital is not surprising, given its position that the U.S. invocation of Article XXI(b), and the concerning facts relating to the undermining of the autonomy of Hong Kong, China, and the rights and freedoms of its people that the United States has put forth regarding the measures at issue can simply be dismissed. If the Panel were to "take into account essential security interest" (or in the U.S. view "security interest") in the assessment of the Article 2.1 claim, as suggested by the Panel's questioning, Hong Kong, China, would have to be in a position to address the well-documented concerns on the face of the measures at issue and elsewhere in the record about the situation in Hong Kong, China, including the imposition of the National Security Law. Hong Kong, China, has not acknowledged the language of the measures at issue, or anything else on the record in this respect.

103. Hong Kong, China, also failed to establish a breach of the GATT 1994. As the complainant in this dispute, Hong Kong, China, has the burden of establishing each of the elements of a claim under Article IX:1 with respect to the measures at issue. Hong Kong, China, has failed to do so. In particular, Hong Kong, China, fails to establish different treatment, much less "less favorable" treatment. In addition – as with its claims under the *Agreement on Rules of Origin* – Hong Kong, China, considers that Article IX:1 of the GATT 1994 prescribes the "actual" country of origin, as well as how it is determined, and requires the "full English name" of that country to be used for a mark. Hong Kong, China, does not provide any textual support for its conclusion that Article IX:1 imposes such a requirement. Hong Kong, China, asserts that in the present dispute the question of what

constitutes "less favorable treatment" in Article IX:1 of the GATT 1994 is the same as what constitutes "less favorable treatment" for purposes of Article 2.1 of the TBT Agreement, and reiterates its erroneous conclusion that the measures at issue are *de jure* discriminatory. Whatever label Hong Kong, China, uses – e.g., *de jure* or *de facto* – it has the burden of proving its claim. For both Article IX:1 of the GATT 1994 and Article 2.1 of the TBT Agreement, Hong Kong, China, must prove that the measure provides for *different* treatment, and that the different treatment is *less favorable* treatment. Hong Kong, China, has not done so. The claims by Hong Kong, China, under Article I:1 of the GATT 1994 suffer similar flaws as its claims under Article IX:1.

I. The Only Finding The Panel May Make Consistent with the DSU is to Note the United States' Invocation of Article XXI

104. In light of the self-judging nature of Article XXI(b) and the U.S. invocation with respect to the claims at issue, the sole finding that the Panel may make consistent with the terms of reference and the DSU is to note the U.S. invocation. Hong Kong, China, argues that Articles 3.2, 3.3, 7.2, 11, 23.1, and 23.2(a) of the DSU indicate that Article XXI(b) is not self-judging, and compel a panel to make a recommendation as to whether an essential security measure is consistent with WTO obligations or should be modified or withdrawn. Hong Kong, China, does not interpret the terms of these, or any other, DSU provisions as written in making these arguments. Hong Kong, China, also fails to recognize the availability of non-violation nullification and impairment claims as a recourse.

V. EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE HEARING

105. The measures in dispute on their face make clear the essential security interests at stake. The United States has supplied the Panel with various evidence on how those U.S. essential security concerns have indeed since materialized. Hong Kong, China, has never disputed or contested any of those facts. The Panel is presented with the fundamental question as to the role of the multilateral trading system in such matters.

106. The self-judging nature of Article XXI(b) of the GATT 1994 is established by the text of that provision, in its context, and in light of the treaty's object and purpose. Hong Kong, China, suggests reading a good faith obligation into the text of Article XXI(b). However, under the DSU, panels are limited to examining the consistency of challenged measures with cited provisions of "covered agreements". Nothing in the text of the provisions of the covered agreements at issue, including Article XXI(b), provides for a good faith obligation.

107. Although the U.S. position is that, in light of the self-judging nature of Article XXI(b), it is not compelled to invoke and make an evidentiary showing with respect to a specific subparagraph, Hong Kong, China, is also incorrect to assert that the United States has made no articulation of its essential security interests in this dispute.

108. The United States has shown, using the customary rules of treaty interpretation, that Article XXI(b) applies to the claims at issue under the Agreement on Rules of Origin and the TBT Agreement. Hong Kong, China, incorrectly rejects the relevance of the structure of the WTO Agreement as context under those rules, both in terms of the overlapping nature of the claims at issue and the balance of rights and obligations provided by the single undertaking.

109. Hong Kong, China's claim that the marking requirement at issue breaches the *Agreement on Rules of Origin* is based on a number of fundamentally flawed arguments with respect to the scope of the Agreement, as well as a mischaracterization of the measures at issue and their basis.

110. Hong Kong, China, also fails to establish a breach of the TBT Agreement. Hong Kong, China, does not show how the disputed measure actually accords "less favorable" treatment under Article 2.1 of the TBT Agreement on the basis of an origin-based discrimination. Second, Hong Kong, China, fails to engage with the regulatory objective of the disputed measure. Third, the detrimental impact claims by Hong Kong, China, are baseless.

VI. EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL'S SECOND SET OF QUESTIONS

U.S. Responses to Questions 68-82

111. The mere requirement to employ a certain country name in product marking is not sufficient to establish detrimental impact. The fact that goods are marked with "China" simply reflects the fact that all imports must be marked using the terminology determined by the United States. This by itself does not constitute evidence of detrimental impact, much less "less favorable treatment", and the response would be no different depending on whether the Member in question is a separate customs territory. To recall, the purpose and overall concern of the marking requirement at issue is not origin-based. The determination with respect to the autonomy of Hong Kong, China, stems from the global U.S. concern for fundamental freedoms, human rights, and integrity of democratic institutions. Interpreting a measure and its impact, if any, must take into account not only the text of the measure, but also its regulatory objective and purpose. Formally different treatment of like products from different sources does not mean there is "less favorable" treatment.

112. Assessment under Article 2.1 is a holistic examination of all the facts and circumstances, including finding a rational linkage between and among the detrimental impact, the regulatory purpose, or facts and circumstances that may provide an origin-neutral explanation. As for what the United States means by rational linkage or relationship as it pertains to the measure, the meaning is twofold: one, whether the regulatory distinction is apt to advance the origin-neutral purpose (here, the United States determined that Hong Kong, China, lacks sufficient autonomy vis-à-vis the People's Republic of China, and therefore differential treatment was suspended); two, whether detrimental impact naturally flows from the origin-neutral regulatory distinction. Hong Kong, China, has refused to engage with the regulatory objective, even as reflected on the face of the measure, and insists that there is "no need for additional" analysis because the "sufficient autonomy condition" applies only to Hong Kong, China.

113. Hong Kong, China, has not shown under its various theories either that the United States determines country of origin for Hong Kong, China, in a manner different than for any other WTO Member; that the United States determines the "actual" country of origin for marking purposes differently; or that "China" may not be the "English name" for marking purposes. The United States questions what purpose a mark of origin that is contrary to a Member's determination regarding the autonomy or territory of a country would serve. The U.S. determination with respect to lack of autonomy in Hong Kong, China, **clearly establishes** why Hong Kong, China, is not entitled to treatment distinct from treatment of the People's Republic of China for purposes of marking, such that "China" is not "mislabeling". Hong Kong, China, is simply dissatisfied with the U.S. determination that it is no longer sufficiently autonomous from the People's Republic of China for purposes of U.S. law.

U.S. Responses to Questions 84-93

114. The basis for considering the legal structure of a treaty is the customary rules of treaty interpretation, which calls for interpretation of the text, in its context and in light of the treaty's object and purpose. The structure of the treaty is context in this exercise. Basic logic and sound reasoning are – quite obviously – necessary for applying the customary rules of treaty interpretation. To not apply logic would run directly contrary to Article 31 of the VCLT, which provides for a treaty to be interpreted "in good faith" in accordance with its text. It is only through logic and reasoning that, for example, a treaty interpreter can analyze what is the "ordinary meaning" of a treaty term or how any particular element of context can affect the interpretation of a particular treaty provision. And conversely, treaty interpretation is not supposed to produce absurd results and interpretations.

115. Under the arguments by Hong Kong, China, a claim of less favorable treatment with respect to a marking requirement would be subject to a higher level of justification – in the sense that a Member seeking to protect its essential security interests with respect to such a requirement would have no recourse to an essential security exception – if that marking requirement were also a rule of origin or a measure disciplined by the TBT Agreement, because Hong Kong, China, considers that Article XXI(b) does not apply to any claims under those agreements even if those claims are virtually the same. This would diminish a Member's right to act to protect its essential security interests and to invoke Article XXI(b) with respect to marking requirements (including with respect to

substantively the same claims of origin-based discrimination) – even though they are specifically recognized by and disciplined by the GATT 1994.

U.S. Responses to Questions 94-126

116. All of the elements in the text of Article XXI(b), including each subparagraph ending, are part of a single relative clause, and they are left to the determination of the Member. Specifically, because the operative language is "it considers," Article XXI(b) reserves for the Member to decide what action it considers "necessary for" the protection of its essential security interests and which circumstances are present. In that sense, the phrase "which it considers" "qualifies" all of the elements in the relative clause, including the subparagraph ending. The legal effect is that the provision is self-judging in its entirety. In other words, the text of Article XXI(b) reserves for the Member the determination of what it considers necessary for the protection of its essential security interests in the circumstances set forth.

117. The English, French, and Spanish texts can be reconciled, as called for under Article 33 of the VCLT. The United States has not identified any rule that would prevent the word "considers" in Article XXI(b) from relating to both the phrases beginning with "necessary" and "taken" without there being a connector between those phrases in either English, French, or Spanish. To the contrary, the absence of a connector between the three (logically separate) subparagraph endings strongly suggests parallelism between those endings – that is, that each subparagraph ending completes the relative phrase ("which it considers") that precedes it.

118. The post-1947 revisions to the Havana Charter essential security provisions, including the modification at the end of the chapeau, were not adopted during the Uruguay Round, reflecting that negotiators did not intend to incorporate whatever subsequent changes might have gone into the ITO text into Article XXI(b).

119. The report in *Russia – Traffic in Transit* does not reflect an interpretation of Article XXI(b) consistent with the customary rules of treaty interpretation. There is no basis in those rules for rejecting the interpretation such an examination yields in favor of an inquiry into either the "logical structure" of a provision, or whether a provision is "capable of objective determination". The DSU makes clear that it is the text of the relevant agreement(s) that determines how a panel should assess a Member's invocation of Article XXI(b). The *Russia – Traffic in Transit* panel erred in finding that the existence of the circumstances in the subparagraphs is subject to review by a panel. In reaching this finding, the panel discounted its own conclusion that the meaning of the words and the grammatical structure supported the interpretation that Article XXI(b) is self-judging in its entirety, and instead conducted an inquiry into whether the subject matter of the subparagraphs is *capable* of objective determination – an inquiry that is not called for under the customary rules of treaty interpretation. The ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Contrary to statements by the panel in *Russia – Traffic in Transit*, nothing in the text somehow limits an "other emergency in international relations" under Article XXI(b)(iii) to an emergency similar to "war", or to situations "giv[ing] rise to defence and military interests, or maintenance of law and public order interests." Likewise, nothing in the text of Article XXI(b)(iii) limits an "emergency in international relations" to a specific territorial area, that is, one "engulfing or surrounding a state".

120. Because Article XXI(b) is self-judging, the Panel need not, and should not, assess the existence of an emergency in international relations. To the extent that the Panel nonetheless chooses to assess the merits of the U.S. invocation, the United States has submitted extensive evidence into record that supports the U.S. invocation of Article XXI(b), as well as the existence of an emergency in international relations. Were the Panel to review whether the circumstances at issue constitute an "emergency in international relations", the views of other countries regarding the situation with respect to Hong Kong, China, could support a finding that there is such an emergency. The fact that multiple countries share the U.S. concerns also shows the baselessness of the accusations by Hong Kong, China, during the second videoconference that those concerns are not sincere.

121. The conclusion of the *Russia – Traffic in Transit* report that Article XXI(b) is subject to a good faith obligation is not based in the customary rules of treaty interpretation. The U.S. concerns with the panel's approach do not relate to whether Members are to implement their obligations in "good faith" under international law. The United States understands that they are – indeed, the United

States understands further that Members are presumed to act in good faith. However, under the DSU, the WTO dispute settlement system has a limited mandate, which is to determine conformity with the "covered agreements," and not international law more generally. In other words, there is no basis in the DSU for examining the consistency of a Member's action with Article 26 of the VCLT, or with a principle of good faith more generally. These are not provisions of the "covered agreements".

VII. EXECUTIVE SUMMARY OF THE U.S. COMMENTS ON RESPONSES BY HONG KONG, CHINA, TO THE SECOND SET OF PANEL QUESTIONS

U.S. Comments on Questions 68-82

122. Hong Kong, China, appears to suggest that an "origin-based distinction" in some instances itself establishes "detrimental impact" (such that there is no need for an evidentiary showing of such impact), and that is what it refers to as "*de jure*" discrimination. This position is untenable. The only alleged support that Hong Kong, China, offers for its conclusion is a quote of a single statement from the European Union's third party submission. However, the European Union's submission does not itself explain the basis for this statement, nor does the United States understand the EU statement to support Hong Kong, China's approach.

123. Hong Kong, China's view that there is no need to account for the regulatory purpose of a measure in cases of what it calls "*de jure*" discrimination is not based in the text of Article 2.1, but rather is based on its reading of certain past dispute settlement reports. Notwithstanding that those reports do not stand for the proposition that Hong Kong, China, asserts, the task of the Panel is to interpret the provisions at issue in accordance with the customary rules of treaty interpretation. The United States notes that the prior reports on which Hong Kong, China, seeks to rely (in lieu of the text of Article 2.1) in support of its argument that no regulatory analysis is required in cases of "*de jure*" discrimination did not address a measure that inherently makes distinctions on the basis of origin, such as a mark of origin requirement. Those reports also did not define or clarify what a "*de jure*" discrimination finding would look like in the context of Article 2.1 of the TBT Agreement, and especially in the context of measures relating to actions necessary to protect an "essential security interest." Moreover, those reports never mentioned that there is "no need for additional analysis" or even consideration of the regulatory objective under certain circumstances when it comes to the examination of a disputed measure.

124. Hong Kong, China, makes no effort to address the absurd results of its interpretation regarding "justification" of measures under Article 2.1 as opposed to under nondiscrimination provisions of the GATT 1994. Hong Kong, China's interpretation would significantly constrain policy space for Members to maintain technical regulations under the TBT Agreement, even if the policy objective is one that the TBT Agreement explicitly recognizes as legitimate. That is, according to Hong Kong, China, while a Member may defend a breach of GATT III:4 under one of the Article XX subparagraphs, there can be no "justification" for the exact same regulation under an Article 2.1 claim if the regulation is what Hong Kong, China, characterizes as "*de jure*" discriminatory, regardless of the regulatory objective.

U.S. Comments on Questions 84-93

125. Hong Kong, China, suggests that modifying the GATT 1947 in the GATT 1994 to provide that Article XXI applies to the other Annex 1A agreements "would have been a simple matter". This assertion is just fiction, without any basis. Indeed, incorporating the GATT 1947 into the GATT 1994 was not a "simple matter", and editing the GATT 1947 itself was not necessarily even considered possible.

