BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

COMMENTS OF HONG KONG, CHINA ON THE UNITED STATES' RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Confidential

14 March 2022

TABLE OF SHORT FORMS

SHORT FORM	OFFICIAL NAME
ARO	Agreement on Rules of Origin
DSU	Dispute Settlement Understanding
Executive Order 13936	The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020)
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
LRD	Legitimate Regulatory Distinction
MFN	Most-Favoured-Nation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF REPORTS

SHORT TITLE	FULL REPORT TITLE AND CITATION
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
China – Publications and Audiovisuals	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Thailand – Cigarettes (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019 – the Division suspended its work on 10 December 2019]
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, adopted 3 December 2015

UNITED STATES – ORIGIN MARKING REQUIREMENT (DS597)

QUESTIONS FROM THE PANEL TO THE PARTIES AFTER THE SECOND SUBSTANTIVE MEETING

31 January 2022

HONG KONG, CHINA'S INTRODUCTORY COMMENTS

1. This submission provides comments on the United States' answers to the Panel's questions following the second substantive meeting. Before turning to those specific comments, however, Hong Kong, China will first address the overarching statement at the outset of the U.S. answers, in which the United States expresses surprise at the idea that Hong Kong, China is not asking this Panel to pass judgment on the veracity of the United States' determination regarding the "sufficient autonomy" of Hong Kong, China.[1] The United States insists that "Hong Kong, China, has brought this dispute with one goal in mind: to secure a recommendation that the United States withdraw or modify its determination as to Hong Kong, China's autonomy vis-à-vis the People's Republic of China."[2]

2. The United States either fundamentally misunderstands, or is purposefully mischaracterizing, the nature of Hong Kong, China's claims in this dispute. As Hong Kong, China explained in the *first sentence of its first written submission*, "[t]his 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")." Hong Kong, China is challenging a single measure – the revised origin marking requirement – and Hong Kong, China has asked the Panel to recommend that the United States bring this *single measure* into conformity with its obligations under the relevant WTO covered agreements.[3] Hong Kong, China has demonstrated that the revised origin marking requirement is *facially* inconsistent with the relevant provisions of the ARO, the TBT Agreement, and the GATT 1994. For the reasons that Hong Kong, China will briefly recall below, the validity of the United States' underlying determination regarding Hong Kong, China's "sufficient autonomy", despite in our view being unmeritorious, is simply not relevant to the Panel's disposition of Hong Kong, China's claims.

3. As Hong Kong, China has previously explained in detail, it is undisputed that U.S. law requires that "every article of foreign origin" imported into the United States be marked with the full English name of the country of "manufacture, production, or growth" (or "substantial transformation") of that article.[4] Pursuant to the *revised* origin marking requirement, however, this "normal" country of origin marking requirement does not apply to goods manufactured and produced in the customs territory of Hong Kong, China. Instead,

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[1] *See* United States' comments on second answers, paras. 2-3.

[2] United States' closing statement at the second meeting, para. 4.

[3] *See* Hong Kong, China's first written submission, Section VI ("Request for Findings and Recommendations").

[4] *See* Hong Kong, China's first written submission, Section II.B; Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a) [redacted]; 19 C.F.R. § 134.1(b) [redacted].

based on the United States' conclusion that Hong Kong, China is not "sufficiently autonomous" from the People's Republic of China[5], goods that are indisputably manufactured or produced in Hong Kong, China must be marked as goods originating in the People's Republic of China, which is a different WTO Member.[6]

4. Hong Kong, China's claims in this dispute under the ARO, the TBT Agreement, and the GATT 1994 are all essentially about this fact – namely, that goods of all other WTO Members are required, and therefore permitted, to be marked with the full English name of the country of "manufacture, production, or growth" (or "substantial transformation"), while goods manufactured and produced in Hong Kong, China are mandated to be marked as goods of a different WTO Member.

5. Critically, the *reason* that the United States has determined to treat Hong Kong, China goods differently and less favourably in respect of its country of origin marking requirement is *categorically irrelevant* to the Panel's disposition of Hong Kong, China's claims under the ARO and TBT Agreement.

6. Hong Kong, China's ARO claims fundamentally concern the fact that the United States makes its country of origin determination for goods of Hong Kong, China on the basis of a condition – the "sufficient autonomy" condition – that is "not related to manufacturing or processing". The legitimacy of the United States' "sufficient autonomy" determination is not relevant. What matters is that the "sufficient autonomy" condition is a condition used to determine country of origin that is "not related to manufacturing or processing" and is one that the United States does not apply to determine the origin of goods from other Members.

7. The validity of the sufficient autonomy determination is also irrelevant to the Panel's disposition of Hong Kong, China's discrimination claim under Article 2.1 of the TBT Agreement. Pursuant to the revised origin marking requirement, Hong Kong, China goods (and only Hong Kong, China goods) may not be marked with the full English name of the country of manufacture or production, and must instead be marked as goods of a different WTO Member. In respect of technical regulations, Article 2.1 prohibits less favourable treatment of products from Member A vis-à-vis like products from Member B. The inconsistency of the revised origin marking requirement with Article 2.1 is therefore evident on the face of the measure, because products of Hong Kong, China are the only products that the United States does not require, and therefore permit, to be marked with the full English name of the country of manufacture or production.[7] The reason *why* the United States treats Hong Kong, China goods less favorably is not relevant, much less the inherent validity of that reason.

[5] Hong Kong, China does not, of course, agree with the United States' determination that Hong Kong, China 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." (United States – Hong Kong Policy Act of 1992 (5 October 1992), Section 202(a) [redacted]. For purposes of the present legal dispute, however, whether this determination has any merit is irrelevant.

[6] *See* Hong Kong, China's first written submission, Section II.B.

[7] 19 C.F.R. § 134.45(a)(1) [redacted].

8. It is only in respect of Hong Kong, China's claims under the GATT 1994, and the United States' invocation of Article XXI(b), that the reason for the United States' less favorable treatment of Hong Kong, China goods becomes relevant. Again, however, the Panel is *not* being asked to pass judgment on the validity of the United States' determination regarding Hong Kong, China's alleged lack of "sufficient autonomy". What the Panel is being asked to evaluate, in the first instance, is whether the United States has demonstrated the objective applicability of one or more of the subparagraphs of Article XXI(b) to the revised origin marking requirement. Had the United States attempted to make its case under subparagraph (iii), for example, the Panel would have needed to evaluate whether the revised origin marking requirement was "taken in time of war or other emergency in international relations". If the United States had discharged this burden (which it clearly has not), the Panel would have then needed to determine whether the United States has sufficiently articulated its essential security interests, and the Panel would also have needed to evaluate any U.S. argument that the revised origin marking requirement bears a plausible relationship to those articulated essential security interests. In no event would the Panel need to evaluate or pass judgment on the merits of the United States' "sufficient autonomy" determination.

9. 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. Hong Kong, China's comments on the U.S. answers below highlight this consistent deficiency in the United States' responses to the Panel's questions.

CLAIMS UNDER ANNEX 1A AGREEMENTS

Agreement on Technical Barriers to Trade (TBT Agreement)

68. To the United States: In paragraph 74 of its opening statement at the second meeting of the Panel, the United States observes that "[b]eing required to use a particular mark of origin – here, 'China' – cannot, in itself, be evidence of detrimental impact…". Does the United States mean that if WTO Member A is required to put the name of WTO Member B on the origin mark, this does not, in itself, constitute evidence of detrimental impact? Does the United States' response differ depending on whether the WTO Member in question is a separate customs territory?

10. In relation to the Panel's questions regarding Hong Kong, China's claims under Article 2.1 of the TBT Agreement, Hong Kong, China will comment on the United States' responses to Panel questions Nos. 68, 69, 74, 75, and 76 collectively.[8]

11. Panel question No. 68 posed a straightforward question to the United States: "Does the United States mean that if WTO Member A is required to put the name of WTO Member B on the origin mark, this does not, in itself, constitute evidence of detrimental

[8] Hong Kong, China does not have specific comments on the United States' responses to Panel questions Nos. 77, 79, 80, or 81.

impact?" The United States offers several observations in response to Panel question No. 68, but none of those observations provides an answer to the Panel's question.

12. First, the United States remarks that "the mere requirement to employ a certain country name in product marking is not sufficient to establish detrimental impact",[9] and "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".[10]

13. This is not responsive to the Panel's question. It is of course true that origin marking terminology is determined by the United States. What matters for purposes of evaluating Hong Kong, China's claim of "less favourable treatment" under Article 2.1 of the TBT Agreement, however, is *how* the United States makes its "terminology" determination, and whether the "requirement to employ a certain country name" reflects origin-based discrimination. As alluded to in the Panel's question, goods of Hong Kong, China origin (i.e. WTO Member A) are required to be marked as goods originating in the People's Republic of China (i.e. WTO Member B). Goods originating in all other WTO Members must be marked with the full English name of the country of "manufacture, production, or growth" (or "substantial transformation").[11] The revised origin marking requirement therefore treats Hong Kong, China products differently based on their origin, and that differential treatment has a detrimental impact on Hong Kong, China goods.[12]

14. The United States argues that there is no detrimental impact in this circumstance, because "none of the provisions of the covered agreements at issue require a Member to permit use of a specific name for origin marking purposes".[13] As Hong Kong, China has previously explained, this argument is a non sequitur.[14] For purposes of Hong Kong, China's claim under Article 2.1, what matters is whether *the United States* treats goods of Hong Kong, China less favourably than goods of all other WTO Members by virtue of the challenged measure. What other provisions of the covered agreements do or do not require with respect to origin marking is irrelevant.[15]

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[9] United States' response to Panel question No. 68, para. 5.

[10] United States' response to Panel question No. 68, para. 7.

[11] 19 C.F.R. § 134.1(b) [redacted].

[12] The detrimental impact of the revised origin marking requirement is evident on the face of the measure, because goods originating in Hong Kong, China must be marked as goods of a *different* WTO Member – namely, the People's Republic of China. Hong Kong, China has also demonstrated as a matter of fact in each of its written submissions that the inability of Hong Kong enterprises to mark their goods as goods of Hong Kong or Hong Kong, China origin detrimentally modifies the conditions of competition in the U.S. market for these goods. [redacted]

[13] United States' response to Panel question No. 68, para. 10.