126. Hong Kong, China, purports to recognize that the "specific relationship" among the agreements and their provisions must take into account this single undertaking structure as context. But then Hong Kong, China, simply ignores this structure and repeats its unsupportable arguments about the applicability of Article XXI. Indeed, within a few sentences of recognizing the overall structure, it rehashes its stale arguments that each of these agreements are "distinct" and essentially must be interpreted in a vacuum reflecting their "own balance of rights and obligations." Rather than conducting a text-based rebuttal of the U.S. application of the customary rules of treaty interpretation with respect to the interpretative question at issue, the response by Hong Kong, China, relies on prior reports addressing the applicability of Article XX. In addition, Hong Kong, China, fails

to address the differences between Article XX and Article XXI for purposes of the analysis in this dispute.

127. Hong Kong, China's understanding of a Member's rights under Article XXI(b) is not only flawed, but also alarming. According to Hong Kong, China, the structure of the WTO Agreement reflects that a WTO Member has *no right* to take actions that it considers necessary to protect its essential security interests – in *any* circumstances – under at least "ten other [WTO] agreements". The dangerous consequences of this position are laid bare by the current circumstances facing Ukraine and the Ukrainian people in the wake of the unjustified invasion by the Russian Federation. The United States considers, consistent with its views expressed in this dispute, that Ukraine is well within its rights to suspend application of the WTO agreements in Annex 1A other than the GATT 1994 to the Russian Federation. The current situation makes clear the absurdity, and the dangerousness, of the argument that drafters of the Uruguay Round simply chose to relinquish their respective rights to take essential security actions under those agreements (for example, because they did not expressly incorporate Article XXI(b) into certain agreements).

128. Furthermore, Hong Kong, China, fails to acknowledge that the United States has also shown the various text-based linkages that establish that Article XXI applies to the ***specific claims at issue*** under the agreements at issue. Hong Kong, China's claim that the U.S. interpretation in that regard would apply with respect to Article XX is not only incorrect in light of the differences between Article XX and Article XXI(b) that the United States has identified throughout this dispute, but it also ignores the specific interpretive issue at hand. The overlap between the claims is established by the nature of the claims themselves – that is, for all of its claims, Hong Kong, China, is claiming that it is subject to a requirement (consideration of autonomy, and in turn marking as "China") that other Members are not, in a way that it is impermissibly discriminatory. And the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation.

U.S. Comments on Questions 94-126

129. Contrary to Hong Kong, China's suggestion, the United States is not asking the Panel to use "interrogative powers" with respect to its invocation of Article XXI(b). The United States does not ask the Panel – or anyone else – to make its case for it. To be clear, because Article XXI(b) is self-judging by its terms, a Member invoking that provision has no further case to make. Even though Article XXI(b) is self-judging and a panel should not review a Member's essential security decisions, the United States in fact has provided ample evidence on this issue. Thus, Hong Kong, China, is incorrect to assert that the United States has provided no evidence or argument to support its invocation of Article XXI(b).

130. It appears that Hong Kong, China, considers that a WTO Member may not validly consider events anywhere outside its territory to be an emergency in international relations or part of its essential security interests. While this position might reflect Hong Kong, China's appraisal of its own security interests, to the extent Hong Kong, China, even retains the capacity to do so, it is not the place of Hong Kong, China, or Chinese authorities, to make that determination for other Members who may choose to take action in response to terrible situations well beyond their borders in light of their own appraisal of their essential security interests in those circumstances. Hong Kong, China's position has no basis in the text of Article XXI(b) and should be rejected by this Panel.

131. Hong Kong, China's conclusion in its response underscores why negotiators agreed, in the text of Article XXI(b), that the assessment of whether a situation constitutes an "emergency in international relations" such that a Member would act to protect "its" essential security interests would be left to the Member. Hong Kong, China, apparently considers that concerns about freedom and democracy, or concerns about events outside a Member's territory, are not and cannot be essential security interests, and may not give rise to an emergency in international relations. The United States does not agree, as is clear from the face of the measures at issue and the other evidence that the United States has submitted.

132. Hong Kong, China, seeks to establish to the contrary by citing first the title of Article XXI, Security Exceptions. The title of a provision is context, and the operative language of Article XXI(b) itself refers to "its essential security interests", and reflects a Member's right to take "any action which it considers necessary for the protection of" those interests. The ordinary meaning of the

terms of Article XXI(b) establishes that "essential security interests" are not limited to "defense and military interests, as well as maintenance of law and public order interests".

133. Hong Kong, China, also now appears to suggest that Article 31 of the VCLT imposes a good faith obligation on WTO Members that is reviewable by a panel. This suggestion is also not based in the text of either the DSU or Article 31 itself.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Brazil	63
Annex C-2	Integrated executive summary of the arguments of Canada	66
Annex C-3	Integrated executive summary of the arguments of China	71
Annex C-4	Integrated executive summary of the arguments of the European Union	73
Annex C-5	Integrated executive summary of the arguments of Japan	77
Annex C-6	Integrated executive summary of the arguments of Norway	80
Annex C-7	Integrated executive summary of the arguments of the Russian Federation	84
Annex C-8	Integrated executive summary of the arguments of Singapore	89
Annex C-9	Integrated executive summary of the arguments of Switzerland	94
Annex C-10	Integrated executive summary of the arguments of Ukraine	99

ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL****INTRODUCTION**

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

1. CLAIMS UNDER ANNEX 1A AGREEMENTS**1.1 Agreement on Rules of Origin**

2. Brazil understands that the term "country" is not defined by the rules of the ARO. Instead, the ARO sets rights and obligations that Members must follow when establishing their national rules and laws set to determine the country of origin of goods. These rules must be applied in a non-discriminatory form, as recognized by Article IX:1 of the GATT 1994.

3. Brazil acknowledges that the explanatory notes to the WTO Agreement state that the term 'country' or 'countries' may include separate customs territories Member of the WTO. However, this does not necessarily entail that Members are required to arrive at a determination on what constitutes a "country" in order to establish the country of origin of a good. Like Canada¹, Brazil considers that Hong Kong, China may be defined as the country of origin for marking purposes, yet nothing in the ARO makes such a marking mandatory on other Members.

4. Brazil understands that Article 2 of the ARO establishes rules that Members must follow when defining their laws, regulations, and administrative procedures applied to determine the country of origin of goods. The ARO does not directly prescribe, however, the manner in which Members are supposed to recognize the territorial boundaries of other Members. Instead, it allows considerable discretion in designing and applying national rules of origin, creating a general set of rules that limit the scope of regulatory action by Members.

1.2 Agreement on Technical Barriers to Trade (TBT Agreement)

5. Brazil observes that the TBT Agreement does not reproduce the structure and language of Article XXI, neither in its operative part nor in its preamble. In Articles 2.2, 2.10, and 5.4 of the TBT, "national security requirements" or "national security" appear alongside other "legitimate objectives", "problems" or "reasons" such as the protection of human health or the environment. Therefore, the framing of the protection of essential security interests is qualitatively different in the GATT 1994 and in the TBT Agreement.

6. The analysis of whether a technical regulation accords "less favorable treatment" under Article 2.1 of the TBT Agreement would involve two steps in Brazil's view: (i) whether the technical regulation modifies the conditions of competition to the detriment of imported products *vis-à-vis* like products of domestic origin and/or like products originating in any other country; and (ii) whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. Brazil submits that this analysis would reflect the specific text, context, and object and purpose of the TBT Agreement, and would be fully capable of taking into account a situation where a technical regulation is motivated by essential security interests.

7. Moreover, Brazil considers that the expression "less favorable" treatment is qualitatively different under Article 2.1 of the TBT Agreement and Article IX of the GATT. When assessing this difference, the panel may take into consideration the interpretation offered by the Appellate Body, in the *US – COOL* dispute, that the obligations regarding marking requirements "are *separate from, and additional to*, the national treatment obligation in Article III:4 of the GATT 1994".² Brazil

¹ Canada's Third-Party Submission, para. 6

² Appellate Body Report, *US – COOL*, para. 269.

understands that those findings may offer some guidance in the comparison of Article IX of the GATT and Article 2.1 of the TBT.

2. APPLICABILITY AND NATURE OF ARTICLE XXI(B)

8. Brazil sustains that Article XXI is justiciable and subject to review by panels. Members may not use Article XXI indiscriminately to depart from its other obligations set out in the covered agreements. An unconstrained "self-judging" security exception could lend itself to abuses that would ultimately defeat the object and purpose of the WTO. This view is also confirmed by the negotiating history of the GATT, as noted by the panel in *Russia – Traffic in Transit*.³

9. Brazil understands that the assessment of Article XXI(b) entails a two-step analysis, formed by subjective and objective elements. First, in the objective part of its analysis, a panel should assess if at least one of the circumstances in the exhaustive list of paragraphs (i), (ii), and (iii) is present. It is not enough for a Member to simply "refer" to the circumstances enumerated in Article XXI(b) without providing any further information about the objective situation at hand.

10. Regarding the circumstances of Article XXI(b)(iii), especially the term "other emergency in international relations", Members do not have unfettered latitude to define what an emergency in international relations is for the purposes of invoking Article XXI(b)(iii). The reading of subparagraph (iii) should, therefore, be done in light of subparagraphs (i) and (ii), and also in light of its relation to defense and military interests or situations of maintenance of law and public order interests, as portrayed by the panel in *Russia – Traffic in Transit*.⁴

11. Secondly, a panel should proceed to the analysis of the subjective component in Article XXI(b), namely the element of "necessity", and also of the relation of the measure at issue with the "essential security interests" that a Member seeks to protect.

12. Since the recourse to exceptions is in the nature of an affirmative defense, it is the burden of the Member invoking Article XXI(b)(iii) to adduce sufficient evidence that the challenged measures were taken in time of an emergency in international relations. Even if a Member chooses not to disclose *any* information to panels, this does not preclude panels from assessing the case at hand, pursuant to Article 3.7 of the DSU and the obligation to find "a positive solution to a dispute".

13. Brazil also underscores that Members affected by measures under Article XXI may resort to non-violation nullification or impairment claims. However, the fact that a party may decide to present a claim under Article XXIII:1(b) of the GATT and Article 26 of the DSU against a given measure bears no relation to the question of whether Article XXI is a self-judging provision or not. Complainants bear the right to present both a violation complaint and, in the alternative, a non-violation complaint regarding measures adopted under Article XXI. Furthermore, Brazil observes that, according to previous panels, non-violation claims place a heavier burden of proof on the complainant.⁵ To assume that Article XXI could only be challenged by a recourse to Article XXIII:1(b) could, therefore, create an imbalance in the rights and duties of Members.

14. Regarding the relation of Article XXI of the GATT with other covered agreements, Brazil observes that, when the drafters of the multilateral agreements intended to include security (or other) exceptions under their provisions, they explicitly did so. For example, Article 3 of the Agreement on Trade-Related Investment Measures (TRIMs), Article 1.10 of the Agreement on Import Licensing Procedures, and Article 24:7 of the Agreement on Trade Facilitation all explicitly refer to the GATT exceptions, thus welcoming the application of Article XXI into their disciplines. Article 73 of the TRIPS Agreement, in turn, explicitly duplicated the text of Article XXI. For these reasons, to argue that the security exceptions of Article XXI of the GATT 1994 apply to all multilateral agreements, including those which do not contain an express provision to that effect, would amount to reduce the abovementioned clauses to redundancy or inutility, a reading contrary to the tenets of text-based interpretation of the covered agreements.

15. In the case of the TBT Agreement, Brazil concludes, in light of the aforementioned, that, if the drafters had wanted to incorporate the provisions of Article XXI fully into the TBT Agreement, they

³ Panel Report, *Russia – Traffic in Transit*, para. 7.90.

⁴ Panel Report, *Russia – Traffic in Transit*, para. 7.75.

⁵ Panel Report, *Japan – Film*, para. 10.30.

would have explicitly done so. Yet, Members decided to frame the protection of security interests under Article 2.2 in a different manner, as one of the "legitimate objectives" that a Member may seek to fulfill by means of a technical regulation. This confirms the view that Article XXI has its application limited to the provisions of the GATT 1994 or to those instances in which a covered agreement explicitly introduces Article XXI into its disciplines. In the case of the Agreement of Rules of Origin, the absence of any mention to security interests does not allow panels to 'fill the gap' by adding legal provisions that are not there or importing concepts that were not intended by its parties.

16. Finally, Brazil understands that, when assessing an exception under Article XXI, a panel must begin its analysis with the complainant's claims. Even if the respondent does not contest these claims, or if it refuses to provide any further information regarding its measures under Article XXI, a panel must proceed to the assessment of the case before it, aiming to secure "a positive solution to a dispute" pursuant Article 3.7 of the DSU.

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. INTRODUCTION**

1. The following submission sets out the main arguments of Canada in the case at hand. Specifically, Canada's views with respect to the applicability of the Agreement on Rules of Origin (ARO), the Agreement on Technical Barriers to Trade (TBT Agreement) and the GATT 1994 to the measures at issue, as well as the interpretation and application of the essential security exception found in Article XXI of the GATT 1994.

II. AGREEMENT ON RULES OF ORIGIN

2. In Canada's view, the provisions of the ARO at issue in this dispute do not discipline a Member's determination of the particular country that must be marked as the country of origin or what a Member must take into consideration when determining what constitutes a "country" for country of origin marking purposes. Rather, the provisions at issue govern the substantive origin requirements that must be met for a good to obtain a certain origin status. This includes requirements such as manufacturing or processing that must be met before a particular origin will be conferred. The provisions do not discipline or dictate what the actual country of origin must be.

3. The definition of country in the Explanatory Notes to the WTO Agreement does not set out a conclusive definition of what constitutes a "country", or how a Member must arrive at that determination, but rather uses the term "includes" to signify that the term is to be understood to encompass separate customs territories.

4. The definition therefore results in a situation wherein Hong Kong, China may be used as the country of origin for marking purposes, but neither the definition nor the provisions of the ARO require that this be the case.

5. In the case at hand, the United States has chosen to look to territorial boundaries and the exercise of sovereignty in its assessment as to what constitutes a "country" for marking purposes under its domestic law. In Canada's view, neither the Explanatory Note to the WTO Agreement nor the ARO precludes the United States from doing so. Rather, in Canada's view, this is a determination that is firmly within the right of WTO Members to make. Such a determination is not a "rule of origin" *per se*, and therefore not governed by the ARO. The ARO governs rules that determine whether a product originates in a particular country, not the identification of that particular country. Moreover, there is nothing in the ARO or the WTO Agreements more generally that requires that the "country" for country of origin marking purposes must be the same as an identified separate customs territory

III. TBT AGREEMENT

6. Canada considers that, as a threshold matter, Hong Kong, China as the complainant has the burden of articulating how the country of origin labelling or marking measure at issue sets out a product characteristic or applies to a product and is therefore a "technical regulation".

7. Canada questioned whether the "essential and integral aspect"¹ of the measure at issue in this dispute is in fact the "marking requirement" discussed at paragraphs 50-52 of Hong Kong, China's first written submission, or whether it is the "determination" by the United States that, for goods produced in Hong Kong, China, the country of origin is China. In its first written submission, Hong Kong, China has not made any representations in this regard.

8. If the Panel finds that the measure is a technical regulation, it must examine the elements of the test under Article 2.1 to determine whether Hong Kong, China has made a *prima facie* case of a violation. Pursuant to the test for whether a measure accords less favourable treatment under Article 2.1, the Panel must assess whether the US requirement that imports from Hong Kong, China be marked as products of China results in detrimental impact on those products. Canada considers

¹ See Appellate Body Report, *EC – Seal Products*, para. 5.19.

that if the Panel agrees that the United States is permitted under WTO rules to determine that, for origin marking purposes, the country of origin for goods produced in Hong Kong, China is China, then the burden to mark those goods as products of China is the same for Hong Kong, China as it is for other WTO Members. In that case, any burden would not be additional and Hong Kong, China would not be denied any treatment accorded to other Members.

9. If the Panel finds that the measure is a technical regulation that results in detrimental impact on goods from Hong Kong, China the Panel must then consider the applicability of the second element of the test under Article 2.1 -- whether the detrimental impact stems from a legitimate regulatory distinction (LRD). Canada considers that the legitimate regulatory distinction element of Article 2.1 can apply whether the alleged discrimination is *de jure* or *de facto*. In Canada's view, it is conceivable that an origin-based distinction could be an LRD.

10. An argument that the LRD test applies only to *de facto* discrimination would mean that the TBT Agreement did not permit WTO Members to take measures that might result in *de jure* discrimination, at any time, for any reason. In contrast, under Articles I and III of the GATT, if a measure results in *de jure* discrimination, that measure can in principle still be justified by the Member under an exception in the GATT, i.e., one of the sub-paragraphs of Article XX or Article XXI. The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.²

11. Canada notes that Hong Kong, China has not addressed the second element and, as a result, may not have met its burden of establishing a *prima facie* case that the US measure violates Article 2.1 of the TBT Agreement. If the panel finds that Hong Kong, China has not discharged its burden of proving each element of the test, then the claim must fail.

IV. GATT 1994 NON-DISCRIMINATION OBLIGATIONS

12. Under Article I:1, the Panel must assess whether the United States has failed to accord to Hong Kong, China an advantage, favour, privilege, or immunity that it accords to other WTO Members. Similar to Canada's views expressed with respect to Article 2.1 of the TBT Agreement, it has not.

13. In respect of its Article IX obligations, the United States requires WTO Members to mark goods as from the country in which they originate. If the United States validly determines that China is the country of origin for goods from Hong Kong, China, then it is treating Hong Kong, China the same as all other Members, for which it determines country of origin based on a set of objective criteria.

V. ARTICLE XXI OF THE GATT 1994

14. Canada affirmed its view that the essential security exception in Article XXI of the GATT is an exception, to be invoked only once a violation of a substantive obligation has been found. Further, that Article XXI is not self-judging and has both objective and subjective elements. In light of the panel report in *Russia – Traffic in Transit*, in which the Panel made findings on the essential security exception in Article XXI(b)(iii) of the GATT 1994, Canada's view is that the correct test and standard of review for the essential security exception involves a combination of subjective and objective elements. Namely:

- The subjective element of the test is found in the chapeau of paragraph (b), such that the invoking Member need demonstrate only that it considered its measures to be necessary to protect its essential security interests.

² See Appellate Body Report, *US – Clove Cigarettes*, para. 96.

- The objective element of the test is contained in the subparagraphs of paragraph (b) and in the relationship between the subparagraphs and the measures adopted by the invoking Member.

15. Canada agrees with the Panel in *Russia – Traffic in Transit* that a panel must objectively determine that there is a "war or other emergency in international relations" for a measure to fall within the scope of the provision.³

16. Further, it is Canada's view that a panel's assessment of whether the requirements of Article XXI(b) (iii) have been met must include a determination of whether there is a "sufficient nexus" between the measure adopted by the invoking Member and the circumstances set out in subparagraph (iii). Examining whether there is a "sufficient nexus" involves, first, a determination that the measures were taken contemporaneously with the "war or other emergency in international relations". The words "taken in" in the text indicate the need for this temporal connection. Second, a panel must be satisfied that there is a sufficient nexus, or link, between the measures at issue and the war or other emergency

17. The requirements of subparagraph (iii) cannot be satisfied with a mere assertion by the invoking Member that there is a "war or other emergency". This is because such an interpretation, if adopted, would result in reducing subparagraph (iii) to redundancy. Meaning must be ascribed to the fact that Members chose to specify circumstances in which the security exceptions could be invoked. An interpretation that fails to require a Member to demonstrate that such a circumstance objectively exists, and that there is a sufficient connection between the measures and that circumstance, would be at odds with the general rules of treaty interpretation that require meaning be given to each term and provision.⁴

18. In this regard, Canada also notes that a panel may take the invoking Member's appreciation of the situation into consideration, but that view is not determinative. Rather, the panel's task is to make an objective assessment based on available facts where a Member has objectively demonstrated that an emergency in international relations was in existence at the time it took the measures, the Panel must then accord a high level of deference to the subjective determination by the invoking Member that it considers its measures necessary to protect its essential security interests. Canada supports the "plausible link" text set out by the Panel *Russia – Traffic in Transit* between the measures invoked by the WTO Member and the security interest that is essential to the Member.⁵

VI. CONTOURS OF THE PHRASE "EMERGENCY IN INTERNATIONAL RELATIONS"

19. Canada also provided an additional observation in relation to the contours of an "emergency in international relations". The panel in *Russia – Traffic in Transit* appeared to suggest that the "emergency in international relations" must occur within the invoking Member or its immediate surroundings.⁶ Canada disagrees. In Canada's view, such a territorial limitation fails to adequately recognize the myriad of ways in which emergencies in international relations may manifest in modern life. A breakdown in the maintenance of law and public order need not necessarily take place within the territory of an invoking Member or its immediate surroundings in order for an "emergency in international relations" to occur. Given our increasingly interconnected and complex world, events on distant shores can have significant implications for international relations. Modern-day methods of waging conflict, such as cyber-attacks and misinformation campaigns seeking to undermine confidence in public institutions, can originate from any part of the globe. Moreover, a significant deterioration in respect for human and democratic rights in one country, could have negative repercussions for the international community more generally. Such developments may, depending on the context, constitute or contribute to an emergency in international relations, despite occurring outside the territorial limits of the invoking WTO member or its immediate neighbourhood.

20. With respect to the panel's statement in *Russia – Traffic in Transit* that the interests that arise from the enumerated subparagraphs of Article XXI(b) are "all defence and military interests, as well as maintenance of law and public order interests", Canada agrees that these interests can arise from

³ Panel Report, *Russia – Traffic in Transit*, paras. 7.77 and 7.83.

⁴ Appellate Body Report, *US – Gasoline*, para. 61.

⁵ Panel Report, *Russia – Traffic in Transit*, para. 7.138.

⁶ Ibid, para. 7.135.

the enumerated subparagraphs of Article XXI(b), and that subparagraphs (i) to (iii) of Article XXI(b) provide guidance as to the seriousness of the subject matter covered by Article XXI(b). Canada cautions, however, against taking too restrictive of an interpretive approach to the subparagraphs of Article XXI(b) or the phrase "emergency in international relations". As expressed in Canada's opening statement, our world is increasingly interconnected and complex - States must retain a certain level of flexibility to determine, for themselves, what constitutes an emergency in international relations serious enough to warrant taking measures(s) in response. This does not detract from the requirement that Members demonstrate that such circumstances objectively exist and that there is a sufficient connection between the measures and those circumstances.

VII. APPLICABILITY OF ARTICLE XXI TO THE ARO AND THE TBT AGREEMENT

21. In the event that the Panel finds that the U.S. measure violates obligations under the ARO and the TBT Agreement, it will be necessary to determine whether Article XXI applies to claims under the ARO and the TBT Agreement. In Canada's view, the Panel's interpretive exercise in this case must be aimed at determining whether there are sufficient textual or contextual linkages between the ARO and the TBT Agreement and Article XXI of the GATT 1994 to determine that the specific essential security exception set out in Article XXI is available as a defence to a claim of a violation of a substantive obligation in those Agreements. The Panel is not called upon to establish broad rules regarding the applicability of Article XXI to all Annex 1A Agreements.

22. In *China – Rare Earths*, the Appellate Body found that when the Annex 1A Agreement does not contain express language incorporating an exception from the GATT 1994, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the relevant agreements and that the "specific relationship" must be determined on a case-by-case basis, through a thorough analysis of all relevant provisions.⁷ Customary rules of international law on the interpretation of treaties would also be relevant.⁸ In Canada's view, this analytical approach is equally relevant in respect of the applicability of a GATT exception to an obligation set out in one of the Annex 1A Agreements. One important distinction from the approach taken by the Appellate Body in that case is that, for the TBT Agreement and the ARO, the text of other Annex 1A Agreements also provide relevant context as they contain text that specifically indicates that the exceptions under the GATT 1994 apply.⁹ This suggests that Article XXI of the GATT 1994 is not intended to apply to all Annex 1A agreements.

23. Although the ARO is conceptually linked to Article IX as a trade discipline, this does not mean that the entire architecture of the GATT 1994 can be imported into the ARO. Similarly, while the TBT Agreement contains several non-discrimination obligations that share conceptual similarities with GATT Article I:1, it does not flow from that fact that the security exception in GATT Article XXI can be used to justify violations of any of the provisions of the TBT Agreement, not least because the TBT Agreement itself contains references to national security in its operative provisions.

24. With regards to the applicability of Article XXI to the TBT Agreement, Canada notes that the TBT Agreement clarifies that Members retain their right to regulate in respect of their essential security interests for measures covered by the TBT Agreement. In other words, it contains a clearly articulated right that Members may regulate in respect of essential security interests; however, it does so in a different way than Article XXI.

25. The references to essential security interests in the preamble and the text of Articles 2.2 and 5.4 provide crucial context regarding how the TBT Agreement provides a distinct means to protect Members' right to regulate in respect of their essential security interests that is consistent with and reflective of the objectives of the TBT Agreement. The presence of these references to essential security interests, in the context of specific operational provisions, indicates that the TBT Agreement already incorporates rights and obligations with respect to essential security interests. Any analytical approach that resulted in considering first, whether a measure was justified on the basis of these specific references to essential security, and then secondly, whether that same measure could be

⁷ Appellate Body Report, *China – Rare Earths*, para. 5.57.

⁸ Ibid.

⁹ See Article 3 of the *Agreement on Trade-Related Investment Measures*, Article 1.10 of the *Agreement on Import Licensing Procedures* and Article 24.7 of the *Agreement on Trade Facilitation*.

justified under Article XXI of the GATT would not only be redundant, it would render these references meaningless.

26. Canada is of the view that a panel's analysis of essential security interests in the TBT context should be grounded in the specific provision in the TBT Agreement to which the assessment of essential security was applied, not in the text and architecture of Article XXI. As the EU notes, the TBT Agreement text also does not contain the words "which it considers necessary". Canada considers that the absence of such language likely signifies that, to the extent that there is a subjective element in Article XXI(b), this element does not exist in the TBT Agreement.

VIII. ARTICLE XXI AND NVNI

27. Canada considers that it is abundantly clear in the text of the NVNI provisions¹⁰ that otherwise inconsistent measures that have been justified under an exception, including an essential security exception, can be subject to an NVNI claim. The phrase "whether or not it conflicts with the provisions of this Agreement" in the NVNI provisions expressly indicates that such measures are captured. The negotiating history further confirms this interpretation.¹¹

28. Canada considers that the GATT/ITO negotiating history suggests that NVNI is available for otherwise inconsistent measures found to be justified under Article XXI, rather than being the only means of recourse for Members affected by essential security measures. There must first be an assessment by a panel as to whether the measures are justified under Article XXI. As Canada and other Members have argued throughout, and previous panel decisions have confirmed, Article XXI is not self-judging and is subject to review by a panel.

¹⁰ Articles XXIII:1 of the GATT 1994, and XXIII:3 of GATS.

¹¹ As the United States delegate noted in 1947 during the negotiations of the NVNI article, "there is no exception from the application" of the provision and that it was perfectly clear from the text that NVNI covers everything in the agreement. See: E/PC/T/A/PV/30, pp. 26-29.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA**

1. China underscores that, Hong Kong, China is an inalienable part of the People's Republic of China and is also an original Member of the WTO by virtue of Article XI of *the Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"). Under *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (which was put into effect as of 1 July 1997, hereinafter the "*Basic Law*") and completely in line with China's "one country, two systems" policy, Hong Kong, China is a separate customs territory. *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (which came into effect on 30 June 2020) and relevant measures taken to safeguard the security and stability of the Hong Kong Special Administrative Region are fully in line with *the Basic Law* and "one country, two systems" policy, and have not changed the status of Hong Kong, China as a separate customs territory, nor do they affect its qualifications and status as a WTO Member. These measures have nothing to do with the so-called "national security" of other WTO Members.

I. THE MEASURES AT ISSUE ARE INCONSISTENT WITH RELEVANT PROVISIONS IN THE ARO, TBT AGREEMENT AND GATT 1994

2. The measures at issue in this dispute involve a determination by the United States that goods manufactured or processed within the customs territory of Hong Kong, China originate within the People's Republic of China, and require these goods to be marked to indicate this origin. In China's view, based on the evidence and facts provided by Hong Kong, China in the present dispute, the measures at issue unlawfully discriminate against goods of Hong Kong, China origin and thus violate the relevant rules and disciplines provided in the ARO, TBT Agreement and GATT 1994.

3. As the rules of the ARO make clear, the country of origin determination must be made exclusively on the basis of where a good was manufactured or processed. WTO Members have an interest in ensuring that the origin of their goods is correctly and uniformly determined in accordance with the rules established for this purpose. A WTO Member is not free to determine that another Member is not a "country" in the sense of the ARO and require the origin mark of that another Member to be changed, otherwise will actually deprive that another Member of its rights under the ARO and reduce the ARO provisions to inutility.

4. The United States' determination that imported goods manufactured or processed in Hong Kong, China have an origin of China appears to be inconsistent with Article 2(c) and Article 2(d) of the ARO. It is inconsistent with Article 2(c) because it unlawfully conditions the conferral of a particular country of origin upon the discriminatory and arbitrary condition – whether Hong Kong, China is so-called "sufficiently autonomous" from the People's Republic of China – unrelated to manufacturing or processing of the goods. It is inconsistent with Article 2(d) because the United States does not apply the same rules of origin to goods imported from the customs territory of Hong Kong, China that the United States applies to goods imported from other WTO Members.

5. As to the TBT issue, China views that the United States' origin marking requirement is a technical regulation which applies to goods imported from Hong Kong, China. The additional condition as mentioned above when the United States applies the country of origin rules results in the inability of Hong Kong, China enterprises to correctly mark their goods as prior to the imposition of the revised origin marking requirement, which detrimentally modifies the conditions of competition in the United States' market for these goods vis-à-vis the treatment accorded to like products originating in other Members. This technical regulation appears to be inconsistent with Article 2.1 of the TBT Agreement.

6. In addition, taking into account the above potential inconsistencies with the provisions set forth in the ARO and the TBT Agreement, the United States' origin marking requirement as applied to goods imported from Hong Kong, China appears to further violate Article IX:1 and Article I:1 of the GATT 1994 for the same essential reasons.

7. China notes the United States does not dispute at all that, its measures at issue violate the provisions of the ARO, the TBT Agreement and GATT 1994 identified by Hong Kong, China in its request for establishment of a panel and in its first written submission, which should be taken into account by the panel when assessing whether the United States' origin marking requirement is in violation of relevant provisions under the ARO, the TBT Agreement and GATT 1994 as mentioned above.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXI(B) OF THE GATT 1994

8. Rather than contesting the merits of Hong Kong, China's substantive claims, the United States devoted the entirety of its first written submission to asserting an affirmative defence under Article XXI(b) of the GATT 1994.

9. The United States' proposed interpretation of Article XXI(b) is completely unfounded under accepted principles of treaty interpretation. Correctly interpreted, Article XXI(b) are not "self-judging" in entirety by the invoking Member. The applicability of the sub-paragraphs of Article XXI(b) to the GATT-inconsistent action for which justification is sought is an objective matter to be determined by the panel.