[14] *See, e.g.*, Hong Kong, China's response to Panel question No. 13.

[15] As Hong Kong, China explained in the introduction to these comments, and as discussed again in paras. 43-45 below, the reason *why* the United States accords less favourable treatment to goods of Hong Kong, China is also irrelevant. In response to Panel question No. 74(e), the United States says that "[t]he 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

15. Finally, beginning in paragraph 11 of its answers, the United States articulates its principal argument in response to Hong Kong, China's claim under Article 2.1 – namely, that there is no discrimination because of the "origin neutral" concerns underlying the United States' "sufficient autonomy" determination. The United States acknowledges that Hong Kong, China's discrimination claim stems from the fact that all "U.S. imports must be marked with the name of the country of 'manufacture, production, or growth', except for goods from Hong Kong, China."[16] The United States maintains, however, that there is no discrimination because the United States' "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."[17]

16. The United States' subsequent responses to Panel questions Nos. 69, 74, 75, and 76 all relate to different aspects of the United States' flawed "origin neutral" theory.[18] The United States insists that if the Panel were to agree with Hong Kong, China that there is a detrimental impact as a result of the revised origin marking requirement, then the Panel must evaluate whether that that detrimental impact is "rationally" or "reasonably" linked to a regulatory distinction that serves an origin-neutral regulatory objective.[19] The Panel posed several related questions in which it attempted to clarify the precise parameters of this novel "origin-neutral" standard, but the United States' responses make clear that this "standard" does not have any precise parameters.

17. In question No. 74(b), for example, the Panel inquires about the U.S. views regarding the necessary steps in the Panel's assessment of less favourable treatment, but the United States explains that there is no "set order of analysis".[20] The United States reiterates this same point in response to Panel questions Nos. 75(a) and (b), emphasizing that the analysis is "holistic", and so there are no particular "steps".[21] In question No. 74(d), the Panel asks about the "exact test" to be applied to assess a measure against an "origin-neutral regulatory purpose", but the United States explains that its myriad formulations of the relevant standard

marking". But pursuant to the MFN principle, Hong Kong, China (as an individual WTO Member) *is* entitled to treatment distinct from treatment of the People's Republic of China for purposes of, among other things, origin marking requirements, because *all other Members* are entitled to distinct treatment for purposes of origin marking requirements as a matter of U.S. law. For purposes of Hong Kong, China's less favourable treatment claim under Article 2.1, the fact that the United States has asserted that there is a reason that Hong Kong, China is not entitled to the same treatment as all other Members only serves as a basis for confirming the less favourable treatment.

[16] United States' response to Panel question No. 68, para. 11.

[17] United States' response to Panel question No. 68, para. 12.

[18] The United States suggests in its responses to Panel questions Nos. 69 and 74(a) that Hong Kong, China's view is that any origin-based distinction is necessarily discriminatory. This is false and a mischaracterization of Hong Kong, China's position. As Hong Kong, China has stated in all of its submissions, discrimination requires a detrimental impact on the conditions of competition. In this case, the detrimental impact is evident on the face of the measure, and Hong Kong, China has also demonstrated detrimental impact as a matter of fact.

[19] United States' response to Panel question No. 74(e), para. 33.

[20] United States' response to Panel question No. 74(b), para. 22.

[21] United States' response to Panel questions Nos. 75(a) and (b), para. 39.

(e.g. "rational linkage or relationship", "apt to", etc.) are "non-mutually exclusive ways to address the question of whether there is origin-based discrimination".[22] In question No. 75(c), the Panel asks about whether the "origin-neutral regulatory purpose" assessment would also apply to a panel's analysis of less favourable treatment under Articles IX and III of the GATT 1994. Despite the fact that the United States has now been given two opportunities to answer this question, Hong Kong, China still has no idea if the U.S. response is "yes" or "no".

18. The only concrete answer that the United States gives is its response to Panel question No. 74(c), where the United States explains that an "origin-neutral regulatory purpose" is necessarily broader than the Appellate Body's concept of a "legitimate regulatory distinction" ("LRD").[23] This is because the United States acknowledges, as it must, that the "regulatory distinction" here draws a distinction *explicitly based on origin*,[24] and so the Appellate Body's LRD framework is inapposite.[25] The United States invented its "origin-neutral regulatory purpose" theory for purposes of this dispute because pursuant to the Appellate Body's analytical framework in every prior dispute under Article 2.1, the revised origin marking requirement is plainly inconsistent with that provision.

19. According to the U.S. "origin-neutral regulatory purpose" theory, an origin-based distinction on the face of a measure that detrimentally modifies the conditions of competition for imported products is not necessarily discriminatory if the distinction is "rationally or reasonably related to an origin-neutral governmental objective".[26] As noted above, the relevant "origin-neutral governmental objective" that the United States has identified is "the U.S. concern for fundamental freedoms, human rights, and the integrity of democratic institutions globally – in Hong Kong, China, as well as elsewhere."[27] The United States explains that "[t]he specific implementation of mechanisms to address those origin-neutral concerns may be origin-specific, depending on the facts and circumstances",[28] and will "vary by country".[29] However, even if these measures are "origin-specific" and have a detrimental impact on conditions of competition in the U.S. market, the U.S. theory is that the measures are not in violation of Article 2.1 as long as they are related to U.S. concerns for "fundamental freedoms, human rights, and the integrity of democratic institutions globally".

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[22] United States' response to Panel question No. 74(d), para. 29.

[23] *See* United States' response to Panel question No. 74(c). In response to Panel question No. 76, the United States also explains that the Appellate Body's standard – that the detrimental impact must *stem exclusively* from a legitimate regulatory distinction – is too narrow (as compared to the United States' "holistic" standard). *See* United States' response to Panel question No. 76, paras. 46-47.

[24] According to the United States, the "regulatory distinction" at issue is the alleged "lack of sufficient autonomy [of Hong Kong, China], which is reflected in the origin marking requirement for products from Hong Kong, China." United States' response to Panel question No. 75(a) and (b), para. 42.

[25] *See* Hong Kong, China's responses to Panel questions Nos. 69 and 71.

[26] United States' response to Panel question No. 74(c), para. 25.

[27] United States' response to Panel question No. 74(c), para. 27.

[28] United States' response to Panel question No. 74(c), para. 27.

[29] United States' response to Panel question No. 74(e), para. 34.

The text of Article 2.1 (properly interpreted in its context and in the light of its object and purpose) does not provide any basis for the U.S. theory.

20. The United States accuses Hong Kong, China of "snidely" dismissing its "origin neutral" concerns, which it has expressed "in declarations of emergencies regarding human rights, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes over decades".[30] To be clear, what Hong Kong, China is dismissing is the U.S. theory that a technical regulation does not treat imported products less favourably so long as it is somehow related to "fundamental freedoms, human rights, and the integrity of democratic institutions", despite the fact that the United States has gone out of its way in this dispute to emphasize that these concerns arise frequently and globally. 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.

21. 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.

69. To both parties: Please explain whether, for the purpose of Article 2.1 of the TBT Agreement, "*de jure* discrimination" is the same as an "origin-based distinction" and how each of these concepts relates to "legitimate regulatory distinctions" as developed by the Appellate Body or "origin neutral" factors/objectives as referred to by the United States.

22. See Hong Kong, China's comments on the United States' response to Panel question No. 68, above.

70. To Hong Kong, China: With reference to Hong Kong China's response to advance question No. 1 at the second meeting of the Panel, please clarify whether it is Hong Kong, China's position that any measure that on its face provides for a difference in treatment with respect to only one WTO member would lead to detrimental impact? If yes, would this lead to the conclusion that every measure that differentiates on the basis of origin constitutes *de jure* discrimination?

[30] United States' response to Panel question No. 68, para. 12.

71. To Hong Kong, China: With reference to the Appellate Body's statement in paragraph 182 of Appellate Body Report, *US – Clove Cigarettes*, please comment on the United States' argument in footnote 226 to paragraph 182 of its second written submission that this statement "does not mean that where there is *de jure* discrimination the panel need not undergo […] legitimate regulatory distinction analysis". Please also comment on Canada's statement in its response to Panel question No. 11 (at paragraph 39) that there "is no textual or conceptual reason that this type of *de jure* distinction should be assessed differently than a distinction giving rise to de facto discrimination where both may result in detrimental impact on the competitive opportunities for imports."

72. To Hong Kong, China: If a Member imposes a measure that makes an origin-based distinction resulting in detrimental impact with respect to products of one Member and does so for legitimate policy reasons (e.g., the protection of consumer information), would it be possible to undertake a "legitimate regulatory distinctions" analysis under Article 2.1? If not – why not?

73. To Hong Kong, China: What is the basis for Hong Kong China's view, expressed during the second meeting of the Panel, that a level of justification would be available under the exceptions for *de jure* discriminations under, *inter alia*, Articles I and IX of the GATT 1994, but not under the TBT Agreement? Please point out what in the text of the two provisions would warrant such a difference of approach between the TBT Agreement and the GATT 1994? In your response, please also comment on the statement by the Appellate Body in paragraphs 96 and 101 in Appellate Body Report, *US – Clove Cigarettes*.

74. To the United States: In its responses to Panel questions Nos. 14 and 15, the United States describes what it considers "the correct" approach under Article 2.1 of the TBT Agreement.

a. Under the "correct" approach described by the United States, would the assessment be the same whether the distinction resulting from the administration of the measure is expressed in origin-based or origin-neutral terms?

b. Please clarify whether the United States sees the examination of whether "any detrimental impact is based on the administration of an origin-based discrimination" as a second step of the analysis of less favourable treatment under Article 2.1, after the panel has found that there is detrimental impact. Please also clarify the United States' statement, in paragraph 57 of its response to Panel question No. 14, that "a panel would evaluate this as part of the overall assessment of whether a measure modified the conditions of competition".

c. Please clarify what the United States means by an "origin-neutral regulatory purpose", and in what respect this concept differs from the concept of "legitimate regulatory distinction" used by the Appellate Body under the approach that the United States considers "flawed". In this regard, please

indicate whether and if so, how, "essential security interests" measures expressly limited to imports from one Member can be origin-neutral?

d. Please elaborate on the exact test that is applied to assess the measure against the origin-neutral regulatory purpose. More specifically, please elaborate on the following:

i. the United States' statement in paragraph 58 of its response to Panel question No. 14 that "if the regulatory purpose invoked bears a *rational relationship* to the measure at issue, this would be indicative of non-discrimination" (emphasis added);

ii. the United States' statement in paragraph 58 of its response to Panel question No. 14 that "if the measure is *apt to* advance the regulatory purpose identified by the regulating Member, this too would be indicative of non-discrimination" (emphasis added);

iii. the United States' statement in paragraph 64 of its response to Panel question No. 15 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" (emphasis added); and

iv. the United States' statement in paragraph 182 of its second written submission that "the question is whether alleged detrimental impact, if any, can be explained by origin-neutral factors *and* such that the impact is rationally related to an origin-neutral regulatory purpose." (emphasis added).

e. Please elaborate on what is the basis for the "reasonable" connection or linkage that the United States referred to in its response to question d) above during the second substantive meeting.

23. See Hong Kong, China's comments on the United States' response to Panel question No. 68, above.

75. To the United States: In paragraph 61 of its opening statement at the second meeting of the Panel, the United States further elaborated on what it considers the "correct approach" under Article 2.1 of the TBT Agreement. The United States points out that to establish its claim under Article 2.1 of the TBT Agreement, Hong Kong, China needs to establish four elements of the test, the fourth being to take into account the existence of any origin-neutral factors, including the factual circumstances as well as the regulatory objective. Similar statements are made in paragraphs 67 and 68 of the United States' opening statement.

a. Is the Panel correct in understanding the United States' view that an origin-based distinction that results in detrimental impact is not enough to show less

favourable treatment, but elements three and four of this test also need to be shown?

b. **Regarding these two additional steps, could the United States elaborate on the issue of attributability and the difference between "origin-neutral factors, including the factual circumstances" and the "regulatory objective"?**

c. **If the concept of "less favourable treatment" in Article 2.1 TBT Agreement requires this assessment, as the United States suggests, does it also require the same test under Article IX (and Article III) in the GATT 1994? If not, why not?**

d. **Given that, in the United States' view, Hong Kong, China has the burden of proof in respect of all these elements, does Hong Kong, China have to demonstrate that the application of the sufficient autonomy condition is not origin-neutral?**

24. See Hong Kong, China's comments on the United States' response to Panel question No. 68, above.

76. To the United States: With reference to paragraph 62 of the United States' response to Panel question 14, could you elaborate on the argument that, under the Appellate Body's "flawed" approach, "any detrimental impact could constitute a breach of Article 2.1 […] because the measure was not designed to eliminate all detrimental impact not exclusively related to the regulatory distinction"?

25. See Hong Kong, China's comments on the United States' response to Panel question No. 68, above.

77. To both parties: Do you consider that in assessing whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction", prior panels and the Appellate Body, have incorporated into the analysis under Article 2.1 of the TBT Agreement concepts that are mostly associated with the test under Article XX of the GATT 1994? If so, what would be the rationale behind using concepts associated with Article XX for the purpose of an examination under Article 2.1 and what is the role of the sixth recital in that regard?

26. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 77.

78. To Hong Kong, China: Could you clarify the argument made in Hong Kong, China's response to Panel question No. 14, that the reference in the seventh recital of the preamble to the protection of essential security interest "foreshadows" certain specific provisions in the TBT Agreement, which do not include Article 2.1? Do you agree with the United States' understanding of this argument as being that the seventh recital "is only relevant for certain

provisions" of the TBT Agreement (United States' second written submission, paragraph 185)?

79. To both parties: In your view, is there a difference between "national security requirements" and "essential security interest" in the context of the TBT Agreement? In your response, please elaborate on your understanding of what each of these two concepts means.

27. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 79.

80. To the United States: In paragraph 184 of its second written submission, the United States describes a hypothetical situation where security interests are involved, but the Member adopting the measure at issue does not invoke Article XXI and submits that in those circumstances "security interests" would be taken into account in applying Article 2.1 of the TBT Agreement.

a. Please clarify what "invocation" means. Does this refer to using the terms "essential security interests" as a justification for a measure or does it additionally require a specific reference to Article XXI of the GATT 1994?

b. Please elaborate on why it would be appropriate to review "essential security interests" under Article 2.1 of the TBT Agreement when a Member does not invoke Article XXI(b) of the GATT 1994 to justify its measure, rather than when it does.

c. Please indicate whether that distinction derives from the United States' view on the self-judging nature of Article XXI(b)(iii) alone or from other arguments.

d. If a measure pertaining to a Member's essential security interests is to be reviewed under Article 2.1 of the TBT Agreement, would the seventh recital constitute relevant context, and would it be for a panel to review what the Member has put forward as essential security interests?

28. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 80.

81. To the United States: Under what circumstances would a Member decide not to invoke Article XXI in respect of a measure taken to protect national security interests that also implicates that Member's essential security interests? Could you provide examples in that respect?

29. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 81.

82. To Hong Kong, China: In paragraph 56 of its response to Panel question No. 16, Hong Kong, China submits that "the burden would be on the United States to *articulate* its essential security interests in the first instance" (emphasis original). In paragraph 113 of its second written submission, Hong Kong, China asserts

that there remains significant disagreement among the parties and various third parties concerning, *inter alia*, the specificity with which the US essential security interests would need to be articulated in order for the Panel to take these interests into account.

a. **What level of detail is required or will be sufficient for the articulation of a Member's essential security interests?**

b. **In paragraphs 108 and 109 of its second written submission, Hong Kong, China refers to the United States' statement in paragraph 71 of its response to Panel question No. 16, quoting paragraph 5 of the United States' opening statement at the first meeting of the Panel, that the United States has articulated certain of its essential security interests in its submissions and oral statements to the Panel. Hong Kong, China submits that the United States has "broadly described" its essential security interests and that the United States only "claims" that it has articulated its essential security interests. Please elaborate. Please comment also on paragraphs 2 and 5 of the United States' second written submission.**

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83. **To the United States: Please comment on Hong Kong, China's view in paragraph 117 of its second written submission and paragraph 35 of its opening statement at the second meeting of the Panel, that by "its terms, there are two steps to assessing whether a measure is inconsistent with [Article IX:1]: (1) identifying the baseline 'treatment with regard to marking requirements' that the responding Member accords to the like products of any third country; and then (2) evaluating whether the 'treatment with regard to marking requirements' accorded to goods of the complaining Member is 'less favourable' than the baseline treatment".**

30. The United States' answer to Panel question No. 83 illustrates its general confusion about the concept of less favourable treatment and how it applies to the facts of this case. The United States' answer also reflects its failure to come to terms with certain undisputed facts on the record.

31. Article IX:1 of the GATT 1994 is not a difficult provision to understand. It provides that "[e]ach contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements *no less favourable* than the treatment accorded to like products of any third country." This is a classic non-discrimination provision, specifically an MFN-type provision applied to the particular case of "treatment with regard to marking requirements". The analysis required under this provision is no different in kind than the analysis required under other MFN-type provisions, including Article I:1 of the GATT 1994 and the MFN obligation contained in Article 2.1 of the TBT Agreement. This analysis can also be assimilated to the WTO's other core non-discrimination obligation, the obligation to accord national treatment to products imported from the territory of other Members (for example, under Article III:4 of the GATT 1994).

32. The Appellate Body has observed that the basic inquiry under the WTO's core non-discrimination provisions "hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products [in the case of national treatment] or like products imported from any other country [in the case of MFN treatment]."[31] As this explanation makes clear, the need to undertake a *comparison* is inherent in the concepts of national treatment and MFN treatment – in the latter case, the one pertinent here, a comparison between the treatment accorded to the products of the complaining Member vis-à-vis the treatment accorded to the products of other countries.[32]

33. For this reason, Hong Kong, China does not understand the United States' assertion in response to this question that "[t]he concept of a 'baseline' is not reflected in the text of Article IX:1, nor is it a useful concept."[33] In order to undertake a comparison between the treatment accorded to the products of the complaining Member vis-à-vis the treatment accorded to the products of other countries, one must first establish these two points of comparison as a factual matter. Hong Kong, China referred to the treatment accorded to the products of other countries as the "baseline" simply because this is the reference point by which one must assess whether the treatment accorded to goods of Hong Kong, China origin in respect of origin marking requirements is "less favourable". It is irrelevant that the term "baseline" does not appear in Article IX:1 – this concept is inherent in Article IX:1, and it is not merely "useful" but required to undertake the analysis called for under this provision.

34. Hong Kong, China has explained, and the United States has not contested, that "treatment with regard to marking requirements" consists of two elements: the determination of the *origin* of a product, and the *terminology* required to indicate that origin, so determined. Both of these elements are necessary to implement a system of marking requirements and therefore constitute the relevant "treatment" in respect of these requirements. This conclusion is evidenced, *inter alia,* by the fact that these two elements are the cornerstone of USCBP's origin marking regulations: the method of determining the origin of a product as prescribed by 19 C.F.R. § 134.1(b), and the terminology required to indicate that origin as prescribed by 19 C.F.R. § 134.45.[34]

35. With regard to the first element, the determination of origin, the United States asserts that "nothing in the record indicates that the United States determines country of origin for Hong Kong, China, in a manner different than for any other Member."[35] This assertion is false. It is undisputed that, pursuant to 19 C.F.R. § 134.1(b), the "country of origin" of a product for the purposes of the U.S. origin marking requirement is the country of manufacture, production, or growth, or the country in which the product last underwent a

[31] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico),* para. 7.278.

[32] *See*, *e.g*., Panel Report, *US – Poultry (China),* para. 7.423 ("Article I:1 [of the GATT 1994] requires a comparison between like products originating from one country vis-à-vis products originating from a WTO Member.") (emphasis added).

[33] United States' response to Panel question No. 83, para. 66.