10. Furthermore, an interpretation of Article XXI(b) that would render this provision entirely self-judging, including its sub-paragraphs, would gravely undermine the "security and predictability" of the multilateral trading system, contrary to the object and purpose of the WTO Agreement. Such an interpretation would effectively emasculate the positive obligations that Members have undertaken in furtherance of a secure, predictable, and rules-based trading system. That risk is evident not only in the measures at issue in the present dispute, but also in other measures that the United States has threatened to impose upon its trading partners under the guise of "national security". Such an entirely self-judging interpretation will open an extremely dangerous door and should be alerted by all WTO Members.

11. As the party invoking an affirmative defence, the United States bears the burden of demonstrating the applicability of Article XXI(b) to the measures at issue. In this respect, the United States' first written submission is wholly deficient. The United States has never identified which of the three subparagraphs of Article XXI(b) it considers applicable to the measures at issue, let alone presented evidence and legal argument sufficient to establish the *prima facie* applicability of any one of those subparagraphs. Such a defence is defective on its face. In addition, the assertions or views put forwarded by third parties cannot remedy this fundamental flaw of the United States that it has failed completely to fulfill its burden to establish the *prima facie* case for its affirmative defence.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****I. ORDER OF ANALYSIS**

1. The correct order of analysis in the present case is to firstly assess whether a prima facie case of inconsistency exists, and - should the Panel find that such inconsistency exists – then turn towards the application of Article XXI of the GATT 1994.

II. APPLICABILITY OF THE ARO

2. The Panel has an obligation to verify that Hong Kong made a valid prima facie case with respect to all of the claims it makes. In the absence of that, it is improper for a panel to uphold a claim by making violation findings, even where a responding party does not comment on the (validity of the) claims in question.

3. Furthermore, pursuant to Article 11 DSU, the Panel is required to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute.

4. In its first written submission, Hong Kong claims that the measures at issue are inconsistent with Article 2(c) and Article 2(d) of the ARO. It asserts that the ARO applies to origin marking requirements by virtue of Article 1 ARO.

5. Hong Kong's interpretation of Article 1 is that origin marking requirements are the same as rules of origin. This reading is not supported by the text, which clearly draws a distinction between "rules of origin, which are defined in Article 1.1 ARO and "origin marking requirements".

6. In accordance with Article 1.2 ARO it is not the origin marking requirements, but the rules of origin *used in the application thereof* that fall within the scope of the ARO.

7. Origin is determined based on the conditions or "origin criteria" contained in the rules of origin, following which the origin marking must reflect origin in accordance with said determination.

8. Rules of origin must be distinguished from origin marking and origin marking requirements. For example, the requirement that "all articles of foreign origin, must be marked permanently, legibly and in a conspicuous place, so as to inform an ultimate purchaser of the English name of the article's country of origin" is a marking requirement. This requirement imposes the obligation to mark the origin, but it cannot be applied in practice without corresponding rules of origin, which set out how origin is determined for imported goods. These two sets of rules are interdependent, but distinct.

9. In sum, if the problem is conceptually reduced to its three constituent elements – "that originates there", anything that develops the concept of "originates" is an origin rule controlled by the Agreement on Rules of Origin; and anything that applies such origin rule(s) to a particular product or products is an application of such origin rule(s), that is, a determination of origin. However, anything that delimits what "there" is, does not in principle fall within the scope of the Agreement on Rules of Origin.

10. Furthermore, a *reason* given for a particular delimitation of "there" is not, without more, sufficient to bring that matter within the scope of the Agreement on Rules of Origin. The second sentence of Article 2(c) contains a specific and limited obligation: "they" (that is, rules of origin) must not require the fulfilment of a certain *condition* not related to manufacturing or processing as a prerequisite for the origin determination (a condition is an "if – then" structure that may either be met or not met in particular instances). A reason for the enactment of a piece of legislation is not to be conflated with a condition as part of a legal provision and the legal test governing its application. If the measure at issue would contain a rule stating, for example, that if the product is dumped it is to be considered as originating in China, whereas if not dumped it is to be considered as originating

in Hong Kong, China, that would be a condition and a violation of the second sentence of Article 2(c); but a reason is not a condition. This conclusion does not change merely because the measure delimits "there" for one specific purpose (origin marking) but not others – that alone does not bring the measure within the scope of the Agreement on Rules of Origin where otherwise it would not control. That situation might or might not be relevant for the Panel's assessment under Article XXI GATT, but that is a different question.

III. APPLICABILITY OF ARTICLE XXI(B) GATT 1994 TO THE CLAIMS UNDER THE TBT AGREEMENT AND CLAIMS UNDER THE TBT AGREEMENT

11. Article XXI of the GATT 1994 is not applicable to claims under the other multilateral agreements mentioned in Annex 1 to the WTO Agreement, such as the TBT Agreement (and the ARO).

12. Each time another Annex 1A agreement incorporates the general and security exceptions it does so by express reference, under a "bridge" provision (e.g. Article 3 of TRIMs Agreement expressly provides that "[a]ll exceptions under GATT 1994 shall apply").

13. It cannot be inferred from simple silence that the application of an exception is permitted or prohibited. However, silence in certain agreements is relevant in conjunction with the express reference in others. If certain agreements contain an express reference, *a contrario* it can be inferred that silence means the lack of availability of the security exceptions absent a "bridge" provision.

14. Several Annex 1A agreements have their own balancing between trade interests and other values, e.g. Article 2.2 of the TBT Agreement.

15. The EU notes the following with regard to the interpretation of the TBT Agreement in the *light* of also this recital:

16. *First*, the difference between an operative article of an agreement and a recital as part of the preamble of an agreement must be recognised. A recital can enlighten as to the object and purpose of an agreement, but it is not as such part of the disciplines (or rights and obligations) stipulated in that agreement.

17. *Second*, while the 7th Recital makes references to the "essential security interests" and therefore contains language which is similar to and recalls Article XXI of the GATT 1994, there are also important differences between the text of Article XXI and of the 7th Recital. In particular, the 7th Recital does not contain the specific wording contained in subparagraphs (i) to (iii) of Article XXI(b), which are constituent elements and necessary conditions for a successful invocation of Article XXI. Furthermore, the 7th Recital does not contain the words "which it considers necessary", which are present in Article XXI(b).

18. *Third*, the EU considers, based on the foregoing, that the 7th Recital can be useful in interpreting Article 2.1 of the TBT Agreement. The EU submits that the interpretation of Article 2.1 in the Appellate-Body's case-law concerning the implications of the 6th Recital of the preamble to the TBT Agreement are transposable to the 7th Recital.

19. The EU submits that the 7th Recital can shed light on what can be considered a legitimate policy objective and a legitimate regulatory distinction, when applying Article 2.1 of the TBT Agreement. The European Union considers that its considerations above on the application of Article XXI of the GATT 1994 can therefore be transposed to the proper interpretation of Article 2.1 of the TBT Agreement in light of the 7th Recital of the preamble to that agreement and to the application of Article 2.1 of the TBT Agreement in this case.

20. The EU notes in this respect that the identification of such legitimate policy objective is just one step in the analysis required under Article 2.1 of the TBT Agreement. The 7th Recital does not provide for a "self-judging" exception to the disciplines of the TBT Agreement. Indeed, the disciplines of Article 2.1 remain as such unchanged and are properly within the jurisdiction of a panel before which a claim of inconsistency with those disciplines is brought. In any event, as the EU has explained beforehand, Article XXI of the GATT 1994 itself is *not* a self-judging exception.

21. In *conclusion*, the EU considers that the correct interpretation of Article 2.1 of the TBT Agreement needs to properly consider the 7th Recital to the Agreement as providing context and information on the object and purpose of the TBT Agreement.

IV. INTERPRETATION OF ARTICLE XXI OF THE GATT 1994

22. The US' view that that Article XXI is "self-judging" has been convincingly rejected by the Panel Report in *Russia — Traffic in Transit*. It is wrong in light of the text, context, object and purpose, and indeed useful effect of the GATT 1994.

23. The EU notes that the correct interpretation and application of Article XXI of the GATT 1994 have been discussed at some length before in other dispute settlement cases under the DSU, and notably in a series of cases concerning measures adopted by the United States on steel and aluminium products (DS544, DS547, DS548, DS552, DS554, DS556 and DS564). The EU is on record in these cases on the interpretation of Article XXI of the GATT 1994 and its applicability outside of the GATT 1994 and considers its interpretation of Article XXI of the GATT 1994 to be consistent with the interpretation and application of the general exceptions contained in Article XX of the GATT 1994.

24. The US position is not supported by any of the materials referred to in Articles 31 and 32 of the VCLT, including supplementary means of interpretation.

25. In addition, while certain GATT Contracting Parties have expressed the view that Article XXI(b) is "self-judging", several others have repeatedly expressed diametrically opposed positions. Thus, the enquiry into the GATT 1947 palaeontology does not support the US position.

26. The EU recalls, *first*, that Article XXI of the GATT 1994 is an affirmative defence. But it does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of GATT 1994. The DSU creates compulsory jurisdiction, and it contains no security exception.

27. *Second*, interpreting Article XXI as a "non-justiciable" provision in this dispute would be inconsistent with the terms of reference of the Panel, which follow Article 7.1 of the DSU. It would also be inconsistent with Article 7.2 of the DSU, which specifies that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

28. Thus, the present dispute differs from the case under the GATT 1947 opposing the US and Nicaragua, where the terms of reference explicitly precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b) by the US.

29. *Third*, interpreting Article XXI as a "non-justiciable" provision would make it impossible for the Panel to "make an objective assessment of the matter before it", as required by Article 11 of the DSU, as the "matter" before the Panel must also include any defence under Article XXI raised by the US.

30. *Fourth*, interpreting Article XXI as a "non-justiciable" provision would undermine one of the fundamental objectives of the DSU, as expressed in Article 3.2 of the DSU: security and predictability.

31. *Fifth*, Article 23 of the DSU prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to dispute settlement in accordance with the DSU. If Article XXI was "non-justiciable", a WTO Member, rather than the WTO adjudicating bodies, would be deciding unilaterally the outcome of a dispute.

32. Finally, by way of illustration, the EU would like to point out that there are fundamental differences in the way that security exceptions are drafted in the GATT, on the one hand, and in other international agreements, on the other hand. For instance, an express text that comes very close to the idea of "non-justiciability" can be found in the KORUS FTA. There is no such text agreed by the WTO Membership in any of the covered agreements.

33. Thus, the invocation of Article XXI by a defending party does not have the effect of excluding the jurisdiction of a panel.

34. The EU fails to understand how Article XXI(a) can exempt the US from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Any discretion accorded under it is not unlimited.

35. The EU acknowledges that information relating to essential security interests is of a highly sensitive nature, but the respondent is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if the US was justified in not providing certain information pursuant to Article XXI(a), that would not discharge the US from its burden of proof in relation to Article XXI(b).

36. Regarding the interpretation of Article XXI, in the EU's view, the phrase "which it considers" refers only to the necessity test and not to any other provisions. Furthermore, the subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision, and cannot be considered cumulative in nature. All those distinct circumstances are objective, and susceptible to a panel's assessment. Moreover, the terms "other emergency in international relations" do not extend to an "emergency" in commercial or trade relations.

37. Concerning the negotiating history raised by the US, even under the Havana Charter, the correct position would have been that the predecessor to Article XXI is "justiciable", and not self-judging. Even under the Havana Charter, all issues arising out of the Charter were intended to be subject to the dispute settlement procedures provided therein, whether involving the ITO itself (Articles 93-95 of the Havana Charter), or the ICJ (Article 96 of the Havana Charter). The evolution towards the WTO covered agreements, and notably the provisions of the DSU, further confirms that position.

38. Furthermore, the 1949 GATT Council decision cited by the US cannot be considered as a subsequent agreement on the interpretation even of the GATT 1947, or in any way binding to all the contracting parties to the GATT 1947. Still less could it be considered as binding under the GATT 1994. In any event, it also supports the complainants' position rather than that of the US.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN*****Introduction**

1. As a third party, Japan chooses to submit its responses to the Panel's Written Questions 1 to 6 concerning the ARO and Questions 9 and 10 concerning the TBT Agreement.
2. As an initial matter, Japan wishes to note its view that, even if the respondent chooses not to rebut explicitly the interpretation and application of a WTO provision underlying the claim raised by the other party, a panel should independently "make an objective assessment" in accordance with Article 11 of the DSU, before it determines the consistency of the measure at issue with such a WTO provision.
3. Japan understands that these questions by the Panel are posed on the premise that WTO panels have the authority and responsibility to interpret and apply a provision at issue of the WTO Agreement, so that "[r]ecommendations and rulings of the DSB" do not "add to or diminish the rights and obligations provided in the covered agreements" (Article 3.2 of the DSU). In this regard, the Appellate Body has found that "a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute".¹ The Appellate Body also stated that:

With respect to the "applicability of ... the relevant covered agreements", a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand. The touchstone of this obligation is that a panel's assessment must be "objective".²

4. On this understanding and its agreement with that position, Japan provides some observations on some of the Panel's questions to facilitate the Panel's examination.

Questions 1-6

1. **To all third parties:** Article 1.2 of the ARO indicates that rules of origin are "used ... in the application of ... origin marking requirements under Article IX of [the] GATT 1994"? Please explain *how* rules of origin are used in such application of origin marking requirements.
2. **To all third parties:** What constitutes a "determination" of origin within the meaning of Article 1.1 of the ARO ("applied ... *to determine* the country of origin of goods ...")?
3. **To all third parties:** In paragraph 296 of its first written submission, the United States argues that "Hong Kong, China, appears to seek a finding that the *Agreement on Rules of Origin* not only disciplines *how* Members determine the country of origin, but also obligates Members to recognize particular claims of sovereignty or territory. Hong Kong, China, would require an importing Member agree with an exporting Member's claims as to territorial boundaries, for purposes of its origin marking requirements. Put simply, this is not a determination that WTO Members agreed to assign to dispute settlement panels." Similarly, in paragraph 6 of its third-party statement, Canada states that the determination of what constitutes a country "is not a 'rule of origin' *per se*, and therefore not governed by the ARO. The ARO governs rules that

* Japan requested that its responses to questions from the Panel serves as its executive summary.

¹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5. 33.

² Appellate Body Report, *Colombia – Textiles*, para. 5.17.

determine whether a product originates in a particular country, not the identification of that particular country."³

- a. Is the determination of "what constitutes a 'country' for country of origin marking purposes" a question of interpretation of the term "country" in Articles 1 and 2 of the ARO? In this context, what is the relevance of the Explanatory Notes to the WTO Agreement, discussed by Hong Kong, China in paragraphs 26 *et al.* of its first written submission and by Canada in paragraphs 7 to 8 of its third-party submission?
 - b. For purposes of clarifying the meaning of "country of origin" in Article 1.1 of the ARO, is it the Panel's task to clarify the meaning of "country" pursuant to Article 3.2 of the DSU? If not, why not?
 - c. Do the disciplines set out in Articles 1 and 2 of the ARO limit the manner in which Members must recognize the territorial boundaries of other Members when conferring origin to products manufactured or processed in any given country?
 - d. If, as submitted by Canada, the determination of "what constitutes a 'country' for country of origin marking purposes" is not governed by the disciplines of the ARO, is it governed by any other disciplines under the covered agreements? In this context, please comment, in particular, on disciplines governing origin marking and those covering equal treatment among Members (e.g. Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994)?
4. **To all third parties:** With reference to paragraph 30 of Hong Kong, China's first written submission, under what circumstances would a country-of-origin determination be wrong or incorrect pursuant to the ARO?
 5. **To all third parties:** Canada argues that the [ARO] provisions at issue in this dispute "do not discipline or dictate what the actual country of origin of a good must be".⁴ Please comment.
 6. **To all third parties:** Does the requirement to indicate a particular country as a country of origin for the purpose of an origin mark necessarily involve a prior determination that that country is the country of origin as stated by Hong Kong, China in paragraphs 24 and 30 of its first written submission, or can that indication be made independently of such a determination? If so, on what basis?