[34] 19 C.F.R. § 134.1(b) [redacted].

[35] United States' response to Panel question No. 83, para. 67.

substantial transformation. It is further undisputed that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin under this definition. Yet as Hong Kong, China has repeatedly explained, most recently in its opening statement at the second substantive meeting, the United States has rejected the use of "Hong Kong" or "Hong Kong, China" as a mark of origin not for any reason relating to terminology, but rather because, in the view of the United States, a mark of "Hong Kong" or "Hong Kong, China" would not accurately indicate what the United States has determined to be the "*actual* country of origin", namely the People's Republic of China.[36] Given that the products in question are indisputably products of Hong Kong, China origin under the United States' *normal* rule for determining the origin of a product, the United States' conclusion that these products originate in the People's Republic of China is *necessarily* based on the application of a rule of origin *other* than the rule that the United States applies to the goods of all other Members.

36. Rather surprisingly, the United States repeatedly refers in its answers to the Panel's questions to the USCBP's determination concerning the "*actual* country of origin" of the products covered by the revised origin marking requirement, yet never confronts the necessary implication of that determination.[37] As Hong Kong, China explained in its opening statement, this unrebutted evidence supports only one conclusion: that the United States has determined that the goods subject to the revised origin marking requirement are goods that originate in the People's Republic of China, a determination that is not based on the rule of origin that the United States applies to the goods of all other Members. Contrary to the United States' assertion that "nothing in the record indicates that the United States determines country of origin for Hong Kong, China, in a manner different than for any other Member", the unrebutted record evidence supports *only* that conclusion. The United States' descriptions of the USCBP's determination in its answers to the Panel's questions only serve to confirm this conclusion.[38]

[36] Hong Kong, China's opening statement for the second meeting, paras. 15-16.

[37] United States' response to Panel question No. 74(e), n. 25; United States' response to Panel question No. 119(b), n. 160.

[38] *See*, *e.g.*, United States' response to Panel question No. 74(e), para. 37 ("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 [the] treatment of the People's Republic of China for purposes of marking, such that "China" is not "mislabeling".); United States' response to Panel question No. 119(b), para. 215 ("The U.S. determination with respect to lack of autonomy of Hong Kong, China, clearly establishes why Hong Kong, China is not entitled to differential treatment for purposes of marking, such that the term 'China' is not 'mislabeling'."). As these explanations make clear, the United States is treating goods that are manufactured or produced in Hong Kong, China as having an origin of the People's Republic of China, which is not the origin of these goods under the United States' normal rule of origin for origin marking purposes. This is because, as a result of the United States' "sufficient autonomy" determination, the United States has concluded that the "actual country of origin" of these goods is the People's Republic of China.

It is remarkable that we have come to the end of a dispute captioned *United States – Origin Marking Requirement* and yet the United States still has not explained what it considers the origin of the affected goods to be and the basis on which it made that determination. The evidence on the record supports only one conclusion: that the United States has determined that the origin of the affected goods is the People's Republic of China. This conclusion is relevant not only to Hong Kong, China's claim under Article IX:1 of the GATT 1994, the subject of this comment, but also to its claim under Article 2(c) of the ARO. The evidence is incontrovertible that the United States has determined that the origin of the affected goods is the People's

37. In sum, with regard to the first element of treatment under Article IX:1 of the GATT 1994 – the determination of origin – the evidence on the record demonstrates that the measures at issue accord less favourable treatment to the goods of Hong Kong, China with regard to origin marking requirements. The United States' determination, contrary to its normal rules of origin, that the "actual country of origin" of Hong Kong, China goods is the People's Republic of China prevents Hong Kong, China's manufacturers and exporters from marking their goods with the full English name of the customs territory in which the goods were manufactured or produced. As discussed below, the United States has presented no credible evidence or legal argument that this treatment does not constitute "less favourable treatment" with respect to an origin marking requirement.

38. Turning to the second element of treatment under Article IX:1 of the GATT 1994 – the terminology required to indicate the origin of a product – the problem with the revised origin marking requirement is straightforward. The measure prevents Hong Kong, China manufacturers and exporters from marking their products with the "full English name" of the customs territory in which the products were manufactured or produced, which is the treatment that the United States accords to the goods of all other Members.

39. Part 134.45 of the USCBP's origin marking regulations provides 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." The term "country of origin" as used in this provision refers to the "country of origin" as determined in accordance with 19 C.F.R. 134.1(b), i.e. the country of manufacture, production, or growth (or substantial transformation).[39] Thus, USCBP's origin marking regulations require, and therefore permit, the goods of all other WTO Members to be marked with the "full English name" of the country of manufacture, production, or growth (or the country in which the product last underwent a substantial transformation).

40. It is undisputed that the "full English name" of the separate customs territory of Hong Kong, China is "Hong Kong, China" or "Hong Kong" in short. It is further undisputed that, in both U.S. and international practice, the short-form "China" refers to the People's Republic of China, a different WTO Member with a different customs territory. Finally, it is undisputed that the United States has, pursuant to the revised origin marking requirement, expressly rejected the use of any variation of "Hong Kong" or "Hong Kong, China" as a mark of origin for goods manufactured or produced in Hong Kong, China.[■] Thus, as a result of the revised origin marking requirement, Hong Kong, China manufacturers and exporters may no longer mark their goods with the full English name of the customs territory in which the goods were manufactured or produced and must instead mark those goods with the name of a

Republic of China based on considerations unrelated to manufacturing or processing, in violation of Article 2(c).

[39] 19 C.F.R. § 134.1(b) ■■■■■.

[■] ■■■■■■■■■■■■■■■■■■■■

customs territory *other* than the customs territory in which the goods were manufactured or produced.

41. For the reasons that Hong Kong, China has explained at length, it is undeniably an advantage for manufacturers and exporters to be able to mark their goods with the name of the customs territory in which the goods were manufactured or produced, i.e. with their correct country of origin, and it is a disadvantage to be required to mark those goods with the name of a customs territory *other* than the customs territory in which the goods were manufactured or produced.[41] The United States has not credibly responded to these explanations or the evidence that Hong Kong, China has presented as confirmation of these explanations.

42. The United States' only response to the less favourable treatment of Hong Kong, China goods in respect of the terminology used to indicate their origin is to misstate the nature of the legal obligation under Article IX:1. The United States asserts that "the requirement that products have marks of origin and the determination of terminology by their nature make a distinction based on origin", by which the United States evidently means that all origin marking requirements will inevitably result in different names being used to indicate different origins – an unremarkable observation.[42] The United States further asserts that "Article IX does not prohibit Members from requiring the 'full English name' as so determined by the Member requiring the mark of origin" and, to the same effect, that "Article IX:1 does not require a Member to use a particular mark to identify a country".[43] The United States evidently means to suggest that Article IX:1 does not prescribe specific rules about *how* a Member chooses the terminology required to indicate a particular country of origin, and therefore that nothing in Article IX:1 prohibits a Member from requiring goods that have an origin of Member A from being marked as having an origin of Member B.

43. As Hong Kong, China explained most recently in its opening statement at the second substantive meeting, the United States misapprehends the nature of the legal obligation under Article IX:1. As discussed above, Article IX:1 is a *non-discrimination* provision, specifically an obligation to accord MFN treatment in respect of origin marking requirements. The question is not whether Article IX:1 prescribes specific rules about the terminology used to indicate the origin of goods. The question is whether the United States accords less favourable treatment in respect of the terminology used to indicate origin *relative to the treatment that it accords to the goods of other Members under its own municipal law and practice*. As discussed above, USCBP's regulations require, and therefore permit, imported goods to be marked with the full English name of the country of manufacture, production, or growth. The United States has expressly denied this treatment to goods of Hong Kong, China. It is this discriminatory treatment of the goods of Hong Kong, China *relative to the treatment accorded to the goods of other Members* that is the gravamen of Hong Kong, China's claim under Article IX:1. It is irrelevant that Article IX:1 does not itself prescribe rules concerning a Member's choice of the terminology used to indicate origin.

[41] *See*, *e.g.*, Hong Kong, China's first written submission, paras. 60-64.

[42] United States' response to Panel question No. 83, para. 69.

[43] United States' response to Panel question No. 83, paras. 69, 67.

44. The United States seeks to get around the obvious discrimination in respect of the terminology used to indicate origin by referring to "the requirement that goods be marked with the 'full English name' *as determined under U.S. law*", disregarding the fact that USCBP's origin marking regulations specifically prescribe the required terminology, i.e. the "full English name" *of the country of manufacture, production, or growth (or substantial transformation).* If the United States means to suggest that there is no discrimination because some *other* provision of U.S. law applicable only to Hong Kong, China – namely, the requirement of "sufficient autonomy" from the People's Republic of China – requires the discriminatory treatment in respect of the terminology used to indicate origin, then the United States' argument simply confirms that the revised origin marking requirement is inconsistent with Article IX:1. It is no defence to a claim of discrimination to respond that the discrimination is required by the measure that is challenged as discriminatory. If some provision of U.S. law requires the United States to accord less favourable treatment to goods of Hong Kong, China in respect of the terminology used to indicate origin – i.e. treatment that is less favourable than the treatment that the United States accords to the goods of other Members – then this simply confirms that the measure requiring that treatment is inconsistent with Article IX:1. Put differently, the reason *why* the United States accords less favourable treatment to the goods of Hong Kong, China – whether it is as a result of a provision of U.S. law that applies only to Hong Kong, China, or otherwise – does not change the fact that the United States is acting in violation of its obligation under Article IX:1.

45. Thus, with regard to the second element of treatment under Article IX:1 – the terminology required to indicate the origin of a good – the revised origin marking requirement accords less favourable treatment to the goods of Hong Kong, China. The United States acknowledges that the goods covered by the revised origin marking requirement are goods manufactured or produced in Hong Kong, China, and so the United States is required under Article IX:1 to permit these goods to be marked with the "full English name" of Hong Kong, China. This is the treatment that the United States accords to the goods of all other Members, and it is the treatment that the United States has expressly denied to goods of Hong Kong, China. The United States' attempts to explain away this discrimination reflect a basic misunderstanding of the nature of its legal obligations under Article IX:1.

THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994

Applicability of Article XXI(b) to the claims under the Annex 1A Agreements at issue in this dispute

84. To Hong Kong, China: At paragraph 133 of its second written submission, Hong Kong, China observes that if "the drafters of the GATT 1994 had meant for Article XXI(b) of the GATT 1947 to apply to *all* of the Annex 1A Agreements, they could have modified the language of Article XXI(b) to this effect when they incorporated the GATT 1947 into the GATT 1994. They did not". Could Hong Kong, China elaborate on why the premise underlying this position is correct, rather than an alternative view according to which the drafters did not do so because they shared the common understanding that the security exception in Article XXI was assumed to apply to the Annex 1A Agreements, unless expressly provided otherwise?

85. To Hong Kong, China: Hong Kong, China submits that "the *silence* of the other Annex 1A agreements on this issue must be interpreted to mean that the GATT exceptions are *not* available under those agreements" (paragraph 134 of its second written submission). Please indicate whether silence could also mean that there was a common agreement that Article XXI applies to Annex 1A Agreements, if not, why not?

86. To Hong Kong, China: In paragraph 141 of its second written submission, Hong Kong, China argues that "the United States ignores the fact that each of the Annex 1A agreements is a distinct agreement, representing its own balance of rights and obligations in respect of the subject matter of that agreement". Could Hong Kong, China please:

a. clarify how this position can be reconciled with the indication in Article II:2 of the Marrakesh Agreement that the "agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members"?

b. elaborate on why Hong Kong, China considers that each Annex 1A Agreement "represents its own balance of rights and obligations in respect of the subject matter of that agreement", when the Uruguay Round negotiations were guided by the principle that the conduct and the implementation of the outcome of the negotiations, that is the eventual WTO Agreements, would be accepted and implemented as a single package of rights and obligations (Uruguay Round Ministerial Declaration) and that any "early harvest" would be agreed on a provisional basis only, together with the later understanding that nothing would be agreed until everything is agreed and that Members would agree to all Multilateral Trade Agreement without any reservations.

87. To United States: Please elaborate on the United States' position in paragraph 115 of the United States' second written submission that the "inclusion of the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement in a single annex is therefore a *legal structure*" (emphasis original) and in paragraph 31 of the United States' opening statement at the second meeting of the Panel. In your response, please refer to the relevant legal basis for this conclusion.

46. Hong Kong, China will comment on the United States' responses to Panel questions Nos. 87, 89, 90, and 93 collectively.

47. Hong Kong, China has only limited comments on the United States' responses to the Panel's questions concerning the applicability of Article XXI(b) of the GATT 1994 to other Annex 1A Agreements, including the ARO and TBT Agreement. The United States' answers to those questions have only served to confirm that the United States' contention that Article XXI(b) applies to the ARO and TBT Agreement is entirely unfounded as a matter of treaty interpretation.

48. For the reasons that Hong Kong, China explained in response to Panel questions Nos. 84, 85, 86, 88, 91, 92, and 93, the ordinary meaning of Article XXI(b), including its reference to "this Agreement", establishes that this exception applies only to claims arising under the GATT 1994. The context provided by the other Annex 1A Agreements confirms that Article XXI(b) applies only to claims arising under the GATT 1994 unless the exception is expressly incorporated into the other agreement (as in the case of the TRIMs Agreement, the Agreement on Import Licensing Procedures, and the Trade Facilitation Agreement) or made available by the necessary implication of the terms used in that agreement.[44] The United States' arguments to the contrary disregard the clear choices that the drafters of the Multilateral Agreements on Trade made concerning the availability or non-availability of certain types of exceptions under each of those agreements.

49. Nothing in the United States' answers to this set of questions has improved upon the United States' theory. Because Hong Kong, China has already addressed most of the points made by the United States, Hong Kong, China will limit its comments to just a few points made by the United States.

50. First, in response to Panel question No. 87, the United States asserts that "[t]he general interpretative note to Annex 1A, which informs how the structure of the Annex is to be interpreted, provides that unless there is a direct conflict of provisions, the GATT 1994 provision applies."[45] On the basis of this assertion, the United States evidently seeks to imply a hierarchical superiority of the GATT 1994 over the other Annex 1A Agreements, and, in particular, a rule that every provision in the GATT 1994 (including its exceptions) applies to the other Annex 1A Agreements unless expressly provided otherwise.

51. The United States misapprehends the General Interpretative Note to Annex 1A. That note provides that "[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A … the provision of *the other agreement* shall prevail to the extent of the conflict."[46] Far from establishing a hierarchical superiority of the GATT 1994 over the other Annex 1A Agreements, the General Interpretative Note to Annex 1A suggests precisely the opposite – that the Annex 1A Agreements other than the GATT 1994 are hierarchically superior to the GATT 1994. By the United States' own logic, the General Interpretative Note to Annex 1A suggests that the provisions of the GATT 1994,

[44] Hong Kong, China has identified only one Annex 1A Agreement for which there *might* be an argument that the GATT 1994 exceptions are made available by the necessary implication of the terms used in that agreement. Article 21.1 of the Agreement on Agriculture states that "*[t]he provisions* of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement *shall apply* subject to the provisions of this Agreement." (emphasis added). One could argue that this language encompasses the availability of the GATT 1994 exceptions, in the same manner that the Appellate Body found in *China – Publications and Audiovisuals* that the phrase "[w]ithout prejudice to China's right to regulate trade *in a manner consistent with the WTO Agreement*" appearing in Article 5.1 of China's Protocol of Accession encompasses China's right to regulate trade in accordance with the GATT 1994 exceptions. Appellate Body Report, *China – Publications and Audiovisuals,* para. 226. No similar language appears in the ARO or TBT Agreement, which is presumably why the United States has made no effort during these proceedings to apply the analytical framework that adopted panel and Appellate Body reports have previously applied to determine whether a GATT 1994 exception is available under another covered agreement.

[45] United States' response to Panel question No. 87, para. 74.

[46] Emphasis added.

including its exceptions, do *not* apply to the other Annex 1A Agreements unless expressly provided – which is, in fact, exactly how the other Annex 1A Agreements were drafted in the case of the GATT 1994 exceptions.

52. More importantly, however, the General Interpretative Note to Annex 1A does not provide "that unless there is a direct conflict of provisions, the GATT 1994 provision applies", as the United States claims. The General Interpretative Note to Annex 1A applies only in situations where there is a "direct conflict of provisions" between the GATT 1994 and another Annex 1A Agreement, and in that event it is the other Annex 1A Agreement that prevails over the GATT 1994. As the United States has acknowledged in response to a prior question from the Panel, "[t]he unavailability of an Article XXI exception would not result in a 'conflict' … between the specific provisions in the GATT 1994 and the Agreement on Rules of Origin or TBT Agreement."[47] The General Interpretative Note to Annex 1A is therefore not relevant to the interpretative question of whether Article XXI of the GATT 1994 applies to the ARO and TBT Agreement.

53. Second, in the United States' combined response to Panel questions Nos. 89 and 90, it is ironic that the United States *correctly* explains that "the question of applicability of specific GATT provisions to other agreements should be answered on a case-by-case basis", citing the adopted panel and Appellate Body reports in which the DSB has carefully examined whether there is an express textual linkage between the covered agreement in question and the specific GATT 1994 exception under which justification is sought.[48] This is the analytical framework that the United States has refused to apply in this case, opting instead to argue that Article XXI(b) of the GATT 1994 applies universally to all of the other Annex 1A Agreements based on sweeping and erroneous assertions about the "structure" and "logic" of the WTO Agreement as a whole. The United States then cites an early Appellate Body report (the report in *Brazil – Desiccated Coconut*) that engaged in precisely the type of textual and contextual analysis that the United States avoids in this dispute to conclude that countervailing duties may only be imposed in accordance with the provisions of Part V of the SCM Agreement and Article VI of the GATT 1994, taken together.[49] In short, the United States does not appear to understand how far removed its arguments in the present dispute are from how adopted panel and Appellate Body reports have consistently examined the relationships among different WTO agreements.

54. Finally, it is apparent from the United States' combined response to Panel questions Nos. 89 and 90 that, at the end of the day, the United States' basic argument is that because the GATT 1994, the GATS, and the TRIPS Agreement each contain security exceptions, this "suggests" that Article XXI of the GATT 1994 must also apply to the other Multilateral

[47] United States' response to Panel question No. 29, para. 142.

[48] United States' response to Panel questions Nos. 89 and 90, para. 81 (citing Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, paras. 7.743-7.744; Appellate Body Report, *China – Rare Earths*, paras. 5.55-5.56; Appellate Body Report, *China – Raw Materials*, paras. 278-307; Appellate Body Report, *China – Audiovisual Products*, paras. 229-233).

[49] Appellate Body Report, *Brazil – Desiccated Coconut* at 16. The Appellate Body's conclusion in that report was based on the fact that Article 10 and Article 32.1 of the SCM Agreement expressly provide that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 as interpreted by the SCM Agreement. *Id.* at 16-17.

Agreements on Trade in Goods notwithstanding the express limitation of that exception to claims arising under "this Agreement", i.e. to claims arising under the GATT 1994.[50] As Hong Kong, China explained in response to the Panel's questions relating to this topic, the United States' argument disregards the fact that the drafters of the Uruguay Round agreements, including the Annex 1A Agreements, made clear choices about the specific types of exceptions that would or would not apply to each of the Multilateral Agreements on Trade. While the United States' arguments in the present dispute (as opposed to its arguments in prior disputes) suggest that the United States wishes that the drafters of the Uruguay Round agreements had made *different* choices in this regard, it is not the role of individual Members or panels convened under the DSU to rewrite the covered agreements. That is what the United States is asking this Panel to do.

88. To Hong Kong, China: Please comment on the United States' statement in paragraph 116 of its second written submission that "[s]ome commentary has even noted that the 'systemic structure of a treaty is … of *equal importance* to the ordinary linguistic meaning of the words used …".

89. To the United States: With respect to the United States' statement in paragraph 116 of its second written submission that "[s]ome commentary has even noted that the 'systemic structure of a treaty is … of equal importance to the ordinary linguistic meaning of the words used …", could the United States illustrate how that interpretative tenet has been applied in the context of WTO dispute settlement or in the context of other international adjudicative mechanisms?

55. See Hong Kong, China's comments on the United States' response to Panel question No. 87, above.

90. To the United States: In paragraph 118 of its second written submission, the United States submits that the "structure of the WTO Agreement – and logic – suggest that the GATT 1947/1994 essential security exception likewise applies to the new agreements on trade in goods contained in Article [sic] 1A". Could you please clarify how "logic" plays a role in treaty interpretation pursuant to the customary rules of interpretation of public international law?

56. See Hong Kong, China's comments on the United States' response to Panel question No. 87, above.

91. To Hong Kong, China: Please comment on the United States' statement in paragraph 120 of its second written submission, that "Hong Kong, China errs in suggesting that the analysis of applicability of the essential security exception under Article XXI must be identical to that of the applicability of Article XX".

92. To Hong Kong, China: Please comment on the United States' position, in paragraph 137 of its second written submission, that "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".

[50] *See* United States' combined responses to Panel questions Nos. 89 and 90, para. 82.

93. To both parties: Where there is a claim of inconsistency with respect to an obligation in the GATT 1994 that is virtually the same as that in another Annex 1A Agreement (e.g., MFN obligations such as here under Article IX:1 and Article I:1), could it be assumed that the justification provided for in the exceptions of the GATT 1994 should be the same under the other Annex 1A Agreement, unless otherwise provided in the specific Annex 1A Agreement? If not, why not?

57. See Hong Kong, China's comments on the United States' response to Panel question No. 87, above.

Interpretation and application of Article XXI(b) of the GATT 1994

94. To both parties: The claimed self-judging nature of Article XXI(b) is derived from the words "which it considers. This suggests therefore, that whether Article XXI(b) is self-judging in full or in part depends on what the words "which it considers" relate to in the text of this provision. Do you agree? If not, why not?

58. Hong Kong, China will comment on the United States' responses to Panel questions Nos. 94-98 collectively, as they all pertain to the interpretation of Article XXI(b) and, in particular, to whether this provision may be considered "self-judging" in its entirety. It is telling that the U.S. interpretation of Article XXI(b) becomes even less coherent the more the United States tries to explain it.

59. The foundation of the U.S. interpretation of Article XXI(b) has always been its observation that "under English grammar rules, a participial phrase, which functions as an adjective, *normally* follows the word it modifies or is otherwise placed as closely as possible to the word it modifies."[51] From this convention – not really a "rule" – the United States deduces that the first two subparagraphs of Article XXI(b) must modify the term "interests". Because the word "interests" forms part of the relative clause beginning "which it considers", the United States concludes that the subject matter applicability of the subparagraphs of Article XXI(b) must fall within the portion of Article XXI(b) that the invoking Member is allowed to determine in its own judgment, subject to the obligation of good faith.

60. The problem with this interpretation is that subparagraph (iii) cannot and does not modify the term "interests" in any of the three authentic texts, as the United States itself acknowledges. Already we see that the English-language convention on which the U.S. interpretation rests is not as absolute as the United States makes it out to be. All parties agree that subparagraph (iii) can only be understood to modify the term "action" in the English text ("mesures"/"medidas"), not "interests". Subparagraph (iii) therefore forms a noun phrase with "action" ("any action … taken in time of war or other emergency …"), and this noun phrase *precedes* the "which it considers" clause that the United States considers to form the "self-judging" portion of Article XXI(b). In other words, the term "action", as modified by subparagraph (iii), is not qualified by the clause beginning "which it considers" and thus, by the United States' own logic, whether a particular "action" is one of the type described by

[51] United States' response to Panel question No. 96, para. 96 (emphasis added).

subparagraph (iii) ("taken in time of war or other emergency …") is *not* for the invoking Member to determine in its own judgment.[52] Given that subparagraphs (i) and (ii) can *also* be understood to modify the term "action" and not "interests", and given that the equally authentic Spanish text *confirms* beyond any doubt that all three subparagraphs modify the term "action" ("mesures"/"medidas"), it follows that the subject matter applicability of the subparagraphs to Article XXI(b) is not "self-judging".

61. It is this fundamental problem with its interpretation that the United States struggles to resolve in its answers to these questions, without success. In essence, the United States tries to enlist the "which it considers" language to do double duty: once to commit the *necessity* of the action for the protection of the invoking Member's essential security interests to the Member's own judgment (as it does by its terms: "which it considers *necessary*"), and then a *second* time to commit the existence of the *actions* described by the subparagraphs to the Member's own judgment.[53] In order to achieve this result, the United States ignores the word "necessary" in its tortured constructions and treats the clause beginning "which it considers" as "a single relative clause … which modifies the noun phrase 'any action'."[54] But this interpretation does not produce a grammatical result in the English text. If the clause beginning "which it considers" were to modify "any action" in the manner that the United States proposes, it would read "any action which it considers necessary for the protection of its essential security interests … *taken* in time of war or other emergency in international relations", where "taken" forms part of the relative clause beginning "which it considers".[55] Under this reading, however, the clause beginning "which it considers" could not grammatically encompass both the necessity of the action *and* whether it is one "taken in time of war or other emergency in international relations". The only way the United States can make the "which it considers" language do double duty in this way is by reading into the text an implied "and to be", i.e. "any action which it considers necessary for the protection of its essential security interests … *and to be taken* in time of war or other emergency in international relations". The United States frankly admits as much when it states that, under its interpretation, "it is the Member that considers the action to be 'taken in time of war or other emergency in international relations.'"[56]

[52] As the United States explains, "the phrase 'which it considers' 'qualifies' all of the elements in the relative clause, including the subparagraph ending." United States' response to Panel question No. 94, para. 88 (emphasis added). The term "action", as modified by subparagraph (iii), does not form part of this relative clause. In its response to Panel question No. 94, the United States agrees that "whether Article XXI(b) is self-judging in full or in part depends on what the words 'which it considers' relate to in the text of this provision", and the United States acknowledges that the term "action", as modified by subparagraph (iii), does not form part of this "self-judging" clause.

[53] *See*, *e.g*., United States' response to Panel question No. 96, para. 100 ("Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one 'which it considers necessary for the protection of its essential security interests'. Second, the action is one 'which it considers' relates [sic] to the subject matters in subparagraph endings (i) or (ii) or 'taken in time of war or other emergency in international relations' as set forth in subparagraph ending (iii).").

[54] United States' response to Panel question No. 96, para. 94.

[55] United States' response to Panel question No. 96, para. 95.

[56] United States' response to Panel question No. 96, para. 97 (emphasis added).

62. The United States is forced to engage in the same rewriting of Article XXI(b) when it comes to its analysis of the French and Spanish texts in response to Panel questions Nos. 97 and 98. Confronted with the fact that the verbs "estimer" (in French) and "estimar" (in Spanish) cannot be followed directly by a past participle ("estimera … appliquées", "estime … aplicadas"), the United States once again inserts "to be" ("être appliquées", "ser aplicadas") into the text.[57] In addition, and although the United States does not acknowledge this fact, the United States must also read an implied coordinating conjunction "and" ("et être appliquées", "y ser aplicadas") into the text in order to have the verbs *estimer* and *estimar* do double duty in relation to both the necessity of the action *and* the existence of the circumstance described in each of the subparagraphs, just as it is forced to do in the English text.[58]

63. The United States is evidently aware of the serious problem that the absence of the word "and" ("et", "y") poses to its double duty theory, because it defensively asserts that it "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 English, French, or Spanish."[59] The United States suggests that the word "and" is merely implied in all three authentic texts because it would have been too difficult to draft Article XXI(b) to make clear that the phrase "which it considers" relates both to the necessity of the action and to the existence of the circumstance described in each subparagraph.[60] However, the United States' convoluted explanation of why the word "and" was omitted from the text presupposes that the United States' "double duty" theory is *correct.* The United States argues that the insertion of the word "and" would have suggested that the subparagraphs do not form part of the relative clause beginning with "which it considers", when that is precisely the interpretative issue under examination.[61] Apparently it never occurred to the United States that its double duty theory is *wrong* and that the subparagraphs of Article XXI(b) do *not* form part of the relative clause beginning with "which it considers". Ironically, the United States concludes this upside-down discussion by inveighing against any interpretation of Article XXI(b) that would involve a "redrafting of the text" to insert the word "and" into the text where it does not appear, when that it is *exactly* what its double duty theory requires.[62]

64. Rather than assume the interpretative conclusion and reason backwards from there, Hong Kong, China respectfully submits that Article XXI(b) must be interpreted as it was

[57] United States' response to Panel question No. 97, paras. 106; United States' response to Panel question No. 98, para. 108.

[58] More precisely, the United States is proposing to insert a complex past participle construction into the French and Spanish texts, along the lines of "et *d'être* appliquées" in the French text and "y *de ser* aplicadas" in the Spanish text. Obviously this is not what either text says.

[59] United States' response to Panel question No. 96, para. 101.

[60] United States' response to Panel question No. 96, paras. 102-104.

[61] United States' response to Panel question No. 96, para. 102 ("the addition of a coordinator – such as 'and', 'et', or 'y' – would arguably *change the meaning* of Article XXI(b) as drafted, *and would suggest that what follows the coordinator is not part of the relative clause beginning with 'which'*"); *id.* ("To revise this sentence with a connector would suggest that the language in the subparagraphs *is not part of that clause*").

[62] United States' response to Panel question No. 96, para. 104.

actually drafted in all three authentic texts. Each subparagraph modifies the term "action" and forms a noun phrase with the term "action" describing the three types of GATT-inconsistent actions for which a Member may seek justification under Article XXI(b). The relative clause beginning with "which it considers" is limited to the *necessity* of that action for the protection of the invoking Member's essential security interests. Because the word "action", as modified by the three subparagraphs, precedes the relative clause "which it considers" and does not form part of that clause, the existence or non-existence of the circumstances described in the three subparagraphs does not fall within the portion of Article XXI(b) that is committed to the invoking Member's own judgment.