Japan's Response

5. Japan is of the view that "rules of origin" subject to the ARO are distinct from "(origin) marking requirements" under Article IX of the GATT 1994. Pursuant to Article 1.1 of the ARO, rules of origin are "laws, regulations and administrative determinations of general application" applied to "*determine* the country of origin of goods" (emphasis added). Rules of origin are concerned with processes that goods undergo and whether such processes are sufficient for a good to be considered as being from one country or another. For example, rules of origin may refer to a change of tariff classification or may refer to a particular manufacturing process.

6. Origin marking requirements under Article IX of the GATT 1994 do not entail any "determination" as to the country of origin of goods. They are simply a "device, stamp, brand, label, inscription"⁵ that identifies the origin of the good. Thus, a requirement that products manufactured in any country be marked with the label "made in [relevant country]" is an origin marking requirement subject to Article IX, but does not constitute a "rule of origin" subject to the ARO.

³ See also Canada's third-party submission, para. 6; and third-party statement, paras. 4 to 7.

⁴ Canada's third-party submission, para. 6.

⁵ See <https://www.oed.com/view/Entry/114169?isAdvanced=false&result=1&rskey=xHqiz&> (last visited 14 October 2021). See Exhibit JPN-1.

Questions 9 and 10

9. **To all third parties:** With regard to Article 2.1 of the TBT Agreement, does a finding of detrimental impact, in this case, depend on whether requiring the name "China" on the origin mark for goods produced in Hong Kong, China is contrary to WTO rules? In your response, please comment on Canada's submission in paragraph 12 of its third-party statement that there may not be differential treatment here.

10. **To all third parties:** If essential security interests were taken into account in the assessment of a claim under Article 2.1 of the TBT Agreement:

- a. what burden of proof would each party carry in respect of such an examination? In your response, please comment on Canada's argument in paragraph 14 of its third-party statement that Hong Kong, China has not met its burden of proof.
- b. what would be the relevance of the sixth and seventh recitals of the preamble of the TBT Agreement for determining the contours of such an examination;
- c. how would such an examination compare to an examination of the same interests in Article XXI(b) of the GATT 1994? In this regard, please consider the European Union's submission that there are textual differences between the 7th recital of the preamble of the TBT Agreement and Article XXI(b). Specifically, there are no sub-paragraphs describing specific situations in the 7th recital, and the terms "which it considers" are missing from that recital⁶;
- d. how would such an examination compare to the necessity test carried out in respect of "national security requirements" in Article 2.2 of the TBT Agreement. In this context, what is the relevance, if any, of this term, as used in Article 2.2, to the assessment of a claim under Article 2.1?

Japan's Response

7. Article 2.1 of the TBT Agreement requires Members to accord treatment "no less favourable" to imports than that accorded to like products of national origin and to like products originating in any other country. As is clear from previous Appellate Body interpretations of Article 2.1 of the TBT Agreement, an assessment of whether a technical regulation accords "no less favourable" treatment entails a two-step examination: (1) whether the technical regulation modifies the conditions of competition to the detriment of imported products; and (2) if so, whether the detrimental impact from the measure stems exclusively from a legitimate regulatory distinction.⁷ If the detrimental impact stems exclusively from a legitimate regulatory distinction, it will not be found inconsistent with Article 2.1.

8. Further, Japan draws the Panel's attention to the seventh recital of the preamble of the TBT Agreement, which states "no country should be prevented from taking measures necessary for the protection of its essential security interest", which should be taken into account as part of the context of Article 2.1⁸ in interpretation and application of the provision with respect to such "a legitimate regulatory distinction".

⁶ European Union's third-party submission, para. 51.

⁷ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.233 (referring to Appellate Body Reports, *US – COOL*, paras. 268 and 271).

⁸ Appellate Body Reports, *US – Clove Cigarettes*, para. 89; *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.88. See also Appellate Body Report, *US – Shrimp*, para. 155.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY****I. INAPPLICABILITY OF ARTICLE XXI TO THE AGREEMENT ON RULES OF ORIGIN AND THE TBT AGREEMENT**

1. One must recall that Article XXI of the GATT 1994 offers a potential justification for violations of the GATT 1994 alone, as made clear by the opening words of the provision, "Nothing in *this* Agreement shall...".¹ On its face, it does not justify a violation of an agreement other than the one referenced by the demonstrative "this", *i.e.*, the GATT 1994.

2. When Members intended a GATT 1994 exception to apply to another covered agreement, they included express language to that effect, as they did in the Import Licensing Agreement, the TRIMS Agreement, and the Trade Facilitation Agreement.² However, no such language renders Article XXI of the GATT 1994 available as a justification for a violation of neither the Agreement on Rules of Origin nor the TBT Agreement.

3. The United States asserts that, as the Marrakesh Agreement is an umbrella, Article XXI of the GATT 1994 applies to all the multilateral agreements on trade in goods listed in Annex 1.³ If the US view were permitted, the words "this Agreement" in Article XXI would serve no purpose, and the explicit incorporation of the GATT 1994 exceptions in certain other goods agreements would be redundant.

II. INTERPRETATION OF ARTICLE XXI

4. The United States asserts that, properly interpreted, Article XXI is self-judging.⁴ Norway disagrees. While Norway accepts that Article XXI confers discretion on Members to protect their essential security interests, this discretion is not unlimited. In particular, properly interpreted, (i) the three sub-paragraphs set out objectively verifiable circumstances which a respondent must demonstrate; and (ii) the words "it considers" accord the respondent some, but not unlimited, discretion with respect to the choice of the "action" to which the *chapeau* refers. A Member invoking Article XXI(b) carries the burden to prove the elements of the defence in both the *chapeau* and, at least, one subparagraph. The only two panels to have adjudicated the security exception share Norway's view.

a. Analysis under sub-paragraph (iii)

5. The three sub-paragraphs under Article XXI(b) set out "objective fact[s]" that are "amenable to objective determination".⁵ In other words, the respondent must demonstrate with evidence, and the Panel must assess, the existence of the facts referenced in the sub-paragraphs in an objective manner. Specifically, under sub-paragraph (iii), the existence of a "war or other emergency in international relations" needs to be demonstrated objectively.

6. The United States argues that the subparagraphs are modified by the phrase "which it considers" in the *chapeau* and, as a result, the respondent is free to decide for itself if the subparagraphs are met.⁶ The United States errs.

7. The verb "consider" qualifies the terms of the *chapeau*; it does not qualify any words in the three sub-paragraphs. This flows from an interpretation of the words of Article XXI(b), in line with

¹ Emphasis added.

² Import Licensing Agreement, Article 1.10; TRIMS Agreement, Article 3; Trade Facilitation Agreement, Article 24.7.

³ The United States' first written submission, para. 269.

⁴ The United States' first written submission, Section A.

⁵ Panel Report, *Saudi Arabia – IPRs*, para. 7.244; Panel Report, *Russia – Traffic in Transit*, para. 7.712.

⁶ The United States' first written submission, para. 48.

the rules of English grammar, and in a manner that ensures consistency among the various language versions.

8. Properly interpreted, each of the three subparagraphs qualifies the word "action", and not the words "essential security interests". This follows from the text, context, object and purpose, and negotiating history of Article XXI(b). In particular, the US view is irreconcilable with the Spanish version of the text, in which the term "relativas" (relating) can only qualify the word "medidas" ("action"); and, the chapeau / subparagraphs are broken by a comma.

9. The United States acknowledges this interpretation of the Spanish version of Article XXI.⁷ However, rather than to interpret the three equally authentic language versions of the GATT 1994 in a coherent and consistent manner, the United States opts to reject the Spanish version and construes its interpretation of the English and French versions in a way that serves their purpose.

10. The Vienna Convention on the Law of Treaties requires that treaty terms be given their "ordinary meaning". There is nothing "ordinary" about a meaning premised on US arguments that entail inconsistency and incoherence, which even the United States calls "less in line with rules of grammar and conventions".⁸ Instead of this strained interpretation, the ordinary meaning dictates that each of the subparagraphs modifies the same noun – "action" – which ensures interpretive consistency and coherence. The subparagraphs are not qualified by other words in the chapeau. When accounting for all the words in the text, the Spanish version confirms the English and French versions: the subparagraphs modify the noun "action".

11. The *chapeau* / subparagraph relationship has important implications for the Panel's approach under Article XXI(b). Specifically, as a consequence of the relationship, a Member's "action" under Article XXI(b) is subject to two sets of distinct and independent conditions:

- (1) the "action" must "relate to" the specific circumstances set forth in subparagraph (i) or (ii), or be "taken in time of war or other emergency in international relations", under subparagraph (iii); and,
- (2) it must be "action" that the Member "considers necessary" for the protection of its essential security interests.

12. As a first step, therefore, a panel must make an objective assessment of whether the Member has demonstrated that the "action" meets the circumstances / situation in at least one of the subparagraphs. Textually, the phrase "which it considers" is not part of this step. Therefore, a Member's demonstration that it fulfils the conditions in the subparagraphs is not subject to a more forgiving standard of review flowing from the verb "consider" in the chapeau.

13. As pointed out by Switzerland in its written third party submission, even the United States acknowledges that subparagraph (iii) relates to the term "action" in the chapeau.⁹ Consequently, it is undisputed that the assessment of whether the Member's action is taken in time of war or other emergency in international relations cannot be modified by the phrase "which it considers". Thus, there is no basis for arguing that the sub-paragraph is self-judging.

14. In sum, what matters under sub-paragraph (iii) is whether an emergency has, objectively, been shown to exist, on the facts. This is a matter for objective determination by the Panel, and not a question of what the United States "considers".

b. Analysis under the *chapeau*

15. If the Panel finds that the requirements of sub-paragraph (iii) are met, the respondent must demonstrate, under the *chapeau*, that it "considers" the "action" "necessary for the protection of its essential security interests".

⁷ The United States' first written submission, para. 165.

⁸ The United States' first written submission, para. 163.

⁹ Switzerland's third party submission, para. 12, referring to the United States' first written submission, para. 45.

16. Although the words "which it considers", in the *chapeau*, establish a degree of deference, the standard of review is not *total deference*. A panel must still exercise scrutiny over the respondent's assertion that its measures are justified under Article XXI(b), including by respecting the legal conditions in the *chapeau*. Like with other provisions of the covered agreements, the acceptable standard of review lies somewhere between the two poles of "total deference" and "*de novo*" review, both of which are excluded.¹⁰

17. A standard of "total deference" would fail to give effect to the individual terms in the *chapeau*. The chosen treaty terms – including the word "considers" itself as well as the other words in the *chapeau* – entail, by their ordinary meaning, constraints on a respondent's exercise of discretion under Article XXI(b).

18. Total deference would also fail to give effect to the requirement under Article 11 of the DSU for a panel to make an "objective assessment". A panel fails to act with objectivity if it accepts mechanically and blindly a respondent's unsubstantiated assertions, without assessing whether it has complied with the conditions in Article XXI(b).

19. The wording of the *chapeau* of Article XXI(b) means that a panel reviews the Member's own alleged action of "consider[ing]" the different factors specified in the *chapeau*. Because the provision focuses on the respondent's own consideration regarding the need for the measure, a respondent must, at a minimum, be able to offer a plausible basis in support of that consideration. If a respondent cannot substantiate, with argument and evidence, such a basis to support its consideration that the measure is necessary, a panel has an objective basis to conclude that the respondent has not satisfied the terms of the *chapeau*.

20. In establishing a plausible basis for its conclusion, under the terms of the *chapeau*, a respondent must:

First, articulate "its essential security interests", so as to allow a panel to assess whether the asserted "interests" rise to the level of "essential" "security" interests;¹¹

Second, set out, with argument and evidence, a plausible basis on "which it considers" there to be a "clear and objective" relationship between the "action" and the protection of the articulated essential security interest, such that the measure is apt to make a "material contribution" to the objective at stake.¹²

21. By arguing that a panel must afford an invoking Member total deference without providing any explanation or evidence to support its argument, the United States deprives the terms of the *chapeau* of their meaning. The *chapeau* comprises a series of words and phrases, each of which must be given their own meaning, with each constraining a respondent's action. These are: "action", "which it considers", "necessary", "for the protection of" and "essential security interests". The interpreter cannot interpret two of these words ("it considers") in a way that deprives the others of their meaning.

22. In undertaking its review, a panel does not make a judgment on what the panel itself "considers" is "necessary" in the circumstances. Nor does the panel agree or disagree with the respondent's own conclusion. Thus, a panel does not conclude, for itself, that a measure is, or is not, necessary for the protection of the respondent's essential security interests.

c. Relationship between Article XXI(a) and XXI(b)

23. Norway disagrees with the underlying premise in the United States' arguments that that "Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to 'test' a Member's invocation of Article XXI(b)" and that "a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b)".¹³

¹⁰ Appellate Body Report, *EC – Hormones*, para. 115.

¹¹ Panel Report, *Russia – Traffic in Transit*, para. 7.131; Panel Report, *Saudi Arabia – IPRs*, para. 7.247.

¹² Panel Report, *Russia – Traffic in Transit*, para. 7.139; Panel Report, *Saudi Arabia – IPRs*, para. 7.252.

¹³ The United States' first written submission, paras. 50 and 51.

24. The United States' arguments are not directed towards the interpretation of any words in Article XXI(b). Instead, they are based on speculation about the amount of evidence that might (or might not) be available to a panel. The interpretation of Article XXI(b) (or any other provision) cannot, however, be driven by speculation about the *evidence* that might be available in a particular case involving the application of the provision. Instead, the treaty terms must be given their ordinary meaning under the usual rules of treaty interpretation.

25. A panel is always required, in applying its standard of review, to tailor its objective assessment to the particular circumstances of each dispute. The contours of a panel's assessment, therefore, vary from case-to-case.

III. ORDER OF ANALYSIS

d. The United States argues that the Panel should begin its analysis by "addressing the invocation by the United States of Article XXI(b)".¹⁴ In support, the United States refers to what it calls the "self-judging nature of that provision" and that the Panel should make no other finding in its report than to note its understanding of Article XXI and the United States' invocation of the provision.¹⁵ Norway disagrees with this view.

e. Article XXI(b) operates to justify certain GATT-inconsistent action, using the same language as Article XX: "nothing in this Agreement shall be construed to prevent any Member from taking any action which...". Hence, Article XXI(b) is, just like Article XX, an affirmative defence to a violation of the GATT 1994. Under Article XX, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article XXI(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.

f. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.¹⁶ Of course, a panel cannot identify the WTO-inconsistent aspects of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.¹⁷

¹⁴ The United States' first written submission, para. 328.

¹⁵ Ibid.

¹⁶ Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

¹⁷ In Norway's view, the panel in *Russia – Traffic in Transit* erred by departing from the accepted order of analysis under "exceptions provisions" in the GATT 1994.

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION****INVOCATION OF ARTICLE XXI(B) OF THE GATT 1994**

1. The United States has invoked Article XXI(b) of the GATT 1994 seeking to defend the challenged measure.¹ In this regard, Russia would like to focus on the proper interpretation of national security exceptions and note the following. First, the overall United States' interpretation of Article XXI(b) of the GATT 1994 is wrong and leads to redundancy and inutility of the whole provision. The United States' arguments regarding the self-judging nature of the security exceptions in its entirety are legally flawed and must be rejected.

2. Second, Russia is of a position that when invoking Article XXI(b) of the GATT 1994 the respondent is under obligation to identify a particular subparagraph. The claimant and the Panel should not left to guess whether the measures at issue are related to fissionable materials or to materials from which they are derived under subparagraph (i), to the traffic in arms, ammunition and implements of war, etc. under subparagraph (ii), or whether they are taken in time of war or other emergency in international relations under subparagraph (iii). Third parties to the dispute are neither in a position to substantiate the respondent's defense. In particular, Russia notes that the EU's and Canada's attempts to introduce subparagraph (iii) as a basis for the measures at issue have no legal value and must fail.² The EU and Canada are not responding parties in this case.

3. Third, the United States' attempts to re-argue the *Russia – Traffic in Transit* dispute must fail. The panel in this dispute undertook an extensive assessment of the matters under its jurisdiction and of the content of rights and obligations of the Members under Article XXI(b)(iii) of the GATT 1994 in its report, based on the text of the WTO Agreements and the relevant negotiating history. The United States as a third party to that dispute was provided with a sufficient opportunity to make its position be heard. According to the DSU third parties had the opportunity to express their comments when the DSB considered the adoption of the panel report. The present dispute is not an appropriate forum to "appeal" the panel report which was adopted by the DSB on 26 April 2019. Panels are not bound by prior panels' decisions; however, given the objective of the dispute settlement system to provide security and predictability to the international trading system, Russia is of the view that the panel report in *Russia – Traffic in Transit* is relevant in this dispute and can guide the Panel as well.

4. These points are dealt with in more detail below.

5. The United States insists that, because of the self-judging nature of Article XXI(b) of the GATT 1994 covering the chapeau and each of the subparagraphs of this provision, the Panel allegedly cannot review whether or not the measures at issue are in breach of the requirements thereof.

6. The reading of Article XXI(b) of the GATT 1994 by the United States is incorrect and unreasonable, it leads to creation of the possibility for any Member to justify any violation of any provision of the WTO Agreements as soon as such Member merely declares the invocation of the said Article, irrespectively of whether the measures were indeed designed or intended to protect essential security interests of that Member in the circumstances specifically provided for therein. The GATT security exceptions do not offer *a carte blanche* to WTO Members. The right to adopt any measures a Member considers necessary for protection of its essential security interests is conditioned by the content of the subparagraphs of Article XXI(b) of the GATT 1994 and the good faith principle.

7. Furthermore, it should be noted that provisions of the DSU do not provide any legal basis for an exclusion of the measure at issue, which was declared by a WTO Member as being taken under Article XXI of the GATT, from the examination and assessment of its WTO-inconsistency by the Panel in accordance with the rules and procedures of the DSU, including Article 11 of the DSU. Instead,

¹ US First Written Submission, para. 23.

² Third Party Written Submission by the European Union, paras. 16, 39 and 40; Canada's oral statement, paras. 17 – 19.

provisions of the DSU require WTO Members to bring their complaints on WTO-inconsistency of measures at issue to the WTO dispute settlement procedure for panel and the Appellate Body examination, assessment and rulings.

8. Russia believes that the ordinary meaning of the treaty terms of Article XXI(b) of the GATT 1994 gives full and unequivocal picture of the way how the Article's provisions shall be applied and interpreted. In Russia's view, the provisions of Article XXI(b) of the GATT 1994 represent a combination of subjective (self-judging) and objective elements. The phrase "any action which it considers necessary for the protection of its essential security interests" leaves it within the sole discretion of a Member to determine what its essential security interests are and the ways and means of their protection. However, this phrase does not qualify the subparagraphs, which are objective in their nature and are subject to objective determination by the Panel.

9. The panel in *Russia – Traffic in Transit* made an extensive review of Article XXI(b) of the GATT 1994 and examined the extent to which it is of self-judging nature. The panel concluded that the self-judging nature of the chapeau of Article XXI(b) of the GATT 1994 resulting from the use of words "which it considers" cannot be extended to the subparagraphs thereof. The panel found that the rights provided for in Article XXI(b) of the GATT 1994 are limited by the content (circumstances) set out in the subparagraphs and that such circumstances can be objectively assessed by the panel, including their existence.³

10. The panel in *Russia – Traffic in Transit* reasoned, *inter alia*, that the object and purpose of the GATT 1994 and the WTO Agreement support a mandate to objectively review the requirements of the subparagraphs of Article XXI(b) of the GATT 1994 and that it would be entirely contrary to security and predictability "to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member".⁴

11. Moreover, the panel in *Russia – Traffic in Transit* has concluded that "the obligation of good faith requires the Members not use the exceptions in Article XXI of the GATT 1994 as a means to circumvent their obligations under the GATT 1994".⁵

12. The Panel in *Russia – Traffic in Transit* clarified the "essential security interests" being the category of interests narrower than simply "security interests" as "the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".⁶ Meanwhile, they will depend on the particular situation and perceptions of the state and can be expected to vary with changing circumstances.⁷ In order to ensure that there is no abuse in the application of good faith principle, the Member, invoking Article XXI(b) of the GATT 1994, should articulate and the Panel should review that "the essential security interests ...sufficient enough to demonstrate their veracity"⁸ and whether the measures at issue are so remote from, or unrelated to the provisions of subparagraphs that it is implausible that the Member implemented the measures at issue for the protection of its essential security interests.⁹

13. Russia is of a position that such approach is in line with the object and purpose of the WTO Agreement, serves as a guarantee against possible abuses and at the same time does not prevent Members to exercise the right as the sovereigns to determine their essential security interests and the means of their protection. This alone allows panels to perform their task as provided for in Article 11 of the DSU, and not only to make an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, including Article XXI(b) of the GATT 1994, when the said Article is invoked by a respondent but also to make such other findings that will assist the DSB in making recommendations and rulings provided for in the covered agreements.

³ Panel Report, *Russia – Traffic in Transit*, para. 7.82.

⁴ Panel Report, *Russia – Traffic in Transit*, paras. 7.78 - 7.79.

⁵ Panel Report, *Russia – Traffic in Transit*, para. 7.133.

⁶ Panel Report, *Russia – Traffic in Transit*, para. 7.130.

⁷ Panel Report, *Russia – Traffic in Transit*, para. 7.131.

⁸ Panel Report, *Russia – Traffic in Transit*, para. 7.134 – 7.139.

⁹ Panel Report, *Russia – Traffic in Transit*, paras. 7.138- 7.145.

14. Russia agrees with the conclusions of the panel in *Russia – Traffic in Transit* and reaffirms that the words "which it considers" provided for in the chapeau of Article XXI(b) of the GATT qualify the chapeau only, but not the subparagraphs. This interpretation is based on the text of the Article. The United States' attempts to connect subparagraphs of the said Article with the words "essential security interests" rather than the word "actions" are fundamentally wrong.

15. The term "which it considers" further qualifies the action that can be taken under this provision (i.e. it must be considered to protect the Member's essential security interests). Such action is further conditioned by three distinct sets of circumstances enumerated (i)-(ii) connected with the chapeau through "relating to" and (iii) through "taken in time of".

16. In *Russia – Traffic in Transit* the panel explained that "[t]he phrase 'relating to', as used in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a 'close and genuine relationship of ends and means' between the measure and the objective of the Member adopting the measure. This is an objective relationship between the ends and the means, subject to objective determination".¹⁰ Therefore, the words "relating to" in subparagraphs (i)-(ii) of Article XXI(b) of the GATT 1994 confirm that the content of the said subparagraphs ("ends") is connected with "actions" in the chapeau ("means").

17. The French and Spanish versions confirm that subparagraphs (i) to (iii) refer to actions and not to the essential security interests. A feminine "relativas" points out that it is linked to the word "medidas" and not "intereses". This is relevant for subparagraph (iii) as well – "aplicadas" and "appliquées" can refer only to "medidas" and "mesures".

18. Additionally, it should be noted that according to Article 33 (3) of the Vienna Convention, where treaties have been authenticated in two or more languages, "the terms of the treaty are presumed to have the same meaning in each authentic text". In discussing the draft text of this Article the International Law Commission noted that such presumption "requires that every effort should be made to find the common meaning for the texts before preferring one to another".¹¹ Article XVI of the WTO Agreement provides that for the covered agreements the English, French and Spanish language each are authentic. The Appellate Body in *US – Softwood Lumber IV* confirmed that "the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language".¹²

19. Therefore, in Russia's view, the meaning of the terms and provisions shall not vary depending the language version. The WTO dispute settlement system being a central element in providing security and predictability shall ensure the simultaneous meaning in each authentic language version. Thus, Russia believes that despite certain grammatical/structural differences, the terms and provisions contained in the three language versions shall be given the same meaning. Otherwise, different countries depending on the language preferred could be guided by different provisions and, therefore, apply security exceptions or any other provision of the WTO agreements in a different way. It is highly dubious that the drafters intended to create a significant distinction between identical texts in different languages.

20. Furthermore, since Article XXI of the GATT 1994 is an "exception" and an affirmative defense, the burden of proof is on the party that asserts such affirmative defense¹³ to establish the *prima facie* case of the applicability of the invoked provision to its measures at issue and of the WTO-consistent application of the invoked exception. However, the United States failed to state a particular subparagraph of Article XXI(b) in justification of its measures and to provide supporting evidence and reasons why the specific circumstances under each of subparagraphs of Article XXI(b) of the GATT 1994 apply to its measures at issue.

21. The Russian Federation recalls that "one aspect of ensuring that the proceedings are fairly conducted is that each party must be entitled to know the case that it has to make or to answer and must be afforded a fair and reasonable opportunity to do so".¹⁴ It follows that the burden is still on the United States. We find it absolutely unacceptable that third parties in these proceedings attempt

¹⁰ Panel Report, *Russia – Traffic in Transit*, para. 7.69.

¹¹ Yearbook of the International Law Commission (1966), Vol. II, p. 225.

¹² Appellate Body Report, *US – Softwood Lumber*, para.59.

¹³ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, 16.

¹⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140. (emphasis added)

to fill the gaps in the United States' defense and refer to subparagraph (iii) of Article XXI(b) of the GATT 1994. We are quite surprised that from the evidence and arguments out forward by the United States, or rather from the lack thereof, the EU and Canada managed to arrive to an assumption that the situation the United States presumably refers to, or rather does not refer to, concerns an "emergency in international relations".

22. Furthermore, the EU in its Third Party Written Submission refers to certain statements made by the EU authorities¹⁵ to support the existence of "significant elements which can indicate that the situation to which the United States sought to respond by its measures is one of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994"¹⁶. First, as it was already mentioned, the United States in its First Written Submission did not refer to a particular subparagraph of Article XXI(b) and did not even mention explicitly or implicitly that the measures at issue were taken in time of war or other emergency in international relations between the United States and Hong Kong, China. For all we (collectively) know, the United States could equally rely on subparagraphs (i) or (ii), or to some circumstances, situations or reasons none of which is covered by any of the subparagraphs set out in Article XXI(b). In any case the United States did not provide any evidence and arguments in support that any emergency really exists. Thus, Russia believes that the United States failed to meet its burden of proof and the EU, whatever its reasons are, cannot fill in these gaps. Second, even if the US had claimed that there was some sort of emergency in international relations between the United States and Hong Kong, China, the statements to which the EU refers do not provide any evidence thereon. They just contain certain concerns expressed by the EU itself. Therefore, Russia believes that the Panel should disregard the EU's attempts to perform the role of the United States' defense lawyer and the statements made in this regard.

23. The United States asserts that Article XXI(a) anticipates the scope and application of Article XXI(b), and, therefore, "a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests".¹⁷ Russia disagrees. Article XXI(a) and XXI(b) of the GATT 1994 are distinct. They are structured differently and separated by conjunction "or". A WTO Member may have recourse to any of the paragraphs set forth in Article XXI or may refer to several of them simultaneously. Moreover, it should be noted that Article XXI(a) is applicable to every provision of the agreement, for example, Article XX of the GATT. However, it does not mean that the Member in this case is no longer under obligation to indicate specific circumstances contributing to adoption of the measure under general exceptions. Thus, Russia is of a position that each of these provisions shall be given its proper meaning independently of each other.

24. Having taken such stand, it seems that United States' position in this respect is that Article XXI(a) shields the invoking Member from meeting its burden under Article XXI(b) of the GATT 1994, *inter alia*, proving the existence of circumstances as embodied in subparagraphs. Such position cannot be accepted.

25. Nevertheless, Russia believes that pursuant to Article 32 of the Vienna Convention the Panel could be guided by supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 of the VCLT, nothing in GATT/ITO negotiating history suggests that the GATT national security exceptions are totally self-judging, thus, are not subject to any review, and could be challenged only as non-violating obligations.

26. In *Russia – Traffic in Transit* the panel examined the negotiating history of Article XXI of the GATT 1947, including draft texts and discussions, *inter alia*, to which the United States refers in these proceedings. The panel concluded that the negotiating history confirms that "the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) made objectively rather than by the invoking Member itself".¹⁸ The panel stressed that "there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny".¹⁹ Russia agrees.

¹⁵ Third Party Written Submission by the European Union, paras. 11 – 16.

¹⁶ Ibid, para. 39.

¹⁷ US First Written Submission, para. 50.

¹⁸ Panel Report, *Russia – Traffic in Transit*, para. 7.100.

¹⁹ Ibid.

27. Finally, the only conclusion that could be made based on GATT/ITO negotiating history is that if the taken action meets the relevant requirements, then it will be justified and consistent with security exception provisions. If it is consistent and nullifies or impairs benefits, nothing shall preclude the Member to lodge a non-violation complaint. If it does not meet these requirements (e.g. taken in normal times), then the action will be inconsistent with the relevant provisions and, thus, non-violation complaint will not be available. No specific rules in respect of security exceptions were established - the availability of the non-violation complaints for the Members does not affect the right of the Members to make use of the violation complaints.

28. Moreover, Russia would like to refer to the Communication by the United States of 10 June 2014 IP/C/W/599 regarding Non-violation Complaints under the TRIPS Agreement which confirmed that in fact the United States does not expect any non-violation complaints, even if brought against the United States, to be successful, because security exceptions were written into the respective agreements, agreed by all Members and, therefore, could be foreseen by the Member affected by other's Member measures undertaken under Article XXI(b) of the GATT 1994.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

I. INTRODUCTION

1. Singapore attaches great importance to upholding an open, stable, and predictable rules-based multilateral trading system. As such, Singapore has consistently intervened as a third party in past WTO disputes where security exceptions were invoked¹, given Singapore's keen interest in this issue. In this particular dispute, the novel but significant issue of whether security exceptions are applicable to the Agreement on Rules of Origin and the Agreement on Technical Barriers to Trade ("TBT Agreement") has arisen and Singapore therefore considers it important to state its views. However, Singapore emphasises that it is not commenting on the merits of the legal claims and defences raised by the parties to the current dispute. Singapore's participation is strictly confined to the legal interpretation and applicability of the security exceptions.

II. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT

A. Applicability of Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") to the Agreement on Rules of Origin and the TBT Agreement

2. Without taking a position on whether the claims of inconsistencies with the Agreement on Rules of Origin and the TBT Agreement are *prima facie* valid, in the event the Panel proceeds to consider the applicability of Article XXI to these two agreements, in determining the relationship between the provisions of different covered agreements, the Appellate Body has applied a standard "analytical approach". This requires an agreement-by-agreement analysis that starts with the text of the agreement in question, and entails a "thorough analysis of the relevant provisions", on the understanding that the lack of an express textual reference is not dispositive in and of itself.² Further, the relationship must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".³ As such, the absence of an explicit cross-reference to or incorporation of Article XXI in these two agreements is not *per se* dispositive of the issue.
3. The analysis in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* is instructive. The question was whether Article XX of the GATT 1994 is applicable to the Agreement on Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation), in light of its preambular references to the GATT 1994. The panel noted that a preamble is useful for providing interpretative context for the operative provisions being interpreted; the language and the title to the Agreement on Customs Valuation reflect a *general link* between the Agreement on Customs Valuation and the GATT 1994, but do not establish any textual link to Article XX of the GATT 1994.⁴ The panel also held that the applicability of Article XX of the GATT 1994 must be decided on the basis of a *clear and sufficient textual link* between provisions of the GATT 1994, especially Article XX, and the agreement to which Article XX allegedly applies.⁵

¹ The disputes in DS512, DS567, DS526, and the set of disputes in DS544, DS547, DS548, DS552, DS554, DS556 and DS564.

² Appellate Body Reports, *China – Rare Earths*, paras. 5.61 to 5.63.

³ Appellate Body Reports, *China – Rare Earths*, para. 5.55.

⁴ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.748 and 7.749.

⁵ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.750.

4. Some of the multilateral agreements on trade in goods within Annex 1A of the WTO Agreement have explicit language that specifically provide for the application of security exceptions.⁶ Some of the agreements within other Annexes of the WTO Agreement also have such explicit language.⁷ The initial conclusion that can be drawn is that the presence of such explicit language in only *certain* agreements is an indication that Article XXI of the GATT 1994 is not intended to apply across-the-board to all Annex 1A agreements.
5. The Agreement on Rules of Origin and the TBT Agreement do not have the above-mentioned explicit language. While there are references to "essential security interest" and "national security" in the TBT Agreement, there is the complete absence of such references in the Agreement on Rules of Origin. The various references to the provisions of the GATT 1994 in both the main text and preamble of the Agreement on Rules of Origin, which reflect the relationship between the Agreement on Rules of Origin and the GATT 1994, are merely of a general nature. As such, there is insufficient textual basis for applying Article XXI of the GATT 1994 to the Agreement on Rules of Origin.
6. In contrast, the TBT Agreement contains the terms "essential security interest" and "national security" in various discrete provisions⁸, each with their own unique drafting. As such, to layer over these the blanket application of Article XXI of the GATT 1994 simply because the TBT Agreement is one of the Annex 1A agreements is legally untenable. In particular, to do so would render otiose Article 10.8.3 of the TBT Agreement, as it has almost the exact wording as Article XXI(a) of the GATT 1994. If there were such blanket application of Article XXI, there would be no need for Article 10.8.3 because Article XXI(a) would already have applied by virtue of the blanket application of Article XXI.
7. What matters instead is the presence of language which can be interpreted as applying the consideration of essential security interests/national security to obligations in the TBT Agreement. The 7th Recital and Article 10.8.3 of the TBT Agreement are two such discrete provisions which have cross-cutting application within the TBT Agreement. The Appellate Body has read Members' right to regulate in the 6th Recital as counterbalancing the trade-liberalization objective expressed in the 5th Recital.⁹ The 7th Recital (which has the same opening phrase as the 6th Recital) also plays a similar balancing role, and due recognition must be given to the language in the 7th Recital. Given that the preamble is useful for providing interpretative context for the provisions being interpreted, the 7th Recital can be considered by the Panel in the interpretation of obligations in the TBT Agreement.

B. Interpretation of Article XXI(b) of the GATT 1994 – the applicable test

8. As regards the test that the Panel should apply in the interpretation of Article XXI(b), in the event the Panel finds inconsistencies with the GATT 1994, Singapore has three points to highlight.
9. First, the word "it" in the phrase "it considers necessary" clearly refers to a "contracting party". This has to be from the standpoint of the Member invoking the exception and whether the Member considers the action to be necessary. This phrase points to the self-judging nature of the assessment, indicating that a Member is allowed to determine with a significant degree of subjectivity what action "it considers necessary" to protect "its essential security interests".
10. Second, the assessment of threats to the essential security interests of a Member and the necessary measures in response involves judgement on the part of that Member and is dependent on the particular context and circumstances of that Member. In arriving at this judgment, every Member has to make determinations of the security threats, sometimes under the most urgent circumstances, relying on information the disclosure of which may itself prejudice the security interest of the Member or other Members. Therefore, there is necessarily a degree of subjectivity in this exercise, and an accompanying diversity of assessments that

⁶ Apart from Article XXI of the GATT 1994, there are Article 3 of the Agreement on Trade-Related Investment Measures, Article 1.10 of the Agreement on Import Licensing Procedures and Article 24.7 of the Agreement on Trade Facilitation.

⁷ Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights and Article XIV *bis* of the General Agreement on Trade in Services.

⁸ The 7th Recital, Articles 2.2, 2.10, 5.4, 5.7 and 10.8.3.

⁹ Appellate Body Report, *US – Clove Cigarettes*, paras. 95, 109 and 174.

has to be respected. It would be well within a Member's right to take a measure to deal with the threat and to protect its essential security interests even though a different measure is taken by another Member in response to the same type of threat.

11. Third, there are many areas in the WTO regime where some margin of appreciation is accepted, for example, in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures,¹⁰ and in relation to the necessity of a measure taken for the protection of health under the GATT 1994.¹¹ None of these provisions come anywhere close to being as explicit and definitive with respect to self-judgment as Article XXI(b). *A fortiori*, a higher level of deference, and a significant margin of appreciation, should be accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of a measure taken for the protection of its essential security interests.
12. That said, Article XXI(b) should not be read as giving a Member entirely unfettered discretion in invoking this exception. A Member must act in accordance with the standard of good faith as set out in Article 26 of the Vienna Convention on the Law of Treaties ("VCLT")¹² and with the general international law prohibition of abuse of rights. It is also well accepted that a Member seeking to rely on an affirmative exception bears the burden of proof. The Member invoking Article XXI would have to provide its reason(s) for doing so. The Member should minimally explain its course of action and invocation of Article XXI, bearing in mind the margin of appreciation to be accorded to Members on matters involving their essential security interests. The extent and degree of detail required is fact and context specific and will be informed by the specific circumstances and the underlying security and confidentiality considerations. Singapore generally agrees with the *Russia – Traffic in Transit* panel's analysis of Article XXI(b)(iii).

III. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSES TO PANEL'S QUESTIONS TO THIRD PARTIES

C. Response to Question 10

13. Paragraphs 216 and 283 of the Appellate Body report in *US – Tuna II (Mexico)* recalled and applied the established principle that the burden of proof rests upon the party who asserts the affirmative of a particular claim or defence, and that the party who asserts a fact is responsible for providing proof thereof. Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing.
14. In the context of Article 2.1 of the TBT Agreement, the Appellate Body has held that the complainant must prove its claim by showing that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products or like products originating in any other country. If less favourable treatment is *prima facie* established, the measure may nevertheless be consistent with Article 2.1 if the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.¹³ However, the burden of showing that the detrimental impact stems exclusively from a legitimate regulatory distinction falls on the respondent. Having promulgated the technical regulation containing the regulatory distinction, the respondent will be best situated to explain why the detrimental impact stems exclusively from a legitimate regulatory distinction.¹⁴
15. Both the 6th and 7th Recitals play similar roles counterbalancing the trade-liberalisation objective expressed in the 5th Recital of TBT Agreement. The preamble is useful for providing interpretative context for the provisions being interpreted, including the interpretation of what would constitute a legitimate regulatory distinction. Essential security interests may therefore form the basis of a legitimate regulatory distinction under Article 2.1. Where this is asserted, the burden of proving it would likewise fall upon the respondent.

¹⁰ Appellate Body Report, *Australia – Salmon*, para. 199.

¹¹ Appellate Body Report, *EC – Asbestos*, para. 168.

¹² Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

¹³ Appellate Body Reports, *US – Clove Cigarettes*, paras. 180-182, *US – Tuna II (Mexico)*, paras. 215-216, *US – COOL*, paras. 271-272.

¹⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.32–7.33.

16. As for the specific application of the Recitals in determining whether there is legitimate regulatory distinction, there is a significant difference between the 6th and 7th Recitals on the extent to which deference will be given to a respondent Member. The Appellate Body has indicated that "[t]he sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and **provided** that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the [TBT] Agreement."¹⁵ Comparing the 6th and 7th Recitals, it is clear that the proviso stated in the quoted text would be of no relevance in the context of 7th Recital. As such, there is greater discretion afforded to a regulating Member when the legitimate policy objective being pursued pertains to the protection of its essential security interests, as compared to those objectives in the 6th Recital. While the term "which it considers" found in Article XXI(b) of the GATT 1994 is missing from the 7th Recital, significant deference has to be accorded to that Member given the very nature of essential security interests. That said, the Member must act in accordance with the standard of good faith as set out in Article 26 of the VCLT.

D. Response to Questions 15 and 16

17. The Panel would need to apply a standard "analytical approach".¹⁶ As such, the absence of an explicit cross-reference to or incorporation of Article XXI in these two agreements is not *per se* dispositive of the issue. There is insufficient textual basis for applying Article XXI of the GATT 1994 to the Agreement on Rules of Origin. As for the TBT Agreement, there are various discrete provisions that contain the terms "essential security interest" or "national security", and to layer over these the blanket application of Article XXI of the GATT 1994 is legally untenable; what matters is the presence of these discrete provisions within the TBT Agreement, which can be interpreted as applying the consideration of essential security interests/national security to obligations in the TBT Agreement.

E. Response to Question 33

18. Article XXI(a) and Article XXI(b) deal with different situations. Article XXI(a) is concerned with a scenario where a Member is asked to "furnish" information, the disclosure of which it considers contrary to that Member's essential security interest. In contrast, Article XXI(b) deals with the situation in which a Member takes actions which it considers necessary for the protection of its essential security interest. The Member would need to demonstrate that its measure is applied in good faith. This is a contextual exercise and minimally calls for the Member to provide a narrative to explain its course of action and invocation of Article XXI(b), to articulate the applicability of the conditions in the sub-paragraphs to Article XXI(b), while bearing in mind the margin of appreciation to be accorded to Members on matters involving their essential security interests.

F. Response to Question 35

19. The phrase "which it considers" in Article XXI(b) points to the self-judging nature of the assessment under Article XXI(b) and indicates that a Member is allowed to determine with a significant degree of subjectivity what action "it considers necessary" to protect "its essential security interests". Given this phrase, a higher level of deference, and a significant margin of appreciation, should be accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of a measure taken for the protection of its essential security interests. This gives effect to the phrase "which it considers".

G. Response to Question 48

20. The phrase "which it considers" points to the self-judging nature of the assessment and indicates that a Member is allowed to determine with a significant degree of subjectivity what action "it considers necessary" to protect "its essential security interests". Under Article XXI(b), a higher level of deference, and a significant margin of appreciation, should be

¹⁵ Appellate Body Report, *US – Clove Cigarettes*, para. 95. [emphasis added]

¹⁶ Appellate Body Reports, *China – Rare Earths*, paras. 5.55, 5.61-5.63; see also Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), paras. 7.748 and 7.749.

accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of a measure taken for the protection of its essential security interests.

H. Response to Question 50

21. Singapore does not read paragraph 7.135 of the *Russia – Traffic in Transit* report as having imposed a territorial limitation. Rather, the panel's observations relate more to the level of specificity or articulation that is required by an invoking Member to invoke Article XXI(b), including Article XXI(b)(iii), and which will be fact and context specific.

I. Response to Question 52

22. Singapore generally agrees with the panel's observation at paragraph 7.74 of the *Russia – Traffic in Transit* report on the matters addressed by the subparagraphs of Article XXI(b). While subparagraphs of Article XXI(b) are intended to be exhaustive, it would be inadvisable for a panel to put forward a label or prescriptive definition of what constitutes the circumstances listed in the subparagraphs. For example, in the case of subparagraph (iii), the panel states that there is a useful "sliding scale" of circumstances that might qualify as an "emergency in international relations", including "heightened tension or crisis" or "general instability engulfing or surrounding a state". Singapore agrees with this conclusion and notes that a panel should adopt a contextual approach in assessing the circumstances, and also be alive to the possibility that the specific interests that would arise from the subparagraphs of Article XXI(b) may evolve over time.

J. Response to Question 56

23. Singapore's approach does not diverge from *Russia – Traffic in Transit*. At paragraph 7.138, the panel states that the obligation of good faith requires that, under Article XXI(b)(iii), the measures at issue must meet a minimum requirement of plausibility in relation to a proffered essential security interest. The panel reviewed whether the measures were so remote from, or unrelated to, the emergency that it was implausible that Russia had implemented measures for protection of its essential security interests arising out of the emergency. At paragraph 7.134, the panel stated that it is incumbent on the invoking Member to articulate the essential security interests sufficiently enough to demonstrate their veracity. Singapore's approach is consistent with this. As noted, a Member should minimally explain its course of action and invocation of Article XXI. However, once it is established that the minimum requirement of plausibility has been met, a panel should accord a higher level of deference and significant margin of appreciation to the Member's chosen level of protection, its assessment of risk and of the necessity of the measure that had been taken.

ANNEX C-9**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND****I. INTERPRETATION OF ARTICLE XXI(b) OF THE GATT 1994****a) Introduction**

1. Switzerland submits that the correct interpretation of Article XXI(b), on the basis of the ordinary meaning of its terms, taken in their context and in light of the object and purpose of the GATT 1994 and the WTO Agreement, clearly establishes that the WTO Member invoking Article XXI(b) as a defence does not enjoy absolute discretion and a panel needs to review whether the conditions set out in that provision are satisfied. Switzerland is of the view that recourse to supplementary means of interpretation, including the negotiating history, is not necessary, given that the interpretation based on the text of Article XXI(b) in its context and in light of the object and purpose of the GATT is clear. Switzerland wants to stress that interpreting Article XXI(b) as a self-judging provision not subject to review by a panel is also manifestly inconsistent with fundamental obligations and principles set out in the covered agreements, in particular in the DSU.

b) Interpretation of Article XXI(b) based on the text of that provision, its context and the object and purpose of the GATT 1994

1) The text of Article XXI(b)

2. First, Switzerland considers that it is clear from the text of Article XXI(b), including its structure and grammar, that the phrase "which it considers" does not qualify the subparagraphs nor the remaining part of the chapeau, and only qualifies the "necessity" of the action.

3. In terms of structure, Article XXI(b) of the GATT 1994 is composed of two distinct parts: on the one hand, the chapeau and on the other hand, the three subparagraphs. Furthermore, Switzerland also submits that it is clear from the wording and the grammatical structure of Article XXI(b) that the three subparagraphs and the circumstances identified therein qualify the word "action" in the chapeau and are not part of the clause "which it considers necessary for the protection of its essential security interests".