95. To both parties: For purposes of deciding whether subparagraph (iii) of Article XXI(b) is covered by the discretion granted to the Member through the words "which it considers", does it matter whether the word "action" relates to all three subparagraphs?

65. See Hong Kong, China's comments on the United States' response to Panel question No. 94, above.

96. To the United States: If discretion depends on the words "it considers" what grammatical rule allows for the word "considers" to relate both to "necessary" and to "taken" without there being any connector between those words? In your response, please cover all three of the authentic WTO languages, namely English, French and Spanish.

66. See Hong Kong, China's comments on the United States' response to Panel question No. 94, above.

97. To the United States: Regarding the authentic French version of Article XXI(b), can the word "estimer" be directly followed by a past participle such as the word "appliquées"?

67. See Hong Kong, China's comments on the United States' response to Panel question No. 94, above.

98. To the United States: Regarding the authentic Spanish version of Article XXI(b), can the word "estimar" be directly followed by a relative pronoun such as "a las" or by a past participle such as "aplicadas"?

68. See Hong Kong, China's comments on the United States' response to Panel question No. 94, above.

99. To Hong Kong, China: Please comment on the United States' view at paragraph 14 of its opening statement at the second meeting of the Panel that "there are no words before any of the subparagraphs – such as 'and which' or 'provided that' – to indicate a break in the single relative clause or to introduce a separate condition with respect to the subparagraphs."

100. To both parties: The final text of Article XXI(b) at the end of the Geneva session of negotiations in the summer of 1947 was adopted in the GATT (the provisional

application of which was decided by protocol on 30 October 1947) and served as draft Article 94 in the final round of negotiations for the Havana Charter. The final text of what became Article 99 of the Havana Charter as adopted in March 1948, contains further modifications to the text of Article XXI(b), including the following modification at the end of the *chapeau*: "…, *where such action*". Please comment on the relevance, if any, of this further modification, to the interpretation of Article XXI(b).

69. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 100.

101. To both parties: In interpreting a provision under the customary rules of interpretation, under what circumstances can a panel take into account information that does not qualify as relevant under Articles 31 and 32 of the Vienna Convention (e.g. the statements that the United States refers to in paragraphs 189 to 214 or the internal documents discussed in paragraphs 136 to 161 of its first written submission)?

70. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 101.

102. To both parties: Please comment on the definition of "war" offered by the panel in *Russia – Traffic in Transit* in paragraph 7.72 of its report (war refers to armed conflict, which "may occur between states (international armed conflict) or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)").

71. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 102.

103. To both parties: Please comment on the definition "emergency in international relations" offered by the panel in *Russia – Traffic in Transit* in paragraph 7.76 of its report (refers "generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or *surrounding* a state").

72. Hong Kong, China will comment on the United States' answers to Panel questions Nos. 103-109 collectively, as they all pertain to the interpretation of the phrase "other emergency in international relations" as it appears in Article XXI(b)(iii) of the GATT 1994.

73. In *Russia – Traffic in Transit,* the panel found that the phrase "other emergency in international relations" refers "generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[63] In its responses to these questions from the Panel, the United States treats this interpretative finding by the panel in *Russia – Traffic in Transit* as if the panel pulled it out of thin air. The panel did not. As Hong Kong, China explained most completely in response to Panel question No. 117, the panel's interpretation of the phrase "other emergency in

[63] Panel Report, *Russia – Traffic in Transit,* para. 7.76.

international relations" was based on a straightforward consideration of the context in which that phrase appears. That context fully supports the panel's conclusion that an "emergency in international relations" must implicate the same types of defence or military interests, or maintenance of law and public order interests, that encompass the subject matter of Article XXI(b) as a whole. As Hong Kong, China further explained in response to Panel question No, 106, this interpretation of the English text is fully supported by a consideration of the equally authentic French and Spanish texts. It is the United States that seeks to interpret the phrase "other emergency in international relations" outside of its context to refer, apparently, to any sort of political or economic disagreement that may arise in international relations.

74. The United States further mischaracterizes the panel's interpretative finding in *Russia – Traffic in Transit* by suggesting that, under that interpretation, "the United States could not validly consider events in Europe or the Indo-Pacific to be relevant emergencies in international relations or part of U.S. essential security interests."[64] The United States evidently believes that, under the panel's interpretation, the situation alleged to constitute an "emergency in international relations" must be occurring within the invoking Member's territory or in an immediately contiguous territory, and that events taking place in other parts of the world could never constitute an "emergency in international relations" under this interpretation.[65] This is incorrect. 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."[66] 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.

75. 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.

104. To both parties: Please comment on whether the situations described in paragraph 18 of Canada's third-party statement and in paragraph 160 of the European Union's third-party response to Panel question No. 51 could generally

[64] United States' response to Panel question No. 103, para. 141.

[65] United States' response to Panel question No. 103, para. 141.

[66] Panel Report, *Russia – Traffic in Transit,* para. 7.130.

be considered to constitute or contribute to an *emergency* in international relations in the sense of Article XXI(b) of the GATT 1994.

76. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

105. To both parties: Which aspects of a situation would render it one where "international relations" are implicated in the sense of Article XXI(b)(iii)?

77. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

106. To both parties: The French and Spanish text of Article XXI(b)(iii) refer to "en cas de grave tension internationale" and "en caso de grave tensión internacional", respectively, where the English text refers to "or other emergency in international relations". Please comment on whether the French and Spanish text provide additional meaning on the type of emergency that needs to exist, for instance, one where there is "heightened tension" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.76).

78. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

107. To both parties: Please comment on the European Union's statement in paragraph 158 of its response to Panel question No. 51 that "[i]n determining whether a particular situation constitutes an 'other emergency in international relations', a panel would need to assess in particular the gravity of the situation".

79. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

108. To both parties: What criteria do you consider appropriate for the Member invoking Article XXI(b)(iii) to take into account when determining whether the gravity of the situation is such that it would constitute an "other emergency in international relations"?

80. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

109. To both parties: Do you consider that there can be situations of concern in international relations that would not be characterized as an "emergency in international relations" in the sense of Article XXI(b)(iii)? In your response, please provide examples.

81. See Hong Kong, China's comments on the United States' response to Panel question No. 103, above.

110. To both parties: In paragraph 3 of its opening statement at the second meeting of the Panel, the United States referred to a joint statement issued by the United States and 20 other countries (Exhibit US-210). What is the relevance of this

statement for the panel's assessment of the existence of an emergency in international relations?

82. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 110.

111. To the United States: In its response to questions on Day 2 of the substantive meeting with the Panel, the United States stated that the concept of "emergency in international relations" is "inherently subjective". Given this, why would the view of other countries be relevant in determining whether a situation is an "emergency in international relations"?

83. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 111.

112. To both parties: In paragraph 7.108 of its report, the panel in *Russia – Traffic in Transit* observed that Article XXI(b)(iii) "acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated". Please comment on whether, and if so, how, the concept of "fundamental change of circumstances" may inform an interpretation of the concept of "emergency in international relations" in Article XXI(b)(iii).

84. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 112.

113. To both parties: Please comment on the following statement by Canada in paragraph 136 of its third-party response to Panel question No. 52: "… 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."

85. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 113.

114. To both parties: Please comment:

a. on the European Union's statement in paragraph 36 of its third-party submission that the terms "in time" in Article XXI "require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations, including in temporal terms"; and

b. on Canada's statement in paragraph 26 of its third-party submission 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)".

86. In its response to this question, the United States takes issue with Canada's explanation that, under Article XXI(b)(iii), there must be a "sufficient nexus" between the action for which justification is sought and the situation alleged to constitute an "emergency in international relations". Canada's understanding is correct – properly interpreted in its context, and taking into account that Article XXI(b)(iii) is an exception provision, Article XXI(b)(iii) requires the invoking Member to demonstrate a subject matter relationship between the GATT-inconsistent action for which justification is sought and the circumstance alleged to constitute an "emergency in international relations". That is, the invoking Member must demonstrate that the GATT-inconsistent action for which justification is sought protects the invoking Member's defence and military interests, or maintenance of law and public order interests, arising from the "emergency in international relations" shown to exist. Article XXI(b)(iii) would not make sense if it allowed a Member to cite the existence of an "emergency in international relations" as a pretext for taking a GATT-inconsistent action that does nothing to protect the Member's essential security interests in relation to that emergency. The United States' disagreement with Canada on this point is based entirely on the United States' mistaken understanding that subparagraph (iii) is "self-judging".

87. Notwithstanding its disagreement with Canada on this point, the United States claims to have "explained the connection between the measures at issue and the circumstances with respect to Hong Kong, China."[67] The United States merely repeats language from Executive Order 13936 claiming that the situation with respect to Hong Kong, China "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" and explains that Executive Order 13936 "declared a national emergency with respect to that threat."[68]

88. To be clear, nothing in the United States' submissions in these proceedings has demonstrated the existence of an "emergency in international relations" within the proper meaning of this phrase. 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

[67] United States' response to Panel question No. 114, para. 175.

[68] United States' response to Panel question No. 114, para. 175.

to assume that "the situation with respect to Hong Kong" is such an "emergency", contrary to a proper interpretation of this phrase.

115. To both parties: During the Geneva Session of the ITO Charter negotiations, the delegate of the United States explained the following with respect to what its delegation understood was meant to be covered by the terms "other emergency in international relations": "[W]e had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take any measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on" (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, 33rd Meeting of Commission A, E/PC/T/A/PV/33, 24 July 1947, (Exhibit US-30) at p. 20). Please comment whether and how, if at all, this statement clarifies the type of link that must exist between the Member invoking Article XXI(b)(iii) and the situation or war or other emergency in international relations at hand.

89. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 115.

116. To the United States: Please comment on the definition of "essential security interests" offered by the panel in *Russia – Traffic in Transit* (at paragraph 7.139 of its report) in light of the observations the United States made in paragraph 40 of its first written submission on how a Member invoking Article XXI(b) is to determine its essential security interests?

90. While taking issue with the interpretation of the phrase "essential security interests" adopted by the panel in *Russia – Traffic in Transit,* the United States in response to this question ultimately seems to conclude that "security interests" involve a Member's interests in "not being exposed to danger" and that these interests must be "essential", i.e. "significant or important, in the absolute or highest sense."[69] Hong Kong, China does not perceive a material difference between this understanding of the phrase "essential security interests" and the interpretation of this phrase adopted by the panel in *Russia – Traffic in Transit,* 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."[70] In any event, the United States has failed to explain how "the situation with respect to Hong Kong" implicates *any* essential security interests of the United States, however this term might be understood.

91. The United States once again quotes the language from Executive Order 13936 claiming that the situation with respect to Hong Kong, China "constitutes an unusual and

[69] United States' response to Panel question No. 116, para. 182.

[70] Panel Report, *Russia – Traffic in Transit,* para. 7.130.

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", and repeats the United States' frequent assertion that "[s]upport for democratization is a fundamental principle of United States foreign policy."[71] After making other assertions along the same lines, the United States summarily concludes that "it is clear why the United States has assessed the circumstances with respect to Hong Kong, China to implicate its essential security interests."[72]

92. Actually, it is not clear at all. The United States fails to explain how the "situation with respect to Hong Kong" "exposes" the United States to any "danger", let alone any "danger" that is "significant or important, in the absolute or highest sense." At most, the United States describes certain political or foreign policy concerns relating to the alleged lack of "sufficient autonomy" between Hong Kong, China and the People's Republic of China. The United States has not shown that these concerns implicate any "essential security interests" of the United States, even as the United States appears to understand the meaning of this phrase. The United States has not shown that these concerns involve any "danger" to the United States "in the absolute or highest sense", or that they implicate 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."

117. To both parties: In paragraph 7.74 of the Panel Report in *Russia – Traffic in Transit*, the panel considered that the interests that would 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. Please comment on whether these interests could arise from a reading of the text of Article XXI(b), specifically subparagraphs (i) and (ii); and whether other types of interests could be implicated by the phrase "other emergency in international relations" in subparagraph (iii). Do subparagraphs (i) to (iii) of Article XXI(b) inform each other as to the overall subject matter and scope of applicability of the provision?

93. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 117.

118. To both parties: Please comment on the views of the panel in *Russia – Traffic in Transit* that the interpretation and application of the *chapeau* of Article XXI(b) is subject to a good faith obligation (Panel Report, *Russia – Traffic in Transit*, paragraphs 7.132-7.133).

94. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 118.

[71] United States' response to Panel question No. 116, paras. 182-183.

[72] United States' response to Panel question No. 116, para. 184.

119. To both parties: The panel in *Russia – Traffic in Transit* derived two consequences from the application of the good faith obligation to the *chapeau* of Article XXI(b).

a. Please comment on whether the good faith obligation would require a Member invoking Article XXI(b) to articulate the essential security interests said to arise from the emergency in international relations "sufficiently enough to demonstrate their veracity" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.134); and

95. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 119(a).

b. Please comment on the view that the obligation of good faith is "crystallized" in the application of Article XXI(b)(iii) 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" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.138).

96. As Hong Kong, China stressed in its closing statement at the second substantive meeting, the United States has made no effort to demonstrate that the GATT-inconsistent action for which it seeks justification under Article XXI(b) satisfies a "minimum requirement of plausibility in relation to the proffered essential security interests", such that the measures at issue "are not implausible as measures protective of those interests".[73] It is apparent from the United States' response to Question 119(b) that it has no intention of even attempting to provide any such explanation.

97. Let us assume, for the sake of argument and contrary to a proper understanding of this phrase, that the United States' professed concerns relating to "fundamental freedoms, human rights, and democratic norms" implicate the "essential security interests" of the United States. The United States would then need to explain how prohibiting Hong Kong, China exporters from marking their goods with the "full English name" of the customs territory in which the goods were manufactured or produced, which is the "treatment with regard to marking requirements" that the United States accords to the goods of all other Members, is "not implausible" as a measure "protective of those interests". The United States asserts in response to Question 119(b) that "[t]he U.S. determination with respect to lack of autonomy of Hong Kong, China, clearly establishes why Hong Kong, China, is not entitled to differential treatment for purposes of marking", by which the United States evidently means that the measures at issue require goods manufactured or produced in Hong Kong, China to be marked as having been manufactured or produced in the People's Republic of China, a different WTO Member with a different customs territory.

98. What the United States fails to explain is *how* requiring Hong Kong, China goods to be marked in this way, in violation of the United States' obligations under Articles IX:1 and I:1 of the GATT 1994, is plausibly protective of the United States' professed concerns relating to "fundamental freedoms, human rights, and democratic norms". At no point during

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[73] Hong Kong, China's closing statement for the second meeting, para. 16.

the course of these proceedings has the United States presented any evidence, or even speculation, as to how requiring the goods of Hong Kong, China to be marked as goods of the People's Republic of China is apt to make any contribution, let alone a material one, to the protection of those professed concerns.[74] Indeed, as Canada observed in response to Question 19 to the third parties, it is hard to see how treatment with regard to origin marking requirements could *ever* have a plausible relationship to a Member's "essential security interests", whatever they might be, given that a mark of origin is a purely factual indication of where a good was manufactured or produced. Certainly the United States has provided no explanation of what that relationship might be, which is all that matters given that the United States bears the burden of demonstrating that it has invoked Article XXI(b) of the GATT 1994 in good faith.

99. For these reasons, even if the Panel were to find, contrary to the evidence and contrary to a proper interpretation of the relevant terms, that the United States has demonstrated the objective applicability of at least one of the subparagraphs of Article XXI(b) and that it has articulated its essential security interests "sufficiently enough to demonstrate their veracity", the Panel would still need to evaluate whether the United States has demonstrated that the GATT-inconsistent measures for which it seeks justification under Article XXI(b) are not implausible as measures protective of those interests, whatever they might be, as required to confirm that the United States has invoked Article XXI(b) in good faith. The United States, however, has presented no evidence to support such a conclusion, and it is not the Panel's function under Article 11 of the DSU to hypothesize evidence and arguments that the United States might have presented had the United States chosen to do so.

120. To both parties: Please comment on the following observations from the panel in *Russia – Traffic in Transit* that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity" (paragraph 7.134) and that when the emergency at issue is " further […] removed from armed conflict, or a situation of breakdown of law and public order … a Member would need to articulate its essential security interests with greater specificity…." (paragraph 7.135). In your response, please indicate whether you consider that, and, if so, how this statement relates to the facts of this case.

100. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 120.

121. To both parties: Please comment on the European Union's view that the "panel in *Russia – Traffic in Transit* made it clear that not *any* interest would qualify under the exceptions in Article XXI(b). The interest must relate genuinely to 'security' and be 'essential'" (European Union's Exhibit EU-5, paragraph 143, emphasis original).

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[74] Norway's third-party response to Panel question No. 35, para. 12; Brazil's third-party response to Panel question No. 33, para. 54; Switzerland's third-party response to Panel question No. 57, para. 47; European Union's third-party response to Panel question No. 33, para. 97.

101. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 121.

122. To both parties: Would a panel be prevented from clarifying the meaning of "essential security interests" in accordance with Article 3.2 of the DSU, if and because these terms are covered by the "which it considers" language?

102. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 122.

123. To Hong Kong, China: Please comment on whether the terms "which it considers" qualifies the terms "its essential security interests" in the *chapeau* of Article XXI(b). In your response, please indicate the type of review that a panel could undertake with respect to a Member's articulation of its essential security interests.

124. To both parties: As explained in paragraph 5 of the United States' second written submission, the revised origin marking requirement was adopted in conjunction with other measures mandated in Presidential Executive Order 13936 and other legal acts. What relevance, if any, do you consider that the Panel should give to that overall package of measures when examining the United States' invocation of Article XXI(b)(iii) with respect to the revised origin marking requirement?

103. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 124.

125. To the United States: The Panel's understanding is that outside this package of measures, relations between the parties continue as before, including in respect of trade. Is this understanding correct? If so, what relevance, if any, do you consider should the Panel give to this fact when examining the United States' invocation of Article XXI(b)(iii) with respect to the revised origin marking requirement?

104. Hong Kong, China notes that the United States did not answer the Panel's question. To answer the first part of the Panel's question, yes, it is correct that beyond the measures at issue in this dispute (and the other actions taken pursuant to Executive Order 13936 not at issue in this dispute), relations between the United States and Hong Kong, China continue as before, including in respect of trade. Most pertinently, the United States continues to treat goods manufactured or produced in Hong Kong, China as goods of Hong Kong, China origin for the purpose of duty assessment.[75] As Hong Kong, China has explained throughout these proceedings, this fact confirms that the United States continues to recognize Hong Kong, China as a distinct "country" (i.e. a separate customs territory from which goods may originate) in the sense of the WTO Agreement and the covered agreements, and that there is

[75] *See* USCBP, Frequently Asked Questions – Guidance on Marking of Goods of Hong Kong – Executive Order 13936 (last modified 6 October 2020) [redacted].

no dispute concerning the geographic boundaries of the separate customs territory of Hong Kong, China.

105. As it pertains to the United States' purported invocation of Article XXI(b) of the GATT 1994 (the subject of the second half of the Panel's question), the fact that trade relations between the United States and Hong Kong, China continue in all other respects as they did prior to Executive Order 13936 belies the United States' contention that the situation in Hong Kong, China implicates any "essential security interests" of the United States or, for example, that that situation gives rise to an "emergency in international relations" within the meaning of Article XXI(b)(iii). The United States has simply chosen to act inconsistently with its obligations under Articles IX:1 and I:1 of the GATT 1994 (and also with its obligations under the ARO and TBT Agreement). The measures at issue are inconsistent with the United States' international legal obligations under the GATT 1994, but they are not justifiable under Article XXI(b).

126. To the United States: Please elaborate on the relationship between the suspension of section 1304 of title 19 of the United States Code and the suspension of other regulations and the adoption of other measures mandated in Presidential Executive Order 13936 and other legal acts with respect to Hong Kong, China.

106. Hong Kong, China does not have specific comments on the United States' response to Panel question No. 126.