4. In fact, the relative clause that follows the word "action" starts with "which it considers" and ends at the end of the chapeau with "essential security interests". The subparagraphs (i), (ii) and (iii) are not part of the relative clause. They constitute coordinated participial clauses which relate directly and modify the noun "action" in the chapeau. More specifically, subparagraphs (i), (ii) and (iii) constitute a case of "coordinate construction", which means that the three subparagraphs of Article XXI(b) must have the same function. Given that it is undisputed and undisputable that subparagraph (iii) relates to the noun "action" – the United States itself acknowledges this¹ –, it means that all three subparagraphs modify the noun "action" in the chapeau. In other words, from a grammatical viewpoint, it is not possible that subparagraphs (i) and (ii) modify the noun "interests" if (iii) modifies the noun "action".

5. Thus, in Article XXI(b), we have a case of double modification of the noun "action": the first modifier is the relative clause ("which it considers necessary for the protection of its essential security interests") while the second modifier is the coordinate construction including subparagraphs (i), (ii) and (iii).

6. This analysis is not only supported by, but also is the only one consistent with, the French and Spanish versions of Article XXI(b). In particular, in the Spanish version, the word "relativas" is not included in the subparagraphs but at the end of the chapeau to introduce the three subparagraphs. Given that this word is feminine and plural, it can relate to the only other word in the chapeau which is feminine and plural, i.e. "medidas" ("action").

¹ United States' first written submission, para. 45.

7. Second, the chapeau and subparagraphs identify objective elements that are subject to objective determination by a panel. Regarding the subparagraphs, they all refer to objective elements, as noted by the panel in *Russia – Traffic in Transit*².

8. Regarding the chapeau, the fact that the phrase "essential security interests" of a Member implies a degree of discretion, does not mean that whether an interest may be regarded as an "essential security interest" may not objectively be assessed by a panel. Similarly, a panel must make an objective assessment of whether there is a rational connection between the action taken and the protection of the Member's essential security interests given that the action must be taken "for" the protection of "essential security interests".

9. The word "considers" does not imply boundless discretion. The word "consider" is defined *inter alia* as to "estimate, reckon".³ Thus, the Member taking the action must "estimate" or "reckon" that the action taken is "necessary" for the protection of its essential security interests. This meaning is consistent with the French and Spanish versions of Article XXI(b).

10. Switzerland submits that the discretion granted to the Member as to the "necessity" of its action implies that no comparison of the action taken by that Member against a benchmark of a less trade restrictive action that could have been taken by that WTO Member instead is required. However, the Member invoking that defence must still present the grounds for its finding of the "necessity" of the measure in order for the panel to assess whether the Member has exercised its discretion in good faith.

2) The context of Article XXI(b)

11. The immediate context provided by the other paragraphs of Article XXI, as well as the broader context provided by other provisions of the GATT 1994 support the conclusion that Article XXI(b) is reviewable by a panel.

12. First, Article XXI(a) merely notes that a Member does not need to provide information "the disclosure of which" it considers contrary to its essential security interests. Importantly, Article XXI(a) does not relieve a WTO Member from its burden of proof in the context of dispute settlement proceedings. Article XXI(a) does not change the principle confirmed by the Appellate Body that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".⁴

13. In addition, the fact that the phrase "which it considers necessary" is not present in XXI(c) does not imply that Article XXI is not reviewable by a panel. As seen above, the phrase "which it considers" in Article XXI(b) only qualifies the "necessity" of the action and does not qualify the subparagraphs nor the remaining part of the chapeau. Moreover, the phrase "taken in time of" describes the connection between the action and the events of war or other emergency in international relations. This connection is a temporal one, which is an objective fact, amenable to objective determination.

14. Second, the broader context provided by other provisions of the GATT 1994, in particular Article XX, also supports the conclusion that the invocation of Article XXI(b) is reviewable by a panel. Both Article XX and Article XXI, which are entitled "exceptions", constitute defences to measures that are inconsistent with the GATT 1994. They are in the nature of "affirmative defences", which means that it is up to the party invoking the exception to offer proof that the conditions set out in the provision laying down the exception are met. Article XX and Article XXI also have a similar structure, including a chapeau and a number of subparagraphs. The Appellate Body found that Article XX sets out a two-tier test for determining whether a measure can be justified under that provision, namely first, whether the measure falls under one of the ten exceptions listed in the paragraphs of Article XX and second, whether it satisfies the requirements of the chapeau.⁵ The similar structure of Article XXI(b) suggests that a similar approach should be followed in the context of Article XXI(b) whereby the Panel first assesses whether the circumstance identified under one of

² Panel Report, *Russia – Traffic in Transit*, para. 7.82

³ *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (eds.) (Oxford University Press, 2007), Vol.1, p. 496.

⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

⁵ Appellate Body Report, *Indonesia – Import Licensing Regime*, para. 5.96.

the subparagraphs is met before examining whether the measure satisfies the conditions of the chapeau.

3) The object and purpose of the GATT 1994

15. That Article XXI(b) is subject to the panel's review is further supported by the object and purpose of the GATT 1994 which is *inter alia* "the security and predictability of 'the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade'".⁶ The possibility to completely shield a trade-restrictive measure from any scrutiny by merely invoking Article XXI(b) would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements.⁷

16. While Switzerland agrees with the observation that the GATT contains both obligations and exceptions (including the Article XXI(b) exception), it submits that the need to maintain "a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions [...], on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand"⁸ implies that the invocation of Article XXI(b) as an exception is necessarily reviewable by a panel.

c) Negotiating history and supplementary means of interpretation

17. Switzerland submits that there is no need to look at supplementary means of interpretation. The interpretation based on the text of Article XXI(b) in its context and in light of the object and purpose of the GATT is clear: Article XXI(b) is not self-judging.

18. The interpretation of Article XXI(b) according to its ordinary meaning, in its context and in light of the object and purpose of the GATT 1994, is clear and reasonable. Thus, the interpretation of Article XXI(b) according to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable. In these circumstances, recourse to the supplementary means of interpretation is not necessary.

19. In any event, supplementary means of interpretation, including the negotiating history, do not support the United States' interpretation as confirmed by the Panel Report in *Russia – Traffic in Transit*.⁹

d) Fundamental obligations and principles

20. Removing a matter from the scope of a panel's review because the defending party invokes Article XXI(b) of the GATT has also no basis in the DSU. In fact, it would be contrary to various principles and obligations included in the WTO covered agreements and, in particular, in the DSU which establish that the Panel shall duly exercise its jurisdiction.

21. Pursuant to Article 11 of the DSU, panels must make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. This implies making findings with respect to the claims raised by the complainants. In some cases, panels will be also required to make "such other findings" pursuant to Article 11 of the DSU as those may be necessary for the DSB to make the recommendations or give the rulings provided for in the covered agreements.

22. Article 23.1 of the DSU requires Members which "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements" to "have recourse to, and abide by, the rules and procedures of this Understanding". When read together with Article 3.3 of the DSU, the Appellate Body has concluded that "[t]he fact that a Member may initiate a WTO dispute whenever it considers that 'any benefits accruing to [that Member] are being impaired by measures taken by another Member' implies that that Member is *entitled* to a ruling by a WTO

⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 243. See also Appellate Body Report, *EC – Computer Equipment*, para. 82.

⁷ Panel Report, *Russia – Traffic in Transit*, para. 7.79.

⁸ Appellate Body Report, *US – Shrimp*, para. 156.

⁹ See Panel Report, *Russia – Traffic in Transit*, paras. 7.83-7.100.

panel."¹⁰ Concluding that this Panel cannot make findings on Hong Kong's claims would "diminish" Hong Kong's right to seek redress within the meaning of Article 23 of the DSU and to bring a dispute pursuant to Article 3.3 of the DSU.¹¹

23. Accepting that the mere invocation of Article XXI(b) of the GATT 1994 automatically excludes the challenged measure from any scrutiny by a panel or the Appellate Body would also be inconsistent with Article 23.2(a) of the DSU which prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to the multilateral dispute settlement system. Indeed, if Article XXI(b) is exempted from any review, this would mean that, by merely invoking that provision, WTO Members would be able to unilaterally decide the outcome of a dispute, in place of WTO adjudicating bodies, contrary to the obligation laid down in Article 23.2(a) of the DSU.

II. ORDER OF ANALYSIS AND BURDEN OF PROOF

24. Article XXI(b) of the GATT 1994, like Article XX, constitutes an affirmative defence that may be invoked to justify a measure that is inconsistent with the GATT 1994. This has important implications for the order of analysis that should be followed by this Panel and for the allocation of the burden of proof.

25. First, as explained by the Appellate Body, "an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified".¹² Thus, in the present case, the Panel must first address the claims of violation before addressing a defence under Article XXI. This is a logical order since if there is no violation, a defence under Article XXI would not even come into play.¹³ This order of analysis is also necessary since it is the WTO-inconsistent aspect of the measure, not the measure as a whole, that must be justified under an affirmative defence.¹⁴ In order to identify the WTO-inconsistent aspects of a measure, a panel must first examine the claims of violation put forward by a complainant.

26. Second, the fact that a provision is an affirmative defence means that the burden of proof is on the party asserting that defence.¹⁵ Indeed, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".¹⁶ A responding party invoking Article XXI(b) bears the burden of proving first that its defence under Article XXI(b) of the GATT 1994 is available and second (and if so) that the conditions laid down in Article XXI(b) are fulfilled.¹⁷ This requires submitting evidence, presenting arguments and linking the evidence to the arguments raised.

27. In that regard, a responding party invoking Article XXI(b) must also clearly indicate which of the subparagraphs of Article XXI(b) it is relying on for its defence. Furthermore, Switzerland recalls that the Appellate Body stressed that "the principles of good faith and due process oblige a responding party to articulate its defence *promptly* and *clearly*. This will enable the complaining party to understand that a specific defence has been made, 'be aware of its dimensions, and have an adequate opportunity to address and respond to it'".¹⁸

III. WHETHER ARTICLE XXI(b) IS AVAILABLE TO JUSTIFY MEASURES INCONSISTENT WITH THE AGREEMENT ON RULES OF ORIGIN AND THE TBT AGREEMENT

28. In the context of Article XX of the GATT 1994, which, like Article XXI, contains the words "nothing in this Agreement", the Appellate Body explained that whether that provision may be invoked to justify a breach of an obligation set out in another covered agreement requires a case-

¹⁰ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis original)

¹¹ *Ibid.*, para. 53.

¹² Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 173, referring to the Appellate Body Report in *US – Gasoline*, p. 23 and GATT Panel Report in *US – Section 337 Tariff Act*, para. 5.9.

¹³ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.107.

¹⁴ Appellate Body Report, *US – Gasoline*, pp. 13-14.

¹⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹⁶ *Ibid.*

¹⁷ Panel Report, *Turkey – Textiles*, para. 9.57.

¹⁸ Appellate Body Report, *US – Gambling*, para. 272. (emphasis added)

by-case analysis of the relationship between the relevant provisions.¹⁹ The Appellate Body noted that such examination will lead to the conclusion that exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation in another covered agreement, for instance where that other agreement contains an express language incorporating that provision.²⁰ The Appellate Body noted that, where there is no such express language, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the relevant agreements. Switzerland considers that the same approach should be followed for determining the applicability of the Article XXI exceptions outside of the GATT 1994.

29. Switzerland notes that certain Agreements included in Annex 1A do explicitly provide that Article XXI of the GATT 1994, or more generally the exceptions under the GATT 1994, apply in the context of those agreements. For instance, Article 1.10 of the Agreement on Import Licensing Procedures, Article 3 of the TRIMS Agreement and Article 23.7 of the Trade Facilitation Agreement. Switzerland notes that no such provision can be found in the Agreement on Rules of Origin or in the TBT Agreement.

30. Absent a specific provision incorporating the text, or explicitly providing for the applicability of Article XXI of the GATT, its applicability to another agreement may nevertheless result from the specific links between Article XXI and the provisions of such other agreement.²¹ The existence of such specific links must be assessed on a case-by-case basis, through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute.²² A general link between the GATT 1994 and another agreement listed in Annex 1A, such as a reference to the GATT 1994 or the fact that an agreement "elaborates" upon the disciplines set out in the GATT 1994, will not suffice. Similarly, references to Articles XXII and XXIII of the GATT 1994 and to the DSU do not support the applicability of Article XXI to the ARO and the TBT Agreement.

¹⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.55.

²⁰ *Ibid*, para. 5.56.

²¹ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), paras. 7.744.

²² See Appellate Body Reports, *China – Rare Earths*, para. 5.57.

ANNEX C-10**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE****1. INTRODUCTION**

1. In its written submission and responses to questions posed by the Panel to the third parties Ukraine provided comments on certain aspects of understanding and meaning of Article 2(c) and (d) of the Agreement on Rules of Origin ("ARO"), the interpretation and application of Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") with respect to the measures concerning the origin marking requirement introduced by the United States to goods manufactured or produced within the customs territory of Hong Kong, China.

2. CLAIMS REGARDING ARTICLE XXI OF THE GATT 1994

2. Ukraine is of the view that the question of the authority of a panel to review invocation of Article XXI of the GATT 1994 should not be a matter in any further disputes. Without repetition of the findings in *Russia – Traffic in Transit*, Ukraine believes that a panel may interpret Article XXI(b) of the GATT 1994 and review the reliance on this provision. It means that Article XXI(b) of the GATT 1994 is justiciable in the same manner as any other provision of the WTO covered agreements.

3. The Panel in *Russia – Traffic in Transit* found that the obligation of good faith requires that Members not use the exceptions of Article XXI as a means to circumvent their obligations under the GATT 1994.¹

4. Therefore, Ukraine insists that WTO Members in any case must indicate their essential security interests if they use security exceptions to justify their actions. This can also be confirmed by the fact that the Panel in *Russia – Traffic in Transit* found that it follows from the Panel's interpretation of Article XXI(b) of the GATT 1994, as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b) of the GATT 1994 is not totally "self-judging".²

5. In Ukraine's view, a panel has to examine whether (i) the interests or reasons advanced by a defendant for imposing the measures fall within the scope of the phrase "its essential security interests"; and whether (ii) the measures are directed at safeguarding a defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.

6. Due to the exceptional features of the disputes involving the "security exceptions" provisions, Ukraine notes that it is important that the Panel considers each invocation carefully, in light of the particular circumstances of the dispute before it.

3. CLAIMS REGARDING ARTICLES 2(C) AND 2(D) OF THE ARO

7. This dispute raises issues on certain measures concerning the origin marking requirement introduced by the United States to goods manufactured or produced within the customs territory of Hong Kong, China.

8. According to Hong Kong, China, the measures of the United States pursuant to which goods manufactured or processed within the customs territory of Hong Kong, China, must be marked as originated within the People's Republic of China ("PRC"), a different WTO Member.

9. The claims of Hong Kong, China, that the United States has reached this erroneous determination for political reasons unrelated to a proper determination of the country of origin of the goods.³

¹ Panel Report, *Russia – Traffic in Transit*, para. 7.133.

² Ibid, para. 7.102.

³ First Written Submission by Hong Kong, China, para. 5.

10. In accordance with Article 2(c) of the ARO rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.

11. In its First Written Submission Hong Kong, China, also challenges the non-compliance of the United States' measures with Article 2(d) of the ARO. From the point of view of Hong Kong, China, the United States therefore "discriminate[s] between other Members" in respect of the rules of origin that the United States applies to imports, in contravention of Article 2(d) of the ARO.⁴

12. In accordance with Article 2(d) of the ARO Members shall ensure that the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned.

13. Therefore, the Panel should carefully analyze the nature of the United States' measures and determine whether alleged by Hong Kong, China, measures are in line with Article 2(d) of the ARO.

⁴ First Written Submission by Hong Kong, China, para. 48.